

MEMORANDUM OF AGREEMENT BETWEEN

THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

AND

THE WASHINGTON STATE DEPARTMENT OF ECOLOGY

REGARDING

THE IMPLEMENTATION OF

SECTION 303(d) OF THE FEDERAL CLEAN WATER ACT

October 29, 1997

CONTENTS

<u>Section</u>	<u>Page</u>
Background	3
I. Schedule for Development of TMDLs.....	4
II. Ecology’s Watershed Approach to WQ Management.....	4
III. TMDL Prioritization	7
IV. Public Participation.....	9
V. Tribal Involvement.....	10
VI. TMDL Scoping and Project Planning.....	10
VII. TMDL Development	11
VIII. TMDL Implementation Strategies and Plans	11
IX. Point Source TMDL Development and Implementation	12
X. Nonpoint Source TMDL Development and Implementation.....	13
XI. EPA Review of TMDLs.....	16
XII. Federal Agencies	16
XIII. TMDLs Developed by EPA.....	16
XIV. TMDL Tracking System.....	17
XV. Evaluation of TMDL Development and Submittal.....	17
XVI. Joint Evaluation of TMDL Implementation	18
XVII. Limitations	18
XVIII. Property Rights.....	18
XIX. Reservation of Rights.....	19
XX. Amendments.....	19
XXI. Communications and Dispute Resolution	19
XXII. Period of Performance	20
XXIII. Severability.....	20
XXIV. All Writings Contained Herein	21
Signature Page	21

WHEREAS, this AGREEMENT is made and entered into by and between the U.S. Environmental Protection Agency, Region 10 (hereinafter referred to as EPA) and the State of Washington Department of Ecology (hereinafter referred to as Ecology).

WHEREAS, the parties agree that the terms of this agreement, including but not limited to any statements of policy and obligations contained herein, are not intended to be statements of national policy or requirements;

WHEREAS, IT IS THE PURPOSE OF THIS AGREEMENT to provide a framework, schedule, and strategy to restore the quality of impaired waters within the State of Washington to achieve Water Quality Standards, and to describe the methods and processes that Ecology will use to develop and implement the requisite Total Maximum Daily Loads for the 1996 303(d) list of water quality limited segments;

WHEREAS, the Clean Water Act (CWA) §303(d), 33 U.S.C. §1313(d), and EPA's implementing regulations provide for: (1) identification of waters for which applicable technology-based effluent limitations and other controls are not stringent enough to implement Water Quality Standards (the Section 303(d) list); (2) establishment of a priority ranking for such waters; and (3) establishment of total maximum daily loads (TMDLs) for those waters which are not in attainment with water quality standards;

WHEREAS, TMDLs shall be established at levels necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality;

WHEREAS, Ecology has the lead responsibility for the designation of Water Quality Limited Segments and the establishment of TMDLs pursuant to Section 303(d) of the CWA, 33 U.S.C. §1313(d) within the State of Washington;

WHEREAS, Ecology has developed and submitted to EPA a schedule for development and submittal of TMDLs as appropriate for all waters listed on the 1996 303(d) list over a time period ending December 31, 2013;

WHEREAS, EPA and Ecology seek to implement a strategy for development and implementation of TMDLs in the State of Washington, through a watershed approach; and to focus efforts on watersheds with the most significant water quality problems that cannot be adequately corrected through existing enforceable control measures;

WHEREAS, Ecology has prepared a technical report, Watershed Approach to Water Quality Management (July, 1993) which addresses: (1) Ecology's transition to the watershed approach so as to maximize Ecology's ability to develop TMDLs and implement water quality-based controls through waste discharge permits through a watershed approach without compromising Ecology's ability to fulfill other Clean Water Act responsibilities; and (2) a strategy for converting to this approach, taking into account resource needs, organizational structure, and program workload;

WHEREAS, Ecology has implemented the Watershed Approach to Water Quality Management since 1993, and has developed and implemented TMDLs using that approach; and

WHEREAS, EPA and Ecology experience similar limitations of resources applicable to the TMDL process, and desire to work together to implement a TMDL process that complies with applicable legal requirements, and meets the legitimate needs of all parties;

THEREFORE, EPA AND ECOLOGY MUTUALLY AGREE THAT:

I. Schedule for Development of TMDLs

A. Ecology will prioritize, schedule, scope, develop and submit Total Maximum Daily Loads (TMDLs) for water quality limited segments on the state's 1996 303(d) list in accordance with the "Schedule For TMDL Submittal" (Attachment A).

B. In fulfilling its commitments under this Agreement, Ecology is under no obligation to establish TMDLs for any water quality limited segments that are determined not to need TMDLs consistent with Section 303(d) of the CWA and its implementing regulations, including 40 CFR § 130.7(b)(1), as amended, or are removed from Washington's 303(d) list consistent with the provisions of the CWA and its implementing regulations.

