

SUBJECT: Transfer of responsibilities concerning radioactive substances to TCEQ

COMMITTEE: Environmental Regulation — committee substitute recommended

VOTE: 7 ayes — Bonnen, Howard, Driver, Homer, T. King, Kuempel, W. Smith
0 nays

SENATE VOTE: On final passage, May 4 — 30-0

WITNESSES: For — Mark Pelizza, URI, Inc.; Cyrus Reed, Lone Star Chapter, Sierra Club; Tom "Smitty" Smith, Public Citizen; Amy Thurlkill, High Plains Uranium
Against — Craig Holmes, Mestena Uranium and Cogema Mining
On — Tristan Mendoza, Texas Radiation Online; Mike Woodward, Waste Control Specialists

BACKGROUND: Texas is one of 33 states with agreement status to regulate all radioactive material in-state, except federal facilities and nuclear power plants. This agreement with the federal government requires the state program to remain compatible with federal regulatory requirements and adequately to protect public health and safety. Over the past five years, the Management Review Board of the U.S. Nuclear Regulatory Commission (NRC) has put the Texas program on "heightened oversight," citing the number of overdue inspections, vacant positions, and staff turnover.

The Department of Health took over regulation of uranium mining and radioactive mill tailings from the federal government in 1963 and held that duty until it was transferred to the Texas Natural Resource Conservation Commission (TNRCC) in 1993, when that agency was created as the state's comprehensive environmental protection agency. Tailings are the dirt that remains radioactive following mining for naturally occurring radioactive materials. In 1997, the 75th Legislature enacted SB 1857 by Brown, which returned this duty to the Department of Health. It became a duty of the Department of State Health Services (DSHS) under the reorganization of Texas health and human services agencies in 2003.

In addition to regulating uranium mining and radioactive mill tailings, DSHS regulates two companies that process low-level waste from other entities. Low-level radioactive waste can include common materials, such as paper, plastic, glass, and metal contaminated by radioactive material; equipment and tools used in certain industrial and medical processes; resins and filters used to purify water at nuclear power plants; clothes, syringes, test tubes, and other equipment used in handling radioactive materials; and animal carcasses, equipment, and products used in biomedical and pharmaceutical research. DSHS also regulates an additional 1,600 radioactive material licenses involved in health processes.

HB 1567 by West, enacted by the 78th Legislature in 2003, authorizes the Texas Commission on Environmental Quality (TCEQ), formerly TNRCC, to license one private, low-level radioactive waste disposal facility. Waste Control Specialists (WCS) is the only private company currently seeking this license from TCEQ to dispose of low-level radioactive waste in Andrews County. Current state regulation gives the authority to regulate the disposal of low-level radioactive waste to TCEQ and the authority to regulate processing and storage of the waste to DSHS. DSHS recently amended the company's existing hazardous waste disposal license to accept radioactive waste from the federal weapons uranium enrichment program stored in Fernald, Ohio for storage in Andrews County.

To perform in situ uranium mining, meaning to drill a well to remove uranium, a business must first obtain a general permit pertaining to the overall mining activities performed in a Production Authorization Area (PAA). Following approval for the PAA, an additional permit is needed for each well, whether used for uranium mining or for waste injection. A court order provided that when applying for a well, public notice would be provided on the basis that injections could influence the water supply.

DIGEST:

CSSB 1667 would institute a state fee on disposal of radioactive substances, authorize area-wide in-situ mining, and shift certain jurisdiction held by HHSC and DSHS over the licensing and regulation of radioactive substances to TCEQ, which would have the jurisdiction to license and regulate:

- the processing of low-level radioactive waste or naturally occurring radioactive material waste received from other persons, except oil and gas NORM;
- the recovery or processing of source material;

- the processing of by-product material; and
- sites for the disposal of low-level radioactive waste, by-product material, or naturally occurring radioactive material waste.

The bill would make conforming changes to the transfer of jurisdiction over these licensing and regulation duties by eliminating certain references to the HHSC and DSHS and adding references to TCEQ where applicable.

