

The Texas Natural Resource Conservation Commission (agency, commission, or TNRCC) proposes amendments to 30 TAC 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.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED 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. The proposed amendments would provide for the executive director either to review the proposed activity or to waive certification.

The amendments would also specifically allow the executive director to waive certification when the applicant agrees to include specific water quality-related conditions in the permit. The amendments would also add detail concerning the time and procedures for the executive director's review of permit applications. The proposed amendments would 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, the proposed amendments would specify the contents of the statement of this decision. The proposed amendments would 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, this proposal would 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 proposes these changes in order to partially restructure the certification process, making it less cumbersome and more flexible. Some of the proposed amendments are the outgrowth of recent discussions and agreements with the Corps aimed at streamlining certification procedures on §404 permits. Some of the proposed amendments reflect the commission's 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

Section 279.1 is proposed to be amended to eliminate unnecessary recitation of language from the federal CWA.

Section 279.2(a) and (b) is proposed to be amended to make grammatical corrections and to 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 Chapter 3 of this title. Subsection (b)(4) is proposed to be amended to 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) is proposed to be amended to delete the provision that a commissioner may request that the commission review a certification application prior to the executive director’s action on it.

Section 279.3 is proposed to be amended to 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, 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 “pollutant” would be changed to conform to TWC, §26.001. The definitions of “affected person” and “person” are proposed to be deleted because these terms are being eliminated from the proposed rules. The definition of “water quality limited segment” is proposed to be deleted because this term has never been used in the rules. The definitions of “commission” and “executive director” are proposed to be deleted because these terms are already defined in Chapter 3 of this title. Definitions have been re-numbered to reflect these changes.

Section 279.4(a) - (e) is proposed to clarify the use of acronyms, to accurately refer to “water” rather than “waters in the state,” and to make grammatical corrections. Subsection(b)(3) is proposed to be amended to provide that the executive director may review the final permit decision document before acting on a request for certification.

Section 279.5(a) is proposed to 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) is proposed to be amended to make a grammatical correction and to clarify an ambiguous pronoun. Subsection (b)(8) is proposed to be amended to use a common acronym (EPA) defined in Chapter 3 of this title. Subsection (b)(11) is proposed to 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) is proposed to be amended to use a current definition (federal CWA) in Chapter 3 of this title. Subsection (c)(4) is proposed to be amended to use a current definition (agency instead of commission) in Chapter 3 of this title and to specify an agency mail code. Subsection (c)(6) is proposed to 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) is proposed to 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)) is proposed to 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 proposed to be amended in this rulemaking, to reflect current definitions (agency instead of commission) in Chapter 3 of this title, and to make grammatical corrections.

Section 279.6 is proposed to 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.

The title to §279.7 is proposed to be amended to make the distinction between a hearing and a public meeting. Section 279.7(a) is proposed to 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) is proposed to be deleted to make requests for a public meeting easier and not restricted only to affected persons. Section 279.7(b) is proposed to 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) is proposed to be amended to provide consistency with commission rules and terminology on public meetings and to make a grammatical correction.

The title to §279.8 is proposed to be amended to provide consistency with commission rules and terminology on public meetings. Section 279.8(a) is 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. Section 279.8(a) and (b) is also proposed to be amended to provide consistency with commission rules and terminology on public meetings, and to make a grammatical correction. Subsection (c)(2) is proposed to be amended to clarify that certifications deal with the discharge of pollutants, not the disposal of waste. Subsection (c)(3) is proposed to 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) is proposed to be amended to use a current acronym (EPA) defined in Chapter 3 of this title. Subsection (c)(11) is proposed to 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) is proposed to be amended to provide consistency with commission rules and terminology on public meetings, make grammatical corrections, and reduce the notice time for public meetings from 30 days to ten days, consistent with the proposed amendment to §279.8(a).

Section 279.9 is proposed to 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) is proposed to be amended to provide that the executive director shall either conduct a review or waive certification. Section 279.9(b) is proposed to 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) is proposed to be amended to clarify which sections of the federal CWA that state certifications cover.

