

Relevant texts in statute, regulations and guidance pertinent to reasonable assurance

Section 303(d) CWA:

“Such load shall be established at a level necessary to implement the applicable water quality standards.”

Preamble to 1985 TMDL regulations

"Although section 303(d)(2) of the Act does not specifically mention either WLAs or LAs, it is impossible to evaluate whether a TMDL is technically sound and whether it will be able to achieve standards without evaluating component WLAs and LAs and how these loads were calculated. Thus, it is necessary for EPA to review and approve or disapprove a TMDL in conjunction with component WLAs and LAs."

1992 40 CFR Part 130.2 (TMDL Definition):

“If BMPs or other nonpoint source pollution controls make more stringent load allocations practicable, then wasteload allocations can be made less stringent. Thus, the TMDL process provides the nonpoint source control tradeoffs.”

1991 Guidance for Water Quality-Based Decisions: The TMDL Process

“..., before approving a TMDL in which some of the load reductions are allocated to nonpoint sources in lieu of additional load reductions allocated to point sources, there must be specific assurances that the nonpoint source reductions will in fact occur.”

“In order to allocate loads among both point and nonpoint sources, there must be reasonable assurances that nonpoint source loads will in fact be achieved. Where there are not reasonable assurances, under the CWA, the entire load reductions must be assigned to point sources.”

“There must be assurances that nonpoint source control measures will achieve expected load reductions in order to allocate a wasteload to a point source with a TMDL that also allocates expected nonpoint source reductions.”

1997 Perciasepe memo:

“In watersheds impaired by a blend of point and nonpoint sources, this TMDL Process guidance document provides that where any wasteload load allocation to a point source is increased based on an assumption that loads from nonpoint sources will be reduced, the State must provide "reasonable assurances" that the nonpoint source load allocations will in fact be achieved.

2002 Guidelines for Reviewing TMDLs Under Existing Regulations Issued in 1992

Reaffirms 1991 Guidance: “When a TMDL is developed for waters impaired by both point and nonpoint sources, and the WLA is based on an assumption that nonpoint source load reductions will occur, EPA's 1991 TMDL Guidance states that the TMDL should provide reasonable assurances that nonpoint source control measures will achieve expected load reductions in order for the TMDL to be approvable. This information is necessary for EPA to determine that the TMDL, including the load and wasteload allocations, has been established at a level necessary to implement water quality standards.

Legal Basis For Reasonable Assurance in TMDLs

While neither the CWA nor EPA's regulations expressly mention the phrase "reasonable assurance," the congruent requirements of CWA 303(d)(1)(C) and 301(b)(1)(C) implicitly require it. Section 303(d)(1)(C) requires that a TMDL be "established at a level necessary to implement the applicable water quality standards . . ." See also 40 C.F.R. 130.7(c)(1). A TMDL calculates the maximum amount of pollutant loadings a waterbody can receive and still meet water quality standards. A TMDL writer must decide *how* to apportion loadings between point and nonpoint sources under the TMDL. Section 303(d)(1)(C) requires that the point source-nonpoint source allocation split be "at a level necessary to implement the applicable water quality standards." Without a demonstration in the TMDL's record of "reasonable assurance" that the chosen nonpoint source load allocations will in fact be met, there is no assurance that the TMDL equation will add up to a sum that does not exceed "a level necessary to implement the applicable water quality standards."

Section 301(b)(1)(C) and EPA's permitting regulations provide additional support for including "reasonable assurance" in a TMDL. Section 301(b)(1)(C) requires that point source permits have effluent limits as stringent as necessary to meet water quality standards. EPA's permitting regulations echo that requirement and, in addition, require that permits include effluent limits "consistent with the assumptions and requirements of any available wasteload allocation for the discharge" approved by EPA. 40 CFR 122.44(d)(1)(vii)(A) & (B). For WLAs to serve as a basis for a WQBEL, they must themselves be stringent enough so that (in conjunction with the waterbody's other loadings) they meet water quality standards. In the absence of reasonable assurance that a TMDL's LAs will in fact be met, the TMDL's WLAs cannot serve as an effective permitting guide. That *can* happen, however, if (1) the TMDL's combined nonpoint source load allocations and point source wasteload allocations do not exceed the water quality standard-based loading capacity and (2) there is "reasonable assurance" that the load allocation will be achieved. Such a demonstration ensures that an effluent limitation that is "consistent" with a TMDL's wasteload allocation pursuant to 122.44 (d)(1)(vii)(B) will also meet water quality standards as required by CWA 301(b)(1)(C) and 122.44 (d)(1)(vii)(A).