

Texas Coastal Management Plan Consistency

See Statewide Rule Section 3.8, subsection (j) at www.rrc.state.tx.us/rules/16ch3.html

Consistency with the Texas Coastal Management Program (CMP)

Section 306 of the Federal Coastal Zone Management Act of 1972 allows coastal states to submit for approval state coastal management plans. Approval of these state plans make the state eligible for federal grant funds for coastal issues and enable the state to review federal actions and permits for consistency with the coastal plan. Texas has an approved Coastal Management Plan (CMP), which was developed and adopted and is currently being implemented by the Texas Coastal Coordination Council (CCC). The CCC is charged with making more effective and efficient use of public funds and providing for more effective and efficient management of coastal natural resources.

Under the CMP, agency actions that are within the coastal boundaries and subject to the CMP must comply with the CMP's applicable goals policies. Issuance of certain state permits to store or dispose of oil and gas waste and issuance of state water quality certifications of certain federal permits are RRC actions that are subject to the CMP.

RRC Actions Subject to the CMP

Under the CMP, agency actions that are within the CMP boundaries and subject to the CMP must comply with the CMP's goals and policies.

Issuance of certifications of compliance with applicable water quality requirements for federal permits for development in critical areas¹ and dredging and dredged material disposal and placement in the coastal area are RRC actions subject to the TCMP.

The RRC adopted rule amendments (Statewide Rule 8(j)) regarding consistency with the TCMP. The RRC Also adopted new rule (Rule 93) regarding water quality certification. Rules 8(j) and 93 have been certified by the Coastal Coordination Council (CCC) as being consistent with the CMP.

B. Consistency Determinations

1. Determination of Direct and Significant Impacts.

The RRC is required to determine if a proposed activity will have a direct² and significant³ impact on any coastal natural resource area (CNRA)⁴. Rule 8(j)(2)(B).

If the RRC determines that a proposed activity will not have a direct and significant impact on any CNRA, then the RRC must issue a specific written determination (Rule 8(j)(i)(A)).

¹ A critical area is a coastal wetland, oyster reef, hard substrate reef, submerged aquatic vegetation, or tidal sand or mud flat.

² "Direct" refers to impacts that are causally linked to an activity.

³ "Significant" refers to appreciable impacts to CNRAs.

⁴ A coastal natural resource area is a coastal barrier, coastal historic area, coastal preserve, coastal shore area, coastal wetland, critical dune area, critical erosion area, gulf beach, hard substrate reef, oyster reef, submerged land, special hazard area, submerged aquatic vegetation, tidal sand or mud flat, water in the open Gulf of Mexico, or water under tidal influence, as these terms are defined in §33.203 of the Texas Natural Resources Code.

2. **Compliance with Applicable Policies.**

If the RRC determines that the proposed activity would result in direct and significant adverse effects to a CNRA, the RRC must determine whether the proposed activity would comply with the applicable policies. See Rule 8(j)(1).

a. Certification for Development in Critical Areas.

When issuing a Rule 93 water quality certification, the RRC must confirm that the requirements for development in critical areas under the TCMP have been complied with, and must coordinate its efforts with those of other appropriate state and federal agencies. See 31 TAC §501.14(h).

For development in critical areas, the CMP requires that:

- (1) the policies regarding development in critical areas be applied in a manner consistent with the goal of achieving no net loss of critical area functions and values;
- (2) persons proposing development in critical areas demonstrate that no practicable alternative with fewer adverse effects is available;
- (3) adverse effects on critical areas shall be avoided to the greatest extent practicable, unavoidable adverse effects shall be minimized to the greatest extent practicable by limiting the degree or magnitude of the activity and its implementation, and appropriate and practicable compensatory mitigation shall be required to the greatest extent practicable for all adverse effects that cannot be avoided or minimized; and
- (4) development in critical areas shall not be authorized if significant degradation of critical areas will occur.