Section 279.10 is proposed to be amended to enumerate the actions the executive director may take on a certification consistent with procedures identified in the NPDES MOA. The title to §279.10 is proposed to be amended to use a current definition (agency instead of commission) in Chapter 3 of this title and to spell out the acronym for NPDES. Section 279.10(a) is proposed to be amended to use a common acronym (EPA) defined in Chapter 3 of this title, to enumerate the actions the executive director may take on a certification, and to make a grammatical correction. Subsection (a)(2) is proposed to be amended to make a grammatical correction and to use a common acronym (CWA) defined in Chapter 3 of this title. Subsection (a)(3) is proposed to be amended to use a current definition (agency instead of commission) from Chapter 3 of this title, to use a common acronym (CWA) defined in Chapter 3 of this title, and to eliminate an unnecessary recitation of language from the federal CWA. Subsection (a)(4) is proposed to be amended to eliminate an unnecessary recitation of language from the federal CWA.

The title to §279.11 is proposed to be amended to use a current definition (agency instead of commission) from Chapter 3 of this title. Section 279.11(a) is proposed to be amended to give the executive director the discretion whether to review or waive certification of any particular permit application. Section 279.11(c) is proposed to be amended to clarify the procedures to be followed if the executive director reviews a permit application. Subsection (c)(1) is proposed to be amended to make grammatical corrections and to reduce the burden on the applicant of demonstrating no practicable alternative. Subsection (c)(2) and (3) is proposed to be amended to make grammatical corrections. Subsection (c)(4) is proposed to 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) is proposed to 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) is proposed for reorganization. Renumbered subsection (d)(2) is proposed to 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) is proposed for deletion, with needed concepts incorporated into proposed amendments to the old subsection (d)(3). Renumbered subsection (d)(2)(A) is 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) is proposed to 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) is proposed to be amended to make a grammatical correction. Renumbered subsection (d)(2)(B) is proposed to 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.

Section 279.12(a)(1) is proposed to be amended to make grammatical corrections and to be consistent with state legal terminology. Section 279.12(a)(2) is proposed to 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) is proposed to be amended to specify that the comments considered should be received in accordance with §279.5 of this title. Subsection (a)(4) is proposed to 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) is proposed to be amended to make grammatical corrections and to be consistent with state legal terminology. Subsection (b)(2) is proposed to 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) is proposed to be amended to specify that the comments considered should be received in accordance with §279.5 of this title. Subsection (b)(4) is proposed to 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) is proposed to be deleted, and its language moved to old subsection (c)(1) that is proposed to 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)) is proposed to 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) is proposed to 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)) is proposed to 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) is proposed to 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) is proposed to 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) is proposed to be deleted because its provisions have been fully incorporated into newly renumbered subsection (c)(2). Old subsection (c)(2) is proposed to be deleted because its provisions have been fully incorporated into the introductory paragraph of §279.12(c).

Section 279.13 is proposed to be repealed. New §279.13 is proposed to eliminate outdated references, and to clarify the agency's existing enforcement authority in the 401 Certification program.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeffrey Horvath, Strategic Planning and Appropriations Division, determined that for the first five-year period the proposed amendments are in effect there will not be significant fiscal implications for the

commission or other units of state and local government as a result of administration or enforcement of the proposed amendments.

The commission proposes these amendments in order to revise procedures for waiving certification, standardizing enforcement provisions, and clarifying existing language for consistency with other commission rules. The proposed amendments do not change the type or number of activities subject to review under the existing rules.

Some of the proposed amendments will facilitate procedures designed to cooperatively streamline certifications of Corps 404 permits. TNRCC recently entered into an MOA with the Corps, the purpose of which is to implement a process for interagency cooperation and review of individual 404 permit applications under the federal CWA, §401, while maintaining state water quality standards in §404 projects. Section 404 permits are issued by the Corps under the authority of the federal CWA, §404, which authorizes the discharge of dredged or fill material into the waters of the United States. This fill or dredged material may be used in such projects as marsh construction; new road construction by the Texas Department of Transportation (TxDOT); industrial expansion along the Houston Ship Channel; individual residential development; commercial real estate development; cities re-channeling streams; or other activities in wetlands, low-lying areas, and coastal areas.

