

Texas Commission on Environmental Quality (TCEQ)

Comments on Proposed Rules Updating Regulations on Water Quality Certification

Docket ID Number EPA-HQ-OW-2019-0405

Background

On August 22, 2019, the United States Environmental Protection Agency (EPA) published a proposed rule in the Federal Register, which updates and clarifies the substantive and procedural requirements for water quality certification under Clean Water Act (CWA) Section 401. The proposed rule would replace and modernize the existing water quality certification regulations at 40 CFR Part 121 and would provide greater clarity and regulatory certainty in the water quality certification process, consistent with the April 2019 Presidential Executive Order "Promoting Energy Infrastructure and Economic Growth." The Executive Order directed the EPA to review and issue new guidance within 60 days and to propose new Section 401 regulations within 120 days. EPA states that within 90 days of issuing its final regulations, 401 implementing agencies should ensure their own regulations are consistent with EPA's in order to provide a consistent national and state approach and to streamline the 401 process in line with the goals of the Executive Order.

The TCEQ offers the following comments on EPA's proposed rule.

1. Timeframe for Certification Analysis and Decision

- A. The TCEQ requests that EPA modify the proposed rule to allow the permitting or licensing agency to submit certification requests to the certifying authority to ensure the timeframe for review is predictable and achievable.**

In order to institute a standard process for review, the States will need to have an even starting line to start the review. If certification requests are submitted by applicants rather than the permitting or licensing agency, then certifying authorities may receive those requests at any point in the project/permit development process. Requiring the applicant to submit the request for certification, while not stipulating a coordinated review process, places certifying authorities in a situation where the request may be received at the early stages of a project before the project is fully developed. Since changes are often made to the project throughout the permitting process which, given the above situation, would result in an incomplete or inaccurate certification review.

For the last 19 years, the TCEQ has used an efficient and effective process where the United States Army Corps of Engineers ("USACE") receives a quick certification decision once they have a final permitting decision. Please see the attached Memorandum of Agreement (MOA) as a model that can be used for effective and efficient 401 certification review. The TCEQ requests that EPA's final rule will accommodate its existing MOA with the USACE and not disrupt a process that has provided regulatory certainty for regulators and applicants alike.

B. The TCEQ recommends that the proposed rule direct permitting and licensing agencies to request certification only after the federal agency provides a final decision document to the 401 certifying authority.

The proposed rule states that the certification must be completed within a reasonable period of time, up to one year, and that the permitting or licensing agency sets the time period. Defaulting to the permitting or licensing agencies to set timeframes less than one year will not lead to efficient processing of 401 certifications. By deferring to the permitting or licensing agency, EPA's proposed rule encourages federal agencies to shorten timeframes to a point where meaningful State reviews could become infeasible. For instance, in the USACE's August 7, 2019 Regulatory Guidance Letter *Timeframes for Clean Water Act Section 401 Water Quality Certifications and Clarification of Waiver Responsibility* sets 60 days as a default, but gives each district engineer discretion to extend the timeframe. Sixty days is not enough time to complete the review steps required by Texas law including: (1) at least 30 days for public notice, (2) technical review of the project considering input from the 30-day public comment period, and (3) coordination with federal agencies.¹ Moreover, a shortened timeframe would not allow enough time to perform an effective 401 review and could lead to increased conditional certifications or denials of certification based on incomplete project details. When the federal permitting or licensing process exceeds one year, which in the TCEQ's experience is quite frequent, the certification process would be cut short if the certifying authority is granted no more than one year to complete the 401 review. In sum, shorter certification review timeframes would not help States' efforts to perform the water quality oversight role that Congress intended in the CWA.

C. The TCEQ recommends instituting a cooperative process where the certification review occurs in parallel with the permitting or licensing process.

The TCEQ successfully implements such a cooperative process in its certification review of 404 permits issued by the USACE. The TCEQ and the USACE have developed a joint and parallel review process that allows for communication and coordination of reviews so that both the 404 permit and 401 certification will incorporate and consider related information from both agencies' perspectives, resulting in a permit and certification that are complete and represent the final project. This process has been institutionalized in the MOA between the TCEQ and the USACE (see attached MOA) which promotes early coordination between 404 permit applicants and the TCEQ. The MOA provides for a quick certification decision (within 10 business days) once the USACE provides their final decision document, and therefore, does not cause delays in 404 permit issuance.

