

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners

Date: November 20, 2015

Thru: Bridget C. Bohac, Chief Clerk
Richard A. Hyde, P.E., Executive Director

From: Brent Wade, Deputy Director
Office of Waste

Docket No.: 2015-0665-RUL

Subject: Commission Approval for Rulemaking Adoption
Chapter 336, Radioactive Substance Rules
Physical Protection of Category 1 and 2 Quantity Radioactive Material and
Volume Reduction
Rule Project No. 2015-012-336-WS

Background and reason(s) for the rulemaking:

The changes to 30 TAC Chapter 336, Subchapters A and D will revise the commission's rules concerning physical protection of radioactive material to ensure compatibility with federal regulations promulgated by the Nuclear Regulatory Commission (NRC) which is necessary to preserve the status of Texas as an Agreement State under Title 10 Code of Federal Regulations (CFR) Part 150 and under the "Articles of Agreement between the United States Atomic Energy 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." Rules which are designated by the NRC as compatibility items must be adopted by an Agreement State within three years of the effective date of the NRC rules, in most cases.

In response to efforts to assess security risks posed by uncontrolled sources, the NRC issued Order EA-05-090 (Increased Controls Order) on November 14, 2005, to impose requirements for the control of high-risk radioactive materials to prevent inadvertent and intentional unauthorized access, primarily due to the potential health and safety hazards posed by the uncontrolled material. The Increased Controls (IC) Order identified certain radionuclides of concern and established control measures for licensees to secure those materials. Part of this order was the requirement to determine that each person who requires access to radioactive material quantities of concern to perform their job duties is sufficiently trustworthy and reliable. Section 652 of the Energy Policy Act of 2005, enacted on August 8, 2005, amended Section 149 (the fingerprinting requirements) of the Atomic Energy Act to require fingerprinting and a Federal Bureau of Investigation (FBI) identification and criminal history records check for "any individual who is permitted unescorted access to radioactive materials or other property subject to regulation by the Commission that the Commission determines to be of such significance to the public health and safety or the common defense and security as to warrant fingerprinting and background checks." The NRC issued Order EA-07-305 on December 5, 2007, to expeditiously implement, in part, these additional requirements as enhancements to the existing trustworthiness and reliability requirements of the IC Order.

As part of both orders, each Agreement State was required to issue legally binding requirements to put essentially identical measures in place for licensees under state regulatory jurisdiction. The commission has already imposed the requirements of the NRC orders on licensees by adding a condition to their radioactive material license that requires the licensees to follow the two NRC orders. The commission adopted rules to implement the IC Order on January 11, 2012. The NRC adopted both orders to Title 10 CFR on March 19, 2013, with modifications to the requirements in the IC Order based on public comments. The modifications to the requirements from the IC Order have resulted in the original rules (adopted in January 11, 2012) being removed in their entirety and replaced with the new, modified rule language. This rulemaking will also add new rules concerning the order requiring fingerprinting and an FBI criminal background check. The NRC completed additional rulemaking on January 26, 2015, which slightly modified the federal rules adopted on March 19, 2013. These modifications have been incorporated into the adopted rules.

This adopted rulemaking also implements requirements relating to volume reduction from Senate Bill (SB) 347, 83rd Texas Legislature, 2013, and the amendments to Texas Health and Safety Code (THSC), Chapter 401 (also known as the Texas Radiation Control Act). New provisions in §336.739 prohibit the compact waste disposal facility license holder from accepting nonparty compact waste for disposal at the facility unless the waste has been volume reduced.

Scope of the rulemaking:

A.) Summary of what the rulemaking will do:

This rulemaking will add 21 definitions to §336.2; and also §336.357 will simultaneously be repealed and adopted as a new rule with minor modifications relaxing some of the requirements, authorizing exemptions for specific types of radioactive waste, and adding rules requiring fingerprinting and an FBI criminal background check for individuals who have unescorted access to quantities of significant concern. Quantities of significant concern will be defined as "category 2 quantity of radioactive material." "Category 1 quantity of radioactive material" will be defined as 100 times the concentration values of category 2 quantity of radioactive materials.

Modifications to the current physical protection of radioactive material rules in §336.357 will include: 1) applying this rule to licensees only when they possess a category 1 or category 2 quantity of radioactive material instead of, as under the current rule, when the licensee is authorized on their radioactive material license for such quantities regardless if the licensee actually possess a category 1 or category 2 quantity of radioactive materials; 2) removing the requirement for licensees to submit compliance information; 3) removing the requirement for a licensee to notify the Local Law Enforcement Agency (LLEA) for work at temporary jobsites; 4) removing several of the LLEA coordination elements, including the requirement to request a written agreement and request notification of any degradation in LLEA response capabilities; 5) requiring that the minimum information to be shared with the LLEA is a description of the facilities and radioactive material along with a description

of the security measures being employed by the licensee and a notification that the licensee will request a timely armed response to any theft, sabotage, or diversion of radioactive material; 6) revising the testing and maintenance requirement for security-related equipment to be the manufacturer's recommended frequency or annually if the manufacturer does not provide a suggested frequency; 7) removing the requirement to calibrate the equipment; 8) removing the requirement for the licensee to disable the vehicle if a site has health and safety requirements that prevent disabling of vehicles; 9) modifying the reporting to clarify the requirements and provide greater flexibility to the licensee; and 10) requiring a licensee to report suspicious activities.

