

The Texas Commission on Environmental Quality (agency or commission) proposes amendments to §§37.9030, 37.9035, 37.9040, 37.9045, and 37.9050. The commission also proposes new §37.9052 and §37.9059, and the repeal of §37.9055. The amended, repealed, and new sections are being proposed in Subchapter T, Financial Assurance for Near-Surface Land Disposal of Low-Level Radioactive Waste.

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The changes proposed to this chapter are part of a larger proposal to revise the commission's radiation control rules. The primary purpose of the proposed rules is to implement House Bill (HB) 1567, 78th Legislature, 2003, and its amendments to the 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 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 proposed for change 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 would 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 proposed amendments to §37.9035 would add a definition of "Corrective action" to identify the new financial assurance requirements added by Texas Health and Safety Code, §401.241. The definition tracks the statutory language which requires the commission to obtain financial security from the compact facility license holder to address and prevent unplanned events that pose a risk to public health and safety and 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 "Institutional control" is proposed 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 proposed amendments would 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 proposed 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 proposed to read "The activities which are identified as institutional control as specified in §336.734 (relating to Institutional Requirements)," to expand and improve the definition. Finally, the definitions section is proposed to be renumbered because of the additional definitions.

*Section 37.9040, Submission of Documents*

The proposed amendment to §37.9040 would add “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.

*Section 37.9045, Financial Assurance Requirements for Closure and Post Closure*

The proposed amendments to §37.9045 would 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. Subsection (a) is proposed to be 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 low-level radioactive waste disposal license. Subsection (a)(5) is proposed to be 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) (related 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 proposed to be amended to add “. . . prior to the expiration, cancellation, or termination . . .” ; 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 proposed to be 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 proposed amendment to §37.9050(b) would delete 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. This is not appropriate for low level radioactive waste 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 contrary to 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 proposed new §37.9050(f) would include 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 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. Proposed new subsection (f)(1) would require that all insurers and reinsurers 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 and any reinsurers on the policy to perform as required. Proposed new subsection (f)(2) states that the insurance certificate required to satisfy financial assurance requirements must include a written statement in language acceptable to the executive director from an authorized officer of each insurer and reinsurer stipulating that the insurance certificate is legally valid and enforceable as the binding agreement superseding any insurance policy provisions which are inconsistent with the requirements of this subsection. The statement must also covenant that the insurer

or reinsurer shall not raise as a defense any provision of the policy that is inconsistent with the requirements of this subsection. This requirement allows ease of administration of the financial assurance mechanism without the need for continuous legal expertise at the commission in the highly specialized business of insurance. It allows the commission to obtain a simple, two-page document that can be relied upon to meet financial assurance requirements. In the absence of a simple document, expert legal review of a lengthy and complex insurance contract would be required upon initial submission of the policy, and each time that the policy was renewed, endorsed, or modified. The written statement from the insurer and reinsurers would provide the necessary assurance that the insurance certificate could be relied upon even if the policy, which is a contract between the licensee and the insurance company, has provisions contrary to the requirements of this subsection. Proposed new subsection (f)(3) 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. Proposed new subsection (f)(4) 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 low-level radioactive waste 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 a low-level radioactive waste 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. Proposed new subsection (f)(5) 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. Proposed new subsection (f)(6) identifies the triggering mechanisms, the occurrence of which prevent a policy from being cancelled, terminated, or not renewed to prevent a loss of financial assurance. The triggering mechanisms include: the executive director deems the facility abandoned; the license expires, is terminated, is revoked, or a new or renewal license is denied; closure is ordered by the executive director or by a United States district court or other court of competent jurisdiction; the owner or operator is named as a debtor in a voluntary or involuntary proceeding under the Bankruptcy Code; or the insurance premium due is paid. Proposed new subsection (f)(7) 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. Proposed new subsection (f)(8) requires that the insurance certificate 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. Proposed new subsection (f)(9) 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. Proposed new subsection (f)(10) 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. Proposed new subsection (f)(11) 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. Proposed new subsection (f)(12) 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. Proposed subsection (f)(13) 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, Certificate of Insurance*

Section 37.9052 is proposed to be added to provide the required language for the insurance certificate to satisfy financial assurance requirements for closure, post closure, and corrective action specified in proposed §37.9050(f).

