



Oregon Department of Environmental Quality  
Sept. 22-23, 2022,  
Oregon Environmental Quality Commission meeting

**Item F: Petition to Conduct Rulemaking to Designate the  
Metolius River as an Outstanding Resource Water (Action)**

## DEQ recommendation to the commission

DEQ recommends that EQC deny the petition on the rule amendments proposed by the Friends of the Metolius and co-petitioner Northwest Environmental Defense Center on June 27, 2022.

*Recommended motion language:*

*“I move that the Oregon Environmental Quality Commission deny the petition on the rule amendments proposed by the Friends of the Metolius and co-petitioner Northwest Environmental Defense Center on June 27, 2022.”*

DEQ’s review of the petition finds that it does not provide sufficient detail to show the reasons for and potential effects of the proposed rule amendments, as required by OAR 137-001-0070(1)(b). DEQ review finds that the proposed rule’s scope is ambiguous, and that there are significant interjurisdictional issues in the Metolius basin that need to be more carefully considered and examined before a rulemaking would be ready to undertake. Petitioners need to consult with the Confederated Tribes of the Warm Springs and well as the U.S. Forest Service regarding interjurisdictional issues, and need to document whether there are continuing threats to water quality given the significant restrictions that already exist on land uses in the basin. Finally, given the resource-intensive nature of the proposed rulemaking and implementation that may be associated with it, DEQ believes the proposal should be considered more deliberately as part of the state’s triennial review process rather than as a stand-alone rule proposal. For these reasons, DEQ recommends that the commission deny the petition at this time. If petitioners wish to pursue this proposal further, DEQ suggests that they consult closely with the Confederated Tribes and with the U.S. Forest Service, and if interjurisdictional issues are clarified, then bring this proposal forward as part of Oregon’s triennial review.

## Overview

### Summary of Petition

EQC and DEQ received a petition from the Friends of the Metolius and co-petitioner Northwest Environmental Defense Center, dated June 27, 2022, requesting that the

commission promulgate rules to designate the Metolius River from its headwaters downstream to Monty Campground as an Outstanding Resource Water of Oregon. The petition contains proposed rule language that would designate the ORW and establish policies to protect the water quality of this portion of the Metolius River. DEQ finds that the petition contains the minimum elements required by OAR 137-001-0070 to be considered a petition for rulemaking. The petition is included as Attachment A of this report.

The Metolius River is located largely in Jefferson County, beginning near Black Butte in the Cascade Mountains. Much of the river, including some of what is proposed for ORW designation, runs along the southern border of the Warm Springs Reservation. The location of the Metolius River is provided in Figure 1, and a map of the river basin is provided in Figure 2 below.

EQC is scheduled to decide whether to deny the petition or direct DEQ to conduct rulemaking at its Sept. 22-23, 2022, meeting. Based on the petition submittal date of June 27, 2022, EQC has until Sept. 25, 2022, to take action on the petition.

On behalf of EQC, DEQ requested public comment on whether to accept or deny the petition to initiate rulemaking proceedings. In accordance with ORS 183.390(2), DEQ specifically requested comment on whether options exist to achieve the rules' goals with less negative economic impact. If EQC directs DEQ to begin rulemaking, DEQ will proceed to form a rules advisory committee and develop proposed rules for further public input before bringing a final proposal back to the commission.



Figure 1: Metolius River in the Deschutes River Basin indicating area proposed for ORW designation.

