

# Water Quality TMDL Division 42 Rulemaking

## Summary

### Rulemaking Advisory Committee Meeting #1

Sept. 2, 2021, 1 p.m. to 3:30 p.m.

Zoom meeting



State of Oregon  
Department of  
Environmental  
Quality

#### List of RAC member attendees

Name	Affiliation
April Snell	Oregon Water Resources Congress
Carl Merkle	Confederated Tribes of the Umatilla Indian Reservation
Corissa Holmes	Oregon Association of Clean Water Agencies
Kathryn VanNatta	NW Pulp & Paper Association
Marganne Allen	Oregon Dept. of Agriculture
Mary Ann Cooper	Oregon Farm Bureau
Mike Eliason	Oregon Forest & Industries Council
Sharla Moffett	Oregon Business and Industry
Thomas Whittington	Oregon Dept. of Forestry

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

#### List of DEQ team attendees

Name	Role
Jennifer Wigal	DEQ WQ Deputy-Division Administrator
Eugene Foster	DEQ WQ Manager
Michele Martin	DEQ Project Manager
Trina Brown	DEQ Administrative Specialist

#### List of handouts

- [Agenda](#)
- [Advisory Committee Charter](#)
- [Draft Rules](#)
- [Draft Fiscal Impact Statement](#)

## Agenda

Time	Topic
1 p.m.	Welcome, Jennifer Wigal
1:10 p.m.	Introductions, all
1:20 p.m.	Charter and general TMDL background, DEQ staff <i>DEQ meeting presentation and Charter</i>
1:40 p.m.	Draft rules, OAR 340-042 Total Maximum Daily Loads, Gene Foster <i>DEQ meeting presentation and proposed draft rules</i>
2:40 p.m.	Fiscal Impact Statement, Michele Martin <i>DEQ meeting presentation and draft fiscal impact statement</i>
3:10 p.m.	Public comment opportunity
3:25 p.m.	Next steps, Jennifer Wigal
3:30 p.m.	Adjourn meeting

## Meeting Summary

### Presentation slide 1

**Jennifer Wigal:** Welcome and meeting purpose and overview

### Presentation slides 2 though 5

**Michele Martin:** Logistics, committee introductions, agenda, and committee Charter

### Presentation slides 6 through 7

**Jennifer Wigal:** Total Maximum Daily Loads (TMDLs) background and reasons for the proposed rulemaking

**Mary Ann Cooper:** Clarification request about the rulemaking process; at the point that conversations with agency staff and with Commissioners can happen are while the public comment period is open; and then after the close of the public comment period, the public cannot interact with agency staff or the Commission because the public comment period is closed. If the way the rulemaking public comment is structured with the Commission, will it reduce conversations the public has historically had with the agency and Commission throughout the TMDL development process. Once public comment period is closed, agency staff and Commissioners cannot have discussions about the rules?

**Jennifer Wigal:** Once the public comment period is closed, we can't continue to accept comments. The close of the comment period and the Commission meeting is a short timeline where DEQ prepares documentation and considers changes based on comments made during the public comment period.

**Mike Eliason:** You mentioned not having a clear public process for TMDLs by order; hard to believe that the Commission would have entirely delegated the authority to the Director of DEQ to develop by order without any sort of public process. Contrast the TMDL by order in contrast to going by rule.

**Jennifer Wigal:** Overstatement on my part to say that TMDLs by order do not have a clear public process. We have requirements at a minimum in federal law; when we do an order, we have a lot of process components similar to a rulemaking process; rules committee in the case of rulemaking, public comment, public hearing, response to comments, are all are various pieces of engagement and documentation when we

process by order or rule. There are additional aspects that come into play with a rulemaking; fiscal impact statement, and rules advisory committee acknowledging more of the policy aspects and bringing that to the Commission.

**Gene Foster:** Jennifer provided the major components of how we conduct our public process. Oregon Administrative Rules 340-042-0050, 0060 also have our public process.

