

The Texas Natural Resource Conservation Commission (agency, commission, or TNRCC) adopts amendments to Chapter 279, Water Quality Certification, §§279.1 - 279.12; the repeal of §279.13; and new §279.13; to revise procedures for waivers of certification, amend enforcement provisions, and modify existing language for consistency with other agency rules. Sections 279.2, 279.3, 279.7, 279.8, and 279.11 are adopted *with changes* to the proposed text as published in the May 4, 2001 issue of the *Texas Register* (26 TexReg 3365). Sections 279.1, 279.4 - 279.6, 279.9, 279.10, 279.12; the repeal of §279.13; and new §279.13 are adopted *without changes* to the proposed text and will not be republished.

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

Title 33 United States Code (USC), §1341, commonly known as the federal Clean Water Act (CWA), §401, requires all applicants for a federal license or permit to conduct any activity that may result in a discharge into navigable waters, including the construction or operation of facilities, to request a certification from the state that the discharge will comply with state water quality standards. The commission rules in Chapter 279 contain the procedures for public notice and review of any such activity proposed to be authorized by federal permit, including applications for dredge and fill permits issued by the U.S. Army Corps of Engineers (Corps). Under Chapter 279, the commission reviews the proposed activity for compliance with 30 TAC Chapter 307, Water Quality Standards, and Texas Water Code (TWC), §§26.011, 26.023, 26.027, 26.121, and 26.127, which direct the commission to act to protect the quality of water in the state. These adopted amendments will provide for the executive director either to review the proposed activity or to waive certification.

These adopted amendments will also specifically allow the executive director to waive certification when the applicant agrees to include specific water quality-related conditions in the permit. The adopted amendments will also add detail concerning the time and procedures for the executive director's review of permit applications. These adopted amendments will expand the category of persons who may request a public meeting, allow the executive director to waive public notice in an emergency or when certification is waived, more clearly describe the type of public meetings that may be held on certification decisions in response to public comments received, and change notice requirements for public meetings. If the executive director grants, grants conditionally, or denies certification, these amendments will specify the contents of the statement of this decision. These adopted amendments will specify the persons to receive notice of a decision, and, if the activity is certified, a statement of reasonable assurance that the proposed activity will not violate water quality standards. Finally, these adopted amendments will require applicants to comply with agreements and permit conditions resulting from the certification procedures in these rules, and provide for enforcement for noncompliance.

The commission adopts these changes in order to partially restructure the certification process, making it less cumbersome and more flexible. Some of these amendments are the outgrowth of recent discussions and agreements with the Corps aimed at streamlining certification procedures on 404 Permits. Some of these amendments reflect the commission and the Corps conclusions, upon review of past practices, that the system should be revised to maximize interagency cooperation and minimize possible duplication of effort.

SECTION BY SECTION DISCUSSION

Adopted §279.1, General, will eliminate unnecessary recitation of language from the federal CWA.

Adopted with changes to the proposal, §279.2, Purpose and Policy, subsections (a) and (b) will make grammatical corrections and change references from “TNRCC” to “agency,” from “Clean Water Act” to “CWA,” and from “Commission” to “commission,” for consistency with style conventions of the *Texas Register* and to reflect current definitions in 30 TAC Chapter 3. Subsections (b)(1) - (3) will make grammatical corrections. Subsection (b)(4) will clarify that the executive director may waive certification upon agreement of an applicant to include and comply with water quality-related conditions in the applicant’s federal permit. Section 279.2(c) will delete the provision that a commissioner may request that the commission review a certification application prior to the executive director’s action on it.

Adopted with changes to the proposal, §279.3, Definitions, will clarify and update the following definitions to clarify acronyms, reflect accurate citations to law and regulations for consistency with definitions found elsewhere, and to make grammatical corrections: 401 Certification, 404 Permit, activity, applicant, aquatic ecosystem, Clean Water Act, emergency, general permit, individual permit, licensing or permitting agency, nationwide permit, National Pollutant Discharge Elimination System (NPDES) permit, regional administrator, and water dependent activity. The definition of general permit will be changed to clarify that they may be issued on a nationwide or regional basis. The definition of pollutant will be changed to conform to TWC, §26.001. The definitions of affected person and person will be deleted because these terms are being eliminated from the adopted rules. The definition of water quality limited segment will be deleted because this term has never been used in the

rules. The definitions of commission and executive director will be deleted because these terms are already defined in Chapter 3. Definitions have been renumbered to reflect these changes.

Adopted §279.4, Application for Certification, subsections (a) - (e) will clarify the use of acronyms, to accurately refer to water rather than waters in the state, and make grammatical corrections.

Subsection(b)(3) will state that the executive director may review the final permit decision document before acting on a request for certification.

Adopted §279.5, Notice of Application, subsection (a) will be amended to make a grammatical correction, change “permit agency” to “permitting agency” to be consistent throughout the rules, and eliminate unnecessary references and redundant language. Section 279.5(b) will be amended to make a grammatical correction and to clarify an ambiguous pronoun. Subsection (b)(8) will be amended to use a common acronym (EPA) defined in Chapter 3. Subsection (b)(11) will be deleted because interested persons must respond to the notice, and a list of interested persons making comments on the certification will not be available until after the notice required by this section is mailed. Subsection (c)(3) will be amended to use a current definition (federal CWA) in Chapter 3. Subsection (c)(4) will be amended to use a current definition (agency instead of commission) in Chapter 3 and to specify an agency mail code. Subsection (c)(6) will be amended for consistency with current commission rules and terminology on public meetings and to reflect that any person may request a public meeting.

Throughout this section, the term “public hearing” has been changed to “public meeting” to clarify that the proceeding contemplated in this chapter is a notice and comment meeting rather than an evidentiary contested case hearing. Section 279.5(d) will be added to state that the executive director may waive

the notice requirements of this subsection when a permit review will be waived. Old §279.5(d) (renumbered §279.5(e)) will be amended to bring the section into consistency with commission rules and terminology on public meetings, to make the references to later sections of Chapter 279 conform to their new titles amended in this rulemaking, to reflect current definitions (agency instead of commission) in Chapter 3, and to make grammatical corrections.