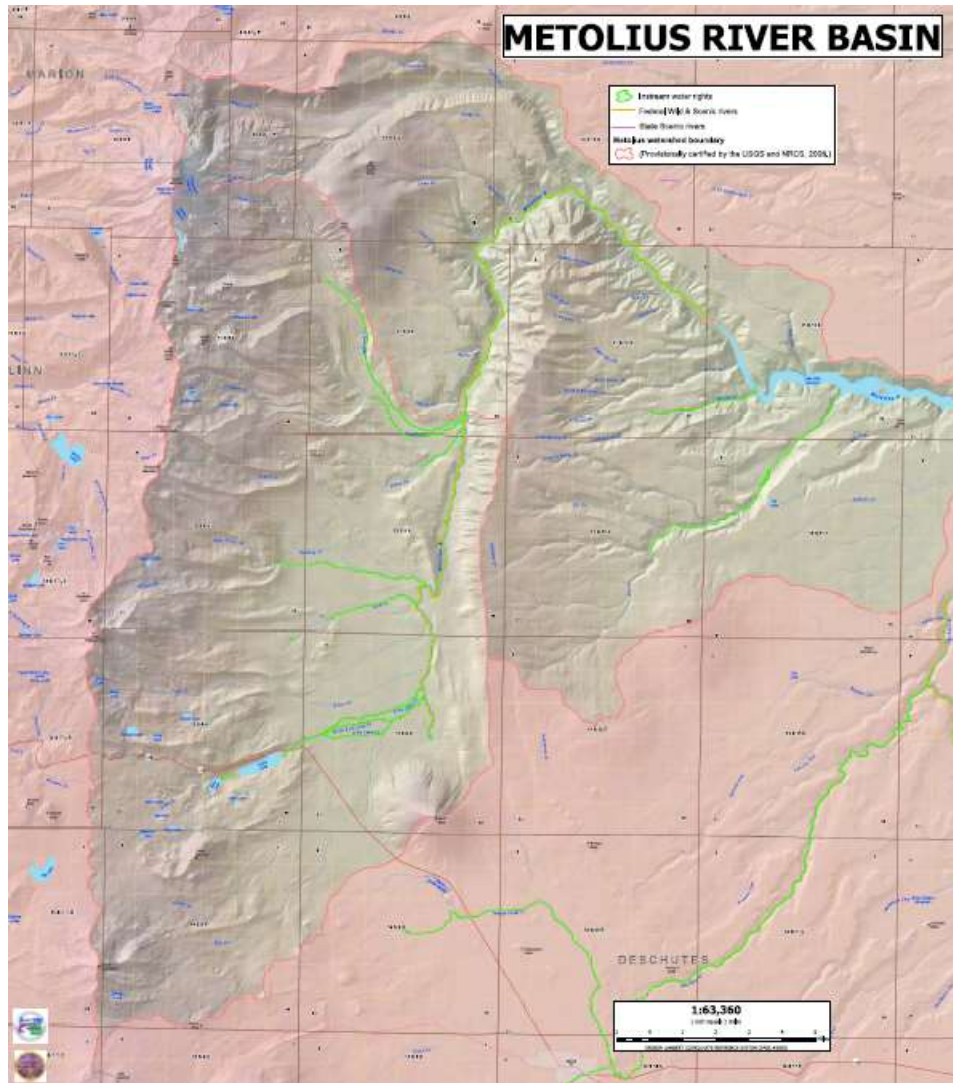


Figure 2. Metolius River Watershed in Deschutes River Basin.

### Rule Amendments Proposed by the Petition

The petition proposes to amend OAR 340-041-0004(8), the Outstanding Resource Waters Policy in Oregon’s Antidegradation rule, to designate the Metolius River from its headwaters to Monty Campground as an ORW.

The petition also proposes to amend OAR 340-041-0135, Water Quality Standards and Policies for the Deschutes Basin, to protect the current high-quality water, exceptional ecological values and existing and designated uses of these waters. The proposed rule amendments would prohibit new or expanded NPDES discharges and other activities that would degrade water quality in the proposed ORW and in tributaries to the proposed ORW. Exceptions are allowed for short-term water quality impacts to respond to emergencies and to obtain long-term restoration or water quality improvements.

The proposed rule amendments are shown on pages 5 and 8 of the Petition in Attachment A. The proposed rule additions are in red text.

## **Background Information on Rulemaking Petitions**

Oregon law allows any person to petition an agency to promulgate, amend or repeal a rule. Oregon Revised Statute 183.390 and administrative rules at OAR 340-011-0046 and 137-001-0070 describe the requirements for the petition and for agency review. The petition to amend a rule must clearly show the proposed rule revisions and provide facts and arguments supporting the proposal. According to the statute, the agency must either deny the petition or initiate rulemaking proceedings within 90 days of receiving the petition.

