



TEXAS MINING AND RECLAMATION ASSOCIATION
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December 20, 2006

VIA HAND-DELIVERY

Mr. Glenn Shankle
Executive Director
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

Dear Mr. Shankle:

I enclose for consideration and action by the Commission an original and one copy of the petition for rulemaking of the Texas Mining and Reclamation Association (TMRA). Please date stamp the copy and return it with the courier. We request that it be set for consideration and Commission action at the earliest possible time and look forward to working with all concerned on this matter.

Thank you for your attention to this matter.

Yours truly,

A handwritten signature in black ink, appearing to read "Stephen F. Smith". The signature is written in a cursive style with some loops and flourishes.

Stephen F. Smith
Executive Director

Enclosure

cc: Russ Kimble, General Law Division

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DEC 20 2006
REGULATIONS DIVISION

**BEFORE THE
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

IN RE	§
PETITION OF THE TEXAS MINING AND RECLAMATION ASSOCIATION	§
FOR RULEMAKING	§

ORIGINAL PETITION FOR RULEMAKING

TO THE HONORABLE COMMISSIONERS:

The Texas Mining and Reclamation Association (TMRA or Petitioner) presents the following Petition for Rulemaking pursuant to the Texas Commission on Environmental Quality (Commission) rule at 30 TAC § 20.15, and respectfully requests the Commission to consider this petition to initiate a rulemaking proceeding covering all of the rules and rule changes proposed in this petition, then to adopt all rules and rule changes proposed and set out herein.

I.

Petitioner's Name and Address

1. TMRA is a non-profit unincorporated association comprising 90 companies involved in various types of mining, including in situ recovery of uranium in Texas and firms and individuals who provide goods and services to the mining industry. The address of TMRA is 816 Congress Avenue, Austin, TX 78701.

II.

Request for Simultaneous Consideration of Multiple Rules and Rule Changes

2. The Petitioner requests the Commission to exercise its discretion to waive its requirement that each individual rule or rule change be submitted by separate petition for

rulemaking and to accept all of the included rules for consideration, rulemaking and adoption. To support this request, Petitioners would show that many of the rules and rule changes here proposed are inter-dependent and the rationales for their adoption are so interrelated that the explanations of how they are intended to operate and the rationales for their adoption can be more effectively and economically considered if they are proposed and considered together rather than if proposed separately. However, should the Commission prefer to review these proposals separately, the Petitioners are prepared to submit them as preferred.

3. Petitioner submits in this petition the following information for each and all of the proposed rules and rule changes included herein.:

- (i) An explanation of the intended effect of the rule or rule change;
- (ii) The text of the proposed rule or rule change indicating any text or punctuation to be added to or deleted from an existing rule;
- (iii) A statement of the Commission's statutory authority to adopt the rule or rule change as requested; and,
- (iv) A statement of the compelling policy reasons supporting the proposed change, including injury or inequity which would result from the failure to adopt the proposed rule or rule change.

III.

Authority to Adopt Rules and Amendments

4. The Commission has authority under Tex. Water Code § 5.103 and § 27.019 to adopt each and all of the proposed rules and rule changes requested herein.

IV.
Explanations and Rationales for Requested Rules and Changes

A. Summary of Proposed Changes

5. To facilitate the regulatory certainty required for orderly and environmentally sound development of uranium resources in the State, TMRA herewith proposes rule changes addressing the following topics:

***a. Replace PAA's with Production area reports.** TMRA seeks and proposes rule language to resolve various issues as to the regulatory status of what are currently called "production area authorizations" (PAA's), which are issued in connection with the administration of "Area permits" issued by the Commission for Class III wells under the Texas Injection Well Act, Tex. Water Code Chap. 27 and the Texas Underground Injection Control (UIC) program. This requires changes to several rules. See ¶¶ 8-25.*

***b. Set time for monitor well placement testing.** TMRA proposes a rule change to clarify the monitor well placement requirements set by the current rules. See ¶ 27.*

***c. Clarify mechanical integrity requirements.** TMRA proposes a rule change to clarify that single point resistivity logging is not required to show the mechanical integrity of Class III injection wells. See ¶ 28.*

***d. Confirm mine area designations and schedules are provisional.** TMRA proposes a rule change to resolve conflict among existing rules to avoid artificially constraining miners to estimated production and restoration schedules. See ¶ 29-32.*

e. Characterize Chapter 305 rules accurately. This change would correct a mischaracterization of the Chapter 305 rules. These rules relating to Class III wells do not involve waste disposal. See ¶ 33.

f. Clarify By-product and source material are not COC's. This rule would clarify that "chemicals of concern" (COC's) under the Texas Risk Reduction Program rules at 30 TAC Chapter 350 do not include "By-product material" or "source material," as defined in Tex. Health & Safety Code §§ 401.003(3)(B) and (22). See ¶ 34.

g. Housekeeping amendments. For purposes of continuity throughout the rules that pertain to the uranium industry, a number of minor clarifications are needed in various parts of § 30 TAC Chapter 331.

B. Background

6. The rule changes proposed by TMRA are best explained and the policy rationales for their adoption are best seen in the context of uranium project development. Therefore, before presenting the specific rule changes proposed by TMRA, the context and rationale for these requested changes is reviewed.

The Regulatory Environment of Uranium Project Development

7. In situ recovery of uranium is driven by two long-lead endeavors: (1) project development (leasing, seeking contracts with end-users, staffing, hiring contractors, ore delineation, well completion, mine plan/facility engineering, wellfield development, and environmental baseline studies) and (2) obtaining the authorizations, permits, exemptions and licenses from the regulatory agencies. While uranium operators have some control over the

timing of project development, difficulties with rule language have come to light and should be resolved so that regulatory uncertainties do not consume undue regulatory or industry resources.