Significant degradation occurs if an activity will –

- (1) jeopardize the continued existence of species listed as endangered or threatened, or will result in likelihood of the destruction or adverse modification of a habitat determined to be a critical habitat under the Endangered Species Act,
- (2) cause or contribute, after consideration of dilution and dispersion, to violation of any applicable surface water quality standards established under subsection (f) of this section;
- (3) violates any applicable toxic effluent standard or prohibition established under §501.14(f) of the CMP Rules;
- (4) violates any requirement imposed to protect a National Marine Sanctuary, such as the Flower Gardens National Marine Sanctuary; or
- (5) cause or contribute to significant adverse effects on, taking into account the nature and degree of all identifiable adverse effects, individually and collectively, including their persistence, permanence, areal extent, and the degree to which these effects will have been mitigated:
 - (A) human health and welfare, including effects on water supplies, plankton, benthos, fish, shellfish, wildlife, and consumption of fish and wildlife;
 - (B) the life stages of aquatic life and other wildlife dependent on aquatic ecosystems, including the transfer, concentration, or spread of pollutants or their byproducts beyond the site, or their introduction into an ecosystem through biological, physical, or chemical processes;

(C) ecosystem diversity, productivity, and stability, including loss of fish and wildlife habitat or loss of the capacity of a coastal wetland to assimilate nutrients, purify water, or reduce wave energy; or

(D) generally accepted recreational, aesthetic, or economic values of the critical area which are of exceptional character and importance.

Compensatory mitigation includes restoring adversely affected critical areas or replacing adversely affected critical areas by creating new critical areas.

b. Certification for Dredging and Dredged Material Disposal and Placement.

When issuing a Rule 93 water quality certification, the RRC shall confirm that the requirements for dredging and dredged material disposal and placement under the TCMP have been complied with.

See 31 TAC §501.14(j). For dredging and dredged material disposal and placement, the CMP requires that:

(1) Dredging and the disposal and placement of dredged material shall avoid and otherwise minimize adverse effects to coastal waters, submerged lands, critical areas, coastal shore areas, and Gulf beaches to the greatest extent practicable. The policies of this subsection are supplemental to any further restrictions or requirements relating to the beach access and use rights of the public. In implementing this subsection, cumulative and secondary adverse effects of dredging and the disposal and placement of dredged material and the unique characteristics of affected sites shall be considered.

(A) Dredging and dredged material disposal and placement shall not cause or contribute, after consideration of dilution and dispersion, to violation of any applicable surface water quality standards established under §501.14(f) of the CMP Rules.

(B) Adverse effects on critical areas from dredging and dredged material disposal shall be avoided and otherwise minimized, and appropriate and practicable compensatory mitigation shall be required, as described above, unless the dredging or dredged material disposal project is determined to be of overriding importance to the public and national interest in light of economic impacts on navigation and maintenance of commercially navigable waterways.

(C) Unless the dredging or dredged material disposal project is determined to be of overriding importance to the public and national interest in light of economic impacts on navigation and maintenance of commercially navigable waterways, the project shall not be authorized if:

(i) there is a practicable alternative that could have fewer adverse effects on coastal waters, submerged lands, critical areas, coastal shore areas, and Gulf beaches, so long as that alternative does not have other significant adverse effects;

(ii) all appropriate and practicable steps have not been taken to minimize adverse effects on coastal waters, submerged lands, critical areas, coastal shore areas, and Gulf beaches; or

(iii) significant degradation of critical areas, as described above, would result.

(2) Adverse effects can be minimized by employing the following techniques, where appropriate and practicable.

(A) Adverse effects from dredging and dredged material disposal and placement can be minimized by controlling the location and dimensions of the activity.

(B) Dredging and the disposal and placement of dredged material shall comply with applicable standards for sediment toxicity. Adverse effects from constituents contained in materials discharged can be minimized by treatment of or limitations on the material itself.

(C) Adverse effects from dredging and dredged material disposal or placement can be minimized through control of the materials discharged.