C. Ecology and EPA understand that future CWA Section 303(d) lists for Washington State may include waters that may warrant TMDL development prior to waters listed on the 1996 Section 303(d) list. The parties agree that Ecology may substitute one or more such future listed waters for one or more waters on the 1996 303(d) list. However, Ecology intends to develop TMDLs in a manner generally consistent with timeframes set out in Attachment A.

II. Ecology's Watershed Approach to Water Quality Management

A. Ecology will use its Watershed Approach to Water Quality Management, as described in its Technical Assistance Report dated July, 1993 or as subsequently amended. In this approach, both point and nonpoint source pollution problems and needs are addressed for all watersheds of the state on a cyclical, sequential basis.

The cornerstones of Ecology's approach are the designation of water quality management areas (WQMA), the appointment of an Ecology staff watershed lead for each WQMA, and a five-step process for systematically assessing water quality conditions, identifying and prioritizing problems, focusing staff effort, and developing an improved basis for decision making in each WQMA, including developing and implementing TMDLs, issuing permits, and undertaking other point and nonpoint source pollution prevention and control activities.

Ecology has aggregated the state's 62 defined Water Resources Inventory Areas (WRIAs) which are the state's major watersheds, into 23 water quality management areas (WQMAs). Ecology has four regional offices located throughout the state. Each region has approximately five WQMAs within its boundaries, with the exception of Eastern Regional Office which has eight WQMAs.

B. Five-Step, Five-Year Cycle: Ecology will address each of the 23 WQMAs within the Watershed Approach. Each year, Ecology will begin the five-year cycle for four or five WQMAs. Within each cycle, there are five steps with each step consuming about one year. The steps are briefly described below:

- Year 1 **SCOPING:** Identify and prioritize known and suspected water quality issues within the WQMA by assembling information from extensive community involvement and internal Ecology staff and reports, including the 303(d) list and the schedule for TMDL submittal. Produce a Needs Assessment and develop a TMDL priority list.
- Specific documents to be developed by Ecology include:
- (1) Needs Assessment for each WQMA, identifying known water quality issues, needs, and recommended actions;
 - (2) TMDL priority list for each WQMA.
 - (3) Responsiveness summary and rationale for changes to priority list.
- Year 2/3 **DATA COLLECTION AND ANALYSIS:** Develop Quality Assurance Project Plans (QAPPs) for TMDLs. Conduct water quality monitoring, special studies, facility inspections, and other general research. Develop technical basis for TMDLs.
- Specific documents to be developed by Ecology include:
- (1) Quality Assurance Project Plans;
 - (2) TMDL technical reports.
- Year 4 **WQMA PLAN OF ACTION:** Develop a Plan of Action in coordination with the watershed community that addresses the priority problems identified in Year 1. Issue draft TMDLs for public comment and subsequent submittal to EPA. Summarize strategies and management activities needed to implement TMDLs, to issue or reissue waste discharge permits, to form partnerships, and to address funding issues. Submit final TMDLs and summary implementation strategies to EPA.
- Specific documents to be developed by Ecology include:

(1) TMDLs and associated responsiveness summaries to public comments, to be submitted to EPA for approval;

(2) Summary implementation strategies;

(3) WQMA Plan of Action, incorporating summary strategies for implementing each TMDL, and

(a) identifying and listing waste discharge permits to be issued in year 5; and

(b) identifying nonpoint control activities, including the categories of nonpoint sources and types of control measures to be undertaken.

Year 5

IMPLEMENTATION: Implement TMDLs; issue or reissue waste discharge permits, and work with local, state and federal programs, and partners to implement nonpoint pollution prevention and control activities.

Specific documents to be developed by Ecology include:

TMDL Implementation Plans, including:

(1) Point source implementation components: draft and final NPDES permits and state waste discharge permits identified in year 4 report;

(2) Nonpoint source implementation components:

(a) Lists of nonpoint sources, with as much specificity as technically feasible and reasonably practical.

(b) Control measures and specific legal authorities, if any, associated with these measures, and rationales for those control measures;

(c) Timeframes for measures to be put into place, and rationales for those timeframes;

(d) Timeframes for meeting water quality standards, and rationales for those timeframes; and

(e) Monitoring plans to measure implementation activities and achievement of water quality standards.

(3) Feedback loops to evaluate TMDL and implementation effectiveness. Ecology will determine:

(a) whether the required source controls have been put into place;
(b) whether those source controls are effective as measured against relevant TMDL and implementation plan targets; and

(c) whether the TMDL needs revision.

(4) Identification of parties responsible for the above implementation components.

C. The combination of Year 4 and Year 5 products will be submitted in Year 5 by Ecology to EPA as updates to the state's Water Quality Management Plan pursuant to 40 CFR 130.6(e).

D. In the following year (year 6), Ecology will initiate a repeat of the five-year cycle. Since many TMDL implementation activities initiated in the previous cycle will not have been completed or fully implemented, during the next watershed cycle Ecology will generally focus on development of other TMDLs within that WQMA.

