

**Department of State Health Services
Council Agenda Memo for State Health Services Council
February 26-27, 2014**

Agenda Item Title: Repeal of a rule and a new rule concerning the memorandum of understanding between the Department of State Health Services and the Texas Commission on Environmental Quality regarding radiation control functions

Agenda Number: 5.d

Recommended Council Action:

For Discussion Only

For Discussion and Action by the Council

Background:

The Radiation Control Program in the Division for Regulatory Services protects and promotes the physical and environmental health of Texas citizens. The program includes licensing, registration, inspection, enforcement, and emergency response functions for the use of radioactive material and radiation machines. DSHS shares jurisdiction with the Texas Commission on Environmental Quality (TCEQ) regarding radioactive material activities and wastes.

The program regulates approximately 1,600 licensees and 16,000 registrants. The program routinely monitors complaints received and resolved, number of new and renewed registrations, number of disciplinary actions taken, and violation trends. The number of complaints received, enforcement actions, inspections performed, and registration actions are monitored on a quarterly basis.

The program charges fees for issuing licenses and registrations and is entirely fee funded.

Summary:

The purpose of the new rule and the repeal is to ensure continued protection of the public, workers, and the environment from unnecessary exposure to radiation by ensuring that jurisdictional responsibilities of DSHS and the TCEQ are clear and specific.

The new rule delineates areas of respective jurisdiction and coordinates the respective responsibilities and duties of DSHS and the TCEQ in the regulation of sources of radiation in accordance with Health and Safety Code, Section 401.069, in order to provide a consistent approach and to avoid duplication. The new rule and repeal are necessary to comply with Senate Bill 347, 83rd Legislature, Regular Session, 2013.

The new rule establishes respective agency responsibilities regarding general agency jurisdiction, jurisdiction over specific activities and wastes, coordination of regulatory activities, coordination of enforcement and incident response activities, mutual assistance, and miscellaneous items. The new rule updates both agency names, makes minor grammatical and typographical corrections, updates technical terminology, corrects and/or updates rule reference citations, and reorganizes rule text.

In addition, the new rule omits the language regarding in situ uranium mining to comply with Health and Safety Code, Section 401.011, and transfers the regulatory authority for licensing and inspection of low-level waste processing and uranium recovery and disposal from DSHS to the TCEQ.

The rule complies with the four-year review of agency rules in Government Code, Section 2001.039.

Key Health Measures:

The program collects and analyzes data about the number of complaints/inspections received, program performance satisfaction, and other process data from stakeholders involved in the various specific radioactive material activities and wastes. In addition, the program will be able to use the quality assurance process to confirm the satisfactory resolution of incidents/complaints received.

In fiscal year 2013, each of the following incidents/complaints constitutes as an inspection since all incidents are investigated via phone call, email, or site visit.

- Disposal/Decontamination activities: Fifteen incidents were investigated and one violation cited. One incident of naturally occurring radioactive material (NORM) waste being rejected at a landfill that is currently under investigation. One complaint of NORM contaminated scrap metal being buried, but the complaint was not substantiated and no violations were cited.
- Transportation activities: Two incidents involving vehicles that transported radioactive material. One determined to not be a reportable event. The other had no release of material, so no violations cited.
- Department of Transportation Special Permits (Exemptions) issued: Twelve transportation exemptions for shipments involving waste within Texas and one shipment involving another state.
- NORM Contaminated Equipment: Zero incidents/complaints.
- Technical assistance provided by DSHS: Primarily for isotope identification to landfills on 20 occasions.

DSHS and the TCEQ participate in quarterly multi-agency meetings with the Texas Radiation Advisory Board (TRAB) to ensure that each agency's activities are shared and coordination is determined as necessary.

Summary of Input from Stakeholder Groups:

The new draft rule was made available on the Radiation Control web site (www.dshs.state.tx.us/radiation/draft.shtm). Notification of the availability of the new draft rule and the opportunity to comment was given to stakeholders and appropriate DSHS staff using email/list servers. No comments were received during the 30-day comment period.

TRAB reviewed the new proposed rule at their November 1, 2013, meeting and recommended that the new rule be forwarded to the State Health Services Council for consideration.

