

Jon Niermann, *Chairman*
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Toby Baker, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

August 2, 2021

Ms. Lauren Kasparek
Attn: Docket ID No. EPA-HQ-OW-2021-0302
U.S. Environmental Protection Agency
Office of Water (4502-T)
Oceans, Wetlands, and Communities Division
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

Subject: *Federal Register*, Vol. 86, No. 104, Pages 29541 – 29544, June 2, 2021, U.S. Environmental Protection Agency's Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule; Docket No. EPA-HQ-OW-2021-0302

Dear Ms. Kasparek:

The Texas Commission on Environmental Quality (TCEQ) appreciates the opportunity to provide input on the Environmental Protection Agency's (EPA) process of reconsidering and revising the 2020 Clean Water Act Section 401 Certification Rule. The notice of intent was published by EPA in the June 2, 2021 *Federal Register*.

The TCEQ supports efforts to revise the 401 Certification Rule to maintain broad state certification authority, reduce unnecessary administrative burdens, and provide sufficient flexibility to allow for a cooperative review process between states and federal permitting agencies. The attached document contains the TCEQ's comments for consideration by the EPA.

If you have questions concerning the enclosed comments, please contact Earl Lott, Director of the Office of Water at (512) 239-2047, or by e-mail at earl.lott@tceq.texas.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Toby Baker".

Toby Baker
Executive Director

Attachment

**Texas Commission on Environmental Quality (TCEQ) Comments on EPA’s Intent to
Revise the 2020 Clean Water Act (CWA) Section 401 Certification Rule
(40 CFR Part 121)**

Docket ID Number EPA-HQ-OW-2021-0302

Background

Through the June 2, 2021 publication of the Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule (Notice), the U.S. Environmental Protection Agency (EPA) is seeking public and stakeholder comment on its intention to review and revise the 2020 Clean Water Act Section 401 Certification rule. The Texas Commission on Environmental Quality (TCEQ) offers the following comments organized by the topics identified in the Notice.

1. Pre-filing meeting requests. The rule requires project proponents to submit a “pre-filing meeting request” to certifying authorities at least 30 days prior to submitting a certification request. (40 CFR 121.4)

While the TCEQ encourages early coordination with 401 applicants, the pre-filing meeting request (PMR) requirement increases the regulatory burden on both applicants and the certifying authority. The requirement essentially adds 30 days to the certification review process, which can be excessive for projects with minimal impacts. The requirement also burdens TCEQ with having to track the receipt of PMRs and then ensure the passage of 30 days before the applicant submits their certification request. Since the 2020 certification rule became effective, the TCEQ has not yet identified a need to hold a pre-filing meeting and any potential utility of the PRM requirement is far outweighed by the delay and burden this requirement causes. The TCEQ recommends removal of the PMR requirement in a revised rule, or that pre-filing coordination between the applicant and the certifying authority is encouraged yet optional.

2. Certification request. The rule defines a certification request as “a written, signed, and dated communication that satisfies the requirements of [section] 121.5(b) or (c).” (40 CFR 121.5)

The certification request (CR) requirement has also caused unnecessary difficulties in TCEQ’s certification process. Because CRs must be submitted by the applicant at least 30 days after the PMR, the applicant will frequently forget to submit the CR, which exacerbates the tracking burden on TCEQ. The CR reflects the same information that is already provided in the federal permitting/licensing agency’s (e.g., U.S. Army Corps of Engineers (USACE)) public notice for a project, which is an unnecessary duplication of information and effort. From our experience, the current CR requirement is an unnecessary administrative step that provides no new or improved information while increasing the burden on the applicant and the TCEQ. The TCEQ recommends that a revised rule allow the permitting or licensing agency to submit CRs to the certifying authority to ensure the certification review process is more efficient, consistent, and predictable.

3. Reasonable period of time. CWA Section 401 requires a certifying authority to act on a certification request within a defined time period known as the “reasonable period of time.” The rule requires the federal licensing or permitting agency to

determine the reasonable period of time using a series of factors, provided that the time does not exceed one year from the date a certifying authority receives a certification request. Additionally, the rule allows federal agencies to extend the reasonable period of time within that one year time period at a certifying authority or project proponent's request, but does not allow certifying authorities to take any other action to extend or modify the reasonable period of time. (40 CFR 121.6)

With the permitting agency's obligation under the current rule to establish the reasonable period of time (RPOT) within 15 days of receipt of the applicant's CR, TCEQ's experience is that implementation has not always been consistent due to occasional applicant failure to provide the CR to the permitting agency, or permitting agency failure to make the RPOT determination. The request for certification, and therefore the establishment of the RPOT, should come at a stage in the process that ensures the certifying authority has sufficient time to complete their 401 certification review. TCEQ again recommends that the revised rule requires the federal permitting or licensing agency to make the certification request, and that the request is made only after the federal agency provides a draft decision document to the certifying authority.

