

**Texas Commission on Environmental Quality (TCEQ) Comments on the
Forthcoming Clean Water Act Section 401 Water Quality Certification Guidance and
Rulemaking Efforts as called for under Executive Order 13868 on Energy
Infrastructure and Economic Growth**

Docket ID Number: EPA-HQ-OW-2018-0855

Background

The U.S. Environmental Protection Agency (EPA) is requesting input to identify provisions that require clarification within Clean Water Act (CWA) Section 401 and related federal regulations and guidance, specifically with respect to scope, process, and timeframes. A *Memorandum* authorizing the posting of EPA-HQ-OW-2018-0855 to Regulations.gov was published for public access on April 15, 2019, and was amended on April 26, 2019 to shorten the timeframe for comment from June 10 to May 24, 2019. This action is being taken in response to Executive Order 13868 which stipulates that,

“This review shall include examination of the existing interim guidance entitled, “Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes” (Section 401 Interim Guidance). This review shall also take into account federalism considerations underlying section 401 of the Clean Water Act and shall focus on:

- (i) the need to promote timely Federal-State cooperation and collaboration;
- (ii) the appropriate scope of water quality reviews;
- (iii) types of conditions that may be appropriate to include in a certification;
- (iv) expectations for reasonable review times for various types of certification requests; and
- (v) the nature and scope of information States and authorized tribes may need in order to substantively act on a certification request within a prescribed period of time.”

The EPA held two webinars where questions were posed for discussion. The TCEQ offers the following input on some of the questions and issues identified.

Input on Questions and Identified Issues

1. What are ways to increase coordination/information sharing between states, federal agencies, and project proponents? Are there any states or tribes that currently have a process in place that facilitates early information sharing?

Pre-application consultations can greatly enhance information sharing between states, federal agencies, and project proponents. These early coordination opportunities allow state and federal regulatory agencies to view and discuss project proposals and provide project proponents with constructive comments and feedback prior to permit application submittal.

Since August 2000, the TCEQ and the U.S. Army Corps of Engineers (USACE) Southwestern Division have operated under a memorandum of agreement (MOA) concerning Section 401 certification procedures, which implements a process for interagency coordination and maximizes the effective use of resources at both agencies. The MOA improves certification decision-making by:

- establishing a tiered project classification system where the TCEQ waives certification for projects under a specified impact threshold contingent upon the applicant's commitment to use certain project best management practices, thus reducing the number of projects that are individually reviewed by the TCEQ for certification and making for a more efficient process when the USACE does not need to wait on the state for certification;
- ensuring that the TCEQ participates in the pre-application process to the maximum extent practicable;
- encouraging early and continuous coordination between the TCEQ and the USACE to ensure reviews begin as early as possible and in parallel;
- providing that each agency will provide copies of pertinent information to the other agency in a timely manner (the TCEQ strives to keep the USACE apprised of the progress of the state's review, letting the USACE know when the state has no further need to comment or request information); and
- instituting a process where, once a permit decision has been made, the USACE advances a final permit decision document to the TCEQ for review and gives the TCEQ 10 business days to either issue, deny, or request an extension. If the TCEQ does not provide a certification decision or request an extension within 10 days, the USACE may presume waiver of certification.

2. What factors play a role in slowing down certification decision-making? What factors help speed up certification decision-making?

Federal review requirements, applicants' slow response, or comment considerations can slow overall permit review; however, the TCEQ's certification review process and timeframe does not typically increase the time to issue a CWA Section 404 permit. The TCEQ conducts its Section 401 certification review in parallel with the Section 404 permit review process timeframe conducted by the USACE. The USACE 404 permit review may include additional requirements that may delay the process, such as archaeological reviews or environmental impact statements. The TCEQ's certification process has been streamlined and is not a hindrance to timely decision-making. For example, the USACE and the TCEQ use a joint public notice process to further streamline the process. Under our MOA, the TCEQ has 10 days from the receipt of the final permit decision document to grant, deny, or grant with conditions the Section 401 certification.