The proposed amendments do not introduce additional regulatory requirements, and are intended to maximize the efficient use of resources at both agencies. There may be cost savings for the commission as a result of adopting the proposed amendments, but these are not considered to be significant.

PUBLIC BENEFIT AND COSTS

Mr. Horvath also determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated from enforcement of and compliance with the proposed amendments would be the maintenance of state water quality standards, the elimination of unnecessary duplication of effort for the review of permits, and the streamlining of the 401 certification process. Historically, there have been between 150 to 200 Corps permits per year subject to individual review by the commission.

The commission proposes these amendments in order to facilitate the implementation of the MOA with the Corps by revising procedures for waivers of certification, standardizing enforcement provisions, and clarifying existing language for consistency with other agency rules. The proposed amendments do not change the type or number of activities subject to review under the existing rules.

The purpose of the MOA is to implement a process for interagency cooperation and review of individual 404 permit applications under the federal CWA, §401, while maintaining state water quality standards in §404 projects. Section 404 permits are issued by the Corps under the authority of the federal CWA, §404, which authorizes the discharge of dredged or fill material into the waters of the United States. This fill or dredged material may be used in such projects as marsh construction; new road construction by TxDOT; industrial expansion along the Houston Ship Channel; individual residential development; commercial real estate development; cities re-channeling streams; or other activities in wetlands, low-lying areas, and coastal areas. The proposed amendments will provide for

substantial compliance with state water quality standards, provide for effective and efficient use of resources at both agencies, and the streamlining of the 401 certification process.

The MOA designates two tiers for 401 certification procedures. Tier 1 projects would include those that will result in a direct impact to three acres or less of water in the state including wetlands, or 1,500 linear feet or less of streams. Projects that impact certain types of rare or ecologically significant wetlands are not included in this tier.

If the applicant chooses to use Tier 1, a statement will be signed indicating that applicable requirements and a TNRCC checklist of best management practices (BMPs) will be satisfied. An applicant's election to incorporate the BMPs and other requirements allows a 404 permit application to proceed without further review by the TNRCC. The BMPs selected by the applicant and other provisions of the checklist become part of the 404 permit and are subject to enforcement.

For Tier II projects, the TNRCC will participate in the pre-application process to the maximum extent practicable and provide the Corps with specific comments on water quality impacts during the public notice comment period up until the issuance of the Corps' decision document. Water quality issues raised by the agency during the public comment period are to be incorporated into the decision document. This revised process eliminates duplicative reviews and raises issues early in the review process thereby reducing the potential for conflicting or inconsistent decisions from the Corps and TNRCC.

The proposed amendments do not introduce additional regulatory requirements, and are intended to maximize the efficient use of resources at both agencies. The TNRCC does not assess application fees for the review of 404 permits and no fees are proposed under this rulemaking. Therefore, any cost savings to applicants are not considered significant. However, applicants may realize reduced processing times and increased consistency in the certification process.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There will be no adverse fiscal implications for small or micro-businesses as a result of implementation of the proposed amendments. The proposed amendments would maintain state water quality standards, eliminate unnecessary duplication of effort for the review of permits, and streamline the 401 certification process. However, applicants may realize reduced processing times and increased consistency in the certification process as a result of the rulemaking. Historically, there have been between 150 to 200 Corps permits per year subject to individual review by the TNRCC.

The commission proposes these amendments in order to facilitate the implementation of an MOA with the Corps by revising procedures for waivers of certification, standardizing enforcement provisions, and clarifying existing language for consistency with other agency rules. The proposed amendments do not change the type or number of activities subject to review under the existing rules.

The purpose of the MOA is to implement a process for interagency cooperation and review of individual 404 permit applications under the federal CWA, §401, while maintaining state water quality standards in §404 projects. Section 404 permits are issued by the Corps under the authority of the

federal CWA, §404, which authorizes the discharge of dredged or fill material into the waters of the United States. This fill or dredged material may be used in such projects as marsh construction; new road construction by TxDOT; industrial expansion along the Houston Ship Channel; individual residential development; commercial real estate development; cities re-channeling streams; or other activities in wetlands, low-lying areas, and coastal areas. The proposed amendments will provide for substantial compliance with state water quality standards, provide for effective and efficient use of resources at both agencies, and the streamlining of the 401 certification process.

