
Date: June 22, 2006

To: Environmental Quality Commission

From: Stephanie Hallock, Director

Subject: Agenda Item J, Informational Item: Public Comment and EQC Rule Adoption, June 22-23, 2006, EQC Meeting

Purpose of item This item provides a starting point for EQC discussion regarding possible changes to the rulemaking process to allow direct public comment to the EQC about proposed rules. The paper provides background on:

- Current DEQ rulemaking processes.
- Public hearing processes used by other commissions.
- Description of possible approaches to allow public comment to the full EQC regarding proposed rules.

Background *Current rulemaking process*

The current DEQ rulemaking process involves the following steps:

1. Draft rule is developed with input from stakeholders.
2. Draft rule is reviewed by DEQ managers.
3. DEQ publishes notice of and invites comment about the rule change in the monthly bulletin of the Secretary of State, and sends direct notice of rulemaking to all interested parties. Notices include the date and location of public hearings and the deadline for written comments.
4. The public comment period typically remains open for 30 days and includes one or more public hearings in various locations around the state—particularly in communities directly affected by the rule.
5. After the public comment period closes, DEQ reviews all comment, and, as appropriate, modifies the draft rule in response to comments.
6. DEQ documents all comments and all resulting changes to the draft rule.
7. The draft rule, revised based on comments, undergoes DEQ internal review.
8. DEQ presents the final proposed rule at an EQC meeting for adoption.
9. If adopted, the rule is filed with the Secretary of State.

The EQC does not currently take direct public comment regarding proposed rule adoptions. Instead, the rule is presented to the EQC after the public comment period has closed and the draft rule has been revised in response to comments. In order to allow public comment on proposed rules at an EQC meeting, DEQ would either have to schedule an EQC hearing during the public comment period or re-notify the public of an additional hearing after the public comment period.

Current EQC authority for taking public comment on rules

The EQC has authority to modify the current rulemaking process or create new processes at its discretion as follows:

1. Allow direct public comment to the EQC regarding a proposed rule (while the comment period is open and after formal public notice of the rulemaking).
2. Limit direct public comment to specific rules only.
3. Limit direct public comment to specific rule provisions or issues, rather than the entire rule.
4. Preside over the public hearing.
5. Allow either oral or written comments or both.
6. Limit the length of oral comments.
7. Discuss the rulemaking with the public, fellow Commissioners and DEQ staff during the hearing.
8. Direct DEQ to revise the proposed rule based on public comment at the hearing.
9. Direct DEQ to re-open or extend a public comment period. (DEQ currently exercises this authority).
10. Defer adoption of the rule until a later meeting. (DEQ currently exercises this authority.)

Public comment to other commissions

Other agencies currently allow direct public comment about rules at their commission meetings. The following is a quick overview of public comment processes used by the Oregon Department of Fish and Wildlife, the Water Resources Department and the Oregon Department of Transportation.

Oregon Department of Fish and Wildlife

- The monthly Oregon Department of Fish and Wildlife (ODFW) Commission meeting is the sole opportunity for public testimony on all proposed ODFW rules.
- The Commission hearing is held during the standard rule comment period.
- Written comments are due and the rule is revised in response to comments before the Commission hearing.
- Public comments are limited to three to five minutes, but all who register to speak, may do so. (ODFW has allowed as much as four hours for public comment.)
- Commission chair presides at hearing.

- Immediately after public comment, staff and commission discuss rule. If necessary, rule writers retreat for 30 minutes to make revisions for an immediate vote.
- In almost all cases, Commission votes on rule at same meeting. ODFW notes that a vast majority of rules are adopted as initially presented by staff (not revised based on testimony at the Commission meeting).

Water Resources Department

- Water Resources Department (WRD) rules are subject to a 30-day comment period with public hearings (similar to current DEQ rule making process).
- The rule comes before the Commission for public hearing *only* if draft rule has changed substantially during the previous public comment. Public may make oral comments to the Commission regarding those revisions only.
- No written comments are accepted at the Commission hearing, but specific changes to rule language may be submitted in writing at the hearing.
- Commission chair presides over the hearing.
- If no significant rule revisions flow from the Commission hearing, Commission votes on adopting the rule at the same meeting.
- If significant changes are recommended at the hearing, the vote may be delayed until the next Commission meeting to allow staff and management time to review changes.

Oregon Department of Transportation

- The Oregon Department of Transportation's (ODOT) commission solicits direct public comment on controversial rules only. (Only about 5% of ODOT rules are determined to be controversial.) ODOT determines early in each rulemaking effort whether a rule is controversial. Non-controversial rules go through a routine public comment process (no Commission hearing), and many are submitted as part of the Commission's consent calendar and adopted without discussion.
- The Commission meeting occurs during the public comment period and provides the only public hearing on rules.
- Written comments are accepted up to and until the close of the Commission meeting.

- Public comments are limited to five minutes each. The hearing is as long as necessary to allow all individuals present to testify.
- The Commission chair presides over the hearing.
- ODOT staff revise the rule in response to comments and present it for adoption at the next Commission meeting. If the rule draft is substantially revised in response to the Commission hearing, additional public hearings may be scheduled.

Key Issues

Issues to consider

If the EQC seeks to revise current rulemaking processes to incorporate direct public comment to the EQC, the following issues should be considered:

- Will the EQC hear public comment on all proposed rules or only controversial ones?
- Will the EQC take direct public comment on the first draft rule or on the draft revised in response to a previous public comment period?
- How will the EQC manage public testimony during EQC meetings?
- Will the process for revising a rule in response to comments at EQC hearing allow adequate time for DEQ comment analysis, rule revision and review?

