

401 WQ CERTIFICATION FEE INCREASE

DRAFT RULE

December 2010

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) Limited or no known public interest;
 - (C) Stormwater management plan review not required or addressed in National Pollutant Discharge Elimination System permitting process;
 - (D) Limited technical assistance needed; or,
 - (E) Within the scope of a United States Army Corps of Engineers Nationwide 404 category requiring a DEQ 401 certification and involves a stormwater management plan 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) Limited stormwater management plan review or technical assistance to a reviewing permitted entity or agent required;
 - (D) Limited technical assistance needed; or
 - (E) Sediment characterization, if required, finds sediment or 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 waterways are affected;
 - (B) High level of public participation required with potential for one or more public meetings or hearings;
 - (C) Complex stormwater management plan review required;
 - (D) High level of technical assistance needed;
 - (E) Substantial coordination with multiple federal, state or local agencies required, including but not limited to one or more meetings;
 - (F) Large or complex compensatory mitigation review required; or
 - (G) Sediment characterization , if required, finds sediment or new surface unsuitable for in-water exposure, and coordination with the DEQ Solid Waste or Environmental Cleanup programs is necessary.
- (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 waterways 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) Complex stormwater management plan review required;
 - (D) Extensive technical assistance required or multiple project revisions received;
 - (E) Substantial coordination with multiple federal, state or local agencies required, including but not limited to one or more meetings;
 - (F) Large or complex compensatory mitigation review required;
 - (G) Site visits needed to understand impacts and advise on potential alternatives;
 - (H) Contaminated sediment or soil present or likely to be present; or
 - (I) Preparation of 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 factors identified in Tier 3;
 - (B) Coordination with the Governor's Office in conjunction with other state agencies, tribal nations and the federal government;
 - (C) Multiple site visits needed to understand impacts and advise on potential alternatives; and

(D) 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 February 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 and Agency Response

401 Water Quality Certification Fee Increase

Prepared by: Palmer Mason

Date: Nov. 9, 2010

**Comment
period**

DEQ held an initial public comment period Aug. 2, 2010, to Sept. 10, 2010, with public hearings in The Dalles, Roseburg and Portland. At the request of interested persons, DEQ provided a second public comment period from Oct. 7, 2010, to Oct. 27, 2010. DEQ did not hold public hearings during the second comment period. No one attended any of the public hearings. DEQ received seven written comments by email or delivered through the U.S. Postal Service.

**Organization
of comments
and
responses**

The following summary list the number of persons who provided comments and DEQ's response. A list of the people who commented and their reference numbers follows the summary.

Summary of comments and agency responses		
From	Comment	DEQ response and proposed rule change
1, 4,6	The cost of government is already too high.	All but one organization represented on the advisory committee, which included representatives from various industries, supported the proposed fee increase as necessary to more effectively operate the 401 certification program and provide a higher level of customer service. No change to the proposed rule recommended.
4,6	The 401 certification program should be supported by additional General Fund in lieu of increasing fees.	The 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 more certainty for applicants. The committee recognized that DEQ was unlikely to receive additional General Fund during the 2011 Legislative session and recommended that fees be increased. The Legislature embraced this approach in the 2009 session by passing House Bill 2185, which outlines the framework for a new fee schedule. No change to the proposed rule recommended.
6	The proposed fee schedule is higher than fees in other states.	The proposed fee increase is set at the amount necessary to manage the program as supported by the advisory committee. DEQ incorporated a phased-in approach for the new fees as suggested by the

		<p>advisory committee.</p> <p>No change to the proposed rule recommended.</p>
1,4,6	The 401 certification program should adopt more efficient methods for processing applications in lieu of more fees and staff.	<p>The stakeholders serving on the advisory committee 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. DEQ will continue to examine ways to improve the program and work with related federal and state agencies to do the same.</p> <p>No change to the proposed rule recommended.</p>
2,6	Volume of material or some other environmental criteria should be the basis for setting fees rather than program costs.	<p>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 was an accurate basis for determining 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.</p> <p>The advisory committee considered this information and agreed that program costs were an appropriate basis for setting fees. The majority also agreed that a “level playing field” was needed so all applicants are required to pay a fee for DEQ services. 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”.</p> <p>No change to the proposed rule recommended.</p>
2,3,4	The criteria in the proposed rule used to distinguish between the different tiers are subjective and ambiguous.	<p>DEQ recognizes that the criteria can be clarified so that applicants have better understanding of what tiers would apply to their proposed projects.</p> <p>Recommend changes to the proposed rule.</p>
2	Higher fees could possibly discourage pre-application meetings.	<p>From past experience, DEQ anticipates that pre-application meetings are more likely to help applicants avoid higher fees because earlier discussions will ensure applicants know DEQ’s process and project requirements ahead of time. This will help define</p>

