

**Oregon Fish Consumption Rate Project  
Rulemaking and Public Input Process  
Human Health Criteria for Oregon's Water Quality Standards**

**Facilitator's Overview of the Process for the June 2011 EQC Meeting**

The following is the process overview report from the impartial facilitation team that was selected by EPA, DEQ and CTUIR, the three governments that sponsored this project, and paid for by EPA, to assist with the discussions amongst the three governments—and between the three governments and the public. This report is intended to provide an overview of the process used to facilitate conversations regarding how DEQ could revise its rules to support more protective human health criteria through a higher fish consumption rate. For more information about the facilitation team used for this work, please see page 10.

**Project Description:**

The project sponsors brought in an outside, professional facilitation team in November of 2006 to help them design, convene, coordinate and facilitate discussions around water quality standards in Oregon—specifically the human health criteria relating to Oregon's fish consumption rates. Over time, the project evolved into three separate phases:

- Phase I—Public workshop, issue identification (January 2007-October 2008);
- Phase II— Rule making working groups comprised of knowledgeable individuals from affected organizations and stakeholder groups (January 2009-December 2010); and
- Phase III—Public hearing and input (January-April 2011).

This project has included involvement of multiple state and federal agencies; tribal governments and their staff; agricultural, environmental, forestry, industrial, municipal, public health, and small business advocates and organizations; members of the Oregon legislature; and members of the public.

The following report describes the engagement of the project sponsors with each other, with affected stakeholders and with the broader public—and the activities of the facilitation team during each phase of the project.

**Three-Government Collaborative Effort**

Stated Goal: Consensus amongst the three governments on a final recommendation for how to protect Oregon's higher fish consumers.

The Oregon Fish Consumption Rate and Water Quality Standards Rule project has been a viable example of proactive intergovernmental collaboration. At all times during this process, the three-governments worked with each other and the facilitation team to identify the necessary people, materials, presenters and topics that would help further their understanding—and the understanding of all involved— of the complex issues that

could emerge from an increased human health criteria in Oregon. The designated representatives from each government took this process seriously and worked hard to:

- find, review and provide up-to-date scientific and social data;
- provide understandable information for the interested stakeholders and public;
- overcome disagreements with each other and others by talking them through; and
- keep their own executive decision makers aware of the progress and issues under discussion.

To do this, the representatives met regularly (up to every other week at many times during Phase II) and utilized regular communication via email and telephone as issues arose. At critical junctures, they reported on the progress of the process to their respective executive boards and senior level administrators to assure that the progress they were making was in line with and supported by the highest levels. When policy issues arose, the staff representatives requested engagement of their senior administrators to be certain that issues were resolved with full knowledge and agreement of these individuals.

This three government collaborative effort required, and demonstrated, a strong commitment to the process and a dedication to achieving the overall goal that the three governments had committed to in 2006 (and noted above). To a person, the individuals involved demonstrated a high level of integrity, professionalism and dedication to doing what they believed the science suggested was the right thing to do. They treated each other and all who they worked with on this project with respect, even when faced with high levels of criticism and emotions. At the end of their joint process, the three governments remained in agreement on all issues over which the representatives had authority to do so.

At this point in the process, the decision now moves to the decision making bodies: the Oregon Environmental Quality Commission and EPA's Region 10 to approve or disapprove of the EQC's decision.

### **Facilitation Team Role and Process Results:**

The three governments chose to use outside, professional facilitation services to help design the overall project based on best practices in the field, manage constructive dialogue of a known contentious issue, and assist with managing the overall process aspects of the project. The facilitation team consisted of three professionals over the course of this process: a lead facilitator, an alternate facilitator/meeting reporter and a support person. The activities of the facilitation team changed during different phases of the process:

#### **Three Government Collaboration**

The facilitation team coordinated and facilitated the work of the three governments as they discussed issues, planned next steps and collaborated on the overall project. This involved one to two planning sessions per month with representatives from the three governments. The primary focus of these inter-governmental meetings was:

- What type of information is needed? From whom?
- What type of input is needed from key core interest groups, the public and 'expert' focus groups?
- Once the information is received, where does the information/input received lead the thinking of the three governments?
- Based on this, what messages need to be sent? To whom, by whom?
- What are the next steps needed to support a legitimate decision by the EQC?

