

The Texas Commission on Environmental Quality (commission) adopts amendments to §§39.703, 39.707, and 39.709 *with changes* to the proposed text as published in the January 28, 2005, issue of the *Texas Register* (30 TexReg 360).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

On September 24, 2003, the commission considered the petition for rulemaking that was filed by Newpark Resources, Inc. on August 5, 2003. The petitioner requested that the commission initiate rulemaking to allow commercial disposal of naturally occurring radioactive material (NORM) waste in Class I injection wells located at facilities at which the storage and processing of such material is licensed by the Texas Department of Health (TDH), Bureau of Radiation Control. TDH is the predecessor agency of the Department of State Health Services. The petitioner also requested amendments to the memorandum of understanding (MOU) with TDH to reflect that TDH is authorized to regulate the storage and processing of NORM waste that will be disposed of at a commercial NORM waste disposal facility.

The commission directed staff to initiate rulemaking for the licensing of commercial disposal of NORM waste streams from public water systems by injection into Class I injection wells. The commission decided that the MOU with TDH should not be amended as requested by the petitioner.

This rulemaking amends the public notice requirements for radioactive material licenses and establishes notice requirements for license applications for commercial disposal of NORM waste authorized under 30 TAC Chapter 336, Subchapter K. A corresponding rulemaking that includes changes to Chapter 336, Radioactive Substance Rules, is published in this issue of the *Texas Register*.

SECTION BY SECTION DISCUSSION

Administrative and grammatical changes are adopted throughout the sections to bring the existing rule language into agreement with guidance provided in the *Texas Legislative Council Drafting Manual*, November 2004.

Section 39.703(a) is adopted to add the phrase “by the Office of the Chief Clerk” to make it clear who must mail the notice. The phrase “by the applicant” has been deleted since proposal. The change was made because some notices under this subchapter are published by the applicant and other notices are published by the commission at the applicant’s expense.

Section 39.703(b) is adopted to make the notice requirements of this section applicable to licenses issued under Chapter 336, Subchapter K, Commercial Disposal of Naturally Occurring Radioactive Material Waste From Public Water Systems.

Section 39.707(a) is adopted to make the notice requirements of this section applicable to licenses issued under Chapter 336, Subchapter K.

Section 39.709(b) is adopted to make the notice requirements of this section applicable to licenses issued under Chapter 336, Subchapter K.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rules in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the adopted rules are not subject to §2001.0225 because they do not meet the criteria for a "major environmental rule" as defined in that statute.

A "major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, 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 to Chapter 39 are part of the commission's rulemaking to authorize commercial disposal of NORM waste. The specific intent of the adopted rules is to allow commercial injection well disposal of NORM waste generated by public water systems. These rules will benefit public water systems by providing an additional disposal option for NORM waste generated from the treatment of water supplies. It is not anticipated that the adopted rules will 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 the adopted rules would only apply to commercial Class I injection well disposal of NORM waste generated by public water systems. The adopted amendments to Chapter 39 are procedural changes that establish the public notice requirements for NORM waste disposal license applications. Therefore, the commission concludes that these adopted rules do not meet the definition of a major environmental rule.

Furthermore, the adopted rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §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.

In this case, the adopted rules do not meet any of these applicability requirements. First, there are no applicable federal standards that these rules would address. Disposal of NORM waste is not subject to standards established by the Nuclear Regulatory Commission or the United States Environmental Protection Agency (EPA). Second, the adopted rules do not exceed an express requirement of state law. Texas Health and Safety Code (THSC), Chapter 401, authorizes the commission to regulate the disposal of most radioactive material in Texas. However, there are no specific requirements for the disposal of NORM waste in the Texas Radiation Control Act that are exceeded by these adopted rules. Third, there is no delegation agreement that would be exceeded by these adopted rules because no delegation agreement relates to this subject matter area. Fourth, the commission does not propose these rules solely under the commission's general powers. THSC, Chapter 401, §§401.051, 401.103, 401.104, and 401.412, specifically authorize the commission to adopt rules for the control of sources of radiation and the licensing of the disposal of radioactive materials.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these adopted rules and performed an assessment of whether the adopted rules constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of the adopted rules is to provide notice requirements for license applications authorizing commercial injection well disposal of NORM waste generated by public water systems. These adopted rules will only apply to license applications for commercial Class I injection well disposal of NORM waste generated by public water systems. Because EPA adopted federal standards for radionuclides in drinking water, some public water systems subject to these federal standards will need to manage and dispose of their treatment residuals containing NORM in a manner that is protective of human health and safety and the environment. The adopted rules would substantially advance this stated purpose by allowing commercial injection well disposal of NORM waste streams generated by public water systems.

Promulgation and enforcement of these adopted rules would be neither a statutory nor a constitutional taking of private real property because the adopted rules do not affect real property. In particular, there are no burdens imposed on private real property, and the adopted rules would allow a new option for the commercial disposal of NORM waste for public water systems dealing with NORM waste generated by the treatment of public water supplies. The existing prohibition of commercial disposal of NORM waste is removed to allow commercial Class I injection well disposal of NORM waste generated by public water systems. The adopted amendments to Chapter 39 are procedural changes that establish the public notice requirements for NORM waste disposal license applications. Because the regulation does not affect real property, it does not burden, restrict, or limit an owner's right to property or reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation.

Therefore, these adopted rules will not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found that the rules are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the adopted rules are not subject to the Texas Coastal Management Program.

PUBLIC COMMENT

The comment period closed on February 28, 2005. A public hearing on this proposal was held in Austin on February 24, 2005. The commission received no comments with regard to Chapter 39.

SUBCHAPTER M: PUBLIC NOTICE FOR RADIOACTIVE MATERIAL LICENSES

§§39.703, 39.707, 39.709

STATUTORY AUTHORITY

The amendments are adopted under the Texas Radiation Control Act, THSC, Chapter 401; THSC, §401.011, which provides the commission authority to regulate and license the disposal of radioactive substances; §401.051, which authorizes the commission to adopt rules and guidelines relating to the control of sources of radiation; §401.103, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, which requires the commission to provide rules for licensing for the disposal of radioactive material; and §401.412, which provides authority to the commission to regulate and license the disposal of radioactive substances and to adopt rules necessary to exercise this authority. The amendments are also adopted under Texas Water Code, §27.019, which requires the commission to adopt rules reasonably required for the performance of the commission's duties under the Injection Well Act. The adopted amendments are also authorized by Texas Water Code, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the Texas Water Code and other laws of the state.

The adopted amendments implement the Texas Radiation Control Act, THSC, Chapter 401; and the Injection Well Act, Texas Water Code, Chapter 27.

§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 must be mailed by the Office of the Chief Clerk 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 Licensing of Alternative Methods of Disposal of Radioactive Material), Subchapter G of this title (relating to Decommissioning Standards), or Subchapter K of this title (relating to Commercial Disposal of Naturally Occurring Radioactive Material Waste From Public Water Systems), notice must be mailed by the Office of the Chief Clerk 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), Subchapter G of this title (relating to Decommissioning Standards), or Subchapter K of this title (relating to Commercial Disposal of Naturally Occurring Radioactive Material Waste From Public Water Systems), 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 must 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 must be published in a newspaper of general circulation in each county in which the proposed disposal facility site is located.

(c) In addition to published notice requirements in subsection (b) of this section, for an initial notice of draft license and opportunity to comment and for any subsequent license 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 the State Office of Administrative Hearings 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), Subchapter G of this title (relating to Decommissioning Standards), or Subchapter K of this title (relating to Commercial Disposal of Naturally Occurring Radioactive Material Waste From Public Water Systems), notice must 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 must 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).