Contested case hearings. TCEQ could hold contested case hearings on license applications under the Texas Radiation Control Act. TCEQ would hold a contested case hearing only if a timely request were filed by an affected person regarding the renewal or amendment of a license if a requested change would constitute a major amendment. Major amendments would include those that transferred the license, changed the authorized wastes, altered facility operations, affected the closure of a facility, or necessitated an environmental analysis. TCEQ would adopt rules to establish requirements for public notice of and public participation in the amendment of a license, including those regarding minor and major amendments. This provision would replace previous provisions governing public notification on license amendments.

Facility licenses. TCEQ could issue, amend, or renew a separate license for a separate commercial storage and processing facility for a site also licensed for disposal. In adopting rules for the issuance of licenses for new sites for processing or disposal of radioactive substances, TCEQ would consult with appropriate entities including the advisory board and the Texas Water Development Board. The commissioner would need to consider the amount of security required by a holder of any license to dispose of radioactive substances, and a compact waste disposal facility license holder would have to obtain at least \$20 million in security. TCEQ could assess and collect fees from an applicant to recover the costs the commission incurred for administrative review, technical review, and hearings on license application.

Licensing authority of TCEQ and the Railroad Commission. TCEQ would possess the sole and exclusive authority to grant, deny, renew, revoke, suspend, amend, or withdraw licenses for the recovery and processing of source material or the disposal of by-product material. TCEQ, HHSC, and the Railroad Commission, by rule, would adopt memoranda of understanding defining their respective duties under this chapter. The Railroad Commission would have sole authority to regulate

and issue licenses, permits, and orders for the processing, storage, and disposal, rather than just disposal, of oil and gas naturally occurring radioactive material (NORM) waste and the decontamination and maintenance of equipment. The rules would provide protection for public health, safety, and the environment equivalent to the protection provided by rules of TCEQ applicable to processing, storage, and disposal of other wastes. The Railroad Commission would consider factors necessary to provide for the equitable allocation among NORM operators of the costs of administering the oil and gas NORM program. The total fees collected could not exceed the estimated costs of administering the oil and gas NORM program.

State fee on disposal of radioactive substances. A holder of a license authorizing the disposal of a radioactive substance from other persons would transfer 10 percent of its gross receipts from disposal operations on a quarterly basis. Eight percent would be transferred to general revenue while 2 percent would be transferred to the host county. This fee would not apply to the disposal of compact, federal facility, or industrial solid waste. The license holder would have to comply with audits by TCEQ to ensure that the license holder had accurately paid its fees.

Jurisdiction over radioactive waste. TCEQ would license and regulate radioactive waste, storage, processing, and disposal activities not preemptively regulated by the federal government. HHSC, through DSHS or another department, would be the state agency that regulated radioactive waste activities other than those regulated by TCEQ. The Railroad Commission of Texas would license and regulate the possession, storage, processing, handling and disposal of oil and gas NORM waste and the decontamination and maintenance of oil-field equipment.

Authorization for area-wide in situ mining of radioactive substances. TCEQ could issue, as a component of an injection well permit, an authorization for in situ mining of radioactive substances in a specified production area. The authorization could not contain a provision that required any additional approval of TCEQ or any additional hearing for the permit holder to conduct minor in situ mining in the production area. An application for minor in situ authorization would not be subject to a contested case hearing, regardless of when the application was submitted. This would not prevent TCEQ from exercising its other powers governing permits. The bill would exempt ownership of an on-site waste disposal

associated with a licensed in situ leach uranium recovery facility from transferring to the state or federal government upon closure.

General provisions. The bill would make conforming changes to the reorganization and renaming of Texas health and human services agencies such that references to the board would mean the executive commissioner of the HHSC, and the department would mean DSHS. Conforming changes also would be made to reflect the name change from TNRCC to TCEQ.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2005. Certain provisions of this bill would be required to be completed on September 1, 2005, if this were the effective date or by 31 days following the effective date if the act took immediate effect. These provisions would include transferring to TCEQ all rights, powers, duties, obligations, functions, activities, property, and appropriations pertaining to the licensing and regulation of radioactive substance recovery, storage, processing, and disposal or long-term care of decommissioned sites for disposal of by-product material formerly performed by HHSC and DSHS.