The Production Area Authorization System

8. As initially conceived, the production area authorization (PAA) was not a permit and the PAA process was not a permitting process. The PAA certainly was not intended to offer a second, third or later reconsideration of issues previously decided in issuance of an area permit. More recently, however, the PAA process has evolved to one in which each PAA is processed with its own additional notice and opportunity for public hearing. That process was not intended by the Commission or this industry and oversteps the historical intent of the regulatory program.

9. By definition, a PAA is not a permit or a permit amendment, but a document which is issued and operates "under the terms of an injection well permit" that authorizes the initiation of mining activities in a specified part of the permit area. 30 TAC § 331.2 (75). Because a PAA is not and cannot be a permit amendment, but is issued "under the terms of an area permit" and can operate only within the confines and context of an area permit, a PAA cannot have the weight of an area permit issued under Tex. Water Code Chapter 27. Historically, the PAA was adopted as an administrative device intended to give Commission staff a prompt and regular opportunity to see additional, more detailed, field and operational data as successive production areas were delineated. In other words, it was supposed to be a system that allowed regulators more detailed field and operational information as it became available, without amending the area permit. The PAA process was not created or intended to insert another decision point where a permittee must again prove his case in order to avoid stranding his capital investment and idling a permitted and operating mine for a year or more.

The PAA Process Dilutes Public Participation and Frustrates Public Policy

10. The PAA which, by definition, is not a permit amendment and can operate only “under” an area permit, has nonetheless come to be treated as yet another permit-- a second (and third and fourth, etc. as the permittee opens successive production areas within the area of his area permit) mining permit that an area permit holder must secure before mining any production area under an approved area permit. However, to require an in situ recovery (*ISR*) uranium operator, already holding an area permit issued under Tex. Water Code § 27.05 1, to obtain any further administrative approval before commencing or continuing economic mining under his area permit is unnecessary. The practice devalues public participation, frustrates the public interest, and creates insoluble legal and practical problems. To achieve and serve the worthy purposes for which it was originally established, the PAA process must be restored to its proper role in the regulatory process.

No Additional Level of Permitting Required

11. The PAA process should not establish an additional level of permitting. First, prior to the recent changes in the function of PAA's, Texas had nearly three decades of experience in successful environmental regulation of *ISR* uranium mining under area permits for Class III wells. There is no credible argument that the PAA process is needed as an additional permitting process in order to make up for some gap or inadequacy which otherwise frustrates the Commission's permitting or regulatory authority over *ISR* uranium mining. There is no basis for a claim that current regulatory authority is inadequate to allow regulators to investigate and act promptly and effectively on information indicating a threat to the environment or the public interest. Statutory provisions and rules for the amendment, suspension and revocation of

permits, the bringing of compliance and enforcement actions and the conduct of investigations already provide regulators appropriate authority to investigate and act upon credible information.

12. Second, neither the U. S. Environmental Protection Agency nor any state other than Texas requires or relies upon the PAA process currently used in Texas. The practice and the problem are unique to Texas.

13. Third, no one has made a credible claim that the issues which must be addressed in the permitting process which precedes the granting of an area permit under Tex. Water Code § 27.051 (a), are so narrow as to frustrate environmental protection. Just the contrary. Current statutory authority leaves no gap or blind spot requiring a “fix” or a “patch.”

14. Fourth, the geology and hydrology of the Texas Gulf Coast are sufficiently known and knowable that operators can reasonably demonstrate, and regulators can reasonably examine and ascertain, the environmental soundness of *ISR* uranium mining proposals well before the site-specific field data needed for delineating ore and planning specific wellfields and pressure regimes can be developed. There is no scientific basis to claim that the inherent unknowability of field conditions precludes the Commission’s making sound regulatory decisions for issuance, or not, of area permits covering a thousand or more acres long before the site specific data required for the planning of well fields is available.

Current PAA Practice Devalues Agency Decisions and Public Participation

15. While government agencies may take legitimate action without soliciting public participation, notice and opportunity for public participation can enhance the legitimacy and effectiveness of regulatory decision-making. Regulators must balance the desirability of public participation with concerns for finality, the permanence accorded to a decision. For there to be a decision, there must be a point at which matters are recognized as having been legitimately

resolved. Without this finality, there is no decision; and, regulated activities requiring substantial investment or long lead times for planning cannot reasonably be undertaken. The finality of a decision is also a measure of the value placed on the public participation and other elements which went into that decision.

16. The current PAA process devalues public participation by discounting either present or past public investments in the decision-making process. In the PAA review process, as most recently implemented, the agency subjects the holder of an area permit issued under Tex. Water Code § 27.05 1 after notice and opportunity for hearing, to yet another decision-making process in which the public is seemingly invited to reconsider many of the same issues decided in the prior statutory proceeding. This second process is not a statutory process, but a consequence of TCEQ's administrative PAA process. It is a process which does not follow the rules which govern revoking, suspending or amending an area permit. The problem is that unless a PAA hearing allows the public to reconsider issues already determined in the earlier statutory process, the public may feel itself abused by being invited to "participate" in a decision it can not influence.

On the other hand, if the agency were to allow a PAA hearing to address larger issues already determined in the earlier statutory hearing, that would dilute and devalue its earlier statutory decision-making on the area permit. Moreover, it would do so in a process which had no statutory basis and was not noticed or conducted under the rules for amending, suspending or revoking an area permit. Apart from the fact that the agency is prohibited by law from attacking or amending an earlier permitting decision except in a process brought according to the rules for revoking, suspending or amending the earlier permitting decision, devaluing its earlier decision in this way also devalues the public participation invested in that earlier statutory decision.

17. The current PAA process creates an artificial, non-statutory decision-point and an invitation to public participation which must either deceive the public because the opportunity to participate is illusory, or devalue and dilute--without following the proper procedures for amending a permit-- the result of the public's earlier participation in the statutory permitting process. Either way, the PAA notice and opportunity for hearing process devalues public participation.