#### Phase I - Public Workshops (2007-2009)

Based on answers to the questions outlined above, the facilitation team designed, coordinated and facilitated public sessions that provided an opportunity for a two-way exchange of information. The stated goal of the public workshops was "to provide opportunities for public input and involvement" so that the three governments could be certain they were reviewing and considering all of the most relevant information needed to make a recommended change to Oregon's Fish Consumption Rate.

To accomplish this, the facilitation team:

- Helped identify a core group of interested organizations/individuals by interviewing people who had been involved in the past DEQ process;
  - Communicated with members of this group via telephone and e-mail regarding two-way information and input needs;
- Helped identify members for expert focus groups;
- Designed agendas and formats of workshops or focus group sessions based on input from all sources;
- Facilitated workshops and most focus groups sessions; and
- Drafted meeting summaries and sent them to DEQ for posting on the agency's website.

**Process Results:** From January 2007-June 2008, seven workshops and eighteen focus group sessions were held. Of the focus group sessions, twelve were the Human Health Focus Group and six the Fiscal Impacts and Implementation Advisory Committee. In summary:

- Workshops were held in Portland, Coos Bay, Lincoln City and Pendleton.
- 195 people attended the sessions representing 64 different organizations or groups.
- Type of input received:
  - Ranged from presentations to active small group dialogues, to large group discussion or reporting, and opportunities at all workshops for written comments and oral testimony. Summaries are available on the website for all the public workshops.  
<http://www.deq.state.or.us/wq/standards/fish.htm>
- A list of 65 individuals and other interested parties received updates and notification of meetings, web postings and other project related information from the facilitation team. In addition to this list, DEQ maintained a website

that allowed people to view information related to the fish consumption rate process and to sign up for notices about related events from DEQ.

In October 2008, the EQC heard the results of these efforts and unanimously directed DEQ to:

1. Revise Oregon's toxics criteria for human health based on a fish consumption rate of 175 grams per person per day;
2. Propose rule language that will allow DEQ to implement the standards in National Pollutant Discharge Elimination System (NPDES) permits and other Clean Water Act programs in an environmentally meaningful and cost-effective manner;
3. Propose rule language or develop other implementation strategies to reduce the adverse impacts of toxic substances in Oregon's waters that are the result of non-point source (not via a pipe) discharges or other sources not subject to section 402 of the Clean Water Act;
4. Develop a proposed rule and implementation methods that carefully consider the costs and benefits of the fish consumption rate and the data and scientific analysis already compiled or that is developed as part of the rulemaking proceeding.

#### Phase II – Rule Making Working Groups

To meet the expectations set out in the EQC Order, the facilitation team worked with DEQ, EPA and CTUIR to continue their collaborative efforts. The three governments determined that the best approach to achieving the Order was to convene a **Rulemaking Working Group (RWG)** that could work with the governments to develop ideas, propose rule language and implementation strategies. The RWG began meeting in January 2009 and was comprised of representatives from municipal and industrial dischargers, environmental groups, public health experts and tribes. The facilitation team was responsible for coordinating and facilitating the sessions and reviewing the summary notes drafted by DEQ staff. A list of the dates, organizations represented in the meetings and the topics discussed is attached to this report.

The RWG's charge was to:

- Help DEQ develop innovative NPDES implementation options;
- Provide advice to DEQ about how to connect NPDES implementation options to the statewide toxics reduction strategy and SB 737;
- Provide input to DEQ on rule language development; and
- Identify issues that are beyond the scope of the water quality standards rulemaking.

