

3/25/2013 – Stephanie Clark and Greg Aldrich verbally told Maggie Vandehey that the EQC adopted the temporary rule with no changes from staff report.

From: CLIPPER Chris
Sent: Monday, March 25, 2013 12:55 PM
To: VANDEHEY Maggie
Cc: CLIPPER Chris
Subject: RM - 401TEMP - Implementation Plan

Hi Maggie,

I'd like to clarify the implementation steps I think are needed for the temporary rulemaking - 401 certification fee, adopted by EQC on 3/21/13. Some of these steps are mandatory (required by statute), while others represent DEQ best practices.

- 1) File rules with Secretary of State. This should be done as soon as possible.
Certificate of Filing Temporary Rules (Rules are to become effective upon filing.)
Statement of Need and Justification
Adopted rules (no changes shown)

Rules will be published in the Bulletin and OAR website May 1, 2013.
- 2) File rules with Legislative Counsel. Submitted within 10 days of submittal to SOS.
Copy of Certificate of Filing Temporary Rules
Copy of Statement of Need and Justification
Adopted rules (changes shown)

The Statement of Need and Justification and Adopted rules (changes shown) are on the sharepoint site. I don't think you need anything from me to complete the SOS and LC filing.
- 3) Rules will be automatically updated on <http://www.deq.state.or.us/regulations/rules.htm> since the adopted rules are text with no tables. This site links to the OAR website. Since there's no policy change, the 401 program doesn't need to update their program website.
- 4) No rule adoption announcement is required for stakeholders (Govdelivery recipients, legislators) since we notified this group prior to rule adoption. Model Rule 137-001-0080(1) specifies this. I recommend no announcement.
- 5) The 401 program will verify accuracy of SOS publication - May 1, 2013.
- 6) I'll submit the official rulemaking record.
- 7) A five year rule review is not required. Rule only effective until July 31, 2013, and it was an amendment.

Please let me know if you agree with the above, and I will send to those who need to know.

Thanks.

Christopher Clipper
Permit Program Analyst
Oregon Dept. of Environmental Quality
811 SW 6th Avenue | Portland, OR 97204
T: 503-229-5656 | clipper.chris@deq.state.or.us

Secretary of State
Certificate and Order for Filing
TEMPORARY ADMINISTRATIVE RULES
A Statement of Need and Justification accompanies this form.

I certify that the attached copies are true, full and correct copies of the TEMPORARY Rule(s) adopted on 03/21/2013 by the
Department of Environmental Quality 340

Agency and Division Administrative Rules Chapter Number

Maggie Vandehey (503) 229-6878

Rules Coordinator Telephone

811 SW Sixth Ave., Portland, OR 97204-1390

Address

To become effective 03/25/2013 through 07/30/2013.

RULE CAPTION

401 Water Quality Certification Fee Schedule Clarification

Not more than 15 words that reasonably identifies the subject matter of the agency's intended action.

RULEMAKING ACTION

Secure approval of new rule numbers with the Administrative Rules Unit prior to filing.

ADOPT:

AMEND:

340-048-0055

SUSPEND:

Statutory Authority:

ORS 468.020, 468.068, 468B.047

Other Authority:

Statutes Implemented:

ORS 468.068

RULE SUMMARY

The Environmental Quality Commission adopted a temporary rule to clarify that the fee structure the adopted and certified in 2004 applies through July 30, 2013.

The purpose of the fee is to cover the costs associated with the program for certification of activities requiring federal licenses and permits to comply with water quality standards. Most projects involve the removal of material from, or placement into, state waters such as sand and gravel operations, wetland fills for development and navigation dredging but do not apply to hydroelectric projects.

Maggie Vandehey
Rules Coordinator Name

maggie.vandehey@state.or.us
Email Address

FILED
3-25-13 2:40 PM
ARCHIVES DIVISION
SECRETARY OF STATE

Secretary of State
STATEMENT OF NEED AND JUSTIFICATION

A Certificate and Order for Filing Temporary Administrative Rules accompanies this form

Department of Environmental Quality

340

Agency and Division

Administrative Rules Chapter Number

401 Water Quality Certification Fee Schedule Clarification

Rule Caption (Not more than 15 words that reasonably identifies the subject matter of the agency's intended action.)