Adopted §279.6, Public Comments, will be amended by removing the requirement for the executive director to consider comments when certification is waived or when public notice has been waived in an emergency.

Adopted with changes to the proposal, the title to §279.7, Public Meetings, will be amended to make the distinction between a hearing and a public meeting. Section 279.7(a) will be amended to provide consistency with commission rules and terminology on public meetings, to clarify that the executive director may conduct a public meeting on any application for 401 Certification based on public comments received during the public comment period or at a request from a commissioner, and to remove the reference to affected person. Subsection (a)(1) through (4) will be deleted to make requests for a public meeting easier and not restricted only to affected persons. Section 279.7(b) will be amended to clarify that the executive director shall notify the appropriate agencies that the executive director will make a certification decision after a public meeting and to provide consistency with commission rules and terminology on public meetings. Section 279.7(c) will be amended to provide consistency with commission rules and terminology on public meetings and to make a grammatical

correction. Section 279.7(d) will be amended to change two references from “hearings” to “meetings” in order to be consistent throughout the section.

The title to §279.8, Notice of Public Meeting, will be amended to provide consistency with commission rules and terminology on public meetings. Section 279.8(a) was proposed to be amended to change the number of days for the executive director to notify the applicant of a public meeting from 30 days to ten days to streamline and facilitate the certification process; however, the time period was left at 30 days as a result of comments that ten days was not enough time. Section 279.8(a) and (b) will be amended to provide consistency with commission rules and terminology on public meetings, and to make a grammatical correction. Subsection (c)(2) will be amended to clarify that certifications deal with the discharge of pollutants, not the disposal of waste. Subsection (c)(3) will be amended to make its wording parallel with subsection (c)(2), to clarify that certifications deal with present or future activities, not only with present facilities, and to clarify that certifications deal with the discharge of pollutants, not the disposal of waste. Subsection (c)(8) will be amended to use a current acronym (EPA) defined in Chapter 3. Subsection (c)(11) will be amended to clarify that any person who commented during the public comment period will be notified of a public meeting. Section 279.8(d) will be amended to provide consistency with commission rules and terminology on public meetings, and make grammatical corrections. The proposal to reduce the notice time for public meetings from 30 days to ten days, consistent with the proposed amendment to §279.8(c), was changed back to 30 days as a result of comments that ten days was not enough time.

Adopted §279.9, Executive Director Review of Water Quality Certification Application, will be amended to give the executive director wider discretion to waive certification and certification review as allowed by the federal CWA. Section 279.9(a) will be amended to provide that the executive director shall either conduct a review or waive certification. Section 279.9(b) will be amended to require that if the executive director conducts a review, after the review and any public meeting, the executive director shall make a determination on the proposed activity. Subsection (b)(2) will be amended to clarify which sections of the federal CWA that state certifications cover.

Adopted §279.10, Final Agency Action on National Pollutant Discharge Elimination System (NPDES) Permits, will be amended to enumerate the actions the executive director may take on a certification consistent with procedures identified in the NPDES Memorandum of Agreement (MOA). The title to §279.10 will be amended to use a current definition (agency instead of commission) in Chapter 3 and to spell out the acronym for NPDES. Section 279.10(a) will be amended to use a common acronym (EPA) defined in Chapter 3, to enumerate the actions the executive director may take on a certification, and to make a grammatical correction. Subsection (a)(2) will be amended to make a grammatical correction and to use a common acronym (CWA) defined in Chapter 3. Subsection (a)(3) will be amended to use a current definition (agency instead of commission) from Chapter 3, to use a common acronym (CWA) defined in Chapter 3, and to eliminate an unnecessary recitation of language from the federal CWA. Subsection (a)(4) will be amended to eliminate an unnecessary recitation of language from the federal CWA.

Adopted with changes to the proposal, the title to §279.11, Final Agency Action on Department of the Army Permits, will be amended to use a current definition, agency instead of commission, from Chapter 3. Section 279.11(a) will be amended to give the executive director the discretion whether to review or waive certification of any particular permit application. Section 279.11(c) will be amended to clarify the procedures to be followed if the executive director reviews a permit application. Subsection (c)(1) will be amended to make grammatical corrections and to reduce the burden on the applicant of demonstrating no practicable alternative. Subsection (c)(2) and (3) will be amended to make grammatical corrections. Subsection (c)(4) will be amended to make grammatical corrections to more clearly express that if the executive director determines the proposed compensatory mitigation will not accomplish the purpose and policy of this chapter, then certification may be denied, even if alternatives are not available. Section 279.11(d) will be amended to clarify what actions the executive director may take, who shall receive notice of the executive director's decision, and to make a grammatical correction. Old subsection (d)(2) and (3) will be amended for reorganization. Renumbered subsection (d)(2) will be amended to clarify the contents of the statement of the executive director's decision, including a description of the materials and information reviewed from old subsection (d)(2), and to make a grammatical correction. Old subsection (d)(3)(A) will be deleted, with needed concepts incorporated into amendments to the old subsection (d)(3). Renumbered subsection (d)(2)(A) will be amended to specify the contents of the statement of the executive director's decision if the activity is certified. Renumbered subsection (d)(2)(A)(i) will be amended to make grammatical corrections clarifying that the executive director must include a statement of reasonable assurance that the activity, if conducted in accordance with the terms of the proposed permit, will not violate the criteria enumerated in §279.9. Renumbered subsection (d)(2)(A)(ii) will be amended to make a grammatical

correction. Renumbered subsection (d)(2)(B) will be amended to clarify that if a certification is denied, the executive director's statement must include an explanation of how the proposed activity will not satisfy one or more of the criteria enumerated in §279.9.