Requiring Another Pre-Mining Approval Defeats the Public Interest

18. In addition to being unnecessary for environmental protection and diluting public participation in a statutory process, inserting another administrative approval between the issuance of a statutory area permit and the beginning or continuation of mining operations under an area permit defeats the very same statutory public interest which the law required the Commission to determine before issuing that area permit. Inserting an additional administrative decision point before the holder of an area permit may commence or continue economic recovery of a valuable natural resource introduces needless uncertainty in production planning, scheduling and budget forecasting. In turn, this tends to make capital financing for mine operations more expensive and more difficult to obtain. Such a regulatory requirement will stunt the resurgence of environmentally sound mining by an industry only now beginning to recover and to develop new Texas reserves. Increasing the administrative costs and risks of conducting *ISR* operations in Texas--without an environmental reason to do so--would act as a significant incentive for *ISR* uranium miners to curtail their operations in Texas and to locate future operations outside of Texas.

19. Texas *ISR mining* produces ore which is a commodity whose price is determined in a worldwide market. Capital financing for mining operations tends to flow to those locations

where the inherent technical and market risks of the business are not exaggerated by needless regulatory burdens, uncertainties or delays. Imposing an additional after-permit approval process would impose a gratuitous risk not found elsewhere; and, this would put Texas operators at a disadvantage in competing for capital. Such a needless bureaucratic burden would directly disadvantage Texas landowners (who would lose royalties from uranium production), Texas electric utilities (who would lose major industrial customers who typically bear substantial utility expenses otherwise borne by residential customers), other local service providers and businesses (who lose customers and revenue), workers (who lose jobs and career opportunities), local homeowners (who lose the benefit of stronger businesses bearing a disproportionate share of the costs of utility services and the local property tax burden), and local governments (who lose tax base and sales tax revenues). In Texas, these losses are especially important because the uranium most likely to be produced underlies many economically distressed areas which can ill-afford the lost opportunities, lost income, lost jobs and lost tax base. Ironically, over the longer term, the mining operators are the least affected by needlessly complex and uncertain regulatory provisions, because they do have the option to move their operations elsewhere. Mineral owners, homeowners, employees, local communities and local governments must bear the burden of these economic losses.

Requiring Another Pre-mining Approval Creates Legal and Practical Problems

20. Finally, recent experience demonstrates that requiring the holder of an area permit to submit to a further, permit-like decision-making process in the issuance of one or more PAA's before the permittee can mine or continue mining under his area permit creates major legal and practical problems. These problems, which generate cost, delay and uncertainty for all concerned, include:

- a. Questions whether the PAA process constitutes a prohibited collateral attack on the agency's order issuing the permittee's area permit;
- b. Questions as to which issues the agency may allow to be addressed in a PAA hearing without the agency's entertaining an illegal collateral attack on its own prior order and permit, and these questions trigger others as to standing;
- c. Questions as to the finality of a Commission decision which awarded an area permit that cannot be used until and unless the permittee secures yet another approval from the same agency touching upon the same issues;
- d. Questions whether a PAA hearing (i) reverses the burden of proof otherwise required by law in any proceeding to revoke, suspend or involuntarily amend an area permit or to bring an enforcement action; and, (ii) allows persons who, under Texas law, are not allowed to participate in enforcement proceedings to revoke, suspend or involuntarily amend a permit to participate in a PAA hearing which can have the same effect.
- e. Questions of policy allowing PAA hearings also turns Texas law on its head by allowing a would-be party what amounts to an immediate temporary injunction suspending mine operations under an approved area permit without having to establish either (i) his or her standing to compel such a hearing, (ii) a *prima facie* case that he or she is likely to succeed on the merits of a claim entitling him to require a suspension of mining operations, and (iii) without having to post any bond for the economic dislocation imposed either upon the operator or upon those who lose their jobs because the pending nature of a hearing will shut down or preclude

mine operations for a year or more (even if the party who has sought to compel the hearing had no credibility or lacked even a colorable claim of right to do so).

These problems flow directly from the contradictions inherent in treating a PAA decision as a permitting decision on which an exercise of agency discretionary judgment and public participation is required. This should not be the case and should be clearly addressed in this rule package.

Conclusion

21. As a permit-like mechanism which neither issues nor amends a statutory permit, but which must operate “under” an already issued area permit, the PAA cannot serve its originally intended purposes and frustrates the legitimate interests of all parties to the regulatory process. Treating the PAA as if it were a permit devalues public participation in the agency’s statutory decision-making process; and, as currently cast, the PAA process is unworkable. However, the Commission can by rule establish an administrative device which avoids all of these problems and serves the legitimate purposes for which the PAA was intended. TMRA proposes that the Commission adopt those changes necessary to restore the function for which the PAA was originally intended.

The PAA Problem Solved

22. The dilemma of the PAA process is that, on the one hand, a PAA application contributes potentially valuable information to the regulatory process; and, that information allows regulators a better understanding of the environmental conditions and operational realities actually encountered by permittees. On the other hand, if the PAA is treated as a permit, the results are counter-productive and confusing. TMRA’s response to the PAA problem is:

- (i) To return the PAA to the status of an administrative reporting device which does not automatically trigger any review or approval process;
- (ii) To require operators to make regular submissions of such data now to be renamed “production area reports” or PAR’s before entering new production areas; and,
- (iii) To require operators to update their mine plan information annually so that the regulators are assured the timely and regular benefits of the additional information developed during mining and restoration operations.

This requires that the operator’s PAR submission be disconnected from any requirement that automatically subjects the submission to any need for recognition or approval. The PAR is simply filed. The agency already has ample statutory authority to investigate and to require more information if it should see fit.; It likewise has ample authority to bring formal or informal enforcement or compliance actions where appropriate.

23. This solution (i) restores the PAA to its originally intended purpose, (ii) ensures that the same informational requirements heretofore associated with a PAA application are maintained, (iii) strips away the features which cause the PAA to resemble a permit (i.e., it no longer solicits or requires any agency action and without a decision to be made, there is no reason for a public hearing). TMRA’s solution serves the public interest by avoiding the difficult policy, legal and practical problems created by the recent PAA process.