Any HHSC or DSHS staff person that performed duties related to the powers transferred to TCEQ could request a transfer, and TCEQ would consider these individuals for staffing. Any transfers as a result of this bill would not affect any pending litigation on the effective date. On the effective date, any condition on a license that would subject the license holder to a civil or administrative penalty for the license holder's failure to transfer by-product material by a certain date would be void.

The bill would also set up dates for consideration of license applications, renewals, or amendments; approval and actions related to remediation plans; and making decisions in contested case hearings. The processing of a license application to dispose of low-level radioactive waste filed before January 1, 2005 would not be affected by this bill, and TCEQ would prioritize processing of these licenses above all other applications and adhere to prioritization of the processing of other applications set forth in the bill.

SUPPORTERS
SAY:

CSSB 1667 would combine regulatory powers over waste disposal under one agency, assure consistent regulations across the board, and ensure that the state and counties received more financial benefit, including an estimated \$4,334,332 in general revenue over the upcoming biennium. This would be a responsible consolidation of resources under one agency and address concerns about fulfilling state obligations under Texas' agreement with the NRC.

Transfer of jurisdiction to TCEQ. Texas' agreement with the federal government requires the state program to remain compatible with federal regulatory requirements and adequately to protect public health and safety. If Texas lost agreement state status through failure to properly regulate radioactive material, the NRC could resume control over these regulatory duties. This would cause increased administrative burdens and costs which would discourage industry development in Texas because companies would have to conduct business through Washington D.C. rather than locally. The NRC has cited the number of overdue inspections, vacant positions, and staff turnover from the DSHS radiation program as the basis for its “heightened oversight” of Texas.

Transferring the licensing and regulatory duties to TCEQ that are proposed in this bill would rectify the issues cited by NRC and eliminate the threat of NRC's resuming regulatory functions in Texas. TCEQ is the state expert when it comes to disposal and environmental concerns because these functions are a piece of the agency mission. The commission has more than 100 engineers and geologists with the unique skills necessary to understand disposal processes and evaluate environmental impact. Although DSHS does have more staff with expertise on radioactive materials, TCEQ has seven health physicists, and the bill provides for the transfer of DSHS expert staff to TCEQ. The transfer of jurisdiction to TCEQ would provide for a more holistic regulatory approach because TCEQ would be equipped to address the disposal, geological, engineering, and radioactive aspects of the process. In addition, it would add consistency to state regulation in the disposal of radioactive waste.

The licensing of WCS is an example of why the transfers of jurisdiction that would be made by this bill would be appropriate. The same company is applying for two licenses that each involve waste disposal; however, one of its applications is being processed by TCEQ and another is being processed by DSHS. This bill would decrease duplication of efforts in

such instances and increase coordination of resources and concentration of expertise.

The timelines provided for the transfer of powers and duties as well as licensing deadlines are adequate to meet the needs to thoroughly review applications to ascertain their validity and adherence to public safety requirements. The bill would not require approval of applications by these deadlines but instead would only require some form of decision to be made by the stipulated dates. Ensuring efficient processing of applications would protect current applicants who should not have to encounter processing delays due to reorganization of the state's licensing authorities. In addition, the sooner such facilities initiated operations, the sooner the state could benefit from return through the additional revenue stream from facility gross receipts.

In situ-drilling. The bill would bring more certainty to companies to ensure that if they invested funds to mine uranium, that they would be able to carry out their intended business. The current process in Texas is unlike any other in the nation in that a business could do all that was required to obtain a permit to drill in a certain area yet might later have permits denied to drill individual wells. This creates a high risk for businesses investing funds in these activities. An initial permit should be sufficient for a company to carry out business within the defined parameters of the permit. The public would still have a mechanism to hold a contested case hearing if any major amendment was made to a permit that would change the outcomes of drilling for which the business initially applied. This bill would grant companies the assurance that after receiving a permit and building a facility, they would have the ability to profit from it.

Fee on radioactive substances. These fees would generate revenue to both the state and to county governments. This would allow the state to share in profits associated with introducing additional radiation streams. Because companies already cover inspection costs and would be required to provide security to cover unexpected events that could risk public safety, 100 percent of these revenues could be used for general purposes.