Adopted §279.12, Other State Certification, subsection (a)(1) will be amended to make grammatical corrections and to be consistent with state legal terminology. Section 279.12(a)(2) will be amended to make a grammatical correction, to delete subsection (a)(2)(D) - (F), because a list of appropriate or interested persons making comments on the certification will not be maintained until after the notice required by this section is mailed, and to make appropriate grammatical and punctuation corrections to subsection (a)(2)(B) and (C). Subsection (a)(3) will be amended to specify that the comments considered should be received in accordance with §279.5. Subsection (a)(4) will be amended to clarify that the executive director shall maintain a list of all applicable nationwide permits and the executive director's certification action on each permit. Subsection (b)(1) will be amended to make grammatical corrections and to be consistent with state legal terminology. Subsection (b)(2) will be amended to make a grammatical correction, to delete subsection (b)(2)(D) - (F) because a list of appropriate or interested persons making comments on the certification will not be maintained until after the notice required by this section is mailed, and to make appropriate grammatical and punctuation corrections to subsection (b)(2)(B) and (C). Subsection (b)(3) will be amended to specify that the comments considered should be received in accordance with §279.5. Subsection (b)(4) will be amended to clarify that the executive director shall maintain a list of all applicable general permits and the executive director's certification action on each permit. Old subsection (c)(2) will be deleted, and its language moved to old subsection (c)(1) that will be changed to an introductory paragraph for subsection (c).

The new introductory paragraph now specifies that the executive director shall send notice to the specified persons and agencies of the decision to deny, grant, grant conditionally, or waive certification, and has a grammatical correction. All remaining subheadings in subsection (c) are proposed to be renumbered accordingly. Old subsection (c)(1)(B) (newly renumbered subsection (c)(2)) will be amended to require that a statement of the basis for the executive director's decision, including a description of the materials and information examined, shall be included in the certification notice; this requirement was formerly included in old subsection (c)(1)(C). New subsection (c)(2)(A) will be added to specify what the executive director's statement must include if the activity is certified. Old subsection (c)(1)(B)(i) (newly renumbered subsection (c)(2)(A)(i)) will be amended to state that the executive director's statement must include reasonable assurance that the activity, if conducted in accordance with the terms of the proposed permit, will not violate criteria enumerated in §279.9; this requirement had been included in old subsection (c)(2)(C)(ii)(I). Newly renumbered subsection (c)(2)(A)(ii) will be amended to require that the executive director's statement must include any monitoring and reporting requirements necessary to assure compliance with criteria enumerated in §279.9; this requirement had been included in old subsection (c)(2)(C)(ii)(II). New subsection (c)(2)(B) will be added to state that if certification is denied, the executive director's statement must include an explanation of why the proposed activity will not satisfy one or more of the criteria enumerated in §279.9; this requirement had been included in old subsection (c)(2)(C)(iii). Old subsection (c)(2)(C) will be deleted because its provisions have been fully incorporated into newly renumbered subsection (c)(2). Old subsection (c)(2) will be deleted because its provisions have been fully incorporated into the introductory paragraph of §279.12(c).

The commission adopts the repeal of current §279.13, Enforcement. New §279.13, Enforcement, will be adopted to eliminate outdated references, and to clarify the agency's existing enforcement authority in the 401 Certification program.

#### FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the act. The intent of the rules and rule amendments is to protect the environment or reduce risks to human health from environmental exposure. The rule amendments will not have an adverse material impact because the amendments only revise procedures for waivers of certification, amend enforcement provisions, and clarify existing language for consistency with other agency rules, and the amendments do not change the type or number of activities subject to review under the existing rules. Therefore, the rule amendments do not meet the definition of a "major environmental rule." Furthermore, the rulemaking action does not meet any of the four applicability requirements listed in §2001.0225(a). The rules and rule amendments do not exceed a standard set by federal or state law; the rules as a whole do exceed the express requirements of state law, but the rules are specifically required by the federal CWA, §401, for any state agency that chooses to certify permits under §401; the rules and rule amendments do not exceed a requirement of a federal delegation agreement or a contract between the state and an agency or representative of the federal government to implement a state and federal program; and the rules and rule amendments are not adopted solely under the general powers of the agency, but rather under TWC,

§§26.011, 26.023, 26.027, 26.121, and 26.127. The commission invited, but did not receive, public comment on the draft regulatory impact analysis determination.

#### TAKINGS IMPACT ASSESSMENT

The commission evaluated these amendments and performed an assessment in accordance with Texas Government Code, Chapter 2007. The following is a summary of that assessment. The specific purpose of the amendments is to more effectively implement the MOA with the Corps regarding federal CWA, §401 provisions. The purpose of the MOA is to implement a process for interagency cooperation and agency review of individual 404 Permit applications under the CWA, §401. The amendments would substantially advance this stated purpose by revising procedures for waivers of certification, amending enforcement provisions, and clarifying existing language for consistency with other commission rules.

Promulgation and enforcement of these amendments would be neither a statutory nor a constitutional taking of private real property. Specifically, these amendments do not affect a landowner's rights in private real property because this rulemaking action does not constitutionally burden, restrict, nor limit the owner's right to property, nor does it reduce a property's value by 25% or more beyond that which would otherwise exist in the absence of the amendments. Instead, these amendments merely clarify existing language, revise procedures, and amend enforcement provisions of rules that have been in place for 13 years; rules that require an applicant for a federal wetlands discharge permit to demonstrate to the state that the discharge will not pollute water in the state. Consequently, these amendments do not meet the definition of a taking under Texas Government Code, §2007.002(5). This rulemaking

action is reasonably taken to fulfill the requirements of state law to control the quality of the state's water and will not constitute a taking under Texas Government Code, Chapter 2007.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed this rulemaking action and found that the rules are identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program (CMP), or will affect an action or authorization identified in §505.11(a)(6), and therefore, required that applicable goals and policies of the CMP be considered during the rulemaking process. The commission determined that this rulemaking action is consistent with the applicable CMP goals and policies.

