

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts amendments to §39.1, Applicability; §39.5, General Provisions; §39.11, Text of Public Notice; §39.13, Mailed Notice; §39.17, Notice of Minor Amendment; §39.701, Applicability; §39.703, Notice of Completion of Technical Review; §39.707, Published Notice; and §39.709, Notice of Contested Case Hearing on Application. The TNRCC also adopts the repeal of existing Subchapter F, §39.301, Notice of Declaration of Administrative Completeness; §39.302, Applicability; §39.303, Notice of License Applications Upon Completion of Technical Review; §39.305, Mailed Notice for Radioactive Material Licenses; §39.307, Published Notice; §39.309, Notice of Contested Case Hearing on Application; §39.311, Proof and Certification of Notice; and §39.313, Public Notification and Public Participation. Sections 39.703, 39.707, and 39.709 are adopted *with changes* to the proposed text as published in the June 16, 2000, issue of the *Texas Register* (25 TexReg 5800). Amended §§39.1, 39.5, 39.11, 39.13, 39.17, and 39.701 and the repeals 39.301 - 39.303, 39.305, 39.307, 39.309, 39.311, and 39.313 are adopted *without changes* and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The changes adopted in this chapter are part of a larger rulemaking to revise the agency's radiation control rules. This rule package has three major goals: (1) implement House Bill (HB) 1172, 76th Legislature, 1999, and its amendments to the Texas Health and Safety Code (THSC); (2) implement the recommendations of the TNRCC's Business Process Review Permit Implementation Team (BPR-PIT) to provide for consistency between the administrative procedures of the radiation control program and the other permitting programs of the agency; and (3) improve readability and understanding by

reorganizing 30 TAC Chapter 336 (relating to Radioactive Substance Rules), putting its requirements into plain English and eliminating its redundancies and conflicts.

Changes to implement HB 1172 are: (1) amending the definition of low-level radioactive waste to be compatible with the United States Nuclear Regulatory Commission's (NRC's) definition; (2) incorporating the TNRCC's new authority to exempt from application of a rule; (3) adding an exemption to continue or expand on-site low-level radioactive waste disposal licensed before September 9, 1989; and (4) adding exemptions from radioactive material licensing requirements for facilities participating in the Voluntary Cleanup Program or Superfund cleanups.

The BPR-PIT changes are part of an agency-wide effort to make programs consistent where feasible. The agency's management has mandated the consistency effort to make agency processes more efficient and "user friendly." Most of the license application process requirements in Chapter 336 can be modified to be more consistent with the requirements of the other permitting programs within the agency. The TNRCC expects a consistent application process to be especially helpful for persons who have multiple permits/licenses from the TNRCC or to staff during the review of consolidated permit applications. Major adopted changes are as follows: (1) that the radiation control program begins using the agency's definitions for major and minor amendments; and (2) the radiation control program license application process will be moved for the most part from Chapter 336 to Chapter 281 (relating to Applications Processing) and Chapter 305 (relating to Consolidated Permits) and amended to be consistent with agency administrative procedures.

The amendments and repeals in Chapter 39 are to incorporate the HB 1172 newly defined term “low-level radioactive waste” and to make only Subchapters H and M of this chapter applicable to radioactive material licenses in the future because Subchapter F is obsolete.

SECTION BY SECTION DISCUSSION

Subchapter A - Applicability and General Provisions

Section 39.1 was amended by replacing reference to Subchapters “B - F” with “B - E,” by adding the word “and.” Section 39.1 was also amended by deleting “and Public Notice for Radioactive Material Licenses” because there were no radioactive material licenses pending on September 1, 1999 (the first part of the sentence states it applies to radioactive material applications that were declared administratively complete before September 1, 1999) and former Subchapter F was repealed; and by deleting former paragraph (7) because the whole chapter is no longer to apply to radioactive material licenses; and by renumbering the last paragraph to account for the deletion of former paragraph (7).

Section 39.5(c) was amended by deleting the last sentence that stated, “This subsection does not apply to applications for radioactive material licenses under Chapter 336 of this title (relating to Radioactive Substance Rules).” Section 39.5(f), (g), and (h) was amended by deleting the last sentence that stated, “This subsection does not apply to applications for radioactive material licenses under Chapter 336 of this title.” These amendments were made because the adopted rule has been changed so that Subchapter A no longer applies and only Subchapters H and M apply to radioactive material licenses.

