

The Texas Commission on Environmental Quality (commission or TCEQ) adopts new §§339.1 - 339.3. Sections 339.2 and 339.3 are adopted *with changes* to the proposed text as published in the April 9, 2004, issue of the *Texas Register* (29 TexReg 3599). Section 339.1 is adopted *without change* to the proposed text and will not be republished.

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The purpose of the adopted rules is to implement House Bill 3442, 78th Legislature, 2003, by establishing, in rule, the amount, applicability, and collection of fees and procedures to process expedited requests for groundwater protection recommendation letters. The letters provide a recommendation to the Railroad Commission of Texas (RRC) on the depth or depths to which useable quality groundwater should be protected in oil and gas operations. Applicants are required by RRC rule to submit these letters with their applications for RRC authorizations.

#### SECTION BY SECTION DISCUSSION

Adopted new §339.1, Purpose, states that the purpose of the chapter is to authorize the processing of requests for groundwater protection recommendation letters required by the RRC for approval of an application. The letters include a recommendation of the depth, or depths, that usable-quality groundwater should be isolated or protected in oil and gas operations. At the present time, the executive director provides these letters to applicants for RRC authorizations, but no commission rules address the topic.

Adopted new §339.2, Applicability, states that this chapter applies to TCEQ groundwater protection recommendation letters required by RRC rules (oil and gas production) or Texas Water Code (TWC), §27.033 (disposal wells). This section also states that the chapter applies to the expedited processing of requests for some of these letters and sets fees for expedited processing as authorized by TWC, §5.701. The commission does not provide expedited processing of requests for groundwater protection letters for the drilling and use of disposal wells permitted by the RRC under TWC, §27.033. The commission has corrected a grammatical error from proposal in the first sentence of this section.

Adopted new §339.3, Groundwater Protection Letter Requests, Expedited Processing, and Fee, describes how an applicant shall submit a request for a groundwater protection recommendation letter on a form approved by the executive director; establishes procedures for the processing of requests for groundwater protection recommendation letters; and sets the fee for expedited processing of groundwater protection recommendation letters at \$75. This section also states that the executive director shall establish procedures for expedited processing of requests for groundwater protection recommendation letters and that the requests shall be processed within four business days. Although the rule language contains the time period of four business days, the executive director has set an internal goal of processing these letters within one business day and expects to meet this goal in most cases.

#### FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that this rulemaking is not subject to §2001.0225

because it does not meet the definition of a “major environmental rule” as defined in that statute. A “major environmental rule” means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. This rulemaking does not meet the definition of a “major environmental rule” because the specific intent of the rules is to require an applicant to pay a fee of \$75 only if it chooses to obtain expedited processing of a groundwater protection recommendation letter. These rules substantially advance this purpose by providing for expedited processing of requests for these letters upon payment of such a fee. This rulemaking does not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs because no fee is required for a groundwater protection recommendation letter; these rules only set a fee for expedited processing of a request for these letters. This rulemaking is not anticipated to adversely affect in a material way the environment or the public health and safety of the state or a sector of the state because it sets a fee only for expedited processing.

In addition, this rulemaking does not exceed the four applicability requirements of Texas Government Code, §2001.0025(a)(1) - (4) in that this rulemaking does not: 1) exceed a standard set by federal law; 2) exceed an express requirement of state law; 3) exceed a requirement of a delegation agreement; or 4) propose to adopt a rule solely under the general powers of the agency.

This rulemaking does not exceed a standard set by federal law because there are no such corresponding federal standards regarding fees for expedited processing of groundwater protection recommendation

letters. Further, this rulemaking does not exceed an express requirement of state law because the fee for expedited processing of a groundwater protection recommendation letter does not exceed the limit of \$75 set by TWC, §5.701(r). This rulemaking does not exceed the requirements of the delegation agreement concerning injection wells because the commission does not regulate the wells that are the subject of the letters and because the delegation agreement does not establish express requirements for fees for processing of expedited groundwater protection recommendation letters. Finally, this rulemaking is not adopted solely under the general powers of the agency, but is adopted under the specific provisions of TWC, §§5.701, 27.019, 27.021, and 27.033.

