

The Texas Commission on Environmental Quality (commission) proposes amendments to §305.53 and §305.127.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The changes proposed to this chapter are part of a larger proposal to revise the commission's radiation control rules. The primary purpose of the proposed rule amendments is to implement House Bill (HB) 1567, 78th Legislature, 2003, and its amendments to Texas Health and Safety Code, Chapter 401.

Some additional changes outside the scope of the bill implementation are proposed to correct citations to federal statutes, provide corrections to rule section titles, improve grammar, and reflect the commission's name change.

SECTION BY SECTION DISCUSSION

SUBCHAPTER C: APPLICATION FOR PERMIT

Section 305.53, Application Fee

A proposed amendment to §305.53(a)(7) would reflect the name change from the Texas Natural Resource Conservation Commission to the Texas Commission on Environmental Quality to implement HB 2912, §18.01, 77th Legislature, 2001. The phrase "pursuant to" is proposed to be changed to "in accordance with" to incorporate plain language into the rule.

SUBCHAPTER F: PERMIT CHARACTERISTICS AND CONDITIONS

Section 305.127, Conditions to be Determined for Individual Permits

The proposed amendment to the first sentence of §305.127 would replace the phrase “set forth herein” with “specified in this section” to incorporate plain language into the rule. In addition, proposed amendments to §305.127(4)(A) and (C) would correct the titles of 30 TAC Chapters 309 (Domestic Wastewater Effluent Limitation and Plant Siting) and 30 TAC Chapter 336 (Radioactive Substance Rules).

The proposed amendments to §305.127(1)(G)(i) would require an initial license term of 15 years rather than a fixed licensing period of 20 years, in accordance with new Texas Health and Safety Code, §401.222. A new sentence is also proposed to be added stating: "After the initial 15 years, the commission may renew the license for one or more terms of ten years." This sentence is proposed to be added to implement new Texas Health and Safety Code, §401.222. For consistency with §336.716(h) (Terms and Conditions of License), a final sentence is proposed to be added which states, “The authority to dispose of waste expires on the date stated in the license except as provided in §336.718(a) of this title (relating to Application for Renewal or Closure).”

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeffrey Horvath, Analyst, Strategic Planning and Appropriations Section, has determined that for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the agency or other units of state and local government as a result of administration or enforcement of the proposed rules.

The rules are proposed as part of a larger proposal in order to implement HB 1567, which provides requirements for the licensing of a low-level radioactive waste (LLRW) disposal site in Texas. The proposed rules implement a change in the term of an LLRW disposal license from 20 to 15 years. After the initial 15 years, the commission may renew the license for one or more terms of ten years.

Proposed rulemaking by the commission to implement HB 1567 in other parts of this proposal provide requirements for the licensing of an LLRW disposal site in Texas and establish procedures for the commission to accept and evaluate license applications from private entities to dispose of LLRW. Under the legislatively required procedures, the commission does not anticipate that a license will be granted until 2007.

The renewal of a license, if granted, would take place outside of the five-year parameter of this fiscal note and, therefore, no fiscal implications are anticipated for units of state and local government, or businesses and individuals. However, if and when this event takes place, there are anticipated to be similar fiscal implications as there were for the initial license application. Under current commission rules, there is no renewal fee for a license to dispose of LLRW. There are provisions which require that an applicant submit an annual license fee and a fee for the actual costs incurred by the commission for hearings associated with an application for an LLRW disposal site. Therefore, the application for renewal would include a fee (the proposed application fee is \$500,000), and the costs for any contested case hearing would be assessed to the applicant by the commission.

Under current requirements, the license holder for an LLRW disposal site is also required to submit an annual license fee to cover the state's actual expenses arising from the regulatory activities associated with the license. This fee shall include reimbursement for the salary and other expenses of resident inspectors.