Since initiation of the MOA in August 2000, the TCEQ has reviewed and certified approximately 1,200 projects seeking individual 404 permits, with only three of those being conditional certifications. Due to this coordinated process, the TCEQ has not denied any certifications since the MOA has been in effect, and no conditional certifications have been issued since 2001. Requests by the TCEQ for additional time (up to 10 business days) to provide a certification decision, which the MOA allows, rarely occur. If EPA's proposed rule is finalized, all of the certification process efficiencies and successes gained through this cooperative

¹ See 30 TEX. ADMIN. CODE § 279, *et seq.*

relationship could be jeopardized. Again, the TCEQ requests that EPA harmonize its final rule with the MOA.

2. Authority for Permitting Agency to Veto State Certification Decisions

- A. The TCEQ opposes the proposed veto authority of federal permitting and licensing authorities over state certification conditions and denials, and recommends that these additional powers be removed from the proposed rule.**

While the TCEQ understands the need to address certification decisions that are not based on water quality protection, the TCEQ believes that EPA's proposal to allow federal agencies to override state certification decisions is inconsistent with the CWA, which states that "No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence" (*e.g.*, fails or refuses to act within a reasonable period of time). In its proposed rule, EPA inserts additional requirements that must be met in order for the State's certification decision to be accepted, allowing federal permitting agencies to veto States' decisions. These added requirements expand federal oversight and reduce state authority, substituting federal judgment for the State's. The TCEQ believes this change to the certification rules is inconsistent with the principle of cooperative federalism that is a cornerstone of the CWA. Therefore, the TCEQ recommends the EPA remove Sections 121.6(c), 121.8(a)(1) and 2, and remove "scope of certification" from the definition of "fail and refuse to act".

3. Scope of Section 401 Certification Review

- A. The TCEQ does not support the narrowed interpretation of certification scope to "assuring that discharges...will comply with water quality requirements". The TCEQ recommends EPA ensure the rule allows for consideration of impacts from the project as a whole, and not be limited to direct impacts from point source discharges.**

The proposed interpretation departs from EPA's long-standing interpretation of CWA Section 401, EPA's current 401 regulations in 40 CFR Part 121, as well as state and federal court decisions that confirm state certification authority is to be construed broadly and that state purview is not limited solely to direct effects of the point source discharge but to the activity as a whole and to state water quality requirements that extend beyond the traditional approaches of managing point source discharges.

With its 401 certification reviews, the TCEQ routinely requests that project proponents identify and address potential indirect impacts that could result from proposed projects that involve discharges of dredged or fill material to a water of the United States. Examples of these types of comments include requests for protections from downstream aquatic habitat and water quality degradation resulting from a proposed development, or assurances that an avoided wetland is not adversely affected by a proposed surrounding development that directly impacts other water resources.

While the TCEQ agrees that consideration of effects of a project that are unrelated to water quality are outside the scope of a 401 review, consideration of impacts

that are tangential to the discharge but that can have significant effects on water quality (e.g., alterations of wetland or stream hydrology downstream of a discharge, introduction of pollution sources connected to land use changes that are associated with a discharge) should fall within the purview of a state's certification review.

- B. The TCEQ does not support the proposed definition of “water quality requirements” which effectively removes Congress’ direction in Clean Water Act Section 401 to acknowledge State laws. The TCEQ recommends EPA ensure the proposed rule recognize applicable state water quality requirements in rule and law.**

The *CWA Section 401(d) Limitations and monitoring requirements of certification* requires that “any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 301 or 302 of this title, standard of performance under section 306 of this title, and with any other appropriate requirement of State law set forth in such certification, ...” In its proposed rule, the EPA is essentially removing “any other appropriate requirement of State law” by defining “water quality requirements” as “applicable provisions of sections 301, 302, 303, 306, and 307 of the CWA including EPA-approved state CWA regulatory program provisions.”