### **Presentation slide 9: referencing examples of changes to allow TMDLs to be adopted by rule by the Environmental Quality Commission**

**Mary Ann Cooper:** I have concerns; I appreciate the rule change is part of statutory authority; my concerns are about the Department signaling intent to do more complex TMDLs by rule, because there are several consequences of that under the APA [*Administrative Procedures Act*]. First, it restrains judicial review in places where we have seen for example the Department inventing terms like *responsible person* and putting those into TMDLs or assigning TMDL loads to natural sources, there are a lot of reasons why we have felt reasons to leave the judicial review open; I think that by order, the judicial review process involves a much more robust judicial review. The judicial review seems to affect those regulated by the TMDL. The environmental groups often go through the federal court and Clean Water Act for their appeals; seems like it [this rule change] affects more the ability seek judicial review of the larger policy calls that the agency has been making. Practically, I know the intent is to have the policy calls in front of the Commission, but doing it through rulemaking shuts off communication with the Department and the Commission once the public comment period closes and with the compressed timeframe we have seen DEQ have to move forward with TMDLs, feels like it's setting up the agency to ensure that it's the most prominent voice the Commission hears in those policy conversations and limits the conversations we have. Historically those conversations have gone right up to the end [in an order] process. When the Commission is being briefed and the agency makes a decision; and just practically, the Commission's role is to have some of the complex issues, and resolve the policy decisions, it's important that those conversations need to be more than a one or two hour briefing in front of the Commission for them to have meaningful engagement in the process. To summarize, it [TMDLs by rule] truncates regulated communities to participate, because in recent TMDLs, we've seen DEQ go in different directions and assign allocations in ways that don't make a lot of sense; rulemaking feels like it's going to constrain public process and not enhance it.

**Mike Eliason:** Share the same concerns. Would like to see the response.

**Sharla Moffett:** *Typed in chat, agreement with Mary Ann Cooper.*

**Kathryn VanNatta:** In the rule language when you insert the Commission, and your choices of where you stuck in the word Commission, some of places don't make sense to me, because the Commission doesn't do the work, unless you are giving the Commission the authority to change a TMDL on the spot, and could you explain what your goal is where you inserted the Commission. Specific example where: OAR 340-042-0040(5) To determine allocations for sources identified in the TMDL, the Department or Commission – why did you insert the Commission in all of those locations?

**Jennifer Wigal:** We wanted to acknowledge that via rulemaking the agency works on behalf of the Commission to adopt the rules and is a parallelism between the Department and the Commission. Worth getting another review by DOJ [*Department of Justice*] to ensure we are not inadvertently applying or construing the rules for the potential to imply who is going the work or the Commission's rule. Did I capture that interpretation correctly?

**Kathryn VanNatta:** Good interpretation.

**Jennifer Wigal:** Important intent in making the revisions is to ensure where the Department is issuing as an order, there is a parallelism of the Department doing the work on behalf of the Commission. Will look at the instances to ensure that if pieces are getting muddled after putting Commission in every parallel part, we can take a look at that.

**Kathryn VanNatta:** The operations of the Department are based on the fact that the Department does the work on behalf of the Commission, and we all realize that; when you say that the Department or Commission will distribute waste load allocations, at face value and then operational, I can come up with two different interpretations.

**Jennifer Wigal:** We had DOJ [*Department of Justice*] take an initial view of these rules and it's good to have questions framed in a certain way to ensure that things are reading the way we intended them to.

**April Snell:** I agree with comments made, concerned with unintended consequences; I understand that it's not the expectation that the Commission would suddenly be establishing or developing TMDLs, but the way it's worded could cause some confusion. In following up with Department of Justice, if these proposed changes would change any of the existing remedies that stakeholders would have for engaging in different aspect of the public process, i.e., the public process, based on the conversation it might better not having it referenced in the way that it's done.

**Jennifer Wigal:** Asking for clarification in the latter part of the comment

**April Snell:** Section where the Department is adding Commission to each section – I leave that to the Department to review, but in reading it and reflecting on the conversation; if the intent would encompass directing the Department to do something directly, but the way that it is, would seem like a new set of responsibilities would be given to the Commission; are they going to group stream segments? I assume not, they would be going with staff recommendations; someone not close to this it seems like it's the Commission doing these things.

**Jennifer Wigal:** I hope it's understood that it's not our intention for the Commission to do the work; I understand that it's possible how the rule are constructed it might be construed that way.