**Process Results:** The RWG met 21 times between January 2009 and December 2010 (roughly every 4-6 weeks). The members reviewed information and data provided by DEQ and members themselves, and input from other states, and then provided insights and ideas for how DEQ could structure its rule in a way that could be implemented by industries and POTWs while also meeting the interests of the environmental community to achieve measurable improvements in Oregon's water quality. The group sought to

reach consensus wherever it could. While there were areas on which the group did agree, an overall consensus decision was not possible given the time frames of the process. To that end, DEQ was clear that the RWG was advisory to DEQ who, by statute, would be the final author of the rule.

One area in which there was agreement involved the need to approach the water quality 'problem' more holistically by addressing the non-point source contributions. All members felt that the NPDES program has had to bear the regulatory brunt of improving Oregon's water quality. For Oregon to be successful achieving the 175 grams per day standard, the group agreed that non-point source contributions needed to be both acknowledged and effectively managed. While RWG members began to discuss ways of approaching this problem, members also agreed the group needed to be expanded to include directly affected stakeholders who could engage in a more meaningful dialogue of the issues and possible solutions.

The ***Non-NPDES Work Group*** began in November 2009 and was comprised of the RWG members plus representatives from agricultural and forest industries and the Departments of Agriculture and Forestry. The facilitation team was responsible for coordinating and facilitating the sessions and reviewing the summary notes drafted by DEQ staff. A list of the dates, organizations represented in the meetings and the topics discussed is attached to this report.

The Non-NPDES Work Group's charge was to:

Assist DEQ in identifying water quality regulatory changes or actions that could be addressed in the short-term that

1. are needed to make a significant improvement in the ability of non-NPDES sources to implement reduction measures for toxic pollutants, and
2. that would have a positive environmental impact.

**Process Results:** The Non-NPDES Work Group met nine times, with its final meeting in December 2010. The group reviewed information and data provided by DEQ and members themselves, received input from other states, grappled with questions of legal authority (about which they never agreed), and then provided insights and ideas for how DEQ's rule could be clarified in a way that could be acted on by the agricultural and forest industries, while also meeting the interests of the environmental community to achieve measurable improvements in Oregon's watery quality. In addition, they shared ideas about collaborative management strategies that could be enhanced to achieve the overall goal of reducing toxics in Oregon's environment.

While there was never an attempt to reach a consensus in this work group, the sessions provided an opportunity for all participants to hear and understand the science, the perspective of others, and to jointly attempt to solve some of Oregon's water quality problems together. In many cases, relationships were improved and positive work has continued outside of the work group between once maligned interest groups. This work

(such as meetings with agricultural interest groups that included DEQ Director and staff) likely will have the long term positive environmental impact that DEQ and the EQC are seeking.

Finally, the facilitation team also assisted DEQ in developing the ***Toxics Reduction Strategy Work Group*** to address the non-rule related toxics reduction efforts inside of DEQ. An internal staff group and a stakeholder group were formed to review and redefine how DEQ could approach reducing toxics across the three environmental landscapes: air, land and water. It should be noted here that the work of the RWG and Non-NPDES work groups is a subset of the agency's efforts and broader vision for Toxics Reduction in Oregon.

### Phase III – Public Comment Period

The most recent phase of this effort has been the statutorily required public comment period staffed and managed by DEQ. The facilitation team was not an active part of the public hearing and comment process. However, the lead facilitator attended two of the public hearings to listen to comments and input on the proposed rule. This attendance helped the facilitator prepare for and coordinate discussions amongst the executive leaders of the three governments as they sought to align the end product with what they heard from the public comments—in addition to what they had heard from the work groups and their staff.