E. The schedule for TMDL submittal (Attachment A) shows the WQMA names in the left-hand column organized into year groups. Ecology will move these groups of WQMAs through the five step, five year process outlined above, scoping issues and prioritizing TMDLs over the entire state within a period of five years. Each year, Ecology will conduct some level of activity at a specific step in each WQMA, thus ensuring statewide coverage of water quality problems. Ecology will prioritize the problems within each WQMA for follow-up activities. Ecology will review and reprioritize problems not addressed in one cycle in subsequent cycles.

F. Ecology reserves the right to revise the boundaries of the WQMAs, and to temporarily or permanently modify the year groups in order to better achieve the results intended by this Agreement, including coordination with other activities intended to benefit water quality.

G. Ecology will prepare revised guidance for TMDL development and implementation, and will target completion by January 1, 1999. The guidance will include relevant legal authorities and examples of successful application of those authorities. Ecology's procedures for developing the products enumerated in section I.B. above are more fully described below.

III. TMDL Prioritization

A. During the WQMA Scoping Year (Year 1) for each WQMA, Ecology will prioritize water quality problems, using the statewide schedule for TMDL submittal and the most recent 303(d) list of impaired water bodies as a starting point. TMDLs listed for initiation within a WQMA will be reviewed for priority setting and scheduling during the Scoping Year by the respective Ecology regional office, the local watershed workgroup, and the Ecology Joint Management Team (JMT).

B. Early in the scoping year for a WQMA, Ecology will hold a watershed workshop. Invited participants will include local governments, tribal governments, Ecology staff, EPA staff, other

state and federal agency staff, and other local interests. This workgroup will review the draft TMDL schedule and other available information and assist the Ecology watershed lead in developing a draft TMDL priority list for that cycle to recommend to the JMT. Workgroup members will be guided by, but not limited to, the severity of the pollution and the uses to be made of the waters at issue. The greatest weight in determining priorities shall be given to the following factors:

- (1) Vulnerability of waterbodies to degradation.
- (2) Risks to public health, aquatic life and other water-dependent wildlife, including threatened and endangered species.

Additional priority setting factors that may be considered are listed below:

- (3) Other designated uses.
- (4) Timing of grant and loan projects.
- (5) Discharge permit issuance and renewal.
- (6) FERC hydroelectric project relicensing schedules.
- (7) Existing water quality management plans.
- (8) Public interest and support.
- (9) Priorities from other planning processes, including section 319.
- (10) Ecology short-term programmatic needs and resources.
- (11) Technical feasibility.
- (12) Judicial orders and decisions.
- (13) National policies and priorities.
- (14) Likelihood of success.
- (15) Opportunities for pollution prevention.

C. The timing of TMDLs on the statewide schedule may be verified, deferred to a subsequent cycle or brought forward for placement on the current priority list. The draft priority list will also receive a preliminary technical review by Ecology's Environmental Investigations and Laboratory Services (EILS) Program. The draft priority list will be subject to public comment, and subsequent review, adjustment, and approval by Ecology management during a JMT meeting. Ecology will issue the final TMDL priority list in the spring of the Scoping Year, and will indicate which TMDLs will be developed that cycle.

D. Ecology and EPA will develop a document to describe the process for development of TMDLs in Washington in the context of the proposed statewide schedule. The draft Washington TMDL Development Schedule: Ecology/EPA Evaluation shall be prepared, and shall be updated as needed.

IV. Public Participation

A. Ecology will include specific interactions with the public designed to ensure adequate consultation and public involvement in TMDL decision making. Ecology's TMDL submittals will include copies of materials showing that an adequate public process has been conducted.

B. Priority Setting: During the public information gathering period preceding the watershed workshops in Year 1 described above, Ecology will discuss with interested stakeholders the schedule for TMDL submittal and associated water quality problems. Ecology will develop and request public comment on the draft TMDL priority list for each WQMA. Ecology will review any comments received and develop a final TMDL priority list for each WQMA. The final TMDL priority list and a responsiveness summary will be provided to the public, and the basis for any changes from the draft priority list will be identified.

C. TMDL Development: Ecology will ensure that TMDL development includes public participation which will at a minimum meet federal requirements for public involvement (40 CFR 25, part 25.4).

(1) Information and Assistance: Ecology will make all information used in the development of a TMDL process available to the public. In addition, lists of interested and affected parties will be compiled and maintained.

(2) Public Notification: Ecology will notify all interested and affected parties not less than 30 days in advance of when major decisions will be made. Major decisions include: submittal of the state's biennial 303(d) list; establishment of TMDL priority lists; establishment of TMDLs; and adoption of TMDL implementation plans. The notices will include a timetable in which the decision will be made, issues under consideration, alternative courses of action, how relevant documents may be reviewed, and the name of an individual to contact for more information.

