

The Texas Commission on Environmental Quality (TCEQ, agency or commission) adopts amendments to §§39.702, 39.703, 39.707, and 39.709.

Sections 39.703 and 39.309 are adopted *with changes* to the text and will be republished. Sections 39.702 and 39.707 are adopted *without changes* to the proposed text as published in the September 7, 2007, issue of the *Texas Register* (32 TexReg 6049) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The purpose of this rulemaking is to implement Senate Bill (SB) 1604, 80th Legislature, 2007, and its amendments to Texas Health and Safety Code (THSC), Chapter 401 (also known as the Texas Radiation Control Act (TRCA)). The bill transfers responsibilities for the regulation and licensing of source material recovery, by-product disposal, and commercial radioactive substances storage and processing from the Texas Department of State Health Services (department) to the commission. This rulemaking intends to transfer the technical requirements for these programs from the department's rules in 25 TAC §289.254 and §289.260 into new subchapters of the commission's radioactive substance rules in Chapter 336.

While the technical requirements remain the same, these new commission programs will be integrated into and administered under the commission's existing radioactive material program requirements for application processing, public notice, public participation, licensing fees, and enforcement. The amendments to Chapter 39, Subchapter M establish the public notice requirements for radioactive materials licenses issued under Chapter 336.

SB 1604 also establishes a new state fee for disposal of radioactive substances and amends underground injection control requirements for uranium mining. The commission intends to address the new requirements in separate rulemaking actions.

A corresponding rulemaking is published in this issue of the *Texas Register* and includes changes to 30 TAC Chapter 281, Applications Processing; and Chapter 336, Radioactive Substance Rules.

SECTION BY SECTION DISCUSSION

The commission adopts administrative changes throughout these sections to be consistent with *Texas Register* requirements and other agency rules and guidelines and to conform to the drafting standards in the *Texas Legislative Council Drafting Manual*, August 2006.

The commission adopts amendments to §39.702 to clarify that the notice of declaration of administrative completeness must be published in a newspaper according to the requirements of §39.707.

The commission adopts amendments to §39.703 to establish uniform notice requirements for the notices of completion of technical review for all radioactive material license applications under Chapter 336. The commission requires public notice providing a thirty day comment and hearing request period on applications for new licenses, renewals, and major amendments. In response to comments, the commission modifies the provisions of §39.703(b) to remove reference to protests or hearing requests on minor amendment applications, requiring only a ten day comment period on notices for minor amendments of all radioactive material licenses under Chapter 336.

The commission adopts amendments to §39.707 to establish public notice requirements for licenses for source material recovery, by-product disposal, and storage and processing of radioactive materials.

The commission adopts amendments to §39.709 to establish public notice requirements for the notice of hearing on applications for radioactive material license. The commission adopts amendments to new §39.709(d) to implement Section 33(k)(4) of SB 1604. In response to comments, §39.709(d) is modified to state that the notice is provided “by mail.”

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission adopts the rulemaking action under the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to §2001.0225 because it does not meet the definition of "A major environmental rule" as defined in the 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 amendments to Chapter 39 establish procedural requirements for the issuance of public notice for a license application. The amendments to Chapter 39 are not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state, because the amendments establish procedural requirements for radioactive substance disposal facilities, source material recovery facilities, or commercial radioactive substances storage and processing facilities. The rulemaking action implements legislative requirements in SB 1604, transferring responsibilities for the regulation of source material recovery, by-product disposal, and commercial

radioactive substances storage and processing from the department to the commission. The rulemaking in Chapter 336 transfers the technical requirements for these licensing programs from the department's existing rules to the commission's rules. The rulemaking also integrates the transferring license programs into existing commission procedural requirements in Chapters 39 and 281.

Furthermore, the rulemaking action 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.

The rulemaking action does not exceed a standard set by federal law, an express requirement of state law, a requirement of a delegation agreement, nor does it adopt a rule solely under the general powers of the agency. The Texas Health and Safety Code, Chapter 401, authorizes the commission to regulate the disposal of most radioactive substances in Texas. Texas Health and Safety Code, §401.051, 401.103, 401.104, and 401.412 authorize the commission to adopt rules for the control of sources of radiation and the licensing of the disposal of radioactive substances. In addition, the State of Texas is an "Agreement State" authorized by the United States Nuclear Regulatory Commission (NRC) to administer a radiation control program under the Atomic Energy Act of 1954, as amended (Atomic Energy Act). The rules are compatible with federal law.