In the Matter of:

401 Water Quality Certification Fee Schedule Clarification

Statutory Authority:

ORS 468.020, 468.068, 468B.047

Other Authority:

Statutes Implemented:

ORS 468.068

Need for the Temporary Rule(s):

The EQC adopted a 401 Water Quality Certification fee increase on Oct. 25, 2012. During the meeting, the commission adopted rule amendments that made the new fee structure effective on July 31, 2013. Though intended, the amendment did not state that the 2004 fees remain in effect until that date.

DEQ filed rules that became effective on Jan. 16, 2013. The amended rule language made it clear the new fees would become effective on July 31, 2013, but the filing did not expressly preserve the 2004 fees during the interim.

Documents Relied Upon, and where they are available:

October 2013 401 Certification Rulemaking at: <http://www.deq.state.or.us/regulations/2012AdoptedRules.htm>

Justification of Temporary Rule(s):

The temporary rule amendments will limit confusion about the applicable fee among 401 Water Quality Certification applicants, permittees and the general public. The temporary rule amendments will avoid potential litigation.

Maggie Vandehey

Printed Name

maggie.vandehey@state.or.us

Email Address

FILED

3-25-13 2:40 PM

ARCHIVES DIVISION
SECRETARY OF STATE

DEPARTMENT OF ENVIRONMENTAL QUALITY

DIVISION 48

**CERTIFICATION OF COMPLIANCE WITH WATER QUALITY
REQUIREMENTS AND STANDARDS**

340-048-0055

Fee Schedule for Certifications

(1) Applicability. The fees established in this rule apply to any person, including a federal agency, submitting an application for certification to DEQ.

(2) Fee Determinations. To determine the appropriate fee to process and review an application for certification, DEQ will do the following:

(a) Perform an initial review of the application and other materials submitted;

(b) Determine the estimated program costs incurred by DEQ in reviewing the proposed project based on the types of tasks expected, the amount of staff time and other expenses, and assign a tier using the criteria in Section (3);

(c) Submit an invoice or, if necessary, multiple invoices, to the applicant based on the appropriate fee schedule provided in Section (4); and

(d) As necessary, revise an assigned tier based on documentation of the expected types of tasks or program costs incurred, if appropriate, and notify the applicant of such revisions.

(3) Project Tiers. The following tier schedule describes the types of tasks expected to appropriately process and review proposed projects for certification:

(a) Tier 1- This tier applies to those projects that incur minimal program costs and impacts to water quality. To qualify under this tier, the project must meet the following:

(A) Potential for minimal impacts to water quality;

(B) Low level of public participation;

(C) No more than standard coordination with federal state or local agencies required;

(D) Stormwater management plan review not required or will be addressed through the National Pollutant Discharge Elimination System permitting process;

(E) Limited technical assistance needed; or,

(F) Within the scope of a United States Army Corps of Engineers Nationwide 404 category requiring a DEQ 401 certification and involving only a stormwater management plan or sediment evaluation review component;

(G) Within the scope of the proposed application, the project has been modified or altered that the DEQ 401 review and certification requires re-issuance, including DEQ public notice.

(b) Tier 2A -This tier applies to those projects that incur a higher than minimal amount of program costs and impacts to water quality. To qualify under this tier, the project must meet some of the following:

(A) Potential for greater than minimal impacts to water quality;

(B) Basic level of public participation required, including but not limited to response to comment;

(C) No more than standard coordination with federal state or local agencies required;

(D) Limited stormwater management plan review or technical assistance to a reviewing permitted entity or agent required;

(E) Limited technical assistance needed; or

(F) Sediment characterization, if required, finds sediment and new surface suitable for in-water exposure.

