



Oregon Department of Environmental Quality
July 18-19, 2019
Oregon Environmental Quality Commission Meeting
Action Item E

Petition to Conduct Rulemaking
To Designate Waldo Lake and its Associated Wetlands
Outstanding Resource Waters

DEQ recommendation to the commission

DEQ recommends that the Environmental Quality Commission direct DEQ to initiate rulemaking on the rule amendments proposed by the Northwest Environmental Defense Center on April 22, 2019.

DEQ recommends that the commission allow DEQ to conduct the rulemaking on a time schedule that does not delay projects currently in progress and considers other program priorities.

Overview

Summary of Petition

The Oregon Environmental Quality Commission and DEQ Director Whitman received a petition from the Northwest Environmental Defense Center, dated April 22, 2019, requesting that the commission promulgate rules to designate Waldo Lake and its associated wetlands as Outstanding Resource Waters of Oregon. Waldo Lake is located in Lane County in the high Cascade Mountains. The petition is included as Attachment A of this report. The location of Waldo Lake is provided in Figure 1, and a map of the lake basin is provided in Figure 2, both below.

Based on the petition submittal date of April 22, 2019, the commission has, by statute, until July 21, 2019 to take action on the petition.

DEQ requested public comment on whether to deny the petition or initiate rulemaking proceedings. In accordance with OAR 183.390(3), DEQ specifically requested comment on whether options exist to achieve the rules' goals with less negative economic impact. The petition contains proposed rule language that would designate the Outstanding Resource Waters and establish policies to protect these waters.

If the commission directs DEQ to begin rulemaking, DEQ will proceed with a rulemaking process that will include an opportunity for public comment on the rule language proposed by the petition.

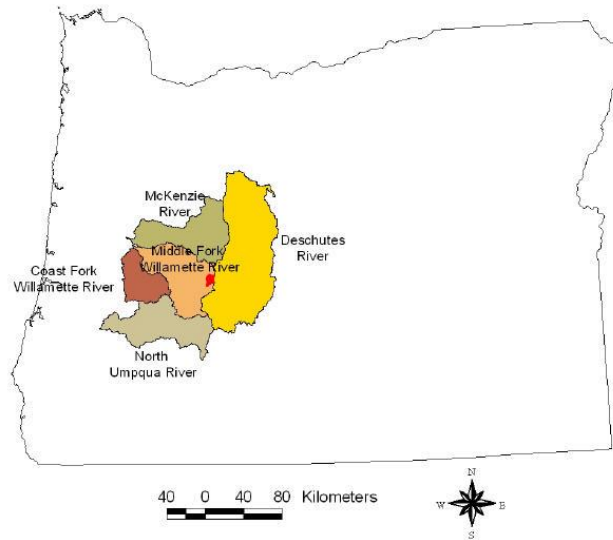


Figure 1: Waldo Lake basin (red) in the Oregon Central Cascades. From: *Waldo Lake Research in 2003*, Center for Lakes and Reservoirs at Portland State University, Portland, Oregon. 2004.