Modifications to the current rules concerning security provisions for the transport of category 1 and category 2 quantities of radioactive material will include: 1) revising the requirement for license verification before transferring the radioactive material to include an emergency option that can be used when the license verification system is nonfunctional and the licensee cannot reach the regulator; 2) exempting the licensee from §336.357(r) - (w) if the transfer is within the same organization (an example would be a company that has a license in several states); 3) removing the rule requiring documentation of the license verification if the license verification system is used; 4) removing the provision for the no-later-than arrival time for category 1 shipments; 5) removing some of the specificity on the required coordination with the states through which the radioactive material is being transported; 6) requiring licensees to discuss the State's intention to provide law enforcement escorts and identify safe havens; and 7) removing other elements because they are not necessary and are overly prescriptive.

New §336.739 will also establish new restrictions on the disposal of low-level radioactive waste in Texas generated outside of Texas or Vermont. Those restrictions require that any such waste to be disposed in Texas must have been volume reduced to a certain degree and imposes certain requirements on records retention related to volume reduction.

B.) Scope required by federal regulations or state statutes:

Revisions to §336.2 and §336.357 in the adopted rulemaking are required by federal regulations imposed on the state of Texas as an NRC Agreement State. The rulemaking language regarding volume reduction in new §336.739 is required by THSC, §401.207.

C.) Additional staff recommendations that are not required by federal rule or state statute:

None.

Statutory authority:

- THSC, §§401.011, 401.051, 401.103, 401.104, and 401.106
- Texas Water Code, §5.103

Effect on the:

A.) Regulated community:

Licensees for the storage, processing, or disposal of radioactive waste will be affected. The effect of the updated physical protection of radioactive material is beneficial, since a stricter version is already in effect, and the modifications with this rulemaking will relax certain requirements. The licensee will also have new regulatory requirements for nonparty waste. Generators may have to change their current waste processing procedures to comply with volume reduction requirements.

B.) Public:

No direct impact is expected to affect the public.

C.) Agency programs:

No direct impact is expected to affect agency programs. Agency staff will have to monitor for compliance with volume reduction requirements in addition to current regulatory compliance monitoring.

Stakeholder meetings:

There were no stakeholder meetings associated with this rulemaking; however, there was a public hearing for this rulemaking on September 22, 2015, in Austin, Texas.

Public comment:

The commission received comments from Energy Solutions, Exelon Generation, and Waste Control Specialists. Two of the comments were in support of the rule, with one commenter suggesting a change to the proposed language regarding requirements for a competitive marketplace. One comment was neither in support of nor against the rulemaking but suggested changes regarding safety of waste packaging, distinctions between waste minimization and volume reduction, and consistency of the rule language for certain radioactive wastes.

Significant changes from proposal:

New §336.357 has some minor changes in order to correct errors in the text, including modifying new §336.357(c)(2)(E)(ii) to change a reference from subsection (f) to subsection (f)(1), modifying new §336.357(o) by merging §336.357(o)(2) and (3) into the single subsection §336.357(o)(2), and modifying new §336.357(z) by adding “≥1.0” at the end of the equation. No changes were made due to public comment.

Potential controversial concerns and legislative interest:

The rulemaking regarding volume reduction requirements for waste has the potential to be controversial. Since SB 347 has passed, there has been significant interest from parties both within Texas and outside of Texas regarding volume reduction. Further, during the legislative process the industry and the disposal licensees had several discussions with legislative members and industry watch groups on this issue. There were no new controversial concerns identified in the public comments received.

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Does this rulemaking affect any current policies or require development of new policies?

No revisions of current policies or creation of new policies are anticipated to be required by this rulemaking.

What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?

If this rulemaking does not go forward, Texas would be at risk of losing its status as an NRC agreement state due to a failure to maintain state compatibility with NRC rules. Also, the rulemaking is necessary to implement SB 347. There are no alternatives, because implementation of the adopted federal regulations is required in order for Texas to maintain compatibility status as an NRC agreement state.

Key points in the adoption rulemaking schedule:

***Texas Register* proposal publication date:** September 4, 2015

Anticipated *Texas Register* adoption publication date: December 25, 2015

Anticipated effective date: December 31, 2015

Six-month *Texas Register* filing deadline: March 4, 2015

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Attachments

SB 347

cc: Chief Clerk, 2 copies
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