

Legend: (Proposed Amendments)

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

§289.205. Hearing and Enforcement Procedures.

(a) (No change.)

(b) Definitions. The following words and terms when used in this chapter shall have the following meanings, unless the context clearly indicates otherwise.

(1) Administrative penalty -- A monetary penalty assessed by the agency in accordance with the Texas Radiation Control Act (Act), §401.384, to emphasize the need for lasting remedial action and to deter future violations.

(2) (No change.)

(3) Applicant -- A person seeking a license, certificate of registration, accreditation of mammography facility, or industrial radiographer certification, issued in accordance with **[under]** the provisions of the Act and the requirements in this chapter.

[(4) Board -- The Texas Board of Health.]

(4) **[(5)]** Certified industrial radiographer -- An individual who meets the definition of radiographer as stated in §289.255(c) of this title (relating to Radiation Safety Requirements and Licensing and Registration Procedures for Industrial Radiography).

(5) **[(6)]** Commissioner -- The **[Texas]** commissioner of the Texas Department of State Health Services **[health]**.

(6) **[(7)]** Contested case -- A proceeding in which the agency determines the legal rights, duties, or privileges of a party after an opportunity for adjudicative hearing.

(7) **[(8)]** Director -- The director of the radiation control program in accordance with **[under]** the agency's jurisdiction.

(8) **[(9)]** Enforcement conference -- A meeting held by the agency with a person to discuss the following:

(A) safety, safeguards, or environmental problems;

(B) compliance with regulatory, license condition, or registration condition requirements;

(C) proposed corrective measures including, but not limited to, schedules for implementation; and

(D) enforcement options available to the agency.

(9) [(10)] Hearing -- A proceeding to examine an application or other matter before the agency in order to adjudicate rights, duties, or privileges.

(10) [(11)] Interested person -- A person who participates in a hearing concerning a contested case but who is not admitted as a party by the ALJ.

(11) [(12)] Major amendment -- An amendment to a license issued in accordance with the requirements of §289.260 of this title (relating to Licensing of Uranium Recovery and Byproduct Material Disposal Facilities) that:

(A) reflects a transfer of ownership of the licensed facility;

(B) authorizes enlargement of the licensed area beyond the boundaries of the existing license;

(C) authorizes a change of the method specified in the license for disposal of byproduct material as defined in the Act, §401.003(3)(B); or

(D) grants an exemption from any provision of §289.260 of this title.

(12) [(13)] Notice of violation -- A written statement prepared by the department of one or more alleged infringements of a legally binding requirement. **[The notice requires the person receiving the notice to provide a written statement describing the following:]**

[(A) corrective steps taken by the person and the results achieved;]

[(B) corrective steps to be taken to prevent recurrence; and]

[(C) the projected date for achieving full compliance. The agency may require responses to notices of violation to be under oath.]

(13) [(14)] Order -- A specific directive contained in a legal document issued by the agency.

(14) [(15)] Party -- A person designated as such by the ALJ. A party may consist of the following:

(A) the agency;

(B) an applicant, licensee, registrant, accredited mammography facility, or certified industrial radiographer; and

(C) any person affected.

(15) [(16)] Person affected -- A person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is:

(A) a resident of a county, or a county adjacent to the county, in which radioactive material is or will be located; or

(B) doing business or has a legal interest in land in the county or adjacent county.

(16) [(17)] Preliminary report -- A document prepared by the agency containing the following:

(A) a statement of facts on which the agency bases the conclusion that a violation has occurred;

(B) recommendations that an administrative penalty be imposed on the person charged;

(C) recommendations for the amount of that proposed penalty; and

(D) a statement that the person charged has a right to a hearing on the occurrence of the violation, the amount of the penalty, or both.

(17) [(18)] Radiation and Perpetual Care Account -- An account established for the purposes described in the Act, §401.305.

(18) [(19)] Requestor -- A person claiming party status as a person affected.

(19) [(20)] Severity level -- A classification of violations based on relative seriousness of each violation and the significance of the effect of the violation on the occupational or public health or safety or the environment.

(20) [(21)] Violation -- An infringement of any rule, license or registration condition, order of the agency, or any provision of the Act.

(c) Procedures for licensing actions in accordance with **[under]** the Act, §401.054.

(1)- 5) (No change.)

(d) - (f) (No change.)

(g) Revocation of accreditation of mammography facilities.

(1) An accreditation of a mammography facility may be revoked, for any of the following:

(A) any material false statement in the application or any statement of fact required in accordance with **[under provision of]** the Act;

(B) - (C) (No change.)

(2) - (3) (No change.)

(h) (No change.)

(i) Compliance procedures for licensees, registrants, certified industrial radiographers, and other persons.

(1) A licensee, registrant, certified industrial radiographer, or other person who commits a violation(s) will be issued a notice of violation. The person receiving the notice shall provide the agency with a written statement and supporting documentation by the date stated in the notice describing the following:

(A) steps taken by the person and the results achieved;

(B) corrective steps to be taken to prevent recurrence; and

(C) the date when full compliance was or is expected to be achieved. The agency may require responses to notices of violation to be under oath.