The MOA between the TNRCC and the Corps would designate two tiers for 401 certification procedures. Tier 1 projects would include those that will result in a direct impact to three acres or less of water in the state including wetlands, or 1500 linear feet or less of streams. Projects that impact certain types of rare or ecologically significant wetlands are not included in this tier.

If the applicant chooses to use Tier 1, a statement would be signed indicating that applicable requirements and a TNRCC checklist of BMPs will be satisfied. An applicant's election to incorporate the BMPs and other requirements allows a §404 permit application to proceed without further review by the TNRCC. The BMPs selected by the applicant and other provisions of the checklist become part of the 404 permit and are subject to enforcement.

For Tier II projects, the TNRCC will participate in the pre-application process to the maximum extent practicable and provide the Corps with specific comments on water quality impacts during the public notice comment period up until the issuance of the Corps' decision document. Water quality issues

raised by the agency during the public comment period are to be incorporated into the decision document. This revised process eliminates duplicative reviews and raises issues early in the review process thereby reducing the potential for conflicting or inconsistent decisions from the Corps and TNRCC.

The proposed amendments do not introduce additional regulatory requirements, and are intended to maximize the efficient use of resources at both agencies. The TNRCC does not assess application fees for the review of 404 permits and no fees are proposed under this rulemaking. Therefore, any cost savings to applicants are not considered significant.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the rulemaking 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 proposed rule amendments do not meet the definition of a “major environmental rule.” Furthermore, the rulemaking 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 §401 permits; 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 invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these proposed amendments and performed a preliminary assessment in accordance with Texas Government Code, Chapter 2007. The following is a summary of that assessment. The specific purpose of the proposed 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 TNRCC review of individual 404 permit applications under the CWA, §401. The proposed 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 proposed amendments would be neither a statutory nor a constitutional taking of private real property. Specifically, the proposed 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, the proposed 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, the proposed amendments do not meet the definition of a taking under Texas Government Code, §2007.002(5). The proposed amendments are 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 the proposed rulemaking 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 Texas Coastal Management Program (CMP), or will affect an action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6), and will, therefore, require that applicable goals and policies of the CMP be considered during the rulemaking process. The commission determined that the proposed action is consistent with the applicable CMP goals and policies.

The goals of the CMP in 31 TAC §501.12 applicable to the proposed rules 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 30 TAC §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 proposed 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 seeks public comment on the consistency of the proposed rules with the CMP.

ANNOUNCEMENT OF PUBLIC MEETING

A public meeting on this proposal will be held in Austin on June 5, 2001, at 2:00 p.m. at the commission's central office located at 12100 Park 35 Circle, Building F, Room 2210. The meeting is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussions will not occur during the meeting; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the meeting and will answer questions before and after the meeting.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the meeting should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Lola Brown, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Log Number 2000-031-279-WT. Comments must be received by 5:00 p.m., June 5, 2001. For further information contact Alan Henderson, Policy and Regulations Division, at (512) 239-1510.

STATUTORY AUTHORITY

The amended sections are proposed 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.

The amended sections implement provisions of TWC, including §26.011, which requires the commission to establish and control water quality in the state; §26.023, which requires the commission to establish water quality standards; §26.027, which grants the commission the authority to issue permits for discharges into water in the state; §26.121, which prohibits the unauthorized discharge of waste into water in the state; and §26.127, which designates the commission as the principal authority on matters relating to the quality of water in the state.

Chapter 279: Water Quality Certification

§§279.1 - 279.12

§279.1. General.

This chapter governs the issuance by the Texas Natural Resource Conservation Commission of state certifications [within the jurisdiction of the Texas Natural Resource Conservation Commission] as authorized by 33 United States Code, §1341, [the Federal Water Pollution Control Act Amendments of 1972, and] commonly known as the federal [Federal] Clean Water Act (CWA), §401. [The Federal Clean Water Act, §401(a)(1), requires that any applicant for a federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities which may result in any discharge into navigable waters of the United States, shall obtain from the state in which the discharge originates or will originate a certification that the discharge will comply with applicable provisions of 33 United States Code, §§1311, 1312, 1313, 1316, and 1317 (the Federal Clean Water Act, §§208(e), 301, 302, 303, 306, and 307). The Federal Clean Water Act, §401(a)(1), further provides that the state shall establish procedures for public notice in the case of all applications for certification and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications.]

