



State of Oregon Department of Environmental Quality

Outstanding Resource Water Nomination Process Response to Comments

Introduction

DEQ is developing an Outstanding Resource Water nomination process to implement the state's antidegradation policy at OAR 340-041-0004(8) by protecting waters that constitute outstanding State or national resources. The process allows the public to nominate a waterbody for ORW designation. DEQ provided the public an opportunity to review and provide comment on the process. DEQ appreciates the comments received. This document summarizes comments DEQ received and our response to those comments.

Environmental justice considerations

Environmental Justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, culture, education or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies.

ORS 182.545 requires natural resource agencies to consider the effects of their actions on environmental justice issues. The ORW nomination process will help streamline how DEQ identifies waters for designation, which will benefit communities in general. If DEQ concludes that a waterbody meets criteria as an ORW, a rulemaking process will be included on the list of potential projects to be considered during the triennial review. The triennial review process includes opportunity for public input, including input regarding whether a project may impact disadvantaged communities, either positively or negatively. If, after the triennial review, the WQS program includes the project as a priority, DEQ will, as part of the project, identify potentially affected Tribes and disadvantaged communities and provide the communities an opportunity to be involved in the project, such as participation on an advisory committee for the project.

Reason to develop the ORW nomination process

DEQ initiated this project as a way to streamline the ORW designation process. Previous ORW designations were conducted in response to rulemaking petitions under OAR 137-001-0070. Such petitions are not planned and require the agency to change program priorities or timelines to respond to the petition within a relatively short time. A nomination process allows the public to provide input on what waterbodies should be prioritized for protection, while allowing DEQ the opportunity to consider the projects along with other program priorities.

Public engagement

If DEQ receives ORW nominations prior to the next triennial review, scheduled to begin in July 2024, the public will have an opportunity to comment on whether an administrative rulemaking to designate the nominated waterbody or waterbodies as ORWs should be a priority for the water quality standards program in the next three years. In addition, if DEQ includes an ORW rulemaking on its list of priority projects, the public will have an opportunity to provide comments during the rulemaking process when DEQ initiates efforts on the specific rulemaking.

Translation or other formats

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Summary of public comments and DEQ responses

Public comment period

DEQ accepted public comment on the ORW nomination process from Aug. 29, 2023, to Sept. 30, 2023. A request for public comments was sent via GovDelivery to the Water Quality Standards email distribution list.

This response to comment document addresses comments and questions DEQ received regarding the ORW nomination process. The individuals and organizations shown in the table below provided comments on the ORW nomination process outlined in the document provided. All comments received during the public comment period have been reviewed by DEQ and addressed in this document. Comments which resulted in modifications to the ORW nomination process are noted.

DEQ received comments from 4 individuals or organizations. DEQ considered the comments and revised the proposed nomination process as described in the response sections below.

List of Commenters				
ID#	Name		Affiliation or Organization	Method of Providing Comment
1	Rebecca	Anthony	Oregon Department of Fish and Wildlife	Online submittal
2	Michelle	Maier	U.S. Environmental Protection Agency	Online submittal
3	Barbara	Ullian	Friends of the Kalmiopsis and Kalmiopsis Audubon Society	Online submittal
4	David	Moryc	American Rivers, Trout Unlimited and KS Wild	Online submittal

General comments

Topic: Screening process required by OAR 340-041-0004(8)(a)

Comment: DEQ should convene a working group to develop a transparent screening process and list of nominated waterbodies for ORWs. (Commenter #1)

Response: In the late 1990s, DEQ convened an advisory group to develop screening criteria and had plans to apply those screening criteria to a list of waterbodies. DEQ utilized information from that advisory group process to develop the screening criteria proposed in the current process. Building on this past effort and adding process steps to explicitly consider these nominations through the WQS triennial review process provides a transparent process to prioritize water quality standard projects.

The nomination process working in concert with the water quality standard triennial review allows DEQ to focus on ORW rulemaking for waterbodies that the public identifies as priorities for protection. This approach also provides the information needed to determine if the waterbody qualifies as an ORW with the public input.

Topic: Supporting rule and guidelines

Comment: The process would benefit from supporting rules and guidelines for moving an ORW nomination into ODEQ's priority list. (Commenter #1)

Response: Once DEQ concludes that a nominated waterbody qualifies as an ORW, the nominated waterbody will move onto the list of projects that DEQ considers in the triennial review. Guidelines for prioritizing water quality standards projects is incorporated into the triennial review process. These guidelines may be revised during each process. An overview of how DEQ prioritized projects during the last triennial review is available in the [2021-2024 Triennial Review Report and Workplan](#).

Topic: ORW rulemaking for waters at immediate risk

Comment #1: “ODEQ should reserve the right to petition for an ORW rulemaking outside of the triennial review process given an immediate or impending risk to a waterbody.” (Commenter #1)

Comment #2: “There should be a way to expedite the ORW process for ecologically significant waterbodies, including but not limited to those categories listed on the Fact Sheet, that are threatened with degradation or could be in the foreseeable future.” (Commenters # 3,4)

Response: DEQ prefers using the streamlined nomination process to advance waterbodies for ORW nomination. However, the ORW nomination process does not prevent DEQ from initiating a rulemaking to designate an ORW at any time, nor does it prevent a member of the public from submitting a direct request or rulemaking petition to request a rulemaking.