**Mike Eliason:** What I'm trying to figure out is the goal to have the Commission to do all of these [TMDLs] by rule or is it the case that the Commission would approve the more complex TMDLs? I would infer that for more straightforward ones they can still be done by order. What are the defining characteristics of one being done by rule or by order? How do you picture parsing those out if you do?

**Jennifer Wigal:** We don't have detailed criteria how we would parse one way over the other. What we are finding as we are doing TMDLs, we know TMDLs are getting more complex as we look to meet the federal requirements and submit approvable TMDLs there are important aspects around reasonable assurance, how we do the allocations, etc. those things are not getting easier, for many TMDLs we do consider important policy considerations that are important to put in front of the Commission our policy-making body. I can't tell you exactly what that means for thresholds or what that means at this time, but it's important to begin putting the framework in place to have that option knowing that many of our TMDLs are complex in nature.

**Sharla Moffett:** Circling back to the issue Kathryn has raised, one question would be in terms of the placement of the Commission into the document, could there be a situation where there would be a looming court order deadline and the Commission could make changes [to the TMDL], which is a significant issue of the placement of the word Commission [in the draft rules].

**Jennifer Wigal:** Asking for clarification; are saying that you are thinking in some ways, the way the rule is written would dictate the result that the Commission could make those changes?

**Sharla Moffett:** The Commission may be able to make changes on the fly that shouldn't be [made].  
Reinforcing Kathryn.

**Jennifer Wigal:** We don't have our attorney in the room; we will have DOJ [*Department of Justice*] look over this again with that lens, but the intent is that any consideration by the Commission would conform with the APA [*Administrative Procedures Act*] processes and the Commission's authority with rules broadly and this rule itself should not be conferring any additional authority or expectations of the Commission with regard to a rulemaking process; it absolutely would not; our sole intent with these revisions is to do changes with what is in statute. We will have our DOJ [*Department of Justice*] take another look at these rules to ensure the rules meet that intent.

**Marganne Allen:** Playing off the theme going on; have you looked ahead how you would frame up what would be going to the Commission; I'm trying to envision what that meeting would look like, similar to some of the questions coming up; I almost feel like is, in a sense, that the Commission is being added in the text as a recipe as to what you would say, potentially highlight the load allocation, the sectors assigned, etc. have you thought that far ahead or not?

**Jennifer Wigal:** Good question, we know that part of the challenge in this discussion is going to be the conforming narrow changes in the rule to conform to the those revisions, and as we think about the actual TMDLs themselves and what that would look like in a rulemaking process; we know that is going to be important and we have had discussions, we anticipate the first TMDLs going through the process will be part of the interest in how that will go forward, there is a lot of supporting documentation we currently produce in in the process and the "meaty" conclusions, that is not a regulatory word; there are both of those pieces and we currently produce those as a single document; we will look at how all of those important elements are there and they might be organized to conform to a rulemaking format.

**Mary Ann Cooper:** Going back to Mike's question when the Department may recommend doing a rulemaking vs. an order, make a request that if the Department is determined to move forward with doing some [TMDLs] in a rulemaking, it may be good to have more in [the proposed] rule to have guidance or that understanding; I think my thought might be opposite, different than what I think the Department's intent is that the more complicated it is, the more fitting it is for a rulemaking; I feel like the more complicated it is the more likelihood we'd need the time and space collaboration that isn't easily afforded by a rulemaking process, and the more the Department may be making policy calls that need to go through judicial review; have that flushed out in the rule more; secondly if the concern is that there are policy calls that should be going in front of the Department, there is nothing stopping the Department from putting those policy calls in the general rulemaking, I say that with the caveat because I know that the responsible party proposal was here is something that the Department did through a TMDL and I think one of the concerns is that it was invented in the TMDL process but I also have some concerns about having something codified in rule that is not in the Water Quality Act, my point is that some criteria of what path will be taken [rule or order] and when is useful, while I generally don't like doing TMDLs as rule, I lay the marker that I hope that in the rulemaking process that the Department will commit to a robust fiscal impact analysis, I think TMDLs would be a really right place for that to be a powerful analysis because there are so many decisions about what to require and when, where, and how, that feel right for a robust fiscal analysis, please make sure the rulemakings allow enough time for a fiscal impact analysis.