(3) Public Consultation: Ecology will consult with interested and affected parties prior to making final major decisions. This consultation may take many forms including, for example, public hearings, public meetings, advisory groups, ad hoc committees, task forces, or workshops.

(4) Public Information Concerning Legal Proceedings: Ecology will provide full and open information on legal proceedings to the extent not inconsistent with court requirements and the state Public Disclosure Act, and where such disclosure would not prejudice the conduct of the litigation.

D. Ecology will also ensure that TMDL submittals include a responsiveness summary to public comments, as described in federal regulations (40 CFR, part 25.8).

After an open public comment period Ecology will compile all comments and responses into a summary document. This document will summarize the public comments, criticisms and

suggestions, set forth specific responses by modification of the proposed alternative or an explanation for the rejection of any proposals made by the public.

E. Ecology will encourage other suggested public process methods found in federal regulations (40 CFR 25, part 25.5 through 25.7), including discretionary public hearings, public meetings and advisory groups.

V. Tribal Involvement

A. Ecology will provide opportunities for tribal government involvement in its 303(d) listing process. The specific opportunities and methods of tribal involvement shall be described in Ecology's 303(d) listing procedure and any agreements that may be entered into between Ecology and any specific tribal government.

B. Ecology will provide opportunities for appropriate tribal government involvement in development and implementation of TMDLs. The specific opportunities and methods of tribal involvement may be determined in agreements entered into between Ecology and any specific tribal government.

VI. TMDL Scoping and Project Planning

A. During the scoping year for each WQMA, Ecology will review the draft statewide TMDL schedule, the most recent 303(d) list of impaired waterbodies, and other available water quality information to determine the appropriate waterbody segments and water quality parameters within a WQMA for which TMDLs are required. These waterbody/parameter combinations will be subject to the prioritization process noted above.

B. Subsequent to the development of the draft TMDL priority list for a WQMA, the draft list will be further reviewed by Ecology staff in order to determine whether additional waterbody/parameter combinations need to be or can be addressed by the recommended high priority TMDLs, and to establish approximate resource needs and TMDL project schedules. Information from this further review will be reflected in a second draft TMDL priority list prepared by Ecology and made available prior to the spring JMT meeting. The JMT will agree on the final TMDL priority list.

C. After the final TMDL priority list is adopted, Ecology TMDL project staff will develop a Quality Assurance Project Plan (QAPP) for all TMDLs to be developed, describing in detail the geographic area to be covered by the TMDLs, the waterbody/ parameter combinations, any additional data to be collected, data collection methods, and other pertinent information. The draft QAPP will be reviewed by Ecology and EPA staff. The final QAPP will describe the full scope of the TMDLs to be developed, and will be provided to interested stakeholders and the public upon request.

D. For those TMDLs completed on a basis other than a five year watershed cycle (e.g., some habitat alterations, sediment and landscape TMDLs), Ecology staff will prepare general project descriptions for the JMT. These descriptions will generally note the type of TMDL to be

addressed, the number of waterbody/parameter combinations to be addressed, and the general methods to be employed in the TMDL analysis. Ecology will develop draft and final QAPPs for each of these TMDLs. The draft QAPP will be reviewed by Ecology and EPA staff. The final QAPP will describe the full scope of the TMDLs to be developed, and will be provided to interested stakeholders and the public upon request.

VII. TMDL Development

A. Ecology will initiate development of TMDLs scheduled within a WQMA in the state fiscal year following Scoping (Year 2). Ecology anticipates that it will devote from 12 to 18 months to complete the analytical components and to prepare a report containing technical recommendations for TMDLs and other water quality issues. Where appropriate and available, Ecology may rely on efforts by other parties to develop the technical basis for TMDLs. These other parties may be local, state or federal agencies, tribal governments, or private parties.

B. TMDLs submitted by Ecology shall include:

- (1) a description of the applicable water quality standards, including the uses to be protected, and the problems to be corrected;
- (2) an analysis of pollution sources contributing to the problem;
- (3) a description of alternative allocation strategies explored;
- (4) a final allocation scheme and a description of how the allocations were developed, including loading capacity estimation, load allocations, waste load allocations and margin of safety;
- (5) for those TMDLs in which wasteload allocations to point sources are based on the assumption that loads from nonpoint sources will be reduced, reasonable assurance that the nonpoint source load allocations will be achieved (e.g., control actions and implementation schedules); and
- (6) any other components required under the CWA and EPA's implementing regulations.

C. Ecology will submit TMDLs to EPA for approval in Year 4.

VIII. TMDL Implementation Strategies and Plans

A. Ecology will develop summary implementation strategies for each TMDL, which will be submitted with the TMDL in Year 4. Summary implementation strategies will identify:

- (1) the timeframe for meeting water quality standards;

(2) the approaches to be used to meet load and wasteload allocations, which consider flow rates and seasonal variations;

(3) interim targets, if appropriate, with linkages to the pollution sources;

(4) a monitoring strategy to measure implementation activities and achievement of interim targets and water quality standards.

