

The Texas Commission on Environmental Quality (commission) adopts amendments to §§37.9030, 37.9035, 37.9040, 37.9045, and 37.9050. The commission also adopts new §37.9052 and §37.9059, and the repeal of §37.9055. The amended, repealed, and new sections are being adopted in Subchapter T, Financial Assurance for Near-Surface Land Disposal of Low-Level Radioactive Waste. Sections 37.9035, 37.9040, 37.9045, 37.9050, 37.9052, and 37.9059 are adopted *with changes* as published in the August 22, 2003 issue of the *Texas Register* (28 TexReg 6711). Section 37.9030 and the repeal of §37.9055 are adopted *without changes* and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The changes adopted in this chapter are part of a larger rulemaking action to revise the commission's radiation control rules. The primary purpose of the rules is to implement House Bill (HB) 1567, 78th Legislature, 2003, and its amendments to Texas Health and Safety Code, Chapter 401, also known as the Texas Radiation Control Act. Subchapter T applies to financial assurance for near-surface land disposal facilities for low-level radioactive waste (LLRW) regulated by the State of Texas under 30 TAC Chapter 336, Subchapter H (Licensing Requirements for Near-Surface Land Disposal of Low-Level Radioactive Waste). Subchapter T is being amended due to the addition of new financial assurance requirements and options for demonstrating financial assurance in accordance with HB 1567.

SECTION BY SECTION DISCUSSION

Section 37.9030, Applicability

The amendments to §37.9030 add financial assurance requirements for corrective action and liability coverage. The purpose of this amendment is to add financial assurance requirements for liability

coverage and financial security to address and prevent unplanned events under Texas Health and Safety Code, §401.233 and §401.241, respectively.

Section 37.9035, Definitions

The amendments to §37.9035 add a definition of "Corrective action" to identify the new financial assurance requirements added by Texas Health and Safety Code, §401.241. In response to comment, the definition of "Corrective action" has been amended to include the risk posed to the environment. The new definition requires financial security from the licensee to address unplanned events that pose a risk to public health, safety, and the environment that may occur after the decommissioning and closure of the compact waste disposal facility or a federal waste disposal facility. Adding the definition for "Corrective action" allows the general subchapters in Chapter 37 to remain unchanged. The definition for "Facility" is amended in response to comment to be consistent with the definition of "Site" in Chapter 336. The definition for "Institutional control" is amended to read "Shall have the same meaning as post closure. . ." to better define the term. The general subchapters of Chapter 37 use the term "post closure" in identifying activities requiring financial assurance. In addition, the amendments add a definition for "Licensee" to §37.9035 stating that for the purposes of this subchapter, the term "Licensee" shall have the same meaning as owner, operator, or license holder. This definition conforms this subchapter with the general subchapters in Chapter 37 which use the terms "owner" and "operator," and Texas Health and Safety Code, §401.241, which uses the term "license holder." The definition for "Post closure" is amended to read "The activities that are identified as institutional control as specified in §336.734 of this title (relating to Institutional Requirements). . ." to expand and improve the definition, and also in response to comment. Finally, the definitions section is renumbered because of the additional definitions.

Section 37.9040, Submission of Documents

The amendment to §37.9040 adds “corrective action” and “liability coverage” to the documentation that must be submitted to the executive director to demonstrate financial assurance under Texas Health and Safety Code, §401.233 and §401.241, respectively. The timing for financial assurance mechanisms to be submitted and effective is amended in response to comment to be “60 days prior to the initial receipt of waste.”

Section 37.9045, Financial Assurance Requirements for Closure and Post Closure

The amendments to §37.9045 change the section title from "Financial Assurance Requirements for Closure and Post Closure" to "Financial Assurance Requirements for Closure, Post Closure, and Corrective Action" to add the additional financial assurance requirement for unplanned events under Texas Health and Safety Code, §401.241. In response to comment, the amended section title does not include liability coverage within this section. Subsection (a) is amended to add “corrective action” for the same reason cited for changing the section title. The payment schedule for financial assurance for corrective action, required under Texas Health and Safety Code, §401.241, will be established in the LLRW disposal license. Subsection (a)(5) is amended to delete the word “an” as a grammatical correction, and to add language to clarify the intent of the subsection that “proof of forfeiture” is not required to collect financial assurance. United States Nuclear Regulatory Commission (NRC) regulations under 10 Code of Federal Regulations (CFR) §61.62(f), relating to funding for disposal site closure and stabilization, state that proof of forfeiture must not be necessary to collect financial assurance so that in the event the licensee could not obtain replacement financial assurance prior to cancellation, the financial assurance shall be automatically collected prior to its expiration. The NRC rule also states that the issuer’s liability under the financial assurance mechanism must remain in effect

until the closure and stabilization program is completed and approved by NRC, and the license transferred. The NRC intent is to ensure that financial assurance cannot be cancelled, terminated, or allowed to expire without NRC approval of replacement financial assurance or closure. Subsection (a)(5) is amended to add “. . . prior to the expiration, cancellation, or termination . . .” and to add that the financial assurance “. . . provider shall pay the face amount of the financial assurance into the perpetual care account” to conform with new requirements in Texas Health and Safety Code, §401.109(a); and to delete the phrase at the end of the sentence, “. . . mechanism shall be automatically collected prior to its expiration” as unnecessary language after the rewording of the subsection. Subsection (a)(6) is added to require that all financial assurance that is converted to cash by the direction of the executive director shall be deposited to the credit of the perpetual care account in accordance with new requirements in Texas Health and Safety Code, §401.109(a).

Section 37.9050, Financial Assurance Mechanisms

The amendment to §37.9050(b) deletes the language allowing the use of a performance bond as a demonstration of financial assurance. A performance bond would give a surety the option to perform the required activities of closure, post closure, and corrective action under the license, which is not appropriate for LLRW disposal facilities for two reasons. First, by statute a single, qualified licensee must be put through a rigorous licensing process based on the qualifications of the licensee. To allow a surety to perform without the same evaluation and qualification is inconsistent with the licensing process. Second, the agency assumes control of the facility after closure; therefore, a funding mechanism rather than a performing mechanism is required. A payment bond issued by a surety remains an option which meets the requirements of Texas Health and Safety Code, §401.109, and NRC requirements which both allow the use of a “surety bond.”

A new §37.9050(f) includes insurance as an additional financial assurance option in accordance with Texas Health and Safety Code, §401.109(d), which lists among acceptable financial assurance mechanisms, “. . . an insurance policy, the form and content of which is acceptable to the agency.”

The requirements of this new subsection are intended to identify the acceptable form and content based on current commission rules and practices, address NRC requirements for security, and address some shortcomings of insurance as a financial assurance mechanism that have been identified by the United States Environmental Protection Agency (EPA), Office of the Inspector General, various states, and a work group of the Association of State and Territorial Solid Waste Management Officials. The provisions within this subsection are designed to ensure the following: the diversification and transfer of risk, the long-term viability and strength of insurers, the performance of the financial mechanism over a long period of time, and the administration of the mechanism without specialized legal expertise in insurance. In response to comment, an endorsement to the insurance policy will be required to demonstrate compliance with the commission’s financial assurance requirements instead of the certificate that was proposed.

New subsection (f)(1) requires that all insurers be authorized to transact the business of insurance in Texas and have financial strength and size categories as assigned by A.M. Best Company equivalent to “excellent” and at least \$2 billion in capital, surplus, and conditional reserve funds. The six primary insurers that issue closure insurance for Resource Conservation and Recovery Act (RCRA) facilities meet these standards. These requirements assure the financial capacities of the primary insurer on the policy to perform as required. In response to comment, references to reinsurers were deleted and provisions to allow coverage by surplus lines insurers were added.

The proposed new subsection (f)(2) has been deleted in response to comment. Subsequent subsections have been renumbered accordingly.

New subsection (f)(2) requires the policy to designate the agency as an additional insured, which provides more security by making the agency a party to the insurance contract.