Topic: Tier 2 ½ designation

Comment #1: ODEQ should clarify how Tier 2 ½ protections have been provided for in the Three Basin Rule (OAR 340-041-0350) and whether waterbodies outside of the Three Basins are eligible for such protections. Guidelines for when ODEQ might consider a Tier 2 1/2 designation would also be desirable. (Commenter #1)

Comment #2: Oregon should include Tier 2 ½ language in their rules rather than interpret or assign such status via guidance outside of rule. (Commenter #2)

Comment #3: Where Oregon is applying a Tier 2 ½ level of protection, it must ensure that they are meeting all requirements of OAR 340-041-0004(6) (“High Quality Waters Policy”), as well as additional State requirements needed for Tier 2.5 protection. (Commenter #2)

Response: The Three Basin Rule (OAR 340-041-0350) is a geographically-specific rule that prohibits DEQ from authorizing new or increased waste discharges, unless certain requirements are met, for the Clackamas, upper McKenzie and North Santiam watersheds. The Three Basin rule was adopted as part of Oregon’s adoption of its initial water quality standards under the Clean Water Act in 1977 and last amended in 1995.

There is no requirement under federal antidegradation regulations at 40 CFR 131.12 that states must develop a provision for Tier 2 ½ protection. However, DEQ can adopt additional water quality protections for specific water bodies through a rulemaking process. DEQ agrees that additional clarity could be provided by developing procedures for when DEQ might consider such additional protections. In the meantime, if a situation arises where full ORW protections are infeasible, DEQ may develop and recommend to the EQC a rule that provides additional protections for specific high quality waters. DEQ will propose specific rule language establishing such protections through a rulemaking process that will provide opportunity for public engagement and comment.

Topic: Tier 3 Protections

Comment: Waters that are specified as receiving Tier 3 protections must be protected as specified in OAR 340-041-0004(8), Oregon’s “Outstanding Resource Waters Policy.” (Commenter #2)

Response: DEQ agrees with this comment. If DEQ moves forward with an ORW rulemaking through the nomination process, rule language will be consistent with OAR 340-041-0004(8).

Topic: Consideration of data and rule requirements

Comment: Oregon should consider best available data as well as their rule requirements in assigning the appropriate level of protection for their waters (Commenter #2).

Response: DEQ agrees with the comment and will consider the best available data when designating uses and assigning appropriate levels of protection.

Topic: Need to meet water quality standards

Comment #1: The Clean Water Act does not require that ORW designation be limited to just those streams that possess high quality water (i.e., meet all water quality standards). (Commenters #3, 4)

Comment #2: Congressionally designated National Wild and Scenic Rivers Oregon and ecologically significant waterbodies should be protected as Outstanding Resource Waters, whether or not the waterbody meets water quality standards. National Wild and Scenic Rivers should be priorities for ORW designation. (Commenters #3, 4)

Response: DEQ agrees that ORW designation is not limited to only those streams meeting all water quality criteria. A waterbody does not need to meet all Screening Criteria (such as meeting all water quality criteria) listed in the Fact Sheet to qualify as a potential ORW. DEQ has edited the fact sheet to ensure that this is clear.

Oregon's Internal Management Directive for NPDES Permits and Section 401 Water Quality Certifications states that there are three classes of waters under Oregon's antidegradation policy: Water Quality Limited, High-Quality Waters, or Outstanding Resource Waters and that a waterbody must meet all water quality standards in order to be classified as a High-Quality Water. However, DEQ's *de facto* approach to antidegradation is that a waterbody can be a high-quality water for one parameter, such as ammonia but can be limited for another parameter, such as temperature. As a result, a waterbody does not have to meet all water quality standards to be a High-Quality Water or an ORW.

As noted in the comments, antidegradation rules specifically list National Wild and Scenic Rivers among the categories of waters that should be priority water bodies for ORW nomination. As a result, designation of a water as a National Wild and Scenic River is included among the criteria for ORW nomination.

Topic: Due date for nominations

Comment: In one place it states that nominations can be submitted anytime. In another, that nominations should be submitted 3 months in advance of the Triennial Review but doesn't say when the latter begins and in another place that nominations for ORWs should be submitted two months in advance of the Triennial Review. It would be helpful to clarify when ORW nominations should be submitted to DEQ. (Commenters #3, 4)

Response: DEQ will clarify deadlines for nomination in the fact sheet. Nominations can be submitted at any time. In order to be considered during an upcoming triennial review, which is DEQ's preferred approach, nominations should be submitted at least 60 days prior to the beginning of the review. This will allow DEQ time to review and provide feedback to the nominating party or parties regarding whether the nomination documentation is complete. DEQ is planning to begin the next triennial review in July 2024, so we request that nominations be submitted before or on May 1, 2024. DEQ will clarify this request in its Fact Sheet for ORW nominations.

Topic: Protection of Darlingtonia Wetlands

Comment: Serpentine Darlingtonia Wetlands and the perennial springs that fed them are "ecologically significant" and as such should qualify as ORW.

Response: DEQ agrees that Darlingtonia Wetlands are significant waterbodies. Rule language developed during the North Fork Smith River ORW designation specifically protected Darlingtonia wetlands in that watershed. DEQ will evaluate protection of Darlingtonia Wetlands if they are nominated as ORWs.

Topic: Language revision for ORW criteria

Comment: Criteria #1 should simply read: Does the waterbody have outstanding qualities or features, such as clarity, temperature, unique species, recreational values, or ecological significance?

Response: Thank you for the comment. DEQ has revised the language in #1 to provide additional clarity.

Non-discrimination statement

DEQ does not discriminate on the basis of race, color, national origin, disability, age or sex in administration of its programs or activities.

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