

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

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 Texas 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 proposes amendments to 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 proposed throughout the sections to bring the existing rule language into agreement with guidance provided in the Texas Legislative Council Drafting Manual, October 2002.

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

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

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

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

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

The proposed rules would establish public notice requirements for entities wishing to obtain a license to commercially dispose of NORM waste by injection into Class I injection wells. The agency

anticipates receiving at least one and perhaps as many as five of these types of applications. Some costs to the agency would be expected to process public comment on any draft licenses, and to fulfill other administrative requirements, though these costs are not anticipated to be significant. These costs would be exclusive of any contested case hearing costs, if applicable.

State and local governments typically do not own or operate Class I injection wells that commercially dispose of NORM waste from public water systems, and therefore fiscal implications are not anticipated for state or local governments. If these types of facilities are owned or operated by units of government in the future, the costs for public notice requirements are expected to be the same as those identified in the PUBLIC BENEFITS AND COSTS section of this preamble.

PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated as a result of the proposed amendments will be that the public will be notified when entities seek a license to commercially dispose of NORM waste by injection into Class I injection wells.

No significant fiscal impact is expected to occur from these proposed amendments. The newspaper publication cost for required notices is estimated to be \$400 - \$600 for a newspaper with a small circulation. In a newspaper with a large circulation, the publication of a public notice is estimated to cost between \$1,100 - \$1,500. This estimate does not include any costs related to contested case hearings for this type of license application, as it is not known how many of the potential license

applications would be subject to contested case hearings, if any. However, if applicable, these costs could be significant and would include attorney fees, expert witness fees, etc.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated as a result of implementation of the proposed rules for small or micro-businesses. The agency does not anticipate that small and micro-business would be applying for this type of license.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission reviewed this proposed rulemaking 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 rules in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed 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 proposed amendments to Chapter 39 are part of the commission's rulemaking to authorize commercial disposal of NORM waste. The specific intent of the proposed 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 proposed 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 proposed rules would only apply to commercial Class I injection well disposal of NORM waste generated by public water systems. The proposed 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 proposed rules do not meet the definition of a major environmental rule.

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.

In this case, the proposed 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 proposed 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 proposed rules. Third, there is no delegation agreement that would be exceeded by these proposed 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 invites public comment regarding the draft regulatory impact analysis determination during the public comment period.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these proposed rules and performed an assessment of whether the proposed rules constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of the proposed rules is to provide notice requirements for license applications authorizing commercial injection well disposal of NORM waste generated by public water systems. These proposed 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 proposed 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 proposed rules would be neither a statutory nor a constitutional taking of private real property because the proposed rules do not affect real property. In particular, there are no burdens imposed on private real property, and the proposed 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 proposed 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 proposed rules will not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed 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 proposed rules are not subject to the Texas Coastal Management Program.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on February 24, 2005, at 2:00 p.m. in Building F, Room 2210, at the commission's central office located at 12100 Park 35 Circle.

The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes before the hearing and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs 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 Joyce Spencer, 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 Project Number 2004-030-336-WS. Comments must be received by 5:00 p.m., February 28, 2005. For further information or questions concerning this proposal, please contact Debi Dyer, Policy and Regulations Division, at (512) 239-3972.

SUBCHAPTER M: PUBLIC NOTICE FOR RADIOACTIVE MATERIAL LICENSES

§§39.703, 39.707, 39.709

STATUTORY AUTHORITY

The amendments are proposed 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 proposed 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 proposed 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 proposed 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 [shall] be mailed by the Office of the Chief Clerk and published by the applicant 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), [or] Subchapter G of this title (relating to Decommissioning Standards), or Subchapter K of this title (relating to Commercial Disposal of Naturally Occurring Radioactive Material (NORM) Waste From Public Water Systems), notice must [shall] 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), [or] Subchapter G of this title (relating to Decommissioning Standards), or Subchapter K of this title (relating to Commercial Disposal of Naturally Occurring Radioactive Material (NORM) 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 [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 must [shall] be published in a newspaper of general circulation in each county in which the proposed disposal facility site is located.

(c) (No change.)

§39.709. Notice of Contested Case Hearing on Application.

(a) (No change.)

(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), or Subchapter K of this title (relating to Commercial Disposal of

Naturally Occurring Radioactive Material (NORM) Waste From Public Water Systems), notice must [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 must [shall] be mailed no later than 31 days before the hearing.

(c) (No change.)