

Memorandum of Agreement Between the U.S. Army Corps of Engineers and the Texas Natural Resource Conservation Commission on Section 401 Certification Procedures

I General Statement

The purpose of this Memorandum of Agreement (MOA) between the Texas Natural Resource Conservation Commission (TNRCC) and the Southwestern Division of the U.S. Army Corps of Engineers (Corps) is to implement a process for interagency cooperation and TNRCC review of individual Section 404 permit applications under Section 401 of the Clean Water Act. This process is intended to result in maintenance of state water quality standards in Section 404 projects and to maximize the effective use of resources at both agencies.

II For the purposes of this MOA, projects are currently designated as either “Tier I” projects or “Tier II” projects.

A. Tier I projects: The TNRCC has designated Tier I projects as 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. If a project has a combination of impacts that exceeds the threshold or is submitted after the fact, it does not qualify as a Tier I project. For purposes of calculating the Tier I threshold, one acre of impact is considered equal to 500 linear feet of impact. Projects that impact certain types of rare or ecologically significant wetlands are not eligible for inclusion in Tier I and will require individual review, even if they meet the three acre/1500 linear feet threshold. Rare and ecologically significant wetlands are identified by the Corps in its regional conditions to the nationwide permits in Texas, and include the following: 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.

1) Tier I Checklist

The TNRCC anticipates that incorporation of certain best management practices (BMPs) into and Corps implementation of the Section 404 (b)(1) guidelines for a proposed Tier I project will generally result in substantial compliance with state water quality standards. The TNRCC has compiled a Tier I checklist (Attachment B) which provides applicants with a choice of BMPs to incorporate into their projects. If the applicant chooses to use Tier I, he must sign a statement in the checklist indicating that applicable requirements and BMPs will be satisfied and should return the completed checklist with the Corps application form to the Corps and the TNRCC. If the Corps receives a completed checklist and signed statement, a request for 401 certification is not necessary. Election by the applicant to incorporate the BMPs and requirements described in the TNRCC’s Tier I Checklist allows a Section 404 permit application to proceed without further review by the TNRCC. The BMPs selected by the applicant and the other provisions of the checklist become part of the Section 404 permit and are subject to enforcement. Since the TNRCC will take no certification action on Tier I

projects, the Corps will presume a waiver of 401 certification pursuant to 33 CFR §325.2(b).

2) Tier I Information Packet

The TNRCC has provided the following information packet to the Corps: a cover letter that describes the state water quality 401 certification process of Section 404 permits (Attachment A), the Tier I Checklist (Attachment B) and a corresponding description of BMPs (Attachment C). The Corps agrees to include this packet with the information that is provided to applicants for individual Section 404 permits. After coordination with the Corps, TNRCC may revise any part of the packet, including the checklist, by furnishing the revised document to the Corps. Revisions to this document shall apply to all applications filed after the Corps receives the revisions. TNRCC agrees to furnish copies of all the packet documents for the Corps to distribute to applicants.

B. Tier II projects: A Tier II project is any project that is not eligible for Tier I processing, including projects which impact rare or ecologically significant wetlands, projects that are submitted after the fact and projects that otherwise qualify for Tier I, but for which the Corps has not received a complete, signed Tier I checklist before issuance of its permit decision document. The TNRCC and the Corps agree that additional streamlining procedures may be identified, including the designation by TNRCC of additional tiers, and further agree that the Chairman of the TNRCC and the Commander of the Southwestern Division of the Corps will meet within six months of execution of this MOA to discuss any potential amendments.

The processes specified in the following paragraphs apply only to Tier II projects.

1) Participation in Preapplication Process and Comment Process.

For Tier II projects, continuous and early coordination between the Corps and the TNRCC is essential. Accordingly, each agency will routinely provide copies of pertinent information to the other agency. TNRCC will furnish the Corps with copies of TNRCC's 401 certification questionnaire for distribution to all Tier II applicants. The TNRCC will participate in the preapplication process to the maximum extent practicable, and will provide the Corps with project specific comments on water quality impacts of an action during the public notice comment period.

2) Sharing of Decision Documents

The Corps will provide the TNRCC a copy of the Corps' final permit decision document upon which the Corps bases its permit decision. The permit decision document will contain the environmental assessment, required mitigation and §404(b)(1) analysis for use by the TNRCC in its review to determine whether the project will comply with state surface water quality standards in accordance

with Section 401 of the Clean Water Act. The Corps will prepare the decision document as soon as possible following the close of the public notice comment period and when all data necessary to make a decision is available. The decision document will be signed by the appropriate Corps representatives and will represent a final Corps permit decision document. TNRCC will transmit an acknowledgment to the Corps of the date it receives each Corps decision document.

The Corps will provide a permit decision to the applicant when the following procedures have been completed. The TNRCC will either provide its certification decision (issuance or denial) to, or request an extension from the Corps within 10 working days from receipt of the Corps decision document. If the TNRCC does not provide a certification decision or request an extension within the 10 day period, the Corps may presume waiver of certification in accordance with 33 CFR §325.2(b) and proceed with the issuance or denial of the permit. If TNRCC requests an extension of time, the District Engineer will determine the merit of the time extension request and the length of the extension based on 33 CFR § 325.2(b) and notify TNRCC of his intended decision. If the District Engineer decides to deny or modify a request for extension, TNRCC will have 10 working days from the date it is notified of the Corps' intended action on the request for extension in which to either certify or deny certification. If TNRCC takes no action within this 10-day period, the Corps may presume waiver and issue the permit.

III. Effective Date

These procedures will begin as of the date signed by Edwin J. Arnold, Jr., Brigadier General, U.S. Army Corps of Engineers, Southwestern Division, and Jeffrey A. Saitas, Executive Director of the Texas Natural Resource Conservation Commission. This MOA supercedes the interim procedures agreement dated April 3, 2000 and may be amended in writing when signed by authorized representatives of both parties. With at least 60 days prior written notice, this agreement may be terminated by either the Corps or the TNRCC. The TNRCC and the Corps further agree to review this MOA at least every two years in order to determine whether changes would be appropriate to better achieve its objectives.

Edwin J. Arnold, Jr.
Brigadier General
U.S. Army Corps of Engineers,
Southwestern Division


Dated: 17 Aug 00

Jeffrey A. Saitas, P.E.
Executive Director
Texas Natural Resource
Conservation Commission


Dated: 8/17/00