The rules do not exceed an express requirement of state law. The Texas Health and Safety Code, Chapter 401, establishes general requirements, including requirements for public notices, for the licensing and disposal of radioactive substances, source material recovery, and commercial radioactive substances storage and processing. The purpose of the rulemaking is to implement statutory requirements consistent with recent amendments to Texas Health and Safety Code, Chapter 401, as provided in SB 1604.

The rules are compatible with a requirement of a delegation agreement or contract between the state and an agency of the federal government. The State of Texas has been designated as an "Agreement State" by the NRC under the authority of the Atomic Energy Act. The Atomic Energy Act requires that the NRC find that the state radiation control program is compatible with the NRC requirements for the regulation of radioactive materials and is adequate to protect health and safety. Under the *Agreement Between the United States Nuclear Regulatory Commission and the State of Texas for Discontinuance of Certain Commission Regulatory Authority and Responsibility Within the State Pursuant to Section 274 of the Atomic Energy Act of 1954, as Amended*, NRC requirements must be implemented to maintain a compatible state program for protection against hazards of radiation. The rules are compatible with the NRC requirements and the requirements for retaining status as an "Agreement State."

These rules are adopted under specific authority of the Texas Health and Safety Code, Chapter 401. Texas Health and Safety Code, §§401.051, 401.103, 401.104, and 401.412 authorize the commission to adopt rules for the control of sources of radiation and the licensing of the disposal of radioactive substances.

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

TAKINGS IMPACT ASSESSMENT

The commission evaluated these rules and performed an assessment of whether Texas Government Code, Chapter 2007 is applicable. The commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to these rules. These rules implement SB 1604, transferring certain regulatory responsibilities for the control of radioactive material from the department to the commission. This rulemaking is reasonably taken to fulfill an obligation required by federal law for the control of radioactive material, which is an exempt action under Texas Government Code, §2007.003(b)(4).

Nevertheless, the commission further evaluated these rules and performed an assessment of whether these rules constitute a taking under Texas Government Code, Chapter 2007. The purpose of these rules is to implement changes to the Texas Radiation Control Act required by SB 1604, 80th Legislature, 2007 for the issuance of public notice for the licensing of the disposal of radioactive substances, recovery of source material, and commercial radioactive substances processing and storage. The rules would substantially advance this purpose by requiring public notices on license applications subject to the commission's jurisdiction under TRCA as amended by SB 1604.

Promulgation and enforcement of these rules would be neither a statutory nor a constitutional taking of private real property. The rules do not affect a landowner's rights in private real property because this rulemaking action does not constitutionally burden, nor restrict or limit, the owner's right to property and reduce its value by 25% or more beyond which would otherwise exist in the absence of the regulations.

The rules establish public notice requirements and do not affect real property. The rules do not change the existing technical requirements that were in place under the department's program. Therefore, the commission's rules do not affect real property in a manner that is different than may have been affected under the department's requirements.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rules and determined that the adopted rules are neither identified in, nor will they affect, any action/authorization identified in Coastal Coordination Act Implementation Rules in 31 TAC §505.111, relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP). Therefore, the rulemaking action is not subject to the CMP.

PUBLIC COMMENT

The commission held a public hearing on September 25, 2007. The comment period closed on October 15, 2007. Comments were received from Mesteña Uranium, L.L.C. (Mesteña); the Lone Star Chapter of the Sierra Club (Sierra Club); the Uranium Committee of the Texas Mining and Reclamation Association (TMRA); Kelly Hart & Hallman LLP on behalf of Uranium Energy Corp., AREVA NC, Inc., and Uranerz Energy Corporation (UAU); Hance Scarborough Wright Woodward & Weisbart on behalf of Waste Control Specialists LLC (WCS); and the Texas Radiation Advisory Board (TRAB). Mesteña supports the revisions as necessary for the orderly and complete program transfer of the radioactive materials programs that oversee uranium recovery operations. The Sierra Club commented that the Sierra Club is pleased with the proposed rules overall and that the proposed rules adequately implement the statutory changes made by SB 1604. TMRA commented on its appreciation of the time and effort the TCEQ has put forth as part of the rulemaking process. Specific comments are addressed below.

