

BAYPORT §401 CERTIFICATION – SUGGESTED TOPICS FOR COMMENTS

By Jim Blackburn

On April 3, the Texas Commission on Environmental Quality (TCEQ) will hold a public hearing regarding the proposed state water quality certification – the so-called §401 certification – of the §404 federal permit applied for by the Port of Houston Authority. If I am not mistaken, this will be the first public hearing ever held by the State of Texas regarding §401 certification. The purpose of this memorandum is to explain the §401 certification process and to make some suggestions regarding the subject matter for public comments.

§401 certification is a water quality-related certification. This is not a hearing on all aspects of Bayport. The scope of appropriate comments at this hearing is more narrow and specific than would be the case at a hearing on the environmental impact statement. Instead, the comments at this public hearing should be targeted toward the impact of Bayport on wetlands and the importance of wetlands to the community. There are many specific aspects that are appropriate here, including suggested alternative sites and the suitability of the proposed mitigation.

The Port of Houston has applied to the Corps to fill wetlands associated with the proposed Bayport container facility. The current application pending before the Corps of Engineers was submitted on July 22, 2002, and proposes the filling of 18.3 acres of wetlands considered to be “jurisdictional” by the Galveston District of the Corps of Engineers and 114 acres of wetlands that are not considered to be jurisdictional. As mitigation for this filling, the application proposes the creation of 66.8 acres of emergent wetlands and the enhancement of 12 acres of existing wetlands. Rumor has it that the Port of Houston is proposing to further amend their permit application to add mitigation lands up the San Jacinto River and in the Katy Prairie.

The following URLs cross reference the regulations of the State of Texas TCEQ that are relevant to §401 certification.

<http://www.tnrcc.state.tx.us/permitting/waterperm/wqstand/401cert.html>

<http://www.tnrcc.state.tx.us/permitting/waterperm/wqstand/index.html>

<http://www.tnrcc.state.tx.us/permitting/waterperm/wqstand/401tier2.pdf>

[http://info.sos.state.tx.us/pub/plsql/readtac\\$ext.ViewTAC?tac_view=4&ti=30&pt=1&ch=279&rl=Y](http://info.sos.state.tx.us/pub/plsql/readtac$ext.ViewTAC?tac_view=4&ti=30&pt=1&ch=279&rl=Y)

<http://www.tnrcc.state.tx.us/permitting/waterperm/wqstand/401cov.pdf>

The following is my summary of the pertinent areas for commenting:

1. Scope of the Jurisdictional Determination By the Corps of Engineers. The Corps of Engineers has only found 18.3 acres of jurisdictional wetlands on the site. Early evaluations of the site found more than 200 acres of jurisdictional wetlands

on the site. Later studies found over 100 acres. After the Supreme Court decision in the SWANCC case, the Galveston District of the Corps found only 2.5 acres of jurisdictional wetlands on site. That was later increased to 18.3 acres after GBCPA submitted detailed comments by John Jacobs contesting these wetland acres. The important point here is to ask the TCEQ to go back to the Corps, requesting that another field evaluation be undertaken. TCEQ should request that the Galveston District of the Corps ask for help from the national Corps office regarding the determination of the number of jurisdictional acres at the Bayport site. As we understand the situation, the Galveston District of the Corps is applying a much stricter jurisdictional standard than is being required by other districts. In this regard, the key issue is the adjacency of all of the wetlands on the site to the tidal waters of Galveston Bay. Please note that you believe that these wetlands are adjacent to navigable waters of the United States and that runoff from these wetlands goes overland into either Pine Gully or the Bayport channel. Please note that you believe that these wetlands provide cleansing functions, thereby helping water quality in Pine Gully and/or the Bayport channel. Again, the important point is to request that TCEQ ask the Corps to re-examine the amount of jurisdictional acres at the proposed Bayport site.

