

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

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The changes proposed to this chapter are part of a larger proposal to revise the commission's radiation control rules. The primary purpose of the proposed rules is to implement 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 proposed 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 substantive 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, financial assurance, and enforcement. The proposed 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.

SECTION BY SECTION DISCUSSION

SUBCHAPTER M: Public Notice for Radioactive Material Licenses

§39.702. Notice of Declaration of Administrative Completeness.

The commission proposes to amend §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.

§39.703. Notice of Completion of Technical Review.

The commission proposes to amend §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 proposes to require public notice providing a thirty day comment and hearing request period on applications for new licenses, renewals, and major amendments. The commission proposes to require a ten day comment and hearing request period on notices for minor amendments of all radioactive material licenses under Chapter 336.

§39.707. Published Notice.

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

§39.709. Notice of Contested Case Hearing on Application.

The commission proposes to amend §39.709 to establish public notice requirements for the notice of hearing on applications for radioactive material license. The commission proposes to add new §39.709(d) to implement section 33(k)(4) of SB 1604.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeff Horvath, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, fiscal implications are anticipated for the commission and the Texas Department of State Health Services (department) due to administration or enforcement of the proposed rules. No fiscal implications are anticipated for other units of state or local government.

The primary purpose of the proposed rules is to implement SB 1604, 80th Legislature, 2007. 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 department to the commission. This proposed rulemaking intends to transfer the technical requirements for these programs from the department's rules into new subchapters of the commission's radioactive substantive rules. 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, financial assurance, and enforcement. Some proposed rule changes are needed for purposes of clarification or to conform to Secretary of State requirements for rule publication. The proposed amendments to Chapter 39 would establish the public notice requirements for radioactive material licenses 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 state fee and underground injection control requirements in separate rulemakings.

SB 1604 transfers regulatory authority to the TCEQ for commercial radioactive waste processing, uranium mining, and by-product disposal. The department's technical rules are being transferred to the

TCEQ through these proposed rules. The legislature provided \$200,000 plus the unexpended and unobligated portions of the appropriations for the state fiscal biennium beginning September 1, 2005, made to the Health and Human Services Commission or the department for activities related to the transfer. Authority for eleven FTEs was transferred from the department to the commission.

Legislative appropriations for fiscal year 2008 and fiscal year 2009 provided that all appropriations made to the department relating to the regulation of radioactive substances, estimated to be \$988,771 in fiscal year 2008 and \$897,931 in fiscal year 2009 out of the General Revenue Fund, and associated Full-Time Equivalent Positions (estimated to be 11.0) were to be transferred from the department to the TCEQ. In addition to these amounts, the TCEQ was also appropriated out of the Waste Management Account Number 549 in Strategy A.2.3, Waste Management and Permitting, \$471,388 in fiscal year 2008 and \$460,728 in fiscal year 2009, to be used for the regulation of radioactive substances. This funding was to come from additional fee revenue the agency would be collecting for administering these new responsibilities.

The number of Full-Time Equivalents (FTE) for the TCEQ was also increased by four in each fiscal year of the 2008-2009 biennium, for a total of 15 FTEs. The appropriations are contingent upon the agency assessing fees sufficient to generate, during the 2008-2009 biennium, revenue to cover, at a minimum, the appropriations, as well as "Other direct and indirect costs" for the program. Other direct and indirect costs are estimated to be \$62,213 in each fiscal year of the 2008-2009 biennium. In the event that actual and/or projected revenue collections are insufficient to offset the costs identified by this provision, the Legislative Budget Board may direct the Comptroller of Public Accounts to reduce the appropriation authority to be within the amount of revenue expected to be available.

PUBLIC BENEFITS AND COSTS

Mr. Horvath also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with state law and increased efficiency of the regulation of radioactive substance processing, storage and disposal through consolidation of these activities at one state agency.

No fiscal implications are anticipated for businesses and individuals as a result of the proposed rules. The proposed rulemaking intends to transfer the technical requirements for the regulation and licensing of source material recovery, by-product disposal, and commercial radioactive substances storage and processing from the department's rules into new subchapters of the commission's radioactive substantive rules. 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, financial assurance, and enforcement. The fees to industry and business are not changing as a result of the proposed rules. The proposed rules simply transfer the existing licensing fees from the department to the TCEQ.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are expected for small or micro-businesses as a result of the proposed rules. The proposed rulemaking intends to transfer the technical requirements for the regulation and licensing of source material recovery, by-product disposal, and commercial radioactive substances storage and processing from the department's rules into new subchapters of the commission's radioactive

substantive rules. 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, financial assurance, and enforcement. The fees to industry and business are not changing as a result of the proposed rules. The proposed rules simply transfer the existing licensing fees from the department to the TCEQ.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has 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 proposes 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 proposed amendments to Chapter 39 establish procedural requirements for the issuance of public notice for a license application. The proposed amendments to Chapter 39 are not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the

state or a sector of the state, because the amendments establish procedural requirements for radioactive substance disposal facilities, source material recovery facilities, or commercial radioactive substances storage and processing facilities. The proposed 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 proposed rulemaking action transfers the technical requirements for these licensing programs from the department's existing rules to the commission's rules in Chapter 336 and establishes the public notice requirements in Chapter 39.

