The Texas Commission on Environmental Quality (TCEQ, agency or commission) adopts amendments to §§37.9001, 37.9030, 37.9035, 37.9040, and 37.9045.

Sections 37.9030, 37.9035, 37.9040 and 37.9045 are adopted *with changes* to the text and will be republished. Section 37.9001 is adopted *without changes* to the proposed text as published in the September 7, 2007, issue of the *Texas Register* (32 TexReg 6045) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The purpose of this rulemaking is to implement Senate Bill (SB) 1604, 80th Legislature, 2007, and its amendments to Texas Health and Safety Code (THSC), Chapter 401 (also known as the Texas Radiation Control Act (TRCA)). The bill transfers responsibilities for the regulation and licensing of source material recovery, by-product disposal, and commercial radioactive substances storage and processing from the Texas Department of State Health Services (department) to the commission. This rulemaking intends to transfer the technical requirements for these programs from the department's rules in 25 TAC §289.254 and §289.260 into new subchapters of the commission's radioactive substance rules in Chapter 336. While the technical requirements remain the same, these new commission programs will be integrated into and administered under the commission's existing radioactive material program requirements for application processing, public notice, public participation, licensing fees, financial assurance, and enforcement. The amendments to Chapter 37 establish the financial assurance requirements for licenses for uranium recovery, by-product disposal, and radioactive substances storage and processing.

SB 1604 also establishes a new state fee for disposal of radioactive substances and amends underground injection control requirements for uranium mining. The commission intends to address the new requirements in separate rulemaking actions. In light of comments on financial assurance, the commission may consider and evaluate all financial assurance requirements for radioactive material in future rulemaking.

A corresponding rulemaking is published in this issue of the *Texas Register* and includes changes to 30 TAC Chapter 39, Public Notice; Chapter 281, Applications Processing; and Chapter 336, Radioactive Substance Rules.

SECTION BY SECTION DISCUSSION

The commission adopts administrative changes throughout these sections to be consistent with *Texas Register* requirements and other agency rules and guidelines and to conform to the drafting standards in the *Texas Legislative Council Drafting Manual*, August 2006.

The commission adopts amendments to the title of Subchapter S by changing the name from "Financial Assurance for Radioactive Material" to "Financial Assurance for On Site Disposal of Radioactive Substances" to be more accurate. Prior to SB 1604, the commission had responsibilities under TRCA only for certain disposal activities. SB 1604 provides the TCEQ with additional regulatory and licensing responsibilities for source material recovery and commercial radioactive substances storage and processing.

The commission adopts amendments to §37.9001 to clarify that the financial assurance requirements of Subchapter S of Chapter 37 only apply to radioactive material licenses for alternative methods of disposal of radioactive material under Subchapter F of Chapter 336 and licenses for the commercial disposal of naturally occurring radioactive material from public water systems under Subchapter K of Chapter 336.

The commission adopts amendments to the title of Subchapter T by changing the name from "Financial Assurance for Near-Surface Land Disposal of Low-Level Radioactive Waste" to "Financial Assurance for Radioactive Substances" to be more accurate. Prior to SB 1604, the commission had responsibilities under TRCA only for certain disposal activities. SB 1604 provides the TCEQ with additional regulatory and licensing responsibilities for source material recovery and commercial radioactive substances storage and processing.

The commission adopts amendments to §37.9030 to establish financial assurance requirements under Subchapter T of Chapter 37 for decommissioning activities under Subchapter G of Chapter 336, licenses for the disposal of low-level radioactive waste under Subchapter H of Chapter 336, licenses for the recovery of source material or by-product disposal under Subchapter L of Chapter 336, and licenses for the storage and processing of radioactive substances under Subchapter M of Chapter 336. ~~There are two~~ The primary difference between Subchapter S and Subchapter T of Chapter 37 is that~~. First, the financial test is not an acceptable financial assurance mechanism under Subchapter T. Second,~~ there are additional requirements for the use of insurance as a financial assurance mechanism under Subchapter T. The commission adopts the more stringent Subchapter T financial assurance requirements for the licensing programs that are subject to the transfer of SB 1604 so that there is enhanced assurance that the state has

adequate funds to perform closure or post closure activities should a licensee fail to perform the required activities.

