401 Certification Summary
~Texas~

Overview

The Texas Commission on Environmental Quality (TCEQ) relies on 401 certification as its primary authority for regulation of most dredge and fill activities (Corps Section 10/Section 404 permits). Permitting for oil and gas activities is the responsibility of the Texas Railroad Commission. The state has entered into a Memorandum of Agreement with the Corps under which the state waives certification of smaller projects provided that best management practices defined by the state are utilized. For larger projects, the state comments to the Corps through the public notice process, utilizing water quality standards and a state No Net Loss policy. The Corps retains responsibility for compliance and enforcement.

Definition of Waters of the State

The definition of Waters of the State in Texas is interpreted to include all wetlands:

> "Water" or "water in the state" means groundwater, percolating or otherwise, lakes, bays, ponds, impounding reservoirs, springs, rivers, streams, creeks, estuaries, wetlands, marshes, inlets, canals, the Gulf of Mexico, inside the territorial limits of the state, and all other bodies of surface water, natural or artificial, inland or coastal, fresh or salt, navigable or non-navigable, and including the beds and banks of all watercourses and bodies of surface water, that are wholly or partially inside or bordering the state or inside the jurisdiction of the state."[i]

Permits Requiring 401 Certification

Texas primarily certifies 404 permits and section 10 permits. 401 certification has also been prompted regarding FERC licenses, nuclear regulatory decisions, section 9 and section 2 permits.

State 401 Certification Standards (Water Quality and Other)

Texas has water quality standards that it uses in the application of 401 certification. The state specifically links wetlands to water quality standards by defining wetlands as a use within their standards. This definition lays out the functions that constitute the use. These narrative criteria serve to strengthen the ability to address wetlands. Texas utilizes its general designated uses for wetlands by translating the functions of a wetland laid out in 404 permit regulations into uses defined in their regulations. In conducting a 401 certification review, Texas will look at the full suite of standards as they might be applicable and use numeric and narrative standards as applicable. If the area has contaminated sediment and the applicant wants to dredge, chemical criteria are used to make sure numeric standards are met. Regarding habitat for streams, the state uses IBIs (Indices of Biotic Integrity) and other narrative biological criteria. They will also use

dissolved oxygen standards regarding wetlands. Turbidity standards are used to calculated numeric limit for return of dredge under Nationwide 16. In general, Texas applies water quality standards to help define restrictions and limitations. Texas's surface water quality standards can be found here:
http://www.statutes.legis.state.tx.us/Docs/WA/htm/WA.26.htm
and here:
http://info.sos.state.tx.us/pls/pub/readtac$ext.TacPage?sl=T&app=9&p_dir=P&p_rloc=80545&p_tloc=&p_ploc=1&pg=2&p_tac=&ti=30&pt=1&ch=307&rl=5

Antidegradation Applications

Texas utilizes its antidegradation policy when analyzing projects. They will often incorporate it in their mitigation sequence so that if the applicant meets the mitigation requirements, they also satisfy antidegradation. One issue the state initially found in relation to 404 permits is that 404 permits do degrade or eliminate a use, so antidegradation cannot apply except by replacing what is lost.

Texas's antidegradation policy can be found here under
Texas Administrative Code, Environmental Quality, Texas Commission on Environmental Quality, Texas Surface Water Quality Standards, Antidegradation, Title 30 Part 1, Chapter 307 Rule S307.5 here:
http://info.sos.state.tx.us/pls/pub/readtac$ext.TacPage?sl=R&app=9&p_dir=&p_rloc=&p_tloc=&p_ploc=&pg=1&p_tac=&ti=30&pt=1&ch=307&rl=5

401 Certification Implementation

> According to EPA's 2010 Interim 401 Certification Handbook,
> "Texas law prevents the state from permitting the discharge of dredged or fill material into waters of the state, but does not limit the state's role in the 401 water quality certification process. Budget constraints led to a reduction in the resources available for the state's 401 certification review activities. In response, the state developed a two-tiered system of review under a Memorandum of Agreement with the Corps. For projects under the impact thresholds identified as Tier 1, water quality certification is essentially waived by the state if the applicant self-selects one Best Management Practice (BMP) from each of three classes to become conditions on their Corps permit."[ii]

Texas will either certify a permit or waive certification. They do not deny permits in general. They have a Memorandum of Agreement with the Corps, which is unique. This MOA streamlines the process by waiving applications with smaller impacts/less than a certain size. Only larger projects are reviewed individually. The state finds that 50% of individual projects are less than 1500 feet/3 acres/a prorated version of this amount. These projects will be waived provided that the applicant incorporates one of the BMPs from the state's list. The state also conditioned some Corps Nationwide permits by their BMPs as a requirement.

