

401 WQ CERTIFICATION FEE INCREASE

DRAFT RULE

October 2012

340-048-0055

Fee Schedule for Certifications

[NEW LANGUAGE PROVIDED BELOW]

~~(1) Persons applying for a certification must pay the fees established in this rule. When fees are based on total volume or area, the fees will be based on the total volume or area specified in the application, not actual volume or area ultimately affected during the term of the certification.~~

~~(2) Fees for removal of materials from waters of the state are as follows:~~

~~(a) 500 to 9,999 cubic yards — \$950;~~

~~(b) 10,000 to 99,999 cubic yards — \$2,800;~~

~~(c) 100,000 to 999,999 cubic yards — \$4,700;~~

~~(d) 1,000,000 to 9,999,999 cubic yards — \$14,000; and~~

~~(e) 10,000,000 cubic yards or more — \$16,000 or the amount specified in section (7) of this rule, whichever is greater.~~

~~(3) The fees established in section (2) of this rule will be reduced by 25% in those cases where the Dredged Material Evaluation Framework (DMEF) exclusion criteria for sediment testing are met. [Reference: Dredged Material Evaluation Framework, Lower Columbia River Management Area, November 1998.]~~

~~(4) Fees for filling of waters of the state are as follows:~~

~~(a) 2 to 4.99 acres — \$950;~~

~~(b) 5 to 9.99 acres — \$2,800;~~

~~(c) 10 to 14.99 acres — \$4,700; and~~

~~(d) 15 acres or more—\$8,000 or the amount specified in section (7) of this rule, whichever is greater.~~

~~(5) Only one certification fee is required for a project that includes both removal of material under section (2) of this rule and filling of material under section (4) of this rule in the immediate area of the excavation. The higher of the two fees applies.~~

~~(6) The fee for application of salt in ski areas is \$5,000.~~

~~(7) For activities described in subsections (2)(e) and (4)(d) of this rule and activities not elsewhere classified in this rule, fees will be based on the estimated number of months of full-time staff equivalent (FTE) required to certify the activity multiplied by \$8,000 (number of months x \$8,000 = fee amount). The estimate of required FTE months will be made by the department. There is no fee for activities requiring less than 2 weeks of FTE.~~

~~(8) Fees for certification of a hydroelectric project must be paid in accordance with ORS 468.065(3).~~

~~(9) Fees for multi-year projects may be paid on a schedule approved by the department.~~

~~(10) All fees are payable to the Business Office, Oregon Department of Environmental Quality.~~

~~(11) A fee may be refunded if the department determines that no certification is required or that the wrong application has been filed.~~

~~(12) Fees are not charged for activities:~~

~~(a) Requiring an operating permit for surface mining under ORS chapter 517;~~

~~(b) Relating to commercial sand and gravel removal operations;~~

~~(c) Involving removal of less than 500 cubic yards of material; or~~

~~(d) Involving a fill of less than two acres.~~

[PROPOSED RULE BELOW]

(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) As of January 1, 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.

(b) 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.

List of advisory committee members

Jon Chandler	Homebuilders Association
Dorothy Sperry	Port of Portland
Marla Harrison	Port of Portland
Gary Neal	Port of Morrow
Patty Snow	Oregon Dept. of Fish & Wildlife
Joe Whitworth	The Fresh Water Trust
Rich Angstrom	Oregon Concrete & Aggregate Producers Assoc.
Emily Ackland	Association of Oregon Counties
Michael Reed	City of Portland
Joyce Casey	U.S. Army Corps of Engineers
*Ken Armstrong	Port Association
*John Van Steveren	Pacific Habitat, Inc., Consultants

* Participated in Advisory Committee from 2007-2010.

Summary of public comment, EQC testimony and agency response

Proposed rule: Fee increase for the 401 Certification Program

Prepared by: Steve Mrazik

Date: Sept. 14, 2012

Comment period	DEQ opened the public comment period from July 16 to Aug. 29, 2012. DEQ held three public hearings in The Dalles, Roseburg, and Portland within the public comment period. The Portland public hearing was in conjunction with the Oregon Environmental Quality Commission meeting on August 23. DEQ received a number of written comments by email and through the U.S. Postal Service before the Aug. 29, 2012, deadline.
Organization of comments and responses	The following lists the parties commenting, summarizes the comments both written and verbal, and provides DEQ's responses.