4. Scope of certification. The rule limits the scope of certification, which includes both the scope of certification review under CWA Section 401(a) and the scope of certification conditions under CWA Section 401(d), to "assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements." (40 CFR 121.3)

The TCEQ agrees that the currently defined scope of certification is too narrow and that state certification authority is to be construed broadly and not limited to direct effects of the point source discharge but to the activity as a whole. While the TCEQ agrees that consideration of effects of a project that are unrelated to water quality are outside the scope of a 401 review, consideration of impacts that are tangential to the discharge but that can have significant effects on water quality should fall within the purview of a state's certification review. The TCEQ recommends a revised rule recognize applicable state water quality requirements in rule and law.

5. Certification actions and federal agency review. The rule provides that certifying authorities may take one of four actions on a certification request, including granting certification, granting certification with conditions, denying certification, or waiving certification. The rule requires that certifying authorities include specific information when granting certification, granting certification with conditions or denying certification. Additionally, the rule requires federal agencies to review certifying authority actions to determine whether they comply with the procedural requirements of CWA Section 401 and the 401 Certification Rule. (40 CFR 121.7 and 121.9)

The TCEQ does not support the allowance, in a revised rule, of federal agency review of certifying authority actions for consistency with procedural requirements. Nor does the TCEQ support any circumstances under which federal agencies may reject state water quality certification conditions.

6. Enforcement. The rule provides that federal agencies are responsible for enforcing certification conditions that are incorporated into a federal license or

permit. Id. at 121.11(c). The rule does not provide a role for certifying authorities to enforce certification conditions under federal law. (40 CFR 121.11)

The TCEQ's position is that the language in 121.11(c) does not preclude the TCEQ from exercising enforcement authority of water quality certification terms or conditions on a discretionary basis.

7. Modifications. The rule removed the 1971 regulation's provision that allowed for modifications where agreed upon by the certifying authority, federal agency, and EPA. (85 FR 42220)

The TCEQ does not experience issues with certification modifications but generally supports increased rule flexibility to enable adaptation to changing circumstances.

8. Neighboring jurisdictions. The rule addresses the so-called "neighboring jurisdiction" process in CWA Section 401(a)(2), including interpreting the timeframe in which a federal agency must notify EPA for purposes of Section 401(a)(2) and providing process requirements for the agency's analysis and the neighboring jurisdictions' review and response. (40 CFR 121.12)

The TCEQ has no comments on this topic.

9. Data and other information. EPA is interested in receiving any data or information from stakeholders about the application of the 401 Certification Rule, including but not limited to, impacts of the rule on processing certification requests, impacts of the rule on certification decisions, and whether any major projects are anticipated in the next few years that could benefit from or be encumbered by the 401 Certification Rule's procedural requirements. Additionally, EPA is interested in stakeholder feedback about existing state CWA Section 401 procedures, including whether the agency should consider the extent to which any revised rule might conflict with existing state CWA Section 401 procedures and place a burden on those states to revise rules in the future.

The 2020 certification rule caused considerable implementation confusion amongst the TCEQ, USACE districts, and applicants with the new requirements for pre-filing meeting requests, certification requests, and the additional tracking requirements that became necessary. The rule also brought about the breakdown of a long-standing, formally established and cooperative process between the USACE and the TCEQ for 401 certification reviews of individual CWA Section 404 permit applications. This process, framed within a memorandum of agreement between the USACE and the TCEQ, was in place for nearly 20 years and provided for efficient and effective certification reviews where the USACE received quick certification decisions once they had reached their final permitting decision. This former process agreement requires a revised rule that allows for such a cooperative process, where certification reviews occur in parallel with the permitting or licensing process.

10. Implementation coordination. EPA is interested in hearing from stakeholders about facilitating implementation of any rule revisions.

The TCEQ has no comments on this topic.