**Presentation slide 10: adding daily load to the definition of Total Maximum Daily Load, OAR 340-042-0030(15)**

**Gene Foster:** presented on the slide.

**Michele Martin:** I'm going to do a round-robin asking for input from committee members if I don't hear from you. You are welcome to say "pass."

No comments

## **Presentation slide 11: Clarifying language to reasonable assurance of implementation**

**Gene Foster:** presented on the slide

**Mary Ann Cooper:** Strikes me that there is some risk that you are including court cases into rule where it's not strictly necessary, where it's something you have been doing [adding into TMDLs currently]. This is to me maybe putting more information into rule than is necessary to put into rule, I don't think it's incorrect or anything like that. Will the agency change it if subsequent court cases that refines or changes or says what it means? It strikes me as there being some jeopardy to the agency in codifying case law into rules; to me the changes to rule that make the most sense is if you are deleting things that are inconsistent with case law, but further elaborating where you are not doing anything inconsistent with case law. Is there some jeopardy to the agency because case law can change and expand over time? It's not that I have a concern with it, but if you are doing it, is there more risk than reward by putting it into the rules?

**Jennifer Wigal:** I don't know that we view it [adding language clarifying language to reasonable assurance of implementation from case law] as risky, it's been consistently been how EPA [*Environmental Protection Agency*] has operationalized their federal requirements for about 20 years now, we think it helps make similar our state regulations with the federal requirements to make them more consistent and clear that this is the threshold and benchmark the state needs to meet to conform to federal requirements. I think the risk on this rule language is low for including. I think case law has affirmed interpretation that the EPA [*Environmental Protection Agency*] is taken, I think they are symbiotic how case law has operationalized and consistently interpreted federal requirements. I'm unaware if there are additional conflicting viewpoints that might introduce additional risk.

**Mary Ann Cooper:** I'm not aware either, so that is helpful. Thanks.

**Sharla Moffett:** How to highlight with implementation, what factors would be considered in that? Is cost a factor for a high likelihood of consideration of implementation?

**Gene Foster:** It's not specified in the rule currently, it gives options in the Water Quality Management Plan section of Division 42 on things that the Department could consider in development of the Water Quality Management Plan framework and for implementation plan development. Costs could be one of the factors that are considered when evaluating implementation strategies for TMDLs, but not required, and can be considered.

**Mary Ann Cooper:** Sharla's question drove home another one for me. I noticed that this language is specific to load allocations, as it relates to load allocations for ag [*agriculture*], a portion of the work we do to achieve TMDLs is incentive based through partnerships with soil and water conservation districts and focused impact areas, and my recollection is that the validity measures that were voluntary to be demonstrated as reasonable assurance that the TMDL would be met looked a lot at the funding behind it, are these incentives concrete, this language just refers to load allocations and I presume that's intentional. Is there a different analysis for waste load allocations as for as the Department is concerned, I want to ensure that the body of case law is reflected if we are going down that path if we need to be, but I'm not sure if we are actually going down that path?

**Gene Foster:** When we establish waste load allocations for NPDES [*National Pollutant Discharge Elimination System*] permitted sources, those waste load allocations are expected to be translated into permit limits at the next NPDES [*National Pollutant Discharge Elimination System*] permit cycle or when the permit is updated. That is the assurance for implementation of the TMDL waste load allocations for NPDES [*National Pollutant Discharge Elimination System*] point sources and that language is typically in the TMDL,

Water Quality Management Plan portion of the TMDL for NPDES [*National Pollutant Discharge Elimination System*] permitted point sources.

**Mary Ann Cooper:** And that makes sense. Probably for the nonpoint sources the high likely to implementation probably gets to that idea, is it funded, do programs exist to incentivize the practices? Is that your understanding?

**Gene Foster:** That is my understanding for high likelihood of implementation is that there are voluntary or regulatory programs in place that would assure that load allocations would be implemented, funding could be a portion of that, regulations could be a portion of that, voluntary actions, entities or agencies available to assist landowner or designated management agencies could be a portion of that high likelihood of implementation statement.