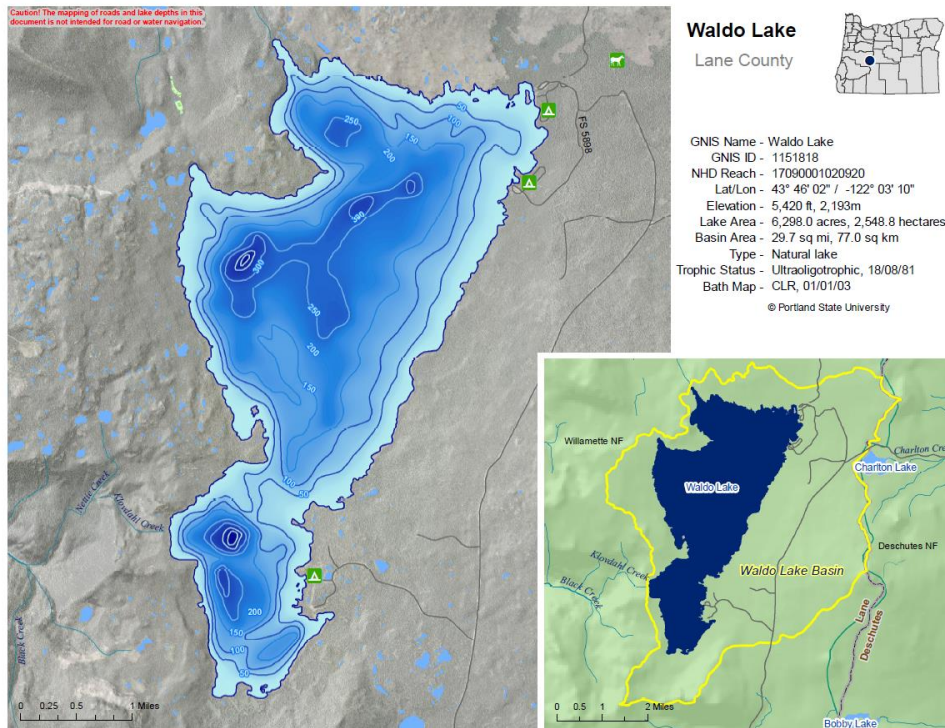


Figure 2. Waldo Lake depth and the lake basin. From: *Atlas of Oregon Lakes, 1985-2019*, Center for Lakes and Reservoirs at Portland State University, Portland, Oregon. <https://aol.research.pdx.edu/lakes/17090001020920>

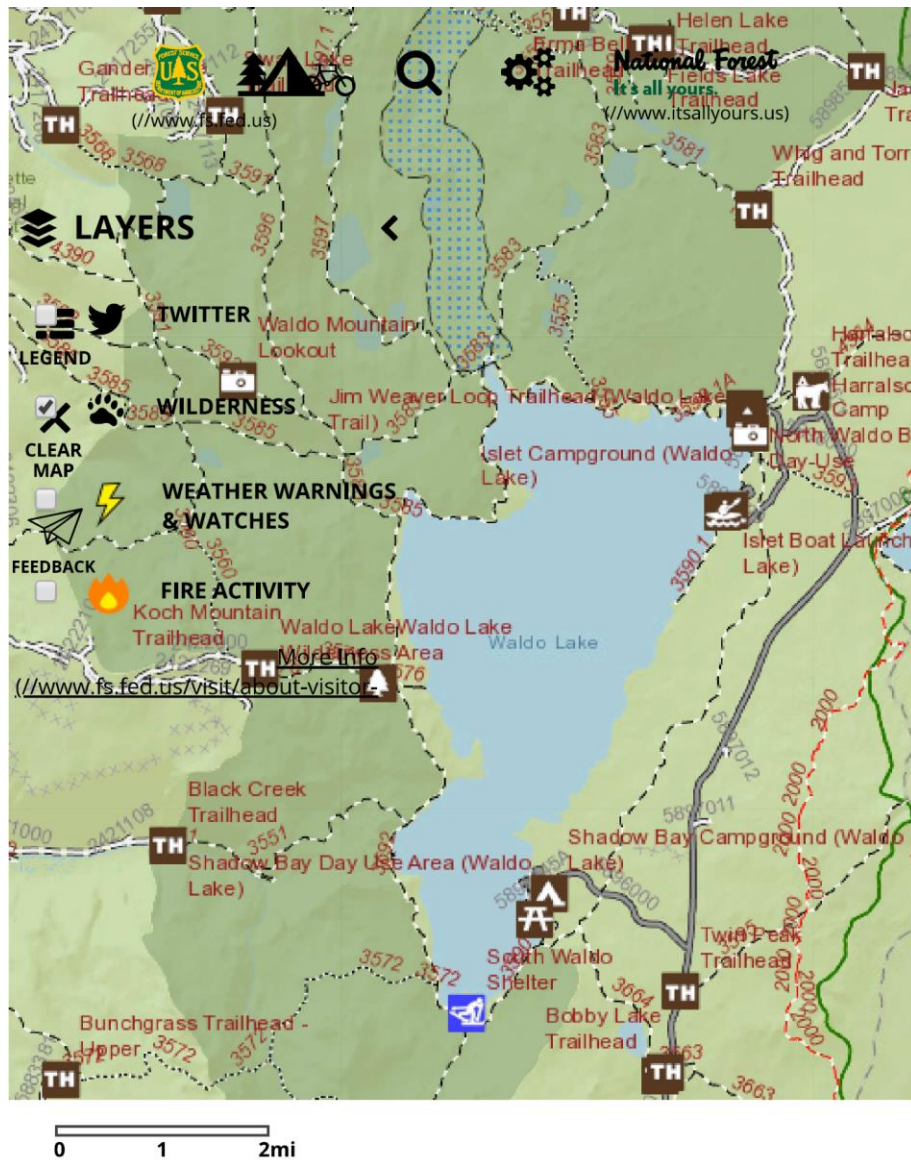


Figure 3. Waldo Lake Vicinity – Willamette National Forest Land Uses

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 Waldo Lake and its associated wetlands as Outstanding Resource Waters.

