

TCEQ Phase II Rulemaking Process

Written Comments of TMRA-Uranium Committee

The members of the Uranium Committee of the Texas Mining and Reclamation Association ("TMRA-UC") appreciate the opportunity to provide the Texas Commission on Environmental Quality ("TCEQ") with written comments regarding the Draft Concepts for Revisions to Rule Language document prepared by the TCEQ staff and distributed at the April 25, 2008 Stakeholders Meeting. The TMRA-UC has identified several areas of concern with the concepts proposed in the Draft Concepts document.

The comments and questions of the TMRA-UC concerning the proposed Phase II Rulemaking concepts are as follows:

1. Aquifer Exemptions – Chapter 331

- Designation Process – The TMRA-UC believes that a lack of clarity exists in the Draft Concepts document with the description of the method by which the executive director will designate an aquifer exemption. The method of designating an aquifer exemption in the Draft Concepts document is different from the current designation process and the TMRA-UC does not understand the need to change the designation process.

- Recordation in County Deed Records – The TMRA-UC has numerous questions regarding the concept which requires the recordation of aquifer exemptions in the pertinent county deed records. The TMRA-UC concerns are as follows:

- No Statutory Authority for Deed Recordation Requirement – The TMRA-UC is unaware of any provision of Texas law which authorizes the TCEQ to require the deed recordation of a state or federal aquifer exemption. Further, the lack of statutory authority for the recordation of aquifer exemptions raises legal questions as to the status of aquifer exemptions or notices of such an exemption as an "instrument" which a county clerk is authorized to record. Chapters 191 and 192 of the Texas Local Government Code contain specific provisions as to the documents and instruments which a county clerk is required to record, including those instruments which are required or permitted by law to be recorded. The TMRA-UC is concerned that the proposed deed recordation requirement would create a situation where a permittee's authority to take action under an area permit would be placed in jeopardy if a county clerk refuses to record aquifer exemptions in that county clerk's county deed records and no legal provision requires the county clerk to take such action.

- Unauthorized Delegation of Authority – With the requirement proposed in the Rules Concept document for aquifer exemptions, the TMRA-UC believes that the TCEQ is mistakenly delegating its authority to authorize

the operation of injection wells to the United States Environmental Protection Agency ("EPA") and one or more county clerks. Currently, the TCEQ issues area permits for the construction and operation of injection wells used for in situ uranium mining under Chapter 27 of the Texas Water Code. The proposed rule regarding aquifer exemptions provides that the EPA must approve an aquifer exemption and the aquifer exemption must be recorded in the pertinent county deed records *before* the injection into the exempt aquifer. (emphasis added) Therefore, an entity who has been granted an area permit by the TCEQ can not begin injection into an exempt aquifer until the EPA has acted on the aquifer exemption and the appropriate county clerk has recorded the aquifer exemption in the county deed records.

- Conflict between surface owners and mineral owners – An additional concern of the TMRA-UC when analyzing this new recordation requirement is the conflict which could be created between surface owners and mineral owners. The requirement of deed recordation for aquifer exemptions established by this new concept could place the surface owner at a disadvantage because the deed recordation would place a restriction on a landowner's deed that implies that some new hazard exists when the character of the aquifer will not have changed as a result of mining.

- Comparison with Similar Situations - The TMRA-UC also wonders how this new concept is different than the instance where a water well driller could intersect an aquifer that has water quality that exceeds drinking water standards? The TMRA-UC asks if the aforementioned situation would require a deed restriction in the same manner as required by the new concept stated in the Draft Concepts document.

2. Annual Report – Chapter 331

● Use of Annual Report – The TMRA-UC supports the concept detailed in the Draft Concepts document which authorizes permittees to use an Annual Report to provide updated information to the TCEQ. The practice of using annual reports to provide updated information to regulatory entities is reasonable and consistent with practices in other states for uranium recovery operations.

