

The Texas Commission on Environmental Quality (TCEQ, agency or commission) proposes amendments to §281.19.

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 281, Subchapter A establish the procedural requirements for the technical review of 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 requirements in separate rulemaking actions.

SECTION DISCUSSION

§281.19. *Technical Review.*

The commission proposes to amend §281.19(a) and (c) to extend the maximum period for conducting the technical review of radioactive material license applications from 450 days to 600 days and to increase the maximum number of notice of deficiencies that can be submitted by the executive director in the review of a license application from two to four. The commission believes that the longer review period and additional rounds of executive director comment on applications will greatly improve the quality of applications submitted to the agency and, thus, the quality and protectiveness of licenses issued by the commission. Applications for radioactive material licenses are complex and require the collection of a great deal of information that is unique to a proposed location. The additional time for conducting the technical review allows an applicant sufficient time to provide all required information to the executive director. The commission also proposes amendment to allow the executive director to extend or delay the schedule under this subsection to comply with the priority given to the review and processing of applications pursuant to TRCA §401.237(c) and section 34(b) and (c) of SB 1604. The commission intends that the changes to this subsection apply only to applications submitted after the effective date of this rule change.

The commission proposes to add new §281.19(d) to address the applications for licenses that were pending with the department prior to transfer of agency responsibilities established under SB 1604. The applications that are pending at the department will be subjected to a maximum technical review period of 600 days at the commission with a maximum of two notices of deficiency issued by the executive director. The processing of these pending applications is subject to the priority for the review and processing of radioactive material licenses in TRCA §401.237(c) and section 34(b) and (c) 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 would establish the procedural requirements for the technical review of 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 281 are procedural, establishing the requirements for the processing of a license application. The proposed amendments to Chapter 281 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 application processing requirements for the licenses in Chapter 281.

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, 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 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 processing of applications for a license for 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 establishing the technical review period for 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 application processing 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 Duron, 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 A: APPLICATIONS PROCESSING

§281.19

STATUTORY AUTHORITY

The amendment is 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 amendment is 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 amendment implements 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.

§281.19. Technical Review.

(a) After an application is determined by the executive director to be administratively complete, the executive director shall commence a technical review as necessary and appropriate. For purposes of these sections, the technical review period is that period of time beginning with the completion of the initial review period and will continue for a period of time not to exceed 75 working days. In the case of applications filed under §291.102 of this title (relating to Criteria for Considering and Granting Certificates or Amendments [Certificate Required]), the technical review period is that period of time beginning 30 days after notice of the application has been given in accordance with §291.109 of this title (relating to Report of Sale, Merger, etc.; Investigation; Disallowance of Transaction [Notice and Hearing for Applications for Certificates of Convenience and Necessity]) and will continue for a period of time not to exceed 75 working days. In the case of applications filed under §335.43 of this title (relating to Permit Required) or §331.7 of this title (relating to Permit Required), the technical review period shall commence upon assignment of the application to a staff member and continue for a period of time not to exceed 120 days. For applications filed under Chapter 336 of this title (relating to Radioactive Substance Rules) and subject to the Notice of Deficiency (NOD) process established in this section, the technical review period shall begin the day after the date of determination of administrative completeness and for issuance, renewal, or major amendments, shall continue for a period of time not to exceed 255 days; however, this time frame may be extended to a maximum of 600 [450] days if an application is

technically deficient; or, for applications for minor amendments, shall continue for a period of time not to exceed 90 days; however, this time frame may be extended to a maximum of 150 days if an application is technically deficient.

(b) (No change.)

(c) For applications for radioactive material licenses, the applicant shall be promptly notified of any additional technical information necessary to complete technical review. For new applications, renewal applications, or major amendment applications, the executive director shall complete application processing within the technical review period (~~600~~ [450] days) if the applicant provides the information within 75 days of the date of the first NOD and 60 days of the subsequent NODs [second NOD]. For minor amendments, the applicant must provide the information within 20 days from the date of the first NOD and 20 days from the date of the second NOD. If the necessary additional information is not received by the executive director prior to the end of the response period, the executive director may return the application to the applicant. In no instance shall the executive director issue more than four [two] NODs before returning the application. The applicant has the option of having the question of sufficiency of necessary technical information referred to the commission for a decision instead of having the application returned. The applicant may request additional time to respond to a notice of technical deficiency. The request must be in writing, set forth the reasons why the applicant cannot respond within the time provided and specify the amount of additional time requested. Any extension of time must be approved by the executive director in writing. The executive director may extend or delay the schedule for the processing of an application under this subsection to comply with the priority established by law for processing and review of radioactive material licenses.

(d) This subsection applies to the technical review of applications for radioactive material licenses submitted to the Texas Department of State Health Services on or before June 18, 2007. For new applications, renewal applications, or major amendment applications, the executive director shall complete application processing within the technical review period (600 days) if the applicant provides the information within 75 days of the date of the first NOD and 60 days of the second NOD. For minor amendments, the applicant must provide the information within 20 days from the date of the first NOD and 20 days from the date of the second NOD. If the necessary additional information is not received by the executive director prior to the end of the response period, the executive director may return the application to the applicant. In no instance shall the executive director issue more than two NODs before returning the application. The applicant has the option of having the question of sufficiency of necessary technical information referred to the commission for a decision instead of having the application returned. The applicant may request additional time to respond to a notice of technical deficiency. The request must be in writing, set forth the reasons why the applicant cannot respond within the time provided and specify the amount of additional time requested. Any extension of time must be approved by the executive director in writing. The executive director may extend or delay the schedule for the processing of an application under this subsection to comply with the priority established by law for processing and review of radioactive material licenses.