

WATER PERMITTING PROCESS - NORTH DAKOTA AND TEXAS

This memorandum provides information regarding the water permitting processes of North Dakota and Texas.

NORTH DAKOTA WATER PERMITTING PROCESS

North Dakota Century Code Section 61-01-01 states the waters of the state belong to the public and are subject to appropriation for beneficial use. Section 61-04-02 authorizes the State Engineer to manage the appropriation process through the issuance of water permits. Section 61-04-02 states "[a]ny person, before commencing any construction for the purpose of appropriating waters of the state or before taking waters of the state from any constructed works, shall first secure a water permit from the state engineer unless such construction or taking from such constructed works is for domestic or livestock purposes or for fish, wildlife, and other recreational uses or unless otherwise provided by law." The State Engineer is appointed by the State Water Commission. The Water Appropriations Division of the State Engineer's office is designated the following responsibilities:

1. Administering and processing water permit applications;
2. Adjudicating and evaluating water rights;
3. Monitoring water resources;
4. Disseminating water resource information;
5. Developing community water supplies;
6. Conducting water resource research; and
7. Identifying and evaluating potential water supplies for economic development.

As of February 2013, the Water Appropriations Division employed 23 staff members across six functional areas. In addition, the 2013 Legislative Assembly authorized two new full-time equivalent (FTE) positions for the State Water Commission relating to permitting. Under the water permit administration area, responsible for administration of the water permit application process, the Water Appropriations Division has five FTE positions. Staff from the division management area, ground water management area, and surface water management area is also involved in various phases of the permitting process.

The Water Appropriations Division appropriates the waters of the state through the issuance of water permits. Water permits are issued so waters of the state can be used for beneficial purposes, including municipal, irrigation, and industrial purposes. The Water Appropriations Division issues two types of water permits--conditional water permits and temporary water permits--as follows:

- Conditional water permit. Individuals or entities can apply for a conditional water permit to gain access to a specified amount of water to be used for a defined beneficial use. Once the water permit application is approved by the Water Appropriations Division and a conditional water permit is issued, the individual or entity typically has one year to three years to bring the water to beneficial use and meet the conditions of the permit, including those related to any infrastructure necessary to extract the water from the source. Once the permit is inspected and all conditions of the permit met, the conditional permit is converted to a perfected permit granting the permitholder a perpetual right to the water designated in the permit.
- Temporary water permit. Individuals or entities can apply for a temporary water permit which provides the permitholder temporary access to water diverted from a designated source for a defined period of time. For industrial water use, there are two types of temporary permits issued:

Temporary in lieu of irrigation permit. Individuals or entities with an established water right for which the defined beneficial use is irrigation can apply for a temporary in lieu of irrigation permit. A temporary in lieu of irrigation permit allows permitholders to divert water designated for irrigation and use it for industrial purposes. The amount to be diverted is based on average usage over the life of the permit or, if no usage data is available, the average usage of other permits in the area. Temporary in lieu of irrigation permits are only issued for a specified period of time--no more than one year--and do not permanently change the designated beneficial use purpose of the permit.

Temporary industrial use permit. Individuals or entities can apply for a temporary industrial use permit which provides the permitholder with temporary access to a specified amount of water to be used for a defined industrial use deemed beneficial by the State Engineer. The majority of temporary industrial use permits are issued for surface water resources. Temporary industrial use permits are only granted for a specified period of time--no more than one year--and do not establish a permanent water right.

Use limitation, pumping rates, and other restrictions are established for each temporary industrial use permit.

For both conditional and temporary permits, an application and applicable support documentation must be submitted to the Water Appropriations Division. The statutory requirements and internal procedures vary for conditional and temporary permit applications as follows:

- Conditional water permit. Fees for conditional water permits range from \$100 to \$750, depending on the amount of water permitted and the permitted use of the water. Water permit amendments are assessed a \$50 fee. The application process for conditional permits consists of three phases--the permit application administration phase, the permit application analysis phase, and the permit perfection phase--as follows:

The application packet must be submitted via mail, accompanied by a map of the proposed well site certified by a licensed surveyor, and include the application fee. Once the application packet is received, the application is assigned a priority date. The Water Appropriations Division has 30 days to review the application packet and notify the applicant if the application packet is incomplete. If the application packet is deemed incomplete, the applicant has 60 days to provide the additional information. If the requested information is not provided within 60 days, the original priority date is voided and a new priority date will be assigned once the requested application materials are received.

Once the application packet is deemed complete, the Water Appropriations Division will issue notification materials, including notification instructions, an affidavit of notice, and a list of permitholders and public use facilities that must be notified as part of the notification process, to the applicant via mail. Once notified, the applicant has 60 days from notification to submit a completed affidavit of notice and certified mail receipts confirming notifications were sent to all identified parties. If the applicant does not provide the completed affidavit of notice and support documentation within the 60-day period, the original priority date is voided and a new priority date is established based on the date the requested materials are received.