● Groundwater Surety Cost Estimate - The TMRA-UC has reservations regarding the requirement of an update of the groundwater surety cost estimate proposed in the Draft Concepts document. Further, the TMRA-UC asks how the requirement can be reconciled with the requirements established in Senate Bill 1604 enacted by the 80th Texas Legislature in 2007 ("SB 1604"). In addition, the TMRA-UC is concerned that the surety increases which result from the annual update required by the Annual Report will trigger additional opportunities for contested case hearings. The TMRA-UC firmly believes that such a requirement was not the intent of SB 1604.

3. Restoration and Stability – Chapter 331

- Increase in Stabilization Period – The TMRA-UC does not understand the need to increase the stabilization period from 6 months to 12 months. Currently, the executive director of the TCEQ can determine that restoration is not complete and can require additional restoration activities and stabilization monitoring prior to release of the mining site. The concept proposed by the TCEQ would increase the stabilization period and provides for additional stabilization monitoring following a restoration table amendment. The proposed concept is confusing because restoration table amendments are typically requested after significant restoration has been performed and the amendments are only granted after a rigorous regulatory process and opportunity for public input. The additional requirement for longer stability monitoring and modeling would already be considered as part of the process of obtaining a restoration table amendment.

4. Baseline and Restoration Values – Chapter 331

- Number of baseline production zone wells – The TMRA-UC does not agree with the proposed concept which changes the number of baseline production zone wells which will be required by the TCEQ. The TMRA-UC believes the current standard provided in the TCEQ Rules which uses at least five designated baseline wells or one baseline production zone well per **five (5)** acres of production area, whichever is greater, to determine production area baseline is more than adequate. The proposed concept published by the TCEQ would require one baseline production zone well per acre of production area.

5. Independent third-party expert – Chapter 331

- Default to Contested Case Hearing – The TMRA-UC requests the removal of the proposed concept which provides that when the executive director determines that the recommendation of the third-party expert does not meet the requirements for the initial establishment of monitoring wells, the initial establishment of monitoring wells will, by default, be subject to a contested case hearing. The TMRA-UC strongly believes that this proposed concept is direct contrast to the language provided in SB 1604. Once the TCEQ uses the third-party expert recommendation process, it is clear that the applicant is not subject to a contested case hearing regardless of the recommendations developed by the third-party expert.

- Qualifications of Independent Third-Party – The TMRA-UC is also concerned that the proposed qualifications for the independent third-party experts would likely eliminate a significant portion of likely candidates who could serve as independent third-party experts. For example, the Bureau of Economic Geology, which is the Texas State Geological Survey, would not be qualified to serve as an independent, third-party expert because the BEG does not have at least 5 years of work experience in specific areas proposed for in situ mining operations. The TMRA-UC has identified another problem with the qualifications provided by the TCEQ for the third-party expert in that the TCEQ failed to include language regarding the disqualification of individuals who have worked

on behalf of protestants to applications under consideration by the TCEQ. Moreover, the TMRA-UC believes it is important to note that the requirement that an individual have both 5 years experience in the geology and hydrogeology of the area of the proposed in situ mining operation and the requirement that the individual is not currently and has not provided direction and advice to the applicant for at least two years will eliminate potential candidates.

6. Financial Assurance – Chapter 305

- Financial Assurance – The TMRA-UC has concerns with the vague and incomplete nature of the proposed concepts provided by the TCEQ regarding financial assurance. The TCEQ has provided numerous proposed financial assurance concepts which fall under the three categories established: major amendment, minor amendment, administrative amendment. The TMRA-UC does not want minor revisions to the financial assurance information provided by permittees to be deemed major or minor amendments. Clearly, the minor revisions to a permittee's financial assurance are administrative amendments. The TMRA-UC previously provided the TCEQ with proposed rule language which complies with the requirements of SB 1604.

- Changes to Radiation Safety Officer – The TMRA-UC believes the changes a permittee would make in regards to its radiation safety officer ("RSO") should not be considered a minor amendment but should be deemed an administrative amendment. The TCEQ Rules currently require a permittee to name a RSO and for the RSO which is named to meet certain standards. Therefore, a RSO change should be an administrative amendment and not a minor amendment as proposed by the TCEQ.