The purpose of this model is to spend time on the individual projects that pose greater impact. For larger projects, the state works with the Corps, submits comments to the Corps during public notice, and receives comments through a joint public notice. The philosophy is that they comment to the Corps and identify their concerns as part of the public comment period. If they get comments that raise new issues, they will send an addendum and work to resolve those issues. They generally do not condition, but usually grant certification without conditions because their conditions have been addressed in the process. If an individual project activates water quality standards, it becomes an administrative limited appeal, a permit they issue. Texas processes around 125 applications per year.

The Texas Administrative Code on Water Quality Certification can be found here:
http://info.sos.state.tx.us/pls/pub/readtac$ext.ViewTAC?tac_view=4&ti=30&pt=1&ch=279&rl=Y
The General Water Quality Permits and Registration page can be found here:
http://www.tceq.texas.gov/nav/permits/water_qual.html
The link to Texas Nationwide Permits (which includes a list of BMPs that can be used as a menu of options for the applicant to consider) can be found here:
http://www.tceq.texas.gov/permitting/water_quality/wq_assessment/401certification/401certification_nationwide.html
Texas's Water Code: Water Rights can be found here:
http://www.statutes.legis.state.tx.us/Docs/WA/htm/WA.11.htm

Texas Railroad Commission and 401 Certification

The statues in Texas separate oil and gas under the jurisdiction of the railroad commission of Texas. If there is a permit issued in their jurisdiction that triggers 401 certification (e.g. oil wells), the Railroad Commission will handle the certification. This is essentially limited to removal of crude oil from the ground—once it is refined it becomes the responsibility of the TCEQ. The Texas Railroad Commission and the TCEQ have separate permits, rules and procedures for 401 certification. The Railroad Commission also issues mining permits but TCEQ is responsible for 401 certification.

Coordination of Programs

Coordination with Corps Districts

Texas works primarily with the Fort Worth and Galveston Districts, and additionally with the Tulsa and, to a limited extent, the Albuquerque Districts. This means that they coordinate with two different divisions and four districts. One major difference that the state encounters between districts is that one will not accept HGMs and another will accept intermittent HGMs. Two of the districts have separate assessment methodologies based on whether the project uses HGM. Another issue is that the guidebooks for these districts are in interim/development stages. Overall there is quite a bit of difference in assessment methodology and each district has independent autonomy.

Through the MOA with the Corps, Texas seeks to identify and resolve any threats to wetlands. The general process is that the Corps submits their statement of findings and the state bases their certification on that. Once the Corps has made a decision, the state has ten days to respond with their conditions. Because the state is involved in the process, they generally anticipate the Corps decision. It is not unusual for the state to work directly with an applicant to resolve a concern; if the applicant is willing to take action to satisfy the state's concern, the solution becomes a component of the Corps permit.

Coordination with other Agencies

In addition to the Corps, Texas coordinates with the Department of Fish and Wildlife, the Department of Parks and Wildlife, the National Marine Fisheries Service, and the Environmental Protection Agency through the Joint Public Notice issued by the Corps. As a result of legislation enacted in 2009, Parks and Wildlife requires the State to provide a written response within 90 in terms of how the agency will respond/consider their comments.

Coordination with Other Authorities

Other state authorities that protect wetlands, including the Coastal Zone Management division, also utilize 401 certification. When certifying a project in a coastal zone, the state will add specific language and additional paragraphs relevant to the coastal zone. Texas worked hard with the National Oceanic and Atmospheric Administration so that no new regulations needed to be added to the Coastal Zone Management program.

Texas will occasionally work with the Federal Emergency Management Agency (FEMA), although much FEMA work is delegated to counties. Generally, because the Corps satisfies federal standards, there are no discrepancies between the state and federal programs. Zoning is not common in Texas, which can make floodplain management more difficult.