**Process Results:** See DEQ staff report.

### **What The Facilitation Team Heard:**

The team heard that water quality and the standards that are used to help attain levels that will support human health is a complex and emotional issue that has the potential to both positively and negatively impact the lives, health and livelihood of countless Oregonians. At the outset of this process, there was a good deal of misunderstanding about the human health impacts that can flow from consuming fish that may have higher levels of toxics in their tissues. There also was uncertainty about the extent of DEQ's responsibility and authority to take actions under the Clean Water Act. While these misunderstandings were brought to light and clarified during Phases I and II, some disagreement remained among certain stakeholder groups (see below). Given comments at the public hearings, it is clear that these misunderstandings still exist among people who were not directly a part of this process and whose lives may be impacted by the final rule decision. Because of the emotional nature of the topic, this lack of understanding has been exploited in some public arenas in which facilitated dialogue is not permitted, making discussion and understanding difficult for all involved.

In addition, there were key messages or themes that can be drawn out here for comparison:

At the outset and throughout the process, the three Governments stated that they needed the following:

| <u>CTUIR</u>  | <u>DEQ</u>  | <u>EPA</u>                                    |
|---|---|---|
| Protect people who eat more than two meals of fish per month with an implementable standard | Develop an implementable standard that reduces contaminants in fish & protects human health and results in EPA approval | A regulation that is approvable under the CWA |

In addition to the stated needs of the governments, other groups articulated their needs throughout the course of the project. Generally, and in summary form, these are as follows:

Municipalities need:

An achievable standard that is not cost prohibitive to implement and a clear implementation process which provides opportunities for innovative pollution prevention with reasonable legal assurances/safety net—plus a more integrated pollution prevention program across point and non-point source boundaries so that point sources do not have to bear the entire regulatory responsibility for improving Oregon’s water quality.

Industry needs:

An achievable standard that is not cost prohibitive to implement and a clear implementation process which provides opportunities for innovative pollution prevention with reasonable legal assurances/safety net and, because of this clarity and assurances, provides a stable business environment.

Tribes need:

An implementable standard that protects people who eat fish much more than twice a month and protects the tribal way of life as “fish eaters.” Tribes support the idea of an integrated pollution prevention program across point and non-point source boundaries and are willing to help with that integration effort.

Public needs:

Protection for people who eat fish and education for the public about ways to reduce contaminants in fish that are eaten. Many supported an integrated pollution prevention program across point source and non-point source boundaries that could reduce contaminants that may be present in Oregon’s waterways.

Environmentalists need:

An implementable and enforced standard that measurably reduces contaminants in fish and Oregon’s waterways—plus an innovative, integrated pollution prevention program that stretches across point and non-point source boundaries.

Oregon Departments of Agriculture and Forestry need:

Clarification of the boundaries between their management authorities and actions and DEQ's, especially with regards to non-point source activities that may impact Oregon's water quality. In addition, they need a working relationship with DEQ that supports achieving Oregon's water quality standards in a collaborative and constructive manner with their immediate stakeholders.

Agricultural Industries need:

Rules and regulations that do not encumber the ability of farmers and other agricultural industries to have profitable businesses in Oregon. They also need easy access to the rules, regulations and people that guide their work so they are clear about the activities they should continue or control in order to be viewed as responsible stewards of Oregon's natural resources. Their preference is to be regulated by a single agency they trust (e.g. ODA).

Forest Industries need:

Rules and regulations that do not encumber the ability of foresters and other forest industries to have profitable businesses in Oregon. They also need easy access to the rules, regulations and people that guide their work so they are clear about the activities they should continue or control in order to be viewed as responsible stewards of Oregon's natural resources. They believe the Forest Practices Act is the only authority for regulating their work and, as such, are regulated by a single agency they trust (ODF).