3. The TCEQ is concerned about the short timeframe for input on revisions to CWA Section 401 certification guidance and rules. The timeframe for review and extent of input on this very significant issue is insufficient for a meaningful and collaborative consultation in the spirit of cooperative federalism.

The TCEQ recommends the agencies implement a more fulsome and iterative effort to obtain substantial input from the states. This effort could entail the use of a workgroup or task force to develop options, processes, and actions. Given the scope and significance of the proposed actions to revise guidance and rules for actions specifically delegated to the states in statute, we support these and other ways to provide substantial state input.

The TCEQ notes the stated intent of Congress to, "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and

enhancement) of land and water resources, and to consult with the [EPA] Administrator in the exercise of his authority," under the CWA (33 U.S.C. Sec. 1251(b)). The Supreme Court has interpreted Section 401 as a broad delegation of conditioning authority to the states. *See Pub. Util. Dist. No. 1 of Jefferson County v. Wash. Dep't of Ecology*, 511 U.S. 700 (1994). Accordingly, the TCEQ requests that any changes to CWA Section 401 or associated regulations, rules, policies, handbooks, or guidance do not compromise the states' well-established authority to manage and protect their water resources.

4. The TCEQ is concerned that the EPA and the USACE will implement an unreasonable and unattainable timeframe for CWA Section 401 certification reviews.

The TCEQ requests the agencies to implement a requirement that the timeframe for review will be contingent upon the state's receipt of a final permit decision document from the USACE. States need to know what the near-final permit will be, yet the USACE may take years to complete their work. The states' timeframe for review should not be abbreviated due to extended work needed by the USACE or other federal agencies such as U.S. Fish and Wildlife Service, the Federal Energy Regulatory Commission, and others. Therefore, the clock for certification should start when the USACE provides a final permit decision document to the states.

In addition, the TCEQ requests the agencies to recognize and defer to existing MOAs between states and their local USACE districts, and to ensure that any state laws and regulations relating to the processing of requests for water quality certification - including those that require certain information to be submitted with applications for water quality certification - are not subverted by any federal rules, regulations, policies, guidance, etc.

5. The TCEQ is concerned that the EPA and USACE will reduce the scope of state authority to review CWA Section 404 permits for their impact on water quality

The TCEQ observes that CWA Section 401 establishes scope of state authority:

- Section 401(a)(1) - "a certification from the State ... that any such discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of this title."
- Section 401(b) - "Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements."
- Section 401(d) - "Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 031 or 301 of this title, standard of performance under section 306 of this title, or prohibition, effluent standard, or pretreatment standard under section 307 of this title, and with any other appropriate requirement of State law set forth in such certification..."

With these provisions in mind, the TCEQ requests the EPA to:

- ensure that any regulation, policy, or guidance that defines “other appropriate requirements of state law” is developed through close and coordinated consultation with states and adheres to the principles expressed in applicable state and federal case law; and
- recognize the consistent interpretations of state and federal courts, including the U.S. Supreme Court, that state authority to review and act upon requests for water quality certification under CWA Section 401 is to be construed broadly and that the scope of states’ certification authority extends to the proposed activity as a whole.

6. The TCEQ recommends that the agencies consider implementing the following strategies to enhance coordination, information sharing, and efficiencies in applications for CWA Section 404 permits:

- Institute a pre-consultation process involving applicants, states, and federal licensing agencies before the commencement of any prescribed timelines required by a CWA Section 401 review. Such a process should be used to define the parameters of a proposed project and its potential effects on water quality, the scope of state review, points of contact, information required to render an application complete and ready for state review (i.e., the commencement of any prescribed timelines for state review), and expectations for supplementing information related to a proposed project;
- To avoid duplicative analysis, ensure that states have access to application information relating to a proposed project’s review under other federal statutes (e.g., the National Environmental Protection Act, Endangered Species Act, etc.) to use, when appropriate, in their water quality certification review under CWA Section 401; and
- Ensure that any state laws and regulations relating to the processing of requests for water quality certification - including those that require certain information to be submitted with applications for water quality certification - are incorporated into, and accorded deference by, any federal rules, regulations, policies, guidance, etc.