

### **C. Hearing before the commission: Proposed 401 Water Quality Certification fee increase**

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.



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August 27, 2012

Via Email to [401Rulemaking@deq.state.or.us](mailto:401Rulemaking@deq.state.or.us)  
Department of Environmental Quality  
Attn: Steve Mrazik  
Oregon DEQ  
2020 SW 4<sup>th</sup> Ave, Suite 400  
Portland, OR 97201-4987

Re: NEDC comments regarding Oregon Department of Environmental Quality's 401 Water Quality Certification Fees Rulemaking

The Northwest Environmental Defense Center (NEDC) submits these comments concerning the Department of Environmental Quality's (DEQ) Proposed 401 Water Quality Certification Fees Rulemaking. NEDC's mission is to preserve and protect the environment and natural resources of the Pacific Northwest. In furtherance of this mission, NEDC often analyzes the environmental effects of projects that require state certification under Section 401 of the Clean Water Act (CWA) and thereby relies on DEQ's assurances that such projects will not cause or contribute to a violation of water quality standards. These comments largely support DEQ's proposed increase in fees for certifying that activities requiring federal licenses and permits comply with water quality requirements and standards. NEDC believes an economically sustainable state program is crucial to DEQ's ability effectively implement and enforce 401 certification procedures.

**I. DEQ's proposed fee increase is necessary and appropriate.**

Mandated by House Bill 2185, DEQ's proposed rulemaking is necessary to balance the actual costs of the program with fees. *See* 2008 Executive Summary, page 2 (DEQ is seeking to "achieve a functional and sustainably funded 401 water quality certification program"). The current program exempts fees for projects related to commercial sand and gravel removal operations, or those proposing to fill less than 2 acres of wetlands or remove less than 500 cubic yards of material. 2008 Executive Summary at 1. Approximately 52 percent of projects receiving a 401 certification do not pay a fee due to exemptions within the fee structure. *Id.* Such exemptions have not provided sufficient funding for DEQ to achieve its mandated duty to protect Oregon's water quality. DEQ noted that it "has not been able to develop key program implementation guidance such as best management practices and monitoring guidelines . . . conduct compliance monitoring to evaluate the effectiveness of 401 certification conditions, . . . conduct enforcement activities in response to complaints," or "develop a web page or develop guidance that helps applicants through the process." 2008 Executive Summary at 1.

The proposed fee schedule introduces a procedure for applicants to elevate issues associated with DEQ's fee assessments, as required by House Bill 2185. This multi-level appeal process will put an additional strain on existing resources. See DEQ Statement of Need and Fiscal and Economic Impact, page 3 (stating that "[e]xtensive applicant fee determination review requests may increase program costs"). The rulemaking will also likely increase DEQ's workload pursuant to the direction in House Bill 2185, which removed the fee exemption for specific projects. Fees will apply to activities that were previously exempt, including sand and gravel operations, projects that fill two acres of wetlands or more, and projects that remove less than 500 cubic yards of material. It will be necessary for DEQ staff to review these projects to determine the applicable tier, and address any objections through the appeal process. The modest fee increase cited in the rulemaking does not appear sufficient to cover these new costs.

At the same time as providing new benefits under section 401, DEQ states that it seeks to lower fees. DEQ is required to reduce the negative economic impact of its rule on business. See DEQ Statement of Need and Fiscal and Economic Impact form, page 2 (citing ORS 183.335(2)(b)(G) (requiring state agencies to include with the notice of intended action a "request for public comment on whether other options should be considered for achieving the rule's substantive goals while reducing the negative economic impact of the rule on business"). However, reducing the negative economic impact is not synonymous with avoiding any negative economic impact. We recognize the directives in House Bill 2185 present a difficult task during troubled economic times. Yet businesses have benefitted from the low fees and exempted categories in DEQ's previous fee schedule for many years, at the expense of DEQ's budget. At bottom, the slight fee increase does not appear to adequately reflect the increased costs of additional FTE's, a new appeal procedure, and improved efficiencies. To create the economically sustainable program that DEQ claims to aspire to, the fee amounts should be greater.