24. TMRA’s solution preserves and enhances regulatory oversight by ensuring that all of the data which TCEQ currently requires area permittees to file will still be required; and, TMRA’s solution offers even more data, the annual report. Instead of being required to attend to all PAA matters as though they were of equal importance, TMRA’s solution leaves regulators free to prioritize and focus their efforts on what they deem the most important issues of

environmental protection. Furthermore, TMRA's proposal clarifies the regulatory setting, which allows all concerned to respond more effectively.

25. TMRA's solution preserves the value of public participation by focusing it on the statutory hearing process related to the area permit, where the contribution of the public to the process is accorded due weight and its contribution preserved in a decision which is not subject to being erased or diluted by in administrative processes which do not follow the requirements for permit amendment, suspension or revocation.

Other Rulemaking Proposals

26. In addition to re-establishing an informational process based on data submittals in PAR's, TMRA proposes the following specific rule changes:

Set Time to Test Production Zone Monitor Well Placement

27. Current rules do not make clear the time when compliance with the monitor well placement provisions of 30 TAC § 331.103 is to be determined. A ring of production zone monitor wells must necessarily be completed before injector or extractor wells are completed within the perimeter defined by the previously drilled monitor wells. However, the distance and angular standards set out in the rule are tied to the locations of production wells, all of which are not—and cannot be—completed at the same time. The placement of the wells in the initial monitor well ring must to some extent anticipate the number and placement of the multiple wells and well fields which will eventually be completed within a production area. These wells are more commonly completed over a period of weeks or months. Completion of such drilling may even take several years, depending upon both market and subsurface conditions. The proposed amendment would set a presumed time for compliance but allow for the exercise of judgment.

This rule change is needed to avoid imposing constraints upon mining which serve no significant or legitimate environmental purpose. This is TMRA's proposed rule change No. 8.

Clarify that SP Resistivity Logging Not Required for MIT

28. It is generally agreed that the rule at 30 TAC § 331.82(c)(2)(A)(i) does not require a single point resistivity test for Class III wells. It is also generally agreed that there is no genuine technical reason to impose such a requirement and that asserting such a requirement would impose a useless burden on miners. Nevertheless, some have read the rule as requiring a single point resistivity test in conjunction with a pressure test for detecting leaks in Class III uranium solution mining wells. The wording of the rule should be amended to avoid the mistaken reading and to make clear that the rule requires only one of the following to test for significant leaks in Class III uranium solution mining wells: (1) monitoring of annulus pressure, (2) pressure test with liquid or gas, (3) radioactive tracer survey, or (4) a single point resistivity survey in conjunction with a pressure test. TMRA has proposed a rule change to avoid the mistaken reading.

Confirm Mine Areas and Schedules Are Provisional

29. A recent hearing presented the question of whether the mine areas or schedule provided in a mine plan established enforceable production or restoration schedules or were instead merely estimates subject to future modification. The Commission determined that a mine plan was not a readily enforceable schedule for mining and restoration because mine plans are estimates. Those opposed to this view argued that the approved mine plan was the only mine plan upon which the public was allowed to scrutinize or comment during this hearing process and cited the language of 30 TAC § 33 1.107(c) in support of their opposing view. The relevant portion of the rule provides,

aquifer restoration, where appropriate for each permit or mine area, shall be accomplished in accordance with a time table specified in the currently approved mine plan unless otherwise authorized by the commission.

However, the “shall” language of this rule is inconsistent with the “estimated schedule” language in the definition of “Mine plan” at 30 TAC § 331.2(58):

(58) Mine plan--A map of adopted mine areas and an estimated schedule indicating the sequence and timetable for mining and any required aquifer restoration.

30. In general, the nature of *ISR* makes it difficult for an operator to determine exact dates for completion of mining or restoration. Other external factors dictate that mine plans be only estimates because it is impossible to predict with certainty how such factors as regulatory timing and world uranium market prices (where sudden price change may render previously uneconomical deposits economic resources or vice versa) may affect production rates and, therefore, restoration timing. Although TMRA has elsewhere herein proposed to replace PAA's with “production area reports,” which would eliminate the application and approval process associated with PAA's, the existing rule at 30 TAC Section 331.107(c) allows the Commission in a proper case to deny a pending application for a PAA if restoration has not occurred. The existing rules are unclear as to whether “mine plans” are fixed or are merely current estimates.

31. Other rule provisions seem to belie the treatment of mine production areas and schedules as fixed. The rule at 30 TAC § 331.107 sets restoration requirements for a production area. A permittee must begin restoration efforts in an area no later than thirty days after the completion of mining in that area. However, when a permittee completes mining and begins restoration, § 331.107(c) requires restoration according to the timetable only when restoration is appropriate for each permit or mine area. This rule seems to recognize that there may be situations in which restoration according to the mine plan timetable is not appropriate. If a situation occurs in which aquifer restoration in accordance with the mine plan is appropriate, but

a permittee seeks to proceed with restoration in a manner that is not consistent with the mine plan, TCEQ may authorize restoration to be accomplished according to another approved approach. If the Commission finds under § 331.107(c) that restoration has not occurred, the Commission may deny a pending application for a subsequent PAA.

32. To resolve the confusion these apparent conflicts may generate, TMRA has proposed amendments to 30 TAC § 331.107 to underscore the tentative nature of both mine areas and schedules. To ensure more current information of a permittee's intentions, the mechanism of an annually updated mine plan is proposed. Without these clarifying changes, regulatory time and resources are subject to being lost pursuing extraneous matters; and, to that extent, rational resource development consistent with sound environmental protection is sacrificed.

Characterize Chapter 305 Rules Accurately

33. The rule at 30 TAC § 305.1(a) provides

(a) The provisions of this chapter set the standards and requirements for applications, permits, and actions by the commission to carry out the responsibilities for management of waste disposal activities under Texas Water Code, Chapters 26, 28 and 32, and Texas Health and Safety Code, Chapters 361 and 401.