The petition also proposes to amend OAR 340-041-0345, Water Quality Standards and Policies for the Willamette Basin, to protect the current high water quality, exceptional ecological values and existing and designated uses of these waters. The proposed rule amendments would prohibit new or expanded wastewater discharges and other activities that would degrade water quality. Exceptions are allowed to respond to emergencies and for restoration or enhancement activities.

The proposed rule amendments are shown on pages 6 and 9 of the Petition in Attachment A. The proposed rule additions are in brown text within that document.

Background: Rulemaking Petitions

Oregon law allows an interested 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 its review, the commission 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, the commission 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: Outstanding Resource Waters

Oregon’s water quality standards define three classifications of state waters: water quality limited, high quality and outstanding resource waters. As stated in OAR 340-041-0004(8) and the associated definition in 340-041-0002 (45), Outstanding Resource Waters 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 these waters must then be protected in accordance with Oregon’s antidegradation policy.

While the Outstanding Resource Waters Policy has been in Oregon’s water quality standards rules for more than 20 years, the commission designated Oregon’s first Outstanding Resource Waters, the North Fork Smith River and its tributaries and wetlands, in 2017.

Other states have designated Outstanding Resource Waters and adopted policies to protect those waters. The policies vary from state to state, but they generally limit or prohibit new permitted wastewater discharges and also state that other activities cannot be allowed to degrade the existing high quality and special characteristics or values of the Outstanding Resource Waters. Oregon’s policy for the North Fork Smith River and the proposed policy for Waldo Lake follow this approach.

Petition Requirements

DEQ finds that the petition meets the administrative requirements for a rulemaking petition and that the proposed rule amendments are ready to undergo rulemaking proceedings. The rulemaking process will include another opportunity for public comment on the proposed rule language. DEQ may recommend revisions to the proposed rule language in response to public comment if the agency finds the revisions to be appropriate or clarifying.

1. DEQ finds that the petition meets the requirements in OAR 137-001-0070 (1) and (1) (a).
 - The petition provides information about the petitioner. (Attachment A, page 2)
 - 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 3-9)

2. DEQ finds that the petition meets the requirements in OAR 137-001-0070 (1) (b) and (c). The petition includes facts and arguments in sufficient detail to show the reasons for and effects of adoption of the proposed rule amendments.
 - The reasons for and effects of the proposed rule amendments are included in the Petition (Attachment A, pages 1-10, 13-14)
 - The petition contains a statement of the propositions of law asserted by the petitioner. 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 [40CFR131.02 (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. DEQ finds that the petition meets the requirements of OAR 137-001-0070 (2). The petition contains comment on each of the required considerations (Attachment A, pages 12-13).

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

The petition notes that the economy in Lane County is in part based on maintaining the current high water quality of Waldo Lake.

DEQ adds that the Waldo Lake basin is entirely within the Willamette National Forest and these lands are not used for logging. The Outstanding Resource Waters designation is consistent with the management plans and objectives of the land owner, the U.S. Forest Service, to manage the basin for wilderness, developed use and semi-primitive non-motorized dispersed recreation. In written comments, the Forest Service supports the designation and notes it has implemented policies to ensure that water quality is protected, such as upgrades to sanitation facilities in developed campgrounds and a prohibition of camping on islands.

DEQ received no public comment that any economic activity would be hindered or precluded by the proposed rules. No options were suggested in the public comment received that would achieve the goal of the outstanding resource water policy in another manner and reduce negative economic impacts to businesses. Therefore, it does not appear, based on the information in front of DEQ at this time, that the designation would have a negative economic impact on businesses currently operating in the area.

If the commission approves DEQ to initiate a rulemaking process, DEQ will convene a fiscal impact Advisory Committee and prepare a fiscal impact statement to further evaluate this question. DEQ will also provide another opportunity for the public to comment on the rule language and to suggest alternatives to reduce any economic impact of the proposed rules on businesses.