New subsection (f)(3) requires the owner or operator to maintain the policy in full force and effect until the executive director consents to termination of the policy. Failure to pay the insurance premium without substitution of acceptable, alternate financial assurance constitutes a violation of Chapter 37, warranting such remedy as the executive director deems necessary. If insurance is used as a financial assurance mechanism, license conditions will also be placed in the LLRW disposal license related to a licensee's failure to pay any insurance premium. Failure to maintain viable financial assurance, including insurance in full force, will result in possible revocation of an LLRW disposal license.

Because financial assurance for this license must be available as a funding mechanism many years after the license is issued, continuation of the insurance or the ability to prevent the loss of financial assurance must be assured in the absence of the executive director's approval of an alternate mechanism or of release from financial assurance requirements.

New subsection (f)(4) states that the policy may only be cancelled, terminated, or not renewed for failure to pay the insurance premium, and requires the insurer to notify both the executive director and the owner or operator by certified mail of intent to cancel, terminate, or not renew the policy. The insurer must provide 120 days' notice, which allows the owner or operator sufficient time to pay the premium or obtain alternate, acceptable financial assurance. The notice period also allows the

executive director to take appropriate action to ensure there is no loss of financial assurance. In response to comments from the NRC, subsection (f)(4) is amended to add the following language: “The policy must also provide that the insurer shall pay the face amount of the insurance policy into the perpetual care account if the executive director does not approve acceptable replacement financial assurance within 90 days of receiving notice by certified mail from the insurer of its election to cancel, terminate, or not renew the policy.”

Proposed new subsection (f)(6) is deleted in response to comment.

New subsection (f)(5) states that the insurance policy may not contain an exclusion for intentional, willful, knowing, or deliberate noncompliance with a statute, regulation, order, notice, or government instruction. This language is meant to address problems identified by other states that have been presented with similar policy language as a reason for nonpayment of insurance claims. This language ensures that insurance can be relied on as a funding mechanism without concern that an insurer can deny funding based on such exclusionary language in the policy.

In response to comment, new subsection (f)(6) requires that the endorsement to the insurance policy, rather than the certificate of insurance submitted to demonstrate financial assurance, must be worded exactly as presented in new §37.9052. This ensures that all of the requirements of this section are met.

New subsection (f)(7) states that the insurance must be issued in the amount of the cost estimates for closure, post closure, and corrective action except when provided in combination with other approved financial assurance mechanisms.

New subsection (f)(8) requires that the policy must guarantee that funds will be available to provide for closure, post closure, or corrective action, and that the issuer of the policy will be responsible for paying out funds upon direction of the executive director up to the face amount of the policy.

New subsection (f)(9) sets out the framework for the licensee or any other person authorized to perform closure, post closure, or corrective action to request reimbursement of expenditures by submitting itemized bills to the executive director.

New subsection (f)(10) provides that once the insurer becomes liable to make payments under the policy, the face amount of the policy, less any payments made, must be increased annually based on an identifiable investment rate. This provision is an equivalent provision to insurance requirements for RCRA facilities found in §37.241(k), Insurance. Because operations will have stopped at the facility by the time the insurer becomes liable to make payments, the licensee's ability to fund increasing financial assurance amounts would be in doubt. This provision ensures that most of the investment earnings on the funds held by the insurer will be available to pay for closure, post closure, and corrective action activities.

New subsection (f)(11) requires that once the institutional control period begins, the insurer must pay the remaining face amount of the policy to the perpetual care account. This provision meets the requirements of §336.734, Institutional Requirements, which requires the custodial agency to carry out the institutional control program.

Section 37.9052, Endorsement

In response to comment, new §37.9052 provides the required language for the endorsement to the insurance policy, rather than the certificate of insurance to satisfy financial assurance requirements for closure, post closure, and corrective action specified in §37.9050(f). In addition, the figure in 30 TAC §37.9052 has been revised accordingly in response to comment.

Section 37.9055, Institutional Control Requirements

The commission repealed §37.9055 because this section did not address the requirement for financial assurance for institutional control and, therefore, served no purpose.

Section 37.9059, Financial Assurance Requirements for Liability

New §37.9059 is added. Section 37.9059(a) was changed to clarify that liability coverage is a financial assurance requirement. Liability coverage is a requirement for the licensee under Texas Health and Safety Code, §401.233(d), in an amount and type acceptable to the commission and adequate to cover potential injury to any property or person. Absent a statutorily defined amount of coverage required, the commission adopts the same amounts of coverage required for a RCRA disposal facility. The licensee must provide financial assurance for bodily injury and property damage to third parties caused by sudden accidental occurrences in the amount of at least \$1 million per occurrence with an annual aggregate of at least \$2 million, exclusive of legal defense costs. The licensee must provide financial assurance for bodily injury and property damage to third parties caused by non-sudden accidental occurrences in the amount of at least \$3 million per occurrence with an annual aggregate of at least \$6 million, exclusive of legal defense costs.

New subsection (e) allows the use of any of the financial assurance mechanisms allowed under Subchapter F, Financial Assurance Mechanisms for Liability, except for self-insurance through a financial test and a corporate guarantee. The exceptions are not proposed as acceptable mechanisms for liability coverage because they are not acceptable for closure, post closure, and corrective action in accordance with NRC requirements under 10 CFR §61.62(g).

New subsection (f) requires that if a “claims-made” insurance policy is used, the applicant must place an amount in escrow sufficient to pay for an additional year of premiums on notice of termination of coverage. This requirement mirrors the requirement in Texas Health and Safety Code, §361.085(i), which has been adopted in §37.6031(f), Financial Assurance Requirements for Liability, for hazardous

and nonhazardous industrial solid waste facilities. This requirement is intended to ensure that a liability insurance policy is not cancelled for nonpayment of premiums, which might result in nonpayment of valid third-party claims in situations where the licensee's financial condition deteriorates rapidly. In response to comment on the timing of escrow account funding, the escrow accounts must be funded at the same time that the insurance policy becomes effective.

New subsection (g) specifies that limits of coverage required in this subsection are distinct from any other liability coverage requirements. The purpose of this language is to prohibit stacking of coverage limits such that liability coverage requirements for the operation of the LLRW disposal facilities cannot be met with liability coverage provided by the licensee to satisfy other program financial assurance requirements such as RCRA and for petroleum underground storage tanks.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed this rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute.

"Major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks 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 the state or a sector of the state. The amendments to Chapter 37 are not anticipated to 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 the state or a sector of the state because they address the financial assurance requirements for an LLRW disposal site. The rulemaking

action implements legislative requirements in HB 1567 for financial assurance for liability and corrective action and the use of insurance for licenses issued under Chapter 336, Subchapter H.

Furthermore, the rulemaking action does not meet any of the four applicability requirements listed in §2001.0225(a). Section 2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. The rulemaking action does not exceed a standard set by federal law, an express requirement of state law, a requirement of a delegation agreement, nor does it adopt a rule solely under the general powers of the agency.

Texas Health and Safety Code, Chapter 401, authorizes the commission to regulate the disposal of most radioactive material in Texas. Sections 401.051, 401.103, 401.104, and 401.412 authorize the commission to adopt rules for the control of sources of radiation and the licensing of the disposal of radioactive materials. In addition, the State of Texas is an "Agreement State" authorized by the NRC to administer a radiation control program under the Atomic Energy Act of 1954, as amended (Atomic Energy Act). The rules do not exceed the standards set by federal law.

The rules do not exceed an express requirement of state law. Texas Health and Safety Code, Chapter 401, establishes general requirements for the licensing and disposal of radioactive materials. The purpose of the rulemaking action is to implement statutory requirements consistent with recent

amendments to Texas Health and Safety Code, Chapter 401, as provided in HB 1567. The rules address the requirements for financial assurance for liability and corrective action and the use of insurance as provided by HB 1567.

