

warm annual peaks in water temperature typically caused by drought conditions are a natural component of the environment and that these infrequent conditions should not drive attainment determinations. Salmonids may experience some adverse effects during these periods, but by definition, they would be infrequent. It is important to note, however, that NPDES-permitted facilities would continue to be subject to the same temperature effluent limits they would be subject to during normal temperature periods, because they should not be able to discharge more heat than they would otherwise be authorized to discharge simply due to a natural event.

Even when accounting for unusually warm conditions in temperature standards, attainment determinations should be based on all climatic conditions except for those unusually warm and rare conditions in order to protect the salmonid designated uses. Thus, given that river temperatures exhibit year-to-year variation in their maximum 7DADM values, the average maximum 7DADM value from a yearly series, as a statistical matter, would need to be lower than the numeric criteria in order to meet the criteria nine out of ten years. Therefore, in most years, the maximum 7DADM temperature would also need to be lower than the numeric criteria in order to meet the criteria in the warm years. EPA took this into consideration when it formulated its proposed numeric criteria.

#### *F. Total Maximum Daily Loads and Impaired Water Listings*

A TMDL is a tool created by the CWA that expresses the total amount of a given pollutant that a particular water body may receive and still achieve applicable water quality standards. Section 303(d) of the CWA and its implementing regulations at 40 CFR part 130 establish the requirements for TMDLs. The TMDL process can broaden the opportunity for public participation, expedite water quality-based NPDES permitting, and lead to technically-sound and legally-defensible decisions for attaining and maintaining water quality standards. In addition, the TMDL process provides a mechanism for integrating the management of both point and nonpoint pollution sources that together may contribute to a water body's impairment. (*See Guidance for Water Quality-Based Decisions: The TMDL Process*, EPA 440-4-91-001, April 1991.)

If Oregon lists waters subject to today's proposed rule on its CWA section 303(d) list(s) because data or

information indicate that water quality standards have not been achieved, EPA recognizes that this listing decision does not mean that a TMDL will immediately be developed. Rather, CWA section 303(d)(1) specifically provides States with the discretion to establish a priority ranking for TMDL development for listed waters, and then to establish TMDLs in accordance with that ranking. EPA notes that even if Oregon establishes a TMDL for a water body designated today for salmonid life stage uses, the question of implementing the TMDL with respect to nonpoint sources and point sources not required to obtain an NPDES permit is entirely a matter of State law.

As discussed elsewhere in today's proposal, EPA strongly encourages the State of Oregon to adopt the appropriate uses for all of the waters subject to this rulemaking. Once EPA approves the State's adoption of a new use designation for a water body, and withdraws that water body from the Federal regulation, the State's use designation will be the applicable use for that water body for purposes of compiling the CWA section 303(d) list. Oregon will be required to list that water body under CWA section 303(d) if data and information show that the use is impaired or the water body exceeds the applicable water quality criteria for temperature or IGDO for the protection of the associated salmonid uses.

For waters that have salmonid use designations (either Federal or State) at the time Oregon assembles its CWA section 303(d) list(s), EPA notes that Oregon need not include a water on its list(s) if it lacks data and information to determine whether the use is being attained, or if the data and information it has is insufficient to make that determination. *See* 40 CFR 130.7(b)(5); "2004 Integrated Water Quality Monitoring and Assessment Report Guidance." While EPA expects Oregon to follow the requirements, if any, of its assessment and listing methodology, EPA also recognizes that it is possible that at the time Oregon compiles its 2004 CWA section 303(d) list, it will not have data or information for all of the waters designated by this rule for salmonid life stage uses. Therefore, it is possible that many of these waters will not appear on Oregon's next CWA section 303(d) list(s).

## **VI. Statutory and Executive Order Reviews**

### *A. Executive Order 12866: Regulatory Planning and Review*

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Executive Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined that this rule is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to E.O. 12866 review.

### *B. Paperwork Reduction Act*

This proposed action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et. seq.* It does not include any information collection, reporting or recordkeeping requirements. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information