Furthermore, the proposed rulemaking action does not meet any of the four applicability requirements listed in §2001.0225(a). Section 2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. The proposed rulemaking action does not exceed a standard set by federal law, an express requirement of state law, a requirement of a delegation agreement, nor does it adopt a rule solely under the general powers of the agency.

The Texas Health and Safety Code, Chapter 401, authorizes the commission to regulate the disposal of most radioactive substances in Texas. Sections 401.051, 401.103, 401.104, and 401.412 authorize the commission to adopt rules for the control of sources of radiation and the licensing of the disposal of

radioactive 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 proposed rules are compatible with federal law.

The proposed 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 proposed 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 proposed rules are compatible with the NRC requirements and the requirements for retaining status as an “Agreement State.”

These rules are proposed under specific authority of the Texas Health and Safety Code, Chapter 401.

Sections 401.051, 401.103, 401.104, and 401.412 authorize the commission to adopt rules for the control of sources of radiation and the licensing of the disposal of radioactive substances. The commission invites public comment of the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these proposed rules and performed a preliminary assessment of whether the Private Real Property Rights Preservation Act, Texas Government Code, Chapter 2007 is applicable. The commission's preliminary assessment indicates that Texas Government Code, Chapter 2007 does not apply to these proposed rules. These proposed rules implement SB 1604, transferring certain regulatory responsibilities for the control of radioactive material from the department to the commission. This proposed 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 proposed rules and performed a preliminary assessment of whether these proposed rules constitute a taking under Texas Government Code, Chapter 2007. The purpose of these proposed 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 proposed 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 proposed rules would be neither a statutory nor a constitutional taking of private real property. The proposed 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 proposed rules establish public notice requirements and do not affect real property. The proposed rules do not change the existing technical requirements that were in place under the department's program. Therefore, the commission's proposed 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 proposed rules and determined that the proposed rules are neither identified in, nor will they affect, any action/authorization identified in Coastal Coordination Act Implementation Rules in 31 TAC §505.11, relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP). Therefore, the proposed rulemaking action is not subject to the CMP.

ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin on September 25, 2007, at 10:00 a.m. at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle in Building E, Room 201S. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. A time limit may be established at the hearing to assure that enough time is allowed for every interested person to speak. There will be no open discussion during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Patricia Duron, Office of Legal Services, at (512) 239-6087. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Patricia Durón, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at <http://www5.tceq.state.tx.us/rules/ecomments/>. File size restrictions may apply to comments submitted via the eComments system. All comments should reference Rule Project Number 2007-028-336-PR. The comment period closes October 15, 2007. Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.state.tx.us/nav/rules/propose_adopt.html. For further information, please contact Susan Jablonski, Director, Radioactive Materials Division, (512) 239-6731.

SUBCHAPTER M: PUBLIC NOTICE FOR RADIOACTIVE MATERIAL LICENSES

§§39.702, 39.703, 39.707, 39.709

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code and other laws of the state. The amendments are also proposed under Texas Health and Safety Code, Chapter 401, concerning Radioactive Materials and Other Sources of Radiation (also known as the Texas Radiation Control Act); §401.011, concerning Radiation Control Agency, which authorizes the commission to regulate and license the disposal of radioactive substances, 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 proposed 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 402.412.

§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) [or for a minor amendment issued under Chapter 336, Subchapter H of this title (relating to Licensing Requirements for Near-Surface Land Disposal of Low-Level Radioactive Waste)], notice must be mailed by the Office of the Chief Clerk and published under this subchapter. The deadline to file public comment, protests, or hearing requests is 30 days after publication.

(b) For [any other] application for a minor amendment to a license issued under Chapter 336, of this title [Subchapter F of this title (relating to Licensing of Alternative Methods of Disposal of Radioactive Material), Subchapter G of this title (relating to Decommissioning Standards), or Subchapter

K of this title (relating to Commercial Disposal of Naturally Occurring Radioactive Material Waste From Public Water Systems),] notice must be mailed by the Office of the Chief Clerk under this subchapter.

The deadline to file public comment, protests, or hearing requests is ten days after mailing.

§39.707. Published Notice.

(a) For applications under Chapter 336, Subchapter F of this title (relating to Licensing of Alternative Methods of Disposal of Radioactive Material), Subchapter G of this title (relating to Decommissioning Standards), [or] Subchapter K of this title (relating to Commercial Disposal of Naturally Occurring Radioactive Material Waste From Public Water Systems), 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 [For] applications under Chapter 336, Subchapter F of this title (relating to Licensing of Alternative Methods of Disposal of Radioactive Material), Subchapter G of this title (relating to Decommissioning Standards), [or] Subchapter K of this title (relating to Commercial Disposal of Naturally Occurring Radioactive Material Waste From Public Water Systems), 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 at least 10 days in advance of the hearing.