Upon review, EQC may: 1) deny the petition, 2) direct DEQ to initiate rulemaking proceedings based on the rules proposed by the petition, or 3) deny the petition but direct DEQ to take some other action.

In reviewing a petition to amend or repeal a rule, EQC shall consider several questions listed in OAR 137-001-0070 and ORS 183.390. Each of these considerations is discussed in the section titled “DEQ Evaluation of the Petition” below.

## **Background on Outstanding Resource Waters**

Oregon’s water quality standards define three classifications of state waters: water quality limited, high quality and outstanding resource waters. In many states, these classifications are described as “Tier 1,” “Tier 2” and “Tier 3” waters. As stated in OAR 340-041-0004(8) and the associated definition in 340-041-0002(45), ORWs are high quality waters that have extraordinary or unique character or ecological value, or are critical habitat areas, such that they constitute an outstanding state or national resource. The special water quality and ecological values of waters designated as Outstanding Resource Waters must then be protected in accordance with Oregon’s antidegradation policy.

ORW policies vary from state to state, but they generally limit or prohibit new or expanded permitted NPDES permitted discharges and also state that other activities cannot be allowed to degrade the existing high quality and special characteristics or values of the ORWs. Oregon’s policy follows this approach for those waters designated ORWs, including the North Fork Smith River and tributaries, Waldo Lake and associated wetlands, and Crater Lake.

## **DEQ Evaluation of the Petition**

### **Petition Requirements**

DEQ evaluated whether the petition met the requirements contained in Attorney General rules for petitions found at OAR 137-001-0070. The following is a summary of DEQ’s evaluation.

#### **1. The petition meets the requirements in OAR 137-001-0070 (1) and (1) (a).**

As required, the petition provides information about the petitioner. (Attachment A, page 2).  
As required, the proposed rule amendments are correctly placed within the OAR 340-041

and clearly indicate all additions in bold and underlined type. There are no proposed deletions of rule language. (Attachment A, pages 3-8)

**2. The petition does not fully meet the requirements in OAR 137-001-0070 (1) (b) and (c).**

The petition includes facts and arguments in support of an ORW designation (Attachment A, pages 10-25). However, the petition does not fully analyze the effects of the proposed rule amendments nor the reasons for ORW designation. Specifically, the petition does not analyze how ORW designation would affect various activities along the Metolius River and within the basin, including Forest Service management actions, operations of the Wizard Falls fish hatchery, residents living along or near the river and its tributaries, or how the designation might impact or conflict with the water resource management interests and responsibilities of the Confederated Tribes of Warm Springs or the U.S. Forest Service.

- The petitioners’ reasons for and assessment of the effects of the proposed rule amendments are included in the Petition (Attachment A, pages 10-25) and summarized in the section below titled “Reasons for and effects of ORW designation for the Metolius River.” As noted above, DEQ finds that the information contained in the petition does not sufficiently analyze effects of the proposed rule amendments.
- The petition contains a statement of the propositions of law in the petition (Attachment A, pages 28-29). The petition states that the proposed rule additions seek to implement existing state rules and fulfill state responsibilities under the federal Clean Water Act and are consistent with federal regulations. The petition cites the following regulations and statutes:
  - The state’s antidegradation policy, which includes the outstanding resource waters policy, found at OAR 340-041-0004 (1), (6) and (8) and OAR 340-041-0002 (44).
  - State environmental standards for wilderness areas [OAR 340-013-0005], which state that it is the policy and purpose of DEQ to maintain the environment of wilderness areas in a pristine state, free from water pollution and in a manner compatible with recreation use and enjoyment of the scenic beauty and splendor of these lands.
  - Federal regulations pertaining to antidegradation [40CFR131.12 (a) (3)], which state “where high quality waters constitute an outstanding national resource... that water quality shall be maintained and protected.”
  - Oregon statute 468B.015(5), which declares that it is the policy of the state to cooperate with other agencies of the state, other states and the federal government in carrying out water quality and pollution control objectives.
- The commission’s statutory basis for regulating water quality in Oregon and adopting the proposed rule amendments comes from ORS 468B.010, 468.015 and 468B.035

**3. While the petition addresses each of the requirements of OAR 137-001-0070 (2) (Attachment A, page 30), DEQ finds that the petition does not adequately address these factors, as described below.**

**(a) Options for achieving the existing rules' goals while reducing the negative economic impact on businesses:**

The information contained in the petition **does not** meet this requirement. The petition notes that the economy in Jefferson County is in part based on maintaining the current high water quality of Metolius River. However, the petition does not discuss if the designation would impact businesses that operate along the Metolius River or its tributaries, or otherwise derive economic benefit from activities in the Metolius Basin.