§279.2. Purpose and Policy.

(a) This chapter establishes procedures and criteria for applying for, [the application] processing, and reviewing [review of] state [water quality] certifications under CWA, §401, for activities under the jurisdiction of the agency [Texas Natural Resource Conservation Commission as required by the Federal Clean Water Act.] It is the purpose of this chapter, consistent with the Texas Water Code and the federal CWA [Federal Clean Water Act], to maintain the chemical, physical, and biological integrity of the state's waters.

(b) It is the policy of the commission [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 [Texas Natural Resource Conservation Commission] that [which] require a federal license or permit and that [which] may result in any discharge to waters of the United States are subject to review [will be reviewed] for consistency with the federal CWA [Federal Clean Water Act] and the Texas Surface Water Quality Standards. After such a review, the agency [commission] shall:

(1) - (3) (No change.)

(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. [for any activity which the Commission finds will result in no discharge, or

which does not fall within the purview of the Commission's authority, or concerning which the Commission expressly waives its authority to act on a request for certification for other reasons.]

(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 [a commissioner or] 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 [The] following words and terms, when used in this chapter, shall have the following meanings [, unless the context clearly indicates otherwise].

(1) **401 Certification** - A certification issued by the state [to assure that a federal permit or license is consistent with state law] as authorized under the federal CWA [Federal Clean Water Act], §401.

(2) (No change.)

(3) **404 Permit** - A Department of the Army permit issued under the authority of the federal CWA [Federal Clean Water Act], §404, which authorizes the discharge of dredged or fill material into

waters of the United States. [404 permits can be either individual, general, or by letter of permission. Individual 404 permits are only issued following a case-by-case evaluation of a specific structure or work in accordance with 33 Code of Federal Regulations, Part 325, a determination that the proposed structure or work is in the public interest pursuant to 33 Code of Federal Regulations, Part 320, and that the proposed action is consistent with 40 Code of Federal Regulations, Part 230 (§404(b)(1) Guidelines).]

(4) (No change.)

[(5) Affected person - Any person who is determined by the commission to have a legally justiciable interest that may be adversely affected by an action taken on a certification.]

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

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

(7) [(8) Clean Water Act - 33 United States Code, §§1251 - 1387 [§§1151, et seq], also known as [and] the federal Clean Water Act (CWA), §§101 - 607 [, et seq].

[(9) Commission] - The Texas Natural Resource Conservation Commission, acting through the executive director pursuant to §279.2(c) of this title (relating to Purpose and Policy).]

[(8) [(10) 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) [(11) 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) [(12) 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) [(13) Emergency] - A condition either meeting the requirements of federal law as constituting an emergency or applicable provisions of §305.21 [§305.23] of this title (relating to Emergency Orders and Temporary Orders Authorized).

[(14) Executive director] - The executive director of the Texas Natural Resource Conservation Commission.]

(12) [(15)] General permit - A permit issued [authorized] by a federal licensing or permitting agency on a regional basis. [General permits are designed to regulate with little delay or paperwork certain activities having minimal impacts.]

(13) [(16)] 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 [facilities] that [which] may result in any discharge into waters of the United States.

(14) [(17)] 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 [which] may result in any discharge into or adjacent to water in the state.

(15) [(18)] Nationwide permit - A type of general permit authorized by a federal licensing or permitting agency [through publication in the "Federal Register"] that applies [is applicable] throughout the nation. [Nationwide permits are designed to regulate with little delay or paperwork certain activities having minimal impacts.]

(16) [(19)] National Pollutant Discharge Elimination System (NPDES) [NPDES] permit - A written document issued by the regional administrator of the EPA under [United States Environmental Protection Agency (EPA)as required by] the federal CWA [Federal Clean Water Act], §402, which

authorizes the discharge of any pollutant, or combination of pollutants, into navigable waters of the United States.

