

Rulemaking for Aquatic Life Use Updates

Aquatic Life Use Updates

Rulemaking Advisory Committee Meeting #5

Aug. 24, 2022, 9 a.m.
Virtual Meeting (Zoom)

List of Attendees

Advisory Committee Members: John Schaefer, Chris McCabe, Glen Spain, James Fraser, Steve Kucas, Rich Wildman (for Oregon Farm Bureau and Oregon Forest & Industries Council), Susie Smith

Agency Advisors: Rebecca Anthony, Brian Bangs, Greg Sieglitz, Michelle Maier

DEQ Staff: James McConaghie, Connie Dou, Trina Brown, Michelle Martin, Aron Borok, Mailea Miller-Pierce

Interested Persons: Derek Godwin, Jackie White, Kalman Bugica, Victoria Frankeny, Ken Yates, Julia Crown

List of handouts and presentation notes

- Second draft of fiscal impact statement
- Discussion draft of Technical Support Document
- Presentation Slides

Agenda

Time	Topic
9 a.m.	Welcome and Introduction
9:20 a.m.	Final Draft Fiscal Impact Statement Q&A and Discussion
9:50 a.m.	Technical Support Document Q&A and Discussion
10:20 a.m.	Break (10 mins)
10:30 a.m.	Aquatic Life Definitions Revisions
10:50 a.m.	Wrap-Up, Next Steps, Final Q&A
11:30 a.m.	Adjourn



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DEQ is a leader in restoring, maintaining and enhancing the quality of Oregon's air, land and water.

Meeting Summary

I. Introduction and Welcome Presentation

DEQ's facilitator reviewed the meeting objectives, the agenda, and the ground rules for the meeting. There were no questions or suggestions for today's agenda.

I. Fiscal Impact Analysis

Mailea Miller-Pierce presented on the final discussion draft of the Fiscal and Economic Impact Statement. The presentation focused on revisions and additions to the fiscal impact statement since RAC meeting #4. All advisory committee members who provided comments were acknowledged and thanked.

Steve Kucas acknowledged that the fiscal impact statement is meant to focus on broad impacts. He asked when in this process would individuals have opportunity to comment on specific cost assessments for facilities and entities? Aron Borok replied that specific costs for any individual permittee is really determined at the permit renewal level and accounted for at the permit writer level. Currently, DEQ doesn't have the information or data to assess individual impacts. Any specific costs to individual facilities expected as a result of the new rules can be submitted to DEQ during the public comment period. Aron emphasized that the fiscal impact statement focus is statewide and focuses on new costs which may occur from changes due to the new proposed rules.

James Fraser had a question about two of the anticipated benefits that he thought were deleted in the latest version of the statement including: 1) indirect impacts for local government: cleaner water may reduce treatment costs; and 2) indirect impacts for the public: positive impacts if proposed rules improve recreational opportunities. Mailea responded that discussion of both potential impacts is still in the document, but reorganized. DEQ still expects positive impacts on these entities could occur, but felt the previous draft was too speculative about specific positive impacts for entities.

II. Technical Support Document Q&A

James McConaghie communicated some of the expectations for providing feedback on the Technical Support Document from the RAC. The purpose of providing the TSD to the RAC was to inform and provide context for the proposed rules. Since DEQ developed the methods for designating the aquatic life use subcategories in conjunction with an expert technical workgroup panel, the department does not expect it will entertain major changes to the methods at this time. However, DEQ encouraged the RAC to provide input on the effectiveness of communicating and supporting the proposed methods, and highly encouraged the RAC to notify DEQ of major concerns as soon as possible.

Rich Wildman stated that there are some passages in the document that reference work still to be done and future development. If new procedures are still being developed, how will they be resolved? Namely, how will DEQ identify where resident trout spawning occurs and how it will designate new areas as they become available?

James McConaghie responded that for identifying presumed resident trout spawning and conservatively applying criteria, DEQ will propose to follow the framework that is currently laid out in the TSD. There is some language that indicates DEQ was still working with ODFW and EPA. That work has to do with how DEQ can adopt the framework from the TSD into rule language consistent with the Clean Water Act, and how we coordinate with ODFW about habitat information that might be created through that process. But DEQ is

not developing new procedures that are different from what is described in the framework. DEQ will add any necessary detail to the proposed rules, and these will be part of our public notice.

Rich Wildman asked an additional question about how Salmon and Steelhead Migration Corridors will be determined. Since they rely on temperature modeling often from TMDLs, what happens as TMDLs are updated and we find that more waters are naturally above 18°C? How formal does the process need to be if a TMDL changes something? Aron answered that DEQ must go through a rulemaking to change a standard and provide a use attainability analysis to EPA to justify that change. There's not an automatic process included in the rule that would cause those designations to change. Some of our proposed use category changes do rely on TMDL modeling and we do explain how that justifies the proposed use through an attainability analysis.

James McConaghie also explained that for the Migration Corridors, the procedure is unique from the other use categories in that it relies on a 'multiple lines of evidence' approach and less on more quantitative procedures using the FHD and timing data. The pre-existing corridor designations were developed more deliberatively with experts from the state and federal wildlife and fisheries agencies. DEQ did evaluate whether some additional reaches might fit a very strict set of conditions using the new FHD and timing data from ODFW- including primarily migration use by anadromous salmonids, no salmonid rearing in the summer, and evidence that the reaches naturally exceed 18°C. But since this designation is meant to address the highest attainable use in a small set of large, mainstem rivers across the state, there are often complicated dynamics that are considered. For example, in the lower Willamette, juvenile salmonids can technically be found throughout the summer, but many of them use cold micro-habitats and thermal heterogeneity within the larger waterbody. But it isn't prime rearing habitat the way many upstream tributaries are. Often, they migrate out if temperatures get too warm, so juvenile presence isn't the only factor considered in the original designation.

III. Aquatic Life Use Definitions

James McConaghie presented the brief proposal for revising the aquatic life use definitions in OAR-340-041-0002. DEQ has concluded that the definitions, though not regulatory definitions, are informative about the types of species that DEQ could consider as "cold water" species or "cool water" species and provides some context that is helpful for the temperature and dissolved oxygen rules. DEQ proposes to retain the definitions but change the terms from "cold water aquatic life" and "cool water aquatic life" to "cold water species" and "cool water species".

IV. Wrap up and Adjournment

James McConaghie highlighted the remaining avenues for the RAC to provide input on documents, and the next steps in the rulemaking process and schedule. The RAC can provide written comments on draft documents until September 15 and is encouraged to contact staff with any questions or concerns in the meantime. There will be a Director's Dialogue item about this rulemaking provided to the Environmental Quality Commission (EQC) at their September meeting. The public notice and comment period for this rulemaking is planned for October 15 and will run for approximately 45 days until the very start of December. DEQ plans to present the rule to the EQC in the March 2023 meeting.

James Fraser asked for clarity on whether the Director's Dialogue is part of the EQC process? James responded that yes, the Director's Dialogue is an internal process for the EQC and is meant to notify the EQC about what is coming up on the schedule and so that they know to expect the future submission.

The floor was opened for non-committee members to ask questions. There were no questions from the public.

DEQ adjourned the meeting early at 10:20 a.m.

Alternative formats

DEQ can provide documents in an alternate format or in a language other than English upon request. Call DEQ at 800-452-4011 or email deqinfo@deq.state.or.us.