

Texas Commission on Environmental Quality

INTEROFFICE MEMORANDUM

To: Commissioners **Date:** June 19, 2009

Thru: LaDonna Castañuela, Chief Clerk
Mark R. Vickery, P.G., Executive Director

From: Stephanie Bergeron Perdue, Deputy Director
Office of Legal Services

Docket No.: 2009-0497-RUL

Subject: Commission Approval for Proposed Rulemaking
Chapter 39, Public Notice
Chapter 281, Applications Processing
Chapter 295, Water Rights, Procedural
Notice Changes for Certain Water Applications
Rule Project No. 2009-028-295-LS

Reasons for the rule package:

This proposal would amend Chapter 39, Public Notice; Chapter 281, Applications Processing; and Chapter 295, Water Rights, Procedural to ensure that persons potentially affected by water permits receive mailed notice and to aid in public participation.

Under what authority are we proposing these changes?

The statutory authority for Texas Commission on Environmental Quality rulemaking is pursuant to the following sections of the Texas Water Code: §§5.102, 5.103, and 5.105 concerning General Powers, Rules, and General Policy, respectively, which authorize the commission to adopt rules as necessary to carry out its power and duties under the Texas Water Code; §5.553, which provides notice requirements for water quality permits; §11.121, which provides that a person cannot store or divert state water without obtaining a permit from the commission; §11.129, which provides for commission review of a water rights application; §11.132, which provides for notice of water rights applications; §26.028, which provides for commission action on a water quality permit application after notice; and §26.121, which provides that certain discharges of waste are prohibited unless authorized by the commission.

Is this rulemaking required by federal rule or state statute? Which ones? No.

Are there any legal deadlines by which these rules must be proposed, adopted, or effective? No.

What issue(s) or problem(s) are we trying to solve?

This rulemaking addresses the problem that may arise when notice is mailed years before a water permit application is heard or issued. Review of water permit applications may be delayed as a result of complex technical issues or the submission of additional information. There may be persons who have become potentially affected in the interim that did not and would not receive notice. For water quality permits, currently the applicant provides a landowner map and landowner list once at the time the application is filed, and two notices, including an initial Notice of Receipt and Intent to Obtain Permit (NORI) and a subsequent Notice of Application and Preliminary Decision (NAPD) are mailed. This rulemaking requires the applicant to provide an updated landowner map and landowner list for the NAPD when it is scheduled to be mailed more than two

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years after the NORI, which will ensure that the NAPD is mailed to the most current list of potentially affected persons. For water rights permits, potentially affected persons currently receive notice of the water rights permit application early in the process when the application is declared administratively complete. This rulemaking changes the timing of the notice to later in the process when the technical review of the application is complete, which will allow notice to be mailed to the most current list of potentially affected persons and will aid public participation by providing notice to persons potentially affected closer to the time that the application could be acted upon.

Why is it important that we do this rule package?

This rule package ensures that mailing lists are kept current and reduces the likelihood that persons potentially affected by a water permit application do not receive mailed notice due to outdated mailing lists.

Other important background or historical information. None.

Scope of the rulemaking:

This rulemaking addresses the problem that may arise when notice is mailed years before a water permit application is heard or issued. There may be persons who have become potentially affected in the interim that did not and would not receive notice.

Changes required by federal rule: None.

Changes required by state statute: Staff updates references to other agency rules.

Staff recommendations that are not expressly required by federal rule or state statute:

- Require applicants for water quality permits to submit an updated landowner map and landowner list when the NAPD is scheduled to be mailed more than two years after the NORI is mailed.
- Change the time that notice of a water rights application is mailed from the time that application is declared administratively complete to the time that technical review is complete and technical memoranda have been filed with the chief clerk.

Impact on the regulated community:

Who will be affected?

This rulemaking affects applicants for water permits, including applicants for water quality permits and water rights permits. Wastewater and water right permit applicants include businesses, individuals, state agencies, and local governments.

Does it create a group of affected persons who were not affected previously? No. **How?** N/A

Will there be a fiscal impact? If so, estimate.

- Applicants for wastewater permits affected by the proposed changes for notice requirements could see costs increase by \$90 to \$150 per wastewater permit application if they are required to obtain and provide updated maps and address lists. Of the 171 applications for new or amended permits for all regulated parties that were pending on April 1, 2009, staff estimates that approximately 12

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would be required to submit updated maps and addresses. This cost increase is not expected to have a significant fiscal impact.

Impact on the public:

Who will be affected?

Some landowners who purchase property after water permit applications are filed but before water permits are issued do not receive mailed notice under existing rules but will receive mailed notice under the proposed rules.

Does it create a group of affected persons who were not affected previously? How? No.

Will there be a fiscal impact? If so, estimate. No.

Impact on agency programs:

- The water rights program does not currently prepare a statement of technical completeness.
- The agency will need to develop a method to track the time elapsed between mailing NORI and a NAPD when dealing with wastewater permit applications.
- The agency will also need to monitor receipt of updated landowner information and new mailing labels for new or changed addresses.

Stakeholder meetings:

Have any stakeholder meetings been held?

No; however, should this proposal be approved for publication in the Texas Register, a public hearing will be held.

With whom? N/A

What were the general sentiments? N/A

Were any changes made in response to stakeholder concerns? N/A

Policy issues:

What policy issues are affected?

The agency's policy regarding mailed notice for water permits is affected by this rulemaking. First, this rulemaking requires the applicant for a water quality permit to provide an updated landowner map and landowner list for the NAPD when it is issued more than two years after the NORI. Second, this rulemaking changes the time that notice of a water right application is mailed from the time that application is declared administratively complete to the time that technical review is complete.

Are any policies that are not currently based on rule being made into a rule? No.

What are the consequences if this rulemaking is not approved to go forward?

Some persons potentially affected by water permits may not receive mailed notice due to outdated mailing lists.

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Are there alternatives?

No.

Potentially controversial matters:

This rulemaking outlines an additional requirement for applicants of water quality permits to prepare an updated landowner map and landowner list when the NAPD is mailed more than two years after the NORI.

Key points in proposed rulemaking schedule:

Anticipated proposal date: July 8, 2009
Anticipated *Texas Register* publication date: July 24, 2009
Public hearing date (if any): August 18, 2009
Public comment period: July 24, 2009 - August 24, 2009
Anticipated adoption date: December 9, 2009

Agency contacts:

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Attachments

cc: Chief Clerk, 5 copies
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