(5) schedule for monitoring and evaluation of TMDL and implementation effectiveness, including source control feedback loops.

B. Ecology will develop detailed implementation plans for nonpoint source and mixed source TMDLs; these plans will be submitted in Year 5. Detailed implementation plans will identify:

(1) the timeframes for meeting interim targets and water quality standards;

(2) a detailed plan to implement control actions to meet load allocations for nonpoint sources;

(3) a detailed monitoring plan to measure implementation activities and achievement of interim targets and water quality standards.

(4) additional implementation measures which Ecology intends to use should initial implementation activities not be implemented or not be effective.

IX. Point Source TMDL Development and Implementation

A. Point Source TMDL Development:

(1) Ecology will initiate those selected TMDLs designated as affected only or primarily by point sources in Year 2 (Data Collection). Analytical and laboratory work will likely continue into Year 3 (Data Analysis) for most complex TMDLs, with a technical report containing draft alternative allocation strategies completed during the latter part of Year 3. The alternative allocation strategies contained within TMDL reports will be referenced in the Plan of Action prepared by Ecology in Year 4. These alternatives will be noted as solutions to priority pollution problems previously identified in Year 1 (Scoping), and will contain the recommended waste load allocations, effluent limits, and other information documenting the TMDL.

(2) Ecology will submit the final TMDL, including the final selected waste load allocations and other required elements, to EPA for approval in accordance with Section 303(d)(2).

B. Point Source TMDL Implementation:

(1) Ecology will implement point source TMDLs beginning in Year 5 (Implementation) through the issuance or reissuance of NPDES permits. Implementation may consist of the

installation of upgraded waste treatment technology, alternative treatment options or discharge sites, pollution prevention activities, or other means to reduce loadings. A compliance schedule for each waste water discharger may be agreed upon.

(2) Ecology will apply its antidegradation implementation procedures for tier two waters to applications for NPDES permits for new or expanded loads if a TMDL contains an allocation for future growth. If there is no allocation for future growth, no permits will be issued for new or expanded loads, unless offset by other reductions.

X. Nonpoint Point Source (NPS) TMDL Development and Implementation

A. NPS TMDL Development and Implementation Plan Development:

(1) EPA and Ecology agree that although the management processes for NPS TMDL development are similar to those for point source TMDLs, there are significant differences in NPS implementation practices and procedures:

(a) A NPS TMDL involves evaluation, source identification, planning, public involvement, development of the TMDL and approval by EPA, followed by implementation and monitoring by a wide variety of participants. NPS TMDLs often reflect the assumption that designed management approaches (e.g. BMPs and/or restoration activities) will produce the desired water quality goals. There is inherent uncertainty in the problem definition and in the effectiveness of corrective actions, therefore a margin of safety must be included and progress must be checked against specific, measurable interim targets. True indicators of effectiveness may not be assessed or evident until well after designed programs are in place.

(b) If initial implementation measures fail, then progressively more aggressive efforts will be employed to meet water quality goals. This allows locally-driven programs a chance to be successful before more restrictive measures are applied. Ecology will specify in the implementation plan other more restrictive measures which will be applied should initial measures not be implemented or successful. The process relies heavily on the development of interim and final targets to identify the desired future condition of a waterbody. These final targets must meet water quality standards at the end of the planned period.

(2) Ecology will initiate those selected TMDLs designated as nonpoint source or mixed point source/NPS beginning in Year 2 (Data Collection). Simultaneous with the initiation of the technical analysis components of the TMDL process, Ecology will attempt to identify interested parties or local groups to be the local sponsor or catalyst for continued planning and implementation. Generally, this effort requires that a public forum be established, with named participants and continuous discussions of the issues and the technical analyses.

(3) Analytical and laboratory work will likely continue into Year 3 (Data Analysis) with a technical report containing alternative allocation strategies completed during the latter part of Year 3.

(4) The alternative allocation strategies contained within the draft TMDL will be referenced in the Plan of Action for the WQMA prepared by Ecology in Year 4 or early in Year 5. These alternatives will be noted as solutions to priority pollution issues previously identified in Year 1 (Scoping).

Generally, implementation of the selected NPS allocations will be undertaken by locally interested parties beginning in Year 5 (Implementation). NPS solutions may require extended periods of time both to implement and to produce measurable results.

(5) For mixed source TMDLs, the technical report will include recommendations for waste load allocations and effluent limits for contributing point sources, and load allocations for nonpoint sources with associated interim targets.

(6) Ecology will submit the final TMDL to EPA for approval in accordance with Section 303(d)(2).

B. NPS TMDL Implementation:

(1) Ecology will implement nonpoint source and mixed source TMDLs beginning in Year 5 (Implementation) following completion of the Detailed Implementation Plan. Implementation may consist of pollution prevention activities, installation of Best Management Practices (BMPs), technical and/or financial assistance, or other means to reduce loadings. A compliance schedule for significant pollution sources will be developed.