		<p>DEQ's expected workload early on.</p> <p>No change to the proposed rule recommended.</p>
2	Applicants should be notified if projects require more effort than originally expected.	<p>The proposed rule requires that DEQ notifies applicants if DEQ's workload changes to the degree that a change in tier is warranted.</p> <p>No change to the proposed rule recommended.</p>
2, 5	The proposed rule is not clear whether Nationwide Permits will be charged fees.	<p>Applicants will not be charged fees for Nationwide or Regional General permits with the exception of DEQ review of stormwater management plans likely to fall under Tier 1.</p> <p>Recommended clarification in the proposed rule.</p>
2	The amount of work needed to evaluate a project is not necessarily related to condition of the water body.	<p>When evaluating the effects of impacts on impaired waterways, whether on identified on the 303(d) list or covered by a total maximum daily load, there is significantly greater work to determine how the impacts relate to water quality standards.</p> <p>No change to the proposed rule recommended.</p>
2	Any time that DEQ spends on requests for review of fee determinations and contested case hearings should not be a factor in determining the fee.	<p>If the proposed rule is adopted, this issue will be addressed in program guidance.</p> <p>No change to the proposed rule recommended.</p>
4	Basing fees on program costs provides no incentive to reduce costs.	<p>Additional staff will enable DEQ to develop better guidance materials, provide more 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.</p> <p>No change to the proposed rule recommended.</p>
4	There is no assurance under the proposed rule that the time to require a permit will be lessened.	<p>The 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. In addition, with more staff available for technical assistance, applicants will have clarity on DEQ's requirements for any particular project. This should lessen the time needed on DEQ's end.</p>

		No change to the proposed rule recommended.
4	The proposed rule should incorporate specific timelines for DEQ and provide consequences when they are not met.	<p>While not reflected in the proposed fee schedule, the 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 time, not to exceed one year. DEQ expects that the increased staff in the 401 program will result in shorter timelines in the process.</p> <p>No change to the proposed rule recommended.</p>
5	The proposed rule and fees will interfere with the maintenance of drainage systems operated by local drainage districts.	<p>Work by local drainage districts is unlikely to be affected by this proposed rule because the activities are either exempt from U.S. Army Corps of Engineers permitting or fall under a Corps Nationwide permit category. In the rare instance where a local drainage district activity might require a 401 certification, DEQ anticipates these projects will fall with Tier 1, which has the lowest fees.</p> <p>No change to the proposed rule recommended.</p>
5	The proposed rule should exempt systems maintained and operated by local drainage districts.	<p>See previous response.</p> <p>No change to the proposed rule recommended.</p>
7	Rule changes are needed to cover program costs, additional staff and compliance / enforcement.	<p>The 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 more certainty for applicants. The committee recognized that DEQ was unlikely to receive additional General Fund during the 2011 Legislative session and recommended that fees be increased. The Legislature embraced this approach in the 2009 session by passing House Bill 2185.</p> <p>No change to the proposed rule recommended.</p>
7	All applicants should pay fees to protect to water ecosystems and quality.	<p>This proposed fee schedule reflects recent legislation that eliminated all statutory fee exemptions, thus all applicants for individual 401 certifications will be required to pay a fee.</p> <p>No change to the proposed rule recommended.</p>

<i>List of commenters and reference numbers</i>				
Ref. #	Name	Organization	Address	Date on comments
1	Dennis James	Not provided.	Not provided.	8/2/10
2	H.A. (Hal) Gard	OR Dept. of Transportation	355 Capitol St. NE, Salem, OR 97301	8/26/10
3	Kathy Wall	International Port of Coos Bay	Not provided.	9/10/10
4	Jon Barton	Friends of New & Sustainable Industry	P.O. Box 1345 Coos Bay, OR 97420	10/14/10
5	Rudy Fenk, Chair	Tillamook County Soil & Water Conservation District	6415 Signal Street, Tillamook, OR 97141	10/18/10
6	Ted Freeman, Jr.	Freeman Rock, Inc.	P.O. Box 1218, Brookings, OR 97415	10/20/10
7	Yvonne Maitland	Not provided.	15676 Oceanview Drive, Harbor, OR 97415	10/27/10

State of Oregon
Department of Environmental Quality

Memorandum

Presiding Officer's Report

Date: November 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 – Aug. 30, 2010, 6 p.m.

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

DEQ convened the rulemaking hearing on the proposal referenced above at 6 p.m. and closed it at 6:45 p.m. Two DEQ employees attended the hearing: Sally Puent as presenter and Palmer Mason as presiding officer. No other persons attended, no testimony was given and no written comments were submitted at this hearing.

Hearing two - Sept. 1, 2010, 6 p.m.

Hearing location: Roseburg Central Library, Roseburg, Oregon

DEQ convened the rulemaking hearing on the proposal referenced above at 6 p.m. and closed it at 6:45 p.m. Two DEQ employees attended the hearing: Sally Puent as presenter and Palmer Mason as presiding officer. No other persons attended, no testimony was given and no written comments were submitted at this hearing.

Hearing three - Sept. 8, 2010, 6 p.m.

Hearing location: DEQ headquarters, Portland, Oregon

DEQ convened the rulemaking hearing on the proposal referenced above at 6 p.m. and closed it at 6:45 p.m. Two DEQ employees attended the hearing: Nina DeConcini as presenter and Palmer Mason as presiding officer. No other persons 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. The proposed rulemaking affects fees for Oregon's 401 Water Quality Certification program. (OAR 340-048-0055). This rulemaking does not alter any certification requirements other than the associated fees.

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).

There are no applicable federal requirements. Section 401 of the federal Clean Water Act directly authorizes the Oregon Department of Environmental Quality to certify whether federal licenses and permits that discharge comply with sections 301, 302, 303, 306 and 307 of the Clean Water Act. However, the Clean Water Act does not prescribe what type of fees may be assessed to process applications for certification as this proposed rule would do.

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 so that revenue is sufficient for program costs and to provide additional staff to expedite review and approval and to enhance technical assistance / 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 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 Water Quality Certification is finalized.

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

Not applicable.

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 the Department 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.