RESPONSE TO COMMENTS

General Notice Requirements

The TRAB commented that the commission should consider methods other than mail and newspaper publication for providing public notice on radioactive materials applications. The TRAB suggested using the internet for providing public notice.

The commission appreciates the comment. Mailed notice and newspaper notice are the primary methods used for providing notice for other permit programs at the TCEQ based on statutory requirements for providing notice, and it is the commission's desire to follow any specific statutory requirements and incorporate the licensing programs transferred from the department into existing processes at the TCEQ for encouraging public participation. However, the commission does recognize that the internet may be a more effective and economic method for providing information to the public. The commission's Office of the Chief Clerk currently maintains an accessible database on the internet that allows the viewing of public notice documents and the tracking of the status of pending applications. The commission also encourages the executive director to maintain information on the Radioactive Materials Division web page that reflects the status of radioactive material license applications. No changes were made in response to the comment.

The Sierra Club commented that the rules should consolidate the notice requirements applicable to radioactive material licenses and injection well permits for *in situ* uranium mining so that the radioactive material license applications for uranium mines meet the more stringent notice provisions required for injection well permit applications.

Commission rules already allow an applicant to combine notice to satisfy more than one applicable requirement of Chapter 39. An applicant has the option to consolidate the notice required for two or more activities that require notice under §39.405(d) so long as the consolidated notice complies with the requirements that would apply to the notice if provided separately. No changes were made in response to the comment.

Notice of Declaration of Administrative Completeness

TMRA commented that the requirement to issue public notice upon declaration of administrative completeness was not a requirement under department rules and requests demonstration of the legal basis for additional notice requirements.

The commission acknowledges that the department's rules do not require the issuance of public notice upon declaration of administrative completeness. The commission intends to incorporate the transferred licensing programs into the commission's existing processes for public participation. Many TCEQ applications for new, major amendments, and renewals of permits or licenses are subject to two rounds of public notice, one notice issued after the application is submitted and a subsequent notice issued after the completion of the review of the application. The commission intends that all applications for new licenses, major amendments, and renewals are subject to these two rounds of public notice. Authority to require notice requirements is provided in Texas Health and Safety Code, §§401.103, 401.104, 401.264, Texas Water Code, §5.115 and Section 33(c) of SB 1604.

Notice of Completion of Technical Review

UAU commented that §39.703(b) includes a hearing request period for applications for minor amendments of radioactive material licenses issued under Chapter 336, while applications for minor amendments are not subject to a contested case hearing.

The commission agrees with this comment, and §39.703(b) has been modified in response to the comment to remove provisions for protesting or requesting a contested case hearing on minor amendment applications.

UAU commented that the commission should define the types of amendments that fall into the “major” and “minor” categories.

Commission rules in 30 TAC §305.62 already establish requirements for determining whether a proposed amendment of a radioactive material license is a “major” or “minor” amendment. Under §305.62(c)(1), a major amendment includes a change to a substantive term, provision, requirement, or a limiting parameter of the license, including an amendment: which authorizes a change in the type of concentration of limits of wastes to be received; authorizes receipt of wastes from other states not authorized in the existing license; authorizes a change in the operator of the facility; authorizes closure and the final closure plan for the disposal site; transfers the license to the custodial agency; or authorizes a change which has a significant effect on the human environment and for which the executive director has prepared a written environmental analysis or has determined that an environmental analysis is required. A minor amendment is an amendment to improve or maintain the licensed quality or method of disposal of waste or other changes that will

not cause or relax a standard or criterion which may result in a potential deterioration of quality of water in the state. No change was made in response to the comment.

The Sierra Club commented that the deadline for filing public comments, protest or hearing requests on minor amendments should be 30 days after the notice is published rather than 10 days after the notice is published. The Sierra Club believes a longer period of time is needed by affected property owners to assess potential impacts on a minor amendment application.