(2) Best Management Practices (BMPs) are frequently the preferred method of implementing NPS TMDLs. Ecology may use one or more nonpoint source programs as the basis for nonpoint source TMDLs and to implement such TMDLs; these programs are described in Ecology's draft report, Relationship of Nonpoint Source Programs in Washington and Section 303(d) of the Clean Water Act: Basin Implementation Guidance, November 1996. Ecology shall revise and issue a final report by January 1, 1999.

(3) Ecology will ensure that a monitoring plan is implemented.

(4) Ecology will evaluate NPS and mixed source TMDLs in subsequent cycles for effectiveness.

(5) EPA and Ecology agree that generally the following are fundamental to implementing a successful NPS or mixed source TMDL, and Ecology may tailor its watershed process as necessary and appropriate to include these factors:

- (i) A locally driven implementation process. Forming (having) a local group interested in improving water quality in a 303(d) listed waterbody is essential.
- (ii) Public understanding of the nature of the impacts to characteristic uses and sources of impairment.
- (iii) Public participation in development of the implementation measures and schedules which are linked to the interim targets and final goals.
- (iv) The application of relevant legal authorities and incentives, where necessary.

C. Approaches to NPS TMDL Implementation

EPA and Ecology agree that a locally managed watershed plan is the preferred approach in Washington State to implementing a NPS TMDL or NPS components of a mixed source TMDL. NPS components of TMDLs may be developed and implemented using the approaches and measures, either individually or in combination, described in Ecology's draft report, Relationship of Nonpoint Source Programs in Washington and Section 303(d) of the Clean Water Act: Basin Implementation Guidance, or in Washington's Nonpoint Strategy, revised June 1996, submitted in accordance with the requirements of Section 6217 of the Coastal Zone Act Reauthorization Amendments, or in the Washington State Nonpoint Source Pollution Assessment and Management Program, October, 1989 or as subsequently amended, submitted in accordance with CWA Section 319.

Such approaches may include, but not be limited to:

- (1) Forestry Watershed Analysis (Chapter 76.09 RCW, Forest Practices Act)
- (2) Puget Sound Watershed Action Plans (Chapter 90.70 RCW, Puget Sound Water Quality Act)
- (3) Lake Restoration Projects (CWA Section 314)
- (4) Shellfish Restoration Program (Chapters 90.70 & 90.72 RCW)
- (5) Habitat Conservation Plans (Endangered Species Act)
- (6) Toxic Site Cleanup Actions (CERCLA (Superfund) and Chapter 70.105D RCW, Model Toxics Control Act)
- (7) Urban Bay Action Program Activities (Chapter 90.70 RCW, Puget Sound Water Quality Act)
- (8) Stormwater Control Plans (CWA, Chapters 90.48 and 90.70 RCW)
- (9) Financial Assistance Programs (Centennial Clean Water Fund, State Revolving Fund, CWA Section 319, etc.)
- (10) Agricultural Compliance Programs (Chapter 90.48 RCW)
- (11) Dairy Waste Management Programs (Chapters 90.48 & 90.64 RCW)

- (12) State Water Pollution Control Act Programs(Chapter 90.48 RCW)
- (13) Public Law 566 NPS Projects
- (14) Hydraulic Project Approvals (Chapter 75.20 RCW, Chapter 232-14 WAC)
- (15) Critical Areas (Chapter 36.70A RCW, Growth Management Act)
- (16) Shorelines Management Program (Chapter 90.58 RCW) and State Coastal Zone Management Program
- (17) Water Resources Management Plans (Chapters 90.03, 90.48, 90.54 RCW and CWA Sec. 401)
- (18) On-Site Systems Programs (Chapters 90.48, 70.05 & 70.118 RCW)
- (19) Ecosystem Grazing Standards (Chapter 43.20.230 RCW)
- (20) Groundwater Management Areas & Protection Districts (Chapters 90.44 and 36.36 RCW)
- (21) State Environmental Policy Act (Chapter 43.21C RCW)
- (22) Water Quality Standards Certifications (CWA Section 401 and Chapter 173-225 WAC)
- (23) Waste Discharge General Permit Program (Chapter 173-226 WAC)

XI. EPA Review of TMDLs

EPA will review the TMDLs submitted by Ecology in accordance with the CWA and EPA's implementing regulations and guidance. Under current EPA guidance, for a TMDL in which wasteload allocations to point sources are based on the assumption that loads from nonpoint sources will be reduced, Ecology will need to demonstrate reasonable assurance that the nonpoint load allocations will be achieved. EPA will review the TMDLs submitted by Ecology where loads are allocated in such a manner to determine whether such reasonable assurance exists.