*Section 37.9055, Institutional Control Requirements*

The commission proposes to repeal §37.9055 because this section does not address the requirement for financial assurance for institutional control, and therefore, serves no purpose.

*Section 37.9059, Financial Assurance Requirements for Liability*

Section 37.9059 is proposed to be added. 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 proposes 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. Proposed 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). Proposed 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. Proposed 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 low level radioactive waste 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.

**FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT**

Jeffrey Horvath, Analyst, Strategic Planning and Appropriations Section, has determined that for the first five-year period the proposed rules are in effect, there will not be significant fiscal implications for the agency or other units of state and local government as a result of administration or enforcement of the proposed rules.

The rule amendments are proposed as part of a larger proposal in order to implement HB 1567, which provides requirements for the licensing of a low-level radioactive waste disposal site in Texas. The proposed amendments to this chapter add new financial assurance requirements and options for demonstrating financial assurance, as provided in HB 1567.

Any applicant for a license to dispose of low-level radioactive waste will be required to comply with the new financial assurance rules. The rules are proposed to be amended to include insurance as an additional financial assurance option in accordance with Texas Health and Safety Code, §401.109(d). Insurance was added as an acceptable mechanism by HB 1567. The proposed rules add financial assurance requirements for corrective action activities and requirements for liability coverage.

No significant fiscal implications are expected for the agency to develop, review, approve, and maintain the proposed financial assurance requirements. The 78th Legislature appropriated the agency funding (estimated to be \$954,018 in Fiscal Year 2004 and \$1,049,018 in Fiscal Year 2005 from fees and balances in the Low-Level Waste Account) and personnel (five additional full time equivalent positions in 2004 and 1.5 additional full time equivalent positions in 2005) to implement HB 1567 and to provide for the licensing of a low-level radioactive waste disposal facility. Costs to other units of state and local government are not anticipated.

#### PUBLIC BENEFIT AND COSTS

Mr. Horvath also has determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from enforcement of and compliance with the proposed rules will

be greater certainty that adequate amounts of financial assurance are provided for a future low-level radioactive waste disposal site to ensure protection of public health and safety and the environment.

Fiscal implications are anticipated to businesses or individuals who wish to meet the proposed financial assurance requirements necessary to obtain a license to dispose of low-level radioactive waste.

The proposed rules establish financial assurance requirements for site closure, post closure, and corrective action activities. HB 1567 requires that in determining the amount of security required of a compact waste disposal facility license holder, the agency shall also consider the need for financial security to address and prevent unplanned events that pose a risk to public health and safety and that may occur after the decommissioning and closure of the compact waste disposal facility or a licensed federal waste disposal facility. The legislation requires that a minimum of \$20 million in security be provided at the time the facility is decommissioned. Because it is not known when the facility would be decommissioned, the minimum required amount of security would be available for corrective action when the license is issued. A payment schedule for corrective action financial assurance will be established in the low-level radioactive waste disposal license for any required amounts above the minimum requirement. The total amount of security established in the payment schedule would be based upon the amount of low-level waste received at the site, long term risks, and the need to address and prevent unplanned events. The payment schedule must be sufficient to ensure that the amount of security provided by the license holder at any time between the issuance of the license and the time at which the facility is decommissioned is sufficient to address any increase in the risk to public health and

safety that accompanies an increase in the volume of waste and meet the requirements of the agency to address unplanned events.

Prior to facility operation, financial assurance for the institutional control period and disposal site closure and stabilization must also be in place. A license holder would be allowed to use insurance to meet these requirements. Financial assurance costs for closure and post-closure activities will depend upon cost estimates to perform those activities. The costs estimates for closure and post-closure activities will not be known until the license application has been evaluated.