(b) The continued need for the existing rule:

The petition requests that the commission add rule language to OAR 340-041-0004 and OAR 340-041-0345 and does not propose to revise or delete any current rule language. The petition does not dispute the continued need for the existing antidegradation rule or the existing basin water quality standards. Rather, the proposed amendments implement the existing antidegradation rule by designating Waldo Lake and its associated wetlands as Outstanding Resource Waters. 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 proposed rule is not complex and DEQ expects that implementation of the rule will not be complex. The Waldo Lake watershed is entirely under the ownership and management of one federal agency whose management policies for this area are consistent with the rule.

(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 proposed designation is compatible with the federal Wilderness Management Plans of the U.S. Forest Service for this area, the federal Roadless Area rule, the State Scenic Waterways Act, and the Oregon Marine Board prohibition on gasoline-powered motor boats in Waldo Lake. The Outstanding Resource Waters designation would add clear and enforceable water quality protections to these waters that are consistent with federal regulations and the management goals of the U.S. Forest Service, the sole land owner.

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

The petition notes that increased access to Waldo Lake and accompanying tourism since the 1970s led to a decrease in water quality of the lake and surrounding land, but also noted that gasoline motor boats have been banned on Waldo Lake. The petition also noted that the area relies on these tourism opportunities to support the local economy.

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 2,155 comments from 1,945 citizens and five organizations. The comments received are summarized later in this report.

Reasons for and Effects of Outstanding Resource Water Designation for Waldo Lake

The primary facts and arguments for the designation provided in the petition are summarized here. The petition provides additional detail and references.

1. Waldo Lake is remote and pristine. The basin is entirely on public land in the Willamette National Forest. The majority of the lake basin is managed as Wilderness, developed use and semi-primitive non-motorized dispersed recreation. There are three developed campgrounds and one horse camping facility on the lake.

2. Waldo Lake has exceptionally high water quality according to users, information in the petition, the US Forest Service, and data collected by DEQ as part of the National Lakes Assessment. The waters are renowned for their outstanding clarity. The petition and many comment letters, including a comment letter from the Willamette National Forest noted that the lake is chemically similar to distilled water. The Center for Lakes and Rivers at Portland State University noted in a comment letter that the clarity of Waldo Lake has averaged 125 feet since 2001 and reached as deep as 160 feet, greater than the deepest clarity ever recorded at Crater Lake. The Center for Lakes and Reservoirs also noted that due to the clarity, mosses and liverworts have enough light to grow to a depth of 420 feet.
3. The petition and public comment letters noted that water in Waldo Lake has a long replacement time because of its small watershed. As a result of this long replacement time and exceptionally low levels of dissolved substances in the water, the lake is more susceptible to pollution than other lakes.
4. Waldo Lake is the headwater source of the North Fork of the Middle Fork Willamette River, which is a Wild and Scenic river. Protecting Waldo Lake will help protect the quality of water in these rivers.
5. Waldo Lake and its basin support rare plant and animal species. These include the rare semi-aquatic leafy liverwort, *Marsupella emartinata* var. *aguatica*, which naturally grows on rocks in the splash-zone of the Waldo Lake outlet. In addition, the petition notes the presence of a number of amphibians in Waldo Lake including the Northwestern salamander, *Ambystoma gracile*, the rough skinned newt, *Trachia granulosa*, the cascade frog, *Rana cascadae*; the western toad, *Bufo boreas* and the tree frog, *Hyla regilla*. The surrounding watershed also provides habitat for spotted owls, pine martens and the Pacific fisher.
6. Waldo Lake and its watershed are managed for recreational opportunities that support the economy of surrounding communities. These activities include camping, boating, hiking, fishing, mountain biking, horseback riding and swimming. The petition notes that campgrounds are often reserved up to six months in advance. However, recreation management is balance with the need to protect the pristine water quality of the lake in several ways. Gas powered motor boats and float planes are not allowed on the lake. And the lake is no longer stocked with fish; the only fish remaining in the lake are naturalized populations from earlier stocking.

The effect of an Outstanding Resource Waters designation would be to provide added protections to these waters as stated in the proposed amendments to OAR 340-041-345. The proposed rules would prohibit new permitted point source discharges to Waldo Lake or its tributaries and would prohibit other activities that would degrade the current high water quality and exceptional ecological characteristics and values of these waters.