(17) [(20)] Person - Any corporation, organization, government, or governmental subdivision or agency, business trust, estate, trust, partnership, association, individual, or other legal entity.]

(17) [(21)] Pollutant - Dredged [Any dredged] spoil, solid waste, incinerator residue, sewage, garbage, [refuse, oil,] sewage sludge, filter backwash, munitions, chemical [hazardous] wastes [waste], [hazardous substance, chemical waste,] biological materials [material], radioactive materials [substance], heat, wrecked or discarded equipment, rock, sand, cellar dirt, and [or] industrial, [recreational,] municipal, and agricultural [, or other] 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) [(22)] Practicable - Available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

(19) [(23)] Regional administrator - The administrator of the EPA [United States Environmental Agency], Region VI.

(20) [(24)] Water dependent activity - An activity that [which] 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.

[(25) Water quality limited segment - Any segment where it is known that water quality does not meet applicable water quality standards, and/or is not expected to meet applicable water quality standards, even after the application of the technology-based effluent limitations required by the Federal Clean Water Act, §301(b) and §306.]

(21) [(26)] 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) [NPDES] permits. No person may conduct any activity under federal permit or license that [which] may result in any discharge into or adjacent to water [waters] 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) - (3) (No change.)

(b) Department of the Army permits. No person may conduct any activity under federal permit or license that [which] may result in any discharge into or adjacent to water [waters] 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) - (2) (No change.)

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

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

(1) - (3) (No change.)

(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 [such] information.

(e) Submission of additional materials. The applicant shall submit in timely fashion, at any time during the review process, additional materials that [which] 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 [utilize] a joint mailed notice issued by the [Department of the Army, or the United States Environmental Protection Agency, or other] licensing or permitting [permit] agency [after agreements with those agencies have been reached regarding the content of the notice and the persons entitled to notice in Texas.]

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

(1) - (7) (No change.)

(8) the EPA [United States Environmental Protection Agency], Region 6;

(9) (No change.)

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

[(11) any known interested persons;]

(11) [(12)] the applicant.

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

(1) - (2) (No change.)

(3) a statement that the applicant is seeking certification under the federal CWA
[Federal Clean Water Act], §401;

(4) a statement that any comments concerning the application may be submitted to the executive director of the agency [Texas Natural Resource Conservation Commission], 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) (No change.)

(6) a statement indicating how [affected] persons can request a public meeting
[hearing].

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

(e) [(d)] The executive director may waive notice and meeting [hearing] requirements of this section [subsection] and §§279.6 - 279.8 of this title (relating to Public Comments, [Nonadjudicated] Public Meetings [Hearings], and Notice of Public Meeting [Hearing]) and issue a final agency [commission] action in accordance with [pursuant to] §§279.10 - 279.12 of this title (relating to Final Agency [Commission] Action on National Pollutant Discharge Elimination System (NPDES) [NPDES] Permits, Final Agency [Commission] Action on [the] Department of the Army Permits [and Other 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 [provide] 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 [submitted] 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. [Nonadjudicated] Public Meetings [Hearings].

(a) The executive director may conduct a [nonadjudicative] public meeting [comment hearing] 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 [hearing] would be appropriate [or if such a hearing is requested by any affected person in writing within 30 days after the publication of notice of application]. The executive director shall conduct a [nonadjudicative] public meeting [comment hearing] on an application for 401 certification if a request for such a meeting [hearing] is made by a commissioner [Commissioner]. [The written request shall contain the following information:]

[(1) the name, mailing address, and phone number of the person making the request;]

[(2) the application number or other recognizable reference to the application;]

[(3) a brief description of the interest of the requestor, or of persons represented by the requestor; and]

[(4) a brief description of how the application, if granted, would adversely affect such interest.]

(b) If a public meeting [hearing] is held, the executive director shall notify the licensing and permitting agency and request an extension of time to consider the certification. [regional administrator in the case of an NPDES permit certification or the district engineer in the case of a Department of the Army permit certification or the designated department of any other licensing or permitting agency, giving an estimate of the additional time necessary to consider the certification, and stating that the executive director is not waiving certification.]

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

(d) (No change.)