OPPONENTS
SAY:

Transfer of jurisdiction to TCEQ. DSHS has an extensive history and greater expertise in regulating radioactive materials than does TCEQ. Duties should not be transferred at a time when TCEQ and DSHS are beginning to reach a better balance of authority in their respective areas of expertise, and the transfer could interfere with pending applications.

There is no guarantee that the experts at DSHS would transfer to fill the gap in needed health physicists at TCEQ, and the number of FTEs necessary for overall regulation would increase under the proposed new structure. An attempt to move programs regulating radioactive issues from the Texas Department of Health (TDH) to TNRCC in 1993 failed because the department retained most of the staff who worked with radioactive issues on a regular basis, and therefore the bulk of the expertise on radioactive matters. SB 1857 in 1997 reversed the transfer of the by-product materials program primarily because the need was recognized to take advantage of the expertise in radioactive matters that remained with TDH.

The bill has several provisions that would not only transfer uranium mining waste recovery and processing from DSHS to TCEQ but could cause any licenses or remediation plans pending to confront a rushed approval deadline as early as October 31, 2005. This would not provide adequate time to consider licenses and remediation plans from companies in Duval, Live Oak, and Kleberg counties that are being contested both by the state and county officials because they do not meet state standards, which are more stringent than federal standards for clean-up.

The transfer of jurisdiction to TCEQ and associated deadlines with processing current WCS applications would not provide enough time adequately to review these applications. TCEQ already is reviewing the WCS low-level waste license application, and the transfer would add requirements to review the by-product disposal license currently at DSHS by as early as January 2006. There is no way that TCEQ could thoroughly review these applications while the commission was simultaneously having to hire more FTEs and contractors. Funding would not even be available to hire contractors until the new biennium begins, and this would constrict the review process even further. Such a fast review of applications for a company to dispose of radioactive waste would be irresponsible and only serve the business interests of WCS.

In situ-drilling. At present, public notice for proposed uranium mining is required. The public has recourse to seek a contested case proceeding when a uranium mining company seeks to expand operations through a PAA. SB 1667 would exempt minor in situ mining from public notice and the opportunity for a contested case hearing. The harmful effects of this provision are evident through the circumstances that could be experienced in Kleberg County, where an application is currently under review. If that

application is considered for minor in situ mining, the public would have no recourse against further drilling even though the Environmental Protection Agency (EPA) already has informed locals that “gross alpha radiation was detected at five to eight times above EPA’s standard” and they should discontinue drinking their water and “consult their family doctor.” Residents believe the company already has polluted the water without concern for the community’s well-being and without remediation, and they should retain the right to contest further drilling. The public has a right to protect their drinking water and their health. A uranium mining company should not be allowed to take away that right, so this special interest provision should be eliminated.

Fee on radioactive substances. While generation of additional revenues would be positive, these fees should be split more evenly between the state and county. This would provide more of a share of the revenues to the county, which is most impacted by the presence and operations of such businesses. In addition, state revenues should be designated to be placed in the Radioactive Waste Perpetual Care Fund.

Finally, this bill should not have eliminated a provision that was included in the Senate-passed version governing limitation on radioactive substance storage. Some waste at a facility would remain radioactive for hundreds or thousands of years, and when relevant to public health, the storage of such substances should be limited.

NOTES:

The fiscal note estimates a gain of \$4,334,332 to general revenue related funds in fiscal 2006-07. This would assume the transfer of \$550,000 from DSHS and eight FTEs to be reduced to 4.5 FTEs following the next biennium. Estimated additional administrative costs would decrease from \$1.1 million in fiscal 2006 to \$555,000 for fiscal 2008 and subsequent years. The new fee on gross receipts and surcharges would be expected to generate at least \$14 million in additional revenues between 2006 and 2010.

The committee substitute added more specific grounds upon which a determination would be made as to whether a contested case hearing could take place. It would also contains a provision on issuance of separate licenses for different facilities. The substitute eliminated a provision

governing limitation on radioactive substance storage and decreased the amount of time that TCEQ would have to complete review of a pending license application following the effective date.