

**Water Quality Certification**  
**§279.1 - §279.13**  
**Effective October 4, 2001**

**§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.

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**§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.

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**§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).

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**§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.

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**§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.

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#### **§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).

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**§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.

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**§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.

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**§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.

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**§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.

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**§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.

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**§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.

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### **§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).

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