The rules do not exceed a requirement of a delegation agreement or contract between the state and an agency of the federal government. The State of Texas has been designated as an “Agreement State” by the NRC under the authority of the Atomic Energy Act, which requires that the NRC find that the state radiation control program is compatible with the NRC requirements for the regulation of radioactive materials and is adequate to protect health and safety. Under the *Agreement Between the United States Nuclear Regulatory Commission and the State of Texas for Discontinuance of Certain Commission Regulatory Authority and Responsibility Within the State Pursuant to Section 274 of the Atomic Energy Act of 1954, as Amended*, the NRC requirements must be implemented to maintain a compatible state program for protection against hazards of radiation. The rules do not exceed the NRC requirements nor do they exceed the requirements for retaining status as an “Agreement State.”

The rules are adopted under specific authority of Texas Health and Safety Code, Chapter 401. Sections 401.051, 401.103, 401.104, and 401.412 authorize the commission to adopt rules for the control of sources of radiation and the licensing of the disposal of radioactive materials.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this rulemaking action and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The commission determined that Chapter 2007 does not apply to these rules because the rules are administrative in nature and will not affect real property

values. The purpose of this rulemaking action is to implement legislative requirements in HB 1567 and advances this purpose by establishing financial assurance requirements for liability and corrective action, and the use of insurance as a financial assurance mechanism for LLRW disposal for licenses issued under Chapter 336, Subchapter H.

Promulgation and enforcement of these rules would be neither a statutory nor a constitutional taking of private real property. The rules do not affect a landowner's rights in private real property because this rulemaking action does not burden (constitutionally), nor restrict or limit, the owner's right to property and reduce its value by 25% or more beyond which would otherwise exist in the absence of the regulations. The rules implement administrative changes to the requirements for financial insurance for LLRW disposal licenses issued under Chapter 336, Subchapter H. The rules address requirements for liability and corrective action coverage and the use of insurance for financial assurance.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking action and found that the rules are neither identified in, nor will their amendment affect, any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Coastal Management Program. Therefore, this rulemaking action is not subject to the Texas Coastal Management Program.

PUBLIC COMMENT

Written and/or oral comments were received from the Advocates for Responsible Disposal in Texas (ARDT); the American Electric Power (AEP); the League of Women Voters of Dallas (LWV-Dallas);

the League of Women Voters of Texas (LWV-Texas); the Nuclear Regulatory Commission (NRC); the South Texas Project Nuclear Operating Company (STP); the Texas Department of Insurance (TDI); the Texas Radiation Advisory Board (TRAB); Texas Radiation Online (TRO); State Representative Lon Burnam representing the Texas Radioactive-Waste Defense Fund (TRWDF); TXU Energy (TXU); US Ecology, Incorporated (US Ecology); Hance Scarborough Wright Woodward & Weisbart, L.L.P., and BakerBotts, L.L.P., on behalf of Waste Control Specialists (WCS); and 237 individuals. One individual endorsed the recommendations submitted by the TRWDF, and TRO agreed with the concerns voiced by the Sierra Club. The TRWDF includes the Lone Star Chapter of the Sierra Club, Public Citizen, Sustainable Energy & Economic Development, the LWV-Texas, and the Nuclear Information and Resource Service.

RESPONSE TO COMMENTS

General Comments

ARDT, AEP, TRAB, and TXU generally supported the proposed rules. One individual stated opposition to the weak regulations as currently developed. LWV-Dallas, LWV-Texas, TRO, TRWDF, and 234 individuals urged the commission to establish regulations that are second to none or rules that are more stringent than the proposed rules. ARDT, AEP, LWV-Dallas, LWV-Texas, NRC, STP, TDI, TRAB, TRO, US Ecology, TRWDF, WCS, TXU, and 237 individuals raised issues or suggested changes to the rules.

Consistent Use of Terminology

WCS stated that defined terms relating to the disposal facility site have not been used in a clear and consistent manner. The use and definition of the term “facility” in §37.9035(4) is ambiguous in the context of a license issued under Chapter 336, Subchapters H and J, of the commission’s rules.

The commission amended the definition of “Facility” as used in Subchapter T of this chapter to be consistent with the use of the term “Site” in §336.2.

Specific Definitions

TRAB commented on the definition of “Post closure” and the use of “which” versus “that” throughout the document. TRAB stated that the regulatory framework and language requires a preciseness in word usage and stated that the words “that” and “which” are not interchangeable. According to *The Elements of Style*, Strunk & White, page 59, “that” is the defining or restrictive pronoun, while “which” is the non-defining or non-restrictive pronoun. The definition should properly read “The activities *that* are identified”

The commission appreciates this comment. The term “which” was changed to “that” in the SECTION BY SECTION DISCUSSION part of the preamble and in §37.9035 and §37.9050(f).

TRAB asked why there was a distinction made between “the” compact waste disposal facility and “a” federal waste disposal facility“ in the “corrective action” definition.

The commission appreciates this comment. No distinction was intended in the definition of “Corrective action” found in §37.9035. However, the definition is taken from the statute in Texas

Health and Safety Code, §401.241(a). The commission made no change in response to the comment.

TRAB stated that the terms “sudden accidental occurrences” and “non-sudden accidental occurrences” need to be defined, and the difference in liability coverage for the occurrence types needs to be described.

Sudden and nonsudden accidental occurrences are defined in Chapter 37, Subchapter E, §37.402.

Section 37.9059(a) states that the licensee must comply with the requirements of Subchapter E.

The commission made no changes in response to this comment.

Adequacy of Financial Assurance Amounts

Several commenters expressed concern about the adequacy of financial assurance amounts to be provided by a licensee. TRO stated that there should be sufficient financial assurance from the licensed entity. LWV - Texas and LWV - Dallas commented that the current amount of \$20 million should be reviewed for adequacy. TRAB commented that the license is for a long duration; therefore, \$20 million now may not be enough in the future. TRAB also asked if there would be coverage for subsequent events if the first event of corrective action exceeded \$20 million.

The commission agrees with the commenters and shares the same concerns with the adequacy of financial assurance over a long period of time; therefore, the rules require the commission to conduct an annual review of the cost estimates for financial assurance. As cost estimates increase, financial assurance must also increase. The Texas Health and Safety Code specifies that the

financial assurance for corrective action is required to address unplanned events occurring after decommissioning. Prior to decommissioning, it is the licensee's financial responsibility to address corrective action irrespective of financial assurance funding. The commission notes that the financial assurance requirement for corrective action may exceed \$20 million, but it must be at least that amount. If the first event were to exceed the funding set aside for corrective action, the licensee would be financially responsible for any additional corrective action required prior to the transfer of the license. The commission made no change in response to these comments.

LWV - Texas and LWV - Dallas stated that the rules need to ensure that any monies in the perpetual care fund are adequate to support monitoring and retrieval of leaking containers after closure.

Financial assurance funding amounts are determined, as well as revisited annually, by the commission based on the actual disposal activities occurring on a licensed LLRW disposal facility. Financial assurance amounts will be set based on the actual inventory of LLRW received for disposal for the purpose of monitoring and maintenance during the institutional control period following closure. Additionally, a corrective action amount for any necessary retrieval of waste after closure will be set based on the actual inventory of waste received for disposal that will be on-site. The commission made no change in response to these comments.

Licensee or Federal Liability

The LWV-Dallas and LWV-Texas commented that the federal government should provide assurances to pay for cleanup and repackaging of its nuclear waste disposal at the site in Texas. In a related

comment, TRAB asked whether the federal government assumes the liability for the facility if the government takes it over.

The commission disagrees with the comment that it is necessary for the federal government to provide stand-alone financial assurance for federal facility waste. Cost estimates related to the license include the waste and activities at both the compact waste disposal facility and the federal facility waste disposal facility.

On decommissioning of the federal facility waste disposal facility, the licensee, the owner of the facility, and waste generators, which may include the federal government and other parties, may be liable.