Of the ten CMP goals contained in 31 TAC §501.12, relating to Goals, five are applicable to these rules which include: 1) to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of the coastal natural resource areas (CNRAs); 2) to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone; 3) to minimize loss of human life and property due to the impairment and loss of protective features of CNRAs; 5) to balance the benefits from economic development and multiple human uses of the coastal zone; the benefits from protecting, preserving, restoring, and enhancing CRNAs; the benefits from minimizing loss of human life and property; and the benefits from public access to and enjoyment of the coastal zone; and 7) to make agency and local government decision-making affecting CNRAs efficient by identifying and addressing duplication and conflicts among local, state, and federal regulatory and other programs for the management of CNRAs. Of the 18 policies contained in

§501.14, relating to Policies for Specific Activities and Coastal Natural Resource Areas, only one, j) Dredging and Dredged Material Disposal and Placement, is applicable to these rules.

The commission reviewed these rules for consistency with the goals and policies of the CMP mentioned previously, and determined that the rules are consistent with the intent of the five applicable goals and the one applicable policy, and will not result in any significant adverse effects to CNRAs.

Promulgation and enforcement of these rules will not violate any standards identified in the applicable CMP goals and policies because these rules implement provisions under TWC, §§26.011, 26.023, 26.027, 26.121, and 26.127, which direct the commission to act to protect the quality of water in the state. These rules amend procedures for public notice and the review of applications for water quality certification, which is consistent with the applicable goals and policies of the CMP. The commission requested public comments regarding the consistency of the proposed rules with the CMP. One written comment letter was received from Michael Behrens, Assistant Executive Director of Engineering Operations, Texas Department of Transportation (TxDOT), and the comments are addressed in the RESPONSE TO COMMENTS section of the preamble.

#### PUBLIC MEETING AND COMMENTERS

A public meeting was held in Austin on June 5, 2001; however, no person presented oral comments. Written comments were received from Michael Behrens, Assistant Executive Director of Engineering Operations, TxDOT; Charles Heald, Executive Director, TxDOT; Steve Kilpatrick of Dow Chemical Company (DOW); and Sara Burgin, Brown McCarroll, L.L.P. on behalf of Reliant Energy, Inc., American Electric Power, and TXU Business Services (the Utilities).

## RESPONSE TO COMMENTS

DOW and TxDOT generally supported the streamlining efforts of the commission, but also suggested revisions. The Utilities expressed neither support nor opposition to the rulemaking action, but suggested revisions.

### *Streamlining General Comments*

DOW, TxDOT, and the Utilities supported the flexibility and streamlining of the tiered approach to 401 Certifications currently being implemented under a MOA with the Corps. All three commenters indicated a concern that the Best Management Practices (BMPs) provided in the Tier I checklist were too limited and reduced the flexibility of the tiered approach. The commenters stated that not all categories of BMPs were appropriate for all projects. TxDOT suggested that individual reviews for special circumstances would defeat the purpose of the streamlining process. DOW and the Utilities suggested that the agency establish a *de minimus* category for small quantity impacts that receive an automatic certification.

**The commission appreciates the support of the tiered approach to 401 Certifications. The details of the tiered approach are not specifically proposed as part of this rule revision in part to allow for the flexibility the commenters are requesting. The commission recognizes the limits in trying to develop a “one size fits all” list of BMPs for any potential application. The approach of the commission has been to provide a list of common BMPs for each of three categories. These categories are erosion control, sedimentation control, and post-construction total suspended sediment (TSS) control. The election by the applicant to incorporate BMPs from the checklist into**

**their permit application is optional. The commission also allows for individual review of alternative BMPs for equivalent effectiveness with the listed BMPs. If the executive director determines an alternative BMP provides equivalent effectiveness, the agency will notify the Corps and allow for the use of the Tier I processing with the alternative BMP. The commission has committed to periodically review alternative BMPs for inclusion in the checklist. To date the commission has not received any request for inclusion of alternative BMPs.**

**The commission also recognizes that there may be limited circumstances in which all three categories of BMPs are not appropriate. Under these circumstances the applicant always has the flexibility to request an individual certification. Certification using the tiered approach is not required, but is the applicant's option. The commission will continue to provide reviews and certification decisions within the established Corps timeframes for individual permits. The commission has previously certified the Corps' nationwide permits which allow small, *de minimus* projects to proceed without additional review by the commission. It is the commission's intent to continue requiring appropriate BMPs to protect the water quality of the state for individual permits.**

#### *CMP Applicability*

TxDOT responded to the request for comments regarding the consistency of this rulemaking proposal with the CMP, but did not have any comments or suggestions to offer.

*Section 279.3. Definitions*

DOW and the Utilities requested the term “affected person” not be deleted.

**The commission disagrees because as discussed in response to comments on §279.5(c)(6), the term “affected person” is no longer used in these rules.**

TxDOT suggested that the terms “dredged material” or “spoil” be defined separately and stated that under certain circumstances dredged material can be used beneficially for uses including habitat restoration and beach nourishment.

**The commission agrees that like many items included in the definition of pollutant, dredged material can be used beneficially. Pollutant is defined in the TWC, §26.001, and includes the term dredged spoil. The commission retains this definition in these rules.**

The Utilities expressed confusion about the proposed definitions of general permit and nationwide permit. The proposed language stated that general permits are issued on a regional basis, with the definition of nationwide permit indicating they are a type of general permit.

**The commission has modified the definition of general permit to clarify that a general permit may be issued on a nationwide or regional basis.**

*Section 279.4(b)(3)*

DOW and the Utilities requested that the language concerning the executive director acting on the request for certification not be changed from preliminary to final permit decision document. They expressed concern that waiting for a final permit decision document would require additional time to complete the permitting process. DOW stated the agency must be conscious of the need to prevent delays in certification since some projects have severe economic time penalties. The Utilities requested an explanation stating why TNRCC should not begin its certification review when the preliminary decision is received.

