

**DEPARTMENT OF ENVIRONMENTAL QUALITY**  
**Chapter 340**  
**Proposed Rulemaking**  
**STATEMENT OF NEED AND FISCAL AND ECONOMIC IMPACT**

**401 Water Quality Certification Fee Increase for Removal & Fill Projects**

This form accompanies a Notice of Proposed Rulemaking

<b>Title of Proposed Rulemaking</b>	This rulemaking revises 401 water quality certification fees on removal and fill projects
<b>Statutory Authority or other Legal Authority</b>	ORS 420 and 468
<b>Statutes Implemented</b>	ORS 468B.035-ORS 468.047
<b>Need for the Rule(s)</b>	<p>State law (Oregon Revised Statutes 468.065) authorizes the Environmental Quality Commission to set fee schedules for the Department of Environmental Quality's Water Quality Division by rule. This rulemaking will revise Oregon Administrative Rule (OAR 340-048-0055) by updating the fee structure to a tiered approach based on workload associated with the scale and complexity of the projects.</p> <p>Through this rulemaking, DEQ seeks commission adoption to revise 401 certification fees so that revenue is sufficient for program costs. The current fees for 401 certifications are assessed based on proposed fill or removal amounts. Approximately 52 percent of the projects receiving a 401 certification do not pay a fee, due to exemptions within the current fee structure.</p> <p>Over the years, actual costs for the 401 certification program have exceeded the revenue generated by 401 fees. This lack of revenue has limited the capacity to provide timely, efficient processing of 401 certification requests and prevented DEQ from ensuring a high level of compliance.</p> <p>DEQ formed an advisory committee that met multiple times in 2007, 2008, 2010, and 2012. Representatives from local government, environmental groups, trade associations, and the federal government all participated in this process.</p> <p>The 2009 Legislature passed HB 2185, which removed 401 certification program fee exemptions, requires that DEQ base fees on project size and estimated or actual costs and requires the Environmental Quality Commission to establish procedures for applicants to elevate issues associated with DEQ's fee assessments.</p> <p>The proposed fee structure is based on a culmination of recommendations from our advisory committee as well as direction from the Legislature. Fee table revisions now include "tiers" which will allow 401 certification projects to be based on workload, distribute costs of the program equitably to all applicants, and provide FTE to expedite review/approval and to enhance technical assistance/program implementation.</p>
<b>Documents Relied Upon for Rulemaking</b>	<p>DEQ relied on a number of key documents and each is described below:</p> <ul style="list-style-type: none"><li>A. The June 23, 2008 Executive Summary, which compiled the input and findings from the 401 Certification Fee Revision for Removal-Fill Advisory Committee;</li><li>B. A March 15, 2012 memorandum to the Advisory Committee, which describes the proposed fee structure;</li><li>C. HB 2185 (enrolled version), which was passed by the 2009 Legislature and eliminated exemptions for certain removal/fill projects as well as outlined the appropriate criteria on which to base 401 certification fees;</li><li>D. A March 2012 spreadsheet developed by DEQ staff to identify the program costs for each of the</li></ul>