(2) - (4) (No change.)

(5) When the agency determines that the action provided for in paragraph (8) of this subsection or subsection (j) of this section is not to be taken immediately, the agency may offer the licensee, registrant, or certified industrial radiographer an opportunity to attend an informal meeting [enforcement conference] to discuss the following with the agency:

(A) - (B) (No change.)

(6) Notice of any informal meeting [enforcement conference] shall be delivered by personal service, or certified mail, addressed to the last known address. An informal meeting [enforcement conference] is not a prerequisite for the action to be taken in accordance with [under] paragraph (8) of this subsection or subsection (j) of this section.

(7) Except in cases in which the occupational and public health, **[interest,]** or safety requires otherwise, no license, certificate of registration, or industrial radiographer certification shall be modified, suspended, or revoked unless, prior to the institution of proceedings therefore, facts or conduct that may warrant such action shall have been called to the

attention of the licensee, registrant, or certified industrial radiographer in writing, and the licensee, registrant, or certified industrial radiographer shall have been afforded **[accorded]** an opportunity to demonstrate compliance with all lawful requirements.

(8) - (9) (No change.)

(j) Assessment of administrative penalties.

(1) - (2) (No change.)

(3) Application of administrative penalties. The agency may impose differing levels of penalties for different severity level violations and different classes of users as follows.

(A) - (B) (No change.)

(C) Adjustments to the **[severity levels and]** percentages of base amounts in Table IB may be made for the presence or absence of the following factors:

(i) - (vi) (No change.)

(D) The penalty for each violation may be in an amount not to exceed \$10,000 a day for a person who violates the Act or a rule, order, license or registration issued in accordance with **[under]** the Act. Each day a violation continues may be considered a separate violation for purposes of penalty assessment.

(4) The department **[Office of General Counsel]** may conduct settlement negotiations.

(k) Severity levels of violations for licensees, registrants, certified industrial radiographers, or other persons.

(1) Violations for licensees, registrants, certified industrial radiographers, or other persons shall be categorized by one of the following severity levels.

(A) Severity level I are violations that are most significant and may have a significant negative impact on occupational and/or public health and safety or on the environment. Severity level I violations are most significant and may have a significant negative impact by increasing the risk of unauthorized use of radioactive material that would be detrimental to public health and safety.

(B) Severity level II are violations that are very significant and may have a negative impact on occupational and/or public health and safety or on the environment. Severity level II violations are very significant and may have a negative impact by increasing the risk of unauthorized use of radioactive material that would be detrimental to public health and safety.

(C) Severity level III are violations that are significant and which, if not corrected, could threaten occupational and/or public health and safety or the environment. Severity level III are significant and, if not corrected, could increase the risk of unauthorized use of radioactive material that would be detrimental to public health and safety.

(D) - (E) (No change.)

(2) (No change.)

(3) Criteria to elevate or reduce severity levels.

(A) Severity levels [Violations] may be elevated to a higher severity level for the following reasons:

(i) - (iii) (No change.)

(iv) a violation was willful or grossly negligent; **[.This means the violation was the result of careless regard for requirements, deception, or other indications of willfulness by the licensee/registrant or employees of the licensee/registrant, or certified industrial radiographer;]** or

(v) compliance history; or

(vi) other mitigating factors.

(B) Severity levels [Violations] may be reduced to a lower level for the following reasons:

(i) the licensee/registrant identified and corrected the violation prior to the agency inspection; **[or]**

(ii) the licensee/registrant's actions corrected the violation and prevented recurrence; or **[.]**

(iii) other mitigating factors.

(4) (No change.)

(1) Impoundment of sources of radiation.

(1) - (2) (No change.)

(3) If agency action is necessary to protect the public health and safety, no prior notice need be given the owner or possessor. If agency action is not necessary to protect the public health and safety, the agency will give written notice to the owner and/or the possessor of the impounded source of radiation of the intention to dispose of the source of radiation. Notice shall be the same as provided in subsection (i)(8) of this section. The owner or possessor shall

have 30 days from the date of personal service or mailing to request a hearing in accordance with [under] the Formal Hearing Procedures, §§1.21, 1.23, 1.25, and 1.27 of this title, and in accordance with subsection (i)(9) of this section, concerning the intention of the agency. If no hearing is requested within that period of time, the agency may take the contemplated action, and such action is final.

(4) - (5) (No change.)

(m) Emergency orders.

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

(5) The agency shall use any security provided by a licensee in accordance with [under] the Act to pay toward the costs of such actions and corrective measures taken. If the cost of actions and corrective measures require more funds than the security has provided, the agency shall request the Attorney General to seek reimbursement from the licensee or person causing the threat.

(A) - (B) (No change.)

(6) (No change.)

(n) (No change.)