#### Conclusion

NEDC supports DEQ's proposal to update the fee schedule to a tiered approach based on workload associated with the scale and complexity of each proposed project. The proposed rulemaking is a suitable means of working towards a more economically sustainable program that ultimately will provide greater assurances that Oregon's water quality is maintained. To accomplish a truly economically sustainable program, however, DEQ should seek a greater increase in fee amounts.

Sincerely,



Marla Nelson  
NEDC Student Director



# CITY OF PORTLAND ENVIRONMENTAL SERVICES



1120 SW Fifth Avenue, Room 1000, Portland, Oregon 97204 • Dan Saltzman, Commissioner • Dean Marriott, Director

August 27, 2012

Steve Mrazik  
Oregon DEQ  
2020 SW 4th Avenue  
Suite 400  
Portland, Oregon 97201-4987

Re: Support for the Section 401 Water Quality Certification Fee Increase Rule

Dear Mr. Mrazik:

The City of Portland extends their support for the proposed 401 Water Quality Certification Fee Increase. As you know, the City has been an active member of the Fee Revision Advisory Committee over the last two years.

The City supports this fee increase for the following reasons. BES constructs many wastewater and watershed projects every year. Many of these projects require federal and state permits including Section 401 Water Quality Certifications. We need the permits to be issued in a timely manner. Currently, this statewide program consists of only two full time technical staff. The current fee structure does not accurately reflect the workload associated with reviewing the applications and corresponding supporting materials leaving staff without the resources or availability to attend all the pre-application Streamlining meetings or site-visits that are needed for an informed and constructive review. The fee increase would assist the DEQ to issue the permits in a reasonable timeframe.

The City believes this new fee structure will more accurately represent the workload of the program which will increase resources available to staff and the DEQ to allow for permits to be issued in a much more timely manner. Please accept our strong support for the fee increase proposal.

Sincerely,

Dean Marriott



August 29, 2012

65 SW Yamhill Street, Suite 200  
Portland, Oregon 97204  
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[www.thefreshwatertrust.org](http://www.thefreshwatertrust.org)

Mr. Steve Mazrik  
Oregon Department of Environmental Quality  
Northwest Region  
2020 SW Fourth Avenue  
Portland, Oregon 97201

Joe S. Whitworth, President

Subject: Section 401 Water Quality Certification Fee Proposal

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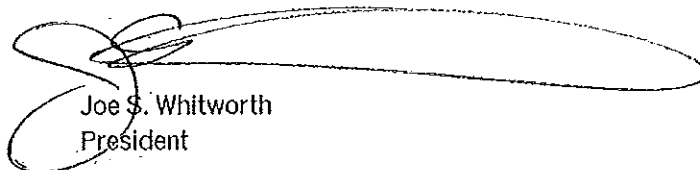
Dear Steve,

On behalf of our board of directors and members around the state, we appreciate the opportunity to respond to your August, 13, 2012 memorandum regarding DEQ's 401 water quality certification fee proposal. The Freshwater Trust (TFT) acknowledges your process improvement work and your commitment to avoiding delays and keeping costs down for applicants. TFT appreciates the 10 agency Kaizen 404/401 process improvement project DEQ initiated along with the excellent follow through in completing 20 of the 29 tasks identified to support the process. While TFT believes that process efficiencies are important, we are equally interested in ensuring that the 401 water quality certification programs is adequately staffed so that water quality in Oregon is protected and is in compliance with the Clean Water Act.

In particular, TFT believes that compliance inspections and enforcement along with thorough application reviews are essential to a viable 401 certification program. It is our understanding that under the current fee structure, neither field work nor enforcement activities are occurring. TFT supports DEQ's proposed fee structure as long as it is based on a thorough workload analysis that addresses field work and compliance and enforcement activities as well as application review.

As always, we support DEQ's efforts to protect water quality in Oregon. Please let me know if we can be of further assistance.