**(b) The continued need for the existing rule:**

The information contained petition meets this requirement. The petition requests that EQC add rule language to DEQ's antidegradation policy at OAR 340-041-0004 and Basin-specific Criteria for the Deschutes River Basin at OAR 340-041-0135. The petition does not propose to revise or delete any current rule language. The petition would supplement the existing antidegradation rule an the existing basin-specific criteria for the Deschutes River Basin. The proposed amendments implement the existing antidegradation rule by designating the Metolius River from its headwaters to Monty Campground as an ORW. The petition states that the existing rules fulfill state responsibilities under the federal Clean Water Act and are consistent with federal regulation.

**(c) The complexity of the existing rule:**

The information contained in the petition **does not** meet this requirement. The petition asserts that the existing rules are not overly complex and discusses similar rule versions that were implemented in the North Fork Smith River and associated tributaries, Waldo Lake and associated wetlands, and Crater Lake. The petition does not provide any additional detail.

DEQ notes that implementation of the proposed rule for the proposed portion of the Metolius would be significantly more complex than for waters previously designated as ORWs. There are multiple land uses along the river and its tributaries, including residences, popular campgrounds, retail facilities and resorts, as well as tribal reservation lands and waters. The petition did not assess the effects to current or future development or its effect on any future actions related to these land uses. The Oregon Department of Fish and Wildlife operates the Wizard Falls fish hatchery, which is permitted to discharge to the Metolius River under DEQ's 2300J General Permit for Fish Hatcheries. DEQ's general permits do not typically allow registration for activities discharging to an Outstanding Resource Water, which would likely require ODFW and any other entity performing an activity that would otherwise be covered under a general permit to obtain an individual permit under the proposed ORW designation to ensure that there is no degradation to the current water quality of the Metolius River.

In addition to private ownership of lands adjacent to the Metolius River, most of the Metolius River and the Metolius River Basin within the proposed ORW is within the Deschutes National Forest. This area was designated as the Metolius Conservation



Area in the Northwest Forest Plan<sup>1</sup>. The Forest Service noted in its comment letter to DEQ that there are several areas where it is unclear how ORW designation could affect the varied Forest Service management actions in the Metolius area. These types of considerations were not included in the proposed petition. If DEQ moved forward with a rulemaking based on the petition, considerable effort would be needed to address these questions.

The Metolius River is the border with the Warm Springs Reservation. The Confederated Tribes of the Warm Springs co-regulates water quality with DEQ for the Metolius River. It is unknown the extent to which the proposed designation will impact the rights of the Confederated Tribes of Warm Springs in managing water quality on the Metolius. There was no note of any coordination with the Confederated Tribes of Warm Springs in the petition.

**(d) The extent to which the rule overlaps, duplicates or conflicts with other state rules or federal regulations and, to the extent feasible, with local government regulations:**

The petition **does not** meet this requirement. The petition asserts that the proposed ORW designation is compatible with a number of designations, including the Metolius' status as a Wild and Scenic River, a State Scenic Waterway and a State Area of Special Concern.

DEQ notes that the designation is generally consistent with these designations and the U.S. Forest Service's objectives for the Metolius Conservation Area; however, as noted above, there is some uncertainty as to how the proposed rules might conflict with Forest Service management actions. The petition did not comment on these considerations.

**(e) The degree to which technology, economic conditions or other factors have changed in the subject area affected by the rule:**

It is uncertain if the petition meets this requirement. The petition notes that natural conditions of the watershed support local economies and that economic conditions have seen little change in the area due to restrictions on large scale development. However, there is no additional detail in this discussion.