These costs are also likely to be outside the five-year time frame. However, the commission estimates that two resident inspectors and an administrative assistant would be required on-site, along with any necessary capital equipment (vehicle, office equipment, sampling equipment, etc.). Total costs for resident inspectors are estimated to be between \$200,000 and \$250,000 per year. The annual license fee is also assumed to include central office administrative costs. The 78th Legislature appropriated the commission five additional full-time equivalent positions in 2004 and 1.5 additional full-time equivalent positions in 2005 to implement HB 1567 and to provide for the licensing of an LLRW disposal facility. This fiscal note assumes that these five full-time equivalent positions will be used to conduct geological, civil engineering, environmental engineering, hydrological, and other studies and regulatory activities associated with the license. Costs are estimated to be \$350,000 per year. Total costs for the annual license fee are estimated to be \$550,000 to \$600,000.

PUBLIC BENEFITS AND COSTS

Mr. Horvath also has determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from enforcement of and compliance with the proposed rules will be compliance with state law and established procedures for the commission to accept and evaluate

license applications from private entities to dispose of LLRW to ensure protection of public health and safety and the environment.

No fiscal implications are anticipated to businesses or individuals who wish to meet the proposed requirements necessary to renew a license to dispose of LLRW for each year of the first five years the proposed rules are in effect.

The renewal of a license, if granted, would take place outside of the five-year parameter of this fiscal note, and therefore, no fiscal implications are anticipated for businesses or individuals. However, if a license is renewed, the commission anticipates there would be similar fiscal implications as there were for the initial license application. This fiscal note assumes that the application for renewal would include a fee (the proposed application fee is \$500,000) and the costs for any contested case hearing (SOAH's cost alone are estimated to be \$250,000; a previous contested case hearing on a license application of similar complexity had estimated commission costs of approximately \$775,000 in 1998) which would be assessed to the applicant by the commission.

The holder of a license for an LLRW disposal site is also required to submit an annual license fee for the state to recover the actual expenses arising from the regulatory activities associated with the license. The fee shall include reimbursement for the salary and other expenses of resident inspectors. These costs to any licensee are likely to take place outside of the five-year period covered in this fiscal note. Costs for resident inspectors are estimated to be between \$250,000 and \$200,000 per year and commission administrative costs are estimated to be \$350,000 per year. Total costs for the annual

license fee are estimated to be \$550,000 to \$600,000. These costs would be recovered by the licensee through fees assessed to waste generators for the disposal of LLRW. Fees will be assessed to waste generators in Texas and the other Texas Low-Level Radioactive Waste Disposal Compact party states, and may include electric utilities, hospitals, and others.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse economic effects are anticipated to any small or micro-businesses as a result of implementing the proposed rules because there are no known small or micro-businesses that own or operate, or are likely to own or operate, an LLRW disposal site with a \$500,000 application fee.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed these proposed rules and determined that a local employment impact statement is not required, because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to §2001.0225 because it does not meet the definition of a “major environmental rule” as defined in the statute. “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, a sector of the economy, productivity, competition, jobs, the

environment, or the public health and safety of the state or a sector of the state. The proposed amendments to Chapter 305 are not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because there are no significant requirements added to radioactive material disposal facilities. The proposed rulemaking action implements legislative requirements in HB 1567, including a change in the term of license issued under Chapter 336, Subchapter H (Licensing Requirements for Near-Surface Land Disposal of Low-Level Radioactive Waste), from 20 to 15 years. The proposed rulemaking also makes nonsubstantive changes to Chapter 305 to reflect the commission's name change to the Texas Commission on Environmental Quality, corrects citations to other laws, and incorporates plain language into the rules.

Furthermore, the proposed rulemaking action does not meet any of the four applicability requirements listed in §2001.0225(a). Section 2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. The proposed rulemaking action does not exceed a standard set by federal law, an express requirement of state law, a requirement of a delegation agreement, nor does it adopt a rule solely under the general powers of the agency.

Texas Health and Safety Code, Chapter 401, authorizes the commission to regulate the disposal of most radioactive material in Texas. Sections 401.051, 401.103, 401.104, and 401.412 authorize the commission to adopt rules for the control of sources of radiation and the licensing of the disposal of radioactive materials. In addition, the State of Texas is an “Agreement State” authorized by the United States Nuclear Regulatory Commission (NRC) to administer a radiation control program under the Atomic Energy Act of 1954, as amended (Atomic Energy Act). The proposed rules do not exceed the standards set by federal law.