	<p>proposed fee tiers (based on a review of the typical program costs associated with the type and level of review and certification involved for projects of similar complexity); and</p> <p>E. The 404/401 Kaizen process improvement project fact sheet and associated information.</p>
<b>Requests for Other Options</b>	Pursuant to ORS 183.335(2)(b)(G), DEQ requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.
<b>Fiscal and Economic Impact, Statement of Cost Compliance</b>	
<b>Overview</b>	<p>The 401 program receives approximately 200 projects per biennium of all complexity levels. About 24 projects are considered "small" projects (Tier 1 - \$985 - of the proposed fee structure), approximately 179 projects labeled as "medium" in complexity (Tier 2A - \$4,390 - and 2B - \$12,105 - of the proposed fee structure) and about 6 large scale projects (Tier 3 - \$17,780 - of the proposed fee structure). The 401 program may also receive occasional projects that fall under the current "special projects" fee (Tier 4 - \$14,020/month - of the proposed fee structure). Examples of special projects are large energy projects such as the liquefied natural gas terminals and pipeline proposals. The proposed fee table labels the project as Tier 1, 2, 3 or 4. Some examples of project types in each of the tiers are:</p> <ul style="list-style-type: none"> <li>• Tier 1: Restoration projects, utility line placement, pond creation, small docks</li> <li>• Tier 2: Dredging projects, dam removal, most developments with wetland fills,</li> <li>• Tier 3: US Army Corps of Engineers dredging projects such as the Columbia River channel deepening, large industrial developments</li> <li>• Tier 4: Large special projects such as liquefied natural gas and pipelines.</li> </ul> <p>For several reasons, this proposed rule will likely increase direct costs of private and public construction, development and in-stream sand and gravel projects where removal and fill activities occur. First, a number of previously exempt projects are required to pay fees as determined by HB 2185. Second, this proposed rule will address the long-standing gap between actual program costs incurred by DEQ and level of 401 certification fees, thus potentially increasing the direct costs for many projects. The magnitude of the impact from the proposed fees will range from minimal to moderate and, in a few cases a major impact may result.</p> <p>Agricultural activities, however, are generally exempt from 401 certification fees.</p> <p>The direct cost increases associated with this proposed rule will likely be offset in some cases by cost reductions realized by expedited review, certification and enhanced technical assistance/program implementation. The proposed rule will eventually add 3.40 full-time employees to the existing program, allowing DEQ to increase field visits, arrange more pre-certification meetings with applicants, and increase guidance information on the DEQ website. Taken together, these activities will in many cases reduce delays in review/approval and will provide more certainty for project applicants.</p> <p>Indirect costs associated with this proposed rule are unknown. Lower impact projects may not experience an increase in fees. However, some construction and development projects with greater impacts and which result in greater program costs or have not paid fees in the past will likely face higher 401 certification fees. Residents and businesses who expect to undertake or benefit from new construction and development may see minimal to moderate cost impacts in the future. Finally, taxpayer or ratepayers who benefit from the construction and development of public infrastructure may experience minimal to moderate cost impacts.</p>
<b>Impacts on the General Public</b>	This proposed rule will likely increase direct costs of many private and public construction, development and sand and gravel projects where removal and fill activities occur. It is expected that the magnitude of the impacts will likely be minimal to moderate in most cases.
<b>Impacts to Small Business</b> (50 or fewer employees – ORS183.310(10))	There is high probability that this proposed rule will increase the direct costs of private and public construction, development and sand and gravel projects undertaken by small businesses where removal and fill activities occur. Prior to the adoption of HB 2185, many smaller removal and fill activities were exempt from paying 401 certification fees. As required by HB 2185, this proposed rule imposes fees on all projects seeking 401 certification. It is reasonable to assume that many of these projects are