The proposed rules include insurance as an acceptable financial assurance option in accordance with HB 1567. The proposed rules are designed to ensure diversification and transfer of risk, long-term viability and strength of insurers, performance of the financial mechanism over a long period of time, and administration of the mechanism without specialized legal expertise in insurance. The proposed rules require that all insurers and reinsurers 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. There are six primary insurers that issue closure insurance for the RCRA facilities that meet these standards.

The proposed rules require the owner or operator to maintain the insurance 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, conditions will also be placed in the low-level radioactive waste 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 a low-level radioactive waste disposal license.

The proposed rules require that the policy must guarantee 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. The amendments set 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. In addition, 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. 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. The amendments ensure 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 and require that once the institutional control period begins, the insurer must pay the remaining face amount of the policy to the Perpetual Care Account.

Financial assurance in the form of securities or cash must be deposited into the Perpetual Care Account. Money and security in the perpetual care account may be used only for the decontamination, decommissioning, stabilization, reclamation, maintenance, surveillance, control, storage, and disposal

of radioactive material for the protection of the public health and safety and the environment. The 78th Legislature appropriated the agency any revenues and proceeds in the Perpetual Care Account for the previously stated purposes.

The proposed rules would require financial assurance requirements for liability coverage adequate to cover potential injury to any property or person. The same amount of coverage is proposed as is currently required for hazardous and nonhazardous industrial solid waste facilities. 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. Annual premium costs are estimated to be between \$40,000 and \$70,000 for this type of coverage.

Any costs incurred by the licensee to meet proposed or current financial assurance requirements are expected to be recovered through fees collected by the licensee assessed for the disposal of low-level radioactive waste. Fees will be assessed to waste generators in Texas and the other Texas Low-Level Radioactive Waste Disposal Compact party states, such as electric utilities and hospitals. Fee amounts will depend upon many variables including the amount and type of waste disposed of, and is expected to be addressed in future rulemaking.

#### SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse economic effects are anticipated to any small or micro-businesses as a result of implementing the proposed rules because there are no known small or micro-businesses that own or operate, or are likely to own or operate, a low-level radioactive waste disposal site with a \$500,000 application fee. The proposal merely clarifies the financial assurance requirements for such a site, when established.

#### LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed the proposed rules and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

#### DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed 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 proposed 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 a low-level radioactive waste disposal site. The proposed rulemaking 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 proposed 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 proposed 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.

The 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 proposed rules do not exceed the standards set by federal law.

The proposed 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 proposed rules address the requirements for financial assurance for liability and corrective action and the use of insurance as provided by HB 1567.

The proposed 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*, NRC requirements must be implemented to maintain a compatible state program for protection against hazards of radiation. The proposed rules do not exceed the NRC requirements nor exceed the requirements for retaining status as an “Agreement State.”

The rules are proposed 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. The commission invites public comment of the draft regulatory impact analysis determination.

#### TAKINGS IMPACT ASSESSMENT

The commission evaluated this rulemaking action and performed a preliminary assessment of whether Texas Government Code, Chapter 2007 is applicable. The commission's preliminary assessment indicates that Chapter 2007 does not apply to these proposed 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 low-level radioactive waste disposal for licenses issued under Chapter 336, Subchapter H.

Promulgation and enforcement of these proposed rules would be neither a statutory nor a constitutional taking of private real property. The proposed rules do not affect a landowner's rights in private real property because this rulemaking 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 proposed rules implement administrative changes to the requirements for financial insurance for a low-level radioactive waste disposal licenses issued under Subchapter H of Chapter 336. The proposed rules address requirements for liability and corrective action coverage and the use of insurance for financial assurance.

#### COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the proposed rulemaking 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 Texas Coastal Management Program. Therefore, the proposed rulemaking is not subject to the Coastal Management Program.

#### ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin on September 16, 2003, at 1:30 p.m. at the commission's central office, 12100 Park 35 Circle, Building E, Room 201S. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, a commission staff member will be available to discuss the proposal 30 minutes prior to the hearing, and will be available to answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs, and who are planning to attend a hearing, should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

#### SUBMITTAL OF COMMENTS

Comments may be submitted to Angela Slupe, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Log Number 2003-037-336-WS. Comments must be received by 5:00 p.m., September 22, 2003. For further information or questions concerning this proposal, please

contact Devane Clarke of the Waste Permits Division at (512) 239-5604, or Alan Henderson of the Office of Environmental Policy, Analysis, and Assessment at (512) 239-1510.

**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 proposed 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 are also proposed 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.

The proposed amendments and new sections implement Texas Health and Safety Code, as amended by House Bill 1567, 78th Legislature, 2003, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.201, and 402.412.

**§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, [and] 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) - (2) (No change.)

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

(4) [(3)] Facility - All contiguous land, water, buildings, structures, and equipment which are or were used for the disposal of radioactive waste, including the radioactive waste, and soils and groundwater contaminated by radioactive material.

(5) [(4)] Institutional control - Shall have the same meaning [be referenced] as post closure.

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

(7) [(5)] Post closure - The activities which are identified [same] 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, [and] post closure, corrective action, and liability coverage must submit originally signed and effective financial assurance mechanisms to the executive director 60 days prior to commencement of operations.

**§37.9045. Financial Assurance Requirements for Closure, [and] Post Closure, Corrective Action,  
and Liability Coverage.**

(a) An owner or operator subject to this subchapter shall establish financial assurance for the closure, [and] post closure, corrective action, and liability coverage 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, [or] post closure, and corrective action. On a case-by-case basis, the executive director may approve other alternative financial assurance mechanisms.

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

(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 [an] 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 [mechanism shall be automatically collected prior to its expiration].

(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 [Issuing] Institutions), except financial assurance must be established within 30 days after such an event.

**§37.9050. Financial Assurance Mechanisms.**

(a) (No change.)

(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) [, or a surety bond guaranteeing performance as provided in §37.221 of this title (relating to Surety Bond Guaranteeing Performance),] except:

(1) - (3) (No change.)

(c) - (e) (No change.)

(f) An owner or operator may satisfy the requirements of financial assurance by obtaining insurance which 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 certificate to the executive director.

(1) At a minimum, the insurer and any reinsurers on the policy must be authorized to transact 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) An insurance certificate may be used to satisfy the requirements of financial assurance of this section only if the insurer and any reinsurer on the policy have submitted a written statement in language acceptable to the executive director from an officer of each entity authorized to bind the entity that stipulates that the insurance certificate in this subsection is legally valid and enforceable as the binding agreement superseding any insurance policy provisions which are inconsistent with the requirements of this subsection. The statement must also covenant that the insurer or reinsurer shall not raise as a defense any provision of the policy that is inconsistent with the requirements of this subsection.

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

(4) 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.

(5) 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.

(6) Cancellation, termination, or failure to renew may not occur and the policy shall remain in full force and effect in the event that on or before the date of expiration of the policy:

(A) the executive director deems the facility abandoned;

(B) the license expires, is terminated, is revoked, or a new or renewal license is denied;

(C) closure is ordered by the executive director of the commission or by a United States district court or other court of competent jurisdiction;

(D) the owner or operator is named as debtor in a voluntary or involuntary proceeding under Title 11 (Bankruptcy), United States Code; or

(E) the premium due is paid.

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

(8) The wording of the certificate of insurance must be identical to the wording specified in §37.9052 of this title (relating to Certificate of Insurance).

(9) 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.

(10) 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.

(11) 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.

(12) 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.

(13) 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. Certificate of Insurance.**

A certificate of insurance 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 Certificate of Insurance 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

**§37.9059. Financial Assurance Requirements for Liability.**

(a) Owners or operators required to demonstrate 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.

(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 proposed 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 proposed 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.

The proposed repeal implements Texas Health and Safety Code, as amended by House Bill 1567, 78th Legislature, 2003, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.201, and 402.412.

**§37.9055. Institutional Control Requirements.**