**4. As required by OAR 137-001-0070(3), DEQ invited public comment on the rule amendments proposed by the petition and requested comment on whether options exist for achieving the substantive goals of the rule in a way that reduces the negative economic impact on businesses.**

DEQ received approximately 1,800 comments. The comments received are summarized in the section titled "Summary of public comments" below.

---

<sup>1</sup> Deschutes National Forest, 1990. Final Environmental Impact Statement, Land and Resource Management Plan, Deschutes National Forest. U.S. Department of Agriculture, Forest Service, Pacific Northwest Region, Deschutes National Forest. See page 4-164 for description of Metolius Conservation Area.

## **Other policy and technical issues**

### **1. Use of existing triennial review process for prioritizing water quality standards projects and use of screening process to nominate waters as ORWs.**

The water quality standards program prioritizes work every three years through a triennial review process. DEQ conducted a robust water quality standard review process in 2021 to set priority projects for the next three years. DEQ encourages petitioners to engage in the WQS triennial review process to provide input on high priority projects such as designation of potential Outstanding Resource Waters before submitting a rulemaking petition.

DEQ notes that the screening process referred to in the ORW authorization rule at OAR 340-041-0004(8)(a) would be a way for DEQ to analyze such impacts for the Metolius River and other potential ORWs in Oregon. DEQ has not yet developed the screening process as anticipated by the rule. However, such a process would be a more efficient way to identify and nominate waters for ORWs than through rulemaking petitions.

### **2. The need for the ORW designation**

The purpose of the ORW policy is to protect the existing high water quality and ecological values of the waters and prevent a lowering of water quality. An ORW designation and the associated protections for those waters are intended to maintain and protect existing high or unique water quality and by extension, to prevent activities and sources that would alter or degrade the water body. The petitioners note that the water quality in the Metolius is generally stable. Existing protections in the area through the Wild and Scenic River designation, restrictions under the State Area of Special Concern and Forest Service management objectives for the Metolius Conservation Area already limit most activities that could degrade water quality.

DEQ is concerned that ORW designation as proposed could lead to unintended consequences without providing significant benefit beyond those provided by existing protections and management plans for the Metolius.

### **3. Process for Outstanding Resource Waters designation**

Oregon's ORW policy at 340-041-0004(8) states that DEQ will develop a screening process and establish a list of nominated water bodies for ORW designation and that DEQ will bring a list of water bodies proposed for designation as ORWs at the time of each triennial water quality standards review. DEQ initiated development of a process in the 1990s, however due to position reductions at the time, the project was not completed. DEQ conducted an evaluation of the Metolius River against proposed screening criteria at the time, although available documentation does not provide insight into whether this was done as an example or because the Metolius River was being considered for ORW designation.<sup>2</sup>

---

<sup>2</sup> Newell, Avis. June 5, 1998. Memorandum: Materials for Outstanding Resource Water Work Group Meeting, June 29, 1995.



#### **4. Are there alternative protections under Oregon’s water quality standards that would be more appropriate for the Metolius River?**

Antidegradation policies in many states include a “Tier 2.5” classification. Such policies provide similar protection as ORW designation, but with additional flexibility for waters that have complicated land management, such as the Metolius River. Oregon’s antidegradation procedures do not explicitly include a Tier 2.5 classification. Tier 2.5 protection may be more appropriate for the Metolius River in order to protect existing water quality and provide more flexibility in balancing existing activities in the basin, complex land management and regulatory protections.

## **Summary of Public Comment**

### **Public Notice**

DEQ requested public comment on the petition and proposed rules. DEQ asked for comment by:

- Sending a GovDelivery email on Aug. 1, 2022, to the water quality standards rulemaking list.
- Posting information about the petition on DEQ’s web site:  
<https://www.oregon.gov/deq/wq/Pages/WQ-Standards-Policies.aspx>

### **Request for other options**

During the public comment period, DEQ requested public comment on whether options exist for achieving the rules’ substantive goals in a way that reduces the negative economic impact on businesses.

### **Comments**

This report summarizes comments received by the close of the comment period at 5 p.m. on Aug. 31, 2022. DEQ received a total of approximately 1,804 comments during the comment period. Original comments are included as an attachment to this report. Some commenters provided multiple comment letters.