Former §39.11(13) was deleted because the adopted rule has been changed so that only Subchapters H and M will apply to radioactive material licenses, and associated formatting changes were made to §39.11(11) and (12).

Former §39.13(b) was deleted because the adopted rule had been changed so that only Subchapters H and M will apply to radioactive material licenses.

Former §39.17(b)(2) was deleted because the adopted rule had been changed so that only Subchapters H and M will apply to radioactive material licenses. Conforming grammatical changes were also made to §39.17(b)(1).

Subchapter F - Public Notice of Radioactive Material License Applications

Former Subchapter F was repealed because there were no radioactive material license applications pending on September 1, 1999 and Subchapter F applied to such applications declared administratively complete before September 1, 1999.

Subchapter M - Public Notice for Radioactive Material Licenses

Section 39.701 was amended to delete "that is declared administratively complete on or after September 1, 1999" because this date was past, and there were no applications still pending on September 1, 1999. Minor grammatical changes were also made to §39.701.

The title in §39.703 was changed to “Notice of Completion of Technical Review” to simplify it.

Section 39.703(a) was amended by adding “Low-Level” to conform with this newly defined term in HB 1172. A minor correction was made after proposal because requirements to license a previously unlicensed site with buried radioactive material for decommissioning were moved from Chapter 336, Subchapter F to Chapter 336, Subchapter G in a concurrent rulemaking; therefore, any notice requirement applicable to Subchapter F should also reference Subchapter G. A reference to Subchapter G has been added accordingly after the reference to Subchapter F in §39.703(b).

A minor correction to §39.707(a) was made after proposal. Requirements to license a previously unlicensed site with buried radioactive material for decommissioning were moved from Chapter 336, Subchapter F to Chapter 336, Subchapter G in a concurrent rulemaking; therefore, any notice requirement applicable to Subchapter F should also reference Subchapter G. A reference to Subchapter G has been added accordingly after the reference to Subchapter F. Section 39.707(b) was amended by adding “Low-Level” to conform with this newly defined term in HB 1172.

Section 39.709(b) was amended adding “Low-Level” to conform with this newly defined term in HB 1172. A minor correction was also made after proposal because requirements to license a previously unlicensed site with buried radioactive material for decommissioning were moved from Chapter 336, Subchapter F to Chapter 336, Subchapter G in a concurrent rulemaking; therefore, any notice requirement applicable to Subchapter F should also reference Subchapter G. A reference to Subchapter G has been added accordingly after the reference to Subchapter F.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a “major environmental rule” as defined in that 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 adopted amendments and repeals in Chapter 39 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 new requirements added that are not already required by current state law.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these adopted rules pursuant to Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the rules is to incorporate the HB 1172 defined term “low-level radioactive waste” in lieu of “radioactive waste” and to make only Subchapters H and M of this chapter applicable to radioactive material licenses in the future because obsolete Subchapter F is concurrently repealed. Promulgation and enforcement of these rules will not burden private real property which is the subject of the rules because there are no new notice requirements added that are not also currently required by state law.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has reviewed the adopted rulemaking and found that the rule is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP) nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the adoption is not subject to the CMP.

HEARING AND COMMENTERS

A public hearing on the proposed amendments and repeals was held on July 6, 2000; however, no one appeared at the hearing to testify. No written comments were received concerning this chapter during the public comment period which closed on July 17, 2000.

STATUTORY AUTHORITY

The amendments are adopted under the Texas Radiation Control Act; THSC, §§401.011, 401.051, 401.057, 401.101, 401.103(b) and (c), 401.104(b) - (e), 401.106(b) and (c), 401.201 - 401.203, 401.303, 401.412, and 401.413; Texas Government Code, §2001.004(1); and Texas Water Code, §5.103.

SUBCHAPTER A: APPLICABILITY AND GENERAL PROVISIONS

§§39.1, 39.5, 39.11, 39.13, 39.17

§39.1. Applicability.