The rule seems to mistakenly characterize TCEQ's rules under Chapter 305 which pertain to administration of TCEQ Class III injection wells under Tex. Water Code Chapter 27 as the "management of waste disposal activities." However, Class III wells do not inject, manage or dispose of waste. This mischaracterization seems inadvertent and should be avoided.

Confirm TRRP Rules Do Not Reach "By-Product" or "Source Materials"

34. TCEQ should clarify the limited application its Texas Risk Reduction Program (TRRP) rules at 30 TAC Chapter 350 are intended to have on *ISR* sites. The TRRP addresses unauthorized or accidental discharges of "chemicals of concern" (COC's); however, TRRP was

not intended to address “by-product material” or “source material” as those terms are defined at Tex. Health & Safety Code §§ 401 .003(3)(B) or (22). TMRA proposes a clarification to avoid any confusion that could result under the rules as currently written.

TEXT OF PROPOSED CHANGES

1. Repeal the rule at 30 TAC § 305.49(b) and re-letter the following subsection accordingly:

§ 305.49 Additional Contents of Application for an Injection Well Permit

...

NOTES:

1. *This chapter of TCEQ rules pertains to “Consolidated Permits;” and, this particular rule pertains to contents of an application for an injection well permit. However, a PAR is neither an application nor any part of an application nor a permit. Moreover, a PAR does not invite or commence any “permitting” action. Likewise, a PAR is not an element of any “application,” including an injection well permit application. Deleting this portion of § 305.49 is essential to clarifying the role and function of the PAR so as to avoid future problems.*

2. Repeal the rule at 30 TAC § 305.155:

NOTES:

1. *A definition of a “Production Area Authorization” is no longer needed. There is no need to define “Production area request” (PAR) here because it will be defined at 30 TAC § 331.2(75). The PAR is an administrative device pertaining exclusively to the UIC program and is not a permit; therefore, its definition belongs in Chapter 331.*

3. Amend the rule at 30 TAC § 331.2 in sections indicated below and renumber following rules as needed:

§ 331.2 Definitions

General definitions can be found in Chapter 3 of this title (relating to Definitions). The following words and terms, when used in this chapter, have the following meanings.

...

(28) Control Parameter -- A physical property of groundwater or the concentration of Any chemical constituent of groundwater monitored on a routine basis to detect or confirm the presence of mining solutions in a designated monitor well.

NOTES:

1. *"Physical property" language added to cover use of conductivity as a control parameter upper limit and to coordinate with reference to "physical property" in the definition of "Monitor well" in definition (59)*

2. *Reference to "concentration" added to recognize that it is not one or more chemical species but the concentration(s) of one or more species that is used as a parameter.*

(59) Monitor well--*Any well used for the sampling or measurement of any chemical or physical property of subsurface strata or their contained fluids.*

(A) Designated monitor wells are those ~~listed in the production area authorization for which routine water quality sampling is required.~~

...

NOTES

1. *The reference to production area authorization is deleted; but, no reference to a production area report is offered in its place because no reference to it is needed.*

...

(75) ~~Production area authorization report--A document, issued under the terms of an injection well permit, approving the initiation of mining activities in a specified production area within a permit area which includes:~~

(1) A mine location map;

(2) A map depicting the production area to which the report pertains and locating all baseline and monitor wells in the production area;

(3) Cross sections of the production area;

(4) A description of the production area geology and hydrology;

(5) Maps depicting the contours of the mine zone and other zones into which monitor wells are completed, maps depicting isopleths of total dissolved solids in fluids in the mine zone and other zones into which monitor wells are completed and maps of the piezometric levels of fluids in the mine zone and other zones into which monitor wells are completed;

(6) Well logs, completion reports, and mechanical integrity reports (1 copy);

(7) Hydrologic test results and interpretation;

(8) Groundwater analysis reports for all baseline and monitor wells;

(9) A groundwater analysis report summary;

- (10) An updated mine plan indicating, to the extent known, the expected schedule for development of the entire permit area;
- (11) An updated comparison of fluid handling requirements to fluid handling capacity;
- (12) A calculated restoration table;
- (13) A calculated control parameters upper limits table; and,
- (14) A baseline water quality table.

A Production Area Report is not an "application" within the meaning of 30 TAC § 3.2(4), § 281.17(d), or § 305.2(1) or any other rule administered by the Texas Commission on Environmental Quality and shall not be considered an "application" for the purpose of any rule administered by the Commission. A Production Area Report does not request or require the commission to act or refrain from acting in any particular manner upon any matter; neither does it request the Commission to act or refrain from acting at all on any matter. Although a Production Area Report may contain forward looking statements reflecting the submitting party's expectation as to whether, when or how various actions may be initiated, conducted or concluded, neither the creation nor the signing, the verification nor the acknowledgment, nor the submission of a Production Area Report binds the submitting party to undertake or evidences that the submitting party has undertaken or will attempt, perform or refrain from attempting or performing any act at any future time. An area permit may require a permittee to file such a production area report as a condition precedent to commencing economic mining within a production area.

NOTES:

1. The definition of a production area authorization is deleted and the definition of a production area report is presented in its place.

2. Instead of the list of the PAA constituents formerly presented at 30 TAC §305.49(b) or § 305.155, the definition presents a more extensive list of 14 elements to be included in a production area report.

3. The suggested name, "Production Area Report," is largely, but not entirely, arbitrary. What is intended is nomenclature which is as transparently descriptive as possible to resist any tendency to suggest a PAR has some legal or practical consequence or serves some purpose other than that specifically intended, a means to provide a technical report on the geological, chemical, and hydrological information related to a production area within an approved area permit. To avoid confusion, it seems useful for the chosen nomenclature not to result in the same acronym, "PAA," as applied to a predecessor device.