DEQ is not required to write a response to comments on the petition.

Of the comments received, 1,742 supported the petition, 58 opposed the petition and four expressed neither support of nor opposition to the petition.

Supporting comments came from many individuals and families, as well as Trout Unlimited (from the statewide organization and the Deschutes Redband Chapter), Central Oregon LandWatch and Oregon Wild. Supporting comments included the following reasons for ORW designation:

1. The pristine and stable water quality of the Metolius River that is primarily spring-fed, which helps stabilize fish populations and allows riparian plants to persist along its banks and on floating wood.
2. The Metolius River supports a local recreation industry and is especially known for fly fishing.
3. The Metolius River supports Bull Trout, Chinook Salmon, Kokanee/Sockeye Salmon, Redband Trout and Mountain Whitefish.
4. The watershed also hosts mule deer, migratory waterfowl, bald eagles, elk, turkeys and other species along its riverbanks.
5. Personal stories regarding recreation along the Metolius River or desire from local residents to protect the river.
6. The need to safeguard wild places while they still exist, given increase in visitors in recent years.
7. DEQ ORW regulations prioritize Wild and Scenic Rivers and State Scenic Waterways for ORW designation and the Metolius is designated as such.
8. The Metolius flows through spectacular geology including recent lava flows. Black Butte and Green Ridge support the geology, soil, diverse forest ecosystems, snowpack, and water quality.
9. The large springs that form the source of the Metolius are unique and a popular tourist destination.
10. The ponderosa pine stands are impressive.
11. The Metolius Basin has unroaded areas where natural processes are allowed to flourish.

Opposing comments came from many cabin owners along the Metolius, the owners of the Camp Sherman store and the Metolius River Forest Homeowners Association. Opposing comments included the following:

1. Existing protections, including the Wild and Scenic Rivers designation, the State Scenic Waterways designation, the State Area of Critical Concern designation and Forest Service management protections are sufficient to protect the river.
2. ORW designation would add complexity to current management.
3. The reason for ORW designation is unclear.
4. There was no outreach or public involvement prior to the petition being submitted.
5. The impact of the designation is unclear and there is the possibility of unintended consequences. A few comments expressed concern with potential consequences to septic system maintenance and the ability to use the river for horseback riding.
6. ORW designation would encourage more visitors, which would harm water quality.
7. The river borders private land and Tribal land and would have consequences on such land.

The Deschutes National Forest submitted a comment letter that provided a background of its management in the Metolius River area under the Wild and Scenic River Plan, the Deschutes National Forest Land and Resource Management Plan and the Northwest Forest Plan and in compliance with the Endangered Species Act and Clean Water Act. The comment letter also detailed restoration activities that the Forest Service leads and the public and private use in the area. The comment letter requested clarification on how ORW designation could affect Forest Service management actions in the area and how to put processes in place for DEQ review of Forest Service actions under ORW designation. The letter also requested development of a programmatic agreement to reduce burden and delays with project reviews. The letter also expressed interest in how climate change, drought and adaptive management would be incorporated into ORW designation. The Deschutes National Forest requested participation on a Rules Advisory Committee for a future rulemaking if the petition is granted.

The Oregon Department of Fish and Wildlife submitted a comment letter expressing general support of actions to maintain water quality conditions in the Metolius but asking for clarity on how ORW designation would affect ODFW facilities including the Wizard Falls Hatchery and the Metolius Youth and Disabled Fishing Pond. The letter expressed concern that such designation could limit or curtail hatchery management practices in the watershed, which is critical to ecological restoration in the area and provides recreational and educational opportunities. The letter encouraged DEQ to acknowledge that existing land uses and management practices are compatible with ORW designation and that operations of existing ODFW infrastructure be grandfathered into the rule. ODFW also requested participation on a Rules Advisory Committee for a future rulemaking if the petition is granted.

EPA provided a letter that neither supported nor opposed the petition, but stated that the agency would provide input if needed for a future rulemaking. One resident stated that there was not sufficient information to support or oppose the petition.

## Next Steps

### **Notification**

DEQ will notify the petitioner in writing of EQC's decision and any related direction to the agency.