Proposed Motion:

Motion to recommend HHSC approval for publication of rules contained in agenda item #5.d.

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| Approved by Assistant Commissioner/Director: | Kathryn C. Perkins, R.N., M.B.A. | Date: | 2/2/2014 |
| Presenter: Barbara J. Taylor, Manager, Radiation Group | Program: Policy/Standards Quality Assurance Unit | Phone No.: | (512) 834- 6770, x2010 |
| Approved by CCEA: | Carolyn Bivens | Date: | 1/31/2014 |

Title 25 Health Services
Part 1. Department of State Health Services
Chapter 289. Radiation Control
Subchapter C. Texas Regulations for Control of Radiation
New §289.101
Repeal §289.101

Proposed Preamble

The Executive Commissioner of Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes the repeal of §289.101 and new §289.101, concerning the memorandum of understanding between the department and the Texas Commission on Environmental Quality (TCEQ) regarding radiation control functions.

BACKGROUND AND PURPOSE

The repeal and new rule are necessary to comply with Senate Bill (SB) 347, 83rd Legislature, Regular Session, 2013. The purpose of the repeal and new rule is to delineate areas of respective jurisdiction and to coordinate the respective responsibilities and duties of the department and the TCEQ in the regulation of sources of radiation in accordance with Health and Safety Code, §401.011 and §401.069, in order to provide a consistent approach and to avoid duplication of radiation control functions.

In addition, this rule proposal satisfies the four-year review of agency rules in Government Code, §2001.039, which requires that each state agency review every four years its rules and consider for re-adoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Section 289.101 has been reviewed and the department has determined that the reasons for adopting new §289.101 continue to exist.

SECTION-BY-SECTION SUMMARY

The repeal of the existing rule and the new rule establish respective agency responsibilities regarding general agency jurisdiction, jurisdiction over specific activities and wastes, coordination of regulatory activities, coordination of enforcement and incident response activities, mutual assistance, and miscellaneous items. New §289.101 updates both agency names, makes minor grammatical and typographical corrections, updates technical terminology, corrects and/or updates rule reference citations; and reorganizes rule text. In addition, the new rule omits the language regarding in situ uranium mining as a result of SB 1604, 80th Legislative Session, 2007, that amended Health and Safety Code, §401.011, and transferred the regulatory authority for licensing and inspection of low-level waste processing and uranium recovery and disposal from the department to the TCEQ.

FISCAL NOTE

John Huss, Section Director, Environmental and Consumer Safety Section, has determined that for each year of the first five years that the sections are in effect, there will be no fiscal

implications to state or local governments as a result of enforcing and administering the sections as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Mr. Huss also has determined that there will be no adverse economic impact on small businesses or micro-businesses required to comply with the sections as proposed. This is determined by interpretation of the rules that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the sections.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There are no anticipated costs to persons who are required to comply with the sections as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Mr. Huss also has determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The public benefit anticipated as the result of enforcing or administering these sections is to ensure continued, enhanced protection of the public, workers, and the environment from unnecessary exposure to radiation by ensuring that the department's and the TCEQ's jurisdictional responsibilities are clear and specific.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule, the specific intent of which is to protect the environment or reduce risk 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 a state or a sector of the state.

TAKING IMPACT ASSESSMENT

The department has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Barbara J. Taylor, Radiation Group, Policy, Standards Quality Assurance Unit, Division of Regulatory Services, Environmental and Consumer Safety Section, Department of State Health Services, Mail Code 1987, P.O. Box 149347, Austin, TX 78714-9347, (512) 834-6770, extension 2010, or by email to

BarbaraJ.Taylor@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

PUBLIC HEARING

A public hearing to receive comments on the proposal will be scheduled after publication in the *Texas Register* and will be held at the Department of State Health Services, Exchange Building, 8407 Wall Street, Austin, Texas 78754. The meeting date will be posted on the Radiation Control website (www.dshs.state.tx.us/radiation). Please contact Barbara J. Taylor at (512) 834-6770, extension 2010, or BarbaraJ.Taylor@dshs.state.tx.us if you have questions.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The repeal and new rule are authorized by SB 347, 83rd Legislature; Health and Safety Code, §401.069, which allows the department and the TCEQ to adopt a memorandum of understanding defining their respective duties; Health and Safety Code, §401.011 which defines generally the jurisdiction of the department and TCEQ; Health and Safety Code, §401.051, which provides the agencies with the authority to adopt rules and guidelines relating to the control of radiation; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. The review of the rules implements Government Code, §2001.039.