§279.8. Notice of [Nonadjudicated] Public Meeting [Hearing].

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

(b) The [Such] notice of meeting [hearing] shall identify the application; the date; time; place and nature of the meeting [hearing]; the legal authority and jurisdiction under which the meeting [hearing] is to be held; the proposed action; the requirements for submitting written comments; the

method for obtaining additional information; and [such] 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) (No change.)

(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 [waste is or will be disposed of];

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

(4) - (7) (No change.)

(8) the EPA [United States Environmental Protection Agency], Region 6;

(9) - (10) (No change.)

(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 [known interested persons].

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

§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 [The] executive director shall, after the review and any public meeting held on the application, determine whether the proposed activity will:

(1) (No change.)

(2) result in any violation of 33 United States Code, §§ 1311, 1312, 1313, 1316, or 1317 [the Federal Clean Water Act, and the criteria in §279.11(c) of this title (relating to Final Commission Action on Department of the Army Permits) for 404 permits];

(3) - (4) (No change.)

§279.10. Final Agency [Commission] Action on National Pollutant Discharge Elimination System (NPDES) [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 [United States Environmental Protection Agency], 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), [including a copy of the certification,] to the applicant, the regional administrator, and any person so requesting [of the decision to deny, grant, grant conditionally or waive the certification]. The [Such] notification shall be in writing and shall include:

(1) (No change.)

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

(3) when the agency [state] certifies a draft permit instead of a permit application, any condition required to assure compliance with the provisions of the federal CWA [Federal Clean Water Act], §§208(e), 301, 302, 303, 306, and 307, and with appropriate requirements of state law shall be identified citing the federal CWA [Federal Clean Water Act] or state statutes [law references] upon

which that condition is based [. Failure to provide such a citation waives the right to certify with respect to that condition]; 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. [Failure to provide this statement for any condition waives the right to certify or object to any less stringent condition which may be established during the United States Environmental Protection Agency permit issuance process.]

(b) (No change.)

§279.11. Final Agency [Commission] Action on Department of the Army Permits.

(a) The executive director shall review or waive certification of any [all] permit application in accordance [applications for consistency] with §279.9 of this title (relating to Executive Director Review of Water Quality Certification). When an application is reviewed, the executive director [and] shall take [issue a] final action [determination] within 60 days after receiving the [receipt of a] certification request from the U.S. Army Corps of Engineers (Corps) [district engineer] as required by 33 Code of Federal Regulations, §325.2(b) unless the executive director, in consultation with the Corps [district engineer], determines a shorter or longer period is reasonable.

(b) (No change.)

(c) If the [The] executive director reviews a [shall review all] request for certification of a 404 permit activity, the review shall be performed [activities] using the following criteria.

(1) No discharge shall be certified if there is a practicable alternative to the proposed discharge that [which] 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 [which] are not water dependent are presumed to have a practicable alternative [alternatives], unless the applicant [clearly] 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 [which] 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 [which] remain after all practicable avoidance and minimization has been completed. Compensatory mitigation requirements will provide for a replacement of impacted functions and values.

(4) If the executive director determines that [There may be circumstances where] the impacts of the project are so significant that the proposed compensatory mitigation will not accomplish

the purpose and policy of this chapter [even if alternatives are not available], certification may be denied even if an alternative is not available [regardless of the compensatory mitigation proposed].

(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 [district engineer], the designated contact of any other licensing or permitting agency, and any person so requesting [of the decision to deny, grant, grant conditionally or waive certification]. The [Such] notification shall be in writing and shall include:

(1) (No change.)

[(2) a statement that the executive director:]

[(A) examined the complete application, specifically identifying the number or code affixed to such application, and based its determination upon an evaluation of the information contained in the application which is relevant to the 401 certification; and/or]

[(B) examined other information, sufficient to enable the executive director to reach the decision;]

(2) [(3)] 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 a waiver of certification is made, a statement explaining the determination that no discharge will result from the activity, or that the activity does not fall within the jurisdiction of the Commission's authority, or the Commission expressly waives its authority to act on a request for certification for other reasons; or]

(A) [(B)] if the activity is certified [a certification or conditional certification is made]:

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

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

(B) [(C)] if [a denial of] certification is denied, [made, a statement explaining] an explanation of how [why] the proposed activity will [result in the unacceptable discharge of

pollutants into or adjacent to waters in the state and detailing] not satisfy one or more of the criteria enumerated in §279.9 of this title [which will be violated].