Protection of the Perpetual Care Fund

The NRC commented that the state is using a perpetual care fund rather than standby trusts as the ultimate depository for financial assurance. This raises an issue if the state requires legislative approval each time it seeks to expend funds from this account which is described as a general revenue fund. The state may need to consider appropriation authority, such as multi-year spending authority, to ensure that these funds are available when needed. NRC also commented that the state should define the process for accessing the perpetual care account funds.

The commission agrees that any expenditure out of the perpetual care account requires appropriation authority from the legislature. It would be reasonable to request an appropriation or a rider appropriation from the perpetual care account in the 2006 - 2007 biennial Legislative Appropriations Request. As long as there is an appropriation, expenditures can be made against the account. However, the legislature can remove appropriation authority any time when in session. The commission also notes that Texas Health and Safety Code, §401.305, identifies how the commission and the Texas Department of Health may use the perpetual care account. The commission made no change in response to these comments.

Insurance as an Appropriate Financial Assurance Mechanism

TRWDF and TRAB each commented on whether insurance was an appropriate financial assurance mechanism for the LLRW disposal facility license. TRWDF stated that insurance as financial assurance is highly unusual and untested, and that an insurance company will have the right to dispute any claim made by the state against the policy. TRAB commented that if there is an event caused by human error, the insurance company will look for exclusions. TRAB also stated that if there is a 100%

probability that the policy will be paid out in full at the end of a given period, then it's not really insurance, and such a policy may not be available. TDI also expressed a general concern regarding the availability of insurance coverage necessary to comply with the commission's proposed rules.

The commission agrees that the insurance option of financial assurance for decommissioning and other activities is not the typical risk transfer arrangement common to insurance contracts.

However, the Texas Health and Safety Code lists insurance as one of the allowable financial assurance options, as long as the form and content are acceptable to the commission. The commission has determined that to be acceptable, the insurance policy must be a funding arrangement as protective and financially sound as the other financial assurance options.

Whether there is a market for this product will be determined by the industry; however, other financial assurance options are available.

To address the concern that the insurance company will look for exclusions to deny a claim, the commission is adopting a recommendation from TDI that the certificate of insurance be replaced by an endorsement to the insurance policy. The endorsement binds the insurer to the requirements in §37.9045(a)(5) and §37.9050(f) and eliminates policy provisions inconsistent with these subsections.

Financial Liability of Licensee

TRAB and TRWDF commented that the rules should clarify the financial liability of the licensee for any unplanned event that does not require decommissioning. TRWDF, in a related comment, also

stated that the rules should require specific proof that a licensee's financial assets are adequate to address remediation during the operation of the facility which does not result in decommissioning.

LWV and 204 individuals encouraged the commission to write rules that deal more completely with the issue of liability and financial responsibility. A related general comment expressed by several individuals was that financial responsibility provisions are inadequate, and taxpayers should not be left with financial responsibility for liabilities at the disposal site. Disposal site operators should be held fully responsible and liable for their activities. 206 individuals stated that there are already examples, including radioactive waste dumps, in this country of disposal companies eluding their responsibility to pay for cleanup costs (due to leakage), or even abandoning dumps to avoid liability.

The Texas Health and Safety Code specifies that the financial assurance for corrective action is required to address unplanned events occurring after decommissioning. Prior to decommissioning, it is the licensee's financial responsibility to address corrective action irrespective of financial assurance funding. Texas Health and Safety Code, §401.211, clearly states that the transfer of title to the LLRW disposal facility, land, and buildings to the state or federal government does not relieve the licensee of liability for any act or omission performed before the transfer or while the LLRW disposal facility, land, and buildings are in the possession and control of the licensee.

For the compact waste disposal facility, the disposal fee rate will include a component for the cost of financial assurance. It is expected that the licensee will charge a fee for federal facility waste that also includes the cost of financial assurance. Financial assurance is specifically for the

activities of decommissioning, post closure monitoring and maintenance, and corrective action.

These are defined activities that take place under the control of the licensee, or in the worst case, under state direction due to a need for corrective action and the licensee is unable or unwilling to address the needed activities. Financial assurance is also for institutional control which takes place after the transfer of the license to the state and to the federal government.

Under §336.711 and §336.735, the applicant's financial qualifications will be evaluated. However, in the worst case, if a licensee is unable or unwilling to address an unplanned or unforeseen event (corrective action) that requires remediation during the operation of the site, the executive director has the authority to demand closure and begin the decommissioning process.

Additionally, the commission, under authority in Texas Health and Safety Code, §401.152, may use any security provided by the license holder to address a situation that threatens public health and safety and the environment.

The commission disagrees with the comments that the rules have not been written to deal completely with the issues of liability and financial responsibility, and that the taxpayer will be left with the liability for the disposal site. The commission notes that financial assurance for decommissioning, post closure monitoring and maintenance, corrective action, and institutional control is required to be provided in full before the initial receipt of waste at the facility. In response to these comments, a requirement for executive director approval of financial assurance prior to accepting waste for disposal has been added to §336.716(f). Additionally, cost estimates for these obligations will be reviewed annually by the commission. For consistency with the review requirements of other financial assurance, annual review by the commission of financial

assurance for corrective action has been added to §336.738(b). In response to these comments, a requirement was added to financial assurance for closure in §336.736(a) to include the disposal of any radioactive material remaining at the site at the time of closure. The rules also ensure the soundness and long-term stability of the financial assurance.

Insurance Specific Issues

TRAB and WCS commented on the proposed language for §37.9050(f)(11). WCS commented that the fourth sentence should be clarified to state that ". . . if the executive director has *reasonable justification* to believe that the maximum cost of closure, post closure, or corrective action . . . will be greater than the face amount of the policy, . . . the executive director may withhold reimbursement" TRAB expressed a concern that the executive director could withhold payment after approved work had been completed, in the event that forecasted work costs outstripped available funds.

The commission disagrees with amending the proposed language recommended by WCS. The proposed language duplicates language in closure insurance provisions for hazardous waste facilities in commission and EPA rules. The commission points out that the executive director must provide a written explanation if the executive director withholds reimbursement.

The commission also disagrees with the concern expressed by TRAB. The commenter assumes that work has been approved; however, it is the plan that is approved, and the work performed may not be in accordance with the approved plan. The adopted rule makes the licensee responsible for ensuring that work performed is in accordance with the approved plan and that cost estimates that form the basis for financial assurance are accurate. In practice, the licensee

and insurer will be working closely with the commission, and the work should be performed under a task-order type contract with sufficient subdivision to allow the appropriate monitoring of cost. The commenter also assumes an orderly and planned decommissioning by the licensee, which may not be the case in a worst-case or adversarial situation. The commission made no change in response to these comments.

There were several comments related to provisions to address non-payment of insurance premiums and failure to renew insurance policies. TRWDF stated that provisions should be established within the rules to require that an escrow account of six months' insurance premiums be in place before a license is issued in the event that the licensee fails to pay insurance premiums.

TRWDF's concern regarding nonpayment of premiums is addressed by new §37.9050(f)(4) to conform to a compatibility requirement pointed out by the NRC. The new subsection requires the insurer to pay the face amount of the policy into the perpetual care account if replacement financial assurance acceptable to the executive director is not provided prior to cancellation, termination, or nonrenewal of the policy. Under Texas Health and Safety Code, §401.151, the commission is required to assure that the management of LLRW is compatible with applicable NRC standards.

WCS commented that in §37.9050(f)(5) and (6), the phrase "or fail to renew the policy" should be deleted. The inclusion of this phrase indicates that an insurer must commit to the policy in perpetuity, and few businesses would be willing to make such a blanket commitment. As a result, the insurance policy might not be available as an option.

New §37.9050(f)(4), added to meet NRC compatibility, has rendered this comment moot, and made proposed §37.9050(f)(6) unnecessary; therefore, that subsection has been deleted.

TXU commented that §37.9050(f)(4), which requires executive director consent to terminate the policy, may be an impediment to the use of insurance as a financial assurance alternative.