The proposed rules do not exceed an express requirement of state law. Texas Health and Safety Code, Chapter 401, establishes general requirements for the licensing and disposal of radioactive materials. The purpose of the rulemaking action is to implement statutory requirements consistent with recent amendments to Chapter 401 as provided in HB 1567. The proposed rule amendment to change the term of a license issued under Chapter 336, Subchapter H, to 15 years is consistent with the requirements of HB 1567.

The proposed rules do not exceed a requirement of a delegation agreement or contract between the state and an agency of the federal government. The State of Texas has been designated as an “Agreement State” by the NRC under the authority of the Atomic Energy Act. The Atomic Energy Act requires that the NRC find that the state radiation control program is compatible with the NRC requirements for the regulation of radioactive materials and is adequate to protect health and safety. Under the *Agreement Between the United States Nuclear Regulatory Commission and the State of Texas for Discontinuance of Certain Commission Regulatory Authority and Responsibility Within the State*

Pursuant to Section 274 of the Atomic Energy Act of 1954, as Amended, NRC requirements must be implemented to maintain a compatible state program for protection against hazards of radiation. The proposed rule amendments do not exceed the NRC requirements nor exceed the requirements for retaining status as an “Agreement State.”

The rules are proposed under specific authority of Texas Health and Safety Code, Chapter 401. Sections 401.051, 401.103, 401.104, and 401.412 authorize the commission to adopt rules for the control of sources of radiation and the licensing of the disposal of radioactive materials. The commission invites public comment of the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this rulemaking action and performed a preliminary assessment of whether Texas Government Code, Chapter 2007 is applicable. The proposed action implements legislative requirements in HB 1567, including a change in the term of license issued under Chapter 336, Subchapter H, from 20 to 15 years. The proposed rulemaking also makes non-substantive changes to Chapter 305 to reflect the commission’s name change to the Texas Commission on Environmental Quality, corrects citations to other laws, and incorporates plain language into the rules.

Promulgation and enforcement of these proposed rules would be neither a statutory nor a constitutional taking of private real property. The proposed rules do not affect a landowner’s rights in private real property because this rulemaking action does not burden (constitutionally), nor restrict or limit, the owner’s right to property and reduce its value by 25% or more beyond which would otherwise exist in

the absence of the regulations. The proposed rules primarily implement non-substantive changes to existing rules and reflect the license term of 15 years required by HB 1567. There are no entities that currently have licenses issued under Chapter 336, Subchapter H.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed this rulemaking action for consistency with the Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the amendments are consistent with the CMP goals and policies. The proposed rulemaking action implements legislative requirements in HB 1567, including a change in the term of license issued under Chapter 336, Subchapter H, from 20 to 15 years. The proposed rulemaking action also makes non-substantive changes to Chapter 305 to reflect the commission's name change to the Texas Commission on Environmental Quality, to correct citations to other laws, and to incorporate plain language into the rules. This rulemaking action will not have direct or significant adverse effect on any coastal natural resource areas, because the rule amendments only affect counties outside the CMP area; will not have substantive effect on commission actions subject to the CMP; and promulgation and enforcement of the amendments will not violate or exceed any standards identified in the applicable CMP goals and policies. The commission solicits comments on the consistency of the proposed rulemaking with the CMP during the public comment period.

ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin on September 16, 2003, at 1:30 p.m., at the commission's central office, 12100 Park 35 Circle, Building E, Room 201S. The hearing will be

structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, a commission staff member will be available to discuss the proposal 30 minutes prior to the hearing, and will be available to answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs, and who are planning to attend a hearing, should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Angela Slupe, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Log Number 2003-037-336-WS. Comments must be received by 5:00 p.m., September 22, 2003. For further information or questions concerning this proposal, please contact Devane Clarke of the Waste Permits Division at (512) 239-5604, or Alan Henderson of the Office of Environmental Policy, Analysis, and Assessment at (512) 239-1510.

