

State of Oregon
Department of Environmental Quality

Memorandum

Date: Jan. 28, 2011

To: Environmental Quality Commission

From: Dick Pedersen, Director

Subject: Agenda item J, Rule adoption: 401 Water Quality Certification fee increase, OAR Chapter 340, Division 48
February 16-18, 2011, EQC meeting

Why this is important The adoption of the proposed fee schedule 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 that 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 and need for rulemaking Under section 401 of the Clean Water Act, DEQ certifies that projects requiring federal licenses and permits comply with water quality standards. Most 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 applications annually.

DEQ is proposing a new fee schedule to certify these projects. 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 previously exempt projects such as sand and gravel operations, projects filling less than two acres of wetlands or removing fewer than 500 cubic yards of material. The proposed changes would not apply to hydroelectric projects. The initial proposed fee increase would be effective February 2011 and slightly higher fees in July 2012, as recommended by the advisory committee.

The fee increase is necessary to ensure sufficient revenue and staff to effectively implement the 401 Certification Program. Specifically, the proposed fee revenue would allow DEQ to increase program staff from two to 4.5 full-time equivalent positions. DEQ is requesting the 2.5 positions in a 2011-13 biennium policy package. Additional staff would enable the program to develop better guidance materials, increase timeliness, provide more technical assistance to applicants and conduct field visits to determine compliance with certification conditions.

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, the amount of staff time and other expenses. 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. At its discretion, DEQ may enter into an intergovernmental agreement with another state agency 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 provides that DEQ must receive payment of a fee before issuing a certification, which is consistent with current practice.

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 in 2007, which met several times through March 2010. Representatives from the federal government, state government, local governments, environmental groups and trade associations all participated in this process. The committee generally agreed to the following:

- To eliminate statutory exemptions for certain projects, thus requiring all applicants to pay fees and support the 401 certification program
- To base the fees on the program costs for the review and evaluation for certification of projects, rather than on the amount of fill or removal
- To ensure that the fee revenue would be sufficient to adequately support and staff the 401 Certification Program.

In response, DEQ developed a proposal to meet these objectives. The proposal classifies projects into different tiers based on the tasks and staff time associated with individual projects rather than the amount of fill or removal. Under this draft proposal, fees would increase as a project was assigned a higher tier, reflecting the greater scale and complexity of the project and the corresponding increase in DEQ's workload to evaluate the application for potential water quality concerns.

In response to recommendations from the advisory committee, DEQ decided to forgo a proposed fee increase during the 2007-09 biennium and develop a legislative concept and policy package with new positions for a new fee schedule in the 2009 legislative session. Work on the legislative concept was necessary to address the issue of statutory exemptions for certain projects.

During the 2009 session, the Oregon Legislature approved House Bill 2185, eliminating all fee exemptions, setting parameters for a new fee structure, and providing a process so applicants could dispute a fee determination. On the issue of fees and how they should be calculated, the Legislature directed DEQ as follows in Section 1 of House Bill 2185: “The fees authorized by this section must be based on the nature of the underlying federal license or permit, the size of the project, the estimated or actual costs incurred by the Department of Environmental Quality and any other relevant factors.”

The 2009 Legislature directed DEQ to reconvene the advisory committee for more input before proceeding to rulemaking. DEQ was asked to consult with the advisory committee on reducing the fee amount in the lowest tier. Lastly, DEQ was directed to return with a policy package for 2.5 positions in the 2011-13 biennium, after adoption of the revised fee schedule.

As a result, DEQ called a meeting of the advisory committee in March 2010 to present two options for a revised fee structure. Both options classified proposed projects into different tiers based on the associated tasks and staff time, not the amount of removal or fill. Also, the revised options took into account several of the issues raised during the 2008 committee discussions as well as the legislative guidance to reduce the fees at the lower tiers. A list of advisory committee members is included as attachment B.

Based on committee input from the March 2010 meeting, DEQ further revised the proposed rule so that lower fees would apply February 2011 through June 2012 and slightly higher fees would take effect July 2012.

As the final step in the stakeholder process, DEQ provided three formal public comment periods and held three public hearings around the state, including the Dec 10 commission meeting in Portland. The summary reports from the public hearings are included as attachment D.

Public comment

An initial public comment period extended from Aug. 2 to Sept. 10, 2010, and included public hearings in The Dalles, Roseburg and Portland. At the request of interested persons, DEQ provided a second public comment period that extended from Oct. 7 to Oct. 27, 2010. No public hearings were scheduled during the second comment period. DEQ reopened the public comment period Dec. 9 through Dec. 23, 2010. The commission accepted comments during the public forum portion of its Dec. 10, 2010, EQC meeting.