The repeal and new rule affect Health and Safety Code, Chapters 401 and 1001; and Government Code, Chapter 531.

Section for Repeal.

§289.101. Memorandum of Understanding Between the Texas Department of Health and the Texas Natural Resource Conservation Commission Regarding Radiation Control Functions.

Legend: (Proposed New Rule)
Regular Print = Proposed new language

§289.101. Memorandum of Understanding Between the Department of State Health Services and the Texas Commission on Environmental Quality Regarding Radiation Control Functions.

(a) Purpose. The purpose of this Memorandum of Understanding (MOU) between the Department of State Health Services (DSHS) and the Texas Commission on Environmental Quality (TCEQ) regarding the regulation of sources of radiation is to acknowledge each agency's respective jurisdiction and duties under Health and Safety Code (HSC), Chapter 401. Pursuant to HSC, §401.414, the separate areas of each agency's jurisdiction are articulated; and the duties and responsibilities of and between the two agencies are clarified. This MOU is adopted between DSHS and TCEQ to ensure that regulation of radiation sources is consistent with HSC, Chapter 401; avoids duplication of effort; and results in a well-coordinated, consistent regulatory scheme.

(b) Definitions. The words and terms used in this section shall have the same meaning as defined in the HSC, §401.003, unless the context clearly indicates otherwise.

(c) Jurisdiction.

(1) DSHS is the Texas Radiation Control Agency. DSHS has jurisdiction over activities and substances regulated under HSC, Chapter 401, except as provided by HSC, §401.011(b) and Subchapters E, F, G, and K of Chapter 401.

(2) TCEQ has jurisdiction to regulate and license:

(A) the disposal of radioactive substances;

(B) the processing or storage of low-level radioactive waste or naturally occurring radioactive material (NORM) waste received from other persons, except oil and gas NORM;

(C) the recovery or processing of source material in accordance with HSC, Chapter 401, Subchapter G;

(D) the processing of by-product material as defined by HSC, §401.003(3)(B); and

(E) sites for the disposal of:

(i) low-level radioactive waste;

(ii) by-product material; or

(iii) NORM waste.

(d) Responsibility over specific activities.

(1) The receipt, storage, or processing of radioactive substances received by a TCEQ licensee for the activity covered by the TCEQ license shall be regulated by TCEQ. All other uses of radioactive material (e.g., well logging, industrial radiography, gauging devices, etc.) at a TCEQ-licensed facility shall be regulated by DSHS.

(2) Radioactive waste produced at DSHS-licensed facilities remains under DSHS jurisdiction until it is transferred to a licensed waste broker, waste processor, or a low-level radioactive waste disposal site.

(3) DSHS has jurisdiction over the possession, processing, and/or use of NORM except for its disposal. TCEQ has jurisdiction over the commercial or third party waste processing and/or disposal of non-oil and gas NORM waste.

(e) Radioactive materials and water quality.

(1) TCEQ has the responsibility for issuance of licenses, permits, and for enforcement of the terms and conditions of licenses, permits, rules, and/or orders that concern the treatment and discharge of radioactive material within the meaning of pollutant as defined in the Water Code, Chapter 26.

(2) TCEQ's jurisdiction regarding discharge of radioactive material is not exclusive as certain wastes are regulated by the Railroad Commission of Texas and DSHS regulates radioactive materials discharged to sanitary sewers. No separate license from TCEQ shall be required to authorize discharge of radioactive wastewaters into a sanitary sewer by DSHS licensees.

(3) TCEQ and DSHS shall notify each other in the event that radioactive materials impact water quality, including safe drinking water standards.

(f) Coordination of regulatory activities. DSHS and TCEQ shall coordinate with each other in the following activities.