XII. Federal Agencies

EPA will pursue the development of appropriate mechanisms (e.g., memorandums of agreement, standards and guidelines in forest plans, etc.) to ensure that actions by federal agencies (including the issuance of permits) will comply with state water quality standards and the requirements of TMDLs. Such agencies will include, but not be limited to, the US Forest Service, US Army Corps of Engineers, US Bureau of Reclamation, National Marine Fisheries Service, US Bureau of Land Management, National Park Service, Natural Resources Conservation Service and US Fish and Wildlife Service.

XIII. TMDLs Developed by EPA

A. Where one or more states or tribes are developing a TMDL for interstate or interjurisdictional waters and requests assistance from EPA, EPA will participate in the development process either as the lead or other appropriate role as agreed upon by the states, tribes and/or EPA.

B. In instances where EPA develops TMDLs for 303(d) listed waters within the state's jurisdiction, responsibility for the implementation plans for the TMDLs at issue will be determined through the Performance Partnership Agreement process.

XIV. TMDL Tracking System

A. Ecology will maintain information on water quality limited segments in a tracking system or database. The tracking system will contain information on (1) waters for which TMDLs have been developed, and (2) water quality limited segments for which TMDLs have not been developed because other pollution controls have been deemed stringent enough to implement applicable water quality standards. The tracking system will be updated with the development of each biennial Section 303(d) list and be available to EPA and the public on request.

B. A report from the tracking system will be submitted to EPA with the biennial submittal of the Section 303(d) list. For each water quality limited segment the report will contain at a minimum:

- (1) waterbody segment number;
- (2) waterbody segment boundary description;
- (3) waterbody segment name;
- (4) the pollutants or form of pollution identified causing a consideration of listing;
- (5) the basis for the consideration of listing;
- (6) If applicable, the rationale for not listing, including information on the schedule and progress of implementation for approved TMDLs or other pollution controls; and
- (7) whether the segment is listed for the particular pollutants or pollution identified.

XV. Evaluation of TMDL Development and Submittal

A. At the interim deadlines for TMDL development identified in Attachment A (i.e., 2003, 2008, and 2013), EPA and Ecology will evaluate the pace of development and submittal of TMDLs for waters on the 1996 303(d) list. If the evaluation indicates that the pace of development and submittal of TMDLs is inadequate, EPA and Ecology will identify causative factors and appropriate remedies.

B. If EPA determines that Ecology has failed to submit TMDLs for waters identified on the 1996 list in substantial compliance with the schedule set forth in Attachment A, then EPA will take such steps as it deems appropriate. EPA shall provide reasonable notice to Ecology of any such steps.

XVI. Joint Evaluation of TMDL Implementation

A. To assure that TMDL implementation is successful, EPA and Ecology will evaluate and assess at the interim deadlines for TMDL development identified in Attachment A (i.e., 2003, 2008, and 2013) the progress and success of the implementation plans developed for submitted TMDLs. This assessment will address, as appropriate, whether interim targets in the implementation plans were met, whether implementation measures such as BMPs were put into effect, review of selected NPDES permits to assess whether effluent limits are consistent with TMDL wasteload allocations, and whether additional implementation measures have been instituted where needed.

B. If the evaluation indicates that the implementation of one or more TMDLs is inadequate, EPA and Ecology will identify causative factors and appropriate remedies. Ecology will apply additional implementation measures as appropriate.

C. If Ecology determines that implementation is inadequate because source controls have not substantially been put into place, then Ecology will place the waterbody on the 303(d) list.

XVII. Limitations.

A. Nothing in this Agreement shall be construed to require actions by Ecology or EPA which are inconsistent with local, State, or Federal laws and regulations or any court order.

B. EPA and Ecology recognize that the performance of this Agreement is subject to fiscal and procurement laws and regulations of the United States and the State of Washington. The possibility exists that circumstances outside the reasonable control of Ecology and EPA could delay compliance with the timetables and requirements contained in this Agreement. Such situations include, but are not limited to, sufficient funds not being appropriated as requested, appropriated funds not being available for expenditure, or catastrophic environmental events requiring an immediate and/or time consuming response by EPA or Ecology. Should a delay occur due to such circumstances, any resulting failure by Ecology to meet the timetables and requirements of the Agreement shall not constitute a failure to comply with the terms of the Agreement. Ecology shall provide to EPA reasonable notice in the event that Ecology invokes this term of the Agreement.

Should this term be invoked, EPA may take such steps as it determines reasonable and appropriate to ensure EPA's compliance with relevant CWA and judicial requirements. EPA shall provide reasonable notice to Ecology of any such steps.

XVIII. Property Rights

The parties recognize that the Washington State Constitution reserves the waters of the State for the people of Washington for their common use; such waters are subject to appropriation as provided for by State law. No TMDL, Wasteload Allocation, or Load Allocation established by EPA or Ecology shall create or vest any property rights, including but not limited to any water rights, in any person.