The major comments are reflected in the key issues set out below. The final proposed rule was revised to address several of these questions and concerns. A summary of the public comment and DEQ’s response are provided in attachment

C.

Key issues

1. Should the 401 Certification Program receive additional general fund to support its activities in lieu of increasing fees?

Recommendation: DEQ recommends making no changes to the proposed rule.

Stakeholders serving on the advisory committee concluded that 401 Certification Program needed more staff to improve environmental protection and to expedite the review and approval of applications and provide more certainty to applicants. Recognizing that additional general fund was unlikely to be appropriated for this purpose during the 2011 legislative session, they recommended that fees be increased. The Oregon Legislature embraced this approach in the 2009 session by passing House Bill 2185.

2. Whether it is appropriate to use program costs rather than volume of material or some other environmental criteria as the basis for setting fees.

Recommendation: DEQ recommends making no changes to the proposed rule.

During the initial meetings of the advisory committee, DEQ offered information to demonstrate that neither the size of the project nor the volume of removal or fill material really determined the costs incurred in reviewing and approving an application. Other factors such as the level of public involvement, particularly in responding to comments and holding public hearings, more significantly affected the costs to the program.

The advisory committee considered this information and ultimately agreed that program costs were an appropriate basis for setting fees. The Legislature embraced this approach in the 2009 session and, among other factors, directed DEQ to base 401 certification fees on “the estimated or actual costs incurred by the Department of Environmental Quality.”

3. Whether the criteria in the proposed rule used to distinguish between the different tiers are subjective or ambiguous.

Recommendation: DEQ recommends changing the proposed rule to address this issue.

Based on public comments, DEQ recognizes that the criteria can be clarified so that applicants have better understanding of what tiers would apply to their proposed projects. For instance, the criteria can be made more objective and clear by defining “impaired waterways” as those identified on DEQ’s 303(d) list or covered by a total maximum daily load. For projects assigned to higher tiers, the

criteria could be improved by specifying that coordination with multiple federal, state or local agencies would in fact be “required” as opposed to “may be necessary.”

4. Whether the 401 certification program could adopt more efficient methods for processing applications in lieu of more fees and staff.

Recommendation: DEQ recommends making no changes to the proposed rule but remains committed to continuous program evaluation and improvement.

Most of the stakeholders involved in the advisory committee recognized that the 401 Certification Program would operate more effectively with additional staff. Similarly, by authorizing House Bill 2185 and directing DEQ to work with the advisory committee to revise fees in a manner that supports additional positions, the Legislature appeared to reach the same conclusion.

5. Whether the 401 Certification Program could outline standards and criteria by which mining applications can be measured and delineate standards and criteria to make the application process less costly and uncertain.

Recommendation: DEQ recommends making no changes to the proposed rule, but remains committed to continuous program evaluation and improvement.

Most of the stakeholders involved in the advisory committee recognized that the 401 Certification Program would operate more effectively with additional staff. With additional staff, the 401 program will develop program guidance, provide technical assistance and attend pre-application meetings to address applicants’ needs and to provide more transparency and certainty in the process.

6. Whether the 401 Certification Program should be returned to be administered by the Environmental Protection Agency or another state agency already involved in waterway permitting should be evaluation the certifications.

Recommendation: DEQ recommends making no changes to the proposed rule.

The water quality certification program established by Section 401 of the Clean Water Act is not an EPA delegated program. It is a direct requirement imposed on applicants for federal licenses or permits when the activity authorized by the license or permit may result in a discharge to waters of the United States. Certification ensures compliance with the various requirements of the Clean Water Act including the water quality standards adopted by the Commission and approved by EPA. The Oregon Legislature has directed DEQ to issue the certifications. No other agency is currently authorized to perform this function.

7. Whether the new fees would assure improved service levels, consistency, and more predictable timeframes.

Recommendation: DEQ recommends making no changes to the proposed rule, but remains committed to continuous program evaluation and improvement.

Additional staff will enable DEQ to provide better customer service by issuing certifications in a timelier manner and through development of better guidance materials. DEQ will be able to better provide 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.