Identifying controversial rulemakings

Many routine DEQ rulemakings spark little public interest and might not benefit from direct public comment to the EQC. (Examples of routine rulemakings include adoption of federal laws by reference and annual statutory fee increases.) Therefore, the EQC might prefer to restrict direct public comment to controversial rulemakings.

The EQC and DEQ management could identify controversial rules prior to rulemaking during development of the DEQ annual Rulemaking Agenda. Rules could also be deemed controversial and scheduled for direct comment to the EQC if the public comment period resulted in substantial modifications to the draft rule.

Timing of direct comment to the EQC

Rules determined to be controversial at some point *during* the standard comment period could be heard at a subsequent EQC meeting, after a second public notice was published announcing a re-opened or extended comment period.

Managing public comments during the EQC meeting

Historically, EQC meeting agendas are busy. In order to allow time for direct public rule commentary, the EQC might need to consider longer or more frequent meetings. The EQC would also need to determine how much time to allot to individuals who comment and how to restrict the scope of commentary to the rule in question.

Revising a rule after direct public comment to the EQC

If the EQC chose to accept direct public comment on rules, it would need to consider whether rule adoption would occur at the same or a subsequent EQC meeting.

Currently, rules revised in response to public comment undergo extensive internal DEQ review before presentation to the EQC. If the EQC accepted public comments and voted on a rule in the same meeting, DEQ rule writers would be required to immediately revise rules in response to comments, and present them for EQC adoption without additional DEQ program review.

In addition, comments presented directly to the EQC just before a vote, could be perceived by the public as more influential (since more immediate) than comments presented at other hearings around the state. As a result, combining EQC rule hearing and adoption in the same meeting might encourage attendance at the EQC hearing in lieu of attendance at local hearings at the cost of input from local stakeholders.

Accepting public comment at one EQC meeting and voting on the rule at a subsequent EQC meeting, some 12-16 weeks later, would allow the customary amount of time for DEQ staff to revise the rule in response to all comments, complete internal reviews, and prepare a staff report and presentation for the EQC meeting. The delayed vote might also minimize the perception that comments made directly to the EQC have a more direct and immediate impact on the vote than comments received at other hearings for the rule.

Analysis of alternatives

The following alternative approaches to incorporating direct public comment to the EQC are offered as a starting point for EQC discussion.

Alternative 1: EQC hearing on original draft rule during standard public comment period

EQC accepts direct public comment on all controversial draft rules. Rules are identified as controversial and processed in the following manner:

1. Each November, DEQ flags controversial rules on its rulemaking agenda and shares agenda with EQC. EQC designates which rules it would like to take public comment on. In addition, DEQ recognizes any developing controversy in early stages of rulemakings and schedules those rules for an EQC public hearing as well.
2. DEQ issues public notice of all hearings for the rule, including one hearing before the EQC.
3. EQC presides over rule hearing at a regularly-scheduled EQC meeting.
4. Public comment period closes after EQC rule hearing.
5. DEQ compiles and responds to comments and revises draft rule.
6. DEQ presents revised draft rule for EQC adoption 12-16 weeks after EQC public rule hearing.

Pros	Cons
<ol style="list-style-type: none"> 1. EQC hears public concerns directly. 2. Public gains opportunity to speak directly to EQC. 3. DEQ rule writers gain direct policy guidance from EQC in response to public comment on rule. 	<ol style="list-style-type: none"> 1. Public may perceive that direct comment to the EQC influences vote more than comments submitted at other hearings. Interest in statewide (non-EQC) rule hearings may diminish. 2. May increase scheduling challenges for EQC meetings. 3. May demand additional time and effort from Commissioners. 4. May lengthen rulemaking process.

Alternative 2: EQC hearing on revised draft rule (revised based on previous public comment period)

1. Rule draft subject to public comment period and statewide (non-EQC) public hearings (Same as current practice).
2. Comments are summarized and rule is revised as appropriate in response to comments (Same as current practice).
3. EQC holds final public hearing on revised draft for rules not previously deemed controversial that trigger significant public comment resulting in substantial revisions.
4. DEQ staff revise rule again in response to public comment at final EQC hearing.
5. EQC votes on rule immediately after hearing or EQC defers vote to subsequent EQC meeting if revisions based on final EQC hearing are substantial.

Pros	Cons
<ol style="list-style-type: none"> 1. EQC hears public concerns directly. 2. Public gains opportunity to speak directly to EQC. 3. DEQ rule writers gain direct policy guidance from EQC in response to public comment on rule. 4. Comments from public are summarized and submitted to EQC in advance of EQC meeting—allowing for thoughtful revision and internal review 5. Compared to alternative one above, narrows scope of hearing comments to substantive revisions to pre-hearing rule draft (revisions based on routine public comment period). 	<ol style="list-style-type: none"> 1. Public may perceive that direct comment to the EQC influences vote more than comments submitted at other hearings. Interest in statewide (non-EQC) rule hearings may diminish for controversial rules heard by the EQC. 2. May increase scheduling challenges for EQC meetings. 3. May demand additional time and effort from Commissioners. 4. If hearing and vote occur during same meeting, rule revisions may be hurried and lack adequate internal review before adoption. 5. May lengthen rulemaking process

Alternative 3: No change to current process. No direct public comment to EQC regarding rule adoptions.

Pros	Cons
Comments from public are summarized and submitted to EQC in advance of EQC meeting—allowing for thoughtful revision and internal review.	<ol style="list-style-type: none"><li data-bbox="704 470 1414 611">1. No formal opportunity to comment directly to EQC regarding rule draft; however, public may discuss a proposed rule during public forum at an EQC meeting before close of the public comment period.<li data-bbox="704 653 1414 793">2. No opportunity to comment directly to the EQC after the comment period and before adoption of a rule draft that has been substantially revised in response to public comment.

Approved:

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