**What Was Accomplished?**

At the end of this four year process, the three governments received the following to aid in their discussions and decisions related to the fish consumption rate in Oregon:

- A substantial report from the Human Health Focus Group that reviews local, regional and national studies and suggests that a higher fish consumption rate should be used in Oregon, based on Northwest-specific information.
- A review and initial report from the Fiscal Impacts and Implementation Advisory Committee related to costs, possible benefits and implementation strategies. Included in this work was a matrix of possible implementation strategies that were further discussed during the rule making work group sessions.
- A comprehensive set of meeting summary notes to review and consider when discussing and making recommendations about the fish consumption rate, water quality standards rules and implementation strategies.
- A list of key people and their contact information for additional discussions that could aid further work on water quality standards in Oregon.
- Ideas and strategies from other states that come from the lessons they have learned using various implementation tools (such as variances).
- A draft rule that was written after hearing and considering the direct input and ideas of primarily affected stakeholders—as well as a broader array of public members from around Oregon.

## **Conclusion**

The Oregon Fish Consumption Rate and Water Quality Standards Rule Making Project has provided an opportunity for a wide range of people and interests to come together, review information and share perspectives and data about what might work to reduce toxics in Oregon's waterways—and the fish that live in them. The project has supported an exchange of ideas and data among the three governments who have, in past years, struggled to have constructive discussions about how to move forward to solve this tough issue. The representatives of the three governments worked hard to 'seek to understand, not just to be understood'. They worked hard – with each other and with those who came to the public workshops or were part of the work groups—to find data, to understand impacts and to test statements that were made about those impacts.

The project may not have been 'perfect' (perfection was challenged by changes in staffing within the governments, difficulties mining needed data and ideas to support robust conversations in a meaningful time frame, and the inevitable overlap of meeting dates with other important public conversations), but it certainly provided an open forum for a good and thorough inquiry to occur. Because of the emotional aspects of this work, the complexities of the data, and the need to raise the technological bar in order to achieve measurable changes in Oregon's water quality, not everyone will agree on the end product of this effort. However, the recommendation that will be forwarded to the Environmental Quality Commission in June 2011 will be the result of honest and open discussions of all the issues raised during the course of the past four years.

This report is respectfully submitted by

Donna Silverberg, Owner/lead facilitator  
DS Consulting

## ***DS CONSULTING***

*813 SW Alder, Suite 400  
Portland, OR 97205*

***DS Consulting*** is a woman-owned full service conflict management, mediation and facilitation firm located in Portland, Oregon that focuses primarily on aspects of public policy regarding natural resources and public health. Our goal is to help the right people have the right conversations to reach the best decisions. We have an internal team of three professionals, Donna Silverberg, Robin Gumpert and Charles Wiggins, who work together and with our clients to understand and then provide the type of services requested by the client. All members of our team are experienced facilitators and mediators who know how to work with people to engage and assist them in negotiating and communicating complex, technical information in large group, public settings.

DS Consulting uses a variety of techniques to help clients enhance communication and negotiation effectiveness so they can achieve innovative and satisfying results. We work closely with clients to assess the type of format or service that best meets their needs and their goals. Clients include: local, state, and federal agencies; elected officials; tribal governments; NGO's; large and small businesses; law firms; and community groups. Services include:

- large group facilitation or mediation;
- conflict needs assessment;
- one-on-one coaching;
- dispute systems design;
- negotiation and communication skills training;
- negotiated rulemaking assistance;
- collaborative problem solving; and
- consensus building.

***Donna Silverberg, owner*** and principal of DS Consulting, has been in the field of mediation, facilitation and consensus building involving local, state, federal and tribal governments, non-profits, businesses and the public since 1988. Her work has included a wide range of issues including endangered species, health care, water resource/quality, human resources, including ADA issues, non-profit planning and management, public health, land-use, and cross cultural.

She is a member of the California State Bar, the Association for Conflict Resolution, the US Institute for Environmental Conflict Resolution's Roster of Mediators, SRA Inc.'s roster of mediators, and served on the Oregon Mediation Association board from 1998-2005, three years as President. She served as Governor Kitzhaber's Special Assistant on Dispute Resolution for Natural Resource issues, Acting Director of the Oregon Dispute Resolution Commission (ODRC) and Manager of the ODRC's Public Policy Dispute Resolution Program. She started DS Consulting in 1998.

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