Parties interested in and potentially affected by the designation include recreational enthusiasts who visit Waldo Lake, such as kayakers, hikers, mountain bikers and fishers, recreation-related businesses, and individuals interested in maintaining pristine waters or protecting rare plants and biodiversity. People who recreate or conduct research on Waldo Lake, or on the North Fork of the Middle Fork Willamette River, are directly affected by the decision. Potentially affected parties also include those who might have an interest in the land being available for future economic use, such as logging, mining, or other economic development. However, DEQ received no comments or information regarding any interest in these types of economic use in the future.

Key policy and technical issues

1. 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 Outstanding Resource Waters at the time of each triennial water quality standards review. DEQ initiated development of a process many years ago, however due to position reductions at the time, the project was not completed. Waldo Lake was one of the waterbodies identified as a candidate for designation at that time.

The fact that DEQ had not yet completed this process does not preclude the commission's authority to designate Outstanding Resource Waters, particularly in response to a citizen rulemaking petition.

2. The need for the Outstanding Resource Waters designation

The purpose of the Outstanding Resource Waters policy is to protect the existing high water quality and ecological values of the waters and prevent a lowering of water quality. An Outstanding Resource Waters 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.

In this instance, pursuing the Outstanding Resource Waters designation and maintaining the current values of these waters provides a useful and efficient way to fulfill DEQ's responsibility to protect water quality and beneficial uses, particularly for waters such as Waldo Lake that are unique and more susceptible to pollution.

3. Does Waldo Lake qualify as an Outstanding Resource Water?

Based on the information provided by the petition and through the public comment, DEQ recommends that there is substantial evidence that Waldo Lake qualifies as an outstanding state and national resource for its unique water quality, ecological values, and importance for recreation and research.

This conclusion is supported by information from the Willamette National Forest, which is the landowner and manager. Comments from the Center for Lakes and Reservoirs, the Oregon Lakes Association, Oregon Wild and the U.S. Environmental Protection Agency, and many citizens in Oregon, as well as nationwide, also support the Outstanding Resource Waters designation.

4. Coordination with other state and federal agencies

Designation of Waldo Lake as an Outstanding Resource Water would be consistent with the following policies and efforts:

- Management Plan of the Willamette National Forest, the sole land manager, for Waldo Lake;
- Wilderness Act and National Forest Roadless Rule;
- State Scenic Waterways Act;
- Federal Wild and Scenic River Designation for the North Fork of the Middle Fork Willamette River; and
- Oregon Marine Board's 2010 decision to ban gasoline-powered boats and a subsequent decision to ban float planes.

While Outstanding Resource Waters designation under the Clean Water Act is consistent with these efforts, it also fulfills the unique role of focusing on the protection of the water quality and ecosystem values of these waters.

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 May 3, 2019, to the water quality standards rulemaking list.
- Posting information about the petition on DEQ's web site:
<http://www.deq.state.or.us/wq/standards/orwo.htm>

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 on June 3, 2019. DEQ received a total of 2,155 comments from 1,945 individuals and five organizations during the comment period. Original comments are available from DEQ.

Unlike a formal rulemaking process, DEQ is not required to write a response to comments on the petition. Due to the short time frame for a petition decision, DEQ has not developed written responses to each comment.

No commenters opposed the petition. The only commenter that did not directly support the petition provided questions regarding the impact of the petition on non-degrading recreational activities on Waldo Lake. That commenter did not subsequently provide any comments in support of or against the petition. In addition, EPA expressed support for appropriate use of DEQ's antidegradation provisions including designation of Outstanding Resource Waters.

The vast majority of comments (2,114 of the 2,155) came from online delivery services from environmental organizations who are listed as petitioners.

The supporting comments recognized the following exceptional qualities and values of Waldo Lake and its tributaries:

1. The waters have exceptional water quality and clarity, are in pristine condition and have water quality comparable to distilled water.
2. The clarity and color of the waters enhances the Lake's scenic and recreational value.
3. Waldo Lake serves as the headwaters of the North Fork of the Middle Fork of the Willamette River, which has designation as a Wild and Scenic River.
4. Much of the watershed is a Wilderness area or protected under the Roadless Area Conservation Rule, providing exceptional opportunities for recreation.
5. Waldo Lake is the only lake in Oregon designated as a State Scenic Waterway.
6. Oregon has already taken steps to protect Waldo Lake from pollution caused by motorized boats, float planes and fish stocking.
7. The Forest Service has long recognized the importance of protecting the water quality of Waldo Lake.