In earnest,

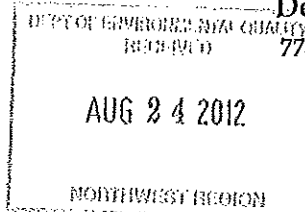


Joe S. Whitworth  
President



# Oregon

John A. Kitzhaber, MD, Governor



## Department of State Lands

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State Land Board

August 23, 2012

John A. Kitzhaber, MD  
Governor

Kate Brown  
Secretary of State

Steve Mrazik  
Oregon Department of Environmental Quality  
2020 SW 4th Ave., Suite 400  
Portland, OR 97201-4987

Ted Wheeler  
State Treasurer

Subject: Department of State Lands' comments on 401 Water Quality Certification Fees  
Rulemaking

Mr. Mrazik:

The Department of State Lands (DSL) appreciates the opportunity to comment during your rulemaking effort. Under the current regulatory framework, DEQ has the opportunity to review and provide input to DSL on removal-fill permit applications regarding state water quality standards. At present the majority of DEQ's efforts to assure compliance of removal-fill projects with state water quality standards are implemented through DEQ's CWA 401-certification, which is required by federal law for U.S. Army Corps of Engineers 404 permits. This works well as DSL's removal-fill program and the Corps' 404 program work in parallel, and nearly all projects requiring a 404 permit from the Corps also require a removal-fill permit.

DSL is investigating assumption of the Clean Water Act 404 program. Should DSL assume the 404 program and begin issuing removal-fill permits that also provide CWA 404 compliance, DSL anticipates the need for more direct involvement with DEQ than under the current regulatory process. 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.

Sincerely,

Louise Solliday  
Director

**ADAMS Diana**

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**From:** Don Young [donyoung@mind.net]  
**Sent:** Friday, July 20, 2012 10:51 AM  
**To:** 401Rulemaking  
**Subject:** 401 Water Quality Certification Fees

The need for DEQ to cover costs is understandable; the need for DEQ to become a government profit center is not. In particular, the Tier 4 fees seem excessive. Do they cover only salary and benefits? Or do they cover salary, benefits and overhead costs to cover the processing and keeping track of benefits, payroll, etc.? In either case, this would seem to be a perfect example that costs could be reduced if Public Employees were required to make modest contributions to their costs of health care insurance and 401K programs. Yes, 401K rather than defined benefit programs do that government costs can be put on a sustainable track.

Or maybe I should apply for a senior technical position. At 68 I have the senior part covered. My Ph. D. in Analytical Chemistry from the University of North Carolina in 1972 and a career in Industry dealing peripherally with environmental issues should cover the rest.

Donald C. Young  
3816 Annettes Way  
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# Willamette RIVERKEEPER®



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Environmental Quality Commission  
811 SW Sixth Avenue  
Portland, OR 97204

Aug. 23, 2012

## Regarding support for 401 fee increase

Dear Chair Blosser and Members of the Commission:

My name is Sue Marshall and I am here today representing the Tualatin Riverkeepers and Willamette Riverkeeper in support of the proposed rule change to increase 401 permit fees based on DEQ program costs to provide sufficient funding of the state water quality certification program.

We supported HB 2185 during the 2009 legislative session and commend DEQ for working closely with a stakeholder group to develop a fee structure and process that responds to issues raised by legislators.

401 water quality certification is an important right granted to the state to weigh in on water quality issues and to protect beneficial uses related to projects where there is a federal nexus and potential discharge to public waters. The 401 permit process and DEQ technical expertise provide an important backstop to assure state water quality issues are fully addressed. It has been my observation that in particular TMDL parameters and implementation plans are not fully understood or integrated in the land use planning process.

We have been concerned about adequacy of staffing for the 401 program. There was an instance several years ago where 401 certification was waived related to commenting on EPA ballast water rules. And while there was a short timeframe to respond, we would not want lack of staffing for the program to create delays, result in an inadequate review or compel DEQ to waive the process.

The new fee structure imparts fairness and allows for some flexibility - larger projects can consume a great deal of staff time and smaller projects will now be included in support for the program, a graduated fee based on actual DEQ program costs is a reasonable approach.

DEQ has provided important leadership through the Kaizen process to improve the 404/401 process. We believe this can help raise and better address water quality issues much earlier in the process.

Thank you for your consideration. We urge your support of the propose fee schedule rule change.

Sincerely,

Sue Marshall

Tualatin Riverkeepers and Willamette Riverkeeper

