

Texas Commission on Environmental Quality 401 State Certification Requirements

The U.S. Environmental Protection Agency published the Clean Water Act Section 401 Certification Rule (Rule) in the Federal Register on July 13, 2020 and it went into effect on September 11, 2020. In addition to the federal Rule requirements that include the Pre-filing Meeting Request and Certification Request, the Texas Commission on Environmental Quality (TCEQ) has additional requirements to fulfill its requirements under 30 Texas Administrative Code (TAC) §279.

Upon the effective date of the Rule, the USACE suspended the Memorandum of Agreement (MOA, 2000) with the TCEQ. Therefore, the TCEQ must transition to a new process that complies with the requirements of both the Rule and 30 TAC §279.

Since applicants and consultants may have become accustomed to the TCEQ's 401 certification process under the MOA, we are providing this guidance to minimize confusion and ensure a smooth transition to our revised 401 certification review process.

Tier I/Tier II Projects Under the MOA, proposed projects were categorized as Tier I or Tier II. Tier I projects were waived at the time of publication of the Joint USACE/TCEQ Public Notice, if the applicant filled out and submitted a Tier I Checklist of Best Management Practices (BMPs). Tier II projects were subject to an individual certification review. Tier I projects are those that result in a direct impact to three acres or less of jurisdictional waters (including wetlands) or 1500 linear feet or less of streams. For purposes of calculating the Tier I threshold, one acre of wetland impact is considered equal to 500 linear feet of stream or shoreline impact. If impacts are above these thresholds, they will be subject to an individual Tier II review.

Tier I Requirements Under the New Rule. The TCEQ will continue to waive projects with minimal impacts that qualify as Tier I. The applicant will continue to be required to submit a [Tier I Checklist](#) with their Certification Request. [Tier I projects](#) will be required to submit a Pre-filing Meeting Request and a Certification Request not less than 30 days submitting the Pre-filing Meeting Request.

If a project has a combination of impacts that exceeds the threshold or incurs unauthorized impacts, it does not qualify as a Tier I project.

Projects that impact certain types of rare or ecologically significant wetlands are not eligible for inclusion in Tier I. Rare and ecologically significant wetlands include pitcher plant bogs, swamps dominated by bald cypress and tupelo gum tree species, the area of Caddo Lake within Texas that is designated as a Ramsar Wetland of International Importance, mangrove marshes and coastal dune swales, and Coastal Critical Areas which include: coastal wetland, oyster reef, hard substrate reef, submerged aquatic vegetation, or a tidal sand or mud flat (as defined in 31 Texas Administrative Code §501.3).

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Tier II Requirements Under the New Rule. Projects with impacts that exceed the Tier I thresholds or don't qualify otherwise, are subject to an individual [Tier II certification review](#). Tier II projects will be required to go through the mitigation sequence of avoidance, minimization, and mitigation.

Applicants will need to submit a [Tier II 401 Certification Questionnaire and Alternatives Analysis Checklist](#) with their Certification Request.

Waiving certification for Tier II projects. When impact from a project are minimal or are clearly outweighed by the ecological benefits of the project, they **may** be waived. Examples of such projects are:

- projects that do not impact special aquatic sites
- certain beach nourishment projects depending on the sand source
- certain beneficial use projects such as breakwaters and marsh creation
- projects where impacts are confined to bay bottom or open water