(c) Tier 2B - This tier applies to those projects that incur higher program costs due to greater potential impacts on water quality. To qualify for this tier, the project must meet a majority of the following:

(A) Potential for greater water quality impacts if the waterway is identified on DEQ's 303(d) list or is covered by a total maximum daily load, or multiple waters of the state are affected;

(B) High level of public participation required with potential for one or more public meetings or hearings;

(C) More than standard coordination with multiple federal, state or local agencies required, including but not limited to one or more meetings or pre-application site visit;

(D) Complex stormwater management plan review and coordination required;

(E) Moderate and on-going level of technical assistance needed;

(F) Large or complex compensatory mitigation review required;

(G) Sediment characterization, if required, finds sediment or new surface unsuitable for in-water exposure, so that coordination with the DEQ Solid Waste or Environmental Cleanup programs is necessary; or

(H) Preparation of a full evaluation and findings report needed.

(d) Tier 3 — This tier applies to those projects that incur very high program costs because a large area is affected, a high degree of complexity is involved or greater potential water quality impacts may result. To qualify for this tier, the project must meet a majority of the following:

(A) Potential for greater water quality impacts if the waterway is identified on DEQ's 303(d) list or covered by a total maximum daily load, or multiple waters of the state are affected;

(B) High level of public participation required with extensive public comments and the potential for one or more public meetings or hearings;

(C) Substantially more than standard coordination with multiple federal, state or local agencies required, including but not limited to one or more meetings;

(D) Complex stormwater management plan review and coordination required;

(E) High level or iterative technical assistance required or substantive project revisions received;

(F) Large or complex compensatory mitigation review required;

(G) Site visit(s) needed to understand impacts and advise on potential alternatives;

(H) Sediment characterization finds sediment or new surface unsuitable for in-water exposure or contaminated soil is likely to be present, so that coordination with the DEQ Solid Waste or Environmental Cleanup Programs is necessary; or

(I) Preparation of a full evaluation and findings report needed.

(e) Tier 4 — This tier applies to those projects that incur the highest program costs because a very large area is affected, an extremely high degree of complexity is involved, or a very high level of public participation is expected. To qualify for this tier, the project must meet all of the following:

(A) All of the applicable factors identified in Tier 3; and

(B) Coordination with the Governor's Office in conjunction with other state agencies, tribal nations and the federal government;

(C) Review of additional documents such as National Environmental Policy Act Resource Reports, Environmental Assessments and Environmental Impact Statements.

(4) Fee Schedules. The following fees apply to tiers assigned under Sections (2) and (3):

(a) Until July 31, 2013, the fees adopted by the Commission in 2004 and certified on April 15, 2004 apply.

(b) As of July 31, 2013, the following fees apply:

(A) Tier 1 — \$985

(B) Tier 2A — \$4,390

(C) Tier 2B — \$12,105

(D) Tier 3 — \$17,780

(E) Tier 4 — \$14,020 per month or average monthly cost of a senior level technical staff position.

(c) In lieu of fees established by this section, DEQ may at its discretion enter into an intergovernmental agreement with another state or federal agency that provides for the payment of the estimated or actual costs of processing an application for certification.

(5) Review of Fee Determinations. An applicant may seek review of DEQ's determination of the appropriate fee as follows:

(a) An applicant may seek review of the fee determination by submitting a written request to the DEQ regional administrator within 30 days of receipt of an invoice. The request must state the specific reasons and provide documentation that the applicant believes supports a different fee amount. Upon receiving such a request, the DEQ regional administrator must respond within 60 days of receipt and render a decision.

(b) That decision may include:

(A) Determination that a different fee tier will apply subject to making specifically identified modifications to the proposed project;

(B) Denial of a request for a different fee amount; or;

(C) The determination that the proposed project meets the criteria for a different tier.

(c) If an applicant is not satisfied by the decision of the DEQ regional administrator, the applicant is entitled to request review by the DEQ director in the same manner as described in subsections (a) and (b) above.

(d) An applicant who is dissatisfied with the review of the director retains the right to a contested case hearing as provided in ORS chapter 183, provided the applicant has sought relief through subsections (a) through (c).