2. According to TCEQ regulations, no §401 certification can be issued unless the proposed fill is the “least damaging practicable alternative”. 30 TAC §279.11. A practicable alternative is one that is “available and capable of being done taking into consideration cost, existing technology and logistics in light of overall project purposes.” 30 TAC §279.3(18). This is an excellent point to be made in public comments. Both Shoal Point in Texas City and Spillman’s Island near Barbours Cut are excellent alternative sites. They should be evaluated as alternative sites, as should Pelican Island and Freeport.

The currently proposed Bayport alternative takes over 1000 acres, many of which are wetlands. A separate application has been filed to develop Shoal Point as a container port by a private applicant in a joint venture with the City of Texas City. Their alternative requires only 400 acres for approximately the same capacity. So, not only is location an alternative, but also size of the proposed facility. A 400 acre facility at Bayport would impact much fewer wetland acres than would the proposed 1000+ acre facility.

The point here is that both alternative locations and alternative configurations are appropriately considered as practicable alternatives. Individuals should put forward an alternative site and discuss it. We have documents in the GBCPA offices and we can help you prepare comments.

3. Adequacy of mitigation is an appropriate issue under the regulations and this is an area where everyone can unload. The proposed mitigation does not provide compensation in the watersheds where the damage is occurring. The mitigation should be for all wetlands destroyed by the project. The mitigation should not be

occurring away from the proposed site but should instead be in the vicinity where the harm is occurring.

This is an area where everyone who lives in the area can talk about the importance of the local wetlands and the need for adequate compensation in the affected neighborhoods. Over 132 acres of wetlands will be destroyed by the Corps' own estimation (even though only 18.3 acres are currently considered to be jurisdictional). My recommendation is to ask for at least 3:1 compensation for 132 acres of loss, meaning that 396 acres of mitigation is needed in the area. I honestly think there may be over 200 acres on the site and I am sure that our consultant John Jacobs believes that. At that rate, we would be looking for 600 acres of wetland mitigation.

Be strong on this mitigation point. Let the agency know that you do not believe that mitigation from another part of the county or in another watershed is appropriate.

4. The Importance of Wetlands in the Community. This is another place where people can talk about what wetlands mean to them. The City of Seabrook has a major wetlands program, a parks program involving wetlands and a major interest in eco-tourism. There should be several presentations from Seabrook officials in this regard. The same would be true for other cities that have an interest in preserving wetlands. Similarly, wetlands perform water quality functions for Pine Gully and the Bayport channel. Those living adjacent to these water bodies should talk about the importance of good water quality in these water bodies, about how people use Pine Gully and the channel and particularly the shore of Galveston Bay, about the difference in runoff after the development of the site, about the pollution that will be coming into the bay. This is all fair game in this hearing. The more we hear from cities, the better. Every city concerned about this project should make a presentation about water quality and/or the need for wetlands in the community. The City of Pasadena could make a very effective presentation regarding the need to preserve wetland areas.
5. This hearing is not about traffic, air pollution or rail traffic. It is about water quality and the pollution that will come from the site. It is about wetlands and the role that wetlands play. It is about alternatives. The bottom line is that the filling of these wetlands will harm the bay and that point should be made time and time again.
6. We should argue that the depth of the dredging is an issue appropriate for consideration in the §401 certification process. Currently, the Port of Houston proposes to dredge and construct the wharves to a depth of 56 feet. The currently authorized Houston Ship Channel is only 45 feet deep and the Bayport channel is only authorized to 40 feet at this time. If Bayport is constructed to depth of 56 feet, the Port of Houston will soon be requesting to deepen the Bayport and Houston Ship Channels to 56 feet. This is a major water quality issue and it is

appropriately addressed in the §401 certification hearing. Salinity is a major water quality issue for Galveston Bay. We should raise it and request that TCEQ require that an analysis of the salinity impacts of a 56 foot deep Houston Ship Channel be provided prior to §401 certification being issued.