**The commission agrees that it should be involved in the certification process early. The agency has committed to regular pre-application meetings, providing agency comments during the public notice comment period and other efforts to provide a clear understanding of the agency's expectations for 401 Certifications. This section of the rules is not intended to limit the early participation of the agency, but rather to allow the agency to base its certification decision on the final federal permit decision document. Basing the agency's final certification decision on the final federal permit decision document will prevent inefficiencies from having to revise or modify certifications as the federal permit changes. For example, the agency previously attempted to base the certification decision on the project description contained in the joint public notice issued by the Corps. The MOA provides that for permits that are individually reviewed, the certification will be based on a final decision document from the Corps. This rule change will codify that approach, but will in no way limit the commission's continued support of early involvement by both the applicant and the agency in the certification review process.**

*Section 279.5(c)(6)*

Dow and the Utilities commented that only persons legally affected by water quality certification should be entitled to request a public meeting on a 401 Certification.

**The commission disagrees. Since the passage of House Bill 801, 76th Legislature, 1999, the commission has standardized its procedures for acting on requests for public meetings and for contested case hearings. For all other permits and authorizations, the determination of an affected person can only be made by the commission at a regularly scheduled agenda approximately 44 days after a request is received, with at least five weeks' public notice with written responses by the executive director, Office of Public Interest Counsel, and the applicant, and an opportunity to reply by the requestor. The only action the commission may take after determining a requestor is an affected person is referral to the State Office of Administrative Hearings (SOAH) for a contested case hearing. This process is not conducive to streamlining or facilitating the certification process. In contrast, a public meeting for all other permits and authorizations can be requested by any person. Section 279.7 of these rules establishes the opportunity for a public meeting as part of a certification review. These rules address the state certification of a federal permit, not a state permit, therefore, there is no opportunity for referral to SOAH. If the executive director determines that there is a substantial or significant degree of public interest in an application, the executive director's staff arranges for a public meeting. The commission is not prepared to administer two standards for requesting a public meeting and therefore has made no change to the proposed language.**

*Section 279.8(a)*

DOW stated ten days is not sufficient time in some cases to prepare for a public meeting or to have all the appropriate parties present.

**The commission had proposed this change to minimize potential time delays. As DOW stated in comments regarding §279.4(b)(3), delays can place additional financial burden on the applicant in some situations. However, the commission is withdrawing this proposed change and the current requirement for a 30-day notice will remain in the rules.**

*Section 279.13*

The Utilities requested that the commission replace the proposed language with the language of the current §279.13 relating to enforcement. They requested that if the commission does not make that change, that an explanation be provided of the legal authority to initiate enforcement in accordance with the proposed language.

**Authority for a state to enforce the terms of a federal permit exists in both federal and state law. TWC, §26.027(d) sets out the state's role in regulating the placement of dredged or fill material into or adjacent to water in the state. A state permit will not be required; however, the commission's authority to control water quality is not otherwise affected. Such authority includes the adoption of rules and regulations to govern and control the discharge of dredged or fill materials. These amendments to Chapter 279 are adopted under this express legislative authority. Additionally, the commission has the duty and the powers necessary or convenient to control the**

**quality of water in the state under TWC, §26.011. Unauthorized discharges from a point source in violation of a commission rule are prohibited by TWC, §26.121(e), and from nonpoint sources by TWC, §26.121(c). The commission has jurisdiction over water quality in the state, including enforcement of water quality rules, under TWC, §5.013(a)(3), and has the authority to adopt rules necessary to carry out its powers and duties, including these rules, under TWC, §5.103(a). Authority to enforce commission rules is set out in TWC, §7.002. Enforcement of the state rules will occur under state law, independent of the federal permit or federal action.**

#### STATUTORY AUTHORITY

The amendments and new section are adopted under TWC, §5.102, which grants the commission the authority to carry out its powers under the TWC, §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; §5.105, which requires the commission to establish and approve all general policy of the commission by rule; and §5.120, which requires the commission to administer the law for the maximum conservation and protection of the environment and natural resources of the state. Chapter 279 governs the issuance of state water quality certifications under the federal CWA, §401, codified at 33 USC, §1341.

## **Chapter 279: Water Quality Certification**

### **§§279.1 - 279.13**

#### **§279.1. General.**

This chapter governs the issuance by the Texas Natural Resource Conservation Commission of state certifications as authorized by 33 United States Code, §1341, commonly known as the federal Clean Water Act (CWA), §401.

#### **§279.2. Purpose and Policy.**

(a) This chapter establishes procedures and criteria for applying for, processing, and reviewing state certifications under CWA, §401, for activities under the jurisdiction of the agency. It is the purpose of this chapter, consistent with the Texas Water Code and the federal CWA, to maintain the chemical, physical, and biological integrity of the state's waters.

(b) It is the policy of the commission to achieve no overall net loss of the existing wetlands resource base with respect to wetlands functions and values in the State of Texas. All activities under the jurisdiction of the agency that require a federal license or permit and that may result in any discharge to waters of the United States are subject to review for consistency with the federal CWA and the Texas Surface Water Quality Standards. After such a review, the agency shall:

(1) grant certification for any activity that will not result in any discharge in violation of water quality standards or any other appropriate requirements as set forth in §279.9 of this title (relating to Executive Director Review of Water Quality Certification Application);

(2) grant conditional certification stating that the conditions necessary to prevent any activity that will result in a discharge from violating water quality standards or any other appropriate requirements as set forth in §279.9 of this title;

(3) deny certification for any activity that will result in a discharge in violation of water quality standards or any other appropriate requirements as set forth in §279.9 of this title; or

(4) waive certification. The agency may condition the waiver of certification upon the agreement of an applicant to include and comply with specific water quality-related conditions in the applicant's federal permit.

(c) The executive director is delegated the responsibility for performing all certification functions under this chapter on behalf of the commission, except that at the request of the executive director, the commission may review the question of certification prior to the executive director's determination on certification.

**§279.3. Definitions.**

In addition to the terms defined in §3.2 of this title (relating to Definitions), the following words and terms, when used in this chapter, shall have the following meanings.

(1) **401 Certification** - A certification issued by the state as authorized under the federal CWA, §401.

(2) **402 Permit** - See NPDES permit.

(3) **404 Permit** - A Department of the Army permit issued under the authority of the federal CWA, §404, which authorizes the discharge of dredged or fill material into waters of the United States.