**Mary Ann Cooper:** I understand this is case law, but that when looking at practices capable of reducing the specified pollutant that they exist, that are technical feasible, have a high likelihood, I know that with some pollutants, thinking about temperature, that there are places that even if we do everything we can we may not be able to hit the temperature targets, how does that analysis square with these requirements when we look at upcoming temperature TMDLs?

**Gene Foster:** With TMDLs and the identification of sources that are, or may be, releasing the pollutant, sources are only responsible for their own actions that are causing or contributing the pollutant to the water body. As in past TMDLs, designated management agencies are only responsible for their own actions that are introducing that pollutant. I would anticipate that is the same approach we will be taking for TMDLs going forward.

**Mary Ann Cooper:** Thanks.

**Michele:** Scheule, agenda, and time check

**Marganne Allen:** Going out on a limb on this one. I'm not familiar how compliance even comes into the picture here, so this question may be mute, but if going from an order to a rule would change the compliance and enforcement aspect with TMDLs?

**Jennifer Wigal:** We don't view this as being different, for example our NPDES [*National Pollutant Discharge Elimination System*] permits are issued as orders, I don't know that changing the format changes anything about how that would be viewed. There may be other administrative law; the applicability in terms of what it means to anyone, who may be assigned an allocation, I don't know that we view that as any different aside from the two different mechanisms.

**Michele Martin:** Asked Thomas Whittington if he has any comments.

**Thomas Whittington:** Pass. Thank you.

**Michele Martin:** Carl Merkle do you have any comments or questions so far?

**Carl Merkle:** No, I do not. Thank you.

## **Presentation slide 12: Public participation proposed change**

**Gene Foster:** presented on the slide

**Mary Ann Cooper:** My understanding of the rulemaking process, the actual APA [*Administrative Procedures Act*] process, is that the rulemaking advisory committee is strongly encouraged, but not required

it's only required for the fiscal impact statement, and not actual development of the rules, and to that end, I have a strong preference for instead of saying the rulemaking process will satisfy the rulemaking participation, clarifying that a rulemaking advisory committee will be utilized and that is expressed in these rules.

**Jennifer Wigal:** I think that is a good observation. In our existing rules, we commit to a local advisory group, and I think we will take that suggestion into consideration to make that clearer because there is a bit of wiggle in the APA [*Administrative Procedures Act*] if you have to have a rulemaking advisory committee or not.

**Mary Ann Cooper:** You are good at convening rulemaking advisory committees; I have a preference for expressed vs. implied.

**Kathryn Van Natta:** My point was going to be the same. I'm not sure that these concepts should be two different sentences, they don't seem to reference the same situation. It could be interpreted that the Commission could do a TMDL by themselves and I don't think that is the goal here, I think you need to wordsmith this, unless that is the goal, and I would have the joy of commenting on that in written comments. The sentence construct is driving part of the problem. You created an *if, when* situation that I don't think you intended to do.

### **Presentation slide 13: Issuing a Total Maximum Daily Load when EPA establishes a TMDL**

**Gene Foster:** presented on the slide

**Mary Ann Cooper:** I know there is the TMDL and Water Quality Management Plan, and I presume that historically the Water Quality Management Plan has also been an order, is that correct and is that separate order from the TMDL?

**Gene Foster:** In Division 42, the Water Quality Management Plan is a component of the TMDL and the Water Quality Management Plan serves as the framework for implementing the TMDL. The Water Quality Management Plan is a component of the TMDL itself and when the Department issues the TMDL as an order, the Water Quality Management Plan is issued at the same time being the component of the TMDL.

**Mary Ann Cooper:** I'm thinking of the actual documents; how would the Water Quality Management Plan actually be in rule because it strikes me as something you wouldn't want to have in rule, it feels like the rules would become really dense, really long, really wordy, rules get posted on your website and on the Secretary of State website in that weird thin format that they have, it strikes me as a document, if approving by rule, I never imagined that all of the components would be in the rule, the charts and all of that, and that having the Water Quality Management Plan; why would you want that [in rule]? I would like to see an example. I was thinking the rule would look like something referencing the document, it struck me that if the full document in rule - practically what is actually going to be published on the Secretary of State website? It seems like that is not something you want published.