Any permit applications listed below that are declared administratively complete before September 1, 1999 are subject to Subchapter A of this chapter (relating to Applicability and General Provisions), and Subchapters B - E of this chapter (relating to Public Notice of Solid Waste Applications, Public Notice of Water Quality Applications, Public Notice of Air Quality Applications, and Public Notice of Other Specific Applications), as applicable. Any permit applications listed below that are declared administratively complete on or after September 1, 1999 are subject to Subchapter H of this chapter (relating to Applicability and General Provisions), and Subchapters I - M of this chapter (relating to Public Notice of Solid Waste Applications, Public Notice of Water Quality Applications and Water Quality Management Plans, Public Notice of Air Quality Applications, Public Notice of Injection Well and Other Specific Applications, and Public Notice for Radioactive Material Licenses), as applicable. All consolidated permit applications are subject to Subchapter G of this chapter (relating to Public Notice for Applications for Consolidated Permits), regardless of when they were declared administratively complete. This chapter applies to:

(1) applications for municipal solid waste, industrial solid waste, or hazardous waste permits under the Texas Solid Waste Disposal Act, Texas Health and Safety Code, Chapter 361;

(2) applications for wastewater discharge permits under Texas Water Code, Chapter 26.

(A) This paragraph includes:

(i) applications for the disposal of sewage sludge or water treatment sludge under Chapter 312 of this title (relating to Sludge Use, Disposal, and Transportation);

(ii) applications for permits under Chapter 321, Subchapter B of this title (relating to Commercial Livestock and Poultry Production Operations).

(B) This paragraph does not include:

(i) applications for authorizations under Chapter 321 of this title (relating to Control of Certain Activities by Rule), other than applications under Subchapter B of this chapter;

(ii) applications for authorizations under Chapter 312 of this title, except applications for a permit under the chapter; and

(iii) applications under Chapter 332 of this title (relating to Composting);

(3) applications for underground injection well permits under Texas Water Code, Chapter 27, or under the Texas Solid Waste Disposal Act, Texas Health and Safety Code, Chapter 361;

(4) applications for production area authorizations under Chapter 331 of this title (relating to Underground Injection Control);

(5) hearings under Chapter 80 of this title (relating to Contested Case Hearings) concerning applications for air quality permits under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification);

(6) hearings on contested enforcement cases under Chapter 80 of this title; and

(7) applications for consolidated permit processing and consolidated permits processed under Texas Water Code, Chapter 5, Subchapter J, and Chapter 33 of this title (relating to Consolidated Permit Processing).

§39.5. General Provisions.

(a) If the chief clerk prepares a newspaper notice that is required by this chapter and the applicant does not cause the notice to be published within 30 days of receipt of the notice from the chief clerk, the chief clerk may cause the notice to be published and the applicant shall reimburse the agency for the cost of publication within 30 days of publication.

(b) The chief clerk may require the applicant to provide necessary mailing lists in electronic form.

(c) When this chapter requires notice by mail, notice by hand delivery may be substituted. Mailing is complete upon deposit of the document, enclosed in a prepaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service. If hand delivery is by courier-receipted delivery, the delivery is complete upon the courier taking possession.

(d) Unless otherwise provided in this chapter, public notice requirements apply to applications for initial permits or applications for the amendment, modification, or renewal of permits.

(e) If an applicant submits more than one application for a facility, notice may be combined to satisfy more than one section of this chapter.

(f) When this chapter requires an applicant to publish notice, the applicant must file an affidavit with the chief clerk certifying facts that constitute compliance with the requirement. The deadline to file the affidavit is the day of the public meeting for notice of public meeting, two days before a public hearing for notice of a public hearing, and 30 days after the last publication for other published notices. For notice of a public meeting, the applicant must also submit the affidavit to the executive director no later than the day of the public meeting. Filing an affidavit certifying facts that constitute compliance

with notice requirements creates a rebuttable presumption of compliance with the requirement to publish notice.