(1) DSHS and TCEQ each agree to work together to ensure that complete regulation is maintained for sources, uses, and users of radiation. As appropriate, DSHS and TCEQ each agree to coordinate rulemaking activities between the two agencies and the Texas Radiation Advisory Board (TRAB) to ensure consistency of regulation in accordance with HSC, §401.020. In addition, TCEQ agrees to coordinate with DSHS in the preparation of the annual evaluation and report to the Legislative Budget Board as required under the Government Code, §2110.006 and §2110.007. DSHS and TCEQ each agree to seek and consider advice from TRAB on issues that involve the development, use, or regulation of sources of radiation.

(2) DSHS and TCEQ each agree to coordinate rulemaking activities that pertain to the requirements of the Agreement between the State of Texas and the United States Nuclear

Regulatory Commission (NRC), as amended, and to ensure the compatibility of rules and guidelines with federal regulatory programs. Each agency agrees to coordinate on providing information on any proposed legislation relating to the regulation of radioactive substances.

(g) Incident response. Incidents concerning radioactive material will be investigated as follows.

(1) Response to unidentified radioactive material discovered at municipal landfills will be investigated by TCEQ. If the investigation reveals that the waste is not acceptable for the municipal landfill and is determined to be generated by a DSHS licensee, TCEQ will refer the matter to DSHS.

(2) Each agency will investigate incidents and allegations concerning radioactive material within each agency's jurisdiction and make required notifications to the NRC.

(h) Emergency preparedness. Emergency preparedness for response to radiological emergencies shall be as follows.

(1) The State of Texas is required by federal laws and regulations to have trained personnel always available for emergency response training, drills, exercises, and actual emergency response. DSHS is assigned the lead role for the state response to radiological emergencies.

(2) DSHS shall provide training to emergency responders along low-level radioactive waste shipping routes with funds collected from shippers of low-level radioactive waste.

(3) DSHS shall collect an annual fee from the operators of fixed nuclear facilities in the state for expenses arising from emergency response activities, including training.

(4) DSHS and TCEQ will coordinate personnel availability for emergency preparedness and response activities.

(5) DSHS will inform TCEQ in a timely manner of all required exercises, drills, and training. All DSHS and TCEQ technical personnel who work in the radiation program and are assigned to the emergency response team shall attend appropriate emergency response training coordinated by DSHS. TCEQ shall notify DSHS of changes in the employment status of all TCEQ radiation personnel assigned to the emergency response team. In the event of an emergency, the appropriate DSHS and TCEQ radiation staff will be available for emergency response under the direction of DSHS staff and in accordance with Annex D of the State of Texas Emergency Management Plan.

(i) Mutual assistance. Each agency may request from the other agency short-term assistance of personnel or resources when there is need for such assistance, such as for performing close-out surveys, training, incident/emergency response and recovery operations, environmental monitoring, technical reviews, financial security information, and technical

support at contested hearings or other project information. Each agency will provide the requested assistance to the extent possible without disrupting its own required activities, in accordance with an approved interagency contract when applicable.

(j) Financial security for decontamination, decommissioning, reclamation, corrective action, and disposal of radioactive material.

(1) When required, TCEQ and DSHS will ensure that financial security is provided for each entity under each agency's jurisdiction.

(2) For entities licensed by both agencies:

(A) each agency will ensure that separate financial security instruments are maintained;

(B) the agencies shall coordinate the allocation of financial security provided to each agency and determine an equitable division of financial assurance to avoid duplication;

(C) each agency will review, evaluate, and collect sufficient financial security instruments required for decontamination, decommissioning, reclamation, and disposal of radioactive material pursuant to each agency's rules for each entity under their respective jurisdictions; and

(D) in the event that either agency cannot determine that decontamination, decommissioning, reclamation, or disposal of radioactive material activities fall under the exclusive jurisdiction of either agency, then both agencies will coordinate and share efforts to address the situation in a prompt manner.

(k) Miscellaneous.

(1) DSHS and TCEQ shall revise their respective rules and procedures as needed to implement this MOU.

(2) If any provision of this MOU is held to be invalid, the invalid provision will be severed and the remaining provisions shall not be affected.

(l) Effective date. This MOU will take effect after approval by both agencies and 20 days after the date on which it is filed in the Office of the Secretary of State in accordance with the provisions of Government Code, §2001.036.