**Gene Foster:** The rule construct could be that the actual rule language is brief or important parts are summarized, such as water body location, or it could also be in the form of adoption in the rule as reference for a Water Quality Management Plan as a full blown large report, or it could be a simple declarative report of the Water Quality Management Plan that relies on the larger policy document so the public can see the rationale behind it; for right now that is some of the constructs, that it could be. I don't think we want to publish a 200 page document into rule language on the Secretary of State website.

**Mary Ann Cooper:** I wish there was a way, I'm a visual person, to see what that would look like, that may be too much to ask. I'm having trouble picturing how the two documents the actual document with charts and graphs and data would relate to the language in the rule and what those would look like, but if there is



anything similar, if you have a rule that is the actual adoption of the rule and a document that explains the thing that would help. The closest thing that jumps to mind is the Oregon wolf plan where they have the wolf plan and the regulatory pieces of the plan are in rule. You are probably not familiar with the wolf plan, so if there is something that you are familiar with that you can show me I would love to visualize something.

**Jennifer Wigal:** Gene did a good job of giving you a flavor of the some of the discussions we are having. We have not landed on a perfect solution. I expect we will share more information on that as we work through the particulars that we are actively giving thought to.

**Mary Ann Cooper:** Makes sense, it strikes me that you would not want to adopt Water Quality Management Plans by rule, that is my official comment on this section is that feels a little different than a TMDL by rule. It seems that if EPA [*Environmental Protection Agency*] established a TMDL, then the Department should continue to issue the Water Quality Management Plan by order, that would be my preference.

**Gene Foster:** The other part of this proposed rule change in referring to the slide, is when the rule would be effective. The order is when the Director signs it and in the case of a rule, it's when the rule is filed with the Secretary of State.

**Michele Martin:** Before we get into the fiscal impact statement, are there any additional comments on any of the proposed changes in the draft rules?

**Marganne Allen:** I'm stuck on the enforcement part. I'm wondering if there are potential linkages, for example I'm looking at OAR 340-012-0055 that talks about if there are cross linkages to watch; failing to timely submit a TMDL implementation plan by DMA [*Designated Management Agency*] as required by Department order?

**Jennifer Wigal:** Good flag. If there are any references to TMDLs order in our enforcement rules we should be aware and we can add companion language, so we are not out of sync.

**Mary Ann Cooper:** I can't remember if ODA [*Oregon Department of Agriculture*] or ODF [*Oregon Department of Forestry*] rules reference TMDLs - Jennifer or Gene, make a check to see if similar language is in other agencies programs.

**Mary Ann Cooper:** I would love to hear the a Department response at some point around some of the concerns I pointed out about the practical impact of transitioning from an order to a rule, in particular the depth and length of time that the public would be able to participate in, and on the judicial review changes, given some of the ways that the Department has interpreted or made policy shifts in TMDLs, but if others don't want to go there I can have a follow-up conversation.

**Jennifer Wigal:** I follow up briefly, and then Mary Ann, you can decide if you want to pick up an additional discussion outside of this forum. In terms of policy considerations, I think that one thing the Department tries to do with our Commission is to ensure they have enough advance information about issues coming to them so that they can make the tough decisions we ask them to make in their role as an appointed commission. We view it as our job to ensure they are prepared to make the decisions we are asking them to make. I don't envision a scenario where they only have the 30-minute presentation, being asked to make decisions they are uncomfortable making or that we don't feel like we have adequately prepared them to make; it's an expectation that the program takes seriously and that our director takes seriously. With regards to participation, there are a variety of perspectives around that if a rulemaking may provide more rigor and clear expectations and transparency. Some people may think that a rulemaking process is more rigorous and transparent. We also have public participation requirements we are meeting on the federal level; I'm unaware of a significant practice post comment period, if there is something we need to be aware of post comment period about substantive information we didn't get public comment on, we have to put that back out there for

public comment regardless of order or rule; that is the way we have consistently operated. My experience has been that we do it this way for both rules and orders. I don't view that as substantively different in any way. Regarding judicial review, I'm not a lawyer, I'm not capable of talking about the nuances of circuit court review vs. APA [*Administrative Procedures Act*] review and other courts, but I do know that we are focused on ensuring that we have process that are commensurate with decisions the agency is making in this instance for those not necessarily complex TMDLs, but TMDLs with important policy decisions being put in front of our Commission. If folks want to get in a conversation about pros and cons about judicial processes, I would need to invite other people into that conversation for it to be meaningful.

