#### State of Oregon

Department of Environmental Quality Memorandum

**Date:** March 30, 2009

**To:** Environmental Quality Commission

**From:** Dick Pedersen, Director

**Subject:** Agenda Item X, Temporary Rule Adoption: Amend the Clean Water State Revolving Fund Rules, OAR Chapter 340, Division 54

April 16-17, 2009 EQC Meeting

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| **Why this is Important** | In February, Congress enacted the American Recovery and Reinvestment Act of 2009. The Act provides $4 billion of stimulus funding to states through the Clean Water State Revolving Fund (CWSRF) loan program. A temporary rulemaking is needed to amend specific requirements within Oregon's CWSRF program to ensure the effective and timely implementation of the Act requirements. |
| **Department Recommendation and EQC Motion** | The Department of Environmental Quality (DEQ) recommends that the Environmental Quality Commission (EQC) adopt the proposed temporary rule revisions to OAR Chapter 340, Division 54 as presented in Attachment A. |
| **Background and Need for Rulemaking** | DEQ administers Oregon’s CWSRF loan program through support of a “capitalization” (cap) grant received each year from the U.S. Environmental Protection Agency (EPA). Oregon’s annual cap grant is about $10 million and provides approximately one fourth of the total funds available.  Through the Act, DEQ will be awarded an additional cap grant of about $44 million. DEQ’s current administrative rules do not allow the grant to be used for additional subsidization as required by the Act. Without the proposed rule amendments, DEQ is not eligible to receive Act funds.  DEQ recognizes the Act’s goal of expeditiously funding eligible projects that will preserve and create jobs and promote economic recovery. DEQ convened a financial work group to address this goal and the group provided recommendations for this rulemaking. DEQ also has worked closely with EPA to ensure this rulemaking complies with requirements of the Act. The proposed rule revisions address the Act’s goal through what projects are eligible, how funds under the Act are to be allocated to projects, and what the financial terms will be. |
| **Effect of Rule** | The temporary rulemaking will establish rules in OAR 340-054-0098 through OAR 340-054-0108 (see page 34, Attachment A). These rules will govern the use of funds provided by the Act within the CWSRF program and will define the use of the funds, the types of eligible projects and activities, the allocation of the funds and specific financial terms. |
| **Commission Authority** | The EQC has authority to take this action under Oregon Revised Statutes 468.020 and 468.423 - 468.440. |
| **Stakeholder Involvement** | DEQ worked closely with current applicants and various organizations including the Oregon Association of Clean Water Agencies (ACWA), the League of Oregon Cities, Oregon Water Resources Congress, Association of Oregon Counties, Special Districts Association of Oregon, and the Oregon Association of Conservation Districts. Notice of the availability of the Act’s funds was provided in December by U.S. mail and e-mail to Oregon communities and public agencies. DEQ met with current applicants in December to provide information on potential federal stimulus funding. A follow-up meeting occurred March 5 to provide updated information and discuss questions. A financial work group was also convened to discuss options for providing subsidization as required by the Act. |
| **Public Comment** | Public comment is not required for a temporary rulemaking and did not occur for this rulemaking due to the urgency for DEQ to obtain the capitalization grant. An opportunity for public comment will be available during the permanent rulemaking that will be scheduled to follow this temporary rulemaking. |
| **Key Issues** | The Act requires that funded projects either be under contract or under construction by February 16, 2010. Wastewater improvement projects typically take more than a year to plan, design, contract work and begin construction. Because DEQ anticipates receiving the cap grant by early June, applicants are being encouraged to complete all loan requirements now.  The Act also requires not less than 50 percent of the capitalization grant be used for additional subsidization. The intent of the Act is to produce the greatest economic stimulus while targeting those communities least able to afford such projects. Providing loans that include principal forgiveness is one subsidization option allowed by Oregon law. DEQ’s approach to targeting communities least likely to afford needed wastewater or water quality improvement projects is to provide a greater incentive to Oregon communities with a population of 5,000 or less. Data indicates the cost per capita for addressing wastewater infrastructure needs is consistently higher for small communities. DEQ determined that by offering loans at 75 percent principal forgiveness and a zero percent interest rate to small communities would best meet the intent of the Act, including the subsidization requirement, and Oregon statutes. To maximize the number of projects DEQ would like to fund under the Act, a $5 million limit is set for each loan.  A third issue is the Act identifies October 1, 2008 as the date certain projects might be eligible for Act funding rather than February 17, 2009, the date the Act was signed. Neither the Act's language nor guidance provided by EPA clarified what projects might be eligible for funding retroactively back to October 1, 2008. Given the level of interest in acquiring Act funds, it is important that DEQ interpret this language correctly and consistently. Based on subsequent guidance offered by EPA and an opinion provided by the Department of Justice, DEQ was able to align its program with the intent of the Act. |
| **Next Steps** | If adopted at the April 16-17, 2008, Commission meeting, these temporary rules will be filed with the Secretary of State’s Office and Legislative Council in late April. DEQ will publish and accept public comment on its CWSRF Intended Use Plan that will outline how the funds under the Act will be utilized. . After the public comment period, EPA will process DEQ’s cap grant application and it is anticipated that funds will be available for loans by June. Permanent rulemaking will begin in April. |
| **Attachments** | 1. Redlined Version of Proposed Rule Revisions 2. Statement of Need and Justification |
| **Available Upon Request** | 1. DEQ’s Implementation Plan of the 2009 American Recovery and Reinvestment Act 2. EPA Guidance documenton awarding capitalization grants under the Act |

Approved:

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