4. Functioning as defined, a PAR is not an "application" or a "permit." An area permit states a permittee's regulatory authority to commence and conduct mining operations. Although an area permit may condition the permittee's authority on one or more subsequent performances, such as filing a PAR for each production area, such a filing does not invite or require any subsequent agency action and therefore does not invite or require any exercise of discretion by the agency.

Requiring a response by the agency to such a filing may, depending upon the nature and extent of the invited or possible response, risk calling into doubt the finality of the agency's action issuing the corresponding area permit. Requiring an agency response may also create finality issues relating to the agency order authorizing issuance of the area permit outside of a proceeding launched and noticed as an enforcement or compliance proceeding or a proceeding to amend, suspend or revoke a permit. Requiring such a response may also raise issues as to reversal of the burden of proof.

5. It must be clear that the PAR is not an "application" within the intent of 30 TAC §§ 50.102 (a), 50.102(d), 50.113, 50.115, or 50.117, and that a PAR does not invite, contemplate or require any action within the contemplation of 30 TAC §§ 60.1 (a) (2,) nor any substantive agency review, approval or disapproval within the meaning of 30 TAC § 60. 1(a)(3).

6. The rules at 30 TAC §§ 55.1(c) and (d) and 55.101 (f) and (g) are exclusionary provisions. However, no amendment of these to expressly exclude PAR's has been suggested, because the mere mention of PAR's in this context might be construed to undermine the rationale that PAR 's are not to be considered as "applications."

7. A PAR is not an "other application" within the scope of 30 TAC § 281.17(d) and does not give rise to (i) any requirement that the filing of a PAR be noticed or (ii) any requirement that the completeness of a PAR be determined, publicly noticed or declared.

(98) Upper limit--A parameter value established by the commission in a permit/production area authorization which when exceeded indicates mining solutions may be present in designated monitor wells.

NOTES:

1. The function of an "Upper limit" is clear without reference to the document in which it is specified.

4. Amend the rule at 30 TAC § 331.5 as follows:

§ 331.5 Prevention of Pollution

...
(b) Subject to the following exception, persons authorized to conduct underground injection activities under this chapter shall address unauthorized discharges of chemicals of concern (COCs) from associated tankage and equipment according to the requirements of Chapter 350 of this title (relating to the Texas Risk Reduction Program). Discharges of "Source material" and discharges of "by-product material," as those terms are defined at Tex. Health & Safety Code §§ 401.003(22) and 401.003(3)(b), respectively, at a site covered by a radioactive materials license

issued for the use, possession or recovery of such materials are excluded from the requirements of Chapter 350 of this title.

...

NOTES:

1. While discharges of materials such as acid or diesel fuel would remain covered by this rule, discharges of defined "source material" and "by-product material" would not require response under the provisions of 30 TAC Chapter 350, the Texas Risk Reduction Program Rules.

5. Amend the rule at 30 TAC § 331.7 as follows:

§ 331.7 Permit Required

...

(b) For Class III in situ uranium solution mining wells, Frasch sulfur wells, and other Class III operations under commission jurisdiction, an area permit authorizing more than one well may be issued for a defined permit area in which wells of similar design and operation are proposed. The wells must be operated by a single owner or operator. ~~Before commencing operation of those wells, the permittee may be required to obtain a production area authorization for separate production or mining areas within the permit area~~ An area permit may require a permittee to file a production area report as a condition precedent to commencing economic mining within a production area which includes an area covered by the area permit.

NOTES:

1. The rule language must be changed to remove language which supports an inference that the holder of an area permit may be "required to obtain" any further Commission authority and to remove language mentions a "production area authorization," a term which is being abandoned. The rule is amended to conform to the language in the last sentence of the definition of a "production area report."

6. Amend the rule at 30 TAC § 331.82(c)(2)(A)(i) as follows, leaving all other provisions of the rule at § 331.82 unchanged:

§ 331.82 Construction Requirements

...

(c) Logs and tests. . . .

...

(2) Mechanical integrity, as described in §331.43 of this title (relating to Mechanical Integrity Standards), shall be demonstrated following construction of the well.

(A) Except as provided by subparagraph (B) of this section, the following tests shall be used to evaluate the mechanical integrity of the injection well:

- (i) to test for significant leaks under §331.43 (a)(1) of this title, either monitoring of annulus pressure, or pressure test with liquid or gas, or radioactive tracer survey; for Class III uranium solution mining wells only, any of the options listed in the immediately preceding clause or a single point resistivity survey in conjunction with a pressure test to detect any leaks in the casing, tubing, or packer; and

...
...
...
NOTES:

1. Although it is generally agreed that environmentally sound practice does not require it, the rule at 30 TAC § 331.82 (c)(2)(A)(1), as currently written, may be read to require a single point resistivity test in addition to a pressure test for detecting leaks in a Class III uranium solution mining well. The amendment avoids this misreading of the rule.

7. Amend the rule at 30 TAC § 331.101 as follows:

§ 31.101 Applicability

This subchapter establishes additional standards for Class III well injection activities ~~regarding the development of production or other areas authorized by an area permit and/or production area authorization.~~

NOTES:

1. The rule is amended to remove references to the "production area authorization" and to remove language which would support an inference that some other Commission action or approval is required before the holder of an area permit may engage in economic mining under the permit.

8. Amend the rule at 30 TAC § 331.103 by making the following changes in subsection (a) and leaving all other subsections of the rule unchanged:

§ 331.103 Production Area Monitor Wells

(a) Production zone monitoring. Designated production zone monitor wells shall be spaced no greater than 400 feet from the production area and with no greater than 400 feet between the

wells. The angle formed by lines drawn from any production well to the two nearest monitor wells will not be greater than 75 degrees. The foregoing spacing requirements shall be satisfied as of 5 years after the commencement of economic mining in the production area unless the permittee demonstrates either (i) a later date for satisfaction of the spacing requirement or (ii) some other arrangement, such as one using "trend wells" or "guard wells", assures adequate protection of groundwater. Changes or adjustments in designated production zone monitor well locations or alternative arrangements, or the time when the spacing of such wells must satisfy these rules, may be authorized by the executive director to assure adequate containment. These wells shall be subject to the sampling, corrective action, and reporting requirements in §331.105 of this title (relating to Monitoring Standards) and §331.106 of this title (relating to Remedial Action for Excursion).