#### **Presentation slide 14: draft fiscal impact statement**

**Michele Martin:** Reminder that we are going to have a public comment period for this rulemaking. We are going to continue this meeting to talk about the fiscal impact statement. Michele presented information about the fiscal impact statement and presented three required questions: Will the proposed rule change have a fiscal impact and if yes, what is the extent of that impact? Will the rules have a significant adverse impact on small businesses? What can DEQ do to reduce any adverse impact on small businesses? Michele reviewed the fiscal impact statement provided with the materials online.

#### **Michele did a round robin to ask everyone on the committee for comments in alphabetical order by first name:**

**April Snell** – Irrigation districts are local governments so not considered small businesses under this fiscal impact statement. I will note that since we are only having the one rulemaking meeting and it does sound like there are going to be additional changes to the proposed rules before they go out for comment, I do think it would have been preferable to have further conversations about this issue and I want to make that comment for the record here. It's unknown what the potential impacts would be to farmers and other water users within districts depending on some of the areas where we have disagreement with DEQ about what the role of irrigation districts are with some of the TMDLs, but as far as the general Division 42 process that we have proposed and discussed today, would simply say it's a little unclear if there is a impact and what that impact would be.

**Carl Merkle** – I don't have any comments at this time other than to note that I'm here as a staff person for the Umatilla Tribes and the Tribes are an independent sovereign not a business or a stakeholder or a member of the public.

**Corissa Holmes** – I don't have any comments at this time either, and as Carl mentioned, Oregon Association of Clean Water Agencies is a nonprofit that serves a board of utilities and not a private entity for business or a public utility.

**Kathryn VanNatta** – I think the rule will have a fiscal impact on DEQ operations because you are changing the way you are operating and that is something you consider and what is the extent of that impact, I cannot estimate, I do believe that because you are changing something it is going to have a fiscal impact as you noted.

**Marganne Allen** – No comments

**Mary Ann Cooper** – I agree with Kathryn, I do think there's likely to be a fiscal impact on DEQ doing that analysis how that process will look different from a staffing perspective for DEQ will help us all understand better about what this is actually going to look like, having that analysis will help. I do think there is a potential for significant adverse effect on small businesses from losing the ability to engage in any meaningful judicial review and the fact that we have seen some decisions in prior TMDLs made by DEQ that have imposed costs on businesses where those business have needed to challenge those TMDLs

and those avenues are different and less available in terms of a meaningful analysis by the courts through a rulemaking. I think reducing that adverse effect, I'd like to see some criteria about developing when they anticipate doing a TMDL by rule or order, what factors would go into that decision so I can better understand how it's likely to affect my members. I represent farmers and ranchers across the state who I think will be impacted, who are certainly impacted by existing TMDLs, and will be impacted by a number of TMDLs that DEQ is looking toward developing in the coming years. I really think a better understanding of when they (DEQ) might do order vs. rules and how that will change their staffing analysis and litigation budget will help me understand impacts on my members. Most of my members are 50 employees and under. At its base, I would like to see DEQ continue to adopt TMDLs by order. I don't see a the need for this change. Absent that I would like to see some of those clarifications around the clarification of the criteria, around making it clear that you will hold an rules advisory committee will help, I'd like to see TMDLs continued by order.

**Mike Eliason** – Obviously TMDLs in general have a fiscal impact, if you accept the notion that TMDLs itself isn't going to change it's simply the process by which it's adopted, I'd have to give it more thought to see if there is a fiscal impact just from this change.

**Sharla Moffett** – I'll echo Mary Ann's comments, particularly on the limitation on judicial review. It's not a known impact on small businesses, because we don't know if judicial review is limited, there's not an option to challenge in the same way that an order can be challenged, there could be significant fiscal impacts we just don't know what those are. I'll echo the concern, the move to adopt TMDLs by rules doesn't seem necessary and I haven't heard a clear articulation why the current practice of adopting by order is a problem.

