

State of Oregon
Department of Environmental Quality

Memorandum

Date: Oct. 3, 2012

To: Environmental Quality Commission

From: Dick Pedersen, Director

Subject: Agenda item F, Rule proposal: 401 Water Quality Certification fee increase, OAR Chapter 340, Division 48
Oct. 25-26, 2012, EQC meeting

Why this is important The adoption of the proposed fee table would ensure sufficient revenue and staff to support the 401 Certification Program for removal-fill projects consistent with recent legislative direction.

DEQ recommendation and EQC motion DEQ recommends the Oregon Environmental Quality Commission repeal the existing fee schedule for 401 certifications (OAR 340-048-55) and adopt the proposed rule presented in attachment A.

Background Under section 401 of the Clean Water Act, DEQ is required to certify that activities requiring federal licenses and permits 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. The size and complexity of projects vary, ranging from road to environmental restoration projects. DEQ receives about 100 individual certification applications annually.

DEQ is proposing a new fee schedule to certify such activities. These fees, as directed by the 2009 Oregon Legislature through House Bill 2185, will be based on projected program costs rather than on volume of material removed or filled. The fees will apply to activities that were previously exempt, such as sand and gravel operations, projects that fill two acres of wetlands or more, or remove more than 500 cubic yards of material. The proposed changes would not apply to hydroelectric projects. The proposed fee increases would take effect January 2013.

The fee increase is necessary to ensure sufficient revenue and staff to improve guidance documents, provide greater technical assistance to applicants, with an emphasis on timeliness, and to establish a field presence to evaluate program effectiveness. The new fees would add an additional 2.5 staff and help fully fund the existing two staff statewide.

Effect of rule

The proposed rule would revise the fee schedule for all applicants, including federal agencies. DEQ would review the application materials, determine the estimated program costs to evaluate projects and make certification decisions based on the types of tasks expected and the amount of staff time anticipated. DEQ would assign the project to a tier using the criteria in the proposed rule, and submit an invoice, or multiple invoices if necessary, to the applicant based on the proposed fee schedule.

The proposed rule would allow DEQ to reassign a proposed project to different tiers based on new information or to refund the fee, or a portion thereof. Under the proposed rule, DEQ could enter into an intergovernmental agreement, at its discretion, with another state agency or applicant that provides for the payment of actual or estimated costs of processing an application for certification. Finally, the proposed rule grants an applicant the opportunity to ask for a review of DEQ's determination of the appropriate fee.

The proposed rule requires that DEQ receive payment of a fee before issuing a certification, which is consistent with current practice.

The proposed fee structure is based on recommendations from a multi-agency Kaizen process-improvement event, advisory committee input and the Oregon Legislature's direction. Recently, DEQ implemented some recommendations, discussed them with the advisory committee and briefed stakeholders.

Commission authority

The commission has authority to take this action under ORS 468 and the proposed rule would specifically implement ORS 468B.047.

Stakeholder involvement

DEQ formed an advisory committee that met multiple times in 2007, 2008, 2010 and 2012. Representatives from the federal government, state government, local governments, environmental groups and trade associations all participated in meetings. The committee did not endorse moving forward with the fee increase without eliminating the exemptions for certain sectors that do not currently pay fees. The committee generally agreed that 401 certification fees should be based on the program costs for the review and approval of projects.

As part of an ongoing process of finding ways to streamline the program, DEQ led a Kaizen 404/401 process improvement project with 10 state and federal agencies in late 2011. DEQ and the other participating entities committed to implementing the outcome of the Kaizen recommendations.

The Kaizen project recommendations benefit all applicants and agencies involved in projects that require a water quality certification. The recommendations include holding pre-application meetings with agencies and applicants. Pre-application activities assist applicants in preparing a complete application with fewer steps. Complete applications help avoid multiple information requests from agencies may result in lower fees. In addition, having the applicant participate in pre-application activities may reduce longer-term technical assistance and extensive multi-agency coordination. Pre-application activities may also provide information to applicants early enough in the design process that applicants can develop and adjust their project design to minimize potential impacts to water quality. All these factors may result in lower fees and faster application processing.

Public comment DEQ held a public comment period from July 16 to Aug. 29, 2012, which included public hearings in Roseburg, The Dalles and Portland. The public hearing in Portland was held in conjunction with the EQC commission meeting on August 23.

The major comments are reflected in the key issues set out below. A summary of the public comment and DEQ's response are provided in attachment C.

Key issues DEQ received a number of comments in writing and at the public hearings. In general, the comments were in support of the revised fee schedule. Comments in support of the revised fee schedule focused on customer service and environmental outcomes; however, one commenter described the Tier 4 fees as excessive.

DEQ is committed to efficient and timely certification evaluations, site visits for technical assistance and to ensure program effectiveness and continuous program improvements. Directed by the Oregon Legislature in 2009's House Bill 2185, the revised fee structure is based on workload costs for DEQ's water quality review. The proposed fee structure revisions will provide anticipated revenue to implement the customer service outcomes.

Next steps If the commission adopts the proposed rule, DEQ will file it with the Secretary of State. Prior to the effective date of the rules, DEQ will update its website and other guidance information so future applicants will be aware of the revised fee schedule. Additionally, program staff will work with DEQ's accounting office to prepare invoices and develop the information systems needed to track payments.

Attachments

- A. Proposed rule
- B. Advisory committee membership

- C. Summaries of public comments and DEQ's response
- D. Presiding Officer's report on public hearings
- E. Relationship to Federal Requirements questions
- F. Statement of Need and Fiscal and Economic Impact
- G. Land Use Evaluation statement

**Available upon
request**

- 1. Cover memorandum from public notice
- 2. Written comments received

Approved:

Division: _____

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