The commission disagrees with lengthening the comment period for minor amendments. In response to comments previously mentioned, the reference to filing protests and requests for hearing on minor amendment applications was removed from the rule language. A ten-day comment period is consistent with minor amendments of other permits at the TCEQ. In the commission's experience, a ten-day comment period is sufficient for the public review of minor amendment applications that do not change a substantive term, provision, or limiting parameter of the permit or license. No changes were made in response to the comment.

Mailed Notice for Radioactive Material Licenses

The Sierra Club commented that §39.705 is not sufficient because the mailed notice is only provided to adjacent landowners.

The commission disagrees with the comment because mailed notice is provided to various people in addition to adjacent landowners. While the commission did not propose amendments to §39.705, the rule requires mailing notice to: the mayor and health authorities of the city or town in which

the facility is or will be located or in which waste is or will be disposed of; the county judge and health authorities of the county in which the facility is or will be located or in which waste is or will be disposed of; persons who request to be on the mailing list for the application or for all applications in the county; the applicant; any other person the executive director or chief clerk may elect to include; and to each owner of property adjacent to the proposed site. No changes were made in response to the comment.

Notice of Contested Case Hearing on Application

WCS commented that §39.709(d) should be revised to indicate that the notice of the contested case hearing required in the subsection is provided “by mail” to reflect the statutory language in Section 33(k)(4) of SB 1604.

The commission agrees with the comment and has revised §39.709(d) to add the words “by mail.”

SUBCHAPTER M: PUBLIC NOTICE FOR RADIOACTIVE MATERIAL LICENSES

§§39.702, 39.703, 39.707, 39.709

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code and other laws of the state. The amendments are also adopted under Texas Health and Safety Code, Chapter 401, concerning Radioactive Materials and Other Sources of Radiation (also known as the Texas Radiation Control Act); §401.011, concerning Radiation Control Agency, which authorizes the commission to regulate and license the disposal of radioactive substances, the processing or storage of low-level radioactive waste or naturally occurring radioactive material, the recovery or processing of source material, and the processing of by-product material; §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, concerning Licensing and Registration rules, which requires the commission to provide rules for licensing for the disposal of radioactive substances; §401.202, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate commercial processing and disposal of low-level radioactive waste; §401.262, concerning Management of Certain By-Product Material, which provides the commission authority to regulate by-product storage and processing facilities; and §401.412, concerning Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances.

The adopted amendments implement Texas Health and Safety Code, as amended by SB 1604, 80th Legislature, 2007, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.202, 401.262, 401.2625, and 401.412.

§39.702. Notice of Declaration of Administrative Completeness.

When an application under Chapter 336 of this title (relating to Radioactive Substance Rules) has been declared administratively complete, the chief clerk shall mail notice under this subchapter. The applicant shall publish the notice of declaration of administrative completeness as provided in §39.707 of this title (relating to Published Notice).

§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), 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 application for a minor amendment to a license issued under Chapter 336, of this title notice must be mailed by the Office of the Chief Clerk under this subchapter. The deadline to file public comment 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), Subchapter K of this title (relating to Commercial Disposal of Naturally Occurring Radioactive Material Waste From Public Water Systems), Subchapter L of this title (relating to Licensing of Uranium Recovery and By-product Material Disposal Facilities), or Subchapter M of this title (relating to Licensing of Radioactive Substances Processing and Storage Facilities), 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 or Subchapter M 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) Except as provided in subsection (d) of this section, 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), Subchapter K of this title (relating to Commercial Disposal of Naturally Occurring Radioactive Material Waste From Public Water Systems), or Subchapter L of this title (relating to Licensing of Uranium Recovery and By-product Material Disposal Facilities), 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) or Subchapter M of this title (relating to Licensing of Radioactive Substances Processing and Storage Facilities), 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).

(d) For an application for a new license to dispose of by-product material under Chapter 336, Subchapter L of this title that was filed with the Department of State Health Services on or before January 1, 2007, notice under this section must be provided to the applicant, the office of public interest counsel, the executive director, and any person who timely submitted a request for a contested case hearing by mail at least 10 days in advance of the hearing.