(4) **Activity** - The construction, operation, maintenance, or modification of facilities, structures, channels, or equipment that may result in any discharge into or adjacent to waters in the state or which may otherwise affect water quality.

(5) **Applicant** - Any person who applies for any license or permit granted by an agency of the federal government to conduct any activity that may result in any discharge into or adjacent to water in the state.

(6) **Aquatic Ecosystem** - Water in the state, including wetlands, that serve as habitat for interrelated and interacting communities and populations of plants and animals.

(7) **Clean Water Act** - 33 United States Code, §§1251 - 1387, also known as the federal Clean Water Act (CWA), §§101 - 607.

(8) **Department of the Army Permits** - All permits and licenses issued by the Department of the Army Corps of Engineers including 404 Permits and permits issued under the authority of the Rivers and Harbors Act of 1899, §10.

(9) **Discharge** - Deposit, conduct, drain, emit, throw, run, allow to seep, or otherwise release or dispose of any pollutant, or to allow, permit, or suffer any of these acts or omissions.

(10) **District engineer** - The Department of the Army representative responsible for administering, processing, and enforcing federal laws and regulations relating to the U.S. Army Corps of Engineers, including permitting.

(11) **Emergency** - A condition either meeting the requirements of federal law as constituting an emergency or applicable provisions of §305.21 of this title (relating to Emergency Orders and Temporary Orders Authorized).

**(12) General permit** - A permit issued by a federal licensing or permitting agency on a nationwide or regional basis.

**(13) Individual permit** - A permit that is issued by a federal licensing or permitting agency following an evaluation of any activity including, but not limited to, the construction or operation of a facility that may result in any discharge into waters of the United States.

**(14) Licensing or permitting agency** - Any agency of the federal government to which application is made for any license or permit to conduct an activity that may result in any discharge into or adjacent to water in the state.

**(15) Nationwide permit** - A type of general permit authorized by a federal licensing or permitting agency that applies throughout the nation.

**(16) National Pollutant Discharge Elimination System (NPDES) permit** - A written document issued by the regional administrator of the EPA under the federal CWA, §402, which authorizes the discharge of any pollutant, or combination of pollutants, into navigable waters of the United States.

**(17) Pollutant** - Dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, filter backwash, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and

agricultural waste discharged into any water in the state. The term “pollutant” does not include tail water or runoff water from irrigation or rainwater runoff from cultivated or uncultivated rangeland, pastureland, and farmland.

**(18) Practicable** - Available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

**(19) Regional administrator** - The administrator of the EPA, Region VI.

**(20) Water dependent activity** - An activity that is proposed for or adjacent to an aquatic site that requires access, proximity to, or siting within an aquatic site to fulfill its basic purpose.

**(21) Water Quality Standards** - Texas Surface Water Quality Standards, Chapter 307 of this title (relating to Texas Surface Water Quality Standards).

**§279.4. Application for Certification.**

(a) National Pollutant Discharge Elimination System (NPDES) permits. No person may conduct any activity under federal permit or license that may result in any discharge into or adjacent to water in the state unless the person has received a certification or waiver under this chapter. The regional administrator or the permit applicant may submit a request for certification.

(1) If state certification has not been received by the time the draft NPDES permit is prepared, the regional administrator shall, pursuant to 40 Code of Federal Regulations §124.53, submit to the executive director:

(A) a copy of a draft permit; and

(B) a request for certification.

(2) If the permit applicant requests certification of the NPDES permit application, he shall submit to the executive director:

(A) a copy of the completed NPDES permit application and any amendments thereto;

(B) a list on a map or on a separate sheet attached to a map of the names and addresses of owners of tracts of land adjacent to the site to be permitted; and

(C) a request for certification.

(3) The executive director may elect to delay acting upon a request for certification until the draft NPDES permit is prepared and notice thereof has been issued.

(b) Department of the Army permits. No person may conduct any activity under federal permit or license that may result in any discharge into or adjacent to water in the state unless the person has received a certification or waiver under this chapter. The district engineer or the permit applicant may submit a request for certification.

(1) If state certification is requested by the district engineer, he shall, pursuant to 33 Code of Federal Regulations §325.2(b)(ii), submit to the executive director:

(A) a copy of the public notice;

(B) a request for certification; and

(C) a copy of the complete permit application upon request.

(2) If the permit applicant requests certification, he shall submit to the executive director:

(A) a copy of the completed permit application and any amendments thereto;

(B) a list on a map or on a separate sheet attached to a map of the names and addresses of owners of tracts of land adjacent to the site to be permitted; and

(C) a request for certification.

(3) The executive director may elect to delay acting on a request for certification until after a review of a final permit decision document.

(c) Other federal licenses or permits. For those federal licenses or permits issued by federal agencies other than the EPA or the Department of the Army that may result in any discharge into or adjacent to water in the state, the permittee must receive certification or waiver under this chapter prior to conducting any permitted activity.

(1) If state certification is requested by the federal agency, that agency shall submit to the executive director:

(A) a copy of the public notice;

(B) a request for certification; and

(C) a copy of the complete permit application upon request.

(2) If the permit applicant requests certification, he shall submit to the executive director:

(A) a copy of the completed permit application and any amendments thereto;

(B) a list on a map or on a separate sheet attached to a map of the names or addresses of owners of tracts of land adjacent to the site to be permitted; and

(C) a request for certification.

(3) The executive director may elect to delay acting on a request for certification until the licensing or permitting agency publishes notice of the application and/or the executive director has reviewed the draft permit.

(d) Review of application for certification. Where the executive director believes more information is required in order to accomplish the review of the request for certification, he shall notify the applicant or licensing or permitting agency and request the information.

(e) Submission of additional materials. The applicant shall submit in timely fashion, at any time during the review process, additional materials that the executive director finds to be necessary for review of the application. In no case will the applicant have less than 30 days to submit the information.

**§279.5. Notice of Application.**

(a) The executive director to the greatest extent practicable shall use a joint mailed notice issued by the licensing or permitting agency.