The commission adopts amendments to §37.9035 to change the definition of facility so that the term includes all contiguous land, water, buildings, structures, and equipment for activities associated with the recovery of source material under Subchapter L of Chapter 336 or the processing and storage of radioactive substances under Subchapter M of Chapter 336. The commission has modified the definition of "facility" to reflect that Subchapter L applies to the licensing and recovery of source material and by-product disposal. Changes were made to the definition of "facility" in §37.9035 in response to comments on the Chapter 336 rules so that the rules consistently address "source material recovery" rather than "uranium recovery."

The commission adopts amendments to §37.9040 to require that effective financial assurance mechanisms must be provided to the executive director 60 days prior to the initial receipt or possession of radioactive substances. In response to comments, §37.9040 was also modified to require the submission of financial assurance mechanisms 60 days prior to the production of radioactive substances.

The commission adopts amendments to §37.9045 to provide that the executive director may accept financial assurance established to meet requirements of other entities for closure or post closure, provided that such mechanisms comply with all TCEQ requirements of Chapter 37 and the full amount of financial assurance for the license is clearly identified and committed for use for the purposes of Subchapters G, H, L, or M of Chapter 336. The commission adopts an amendment to subsection (a)(6) to include citations

to 30 TAC §336.1125 and §336.619 should the executive director be required to convert a financial assurance mechanism into cash for deposit into the perpetual care account.

The commission adopts the amendment to §37.9045 to provide for the financial test and the parent company guarantee financial assurance mechanism. The financial test was an option available under department rules for licenses for storage and processing, and the same limitation to applicability has been incorporated in to §37.9045. The parent company guarantee was also an option available under the department rules. Therefore, the commission now includes a provision in Subchapter T at §37.9045 to provide for wording similar to 25 TAC §289.252(ii)(3). THSC, §401.109 requires that the financial assurance for radioactive material licenses issued by the commission must be provided in a mechanism acceptable to the commission. The financial test is not included as a specific financial assurance mechanism in THSC, §401.109(d). However, this financial assurance mechanism exists in 25 TAC §289.252(ii)(3).

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission adopts the rulemaking action under 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. "A 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 establish the financial assurance requirements for radioactive material licenses. Financial assurance was already required by the

department. 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 the amendments establish procedural requirements for radioactive substance disposal facilities, source material recovery facilities, or commercial radioactive substances storage and processing facilities. The rulemaking action implements legislative requirements in SB 1604, transferring responsibilities for the regulation of source material recovery, by-product disposal, and commercial radioactive substances storage and processing from the department to the commission. The rulemaking in Chapter 336 transfers the technical requirements for these licensing programs from the department's existing rules to the commission's rules. The rulemaking also integrates the transferring license programs into existing commission procedural requirements in Chapters 39 and 281 and establishes financial assurance requirements in Chapter 37.

Furthermore, the rulemaking action does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §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 substances in Texas. Texas Health and Safety Code, §§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 substances. In addition, the State of Texas is an "Agreement State" authorized by the United States Nuclear Regulatory Commission (NRC) to administer a radiation control program under the Atomic Energy Act of 1954, as amended (Atomic Energy Act). The rules are compatible with federal law.

The rules do not exceed an express requirement of state law. Texas Health and Safety Code, Chapter 401, establishes general requirements, including requirements for financial assurance, for the licensing and disposal of radioactive substances, source material recovery, and commercial radioactive substances storage and processing. The purpose of the rulemaking is to implement statutory requirements consistent with recent amendments to Texas Health and Safety Code, Chapter 401, as provided in SB 1604.

The rules are compatible with 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. The Atomic Energy Act 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 rules are compatible with the NRC requirements and the requirements for retaining status as an "Agreement State."

These rules are adopted under specific authority of the Texas Health and Safety Code, Chapter 401. Texas Health and Safety Code, §§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 substances.

The commission invited public comment of the draft regulatory impact analysis determination. No comments were received on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these rules and performed an assessment of whether Texas Government Code, Chapter 2007 is applicable. The commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to these rules. These rules implement SB 1604, transferring certain regulatory responsibilities for the control of radioactive material from the department to the commission. This rulemaking is reasonably taken to fulfill an obligation required by federal law for the control of radioactive material, which is an exempt action under Texas Government Code, §2007.003(b)(4).