(6) Certification of Hydroelectric Projects. Fees for certification of a hydroelectric project as proposed to be licensed by the Federal Energy Regulatory Commission must be paid in accordance with ORS 468.065(3). Fees for a certification related to a hydroelectric project but for a license or approval not issued by the Federal Energy Regulatory Commission are based on the actual expenses incurred by the department, including expenses of the Environmental Quality Commission, related to the certification review and decision. In consultation with the applicant, DEQ will establish a periodic basis for billing the applicant.

(7) DEQ may approve a payment schedule for fees, including the submission of multiple invoices, for multi-year projects or projects assigned as a Tier 4.

(8) DEQ must receive the payment of the full invoiced fee before issuing a certification, and a review made pursuant to subsection (5) does not suspend the requirement to pay the appropriate fee. An application for certification is considered withdrawn if the applicant fails to pay the appropriate fee within 90 days of the invoice date. An applicant may request that DEQ grant an extension of time to pay the appropriate fee to an applicant upon a showing of good cause, and DEQ will continue processing the application for certification. DEQ may refund the fee or some portion if it determines that no certification is required, that minimal program costs were not incurred, a revised tier assignment is provided or the wrong application has been filed.

Stat. Auth.: ORS 468.068 & 468B.047

Stats. Implemented: ORS 468.068

Hist.: DEQ 28-1998, f. & cert. ef. 12-22-98; Renumbered from 340-048-0200, DEQ 2-2004, f. & cert. ef. 4-15-04; DEQ 1-2013, f. & cert. ef. 1-16-13

Housing Cost Impact

DEQ determined the proposed rules would have no effect on the development cost of a 6,000-square-foot parcel and construction of a 1,200-square-foot detached, single-family dwelling on that parcel. The proposed rules are clarifying existing fees.

Authorization Page
Generated on March 25, 2013 2:31PM
TEMPORARY ADMINISTRATIVE RULES

Department of Environmental Quality	340
Agency and Division	Administrative Rules Chapter Number
Maggie Vandehey	maggie.vandehey@state.or.us
Rules Coordinator	Email Address
811 SW Sixth Ave., Portland, OR 97204-1390	503-229-6878
Address	Telephone
03/21/2013	
Adopted on	
03/25/2013 thru 07/30/2013	
Effective dates	

RULE CAPTION

401 Water Quality Certification Fee Schedule Clarification
Not more than 15 words

RULEMAKING ACTION

ADOPT:

AMEND: 340-048-0055

SUSPEND:

Stat. Auth.: ORS 468.020, 468.068, 468B.047

Other Auth.:

Stats. Implemented: ORS 468.068

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The Environmental Quality Commission adopted a temporary rule to clarify that the fee structure the adopted and certified in 2004 applies through July 30, 2013.

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not apply to
hydroelectric projects.

STATEMENT OF NEED AND JUSTIFICATION

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Need for the Temporary Rule(s)

The temporary rule amendments will limit confusion about the applicable fee among 401 Water Quality Certification applicants, permittees and the general public. The temporary rule amendments will avoid potential litigation.

Justification of Temporary Rules


Authorized Signer

Maggie Vandehey
Printed Name

3/25/2013
Date

Authorization Page replaces the ink signature on paper filings. Have your authorized signer sign and date, then scan and attach it to your filing. You must complete this step before submitting your Permanent and Temporary filings.

Attachment A

DEPARTMENT OF ENVIRONMENTAL QUALITY

DIVISION 48

CERTIFICATION OF COMPLIANCE WITH WATER QUALITY REQUIREMENTS AND STANDARDS

340-048-0055

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From:

1 of 1

Department of Environmental Quality Portland
811 SW 6th Ave
Portland, OR 97204
340000

To:

Legislative Counsel
900 Court St NE S 101
Salem, OR 97301
142000

Security Level:	4
Misc.:	
# of Pkgs:	1
Delivery Time :	8:25 AM

PICK39480749683177-1



Special Instructions:

From Magie Vandehey

*401 Certification
Fee
TEMPORARY
RUC*