

State of Oregon  
Department of Environmental Quality

Memorandum

**Date:** November 22, 2010

**To:** Environmental Quality Commission

**From:** Dick Pedersen, Director

**Subject:** Agenda item E, Rule adoption: 401 Water Quality Certification fee increase,  
OAR Chapter 340, Division 48  
December 9-10, 2010, EQC meeting

**Why this is Important** The 401 certification program protects water quality. Adoption of the proposed fee schedule is necessary to ensure sufficient revenue and staff to support the 401 certification program for removal-fill projects and to implement the program consistent with recent legislative direction.

**DEQ recommendation and EQC motion** DEQ recommends that the 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 projects involve the removal of material from, or placement into, state waters, such as sand and gravel operations, wetland fills for development and navigation dredging. The size and complexity of projects vary, ranging from road to environmental restoration projects. DEQ receives about 100 individual applications annually.

DEQ is proposing a new fee schedule to certify such activities. These fees, as directed by the 2009 Oregon Legislature through House Bill 2185, are 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 with slightly higher fees effective 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 FTEs. DEQ is requesting the 2.5 positions in its 2011-13 biennium policy package. The 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 any applicant, including federal agencies, submitting an application for certification. DEQ would review the application for certification and any other submitted materials. After this review, DEQ would 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 then assign the project 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 further information. 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. The proposed rule also grants an applicant the opportunity to seek 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. A list of advisory committee members is included in attachment B. 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; and
- 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 did not request a fee increase during the 2007-09 biennium and developed a legislative concept and

policy package with new positions for a new fee schedule in the 2009 Oregon legislative session. Work on the legislative concept was necessary to address the issue of statutory exemptions for certain projects.

During the 2009 session, the 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. House Bill 2185 directed DEQ to assess fees 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 Legislature directed DEQ to reconvene the advisory committee for more input before proceeding with rulemaking and directed DEQ to return with a policy package for 2.5 positions in the 2011-13 biennium, after adoption of the revised fee schedule.

DEQ reconvened the advisory committee in March 2010 and presented 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. 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. 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 two separate formal public comment periods and held three public hearings in three locations around the state.

**Public comment** 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 that extended from Oct. 7, 2010, to Oct. 27, 2010. DEQ did not hold public hearings during the second comment period.

The major comments are reflected in the key issues section, below. The final proposed rule, as seen in attachment A, was revised to address several of these questions and concerns. A summary of the public comment and DEQ’s responses are provided in attachment C.

**Key issues** 1. Whether the 401 certification program should receive additional General Fund to support its activities in lieu of increasing fees

DEQ recommends making no changes to the proposed rule. 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 provide more certainty to applicants. Recognizing that DEQ is unlikely to receive additional General Fund during the 2011 Legislative session, they recommended that fees be increased. The 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

DEQ recommends making no changes to the proposed rule. The advisory committee considered this information and 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.”

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.

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

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 water quality management plan. For projects assigned to higher tiers, the criteria could be improved by specifying that coordination with multiple federal, state or local agencies would be required and not optional.

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

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. The Legislature appeared to reach the same conclusion by authorizing House Bill 2185 and directing DEQ to work with the advisory committee to revise fees in a manner that supports additional positions.

**Next steps** If EQC adopts the proposed rule, DEQ will immediately file the rule with the Secretary of State. Prior to the proposed effective date of Feb. 1, 2011, DEQ will update its website and other guidance information so future applicants will be aware of the revised fee schedule. Additionally, staff from the 401 program 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. Summary 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: \_\_\_\_\_

Section: \_\_\_\_\_

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