NOTES:

1. Current rules do not state the time when compliance with the monitor well placement provisions is to be determined. The time for compliance should be stated because the time for compliance cannot be as soon as the completion of the first well or even the first well field unless that is to be the only well or well field in the production area. The indicated amendment would resolve this and leave room for the exercise of professional judgment by regulators.

9. Amend the rule at 30 TAC § 331.106 as follows, leaving all other provisions of the rule unchanged:

§ 331.106 Remedial Action for Excursion

If the verifying analysis indicates that mining solutions are present in a designated monitor well, the operator shall take the following actions:

(1) notification--notify the commission regional office by the next working day by telephone and notify the executive director by letter postmarked within 48 hours of identification of the excursion. The notification must identify the affected monitor well and the control parameter concentrations values.

(2) analysis--complete a groundwater analysis report for each affected well on forms provided by the executive director (including accuracy checks and stiff diagram) for the following: pH, calcium, magnesium, sodium, potassium, carbonate, bicarbonate, sulfate, chloride, silica, uranium, radium-226, total dissolved solids (180 degrees Celsius), specific conductance, dilute conductance, and any other specified constituents. Results shall be reported in accordance with §331.85(e) of this title relating to Reporting Requirements).

NOTES:

1. Because the control parameters may include physical properties such as conductance, the reference to "control parameter concentrations" is changed to "control parameter values."

2. Uranium and radium-226 are added to the list of chemicals for which a groundwater analysis report is required and a superfluous "and" is deleted.

10. Amend the rule at 30 TAC § 331.107 as follows, leaving all other provisions of the rule unchanged:

§ 331.107 Restoration

(a) Restoration table. Upon issuance and renewal, a Class III permit shall contain either (i) a restoration table listing restoration goals as provided by § 331.104 of this title (relating to Establishment of Baseline and Restoration Values) or (ii) a list of constituents and properties for which the permittee must calculate the restoration goals in accord with the rule at 30 TAC § 331.104. In either case, the permittee must meet such goals unless otherwise authorized by the commission after consideration of the factors set out in the rule at 30 TAC § 331.107(f) (Restoration table values not achieved).

...

(c) Timetable. ~~Aquifer restoration, where appropriate for each permit or mine area, shall be accomplished in accordance with the timetable specified in the currently approved mine plan pursued diligently to conclusion, unless otherwise authorized by the commission. Authorization for expansion of mining into new production areas may be contingent upon achieving restoration progress in previously mined production areas within the schedule set forth in the mine plan. The commission may (i) amend an area permit to allow an extension of the time to complete restoration or (ii) amend one or more applicable restoration tables, or (iii) do both of the preceding, after considering the following factors:~~

- (1) efforts made to achieve restoration by the original date in the mine plan;
- (2) technology available to restore groundwater for particular parameters;
- (3) the ability of existing technology to restore groundwater to baseline quality in the area;
- (4) the cost of achieving restoration by a particular method;
- (5) the amount of water which would be used or has been used to achieve restoration;
- (6) the need to make use of the affected aquifer; and
- (7) complaints from persons affected by the permitted activity.

...

(f) Restoration table values not achieved. After an appropriate effort has been made to achieve restoration to levels consistent with values listed in the restoration table for a production area, the permittee may cease restoration operations, reduce bleed and request that the restoration table be amended. With the request for amendment, the permittee shall submit the results of three

consecutive sample sets taken at a minimum of 30-day intervals from all production area baseline wells used in determining the restoration table to verify current water quality. Stabilization sampling may commence 60 days after cessation of restoration operations.

(1) In determining whether the restoration table should be amended, the commission will consider the following items addressed in the request:

(A) uses for which the groundwater in the production area within the exempted aquifer was suitable at baseline water quality levels;

(B) actual existing use of groundwater in the mine area prior to and during mining;

...
(F) the ability of existing technology to restore groundwater to baseline quality in the production area under consideration within the exempted aquifer;

(2) The commission may amend the restoration table if it finds that:

...
(C) the formation water present in the production area within the exempted aquifer would be suitable for any use to which it was reasonably suited prior to mining; and

...
NOTES:

1. *The amendment to subsection (a) requires calculation of the proper restoration goals and requires the permittee to comply with them unless released from that obligation upon consideration of the factors set out in the rule at 30 TAC § 331.107(f).*

2. *The amendment to subsection (a) allows the Commission either to set initial restoration table values (but does not specifically provide for the Commission's establishment of a restoration range table) or to identify parameters for which restoration goals are to be set using the procedures set out in Commission rules.*

3. *Regarding the amendment to subsection (c), because a consideration of subsurface conditions such as those set out in the rule at 30 TAC § 331.107(f) may affect whether groundwater restoration targets are met, the rule states the miner's obligation in terms of diligent pursuit of conclusion.*

4. *Regarding subsection (c), in the current rule, the mention of a "currently approved mine plan" may be read to support a claim (i) that the mine plan is*

something more than a good faith estimate, as contemplated by the definition of "mine plan" at 30 TAC 331.2 (58) and (ii) that the mine plan, which was submitted as part of either a Production Area Report or an earlier application for a Production Area Authorization has somehow been "approved" by the agency. Both of these would undermine the use of the PAR by making it appear to be a form of permit or agency authorization—all of which would result in the delay and uncertainty which the commission now seeks to avoid.