Application of 401 Certification to Wetlands that have been declared non-jurisdictional due to the US Supreme Courts decisions in SWANCC

In the case of wetlands that have been declared non-jurisdictional due to the SWANCC decision, Texas can request mitigation, but they cannot require it. They do not have a solid tracking system to determine how often their requests are met, but they do know it does happen in some cases. In some large high profile projects, they have seen the projects implement mitigation as a way to foster public image.

Project Analysis/Integration of 404(b)(1) Guidelines

In accordance with the MOA with the Corps, Texas does incorporate the 404(b)(1) guidelines directly into their review, but relies on the Corps decision for consistency with the guidelines. Under state rules, the state certification must be based on the Corps decision document. According to Interim 401 Handbook 2010, "Texas…certifications…rely on "No Net Loss" goals laid out in statute or regulation when requiring adherence to the avoidance, minimization and

mitigation standards found in the CWA §404(b)(1) guidelines."[iii] The state does require alternative analysis and there are questions on the application to lead the applicant through this. Alternatives analysis typically leads to mitigation in Texas.

Mitigation Requirements

Texas does require mitigation. The state is trying to move away from a strong reliance on preservation. In forested systems they struggle to find a balance where there are no prescribed mitigation ratios. Regarding mitigation they maintain a no net loss requirement and conduct internal SOPs to achieve consistency within their staff.

Monitoring and Enforcement Approaches

There is no active enforcement program in Texas. The state has very limited involvement in enforcement but state agencies assist in certain cases. The Corps handles enforcement, and they have discretion on whether to enforce a violation. The Corps lets areas of expertise influence its discretion. Sometimes the Corps will consider an issue to be one that would be more appropriately handled by the state; for example regarding dissolved oxygen, the Corps says they do not have the ability to test for this so that is the state's responsibility, and the Corps does not have to enforce. However, the state does not have an enforcement program. In addition, the way that the Corps uses this discretion tends to vary, sometimes they will implement enforcement in response to a BMP requirement and sometimes it will not.

Texas has struggled to make rules that address this issue. The state's attorneys indicated that it is difficult to enforce certification of someone else's permit. The line between certification and permit is part of what makes it difficult for them to access enforcement. In order for the state to independently enforce an action, it would need to be a violation of water quality standards. In one case, the state was able to offer its monitoring expertise and combine it with the Corps enforcement capabilities. One possibility would be for the state to create a path to enforcement through the way that their certification letter specifically links to the Corps statement of findings but this would need to be approved by the legislation.

Staffing

There are currently eight people who distribute their time to 401 certification. There are seven part-time 401 certification reviewers that share their time with other duties. In total, this amounts to about four FTE.

Tracking Techniques/Databases

Texas does maintain a database specifically for the tier 2 projects that they review.

Program fees

Texas does not have any program fees. The Corps requires fees of $10 and $100. If the state wanted to charge enough to make the program pay for itself, it would need to charge significantly higher fees than the Corps, which would be difficult.

Important Court Cases

There was a court case in Texas that involved the Bay Port of Houston that appealed a 401 certification. It was a coastal project with isolated wetlands. The area was delineated prior the the SWANCC decision and permitted after the SWANCC decision. The applicants volunteered a significant amount of non-jurisdictional mitigation. The case is before the federal 5th circuit court of appeals.

Overall Comments

Texas is working to gain access to using other state laws as a basis for their 401 certification decisions. There is an arising issue in water development as the state is seeing some huge residential proposals going through the environmental impact statement process. They are looking to EPA guidance on this issue.

Texas is also working to increase awareness for streams and to build CWA consistency in how streams are addressed. The state has a well-established assessment process and wants to work toward more coordination with the Corps in terms of streams, by determining how to delineate and provide the staff capacity needed to regulate these more complicated procedures.

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[i] http://www.statutes.legis.state.tx.us/Docs/WA/htm/WA.26.htm
[ii] http://www.epa.gov/wetlands/pdf/CWA_401_Handbook_2010_Interim.pdf p.25
[iii] http://www.epa.gov/wetlands/pdf/CWA_401_Handbook_2010_Interim.pdf p.19