Nevertheless, the commission further evaluated these rules and performed an assessment of whether these rules constitute a taking under Texas Government Code, Chapter 2007. The purpose of these rules is to implement changes to the Texas Radiation Control Act required by SB 1604, 80th Legislature, 2007 for the issuance of public notice for the licensing of the disposal of radioactive substances, recovery of source

material, and commercial radioactive substances processing and storage. The rules would substantially advance this purpose by establishing the financial assurance requirements for the licenses that are subject to the transfer of jurisdiction under SB 1604.

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 constitutionally burden, 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 establish financial assurance requirements and do not affect real property. Financial assurance was required by the department for these programs, and the rules do not substantially change the existing requirements that were in place under the department's program. Therefore, the commission's rules do not affect real property in a manner that is different than may have been affected under the department's requirements.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

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

PUBLIC COMMENT

The commission held a public hearing on September 25, 2007. The comment period closed on October 15, 2007. Comments were received from Mesteña Uranium, L.L.C. (Mesteña); the Lone Star Chapter of

the Sierra Club (Sierra Club); the Uranium Committee of the Texas Mining and Reclamation Association (TMRA); Kelly Hart & Hallman LLP on behalf of Uranium Energy Corp., AREVA NC, Inc., and Uranerz Energy Corporation (UAU); Hance Scarborough Wright Woodward & Weisbart on behalf of Waste Control Specialists LLC (WCS); and the Texas Radiation Advisory Board (TRAB). Mesteña supports the revisions as necessary for the orderly and complete program transfer of the radioactive materials programs that oversee uranium recovery operations. The Sierra Club commented that the Sierra Club is pleased with the proposed rules overall and that the proposed rules adequately implement the statutory changes made by SB 1604. TMRA commented on its appreciation of the time and effort the TCEQ has put forth as part of the rulemaking process. Specific comments are addressed below.

RESPONSE TO COMMENTS

General Comments on Financial Assurance Requirements

The Sierra Club supports the commission's recommendation to subject the programs transferred by SB 1604 to the requirements of Subchapter T of Chapter 37. The Sierra Club requests clarification on how applications for licenses that were pending at the DSHS and have not yet been issued by the TCEQ will be treated under the financial assurance requirements.

The commission appreciates the comment. The commission anticipates that these rules will be effective twenty days after the rules are submitted to the Office of the Secretary of State. The *Texas Register* publication of these rules will indicate the date that the rules are effective. New applications and applications for licenses under Subchapters L and M of Chapter 336 that are under technical review will be subject to the financial assurance requirements upon the effective date of these rules. Existing licensees or applicants that have completed the technical review prior

to the effective date of these rules must have financial assurance that complies with the requirements of the commission's rules by June 1, 2008 as provided in §336.1125 and §336.1235. No changes were made in response to these comments.

WCS comments that a parent company guarantee as a demonstration of a financial test for satisfying the financial assurance requirements should be available to owners or operators that were previously able to use the mechanism under department rules. WCS comments that proposed Subchapter T of Chapter 37 does not authorize an owner or operator to use a parent company guarantee or financial test as a mechanism for satisfying the financial assurance requirements for radioactive materials licenses authorized under Subchapters L or M of Chapter 336. WCS comments that proposed Subchapter T of Chapter 37 is inconsistent with the financial assurance requirements applicable to existing licenses that were authorized by the department to store and process radioactive substances and is inconsistent with the financial requirements applicable to by-product disposal under existing regulations because a parent company guarantee was allowed under department rules. WCS comments that state law mandates that radioactive substances storage and processing licensees that currently operate pursuant to a parent company guarantee as authorized by the department must not be forced to replace their existing financial assurance instruments due to the change in jurisdiction in SB 1604 because Section 33(d) of SB 1604 provides that "the transfer of rights, powers, duties, obligations, functions, activities, property, and programs of the Health and Human Services Commission or the Department of State Health Services to the Texas Commission on Environmental Quality made by this Act does not affect or impair any act done or obligation, right, license, permit, requirement, or penalty accrued or existing under the former law; that law remains in effect for the purposes of any action concerning such an act done or obligation, right,

license, permit, requirement, or penalty." WCS recommends modifying Subchapter T of Chapter 37 to allow the use of a financial test as provided in Subchapter S.