#### TAKINGS IMPACT ASSESSMENT

The commission prepared a takings impact assessment for these rules in accordance with Texas Government Code, §2007.043. The commission's assessment indicates that Texas Government Code, Chapter 2007 applies to these rules and that these rules do not constitute a statutory or constitutional taking by affecting a landowner's rights in private real property because this rulemaking does not burden (constitutionally) nor restrict or limit the owner's right to property, nor reduce its value by 25% or more beyond that which would otherwise exist in the absence of the rules.

The specific purpose of these rules is to allow an applicant for an RRC authorization to pay a fee of \$75 to obtain expedited processing of a groundwater protection recommendation letter. House Bill 3442, 78th Legislature, 2003, amended TWC to set a maximum fee for expedited processing of a request for a letter from the executive director stating the total depth of surface casing needed during the drilling of

wells to protect usable-quality groundwater in the state and required for the processing of certain permits from the RRC to \$75.

This rulemaking substantially advances the purpose stated in the preceding paragraph by providing for the expedited processing of requests for these letters upon payment of a fee of \$75.

This rulemaking does not place any burden on real property and it does not obtain any benefit to society from the proposed use of private real property because it does not directly apply to the ownership or use of a particular parcel of private real property.

Promulgation of these rules will not constitute a taking because there is no fee for a groundwater protection recommendation letter; the fee is only incurred if an applicant requests expedited processing of a groundwater protection recommendation letter.

There are alternative actions that the commission may take regarding this rulemaking, such as not charging a fee or charging a lower fee than \$75; however, it is reasonable to charge a fee of \$75 because that amount is estimated to be necessary to cover the costs of expedited processing of requests for these letters.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed these rules for consistency with the Texas Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council and

determined that these rules will not have direct or significant adverse effect on any coastal natural resources areas, nor will they have a substantive effect on commission actions subject to the CMP.

#### PUBLIC COMMENT

The public comment period ended at 5:00 p.m. on May 10, 2004. One comment letter was submitted by the Texas Oil & Gas Association (TxOGA). TxOGA provided specific comments on the rules.

#### RESPONSE TO COMMENTS

TxOGA commented that §339.3(b) should be amended to commit the TCEQ to a one business day turnaround of requests for expedited processing of a request for a groundwater protection letter.

TxOGA commented that the preamble to the proposed rules states that the executive director has set an internal goal of processing these expedited letters to applicants within one working day. TxOGA stated that this should be made a part of the rule language to formalize this commitment and that it is reasonable given the \$225,000 annual legislative appropriation specifically for expedited handling of these requests.

**The commission partially agrees with the comment. The commission agrees that the rule should include a time commitment for the agency to process requests for groundwater protection letters; however, the commission does not agree that it should be one business day. One business day is not practical because of the small number of staff assigned to these duties and the specialized skill required to perform the duties. Section 339.3(b) has been amended to state that requests for expedited recommendations shall be processed within four business days. The intent of this**

**provision is that this time frame is directory and not mandatory. The agency is still committed to having a goal of a one business day turnaround of all such requests for expedited processing. The commission does not want to create an unreasonable expectation that all such requests will be processed within one business day. The executive director expects to meet the goal of one business day in most cases.**

TxOGA commented that §339.3(c) should be amended to allow use of the TexasOnline portal or a prepaid account for payment of the fee for expedited processing of a request for a groundwater protection recommendation letter. TxOGA stated that the use of the TexasOnline portal would allow operators to pay fees using a credit card. TxOGA also commented that the prepaid account option allows operators to prepay fees by establishing an account with the agency and to credit fees against the balance in the account. TxOGA stated that both options are in use by other agencies and should be available for fee payments to the TCEQ.