(g) When this chapter requires notice to be published according to this subsection, the applicant shall publish notice in a newspaper of the largest general circulation that is published in the county in which the facility is located or proposed to be located. If a newspaper is not published in the county, the notice must be published in a newspaper of general circulation in the county in which the facility is located or proposed to be located. If a newspaper is not published in the county, and the application concerns an application for a new or amended municipal solid waste permit, and publication of notice of intent, notice of draft permit, or notice of hearing, then the applicant shall publish notice in a newspaper of the largest general circulation in the county in which the facility is located or proposed to be located and in a newspaper of circulation in the immediate vicinity in which the facility is located or proposed to be located, and such notice may be satisfied by one publication if the publishing newspaper meets both circulation requirements.

(h) When this chapter requires notice be broadcast according to this subsection, the applicant shall broadcast notice of the application on one or more local radio stations that broadcast to an area that includes all of the county in which the facility is located. The executive director may require that the broadcasts be made to an area that also includes contiguous counties.

§39.11. Text of Public Notice.

When notice by publication or by mail is required by this chapter, the text of the notice must include:

- (1) the name and address of the agency;
- (2) the name and address of the applicant and, if different, the location of the facility or activity to be regulated by the permit;
- (3) a brief description of the business conducted at the facility or activity described in the application or the draft permit;
- (4) the name, address, and telephone number of an agency contact person from whom interested persons may obtain further information;
- (5) a brief description of public comment procedures, and the time and place of any public meeting or public hearing;
- (6) a statement of procedures by which the public may participate in the final permit decision and, if applicable, how to request a hearing, or a statement that later notice will describe procedures for public participation;

(7) for notices of public meetings or hearings, the date, time, and place of the meeting or hearing, and a brief description of the nature and purpose of the meeting or hearing, including the applicable rules and procedures;

(8) the application or permit number;

(9) if the application is subject to final approval by the executive director under Chapter 50 of this title (relating to Action on Applications), a statement that the executive director may issue final approval of the application unless there is a (if applicable) request for hearing filed with the chief clerk;

(10) if applicable, the deadline to file comments and, if applicable, hearing requests;

(11) a statement of whether the executive director has prepared a draft permit; and

(12) if applicable, a statement that the application or requested action is subject to the Coastal Management Program and must be consistent with the Coastal Management Program goals and policies.

§39.13. Mailed Notice.

When this chapter requires mailed notice under this section, the chief clerk shall mail notice to:

(1) the landowners named on the application map or supplemental map, or the sheet attached to the application map or supplemental map;

(2) the mayor and health authorities of the city or town in which the facility is or will be located or in which waste is or will be disposed of;

(3) the county judge and health authorities of the county in which the facility is or will be located or in which waste is or will be disposed of;

(4) the Texas Department of Health;

(5) the Texas Parks and Wildlife Department;

(6) the Texas Railroad Commission;

(7) if applicable, local, state and federal agencies for which notice is required in 40 Code of Federal Regulations (CFR), §124.10(c), as amended and adopted in the CFR through May 2, 1989, at 54 FedReg 18786;

(8) if applicable, persons on a mailing list developed and maintained in accordance with 40 Code of Federal Regulations, §124.10(c)(1)(ix);

(9) the applicant;

(10) if the application concerns an injection well, the Water Well Drillers Advisory Council;

(11) persons on a relevant mailing list kept under §39.7 of this title (relating to Mailing Lists);

(12) any other person the executive director or chief clerk may elect to include;

(13) if applicable, the secretary of the Coastal Coordination Council; and

(14) persons who filed public comment or hearing requests on or before the deadline for filing public comment or hearing requests.

§39.17. Notice of Minor Amendment.

(a) The only required notice for applications seeking a minor amendment of a permit under Chapter 305, Subchapter D of this title (relating to Amendments, Modifications, Renewals, Transfers, Corrections, Revocation, and Suspension of Permits) is that the chief clerk shall mail notice to the persons listed in §39.13 of this title (relating to Mailed Notice). The deadline to file public comment is ten days after mailing.

(b) Subsection (a) of this section does not apply to applications seeking a minor amendment or minor modification of a wastewater discharge permit. For such applications, the notice requirements are in §39.151(c) of this title (relating to Application for Wastewater Discharge Permit, Including Application for the Disposal of Sewage Sludge or Water Treatment Sludge).

