

Administrative Rules for Recovering the Costs of Engineering and Superintendence Services for Public Sewer Improvement Projects During the Construction Phase

ENB – 4.11

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ENVIRONMENTAL SERVICES
CITY OF PORTLAND

working for clean rivers

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These are administrative rules for the Bureau of Environmental Services (BES). For background information regarding these rules, see Appendix A.

1. Purpose

These administrative rules are intended to provide clear and consistent guidance for the recovery of engineering and superintendence costs during the construction phase incurred by the Bureau of Environmental Services to permit, inspect and accept improvements to the public sewer system. See administrative rules in TRN-9.07 for cost recovery during the design phase.

2. Authority

City Council adopted these rules via Ordinance No. 179274. Ordinance No. 187486 amended these rules and granted the Director of the Bureau of Environmental Services the authority to adopt future amendments to them. Portland City Code Section 3.13.040 further establishes the authority of the Director of the Bureau of Environmental Services to adopt administrative rules.

3. Definitions

- A. **“Facial Challenge”** means a challenge to a requirement that is based on an argument that the requirement cannot be applied fairly or reasonably in any situation. By contrast, an as-applied challenge is one based on an argument that a requirement should not be applied to the challenger’s particular situation because of factors that, in the challenger’s view, distinguish it from similar situations.

4. Guiding Principles

The Bureau of Environmental Services will be guided by the following principles when implementing these administrative rules:

- B. Cost recovery methods will be transparent, well documented and easily explainable to permittees.
- C. Cost recovery methods will be consistent with the best management practices of municipal utilities.
- D. Cost recovery methods will be undertaken in a manner that promotes administrative efficiency, effectively recovers the Bureau’s engineering and superintendence costs, and assesses costs equitably and accurately to permittees.

5. Cost Recovery Practices

- A. **Deposits.**

1. At the end of the design phase, the person desiring the permit must submit a deposit. The deposit will be based on the estimated Bureau costs of engineering and superintendence for the construction phase as determined by the Chief Engineer.
2. Estimated Bureau costs may include, but are not limited to, required staff time, materials and supplies, services, equipment and other assets, administrative costs and overhead.
3. The Bureau will use the same method for calculating the estimated Bureau costs as that used to determine the final costs of engineering and superintendence services.
4. All deposits must be made prior to permit issuance.

B. Accounting Requirements.

1. The Bureau will maintain detailed cost recovery records for each public sewer improvement permit.
2. Records will include staff hours, expended materials and supplies, services, the use of equipment and other Bureau assets, and any other documents that support the final calculation of charges.

C. Final Charges.

1. Prior to the issuance of the certificate of completion, the Chief Engineer will calculate final engineering and superintendence charges based on Bureau records of staff time, materials and supplies, services, equipment and other Bureau assets expended on behalf of the public sewer improvement project, administrative and other costs, and overhead.
2. The Bureau will limit billable overtime hours to overtime work performed at the request of the permittee or in response to events caused solely by or on behalf of the permittee. The permittee will be given reasonable prior notice of instance requiring the use of overtime labor.
3. Materials consumed will be at actual cost including delivery to the City.
4. Services from other City bureaus will be at actual cost determined in accordance with Portland City Code Section 5.48.070.
5. Services provided from non-City sources will be at actual cost to the City.
6. Motorized equipment, trailers, etc., will be actual time at rates for each particular class of equipment established by the Director of the Bureau of Environmental Services.

7. The Chief Engineer will calculate the final charges as set forth above. Any remaining balance, after payment of all costs, will be returned to the permittee. If additional funds are required of the permittee, they must be paid prior to the issuance of the certificate of completion.

6. Administrative Review and Appeal

A person may request reconsideration of a BES decision through administrative review as described in this Section. After the requestor has exhausted all BES administrative review, the requestor may file for an appeal of a decision with the Code Hearings Officer (CHO) per Portland City Code Title 22. A person may only appeal a decision that is subject to administrative review by BES.

- A. **Administrative Review Requests.** A person to whom a notice was addressed will have 20 business days from the date the notice is issued to submit a written request for administrative review of a decision described in the notice. The requestor must provide all information known to the requestor that supports an assertion made in the written request for administrative review. The requestor must provide such information via graphic, written, or recorded communication, or in person at the administrative review meeting. BES will hold an administrative review meeting within 15 business days of receipt of the written request for administrative review unless BES determines in its reasonable discretion that a delay is justified. The requestor may provide detailed information in writing in lieu of attending the administrative review meeting.
- B. **Non-Reviewable Items.** A BES decision made under these rules is subject to administrative review except that BES will not grant administrative review for the following:
 1. A charge or rate adopted by City Council;
 2. BES's determination of the cost to the bureau of staff time, materials, supplies, services, equipment, other assets, administrative costs, overhead, etc., unless the person seeking administrative review alleges a mathematical error in how BES calculated a cost; and
 3. A Facial Challenge—as that term is defined in these rules—to a requirement in these rules or associated City Code, or to any technical standard.
- C. **BES Evaluation.** BES will use authorizing City Code, the provisions of these rules, City records, and the testimony and documentation provided by the requestor to make a final determination on the issue that is the subject of the administrative review.
- D. **Final Determination.** BES will issue to the requestor a written determination within 15 business days of the administrative review meeting unless BES determines that extenuating circumstances justify a reasonably longer period of evaluation. The written final determination will provide information about the process for filing an appeal to the CHO.

APPENDIX A—Background Information

ENB-4.11 contains administrative rules whose substance was originally adopted by City Council via Ordinance No. 179274 in May 2005. The original rules addressed the recovery of Bureau of Environmental Services costs associated with engineering and superintendence services provided during the design *and* construction phases of public sewer improvement projects.

In December 2015, City Council adopted TRN-9.07, new temporary rules governing certain aspects of the City’s public works permitting, via Ordinance No. 187486. At that time, City Council also made corresponding temporary changes to ENB-4.11, deleting design-phase elements of ENB-4.11, since those were addressed in the new TRN-9.07. Further, City Council directed Portland’s public works bureaus to complete permanent public rulemakings for TRN-9.07 and ENB-4.11, to solicit public comment and make versions of those rules permanent. A rulemaking circulated for public comment in Fall 2016 resulted in the current permanent version of ENB-4.11, whose substantive provisions are identical to those adopted by City Council in December 2015.