

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

Agenda Item Title: Amendment to a rule concerning fees for certificates of registration, radioactive material licenses, emergency planning and implementation, and other regulatory services

Agenda Number: 5.e

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. The program regulates approximately 1,600 licensees and 16,000 registrants.

The program routinely monitors complaints received and resolved, the number of new and renewed registrations, the number of disciplinary actions taken, and violation trends. The number of complaints received, enforcement actions taken, inspections performed, and registration actions are monitored and evaluated.

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

Summary:

The purpose of the amendment is to continue protection of the public, workers, and the environment from unnecessary exposure to radiation and raise the cap of the radiation perpetual care account (PCA).

In September 1, 2004, DSHS commenced collecting an additional 5% fee from radioactive material licensees to be deposited to the radiation PCA. The funds in the PCA are to be used to prevent or mitigate adverse effects of abandonment of radioactive materials, default on a lawful obligation, insolvency, or other inability of licensees to meet radiation control requirements. In November 2008, DSHS suspended collection of the 5% fee when the total amount in the PCA reached \$500,000, which was the legislative cap that was imposed.

Senate Bill 347, 83rd Legislature, Regular Session, 2013, raised the cap on the state's total PCA from \$500,000 to \$100 million and changed the minimum amount to be maintained in the account from \$350,000 to \$50 million.

The amendment permits DSHS to reinstate the collection of an additional 5% fee to the radioactive material licensees, excluding licensees that are authorized only for diagnostic nuclear medicine, until the new PCA cap of \$100 million is met. In addition, the amendment requires DSHS to reinstate the collection of the 5% fee in the event the state's total PCA cap is reduced to \$50 million or less.

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

Key Health Measures:

There will be anticipated adverse fiscal impact on state and local government facilities and to persons, entities or small and micro-businesses that are specifically licensed to possess radioactive materials, excluding licensees authorized only for diagnostic nuclear medicine. The additional cost will be equal to 5% of the respective radioactive material license fee ranging from \$55 to \$3,850 every 2 years, until the \$100 million PCA cap is met.

Since the inception of the 5% fee on September 1, 2004, DSHS has accessed the funds as follows.

- (1) In 2006, \$3,077 was spent to enhance the safety of the radiation down-hole storage bunker at DSHS's main campus in Austin.
- (2) In 2007, in a contract with the Railroad Commission of Texas, DSHS spent \$400,000 to assist in the abatement of a potential radiation threat posed to the State's coastal environment and its citizens from a ruptured radioactive logging source in Winnie, Chambers County, by excavating and removing contaminated material from the site and decommissioning the site.
- (3) In October 2007, \$72,490 was spent to properly dispose of various radioactive sources, which had been stored in the bunker at DSHS's main campus in Austin, including radiographic cameras, sealed radioactive sources, gauges, sealed capsules from a hospital, radium sources, and contaminated soil.

DSHS and the Texas Commission on Environmental Quality (TCEQ) will monitor the balance in the PCA to determine when the maximum and minimum amounts to be held in the state's total PCA are met. PCA funds are expended when DSHS and/or TCEQ determine that funds are needed to prevent or mitigate adverse effects of abandonment of radioactive materials, default on a lawful obligation, insolvency, or other inability of licensees to meet radiation control requirements.

Summary of Input from Stakeholder Groups:

The 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 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.

The Texas Radiation Advisory Board (TRAB) reviewed the proposed amendment at their November 1, 2013, meeting and recommended that the rule be forwarded to the State Health Services Council for consideration.

Proposed Motion:

Motion to recommend HHSC approval for publication of the rule contained in agenda item #5.e.

Approved by Assistant Commissioner/Director:	Kathryn C. Perkins, R.N., M.B.A.	Date:	2/3/14
Presenter:	Barbara J. Taylor, Manager, Radiation Group	Program:	Policy, Standards & Quality Assurance Unit
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Approved by CCEA:	Carolyn Bivens	Date:	2/03/2014

Title 25. Health Services
Part 1. Department of State Health Services
Chapter 289. Radiation Control
Subchapter D. General
Amendment §289.204

Proposed Preamble

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes an amendment to §289.204, concerning fees for certificates of registration, radioactive material licenses, emergency planning and implementation, and other regulatory services.

BACKGROUND AND PURPOSE

The amendment to §289.204 of the department's radiation control rules is necessary to comply with Senate Bill (SB) 347, 83rd Legislature, Regular Session, 2013, a portion of which is codified at Health and Safety Code (HSC), §401.307, which increases both the maximum and the minimum amounts to be held in the state's total perpetual care account (PCA) for radiation.

House Bill 1678, 78th Legislature, Regular Session, 2003, amended HSC, §401.301(d), directing the department to collect an additional 5% fee from radioactive material licensees to be deposited to the department's radiation PCA. The funds in the PCA are to be used to pay for measures to prevent or mitigate adverse effects of abandonment of radioactive materials, default on a lawful obligation, insolvency, or other inability of licensees to meet radiation control requirements. The department commenced collection of these fees effective September 1, 2004. In November 2008, the department suspended collection of this 5% fee when the total amount in the PCA reached \$500,000, the legislative cap previously imposed.

Under SB 347, the cap of the state's PCA was raised from \$500,000 to \$100 million, effective September 1, 2013. More specifically, when the balance of the state's PCA, to which both the department and the Texas Commission on Environmental Quality (TCEQ) now contribute, totals \$100 million, further collection of these fees is to be suspended. The department collects this 5% fee from its radioactive material licensees, excluding licensees that are authorized only for diagnostic nuclear medicine. If and when the balance of the state's PCA falls to \$50 million or less, the 5% fee is to be reinstated.