The commission agrees that requiring executive director consent before policy termination could serve as an impediment to the use of insurance. However, the commission notes that the insurance option of financial assurance, in order to maintain federal compatibility, must offer protections equivalent to the other financial assurance options by remaining in effect until replacement, cash conversion, or release. The commission made no change in response to this comment.

WCS commented that §37.9045(a)(5) should be revised so that a financial assurance provider is *not* required to pay the face amount of the financial assurance into the perpetual care account. This requirement, as proposed, could discourage insurers from offering insurance policies to satisfy the financial assurance requirements, since the proposed language apparently allows the agency to draw on the entire face value of the policy. Further, the proposed language may result in payments that greatly exceed the amount of financial assurance that is reasonably required at the time that a financial assurance mechanism lapses. To address these concerns, WCS suggested that the rules provide some additional means for resolving this situation, without requiring a policy to be paid in full.

The commission disagrees with the commenter because this provision is required for insurance to be compatible with NRC requirements in 10 CFR §61.62(f). NRC provided the following comment: “§37.9045(a)(5) provides that financial assurance providers pay the face amount of the financial assurance if the owner does not obtain replacement assurance within the required time frame. However, this is not addressed in the context of insurance as part of §37.9050(f). The certificate of insurance is silent on this issue. The regulations should require that the insurance company must agree to this term in the insurance policy to be compatible with 10 CFR §61.62(f) . . .” Conforming changes have been made as a matter of compatibility to §37.9050(f)(4) and the endorsement to the insurance policy under §37.9052.

The commission notes that the commission will conduct an annual review of cost estimates; therefore, the amount that would have to be paid to the perpetual care account should not greatly exceed the amount of financial assurance reasonably required.

NRC commented that §37.9045(a)(5) provides that financial assurance providers pay the face amount of the financial assurance if the owner does not obtain replacement assurance within the required time frame. However, this is not addressed in the context of insurance as part of §37.9050(f). The certificate of insurance is silent on this issue. The NRC commented that the regulations should require that the insurance company must agree to this term in the insurance policy to be compatible with 10 CFR §61.62(f). The NRC stated that the state needs to amend the language in the insurance certificate to replace the terms prescribed in “§37.9050(f)” with “§37.9045(a)(5) and §37.9050(f)” in the three places it appears in the certificate.

The commission agrees with the NRC. Conforming changes have been made to §37.9050(f)(4) and the endorsement to the insurance policy under §37.9052. Under Texas Health and Safety Code, §401.151, the commission is required to assure that the management of LLRW is compatible with applicable NRC standards.

TDI commented that requiring insurance to be provided by an "authorized insurer" may restrict availability of coverage to insurers that submit license applications to engage in the business of insurance in Texas and are licensed by TDI. The use of the term "authorized insurer" would not include surplus lines insurers that may be more inclined to write this type of exposure. TDI recommended the following language: ". . . *an insurer authorized to transact insurance in this state or a surplus lines insurer eligible to engage in the business of insurance in Texas pursuant to Article 1.14-2, Insurance Code.*" TDI also commented that if the commission chooses to use the proposed language, insurers would be required to be authorized or eligible; therefore, the requirement for reinsurers to be authorized should be deleted, since TDI does not issue certificates of authority or licenses to reinsurers.

WCS offered a similar comment that in §37.9050(f)(1) and (2), the references to "reinsurers" should be deleted.

TRAB commented that §37.9050(f)(2) is close to incomprehensible, recommending that subsection (f) be broken down into smaller requirements and sub-requirements that are more readily understood by the public.

The commission agrees with TDI and has made conforming changes to the endorsement to the insurance policy, which replaces the certificate of insurance. TDI's recommended language to allow surplus lines carriers to provide this coverage has been incorporated in §37.9050(f)(1) and in the endorsement in §37.9052.

The commission also agrees with TDI and WCS that the requirement for reinsurers should be deleted because TDI does not issue certificates of authority or licenses to reinsurers. Additionally, the financial capacity of the primary insurer is assured by the requirements under §37.9050(f)(1). Therefore, references to and requirements related to reinsurers have been removed from §37.9050(f)(1) and in the endorsement in §37.9052.

Related to these changes and addressing TRAB's concerns with the readability of §37.9050(f)(2), the commission is deleting proposed §37.9050(f)(2). The replacement of the certificate of insurance with an endorsement to the policy addresses the enforceability issues of §37.9050(f)(2), rendering the requirement for a separate statement from the insurer unnecessary.

The endorsement has been revised to incorporate the covenant that the insurer will not raise as a defense any provision of the policy that is inconsistent with the requirements of §37.9050(f) and §37.9045(a)(5).

TRAB stated that when allowing insurance as a mechanism under §37.9050(f), the writing agent should be asked about his "errors and omissions" insurance coverage and limits. TRAB added that this is a very important factor if there is a coverage question.

The commission responds that concerns about errors or omissions on the part of an agent have been addressed by the revisions recommended by TDI, replacing the certificate of insurance with an endorsement to the policy. TDI recommended that the language necessary to comply with the rules be included in an endorsement that must be attached to the policy, so that all the terms of coverage are contained within the policy agreement.

WCS commented that proposed language in §37.9050(f)(7) seeks to impose further restrictions on potential insurers by prohibiting language in the policy that excludes certain intentional noncompliances with a statute, regulation, order, notice, or government instruction. Such language is a concern to WCS for two reasons. First, sound business judgment would suggest that an insurer would prefer to avoid covering the risk of someone's willful and intentional misconduct. Second, the language is so broad and far-reaching that it may discourage insurance companies from considering such a risk. In other words, if an insurer is asked to cover the far-reaching potential risks associated with this proposed regulatory language, the insurer may view this as an exposure that is not insurable. WCS added that subsection (f)(7) should be deleted.

The commission disagrees with the commenter. To meet federal compatibility requirements, these provisions are necessary for insurance to be equivalent to the other financial assurance options which do not have exclusions. All financial assurance must ensure funding regardless of the conduct or compliance of the licensee. The commission made no change in response to this comment.

TRAB commented that the words “sudden” and “accidental” are key words to be aware of in evaluating insurance coverage requirements in §37.9050(f). If an event is not “sudden” and “accidental,” then it comes under “maintenance” and that is where coverage issues will be of concern for exclusions. TRAB recommended excluding all policies that may include sudden and accidental clauses, and requiring an “All Risk Policy.”

Insurance issued in accordance with §37.9050(f) provides a funding mechanism for the licensee’s financial assurance obligations that is unaffected by whether an event or activity addressed by the financial assurance was of a sudden or accidental nature. The commission made no change in response to this comment.

TRAB asked when allowing insurance as a mechanism under §37.9050(f), will the insurance company go beyond \$20 million if the first event exceeds that amount? TRAB added that annual aggregates limit the amount for one year.

The commission position is that the insurance will be limited to the face amount of the policy. Insurance is a funding mechanism for the activities of decommissioning, post closure observation and maintenance, corrective action, and institutional control. There are no provisions under this financial mechanism to limit funding to an annual aggregate. The commission made no change in response to these comments.

TDI commented that in addition to requiring a certificate of insurance, the commission may want to consider requiring insurers to include the certificate of insurance language necessary to comply with the

rules in an endorsement that must be attached to the policy. TDI requires that the terms of coverage be contained within the policy agreement. In a related comment, TRAB recommended that the commission ask the company for the opportunity to design the insurance product with the head underwriter of the company, which would also provide the opportunity to know the exact coverage and exclusions.

The commission agrees with the TDI recommendation and has made conforming changes to the rules to make the proposed certificate of insurance an endorsement to the insurance policy. This change addresses the TRAB recommendation that the commission should know the coverage and exclusions of the policy, since the endorsement incorporates the requirements of §37.9045(a)(5) and §37.9050(f). The insurer covenants in the endorsement that any provision of the policy inconsistent with such regulations is amended by the endorsement to eliminate the inconsistency.