- (D) Adverse effects from dredging and dredged material disposal or placement can be minimized by controlling the manner in which material is dispersed.
- (E) Adverse effects from dredging and dredged material disposal or placement operations can be minimized by adapting technology to the needs of each site.
- (F) Adverse effects on plant and animal populations from dredging and dredged material disposal or placement can be minimized by:
- (i) avoiding changes in water current and circulation patterns that would interfere with the movement of animals;
 - (ii) selecting sites or managing discharges to prevent or avoid creating habitat conducive to the development of undesirable predators or species that have a competitive edge ecologically over indigenous plants or animals;
 - (iii) avoiding sites having unique habitat or other value, including habitat of endangered species;
 - (iv) using planning and construction practices to institute habitat development and restoration to produce a new or modified environmental state of higher ecological value by displacement of some or all of the existing environmental characteristics;
 - (v) using techniques that have been demonstrated to be effective in circumstances similar to those under consideration whenever possible and, when proposed development and restoration techniques have not yet advanced to the pilot demonstration stage, initiating their use on a small scale to allow corrective action if unanticipated adverse effects occur;
 - (vi) timing dredging and dredged material disposal or placement activities to avoid spawning or migration seasons and other biologically critical time periods; and
 - (vii) avoiding the destruction of remnant natural sites within areas already affected by development.
- (G) Adverse effects on human use potential from dredging and dredged material disposal or placement can be minimized by:
- (i) selecting sites and following procedures to prevent or minimize any potential damage to the aesthetically pleasing features of the site, particularly with respect to water quality;
 - (ii) selecting sites which are not valuable as natural aquatic areas;
 - (iii) timing dredging and dredged material disposal or placement activities to avoid the seasons or period when human recreational activity associated with the site is most important; and
 - (iv) selecting sites that will not increase incompatible human activity or require frequent dredge or fill maintenance activity in remote fish and wildlife areas.
- (H) Adverse effects from new channels and basins can be minimized by locating them at sites:
- (i) that ensure adequate flushing and avoid stagnant pockets; or
 - (ii) that will create the fewest practicable adverse effects on CNRAs from additional infrastructure such as roads, bridges, causeways, piers, docks, wharves, transmission line crossings, and ancillary channels reasonably likely to be constructed as a result of the project; or
 - (iii) with the least practicable risk that increased vessel traffic could result in navigation hazards, spills, or other forms of contamination which could adversely affect CNRAs;
 - (iv) provided that, for any dredging of new channels or basins subject to the requirements of the CMP policy for major actions, data and information on minimization of secondary adverse effects need not be produced or evaluated to comply with this subparagraph if such data and information is produced and evaluated in compliance with the policy for major actions.

(3) Disposal or placement of dredged material in existing contained dredged disposal sites identified and actively used as described in an environmental assessment or environmental impact statement issued prior to the effective date of this chapter shall be presumed to comply with the requirements of (1) above unless modified in design, size, use, or function.

(4) Dredged material from dredging projects in commercially navigable waterways is a potentially reusable resource and must be used beneficially in accordance with this policy.

(A) If the costs of the beneficial use of dredged material are reasonably comparable to the costs of disposal in a non-beneficial manner, the material shall be used beneficially.

(B) If the costs of the beneficial use of dredged material are significantly greater than the costs of disposal in a non-beneficial manner, the material shall be used beneficially unless it is demonstrated that the costs of using the material beneficially are not reasonably proportionate to the costs of the project and benefits that will result.

(5) If dredged material cannot be used beneficially to avoid and otherwise minimize adverse effects, preference will be given to the greatest extent practicable to disposal in contained upland sites, other contained sites, and open water areas of relatively low productivity or low biological value.

(6) For new sites, dredged materials shall not be disposed of or placed directly on the boundaries of submerged lands or at such location so as to slump or migrate across the boundaries of submerged lands in the absence of an agreement between the affected public owner and the adjoining private owner or owners that defines the location of the boundary or boundaries affected by the deposition of the dredged material.

- 3. a. Consistent Activities.** If the Commission determines that the proposed activity complies with the applicable policies, the Commission must issue the following written consistency determination:

The Railroad Commission has reviewed this proposed action for consistency with the Texas Coastal Management Program (CMP) goals and policies, in accordance with the regulations of the Coastal Coordination Council (council), and has determined that the proposed action is consistent with the applicable CMP goals and policies.

This determination may be issued to the applicant in the form of a letter.

- b. Inconsistent Activities.** If the Commission determines that the proposed activity does not meet the requirements of the applicable policies, the Commission cannot issue a permit for the proposed activity and the application must be denied.