This rule proposal also 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 289.204 has been reviewed in its entirety and the department has determined that the reasons for adopting the section continue to exist; however, revisions to the rule are necessary as outlined in this preamble.

SECTION-BY-SECTION SUMMARY

A change to §289.204(d)(5) clarifies that radioactive material licensees authorized only for diagnostic nuclear medicine are not required to pay this additional 5% fee.

The amendment to §289.204(d)(5)(B) increases the state's PCA cap from \$500,000 to \$100 million and raises the minimum amount to be maintained in the PCA from \$350,000 to \$50 million. If and when the balance of the total PCA exceeds \$100 million, the 5% fee is to be suspended; if and when the balance is reduced to \$50 million or less, the department is to reinstate the additional 5% fee.

FISCAL NOTE

John Huss, Section Director, Environmental and Consumer Safety Section, has determined that for each year of the first five years that the section is in effect, there will be fiscal implications to state or local governments as a result of enforcing and administering the section as proposed. The department will receive an estimated additional \$196,800 in revenue each year of the first five years from the additional 5% fee to radioactive material licensees, excluding licensees authorized only for diagnostic nuclear medicine. Collection of the additional fee will continue until the amount in the state's PCA reaches \$100 million. The fees shall be deposited to the credit of the department's PCA to be administered only for specifically designated uses as prescribed by HSC, §401.052(d) and §401.305. If the balance in the state's PCA is reduced to \$50 million or less, the department is to reinstate the assessment of the fee until the balance reaches \$100 million. The fiscal impact to state or local government entities licensed to possess radioactive materials, excluding licensees authorized only for diagnostic nuclear medicine, will be an additional cost equal to 5% of the respective radioactive material license fee ranging from \$55 to \$3,850 every 2 years, until the \$100 million PCA cap is met.

The department is unable to determine the duration for the collection of the 5% fee due to the collection of multiple funds being deposited to the state's total PCA, imposed by HSC, §401.301(d), §401.052(d), and §401.207(g), until the \$100 million PCA cap is met. The variables or factors involved in calculating the balance of the state's total PCA include: (1) the differing fees paid by specific licensees which is the basis for the 5% fee (collected and deposited by the department as well as TCEQ); (2) the unknown quantities of low-level radioactive waste that will be shipped (with associated fees collected and deposited by the department); (3) the total contract rate for nonparty compact waste (funds collected and deposited by TCEQ); and (4) the possible withdrawal of funds for specifically designated uses as prescribed by Health and Safety Code, §401.052(d) and §401.305.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Mr. Huss also has determined that there will be an adverse economic impact on licensees that are small businesses or micro-businesses, excluding licensees authorized only for diagnostic nuclear medicine, required to comply with the section as proposed. These businesses will incur an additional cost equal to 5% of the respective radioactive material license fee, ranging from \$55 to \$3,850 every 2 years, until the \$100 million PCA cap is met.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There are anticipated costs to licensees that are persons, excluding licensees authorized only for diagnostic nuclear medicine, who are required to comply with the section as proposed. These persons will incur an additional cost equal to 5% of the respective radioactive material license fee, ranging from \$55 to \$3,850 every 2 years, until the \$100 million PCA cap is met. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

Mr. Huss has determined that for each year of the first five years the section is in effect, the public will benefit from adoption of the section as amended. The public benefit anticipated as the result of administering this section will be continued protection of the public, workers, and the environment from unnecessary exposure to radiation by ensuring funds are available to prevent or mitigate adverse effects of abandonment or radioactive materials or the default on a lawful obligation, insolvency, or other inability of licensees to meet the radiation control requirements.

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 and Quality Assurance Unit, Environmental and Consumer Safety Section, Division for Regulatory Services, 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 rule has been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The amendment is authorized by SB 347, 83rd Legislature (codified at Health and Safety Code, §401.307); Health and Safety Code, §401.301, which allows the department to collect fees for radiation control licenses and registrations that it issues; Health and Safety Code, §401.302, which allows the department to collect fees from each nuclear reactor or other fixed nuclear facility in the state that uses special nuclear material; Health and Safety Code, §401.051, which provides the Executive Commissioner of the Health and Human Services Commission with 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 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 rule implements Government Code, §2001.039.

The amendment affects Health and Safety Code, Chapters 401 and 1001; and Government Code, Chapter 531.

Legend: Proposed Amendment

Single Underline = Proposed new language

[Bold, Print, and Brackets] = Current language proposed for deletion

Regular Print = Current language

(No change.) = No changes are being considered for the designated subdivision

§289.204. Fees for Certificates of Registration, Radioactive Material Licenses, Emergency Planning and Implementation, and Other Regulatory Services.

(a) - (c) (No change.)

(d) Payment of fees.

(1) - (4) (No change.)

(5) An additional nonrefundable fee equal to 5% **[five percent]** of the total fee for each specific license shall be paid with the specified fee by each holder of a specific license, excluding licensees that are authorized only for diagnostic nuclear medicine **[licensees]**.

(A) The fees collected by the agency in accordance with this paragraph shall be deposited to the credit of the agency's Radiation and Perpetual Care Account **[, until the fees collectively total \$500,000]**.

(B) The agency shall collect the fees **[If the balance of fees collected]** in accordance with this paragraph so long as the sum of the balances of the perpetual care accounts specified under Health and Safety Code, §401.307, does not exceed \$100 million; and if the sum of such balances subsequently is **[is subsequently]** reduced to \$50 million **[\$350,000]** or less, the agency shall reinstitute assessment of the fee until the sum of such balances **[balance]** reaches \$100 million **[\$500,000]**.

(6) - (9) (No change.)

(e) - (m) (No change.)