(b) If a joint notice is not used as provided in subsection (a) of this section and the executive director finds that all necessary materials have been received, the executive director shall mail notice of the application for certification to:

(1) the adjacent landowners;

(2) the mayor and health authorities of the city or town in which the activity is or will be located or in which waste is or will be disposed;

(3) the county judge and health authorities of the county in which the facility is located or in which waste is or will be disposed;

(4) the Texas Parks and Wildlife Department;

(5) the United States Department of Interior Fish and Wildlife Service;

(6) the Texas Water Development Board;

(7) the United States Commerce Department, National Marine Fisheries Service;

(8) the EPA, Region 6;

(9) the Texas General Land Office;

(10) the Secretary of the Coastal Coordination Council; and

(11) the applicant.

(c) Any public notice issued under subsection (b) of this section shall contain:

(1) the applicant's name and mailing address, together with the name and mailing address of the party conducting the activity, if different from the applicant;

(2) a brief written description of the activity;

(3) a statement that the applicant is seeking certification under the federal CWA, §401;

(4) a statement that any comments concerning the application may be submitted to the executive director of the agency, Attention 401 Coordinator, MC 150, P.O. Box 13087, Austin, Texas 78711-3087, and a deadline for written public comment of no less than 30 days;

(5) a statement that a copy of the application is available for review in the office of the federal licensing or permitting agency's office; and

(6) a statement indicating how persons can request a public meeting.

(d) The executive director may waive notice requirements of this section when it is determined that a certification will be waived.

(e) The executive director may waive notice and meeting requirements of this section and §§279.6 - 279.8 of this title (relating to Public Comments, Public Meetings, and Notice of Public Meeting) and issue a final agency action in accordance with §§279.10 - 279.12 of this title (relating to Final Agency Action on National Pollutant Discharge Elimination System (NPDES) Permits; Final Agency Action on Department of the Army Permits; and Other State Certification) when an emergency as defined in §279.3 of this title (relating to Definitions) has been determined to exist and it is in the public interest to issue a certification decision in less than 30 days.

**§279.6. Public Comments.**

The executive director shall consider all comments related to the impacts of the proposed activity received in accordance with these rules for permit applications subject to review, unless a public notice has been waived under §279.5(d) or (e) of this title (relating to Notice of Application).

**§279.7. Public Meetings.**

(a) The executive director may conduct a public meeting on any application for 401 certification if the executive director determines, based on public comment received during the public comment period, that such a meeting would be appropriate. The executive director shall conduct a public meeting on an application for 401 certification if a request for such a meeting is made by a commissioner.

(b) If a public meeting is held, the executive director shall notify the licensing and permitting agency and request an extension of time to consider the certification.

(c) All meetings held under this section shall be conducted by a representative of the executive director. The representative shall receive comments concerning all matters affecting the 401 certification.

(d) After the meeting the executive director may consider any information provided at the meeting and any other information appropriate to determine whether to certify the activity.

**§279.8. Notice of Public Meeting.**

(a) The executive director shall notify the applicant not less than 30 days before the date set for meeting that a public meeting will be held on the application. The notice shall be by certified mail, return receipt requested.

(b) The notice of meeting shall identify the application; the date; time; place and nature of the meeting; the legal authority and jurisdiction under which the meeting is to be held; the proposed action; the requirements for submitting written comments; the method for obtaining additional information; and other information as the executive director deems necessary.

(c) The executive director will transmit the notice by first-class mail or by personal service to:

(1) the adjacent landowners;

(2) the mayor and health authorities of the city or town in which the activity is or will be located or in which pollutants will be discharged;

(3) the county judge and health authorities of the county in which the activity is or will be located or in which pollutants will be discharged;

(4) the Texas Parks and Wildlife Department;

- (5) the United States Department of Interior Fish and Wildlife Service;
- (6) the Texas Water Development Board;
- (7) the United States Commerce Department, National Marine Fisheries Service;
- (8) the EPA, Region 6;
- (9) the Texas General Land Office;
- (10) the Secretary of the Coastal Coordination Council; and
- (11) any person from whom written comment was received during the comment

period, provided that the comment included a legible mailing address for the commenter.

(d) The date of mailing the notice of meeting shall be at least 30 days before the date set for the meeting.

**§279.9. Executive Director Review of Water Quality Certification Application.**

- (a) The executive director shall conduct a review or waive certification.

(b) If the executive director conducts a review, the executive director shall, after the review and any public meeting held on the application, determine whether the proposed activity will:

(1) result in any discharge;

(2) result in any violation of 33 United States Code, §§1311, 1312, 1313, 1316, or 1317;

(3) result in any violation of applicable water quality standards; or

(4) result in any violation of any other appropriate requirements of state law.

**§279.10. Final Agency Action on National Pollutant Discharge Elimination System (NPDES) Permits.**

(a) The executive director shall issue a final determination within 60 days from the date the draft permit is mailed by the Regional Administrator, EPA, as required by 40 Code of Federal Regulations §124.53, unless the executive director in consultation with the Regional Administrator finds that unusual circumstances require a longer time. The executive director shall send notice of the decision to deny, grant, grant conditionally, or waive the certification, and a copy of the certification (if granted), to the applicant, the regional administrator, and any person so requesting. The notification shall be in writing and shall include:

(1) the name and address of the applicant;

(2) conditions that are necessary to assure compliance with the applicable provisions of the federal CWA, §§208(e), 301, 302, 303, 306, and 307, and with appropriate requirements of state law;

(3) when the agency certifies a draft permit instead of a permit application, any condition required to assure compliance with the provisions of the federal CWA, §§208(e), 301, 302, 303, 306, and 307, and with appropriate requirements of state law shall be identified citing the federal CWA or state statutes upon which that condition is based; and

(4) a statement of the extent to which each condition of the draft permit can be made less stringent without violating the requirements of state law, including water quality standards.

(b) The executive director shall not condition or deny an NPDES certification on the grounds that state law allows a less stringent permit condition.