5. To condition the expansion or movement of mining activity from one production area to another within the permit area upon the permittee's filing of a further request for Commission authorization and a Commission determination which may require a further exercise of discretionary judgment by the Commission, merely continues the regulatory uncertainty which the current rulemaking seeks to remedy. Those conditions have allowed an unintended inference that a "production area authorization" should be treated as a separate permit which may require a permittee to participate in an additional hearing process for each additional production area within a permitted area before being allowed to mine in each such additional production area under the already issued area permit. To avoid this result, the regulatory process must not subject a permittee's right to continue mining activity under its area permit to any further opportunity for the exercise of agency discretion. This does not preclude the Commission's exercise at any time of any of its authority to bring proceedings to consider voluntary or involuntary permit amendments, permit suspensions, revocations or enforcement actions.

6. See the definitions of "application" at 30 TAC § 3.2(4) and 305.2 (1), "permit" at 30 TAC 3.2(24) and 305.2 (2 7) and the provisions regarding permits and other forms of authorization at 30 TAC § 60.1(2) and (3) (regarding use of compliance history).

7. The suggested amendment to subsection (c) contemplates the Commission's amending an area permit to amend a restoration table (including one calculated after issuance of the current area permit) or extending the time required for the completion of restoration.

8. The amendments to subsection (f) seek to make clear that the targeted groundwater is that within the exempted aquifer within the production area from whose restoration table the permittee seeks relief.

11. Amend the rule at 30 TAC § 331.122 as follows, leaving all other provisions of the rule unchanged:

§ 331.122 Class III Wells

The commission shall consider the following before issuing a Class III Injection Well or Area Permit:

...
(2) all information in the Technical Report submitted with the application for permit, including :

(A) a map showing the injection well(s) and area for which the permit is sought and the applicable area of review. Within the area of review, the map must show the number, or name, and location of all existing producing wells, injection wells, dry holes, surface bodies of water, mines (surface and subsurface), quarries, public water systems, water wells, and other pertinent surface features, including residences and roads. The map should also show faults, if known or suspected. Only information of public record is required to be on this map. ~~If production area authorizations are required prior to the commencement of mining, the proposed production areas must be shown on the map~~ The proposed production areas must be shown on the map, but the number, sizes and shapes of the indicated production areas shall be treated as estimates subject to later revisions by the permittee;

...
NOTES:

1. The rule is recommended to be amended to reflect the expectation that subsequently issued area permits will require permittees to file "Production area reports" before commencing mining. The rule echoes the recognition elsewhere that the identification of "production areas" may and should be expected to change as permittees adjust them to reflect both local, field conditions and extrinsic matters such as their own sales commitments and marketing plans.

12. Amend 30 TAC Chapter 331 by adding a new provision within 30 TAC Chapter 331, to be numbered appropriately and to read as follows:

§ 331.xxx Filing Deadline for Production Area Report

An area permittee shall file a production area report no less than 90 days before commencing mining within a production area.

NOTES:

1. The purpose of this amendment is to set the lead time for filing of PAR's and an annual mine operations report.

13. Amend 30 TAC Chapter 331 by adding a new provision within 30 TAC Chapter 331, to be numbered appropriately and to read as follows:

§ 331.xxx Annual Mine Operations Report

(a) The holder of an area permit shall file an annual mine operations report pertaining to the mine authorized by an area permit by the close of business on the first business day following each anniversary of the latest issue date of that area permit or any amendment thereto. For the convenience of either the permittee or the Commission, and upon 90 days' written notice to the commission prior to the due date of an annual mine operations report, a different anniversary date for such mine operations report may be set.

(b) The annual report shall include:

(1) The name and address of the operator and the permit number;

(2) A report supplemented with maps, cross sections, photographs, or other material indicating:

(A) The extent that mining operations have been carried out;

(B) The progress of all groundwater restoration work and plugging and abandonment of wells;

(C) The extent to which expectations and predictions made in the most recent annual report or the last application upon which a permit or permit amendment was issued, whichever is later, have been fulfilled, and any deviation therefrom.

(3) A revised estimated schedule or timetable of operations and reclamation and an estimate of the production areas to be to be affected during the next one- year period.

(4) A map or maps showing the location of all wells installed in conjunction with the mining activity and showing all areas where:

(5) Whether groundwater restoration has been achieved, is actively taking place or is expected to commence during the next year;

(6) Whether mining is expected to commence during the next year;

(7) The total quantity of recovery fluid injected and the total quantity of recovery fluid extracted during the reporting period for each well-field area, including a description of how these quantities were determined;

(8) Monitoring program results which have not been previously reported; and,

(9) An updated potentiometric surface map or maps for each aquifer that is or may be affected by the mining operation if requested by the Executive Director.

NOTES:

1. The purpose of this amendment is to establish the content and filing deadline for filing an annual mine operations report. This amendment also contemplates that the anniversary date may be adjusted to another date for ease of administration.

14. Amend 30 TAC Chapter 331 by adding a new provision within 30 TAC Chapter 331, to be numbered appropriately and to read as follows:

§ 331 .xxx Area Permit References

All area permit provisions requiring an area permittee to make application for a “production area authorization” shall be deemed to provide that the area permittee shall file a “production area report” as herein defined and provided for. All area permit provisions reciting any procedures applicable to making application for a “production area authorization” shall be deemed to have been superseded by the filing of a production area report. All area permit provisions establishing the contents of an application for a production area authorization or a production area authorization shall be deemed to have been superseded by the herein-defined contents of a production area report.

NOTES:

1. This amendment sets out language to override existing area permit provisions which either (i) call for a permittee to secure a production area authorization or (ii) indicate the procedures formerly applicable to making such an application or commission action on such an application. This provision makes clear that the prior provisions regarding “Production area authorizations” are replaced with new provisions requiring the “Production area reports”, without needlessly and unfairly burdening the holders of existing area permits with a continuation of the older requirements.

WHEREFORE, premises considered, TMRA respectfully requests the Texas Commission on Environmental Quality to accept the filing of this petition for rulemaking, to initiate rulemaking proceedings on the rules and rule changes proposed herein and, thereupon, to adopt the rules and rule changes set out herein.

December 20, 2006

Respectfully Submitted,



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