

The Texas Commission on Environmental Quality (commission) proposes amendments to §§39.703, 39.707, and 39.709.

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 rules is to implement House Bill 1567, 78th Legislature, 2003, and its amendments to the Texas Health and Safety Code, Chapter 401 (also known as the Texas Radiation Control Act). Changes to implement House Bill 1567, relating to the licensing of low-level radioactive waste disposal, that are specific to this chapter include changes in procedures for providing notice of draft license and opportunity for hearing. Some additional changes outside the scope of the bill implementation are proposed to provide corrections to rule section titles, improve grammar, and correct typographical errors.

SECTION BY SECTION DISCUSSION

Section 39.703, Notice of Completion of Technical Review

The proposed amendment to §39.703(b) would correct the title for Chapter 336, Subchapter F, Licensing of Alternative Methods of Disposal of Radioactive Material.

Section 39.707, Published Notice

The proposed amendment to §39.707(a) would correct the title for 30 TAC Chapter 336, Subchapter F. The proposed amendment to §39.707(b) would change the requirements for providing published notice of the draft license and opportunity for hearing. The proposed amendment provides that notice shall be

published in a newspaper of general circulation in each county in which the proposed disposal facility site is located. The proposed amendment also requires that the draft license and application materials be available for review at the offices of the commission and in a public place in the county or counties in which the proposed disposal facility site is located. Public places may include a county courthouse, public library, city hall, or other public location where members of the public may have access to the materials for review and photocopying. The proposed amendment conforms with new statutory requirements given in Texas Health and Safety Code, §401.238.

Section 39.709, Notice of Contested Case Hearing on Application

The proposed amendment to §39.709(a) would delete the acronym “SOAH” and substitute “the State Office of Administrative Hearings” because the term is only used once in the section. The proposed amendment to §39.709(b) would correct the title for Chapter 336, Subchapter F.

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, there will not be significant fiscal implications for the agency or other units of state and local government as a result of administration or enforcement of the proposed rules.

The rule amendments 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 disposal site in Texas. Changes to implement HB 1567 that are specific to this chapter include changes in procedures for providing

notice of draft license and opportunity for hearing. Some additional changes outside the scope of the bill implementation are proposed to provide corrections to rule section titles, improve grammar, and correct typographical errors.

The proposed rules conform with new statutory requirements given in Texas Health and Safety Code, §401.238. The proposed rules would change the requirements for providing published notice of the draft license and opportunity for hearing. The proposed rules would require that upon completion of technical review and preparation of the draft license, the commission shall publish, at the applicant's expense, notice of the draft license and specify the requirements for requesting a contested case hearing by an affected person. The notice shall include a statement that the draft license is available for review on the commission's Web site and that the draft license and application materials are available for review at the offices of the commission and in a public place in the county or counties in which the proposed disposal facility site is located. Public places may include a county courthouse, public library, city hall, or other public location where members of the public may have access to the materials for review and photocopying.

Notice shall be published in a newspaper of general circulation in each county in which the proposed disposal facility site is located. The proposed rulemaking also makes nonsubstantive changes to Chapter 39 to correct citations to other laws.

Posting of the draft license on the commission's Web site and making available application materials at the commission offices and a public place in which the proposed facility is to be located is not expected to result in significant fiscal implications for the commission or the affected county.

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 the provision of public notice and opportunity for hearing for a draft license issued under Chapter 336, Subchapter H, Licensing Requirements for Near-Surface Land Disposal of Low-Level Radioactive Waste.

No significant fiscal implications are anticipated to businesses or individuals who wish to meet the proposed notice requirements necessary to obtain a license to dispose of low-level radioactive waste.

The proposed rules would require that upon completion of technical review and preparation of the draft license, the commission shall publish, at the applicant's expense, notice of the draft license and specify the requirements for requesting a contested case hearing by an affected person. Notice shall be published in a newspaper of general circulation in each county in which the proposed disposal facility site is located. Costs for the applicant to publish notice in a newspaper of general circulation will vary, but are estimated to be between \$250 and \$800.

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, a low-level radioactive waste 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 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 proposed amendments to 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 significant requirements added to the noticing

of draft licenses for radioactive material disposal facilities. The proposed rulemaking action implements legislative requirements in House Bill 1567, including a change in the publication of notice of a draft license issued under Chapter 336, Subchapter H, Licensing Requirements for Near-Surface Land Disposal of Low-Level Radioactive Waste. The proposed rulemaking also makes nonsubstantive changes to Chapter 39 to correct citations to other laws.

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 Texas Health and Safety Code, Chapter 401 as provided in House Bill 1567. The proposed rule amendment changes the requirements for newspaper notice in accordance with the requirements of House Bill 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, which 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 House Bill 1567, including a change in the publication of notice of a draft license issued under Chapter 336, Subchapter H. The proposed amendments to Chapter 39 affect only the procedural requirements for issuing notices of draft licenses. The proposed rulemaking also makes non-substantive changes to Chapter 39 to correct citations to other laws.

Promulgation and enforcement of these proposed rules would be neither a statutory nor a constitutional taking of private real property. The subject proposed regulations 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 implement non-substantive changes to existing rules and reflect a change in the procedural requirements for the notice of draft licenses provided in House Bill 1567.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed this proposed rulemaking action and determined that the rules are neither identified in, nor will their amendment affect, any action/authorization identified in Coastal Coordination Act Implementation Rules in 31 TAC §505.11, relating to Actions and Rules Subject to the Coastal Management Program. Therefore, the proposed rulemaking action is not subject to the Texas Coastal Management Program.

ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin, Texas, on September 16, 2003, at 1:30 p.m., at the commission's central office, 12100 Park 35 Circle, Building E, Room 201. 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 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 the 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, Texas Commission on Environmental Quality, 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, please contact Devane Clarke of the Waste Permits Division at (512) 239-5604, or Alan Henderson of the Policy and Regulations Division at (512) 239-1510.

SUBCHAPTER M: PUBLIC NOTICE FOR RADIOACTIVE MATERIAL LICENSES

§§39.703, 39.707, 39.709

STATUTORY AUTHORITY

The amendments are 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 amendments are 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 amendments implement 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.

§39.703. Notice of Completion of Technical Review.

(a) (No change.)

(b) For any other application for a minor amendment to a license issued under Chapter 336, Subchapter F of this title (relating to Licensing of 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 Licensing of 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), on completion of technical review and preparation of the draft license, the commission shall publish, at the applicant's expense, notice of the draft license and

specify the requirements for requesting a contested case hearing by a person affected. The notice shall include a statement that the draft license is available for review on the commission's Web site and that the draft license and application materials are available for review at the offices of the commission and in a public place in the county or counties in which the proposed disposal facility site is located. Notice shall be published in a newspaper of general circulation in each county in which the proposed disposal facility site is located. [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) (No change.)

§39.709. Notice of Contested Case Hearing on Application.

(a) The requirements of this section apply when an application is referred to the State Office of Administrative Hearings [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 Licensing of 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) (No change.)