**The commission partially agrees with the comment. The agency is in the process of reviewing fees to be placed on the TexasOnline portal; however, at present, the agency is not considering the acceptance or management of prepaid accounts. No change has been made in response to this comment.**

TxOGA commented that the TCEQ should streamline the form used for a groundwater protection recommendation letter and eliminate the multi-part format for the request. TxOGA specifically recommended that the requirement for submittal of a map be eliminated because it is redundant to the

detailed location information that is required on the form. TxOGA stated that redundant and/or unnecessary information on the form that should be eliminated includes distance in miles and direction from nearest town, geologic formation at total depth, and purpose of request. TxOGA also commented that for many operators, virtually all of their forms are prepared using computers, and that it is much easier for applicants to submit multiple copies, if needed, of the request form than to type or hand-print the multi-part form with carbon copies.

**The comment deals with the contents of the form required for requesting groundwater protection letters and therefore, goes beyond the scope of this rulemaking. The contents of the form are to be determined by the executive director. This gives the agency the flexibility to address the concerns expressed in the comment without the need to revise the rule at a future date. The commission does respond by stating that the map is used to verify that the form has been filled out correctly. Agency staff have received many forms that have been submitted with incorrect location data such as incorrect survey data, incorrect block and section information, incorrect directions from surveyed lines, and footages given from lease lines instead of surveyed lines. These common mistakes can be quickly resolved by reference to the attached map or plat. By using this quality control measure, staff will often catch such errors early in the application process, which saves the operator the time and expense of having to file an amendment to the RRC application and allows the agency to avoid doing the same work twice. No change has been made in response to this comment.**

TxOGA commented that the TCEQ should develop an on-line electronic version of the groundwater protection recommendation letter that can be used with an electronic payment by means of the TexasOnline portal or direct electronic funds transfer.

**The commission agrees with the comment. The commission responds by stating that an electronic version of the letter would be more efficient and accessible and anticipates the development of an electronic format in conjunction with TexasOnline portal. No change has been made in response to this comment.**

**CHAPTER 339: GROUNDWATER PROTECTION RECOMMENDATION**

**LETTERS AND FEES**

**§§339.1, 339.2, 339.3**

**STATUTORY AUTHORITY**

The new sections are adopted under TWC, §5.103, which provides the commission with authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; §5.701, relating to fees; §27.019, which requires the commission to adopt rules reasonably required for the regulation of injection wells; §27.032, regarding information required of applicants by the RRC; §27.033, regarding letters from the executive director; §27.051, regarding the issuance of permits; and §27.0511, regarding conditions of certain permits.

**§339.1. Purpose.**

This chapter authorizes the executive director to provide groundwater protection recommendation letters to the Railroad Commission of Texas for use in processing applications. This chapter also establishes the fee for the expedited processing of requests for groundwater protection recommendation letters.

**§339.2. Applicability.**

This chapter applies to Texas Commission on Environmental Quality groundwater protection recommendation letters required by Railroad Commission of Texas (RRC) rules or Texas Water Code, §27.033, except that §339.3(b) and (c) of this title (relating to Groundwater Protection Letter Requests, Expedited Processing, and Fee) does not apply to letters related to drilling and use of disposal wells permitted by the RRC. The executive director provides these letters to applicants for authorizations from the RRC. The letters contain a recommendation to the RRC on the depth, or depths, that usable-quality groundwater should be isolated or protected in oil and gas operations. This chapter also applies to the expedited processing of requests for these letters and sets fees for expedited processing as authorized by Texas Water Code, §5.701.

**§339.3. Groundwater Protection Letter Requests, Expedited Processing, and Fee.**

(a) The applicant shall submit a request for a groundwater protection recommendation letter on a form approved by the executive director. The form must contain all information required by the executive director before a request will be processed.

(b) The executive director shall establish procedures for expedited processing of requests for groundwater protection recommendation letters. Requests for expedited groundwater protection recommendation letters shall be processed within four business days.

(c) The fee for expedited processing of a request for a groundwater protection recommendation letter is \$75 and must be in the form of a check, money order, cashier's check, or electronic funds transfer made payable to the Texas Commission on Environmental Quality. The fee must be paid before the request will be processed.