**Thomas Whittington** – Thank you. I don't have any additional comments on the fiscal impact statement for this rulemaking.

**Michele Martin:** Jennifer or Gene – any clarifications or anything to add or anything else?

**Jennifer Wigal:** Some of the topics that have been raised here are some we discussed unless there is something new that was raised as part of this part of our discussion.

**Kathry VanNatta:** This is a facilitation issue, you started that conversation by asking question one and you didn't broach questions two and three to the whole group, one of the speakers expanded that topic. Did you want to go back and ask questions two and three to the entire group or do you think you address that?

**Jennifer Wigal:** If there are additional responses to two and three if we only heard answers from question one when we did the round robin, we should make sure that we've got everything.

**Kathryn VanNatta:** In that case then I would like to agree with Sharla and Mary Ann on the answer to question two that there is an impact on small business and to three, what can DEQ do to reverse any adverse impacts on small business; as Mary Ann said, hold the rulemaking advisory committees, involve folks in the development of the Water Quality Management Plan and those issues for load allocations, and listen to stakeholders as we move forward, and work with sister agencies to develop an Oregon way of doing things to improve water quality. Thank you.

**Jennifer Wigal:** Can I get a clarification form Kathryn in terms of you said there could be a significant adverse impact on small businesses, attributable to which aspect of the rule that we are changing, you think causes that?

**Kathryn VanNatta:** If you stop the ability to judicial review, if you have a TMDL that does create significant adverse impact in someone's view that it would be more difficult to challenge the TMDL under the

proposed rule, if it were issued as a rule as opposed to an order, that is the point that I interpreted Mary Ann making. Mary Ann can agree or disagree with my clarification on her comment.

**Mary Ann Cooper:** Agreed.

**Michele Martin:** Regarding fiscal impact and small business and getting to ensure that everyone has had an opportunity to at this committee regarding this particular rulemaking, question two will the rule have a significant adverse impact on small businesses and three, what can DEQ do to reduce any adverse impact on small businesses? I'll look for your raised hand and in the chat. I'm not seeing any raised hands or chats. Are we good to move on to the public comment opportunity? Jennifer and Gene, are you ready to move on to that topic?

### **Presentation slide 15: Public comment opportunity**

Public comment opportunity – No comments

### **Presentation slide 16: next steps**

**Michele Martin** – Provided this rulemaking schedule.

**Kathryn VanNatta** – How long is the comment period?

**Michele Martin** – We are planning for 60 days.

### **Presentation slide 17: Final slide**

**April Snell:** Are you going to post the PowerPoint you just provided to us on the webpage?

**Michele Martin:** Yes.

**Sharla Moffett:** Typically, rulemaking advisory committee members are usually offered to provide comments before going to public comment.

**Jennifer Wigal:** I would say that if there is something that occurs to you on the next few days if it helps for you to put something in words in next few days that you need to address, I want to check with Michele, that we can do that.

**Michele Martin:** Advisory committee members at the latest could provide comments Sept. 8, 2021, by end of day.

**Jennifer Wigal:** I appreciate that if we provided information that you couldn't respond to in the moment today, if you have a thought in the next few days we can take that.

**Michele Martin:** Thank you for asking that, Sharla. Any comments, I would have to double check with our attorney, that any comments you make in writing will have to be shared with the entire committee perhaps putting those in writing that it's a clear and transparent process and we are following our rule guidelines. Gene and Jennifer – any final comments?

**Gene Foster:** Thank you for your participation. We appreciate the discussion and your input.

**Jennifer Wigal:** I will echo Gene's thank you and for taking the time out of your schedules to join us, everybody was clearly prepared I could tell and read the materials, thank you for your preparation and engagement today. There was definitely a few things that folks brought up that we will be thinking about in

advance of putting out the rule for public comment and as we just discussed if there is anything you want to put in writing we will get those comments to the rest of the group. Thank you.

**Michele Martin:** Thanks everyone, we appreciate those on the advisory committee and those who are not on the advisory committee joining us today.

**Adjourn: 3:09**

**Alternative formats**

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