Summary of comments and DEQ responses	
Support for the fee increase	Economically sustainable 401 state program crucial; program oversight and compliance of projects is critical; fee schedule determination process for applicants will put additional strain on existing resources; modest fee increases should be greater to cover new costs (2)
	<p><i>DEQ's response:</i> <i>Most organizations represented on the advisory committee support the proposed fee increase to more effectively operate the 401 certification program and provide a higher level of customer service and project oversight. The fee determination process required by HB 2185 allows applicants to elevate questions associated with their project tier category. Extensive applicant fee determination review requests may increase program costs. No change in the proposed rule is recommended.</i></p>
	<p>The city has been a member of the advisory committee and supports the fees because the new fee structure will more accurately represent the workload of the program and allow DEQ to issue certifications in a more timely manner. (4)</p> <p><i>DEQ's response:</i> <i>DEQ is committed to providing better customer service outcomes including more timely issuance of certifications and through development of better guidance materials. The new fee structure will provide resources to deliver on customer service outcomes. No change to the proposed rule is recommended.</i></p>
	The Port of Portland served on the advisory committee and supports the fee to ensure that port projects receive technically sound and timely 401 water quality certifications. Fees should assure improved service levels, consistency, and more predictable timeframes. The Port expects DEQ to continue to look for efficiencies and ways to streamline the program. (5)

	<p><i>DEQ's response:</i> <i>Additional staff will enable DEQ to provide better customer service, more timely issuance of certifications and through development of better guidance materials. DEQ will be able to provide better technical assistance and conduct compliance checks so applicants can identify ways to minimize costs. DEQ will continually evaluate how to reduce program costs where appropriate and will consult with the advisory committee. No change to the proposed rule is recommended.</i></p> <p>The Willamette and Tualatin Riverkeeper organizations supports the revised fee structure "The new fee structure imparts fairness...a graduated fee based on actual DEQ program costs is a reasonable approach" (1). "DEQ has provided important leadership through the Kaizen process to improve the 404/401 process" (1) 401 permit process and DEQ technical expertise assure state water quality issues fully addressed. (1)</p> <p><i>DEQ's response:</i> <i>HB 2185 eliminated fee exemptions and directed DEQ to develop a fee structure based on workload costs. DEQ is committed to continuous improvement like the 404/401 Kaizen project. The stakeholders serving on the advisory committee generally concluded that the 401 Certification Program needs more revenue and staff to improve environmental protection and to expedite the review and approval of applications for a sustainable program. No change to the proposed rule is recommended.</i></p>
<p>Neutral to the fee increase</p>	<p>The Oregon Department of State Lands comments it "will be important for DEQ to have the ability to provide an appropriate level of review of DSL permits to ensure compliance with state water quality standards" if DSL should assume the 404 program in the future.(6)</p> <p><i>DEQ's response:</i> <i>The outcome of the 404 assumption process is uncertain and the specific timeline undetermined. DEQ will actively participate in the process to potential state assumption of the 404 program and will discuss resource options at that time. No change to the proposed rule is recommended.</i></p>
<p>Opposition to the fee increase</p>	<p>Resident Don Young comments that the "Tier 4 fees seem excessive".(3)</p> <p><i>DEQ's response:</i> <i>The proposed fee structure is based on workload required by DEQ to review projects relative to state water quality standards. Tier 4 will be used for projects of sizes and scopes that are large and unprecedented, such as proposed Liquefied Natural Gas terminals, that will take a great deal of time and technical expertise. The proposed fee structure outlines criteria for placing projects into tiers. No change to the proposed rule is recommended.</i></p>

List of people submitting comments (by commenter number)			
Ref. No.	Name	Affiliation or organization	Received
1.	Sue Marshall	Willamette Riverkeepers and Tualatin Riverkeepers	8/23/12 (EQC hearing testimony)
2.	Marla Nelson	Northwest Environmental Defense Center	8/27/12 (written)
3.	Don Young	Resident	7/20/12
4.	Dean Marriot	City of Portland	8/27/12 (written)
5.	Dorothy Sperry	Port of Portland	8/23/12 (EQC testimony)
6.	Louise Solliday	Department of State Lands	8/24/12 (written)

All written comments are available upon request

Presiding Officer's report on public hearings

State of Oregon
Department of Environmental Quality

Memorandum

Date: Sept. 6, 2012
To: Environmental Quality Commission
From: Steve Mrazik, DEQ
Subject: Presiding Officer's report for rulemaking hearing

Title of proposal: 401 Water Quality Certification Fee Increase

Hearing one

Hearing date and time: **Aug. 15, 2012**, 6 p.m.