	undertaken by small business, and that they will likely be moderately impacted.	
<b>Cost of Compliance on Small Business</b> (50 or fewer employees – ORS183.310(10))	a) Estimated number of small businesses subject to the proposed rule	Over the last five years, DEQ has processed approximately 100 certifications per year. Approximately, 20 percent (about 10 percent currently fee-exempt will pay a fee and about 10 percent who currently pay fees will pay a higher fee) of those certifications are likely to involve firms meeting this definition of “small business.”
	b) Types of businesses and industries with small businesses subject to the proposed rule	Small businesses within the following industries could potentially be affected by the proposed rule: construction, development, restoration, mining, reclamation, and marine recreation.
	c) Projected reporting, recordkeeping and other administrative activities required by small businesses for compliance with the proposed rule, including costs of professional services	The proposed rule does not require additional reporting.
	d) The equipment, supplies, labor, and increased administration required by small businesses for compliance with the proposed rule	The proposed rule does not require additional equipment or administration.
	e) A description of the manner in which DEQ involved small businesses in the development of this rulemaking	There were no individuals on the advisory workgroup who specifically represented small business. However, several trade associations representing various sectors of the construction, development and mining industries-including the small businesses within those industries-participated on the advisory workgroup.
<b>Impacts on Large Business</b> (all businesses that are not “small businesses” under ORS183.310(10))	Because this proposed rule will address the long-standing gap between actual program costs incurred by DEQ and level of 401 certification fees, it is likely that large businesses-especially those in the construction, development, restoration and mining industries-will potentially see increased costs for 401 certifications. It is expected that the magnitude of the impacts will likely be more minimal when compared to small business.	
<b>Impacts on Local Government</b>	This proposed rule may increase direct costs, likely at a minimal level, of some public construction, development and reclamation projects where removal and fill activities occur. A subset of local transportation projects are covered under a general permit and would likely not realize a substantial fee increase. Taxpayers or ratepayers that benefit from the construction and development of public infrastructure may realize higher fees, taxes and rates.	
<b>Impacts on State Agencies other than DEQ</b>	This proposed rule will likely increase direct costs of many public construction, development and sand and gravel projects where removal and fill activities occur.	
<b>Impacts on DEQ</b>	Some initial costs for setting up administrative procedures will occur. Included in the fee is a one-time cost for data base improvement, so these costs should not be ongoing. DEQ’s 401 Water Quality Certification Program will be more sustainable with fees that more accurately reflect program costs. Extensive applicant fee determination review requests may increase program costs.	
<b>Assumptions</b>	DEQ assumes that for most businesses, local governments and state agencies that the cost of obtaining 401 certification is small compared to overall project or operating costs.	
<b>Housing Costs</b>	<p>DEQ has determined that this proposed rulemaking will have the following potential effects on the cost of development of a 6,000 square foot parcel and the construction of a 1,200 square foot detached single family dwelling on the parcel.</p> <p><u>Scenario A</u> DEQ assumes the proposed rule would have a minimal impact where the lot and single-family dwelling are part of a larger development project submitted by a developer. In the instance, DEQ estimates that the overall development project would likely fall into either Tier 2A or Tier 2B (\$4390 or \$12105 in the fee structure). Because the 401 certification costs would be assumed by the developer and only some portion of those costs would be allocated to an individual parcel or dwelling, DEQ estimates that there</p>	

	<p>would only be a minimal impact.</p> <p><u>Scenario B</u></p> <p>In those cases, where an applicant is seeking 401 certification for an individual parcel or dwelling, the effect of the proposed rule is likely to be greater. Based on an estimate of where these projects would fall in the proposed fee schedule, it is likely that the applicant would need to pay either \$985 or \$4390 in fees (Tier 1 and Tier 2A, respectively). Assuming the higher amount, the impact of the proposed rule could be substantial on an individual parcel or dwelling.</p>
<b>Administrative Rule Advisory Committee</b>	<p>DEQ formed an advisory committee in 2007, and the committee met several times since then. Representatives from the federal government, state government, local governments, environmental groups, and trade associations all participated in this process. The committee generally agreed that 401 certification fees should be based on the actual program costs associated with the review and approval of specific projects.</p> <p>In light of new legislative direction per HB 2185 in 2009, DEQ held an additional meeting of this committee in March 2010 to present options for revised fee structure in the form of fee Tiers. The revised structure took into account several of the issues raised in prior committee discussions and by the Legislature.</p> <p>DEQ reconvened the advisory committee in March 2012 to outline the Kaizen process improvement project, review the proposed fee structure, and discuss the 401 rulemaking plan.</p> <p>In June 2012, DEQ provided the members of the advisory committee an opportunity to review and comment on this fiscal impact statement.</p>

Prepared by

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Date

Approved by DEQ Budget Office

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Date