This narrowed scope of certification review as proposed conflicts with Texas state law and several of TCEQ’s rules and its water quality management program implementing document. The EPA would be limiting Texas’ authority with these proposed revisions, including:

- (1) TCEQ’s 401 certification rules in Title 30 of Texas Administrative Code (TAC) Chapter 279 state that “(c)ertification of discharges into aquatic ecosystems shall avoid unacceptable adverse impacts, including cumulative and secondary impacts” (§279.11(b)) and require the application of 401 certification review criteria such as prioritizing discharge alternatives that avoid impacts to the aquatic ecosystem, minimizing unavoidable impacts to the greatest extent practicable, and requiring appropriate compensatory mitigation for all unavoidable impacts after avoidance and minimization efforts have been completed (§279.11(c));
- (2) Texas Water Code Section 26.027(d) gives TCEQ broad authority to adopt rules to govern and control the discharge of dredged or fill materials consistent with the purpose of maintaining water quality in the state;
- (3) Series 22 of the TCEQ’s Water Quality Management Program Continuing Planning Process, which is an EPA-approved document, states that a 401 certification involves the determination that a discharge “will comply with applicable provisions of the Federal Clean Water Act and all applicable state laws,” and also acknowledges that 30 TAC Chapter 279 directs the TCEQ’s issuance of state 401 certifications;
- (4) The Texas Surface Water Quality Standards (TSWQS) in 30 TAC Chapter 307, which are also approved by EPA, provide that aquatic habitat must be maintained or mitigated to protect aquatic life uses and point to procedures to protect habitat in CWA Section 404 and state certification rules in 30 TAC Chapter 279 (§307.4(i)). The TSWQS also state that wetland water quality

functions must be maintained and protected for all water in the state (§307.7(b)(5)); and

- (5) The “federal consistency” provision under Section 307 of the Coastal Zone Management Act of 1972 gives States a voice in federal agency decision making for activities that may affect a State’s coastal uses or resources to ensure federal actions are consistent with the enforceable policies of a State’s federally approved coastal management program. The Texas Coastal Management Program (CMP) requires evaluation of factors in addition to the impact of a specific discharge, such as the combined effects of permitted discharges on water quality within a watershed or region (31 TAC §501.21) and the cumulative and secondary adverse effects of such activities (31 TAC §501.23).

4. Oversight Requirements

- A. The TCEQ recommends the EPA remove the new requirement to include a statement with each condition describing whether and to what extent a less stringent condition could satisfy applicable water quality requirements.**

The EPA added new justification requirements to be included with each certification. The three requirements include:

- (1) A statement explaining why the condition is necessary to assure that the discharge from the proposed project will comply with water quality requirements;
- (2) A citation to federal, state, or tribal law that authorizes the condition; and
- (3) A statement of whether and to what extent a less stringent condition could satisfy applicable water quality requirements.

The third requirement is superfluous as the certifying authorities only include conditions that are necessary to assure that any applicant for a Federal license or permit will comply with the enumerated sections of the CWA and any other appropriate requirement of State law. Therefore, we recommend that EPA delete the third requirement.

- B. The TCEQ recommends that EPA *not* play a role in the oversight of initial or modified State certifications.**

EPA states that CWA Section 401 does not provide an express oversight role for EPA with respect to the issuance or modification of individual water quality certifications by certifying authorities, other than the requirement that EPA provide technical assistance and ensure the protection of other States’ waters under CWA §401(a)(2). EPA requested comment on whether to retain existing text in 40 CFR 121.2(b) that gave EPA a unique oversight role in the context of a modification to an existing water quality certification. EPA is proposing to remove this provision from the regulatory text as it is inconsistent with their role for new certifications and the TCEQ agrees with the removal of that oversight role.

- C. The TCEQ recommends the EPA *not* require certifying authorities to submit their CWA Section 401 procedures or regulations to the EPA.**

The EPA solicited comment on whether it would be appropriate or necessary to require certifying authorities to submit their CWA Section 401 procedures and regulations to the EPA for informational purposes. It is not appropriate or necessary for EPA to require certifying authorities to submit to EPA their Section 401 procedures and regulations.