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 agency 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 comment received

Approved:

Division: _____

Report Prepared By: Sally Puent
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401 WQ CERTIFICATION FEE INCREASE

DRAFT RULE

January 2011

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) 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 for this tier, the project must meet a majority of 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 addressed in 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.
 - (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 for this tier, the project must meet a majority of the following:
 - (A) Potential for greater than minimal impacts to water quality if the waterway is identified on DEQ's 303(d) list or covered by a Total Maximum Daily Load;
 - (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;
 - (D) Complex stormwater management plan review required;
 - (E) High 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 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) From May 1, 2011 through June 30, 2012, the following fees apply:
 - (A) Tier 1 - \$970
 - (B) Tier 2A - \$4450
 - (C) Tier 2B - \$8980
 - (D) Tier 3 - \$14,320
 - (E) Tier 4 - \$15,000 per month or average monthly cost of a senior level technical staff position.
- (b) As of July 1, 2012, the following fees apply to tiers assigned under Sections (3) and (4):
 - (A) Tier 1 - \$995
 - (B) Tier 2A - \$4755
 - (C) Tier 2B - \$13,345
 - (D) Tier 3 - \$18,020
 - (E) Tier 4 - \$15,000 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 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) Identification of modifications or changes to the proposed project that will change the appropriate tier assignment;

- (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 a 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. DEQ may grant an extension of time to pay the appropriate fee to an applicant upon a showing of good cause. Fees are payable to the Oregon Department of Environmental Quality Accounting Section. DEQ may refund the fee or some portion if it determines that no certification is required, 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
Ken Armstrong	Port Association
John Van Steveren	Pacific Habitat, Inc., Consultants
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

Summary of public comment, EQC testimony and agency response

Proposed rule: Fee increase for the 401 Certification Program

Prepared by: Sally Puente

Date: Jan. 18, 2011

Comment period	DEQ reopened the public comment period from Dec. 9 to 23, 2010. DEQ did not hold public hearings during this comment period, but received public comment on the rules at the Dec. 10 Environmental Quality Commission meeting. DEQ received a number of written comments by email and through the U.S. Postal Service before the Dec. 23, 2010 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	<p>401 projects have the potential to cause environmental harm; program oversight of projects is critical; it is fair that the cost of DEQ oversight is borne by project applicants; special treatment should not be given to gravel industry. (1)</p> <p><i>DEQ's response:</i> All but one organization represented on the advisory committee supported the proposed fee increase to more effectively operate the 401 certification program and provide a higher level of customer service and project oversight. The advisory committee also supported that all applicants should pay a fee. No change in the proposed rule is recommended.</p>
	<p>The commenter does not agree with allowing dredging and in-water work and felt that higher fees would be a deterrent. (3)</p> <p><i>DEQ's response:</i> The stakeholders serving on the advisory committee generally concluded that the 401 Certification Program requires 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.</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> Additional staff will enable DEQ to provide better customer service by timelier issuance of certifications and through development of better guidance materials. No change to the proposed rule is recommended.</p>

	<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, 6)</p> <p><i>DEQ's response:</i> Additional staff will enable DEQ to provide better customer service by timelier issuance of certifications and through development of better guidance materials. DEQ will be able to better provide 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</p>
	<p>The Tualatin Riverkeepers support the fees to "...keep this vital program for the protection of Oregon waters adequately funded." (7, 8)</p> <p><i>DEQ's response:</i> 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.</p>
	<p>The USACE generally supports the proposed new fee schedule and recognizes that the shortage of staff has been a problem for them in receiving timely certifications. USACE recommends that example projects be included for each tier. USACE recommends that DEQ provide timeframes for each of the tiers and that some level of accountability be provided so that applicants would know how much time is required to process a certification and could provide additional information which could reduce DEQ staff time and reduce fees. USACE is also concerned that applicants could request Tier 4 for their projects so that they can have a DEQ employee working full time on their project and thereby obtain their certification quicker. USACE also expressed concern for which tiers their projects would fall into. For example, would operation and maintenance for the Columbia River Federal Navigation Channel fit into Tier 2 or 3?</p> <p><i>DEQ's response:</i> DEQ is developing applicant guidance, to be posted on the project web site, which will describe potential example projects for each tier. While not reflected in the proposed fee schedule, Oregon statute provides that DEQ waive the right to certify whether a proposed project meets water quality standards if it fails to act upon an application within a reasonable period, not to exceed one year. Even under the current fee structure, DEQ rarely takes one year to process a certification. Certifications are generally processed within 60 to 90 days if the applicant submits all the required information DEQ needs to evaluate the project. DEQ needs all of the applicable information for projects sooner in the process. Rather than having timeframes trigger the need for additional information, having all of the required information up front will shorten the process allowing for a quicker certification and potentially lower fees.</p> <p><i>DEQ currently has a very informative web page that helps applicants know what to provide to DEQ for a more efficient and faster review. DEQ expects that increased staff in the program will result in shorter timelines and additional guidance to help applicants better navigate the process. DEQ will be providing outreach to stakeholders and will be</i></p>