The supporting comments also included the following:

1. Waldo Lake supports a local recreation industry.
2. As the first ORW for a lake, Waldo Lake would be a great reference lake for water quality studies.
3. Several personal stories regarding trips to Waldo Lake for recreation, as well as the current ban on gas-powered motorboats, float planes and fish stocking.
4. There is a need to safeguard wild places while they still exist.

DEQ received comments from five organizations: the U.S. EPA, the Willamette National Forest, the Center for Lakes and Reservoirs, the Oregon Lakes Association and Oregon Wild.

The Willamette National Forest supported Oregon DEQ in moving forward with rulemaking on the petition. The Forest Service letter recognized the clarity and

fragility of the Lake and its ecosystem and recognized the exceptional aesthetic and recreational values. The letter also noted that the watershed is managed primarily as Wilderness, which balances the needs for unmodified natural environments with recreational, scientific, biological and educational values. The letter noted that a non-degradation management policy is followed to maintain the area in a near natural state while allowing recreation opportunities that do not interfere with natural processes.

The Center for Lakes and Reservoirs at Portland State University provided a letter supporting the petition to designate Waldo Lake as an Outstanding Resource Water. This letter provided water clarity data that it has collected for many years and noted that the maximum clarity measured at Waldo Lake (160 feet) is greater than that of Crater Lake (143 feet). The letter also noted that the clarity allows mosses and liverworts to grow to a depth of 420 feet.

The Oregon Lakes Association provided a letter supporting the petition. This letter noted characteristics that Waldo Lake shares with Crater Lake, including water clarity and the pristine nature of its watershed, and also noted that Waldo Lake differs from Crater Lake due to its low buffering capacity and its situation at a lower altitude. This letter also noted that the watershed is mostly surrounded by a federal Wilderness area and that it serves as the headwaters for a Wild and Scenic River. Oregon Lakes Association noted the importance of the lake for recreation and wildlife habitat. Finally, this letter noted that the low turnover rate at Waldo Lake and low concentrations of dissolved materials makes it susceptible to pollution.

Doug Heiken submitted a letter on behalf of Oregon Wild, one of the petitioners. In addition to many of the comments made by many other individuals and organizations, the Oregon Wild letter provided a list of relevant management policies that Outstanding Resource Waters designation would complement:

- The campgrounds around Waldo Lake were specially designed to protect the shoreline, including reasonable limits on chainsaws and generators
- To make sure that nutrients are not added to the lake, the Forest Service replaced the old septic system toilets with enclosed composting toilets and vault toilets, and closed the sewage holding tank dump station
- The Forest Service designated the area immediately around the lake as "non-motorized recreation" use
- Motorized vehicles and snowmobiles are restricted to existing roads, of which there are few in the watershed
- The Oregon Department of Fish and Wildlife stopped stocking fish in Waldo Lake
- In 1997, the Forest Service adopted a Water Quality Strategy for Waldo Lake
- In 1998, the Forest Service proposed an implementation guide for its Waldo Lake Basin Plan, in which dispersed camping is prohibited in the fire area bordering the north shore of Waldo Lake
- Long-term mooring of sailboats not allowed
- Precautions have been developed to avoid impacts to the lake during fire-fighting operations, including the Forest Service adopting new national direction concerning the use of fire retardant near lakes and rivers

The Oregon Wild letter also highlighted existing policies in favor of recreation for Waldo Lake, many of which are noted under this report's "Key Policy and Technical Issues."

A letter from EPA indicated support for implementing Oregon's antidegradation policy, including designating waters for Outstanding Resource Water protection. EPA offered support to DEQ if the petition is granted.

Next Steps

Notification

DEQ will notify the petitioner in writing of the commission's decision. DEQ will also post notice of the commission decision on the web site and send electronic notice of the decision through the GovDelivery system to all persons who commented on the petition.

Rulemaking

If the commission directs DEQ to initiate rulemaking, DEQ staff will develop a project plan and schedule for the rulemaking process, which will include another opportunity for public comment on the rule language.

Because DEQ is not aware of an urgent need to complete the designation quickly, DEQ is proposing to schedule this rulemaking so that it does not delay projects currently in progress or other high-priority water quality program work. Commission action on the proposed rules will be scheduled for a future meeting.