SUBCHAPTER F: PUBLIC NOTICE OF RADIOACTIVE MATERIAL

LICENSE APPLICATIONS

§§39.301 - 39.303, 39.305, 39.307, 39.309, 39.311, 39.313

STATUTORY AUTHORITY

The repeals are adopted under the Texas Radiation Control Act; THSC, §§401.011, 401.051, 401.057, 401.101, 401.103(b) and (c), 401.104(b) - (e), 401.106(b) and (c), 401.201 - 401.203, 401.303, 401.412, and 401.413; Texas Government Code, §2001.004(1); and Texas Water Code, §5.103.

§39.301. Notice of Declaration of Administrative Completeness.

§39.302. Applicability.

§39.303. Notice of License Applications Upon Completion of Technical Review.

§39.305. Mailed Notice for Radioactive Material Licenses.

§39.307. Published Notice.

§39.309. Notice of Contested Case Hearing on Application.

§39.311. Proof and Certification of Notice.

§39.313. Public Notification and Public Participation.

SUBCHAPTER M: PUBLIC NOTICE FOR RADIOACTIVE

MATERIAL LICENSES

§§39.701, 39.703, 39.707, 39.709

STATUTORY AUTHORITY

The amendments are adopted under the Texas Radiation Control Act; THSC, §§401.011, 401.051, 401.057, 401.101, 401.103(b) and (c), 401.104(b) - (e), 401.106(b) and (c), 401.201 - 401.203, 401.303, 401.412, and 401.413; Texas Government Code, §2001.004(1); and Texas Water Code, §5.103.

§39.701. Applicability.

Any license application under Chapter 336 of this title (relating to Radioactive Substance Rules) is subject to this subchapter and applicable requirements under Subchapter H of this chapter (relating to Applicability and General Provisions).

§39.703. Notice of Completion of Technical Review.

(a) When the executive director has completed the technical review of an application for a license, major amendment, or renewal of a license issued under Chapter 336 of this title (relating to Radioactive Substance Rules) or for a minor amendment issued under Chapter 336, Subchapter H of this title (relating to Licensing Requirements for Near-Surface Land Disposal of Low-Level Radioactive

Waste), notice shall be mailed and published under this subchapter. The deadline to file public comment, protests, or hearing requests is 30 days after publication.

(b) For any other application for a minor amendment to a license issued under Chapter 336, Subchapter F of this title (relating to Alternative Methods of Disposal of Radioactive Material) or Subchapter G of this title (relating to Decommissioning Standards), notice shall be mailed under this subchapter. The deadline to file public comment, protests, or hearing requests is ten days after mailing.

§39.707. Published Notice.

(a) For applications under Chapter 336, Subchapter F of this title (relating to Alternative Methods of Disposal of Radioactive Material) or Subchapter G of this title (relating to Decommissioning Standards), when notice is required to be published under this subchapter, the applicant shall publish notice at least once in a newspaper of largest general circulation in the county in which the facility is located.

(b) For applications for a new license, renewal license, or major amendment to a license issued under Chapter 336, Subchapter H of this title (relating to Licensing Requirements for Near-Surface Land Disposal of Low-Level Radioactive Waste), when notice is required to be published under this subchapter, the applicant shall publish notice in a newspaper published in the county or counties in which the facility is or will be located. If no newspaper is published in the county or counties in which the facility is or will be located, a written copy of the notice shall be posted at the courthouse door and

five other public places in the immediate locality to be affected. The notice shall be posted for at least 31 days.

(c) In addition to published notice requirements in subsection (b) of this section, for an amendment of a license under Chapter 336, Subchapter H of this title, the chief clerk shall publish notice once in the *Texas Register*.

§39.709. Notice of Contested Case Hearing on Application.

(a) The requirements of this section apply when an application is referred to SOAH for a contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings).

(b) For applications under Chapter 336, Subchapter F of this title (relating to Alternative Methods of Disposal of Radioactive Material) or Subchapter G of this title (relating to Decommissioning Standards), notice shall be mailed no later than 30 days before the hearing. For applications under Chapter 336, Subchapter H of this title (relating to Licensing Requirements for Near-Surface Land Disposal of Low-Level Radioactive Waste), notice shall be mailed no later than 31 days before the hearing.

(c) When notice is required under this section, the text of the notice must include the applicable information specified in §39.411(b)(13) and (d) of this title (relating to Text of Public Notice).