	<p><i>working with USACE to schedule a meeting to educate USACE staff on the new fee rules and discuss the tiers into which USACE projects will potentially fall. Applicants will not be able to choose the tier for their projects. For example, Tier 4 is only for very large, multi-year projects, such as liquefied natural gas facilities and pipelines. USACE projects would likely not fall into these categories and would be either in Tiers 2A, 2B or 3, depending on the scope of the project.</i></p> <p><i>DEQ will clarify the proposed rule by describing in more detail differences in tier criteria with regard to levels of technical assistance, public participation requirements, levels of agency coordination and sediment contamination reviews.</i></p>
Opposition to the fee increase	<p>The commenter expressed concern about the size of the new fees, particularly when "... they are disproportionate to other state agency fees, burdensome to industry and not associated with a clearly defined regulatory program." He also referred to a letter submitted to Dick Pedersen on June 7, 2010, in response to a DEQ request for advisory committee comments on the rulemaking fiscal impact statement. That letter mentions OCAPA's concern regarding "...DEQ's failure to outline standards and criteria by which mining applications can be measured and to delineate standards and criteria to make the application process less costly and uncertain." OCAPA is also concerned that most of the in-water mining will fall into the higher tiers (3 or 4). OCAPA believes that "an exception or modification to the tiers determination is necessary where a regional general permit is issued by USACE. DEQ should weigh the size of the project, the operator's ability to pay, and the affect on business in determining the fee amounts.</p> <p>The commenter stated verbally to the EQC that the 401 Certification Program should be returned to be administered by EPA or that another state agency already involved in waterway permitting should be evaluating the 401 water quality certifications. He presented the EQC with a chart DEQ staff prepared for him as part of the advisory committee process in 2008. The chart shows the gravel project certifications issued in 2007 and describes which tiers they represented. (2)</p> <p><i>DEQ's response:</i> <i>The water quality certification program established by Section 401 of the Clean Water Act is not an EPA delegated program. It is a direct requirement imposed on applicants for federal licenses or permits when the activity authorized by the license or permit may result in a discharge to waters of the United States. Certification ensures compliance with the various requirements of the Clean Water Act including the water quality standards adopted by the Commission and approved by EPA. The Oregon Legislature has directed DEQ to issue the certifications. No other agency is currently authorized to perform this function.</i></p> <p><i>The chart OCAPA handed out at the EQC meeting on Dec. 10, 2010, was based on gravel mining applications received in 2007 and was prepared by DEQ staff as part of the advisory committee process. Out of the 12 gravel mining projects received in 2007, three would have fallen into Tier 1; three into Tier 2A; four into Tier 2B; and two into Tier 3. We do not anticipate that gravel projects will fall into Tier 4 as this tier is reserved for unprecedented new projects such as liquefied natural gas facilities and associated pipelines. The chart showed the original draft fees, not those proposed in this version of the fee rule and therefore they are no longer applicable. In 2009, the Oregon Legislature instructed DEQ to revisit the fees and consider lowering the fees for lower impact projects. We have evaluated the 2007 fees, revised the fee schedule, and added a phased-in fee schedule as presented in the draft rules. DEQ's action to phase in the fees</i></p>

	<p><i>was a direct result of a suggestion made by an advisory committee member.</i></p> <p><i>A separate but related effort that has occurred on a parallel path to DEQ's 401 fee rule development, is a three-year collaborative process among DEQ and other state and federal agencies, to develop a regional general permit for the Chetco River. During that process, standard conditions were developed to address many of the specific water quality impacts. The 401 certification associated with the regional general permit is in final draft, has been through public comment, and will be issued in the next few weeks. The gravel industry was not required to pay fees for development of the 401 certification. DEQ remains committed to the regional general permit process and will continue to participate in this effort as the participating agencies review additional coastal river systems. Under the proposed fee structure, the gravel operators would not be charged for work associated with the regional general permit.</i></p> <p><i>While DEQ did agree to phase in the fees in response to the advisory committee recommendations and OCAPA's concern regarding the impact to its members, DEQ is not recommending any additional changes to the fee rule as a result of OCAPA's comments. DEQ recognizes the concerns that OCAPA continues to have regarding certainty and criteria specific to mining and is committed to working with them to resolve technical issues and develop a collaborative relationship.</i></p>
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List of people submitting comments (by commenter number)			
Ref. No.	Name	Affiliation or organization	Received
1.	Lauren Goldberg and Mark Riskedahl (presented together and independently submitted written comment)	Columbia Riverkeeper, Willamette Riverkeeper, Rogue Riverkeeper, Portland Audubon, and the Oregon Coast Alliance (Goldberg) and Northwest Environmental Defense Center (Riskedahl)	12/10/2010 (EQC testimony) and 12/23/2010 (written)
2.	Rich Angstrom and Bob Short	OCAPA	12/10/2010 (EQC testimony) and 12/16/2010 (written)
3.	Stuart Phillips	Resident	12/9/2010
4.	Dean Marriot	City of Portland	12/23/2010 (written)
5.	Dorothy Sperry and Marla Harrison	Port of Portland	12/10/2010 (EQC testimony)
6.	Sam Ruda	Port of Portland	12/23/2010 (written)
7.	Sue Marshall	Tualatin Riverkeepers	12/10/2010 (EQC testimony)
8.	Brian Wegener	Tualatin Riverkeepers	12/9/2010 (written)
9.	Joyce Casey	U.S. Army Corps of Engineers	12/23/2010 (written)