Hearing location: Roseburg Central Library, **Roseburg, Oregon**

DEQ convened the hearing at 6 p.m. and closed at 7:30 p.m. Two DEQ employees attended the hearing: Steve Mrazik as presenter and Christine Svetkovich as presiding officer. No others attended, no testimony was given and no written comments were submitted at this hearing.

Hearing two

Hearing date and time: **Aug. 20, 2012**, 6 p.m.

Hearing location: Columbia Gorge Community College, **The Dalles, Oregon**

DEQ convened the hearing 6 p.m. and closed at 7 p.m. Two DEQ employees attended the hearing: Steve Mrazik as presenter and Nina DeConcini as presiding officer. No others attended, no testimony was given and no written comments were submitted at this hearing.

Hearing three

Hearing date and time: **Aug. 23, 2012**, 9:45a.m.

Hearing location: DEQ headquarters, **Portland, Oregon**

At 9:45 a.m., Chair Blosser opened the public hearing regarding the fee increases for the Water Quality Division 401 Certification program. DEQ plans to bring proposed final rules and a proposal for changes to the program's fees for commission action at the October 2012 EQC meeting.

Two people submitted request-to-speak forms for the hearing.

1. Dorothy Sperry, Port of Portland, presented comment in support of the proposed changes and thanked DEQ for having the Port participate in the advisory committee. She stressed the importance of efficient and timely permit processing, and stated that it is critical for DEQ to have the technical knowledge and resources to provide better and quicker certifications. She noted that the Port of Portland is willing to pay more, as it likely will, under the proposed fee rules for improved service.

The commissioners asked Sperry informational questions and the Port's expectations for the program with fee changes and related increase in staffing support.

2. Sue Marshall, Willamette and Tualatin Riverkeepers, presented comment in support of the proposed fee increase for the Water Quality 401 Certification program. She submitted a written copy of her comments to the commission. She explained that while neither Riverkeeper organization was not part of the advisory committee, both supported increasing staffing to support beneficial environmental outcomes through the certification program.

Chair Blosser closed the hearing at 10 a.m. Director Pedersen explained that the comment period for this item closes Aug. 29, 2012, and DEQ can provide the commission with copies of written comments prior to October EQC when the commission decides whether or not to approve the rules, and promised Commissioner Uherbelau that she would receive this information as soon as responses to comments are prepared.

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY

Relationship to Federal Requirements

RULE CAPTION

This rulemaking revises fees for 401 Water Quality Certifications

Answers to the following questions identify how the proposed rulemaking relates to federal requirements and the justification for differing from, or adding to, federal requirements. This statement is required by OAR 340-011-0029(1).

1. Is the proposed rulemaking different from, or in addition to, applicable federal requirements? If so, what are the differences or additions?

There are no applicable federal requirements.

2. If the proposal differs from, or is in addition to, applicable federal requirements, explain the reasons for the difference or addition (including as appropriate, the public health, environmental, scientific, economic, technological, administrative or other reasons).

N/A

3. If the proposal differs from, or is in addition to, applicable federal requirements, did DEQ consider alternatives to the difference or addition? If so, describe the alternatives and the reason(s) they were not pursued.

There are no applicable federal requirements.