TRAB commented that only financially-sound insurance companies with a minimum of \$50 - \$80 billion in assets and the highest rating from the insurance rating institutions such A.M. Best Company should be allowed to provide coverage under §37.9050(f). Insurers in the “substandard” insurance category should be excluded, and insurers that are members of the Texas Guarantee Fund should be included.

In a related comment, TXU stated that requiring an insurer be an A.M. Best Company, “A” rated company with over \$2 billion of surplus may be an impediment to the use of insurance as a financial assurance alternative.

The commission disagrees that the minimum financial strength and financial size categories in §37.9050(f)(1) for a qualifying insurer need to be adjusted. The rules have applied the highest financial strength category given by A.M. Best Company, XV, which is equivalent to \$2 billion in capital, surplus, and unconditional reserves. The rules require an “A” rating which is “excellent,” and only one rung below “superior.” The commission believes that these standards provide the necessary assurance of the primary insurer’s capacity to perform. Substandard insurers are excluded by this criteria. Licensed insurers are members of the Texas Guarantee Fund, and are eligible under these rules to provide insurance if they meet the ratings and financial strength requirements. The commission made no change in response to these comments.

TRAB asked for an explanation of what happens to the insurance policy after decommissioning.

Upon any transfer of the license, the financial assurance, which can include insurance, is converted to cash and paid into the perpetual care account. Until that time, financial assurance is available to pay for the costs of post closure observation and maintenance and corrective action.

Timing of Coverage

WCS commented that §§37.9040, 336.736(e), and 336.737(b) should be revised to provide more specificity on when the various financial assurance mechanisms should be “signed” and should be “effective.” Although the rules suggest this should occur for closure, post closure, corrective action, and liability coverage “60 days prior to commencement of operations,” it would be more appropriate to require these coverages for closure, post closure, and liability coverage to be in effect *prior to the initial receipt of waste*. By statute, corrective action coverage is required at decommissioning.

The commission agrees that the timing of the submission of effective financial assurance mechanisms could be more exact. The timing of the submission of financial assurance has been revised from “before commencement of operations” to “60 days prior to the initial receipt of waste.” Sixty days allows the executive director the time to review and approve the financial assurance mechanisms, and ensures that financial assurance is in place before waste is received at the facility. Conforming changes are made in §37.9040 and §§336.736 - 336.738.

Liability Coverage

WCS commented that in §37.9045(a), and in the revised title for this section, the scope of the section is expanded to include "corrective action" and "liability coverage," as well as closure and post closure. It appears that §37.9045(a)(1) and (4) should also recite the applicability for financial assurance demonstrations for closure, post closure, corrective action, and liability coverage, if such is the intention of the rule.

In response to a related comment, references to “liability coverage” in the title and §37.9045(a)(1) have been deleted as unnecessary. Specific liability coverage requirements are found in §37.9059.

WCS commented that §37.9059 of the proposed rules should be clarified to explain whether it applies to applicants, owners, or operators. The broad reference to "liability" in §37.9059(a) and to "liability coverage" in §37.9059(f) should be more specific as to the expected timing and appropriate requirements. The assertion in proposed §37.9059(g) that the "required limits of coverage in this subsection are distinct from any other liability requirements under this chapter" adds to the confusion. The terminology used in this section should be more consistent and specific.

The commission agrees with the commenter that while §37.9059 applies to an owner or operator, §336.736(e) refers to the applicant. A conforming change is made to §336.736(e) to refer to the licensee, which under Chapter 37 is the same as owner or operator. The timing of the submission and effective dates for liability coverage is addressed in §37.9040.

The commission agrees that the timing of funding the escrow account under §37.9059(f) should be addressed; therefore, the subsection has been revised to require that the escrow account be funded at the same time that the liability insurance policy becomes effective.

The commission disagrees with the comment that §37.9059(g) is confusing. As the preamble to the proposed rules stated, the purpose of this subsection is to prohibit stacking of coverage limits such that liability coverage requirements for the operation of the LLRW disposal facility cannot be met with liability coverage provided by the licensee to satisfy other program financial assurance requirements such as RCRA and for petroleum underground storage tanks.

TXU commented that liability insurance will likely be required by the NRC and that policies may be available from American Nuclear Insurance, and recommended contacting American Nuclear Insurance to verify the availability of such insurance.

The commission agrees that the potential applicants and the licensee should contact American Nuclear Insurance as a potential provider of liability coverage.

WCS commented that in proposed §37.9059(f), owners or operators are prohibited from using a claims made insurance policy as security for liability coverage "unless the applicant places in escrow, as provided by the executive director, an amount sufficient to pay an additional year of premiums for renewal of the policy by the state . . ." This provision should be deleted as unduly burdensome. As a practical matter, insurance policies for environmental liability coverage are claims-made policies. The proposed language would therefore require an applicant to escrow an additional year of premiums, when there is already a requirement to maintain insurance coverage in full force and effect until the executive director consents to its termination. Such a requirement would cause more money to go into escrow, but it would not further a legitimate purpose or need.

The commission disagrees with the commenter that this provision should be deleted. This requirement mirrors the requirement in Texas Health and Safety Code, §361.085(i), which has been adopted in §37.6031(f), relating to Financial Assurance Requirements for Liability, for hazardous and nonhazardous industrial solid waste facilities. This requirement is intended to ensure that a liability insurance policy is not cancelled for nonpayment of premiums, which might result in nonpayment of valid third-party claims in situations where the licensee's financial condition deteriorates rapidly. There is no requirement in §37.9059 that liability coverage must be maintained in full force and effect until the executive director consents to its termination. The commission made no change in response to these comments.

TXU commented that it supports the option of a letter of credit and payment bond available under the current rules.

The commission appreciates the comment. A surety bond guaranteeing payment and an irrevocable standby letter of credit may be acceptable financial assurance mechanisms under §37.9050.

SUBCHAPTER T: FINANCIAL ASSURANCE FOR NEAR-SURFACE LAND

DISPOSAL OF LOW-LEVEL RADIOACTIVE WASTE

§§37.9030, 37.9035, 37.9040, 37.9045, 37.9050, 37.9052, 37.9059

STATUTORY AUTHORITY

The amendments and new sections are adopted under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code and other laws of the state. The amendments and new sections are also adopted under Texas Health and Safety Code, Chapter 401, concerning Radioactive Materials and Other Sources of Radiation, also known as the Texas Radiation Control Act; §401.011, concerning Radiation Control Agency, which authorizes the commission to regulate and license the disposal of radioactive substances; §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, concerning Licensing and Registration rules, which requires the commission to provide rules for licensing for the disposal of radioactive material; §401.201, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate the disposal of low-level radioactive waste; and §401.412, concerning Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances.

§37.9030. Applicability.

This subchapter applies to owners or operators required to provide financial assurance under Chapter 336, Subchapter H of this title (relating to Licensing Requirements for Near-Surface Land Disposal of Low-Level Radioactive Waste). This subchapter establishes requirements and mechanisms for demonstrating financial assurance for closure, post closure, corrective action, and liability coverage.

§37.9035. Definitions.

Definitions for terms that appear throughout this subchapter may be found in Subchapter A of this chapter (relating to General Financial Assurance Requirements), §336.2 of this title (relating to Definitions), and §336.702 of this title (relating to Definitions), except the following definitions shall apply for this subchapter.

(1) **Annual review** - Conducted on the anniversary date of the establishment of the financial assurance mechanism.

(2) **Closure** - Any one or combination of the following: closure, dismantlement, decontamination, decommissioning, reclamation, disposal, groundwater restoration, stabilization, monitoring, or post closure observation and maintenance.

(3) **Corrective action** - The activities to remediate unplanned events that pose a risk to public health, safety, and the environment and that may occur after the decommissioning and closure of the compact waste disposal facility or a federal facility waste disposal facility.