Once the completed affidavit of notice and support documentation has been received, the Water Appropriations Division prepares a public notice statement. The statement is provided to the applicant and the official newspaper in the county in which the proposed water appropriations site is located. This public notice is to be published once a week for two consecutive weeks. A 30-day comment period is held following the first date of publication. Interested parties who comment become parties of record. At the conclusion of the comment period, the Water Appropriations Division prepares a comment period summary that includes information regarding the permit, as well as a list of all comments received during the comment period. This completes the permit application administration phase.

Once the permit application administration phase is complete, the application is assigned to a project hydrologist for review. The project hydrologist will document the review in the form of a recommended decision that will address both the regulatory criteria and any comments received from interested parties during the comment period. Once complete, the recommended decision is reviewed and approved by the State Water Commission management. Once approved, the recommended decision is mailed to the applicant and parties of record. At this time, a second 30-day comment period begins, allowing comment on the recommended decision. During the second comment period, adjudicative proceedings may be requested by the applicant or other parties of record. If deemed necessary by the State Engineer, the adjudicative proceeding will occur prior to permit issuance to address any public concerns.

If no adjudicative proceeding is requested or at the conclusion of the proceedings, the permit will be reviewed and signed by the State Engineer and issued to the applicant. This concludes the permit application analysis phase.

On or before the beneficial use date or upon notification from the applicant that the water is being put to a beneficial use, the Water Appropriations Division will conduct an inspection of the permit to verify that all required conditions have been met. Once all permit conditions have been met, the project hydrologist reviews the inspection documentation and prepares a second recommended decision regarding the permit perfection. Then, the recommended decision is reviewed and approved by the State Water Commission management and the conditional permit is converted to a perfected permit. The perfected permit provides the applicant with a perpetual right to the water allocated by the permit.

- Temporary water permit. The State Engineer has the authority to grant temporary permits and to establish a separate procedure for the processing of applications for temporary water use. There is no fee associated with temporary water permits. Also, there are no statutory requirements that govern the

temporary permit application process; therefore, the process is not segmented into components like the conditional permit application process. Temporary water permit applicants are not required to include support documentation with their applications. Once the application is receipted and deemed to have been completed, the application is routed to a project hydrologist for review. For temporary in lieu of irrigation permits, once that review is complete, a formal recommended decision is prepared by the project hydrologist. The application and the recommended decision are then routed to the State Water Commission management for review and approval on behalf of the State Engineer. For temporary industrial use permits, no formal recommended decision is required to be prepared by the project hydrologist. Once the project hydrologist review is complete, only the application form is routed to the State Water Commission management for review and approval. Also, with approval of the State Water Commission management, the project hydrologist is authorized to approve the temporary industrial use permit applications on behalf of the State Engineer. Individuals or entities must apply for a new temporary permit on an annual basis or at the conclusion of the temporary appropriation period. There is no statute that limits the number of sequential temporary permits that may be granted; however, the Water Appropriations Division requests a conditional permit application be submitted after three consecutive temporary permits.

TEXAS WATER PERMITTING PROCESS

Water in the rivers, streams, underflow, creeks, tides, lakes, and every bay and arm of the Texas portion of the Gulf of Mexico is considered state water. The state authorizes the use of state water through a permitting system administered by the Texas Commission on Environmental Quality (TCEQ) or by the adjudication of claims by the state court under the state's Water Rights Adjudication Act. Ground water is not considered state water and is not regulated by the TCEQ. Ground water in certain areas of the state is regulated by the local ground water conservation district. Each ground water conservation district generally covers one county, but not all counties are regulated by a ground water conservation district.

The TCEQ is the environmental agency for the state. Three full-time commissioners are appointed by the Governor to the TCEQ to establish overall agency direction and policy and to make final determinations on contested permitting and enforcement matters. The agency has approximately 2,767 employees, 16 regional offices, and a \$379 million operating budget for the 2014 fiscal year. The Office of Water of the TCEQ works toward clean and available water and is responsible for all aspects of planning, permitting, and monitoring to protect the state's water resources. The Office of Water is divided into four divisions--the Water Availability Division, the Water Quality Division, the Water Quality Planning Division, and the Water Supply Division. The Water Availability Division is responsible for processing water rights permits and amendments. The Water Availability Division has about 70 employee positions, of which 37 employee positions are in the Water Rights Permitting and Availability Section.

The TCEQ provides preapplication project planning and coordination for surface water use projects, making sure that all administrative and technical requirements are known to the client. The TCEQ processes applications and acts as project manager in coordination with the various technical and legal groups that review the application. This gives the client one contact for most information relating to the application.