**§279.11. Final Agency Action on Department of the Army Permits.**

(a) The executive director shall review or waive certification of any permit application in accordance with §279.9 of this title (relating to Executive Director Review of Water Quality Certification). When an application is reviewed, the executive director shall take final action within 60

days after receiving the certification request from the U.S. Army Corps of Engineers (Corps) as required by 33 Code of Federal Regulations, §325.2(b) unless the executive director, in consultation with the Corps, determines a shorter or longer period is reasonable.

(b) Certification of discharges into aquatic ecosystems shall avoid unacceptable adverse impacts, including cumulative and secondary impacts.

(c) If the executive director reviews a request for certification of a 404 Permit activity, the review shall be performed using the following criteria.

(1) No discharge shall be certified if there is a practicable alternative to the proposed discharge that would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other more significant adverse environmental consequences. Activities that are not water dependent are presumed to have a practicable alternative, unless the applicant demonstrates otherwise. For the purposes of this section compensatory mitigation is not considered an alternative.

(2) No discharge of dredged or fill material shall be certified unless appropriate and practicable steps have been taken that will minimize potential adverse impacts of the discharge on the aquatic ecosystem.

(3) Certification shall require appropriate and practicable compensatory mitigation for all unavoidable adverse impacts that remain after all practicable avoidance and minimization have been

completed. Compensatory mitigation requirements will provide for a replacement of impacted functions and values.

(4) If the executive director determines that the impacts of the project are so significant that the proposed compensatory mitigation will not accomplish the purpose and policy of this chapter, certification may be denied even if an alternative is not available.

(d) The executive director shall send notice of the decision to deny, grant, grant conditionally, or waive certification, including a copy of the certification decision, to the applicant, the Corps, the designated contact of any other licensing or permitting agency, and any person so requesting. The notification shall be in writing and shall include:

(1) the name and address of the applicant;

(2) if certification is granted or denied, a statement of the basis for the executive director's decision, including a description of the materials and information examined during the executive director's review. The statement shall include:

(A) if the activity is certified:

(i) a statement that there is a reasonable assurance the activity, if conducted in accordance with the terms of the proposed permit, will not violate the criteria enumerated in §279.9 of this title; or

(ii) a statement of conditions, including any monitoring and reporting requirements necessary to assure compliance with the criteria enumerated in §279.9 of this title;

(B) if certification is denied, an explanation of how the proposed activity will not satisfy one or more of the criteria enumerated in §279.9 of this title.

**§279.12. Other State Certification.**

(a) Nationwide Permit Certification.

(1) The executive director shall consider all proposed nationwide permits for certification for activities that may result in any discharge into or adjacent to water in the state consistent with §279.9 of this title (relating to Executive Director Review of Water Quality Certification Application). Water quality certification for activities authorized under a nationwide permit is complete at the time the permit is issued. No additional certification is required for activities authorized under that nationwide permit.

(2) When a federal licensing or permitting agency proposes a nationwide permit for an activity that may result in a discharge, the executive director shall notify:

(A) the Texas Parks and Wildlife Department;

(B) the Texas Water Development Board; and

(C) the Texas General Land Office.

(3) After considering public comments received in accordance with §279.5 of this title (relating to Notice of Application) and other information, the executive director shall grant, grant conditionally, deny, or waive certification.

(4) The executive director shall maintain a list of all applicable nationwide permits and the executive director's certification action on each one.

(b) General Permit Certification.

(1) The executive director shall consider all proposed general permits for certification for activities that may result in any discharge into or adjacent to water in the state consistent with §279.9 of this title. Water quality certification for activities authorized under a general permit is

complete at the time the permit is issued. No additional certification is required for activities authorized under that general permit.

(2) When a federal licensing or permitting agency proposes a general permit for an activity that may result in a discharge, the executive director shall notify:

(A) the Texas Parks and Wildlife Department;

(B) the Texas Water Development Board; and

(C) the Texas General Land Office.

(3) After considering public comments received in accordance with §279.5 of this title (relating to Notice of Application) and other information, the executive director shall grant, grant conditionally, deny, or waive certification.

(4) The executive director shall maintain a list of all applicable general permits and the executive director's certification action taken on each one.

(c) Final Action on Other Certification. The executive director shall send notice of the decision to deny, grant, grant conditionally, or waive certification, including a copy of the certification

if granted, to the applicant, the designated contact of the licensing or permitting agency, and any person so requesting. The notification shall be in writing and shall include:

(1) the name and address of the applicant;

(2) if certification is either granted or denied, a statement of the basis for the executive director's decision, including a description of the materials and information examined during the executive director's review. The statement shall include:

(A) if the activity is certified;

(i) a statement that there is a reasonable assurance the activity, if conducted according to the terms of the proposed permit, will not violate the criteria enumerated in §279.9 of this title; or

(ii) a statement of conditions, including any monitoring and reporting requirements, necessary to assure compliance with the criteria enumerated in §279.9 of this title;

(B) if certification is denied, an explanation of how the proposed activity will not satisfy one or more of the criteria enumerated in §279.9 of this title.

**§279.13. Enforcement.**

Applicants whose activities are certified or conditionally certified by the executive director, or for whose activities the executive director waives certification or takes no certification action based upon the applicant's agreement to include permit terms or conditions in the federal permit, shall comply with all terms and conditions of the permit as issued by the federal agency and as thereafter amended. Violation of the agreement to include permit terms or conditions, or violation of any term or condition of a permit relating to water quality shall constitute a violation of this rule. The commission may enforce such a violation under TWC, Chapter 7, and Chapter 70 of this title (relating to Enforcement).

#### STATUTORY AUTHORITY

The repeal is adopted under TWC, §5.102, which grants the commission the authority to carry out its powers under the TWC; §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; §5.105, which requires the commission to establish and approve all general policy of the commission by rule; and §5.120, which requires the commission to administer the law for the maximum conservation and protection of the environment and natural resources of the state. Chapter 279 governs the issuance of state water quality certifications under the federal CWA, §401, codified at 33 USC, §1341.

#### **§279.13. Enforcement.**