XIX. Reservation of Rights.

A. In executing the Memorandum of Agreement, Ecology does not waive any rights it may have to challenge EPA's interpretation or implementation of any CWA provision, including but not limited to regulations, guidance, and policies related to CWA §303(d), in any administrative or judicial forum. EPA does not waive its right to challenge Ecology's interpretation or implementation of the requirements of § 303(d), to approve or disapprove any TMDLs proposed by the State, or to establish TMDLs as otherwise required by law.

B. This Memorandum of Agreement does not constitute an explicit or implicit agreement by Ecology or EPA to subject itself to the jurisdiction of any federal or State court. Nor shall this Agreement be construed as creating any right or benefit, substantive or procedural, enforceable at law or in equity, by any person or entity against EPA or Ecology. This Agreement shall not be construed to create any right to judicial review involving the compliance or noncompliance of EPA or Ecology with this Agreement.

XX. Amendments.

EPA and Ecology agree that difficulties may arise in implementing requirements of § 303(d). Therefore, both parties agree to periodically evaluate this Memorandum of Agreement and make recommendations for alterations and amendments. EPA and Ecology agree to modify or amend this Agreement as necessary to comply with any future changes in CWA §303(d), 33 U.S.C. §1313(d), and EPA's implementing regulations. This Agreement may be amended by mutual agreement of EPA and Ecology. Such amendments shall not be binding unless they are in writing and signed by personnel authorized to bind each of the parties.

XXI. Communications and Dispute Resolution.

A. While implementing this Agreement, EPA and Ecology are committed to on-going, timely and open communications. EPA and Ecology commit to the identification of issues and problems at early stages of development in order to provide time to plan potential resolutions in furtherance of this Agreement.

B. Each party to the Agreement will identify in writing a staff person who will serve as the primary contact for activities under this Agreement, and will notify the other party when the primary contact is replaced.

C. Communications concerning major documents, comments, and major decisions shall be in writing. Verbal communications on important matters will be followed by written notification as soon as possible.

D. EPA and Ecology will generally communicate and strive to address matters at the staff level. In the event that staff are unable to resolve a dispute, the staffs will present the matter to progressively higher levels of management until consensus is reached. In the event consensus is

not reached, the Regional Administrator for EPA Region 10 shall resolve the issue, in consultation with the Ecology Director.

XXII. Period of Performance.

A. Subject to its other provisions, the period of performance of this Agreement shall commence when it is signed by the parties hereto. This Agreement, and all obligations arising hereunder, shall terminate on December 31, 2013. Specific commitments and agency roles and responsibilities will be incorporated into the annual State-EPA Performance Partnership Agreement (PPA) after June 30, 1998 (i.e., beginning with the 1999 PPA).

B. Notwithstanding subsection A above, either of the parties may terminate this Agreement upon 180 days prior written notification to the other party.

XXIII. Severability

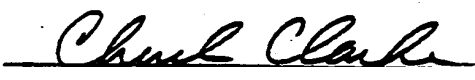
If any provision of this Agreement or any provision of any document incorporated by reference shall be held invalid, such invalidity shall not affect the other provisions of this Agreement which can be given effect without the invalid provision, if such remainder conforms to the requirements of applicable law and the fundamental purpose of the Agreement, and to that end the provisions of this Agreement are declared to be severable.

XXIV. All Writings Contained Herein

This Agreement contains all the terms and conditions agreed upon by the parties. No other understandings, oral or otherwise, regarding the subject matter of the Agreement shall be deemed to exist or to bind either of the parties hereto.

DATED this 31st day of October, 1997.

United States Environmental Protection Agency

By: 
Chuck Clarke
Regional Administrator
U.S. Environmental Protection Agency

State of Washington, Department of Ecology

By: 
Tom Fitzsimmons
Director
Washington State Department of Ecology

w:/section/wm/davepeel/303moa12.doc

Attachment A:

WATERSHED APPROACH TO ESTABLISHING TMDLs

Schedule for TMDL Submittal														
State Fiscal Year (July 1 through June 30)														
	98	99	00	01	02	03	04	05	06	07	08	09	10	11
Water Quality Management Areas														
Skagit/Stillaguamish, Columbia Gorge, Horse Heaven/Klickitat, Upper Columbia, Pend Oreille	12				14					15				
Island/Snohomish, South Puget Sound, Okanogan, Crab Creek, Esquatzel	20					4					11			
Nooksack/San Juan, Western Olympic, Wenatchee, Upper Snake, Lower Snake	4	19*					44					32		
Kitsap, Lower Columbia, Upper Yakima, Mid Columbia	1		14					29					13	
Cedar/Green, Eastern Olympic, Lower Yakima, Spokane	22			24					53					3
State Wide Group						115				400				
TOTAL ANNUAL TMDLs	59	19*	14	24	14	119	44	29	53	15	411	32	13	3
TOTAL 5 YEAR CYCLE TMDLs						249					552			
CUMULATIVE PERCENT OF ALL TMDLs						16 %					51%			

NOTES: Shaded areas are implementation startup years. * includes Chehalis Temperature TMDLs not on the 1996 Section