All written comments are available upon request

Presiding Officer's report on public hearings

State of Oregon
Department of Environmental Quality

Memorandum

Date: Nov. 9, 2010
To: Environmental Quality Commission
From: Palmer Mason, 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. 30, 2010**, 6 p.m.

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

DEQ convened the hearing at 6 p.m. and closed at 6:45 p.m. Two DEQ employees attended the hearing: Sally Puent as presenter and Palmer Mason 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: **Sept. 1, 2010**, 6 p.m.

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

DEQ convened the hearing 6 p.m. and closed at 6:45 p.m. Two DEQ employees attended the hearing: Sally Puent as presenter and Palmer Mason 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: **Sept. 8, 2010**, 6 p.m.

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

DEQ convened the hearing at 6 p.m. and closed at 6:45 p.m. Two DEQ employees attended the hearing: Nina DeConcini as presenter and Palmer Mason as presiding officer. No others attended, no testimony was given and no written comments were submitted at this hearing.

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>This rulemaking is intended to revise 401 certification fees so that fee revenue is sufficient for program costs and to provide additional FTEs to expedite review / approval and to enhance technical assistance / program implementation.</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 as well as prevented DEQ from ensuring a high level of compliance.</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 24, 2010 memorandum to the Advisory Committee, which describes the proposed fee structure and outlines various options; 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; and D) A March 2010 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).
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	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 provided 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 to these projects from the proposed fees will likely range from minimal to moderate and, in a few cases, a major impact may result.

	<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 FTEs 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.</p> <p>Indirect costs associated with this proposed rule are unknown. Lower impact projects may not experience an increase from the fees. However, some construction and development projects with greater impacts and which incur 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 impacts in the future. Finally, taxpayer or ratepayers who benefit from the construction and development of public infrastructure may likewise see minimal to moderate impacts.</p>	
Impacts on the General Public	<p>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.</p>	
Impacts to Small Business (50 or fewer employees – ORS183.310(10))	<p>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.</p>	
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 approx. 100 certifications per year. Approximately, 20% (about 10% currently fee-exempt will pay a fee and about 10% 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 or 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.
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 that parcel.</p> <p>Scenario A 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 that instance, DEQ estimates that the overall development project would likely fall into either Tier 2A or Tier 2B (\$4450 or \$8980 in the first year). 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>Scenario B 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 \$970 or \$4450 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 2008, and the committee met several times. Representatives from the federal government, state government, local governments, environmental groups, and trade associations all participated in this process. The committee largely agreed to a basic structure wherein 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, DEQ held an additional meeting of this committee in March 2010 to present two options for a revised fee structure. The revised structure took into account several of the issues raised in prior committee discussions.</p> <p>Based on the March 2010 meeting, DEQ further revised this proposed rule to phase in the fee revisions so that fees (option #2 of the March 2010 advisory committee memorandum) for the first 16 to 17 months of adoption will be lower. Slightly higher fees (option #1 of the March 2010 advisory committee memorandum) will be implemented in July 2012.</p>

In June 2010, DEQ provided the members of the advisory committee an opportunity to review and comment on this fiscal impact statement.

E. Palmer Mason
Prepared by

E. Palmer MASON
Printed name

7-12-2010
Date

Luciano Garza for J. Roys
Approved by DEQ Budget Office

Luciano Garza for J. Roys
Printed name

7-8-2010
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 X 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 X 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 2. above, and are subject to existing land use compliance and compatibility procedures.