§279.12. Other State Certification.

(a) Nationwide Permit Certification.

(1) The executive director shall consider all proposed nationwide permits for certification for activities that [which] may result in any discharge into or adjacent to water [waters] in the state consistent with §279.9 of this title (relating to Executive Director Review of Water Quality Certification Application). Water quality certification [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 [which] may result in a discharge, the executive director shall notify:

(A) (No change.)

(B) the Texas Water Development Board; and

(C) the Texas General Land Office_ [;]

[(D) any other appropriate person;]

[(E) any person who requests to be put on the mailing list; and]

[(F) any other appropriate person.]

(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 [certifications of] nationwide permits and the executive director's certification action on each one [granted or granted conditionally].

(b) General Permit Certification.

(1) The executive director shall consider all proposed general permits for certification for activities that [which] may result in any discharge into or adjacent to water [waters] in the state consistent with §279.9 of this title [(relating to Executive Director Review of Water Quality Certification Application)]. Water quality certification [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 [which] may result in a discharge, the executive director shall notify:

(A) (No change.)

(B) the Texas Water Development Board; and

(C) the Texas General Land Office_ [;]

[(D) any other appropriate person;]

[(E) any person who requests to be put on the mailing list; and]

[(F) any other appropriate person.]

(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 [certifications of all] general permits and the executive director's certification action taken on each one [granted or granted conditionally].

(c) Final Action on Other Certification.

[(1)] 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 [of the decision to deny, grant, grant conditionally or waive certification]. The [Such] notification shall be in writing and shall include:

(1) [(A)] the name and address of the applicant;

(2) [(B)] if certification is either granted or denied, a statement of the basis for [that] the executive director's [director has either] 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 [examined the complete application, specifically identifying the number or code affixed to such application, and based on its determination upon an evaluation of the information contained in the application which is relevant to the 401 certification; and/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
[examined other information furnished by the applicant or provided in a nonadjudicative public hearing, sufficient to permit the executive director to reach the decision];

(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.

[(C) a statement of basis for the executive director's decision:]

[(i) if a waiver of certification is made, a statement explaining the determination that no discharge will result from the activity, or that the activity does not fall within the jurisdiction of the Commission's authority, or the Commission expressly waives its authority to act on a request for certification for other reasons; or]

[(ii) if a grant or conditional grant of certification is made:]

[(I) a statement that there is a reasonable assurance the activity will be conducted in a manner which will not violate the criteria enumerated in §279.9 of this title; or]

[(II) a statement of conditions which the executive director deems necessary with respect to the discharge, including any necessary monitoring requirements to assure the discharge will not violate applicable water quality standards;]

[(iii) if a denial of certification is made, a statement explaining why the activity will result in the unacceptable discharge of pollutants into or adjacent to waters in the state and detailing the criteria enumerated in §279.9 of this title which will be violated.]

[(2) After considering public comments and other information the executive director shall grant, grant conditionally, deny or waive certification.]

STATUTORY AUTHORITY

The repeal is proposed 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.

The repeal implements provisions of TWC, including §26.011, which requires the commission to establish and control water quality in the state; §26.023, which requires the commission to establish water quality standards; §26.027, which grants the commission the authority to issue permits for discharges into water in the state; §26.121, which prohibits the unauthorized discharge of waste into water in the state; and §26.127, which designates the commission as the principal authority on matters relating to the quality of water in the state.

§279.13. Enforcement.

STATUTORY AUTHORITY

The new section is proposed 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.

The new section implements provisions of TWC, including §26.011, which requires the commission to establish and control water quality in the state; §26.023, which requires the commission to establish water quality standards; §26.027, which grants the commission the authority to issue permits for discharges into water in the state; §26.121, which prohibits the unauthorized discharge of waste into water in the state; and §26.127, which designates the commission as the principal authority on matters relating to the quality of water in the state.

§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).