(4) **Facility** - All contiguous land, water, buildings, structures, and equipment which are or were used for activities associated with the disposal of radioactive material, including disposal, receipt, storage, processing, or handling of radioactive material, waste, soil, and groundwater contaminated by radioactive material. The term "Facility" has the same meaning as the term "Site" as defined in §336.702 of this title.

(5) **Institutional control** - Shall have the same meaning as post closure.

(6) **Licensee** - Shall have the same meaning as owner, operator, or license holder.

(7) **Post closure** - The activities that are identified as institutional control as specified in §336.734 of this title (relating to Institutional Requirements).

§37.9040. Submission of Documents.

An owner or operator required by this subchapter to provide financial assurance for closure, post closure, corrective action, and liability coverage must submit originally signed and effective financial assurance mechanisms to the executive director 60 days prior to the initial receipt of waste.

§37.9045. Financial Assurance Requirements for Closure, Post Closure, and Corrective Action.

(a) An owner or operator subject to this subchapter shall establish financial assurance for the closure, post closure, and corrective action of the facility that meets the requirements of this section, in addition to the requirements specified under Subchapters A, B, C, and D of this chapter (relating to General Financial Assurance Requirements; Financial Assurance Requirements for Closure, Post Closure, and Corrective Action; Financial Assurance Mechanisms for Closure, Post Closure, and Corrective Action; and Wording of the Mechanisms for Closure, Post Closure, and Corrective Action).

(1) An owner or operator subject to this subchapter may use any of the mechanisms as specified in §37.9050 of this title (relating to Financial Assurance Mechanisms) to demonstrate financial assurance for closure, post closure, and corrective action. On a case-by-case basis, the executive director may approve other alternative financial assurance mechanisms.

(2) The executive director will respond within 60 days after receiving a written request for a financial assurance reduction in accordance with §37.151 of this title (relating to Decrease in Current Cost Estimate).

(3) An owner or operator may use multiple financial assurance mechanisms provided in §37.41 of this title (relating to Use of Multiple Financial Assurance Mechanisms), but must use only those financial assurance mechanisms as specified in §37.9050 of this title.

(4) The executive director may accept financial assurance established to meet requirements of other federal, state agencies, or local governing bodies for closure or post closure, provided such mechanism complies with the requirements of this chapter and the full amount of financial assurance required for the specific license is clearly identified and committed for use for the purposes of Chapter 336, Subchapter H of this title (relating to Licensing Requirements for Near-Surface Land Disposal of Low-Level Radioactive Waste).

(5) Proof of forfeiture must not be necessary to collect the financial assurance, so that in the event that the owner or operator does not provide acceptable replacement financial assurance within the required time prior to the expiration, cancellation, or termination of the financial assurance mechanism, the financial assurance provider shall pay the face amount of the financial assurance into the perpetual care account.

(6) All financial assurance required to be converted to cash by direction of the executive director under §§336.736 - 336.738 and 37.101 of this title (relating to Funding for Disposal Site Closure and Stabilization; Funding for Institutional Control; Funding for Corrective Action; and Drawing on the Financial Assurance Mechanisms) and paragraph (5) of this subsection shall be deposited to the credit of the perpetual care account.

(b) The owner or operator shall comply with §37.71 of this title (relating to Incapacity of Owners or Operators, Guarantors, or Financial Institutions), except financial assurance must be established within 30 days after such an event.

§37.9050. Financial Assurance Mechanisms.

(a) An owner or operator may satisfy the requirements of a fully funded trust or standby trust fund as provided in §37.201 of this title (relating to Trust Fund), except within 60 days following the executive director's final review and approval of closure or post closure expenditures for reimbursement, release of funds shall occur.

(b) An owner or operator may satisfy the requirements of a surety bond guaranteeing payment as provided in §37.211 of this title (relating to Surety Bond Guaranteeing Payment) except:

(1) the surety must also be licensed in the State of Texas;

(2) cancellation may not occur during the 90 days beginning on the date of receipt of the notice of cancellation; and

(3) the bond must guarantee that the owner or operator will provide alternate financial assurance within 30 days after receipt of a notice of cancellation of the bond.

(c) An owner or operator may satisfy the requirements of an irrevocable standby letter of credit as provided in §37.231 of this title (relating to Irrevocable Standby Letter of Credit), except:

(1) the letter of credit shall be automatically extended unless the issuer provides notice of cancellation at least 90 days before the current expiration date. Under the terms of the letter of

credit, the 90 days shall begin on the date when both the owner or operator and the executive director have received the notice, as evidenced by the return receipts; and

(2) in accordance with §37.231(h) of this title, the executive director shall draw on the letter of credit within 30 days after receipt of notice from the issuing institution that the letter of credit will not be extended, or within 60 days of an extension, if the owner or operator fails to establish and obtain approval of such alternate financial assurance from the executive director.

(d) A statement of intent may be used by a governmental entity subject to this subchapter. The statement of intent shall be subject to the executive director's approval and shall include the following:

(1) a statement that funds will be made immediately available upon demand by the executive director;

(2) the signature of an authorized official who has the authority to bind the governmental entity into a financial obligation, and has the authority to sign the statement of intent;

(3) name of facility(ies), license number, and physical and mailing addresses; and

(4) corresponding current cost estimates.

(e) An owner or operator may satisfy the requirements of financial assurance by establishing an external sinking fund as specified in this subsection. An external sinking fund has two components: a

sinking fund account and a financial assurance mechanism such that the total of both equals, at all times, the current cost estimate. A sinking fund account is an account segregated from the owner's or operator's assets and is outside the owner's or operator's administrative control. As the value of the sinking fund account increases, the value of the second financial assurance mechanism decreases. When the external sinking fund account is equal to the current cost estimate, the second financial assurance mechanism will no longer be required to be maintained.

(1) An external sinking fund account shall be approved by the executive director and administered by a third party that is regulated and examined by a federal or state agency.

(2) The external sinking fund is established and maintained by setting aside funds periodically, at least annually.

(f) An owner or operator may satisfy the requirements of financial assurance by obtaining insurance that conforms to the requirements of this subsection, in addition to the requirements specified in Subchapters A and B of this chapter (relating to General Financial Assurance Requirements and Financial Assurance Requirements for Closure, Post Closure, and Corrective Action), and submitting an originally-signed endorsement to the insurance policy to the executive director.

(1) At a minimum, the insurer on the policy must be authorized to transact or be a surplus lines insurer eligible to engage in the business of insurance in Texas and have a minimum financial strength rating of "A" and a financial size category of "XV" as assigned by the A.M. Best Company.

(2) The insurance policy must designate the commission as an additional insured.

(3) The owner or operator must maintain the policy in full force and effect until the executive director consents to termination of the policy. Failure to pay the premium, without substitution of alternate financial assurance as specified in this subchapter, shall constitute a violation of these regulations, warranting such remedy as the executive director deems necessary. Such violation shall be deemed to begin upon receipt by the executive director of a notice of future cancellation, termination, or failure to renew due to nonpayment of the premium, rather than upon the date of expiration of the policy.

(4) The policy must provide that the insurer may not cancel, terminate, or fail to renew the policy except for failure to pay the premium. The automatic renewal of the policy shall, at a minimum, provide the insured with the option of renewal at the face amount of the expiring policy. If there is a failure to pay the premium, the insurer may elect to cancel, terminate, or fail to renew the policy by sending notice by certified mail to the owner or operator and the executive director. Cancellation, termination, or failure to renew may not occur, however, during 120 days beginning with the date of receipt of the notice by both the executive director and the owner or operator, as evidenced by the return receipts. The policy must also provide that the insurer shall pay the face amount of the insurance policy into the perpetual care account if the executive director does not approve acceptable replacement financial assurance within 90 days of receiving notice by certified mail from the insurer of its election to cancel, terminate, or not renew the policy.

(5) The insurance policy may not contain an exclusion for intentional, willful, knowing, or deliberate noncompliance with a statute, regulation, order, notice, or government instruction.