SUBCHAPTER C: APPLICATION FOR PERMIT

§305.53

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code and other laws of the state. The amendment is also proposed under Texas Health and Safety Code, Chapter 401, concerning Radioactive Materials and Other Sources of Radiation (also known as the Texas Radiation Control Act); §401.011, concerning Radiation Control Agency, which authorizes the commission to regulate and license the disposal of radioactive substances; §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, concerning Licensing and Registration rules, which requires the commission to provide rules for licensing for the disposal of radioactive material; §401.201, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate the disposal of low-level radioactive waste; and §401.412, concerning Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances.

The proposed amendment implements Texas Health and Safety Code, as amended by House Bill 1567, 78th Legislature, 2003, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.201, and 402.412.

§305.53. Application Fee.

(a) Except for radioactive material licenses or as specifically provided hereunder, an applicant shall include with each application a fee of \$100.

(1) - (6) (No change.)

(7) The fees established by this section are due at the time that the application is filed in accordance with §281.3 of this title (relating to Initial Review), except that for hazardous waste permit applications filed on or after September 1, 1985, but prior to the effective date of paragraph (2) of this subsection are due at the time that the application is forwarded to the chief clerk of the Texas [Natural Resource Conservation] Commission on Environmental Quality for purposes of issuance of the notice of application. Unless the recommendation of the executive director is that the application be denied, the commission will not consider an application for final decision until such time as the fees in accordance with [pursuant to] paragraph (2) of this subsection are paid.

(b) - (c) (No change.)

SUBCHAPTER F: PERMIT CHARACTERISTICS AND CONDITIONS

§305.127

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code and other laws of the state. The amendment is also proposed under Texas Health and Safety Code, Chapter 401, concerning Radioactive Materials and Other Sources of Radiation (also known as the Texas Radiation Control Act); §401.011, concerning Radiation Control Agency, which authorizes the commission to regulate and license the disposal of radioactive substances; §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, concerning Licensing and Registration rules, which requires the commission to provide rules for licensing for the disposal of radioactive material; §401.201, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate the disposal of low-level radioactive waste; and §401.412, concerning Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances.

The proposed amendment implements Texas Health and Safety Code, as amended by House Bill 1567, 78th Legislature, 2003, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.201, and 402.412.

§305.127. Conditions to be Determined for Individual Permits.

Conditions to be determined on a case-by-case basis according to the criteria specified in this section [set forth herein], and when applicable, incorporated into the permit expressly or by reference, are:

(1) Duration.

(A) - (F) (No change.)

(G) Radioactive material licenses.

(i) Licenses issued under Chapter 336, Subchapter H of this title (relating to Licensing Requirements for Near-Surface Land Disposal of Low-Level Radioactive Waste) shall be issued for an initial term of 15 years from the date of issuance. After the initial 15 years, the commission may renew the license for one or more terms of ten years. The authority to dispose of waste expires on the date stated in the license except as provided in §336.718(a) of this title (relating to Application for Renewal or Closure) [for a fixed term not to exceed 20 years].

(ii) (No change.)

(2) - (3) (No change.)

(4) Requirements for individual programs.

(A) Requirements to provide for and assure compliance with standards set by the rules of the commission and the laws of Texas shall be determined and included in permits on a case-by-case basis to reflect the best method for attaining such compliance. Each permit shall contain terms and conditions as the commission determines necessary to protect human health and safety, and the environment. Reference is made to Chapter 330 of this title (relating to Municipal Solid Waste) for municipal solid waste facility standards, to Chapter 331 of this title (relating to Underground Injection Control) for injection well standards, to Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste) for solid waste facility standards, to Chapter 336 of this title (relating to Radioactive Substance Rules) for radioactive material disposal standards, to Chapter 309 of this title (relating to Domestic Wastewater Effluent Limitation and Plant Siting [Standards]) for waste discharge standards, and to Chapter 329 of this title (relating to Drilled or Mined Shafts) for drilled or mined shaft standards.

(B) (No change.)

(C) New, amended, modified, or renewed permits shall incorporate any applicable requirements contained in Chapter 331 of this title for injection well standards, Chapter 335 of this title for solid waste facility standards, Chapter 336 of this title [(relating to Radioactive Material Disposal Standards)], Chapter 309 of this title for waste discharge standards, and Chapter 329 of this title for drilled or mined shaft standards.

(5) - (6) (No change.)