An application to appropriate state water must:

1. Be in writing and sworn to;
2. Contain the name and post-office address of the applicant;
3. Identify the source of water supply;
4. State the nature and purposes of the proposed use or uses and the amount of water to be used for each purpose;
5. State the location and describe the proposed facilities;
6. State the time within which the proposed construction is to begin;
7. State the time required for the application of water to the proposed use or uses; and
8. Contain the name and address of the holder of any lien on:
 - a. Any water right permit, certified filing, or certificate of adjudication to be granted under the permit for which application is made; or

- b. Any land to which that water right permit, certified filing, or certificate of adjudication would be appurtenant.
- 9. Be accompanied by a map or plat drawn on tracing linen on a scale not less than one inch equals 2,000 feet. The map must show substantially:
 - a. The location and extent of the proposed facilities;
 - b. The location of the headgate, intake, pumping plant, or point of diversion by course and distance from permanent natural objects or landmarks;
 - c. The location of the main ditch or canal and the locations of the laterals or branches of the main ditch or canal;
 - d. The course of the water supply;
 - e. The position, waterline, and area of all lakes, reservoirs, or basins intended to be used or created;
 - f. The point of intersection of the proposed facilities with any other ditch, canal, lateral, lake, or reservoir; and
 - g. The location of any ditch, canal, lateral, reservoir, lake, dam, or other similar facility already existing in the area, drawn in a different colored ink than that used to represent the proposed facilities, and the name of the owner of the existing facility.

If the proposed use is irrigation, the application must also contain a description of the land proposed to be irrigated and an estimate of the total acreage to be irrigated. If the application is for a seasonal permit, the application must also state the months or seasons of the year the water is to be used. If the application is for a temporary permit, the application must also state the period of the proposed temporary use. If the application is for a term permit, the application form must state that on expiration of the term permit the applicant does not have an automatic right to renew the permit. If the application is for a permit to construct a storage reservoir, the application must also contain evidence the applicant has mailed notice of the application to each member of the governing body of each county and municipality in which the reservoir, or any part of the reservoir, will be located.

Each application for a permit is reviewed for administrative and technical requirements to evaluate its impact on other water rights, bays and estuaries, conservation, water availability, public welfare, etc. Most technical reviews are done concurrently along with the administrative review. The TCEQ may grant the application only if:

1. The application conforms to the requirements prescribed by law and is accompanied by the prescribed fee;
2. Unappropriated water is available in the source of supply; and
3. The proposed appropriation:
 - a. Is intended for a beneficial use;
 - b. Does not impair existing water rights or vested riparian rights;
 - c. Is not detrimental to the public welfare; and
 - d. Addresses a water supply need in a manner that is consistent with the state water plan and the relevant approved regional water plan for any area in which the proposed appropriation is located, unless the TCEQ determines that conditions warrant waiver of this requirement.

The minimum fee for filing a water permit application is \$100 plus the costs of recording and required notice. Depending on the total amount of water requested, the fee can be up to \$2,000 plus the costs of recording and required notice. Permits may be issued in perpetuity, for a limited number of years (term), or for temporary uses. Seasonal permits may be issued in the same manner as regular permits. The TCEQ may authorize any member of the TCEQ to approve and issue temporary permits without notice and hearing if it appears that sufficient water is available at the proposed point of diversion to satisfy the requirements of the temporary permit as well as all existing rights. A temporary permit issued without notice and hearing may not authorize more than 10 acre-feet of water, nor may it be for a term in excess of one year. The fee schedule for temporary water permits is \$100 for 10 acre-feet or less and \$250 for any application for more than 10 acre-feet of water.

Notice shall be given to the persons who in the judgment of the TCEQ may be affected by an application. If the proposed use is for irrigation, the TCEQ shall include in the notice a general description of the location and area of the land to be irrigated. The notice shall include the name and address of the applicant, the date the

application was filed, the purpose and extent of the proposed appropriation of water, the source of supply, the time and location where the TCEQ will consider the application (hold the hearing), and any additional information the TCEQ considers necessary. The TCEQ, on the motion of a commissioner or on the request of the executive director or an affected person, shall hold a public hearing on the application. The TCEQ may act on the application without holding a hearing if:

1. Not less than 30 days before the date of action on the application by the TCEQ, the applicant has published the TCEQ's notice of the application at least once in a newspaper regularly published or circulated within the section of the state where the source of water is located;
2. Not less than 30 days before the date of action on the application by the TCEQ, the TCEQ mails a copy of the notice by first-class mail, postage prepaid, to:
 - a. Each claimant or appropriator of water from the source of water supply, the record of whose claim or appropriation has been filed with the TCEQ; and
 - b. All navigation districts within the river basin concerned; and
3. Within 30 days after the date of the newspaper publication of the TCEQ's notice, a public hearing has not been requested in writing by a commissioner, the executive director, or an affected person who objects to the application.

At the time and place stated in the notice, the TCEQ shall hold a hearing on the application. Any person may present an objection to the issuance of the permit, and the TCEQ may receive evidence, orally or by affidavit, in support of or in opposition to the issuance of the permit. After the hearing, the TCEQ shall make a written decision granting or denying the application.

Each person who has a water right issued by the TCEQ or who impounded, diverted, or otherwise used state water during the preceding calendar year shall submit a written report to the TCEQ on a form prescribed by the TCEQ. The report shall contain all information required by the TCEQ to aid in administering the water law and in making inventory of the state's water resources. With the exception of those persons who hold water rights, no report is required of persons who take water solely for domestic or livestock purposes. A person who fails to file an annual report with the TCEQ as required is liable for a penalty of \$25, plus \$1 per day for each day the statement is past due, with a maximum penalty of \$150. Water use information is required to be maintained on a monthly basis during the months a water rights holder uses permitted water.