(6) The wording of the endorsement to the insurance policy must be identical to the wording specified in §37.9052 of this title (relating to Endorsement).

(7) The insurance policy must be issued for a face amount at least equal to the current cost estimate for closure, post closure, or corrective action, except when a combination of mechanisms are used in accordance with §37.41 of this title (relating to Use of Multiple Financial Assurance Mechanisms). Actual payments by the insurer shall not change the face amount, although the insurer's future liability shall be lowered by the amount of the payments.

(8) The insurance policy must guarantee that funds shall be available to provide for closure, post closure, or corrective action of the facility. The policy shall also guarantee that once closure, post closure, or corrective action begins, the issuer shall be responsible for paying out funds, up to an amount equal to the face amount of the policy, upon the direction of the executive director, to such party or parties as the executive director specifies.

(9) An owner or operator or any other person authorized to perform closure, post closure, or corrective action may request reimbursement for closure, post closure, or corrective action expenditures by submitting itemized bills to the executive director. The request shall include an explanation of the expenses and all applicable itemized bills. The owner or operator may request

reimbursement for partial closure only if the remaining value of the policy is sufficient to cover the maximum costs of closing the facility over its remaining operating life. Within 60 days after receiving bills for closure, post closure, or corrective action activities, the executive director shall determine whether the closure, post closure, or corrective action expenditures are in accordance with the approved closure, post closure, or corrective action activities or are otherwise justified and, if so, shall instruct the insurer to make reimbursement in such amounts as the executive director specifies in writing. If the executive director has reason to believe that the maximum cost of closure, post closure, or corrective action over the remaining life of the facility will be greater than the face amount of the policy, the executive director may withhold reimbursement of such amounts as deemed prudent until the executive director determines, in accordance with Subchapters A and B of this chapter, that the owner or operator is no longer required to maintain financial assurance requirements for closure, post closure, or corrective action of the facility. If the executive director does not instruct the insurer to make such reimbursements, the executive director shall provide the owner or operator with a detailed written statement of reasons.

(10) Commencing on the date that liability to make payments pursuant to the policy accrues, the insurer will thereafter annually increase the face amount of the policy. Such increase must be equivalent to the face amount of the policy, less any payments made, multiplied by an amount equivalent to 85% of the most recent investment rate or of the equivalent coupon issue yield announced by the United States Treasury for 26-week Treasury securities.

(11) Upon notification by the executive director that the institutional control period has begun, the insurer will pay the remaining face amount of the policy to the perpetual care account.

§37.9052. Endorsement.

An endorsement to the insurance policy for closure, post closure, or corrective action, as specified in §37.9050(f) of this title (relating to Financial Assurance Mechanisms), must be worded as specified in the Endorsement in this section, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.

Figure: 30 TAC §37.9052

ENDORSEMENT

Name and Address of Insurer (herein called the "insurer"):

Name and Physical and Mailing Addresses of Insured (herein called the "insured"):

Additional Insured: Texas Commission on Environmental Quality

Physical Address: 12100 Park 35 Circle, MC 214, Austin, TX 78753

Mailing Address: MC 214, P. O. Box 13087, Austin, TX 78711-3087

Facilities covered: *List for each facility: The permit number, name, physical and mailing addresses, and the amount of insurance for closure, post closure, or corrective action. These amounts for all facilities covered must total the face amount shown below.*

Face Amount: _____

Policy Number: _____

Effective Date: _____

This endorsement certifies that the policy to which this endorsement is attached provides financial assurance for closure, post closure, or corrective action for the facilities identified above. The insurer further warrants that such policy conforms in all respects with the requirements of 30 Texas Administrative Code (TAC) §37.9050(f) (relating to Financial Assurance Mechanisms) and 30 TAC §37.9045(a)(5) (relating to Financial Assurance Requirements for Closure, Post Closure, and Corrective Action), as applicable, and as such regulations were constituted on the date shown immediately below. It is agreed that any provision of the policy inconsistent with such regulations is hereby amended to eliminate such inconsistency. This endorsement also covenants that the insurer shall not raise as a defense any provision of the policy that is inconsistent with the requirements of 30 TAC §37.9050(f) and 30 TAC §37.9045(a)(5).

Whenever requested by the Executive Director of the Texas Commission on Environmental Quality, the insurer agrees to furnish a duplicate original of the policy listed above, including all endorsements thereon.

We hereby certify that the wording of this endorsement is identical to the wording specified in 30 TAC §37.9052 (relating to Endorsement), as such regulations were constituted on the date shown immediately below. The undersigned insurer certifies that it is authorized to transact or be a surplus lines insurer eligible to engage in the business of insurance in Texas and it has a minimum financial strength rating of “A” and a financial size category of “XV” as assigned by the A.M. Best Company.

(Authorized signature) Insurer: _____

(Name of person signing) _____

(Title of person signing) _____

(Signature of witness or notary) _____

(Date) _____

§37.9059. Financial Assurance Requirements for Liability.

(a) Owners or operators required to demonstrate financial assurance for liability must comply with Subchapters A, E, F, and G of this chapter (relating to General Financial Assurance Requirements; Financial Assurance Requirements for Liability Coverage; Financial Assurance Mechanisms for Liability; and Wording of the Mechanisms for Liability).

(b) An owner or operator subject to this section must demonstrate financial assurance for bodily injury and property damage to third parties caused by sudden accidental occurrences arising from operations of the compact waste disposal facility and/or federal facility waste disposal facility. The owner or operator must have and maintain liability coverage for sudden accidental occurrences in the amount of at least \$1 million per occurrence with an annual aggregate of at least \$2 million, exclusive of legal defense costs.

(c) An owner or operator subject to this section must demonstrate financial assurance for bodily injury and property damage to third parties caused by non-sudden accidental occurrences arising from operations of the compact waste disposal facility and/or federal facility waste disposal facility. An owner or operator must have and maintain liability coverage for non-sudden accidental occurrences in the amount of at least \$3 million per occurrence with an annual aggregate of at least \$6 million, exclusive of legal defense costs.

(d) Owners or operators who must meet the requirements of this section may combine the required per-occurrence coverage levels for sudden and non-sudden accidental occurrences into a single per-occurrence level, and combine the required annual aggregate coverage levels for sudden and non-sudden accidental occurrences into a single annual aggregate level. Owners or operators who combine coverage levels for sudden and non-sudden accidental occurrences must maintain liability coverage in the amount of at least \$4 million per occurrence and \$8 million annual aggregate.

(e) Owners or operators subject to this subchapter may use any of the mechanisms specified in Subchapter F of this chapter except for the Financial Test for Liability and the Corporate Guarantee for Liability to demonstrate financial assurance for sudden and for non-sudden liability.

(f) Owners or operators required to provide liability coverage may not use a claims-made insurance policy as security unless the applicant places in escrow, as provided by the executive director, an amount sufficient to pay an additional year of premiums for renewal of the policy by the state on notice of termination of coverage. The escrow account must be funded at the same time the insurance policy becomes effective.

(g) The required limits of coverage in this subsection are distinct from any other liability requirements under this chapter.

SUBCHAPTER T: FINANCIAL ASSURANCE FOR NEAR-SURFACE LAND

DISPOSAL OF LOW-LEVEL RADIOACTIVE WASTE

§37.9055

STATUTORY AUTHORITY

The repeal is adopted under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code and other laws of the state. The repeal is also adopted under Texas Health and Safety Code, Chapter 401, concerning Radioactive Materials and Other Sources of Radiation, also known as the Texas Radiation Control Act; §401.011, concerning Radiation Control Agency, which authorizes the commission to regulate and license the disposal of radioactive substances; §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, concerning Licensing and Registration rules, which requires the commission to provide rules for licensing for the disposal of radioactive material; §401.201, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate the disposal of low-level radioactive waste; and §401.412, concerning Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances.

§37.9055. Institutional Control Requirements.