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

Title of Proposed Rulemaking	This rulemaking revises 401 water quality certification fees on removal and fill projects
Statutory Authority or other Legal Authority	ORS 420 and 468
Statutes Implemented	ORS 468B.035-ORS 468.047
Need for the Rule(s)	<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>
Documents Relied Upon for Rulemaking	<p>DEQ relied on a number of key documents and each is described below:</p> <ul style="list-style-type: none"> A. The June 23, 2008 Executive Summary, which compiled the input and findings from the 401 Certification Fee Revision for Removal-Fill Advisory Committee; B. A March 15, 2012 memorandum to the Advisory Committee, which describes the proposed fee structure;

	<p>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;</p> <p>D. A March 2012 spreadsheet developed by DEQ staff to identify the program costs for each of the 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>
Requests for Other Options	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.
Fiscal and Economic Impact, Statement of Cost Compliance	
Overview	<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"> • Tier 1: Restoration projects, utility line placement, pond creation, small docks • Tier 2: Dredging projects, dam removal, most developments with wetland fills, • Tier 3: US Army Corps of Engineers dredging projects such as the Columbia River channel deepening, large industrial developments • Tier 4: Large special projects such as liquefied natural gas and pipelines. <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>

Impacts on the General Public	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.	
Impacts to Small Business (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.	
Cost of Compliance on Small Business (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.
Impacts on Large Business (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.	
Impacts on Local Government	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.	
Impacts on State Agencies other than DEQ	This proposed rule will likely increase direct costs of many public construction, development and sand and gravel projects where removal and fill activities occur.	
Impacts on DEQ	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.	

Assumptions	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.
Housing Costs	<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 would only be a minimal impact.</p> <p><u>Scenario B</u> 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>
Administrative Rule Advisory Committee	<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 _____

Printed name _____

Date _____

Approved by DEQ Budget Office _____

Printed name _____

Date _____

State of Oregon
DEPARTMENT OF ENVIRONMENTAL QUALITY
Land Use Evaluation Statement

Rulemaking Proposal
For

401 Certification Fees – Clean Water Act

RULE CAPTION
401 WQ Certification Fee Increase

1. Explain the purpose of the proposed rules.

This rulemaking is intended to increase 401 certification fees to provide sufficient revenue to cover program costs and to provide additional staff to expedite review/approval and to enhance technical assistance and program implementation. This rulemaking will also restructure the fees so that they are based on program costs rather than on the amount of removal and fill.

2. Do the proposed rules affect existing rules, programs or activities that are considered land use programs in the DEQ State Agency Coordination (SAC) Program?

Yes ☒ No ☐

a. If yes, identify existing program/rule/activity:

The proposed rules affect Oregon's 401 Water Quality Certification Removal/Fill program (OAR 340-018-0030(5)(g) Certification of Water Quality Standards for Federal Permits, Licenses, that certifies that activities requiring federal licenses and permits must comply with water quality requirements and standards.

b. If yes, do the existing statewide goal compliance and local plan compatibility procedures adequately cover the proposed rules?

Yes ☒ No ☐ (if no, explain):

DEQ will implement the proposed rules through its 401 Water Quality Certification program. An approved land use compatibility statement is required from local government before a 401 Certification is finalized.

c. If no, apply the following criteria to the proposed rules.

Staff should refer to Section III, subsection 2 of the SAC document in completing the evaluation form. Statewide Goal 6 - Air, Water and Land Resources is the primary goal that relates to DEQ authorities. However, other goals may apply such as Goal 5 - Open Spaces, Scenic and Historic Areas, and Natural Resources; Goal 11 - Public Facilities and Services; Goal 16 - Estuarine Resources; and Goal 19 - Ocean Resources. DEQ programs and rules that relate to statewide land use goals are considered land use programs if they are:

1. Specifically referenced in the statewide planning goals; or
2. Reasonably expected to have significant effects on
 - a. resources, objectives or areas identified in the statewide planning goals, or
 - b. present or future land uses identified in acknowledged comprehensive plans.

In applying criterion 2 above, two guidelines should be applied to assess land use significance:

- The land use responsibilities of a program/rule/action that involved more than one agency, are considered the responsibilities of the agency with primary authority.
- A determination of land use significance must consider the Department's mandate to protect public health and safety and the environment.

In the space below, state if the proposed rules are considered programs affecting land use. State the criteria and reasons for the determination.

Not applicable.

- 3. If the proposed rules have been determined a land use program under 2. above, but are not subject to existing land use compliance and compatibility procedures, explain the new procedures DEQ will use to ensure compliance and compatibility.**

Not applicable. The proposed rules have been determined a land use program under question two, above, and are subject to existing land use compliance and compatibility procedures.