The commission agrees that the parent company guarantee was an option available under the department rules ~~does not agree with these comments~~. Therefore, the commission now includes a provision in Subchapter T at §37.9045 to provide for wording similar to 25 TAC §289.252(ii)(3). Texas Health and Safety Code, §401.109 requires that the financial assurance for radioactive material licenses issued by the commission must be acceptable to the commission. The financial test is not included as a specific financial assurance mechanism in Texas Health and Safety Code, §401.109(d). However, this financial assurance mechanism exists in 25 TAC §289.252(ii)(3). ~~The commission finds that a financial test as provided by a parent company guarantee is not appropriate financial assurance for radioactive material activities for several reasons. The use of a financial test imposes more risk onto the state of Texas than the financial assurance mechanisms provided in Subchapter T in the event of a licensee's failure to perform required activities because no funds are set aside and there is no transfer of risk to a third party. Ongoing experience in handling a bankruptcy matter where the issue of inadequate financial assurance held by the department in the amount of less than $1 million resulted in an emergency removal action costing $25 million plus additional costs for radioactive waste storage. In addition, the recent bankruptcy filings of several large corporations point out the potential dangers of inadequate disclosure of obligations, particularly off-balance sheet liabilities, which may not be reflected on a financial test. Environmental obligations do not receive preferential treatment under the bankruptcy code and any guarantee issued by a parent corporation would be closely scrutinized in any bankruptcy proceeding of the parent and may be set aside for inadequate consideration (see e.g. Uniform~~

~~**Fraudulent Transfer Act, Uniform Fraudulent Conveyance Act). A financial test does not assure that funds will be placed in the state's perpetual care account in the event of the licensee's default as required in statute.**~~

~~**The parent company guarantee provides only limited transfer of risk since a financial deterioration of the licensee would impact the financial position of its parent. In addition, under a parent company guarantee, the state must depend on the parent company to fulfill obligations that the parent's subsidiary already failed to perform. When issuing a radioactive materials license, the commission has determined that the licensee is qualified by training and experience to conduct the proposed radioactive material activities in accordance with the commission's rules in such a manner as to protect and minimize danger to the public health and safety and the environment. However, the commission does not make a similar determination that the parent company of the licensee is also qualified to conduct the activities. If the parent company was called upon to fulfill the licensee's obligations, there is no demonstration that the parent company is qualified to conduct the required activities in a manner that will safely protect workers, public health and safety, and the environment. Therefore, the commission concludes that financial mechanisms provided in Subchapter T, such as a fully funded trust or standby trust fund, a payment bond, an irrevocable standby letter of credit, a governmental guarantee, an external sinking fund, or an insurance policy are the appropriate methods for providing financial assurance for those activities that require financial assurance under Subchapters L and M.**~~

~~**The commission does not agree with the interpretation that the first sentence of Section 33(d) of SB 1604 somehow freezes existing department requirements and prevents the commission from**~~

~~adopting rules for administering the regulation and licensing of commercial radioactive waste storage and processing and by-product disposal. SB 1604, Section 33(d) as a whole, provides that the legislation itself maintains the status quo with respect to any act, obligation, right, license, permit, requirement, or penalty because of the transfer of the jurisdiction over the regulatory program from the department to the commission. The commission is required to continue proceedings of the department related to programs transferred under the Act. And, under the third sentence of SB 1604, Section 33(d), "a rule of the Health and Human Services Commission or the Department of State Health Services related to a responsibility, duty, activity, function, or program transferred by this Act is enforceable as a rule of the Texas Commission on Environmental Quality *until the Texas Commission on Environmental Quality adopts other rules*" (emphasis added.)~~

~~Texas Health and Safety Code, §401.011(b) and Section 33(c) of SB 1604 unequivocally provide the commission full responsibility for the administration and enforcement of laws related to licensing of the disposal of radioactive substances, the processing or storage of low-level radioactive waste or non oil and gas naturally occurring radioactive materials, the recovery or processing of source material, the processing of by-product material, and sites for the disposal of radioactive substances. Under the Texas Radiation and Control Act, the commission is empowered with the duty to protect occupational health and safety, public health and safety, and the environment. The commission is authorized to adopt rules and establish acceptable forms of financial assurance. Thus, the Texas Radiation and Control Act and SB 1604 authorize the commission to adopt rules for the administration of the licensing programs including changes to requirements previously implemented by the department. Section 33(k)(1) of SB 1604 does provide that an application for a~~

~~**license to dispose of by-product material that was filed with the department on or before January 1, 2007 must be governed by the technical rules and regulations of the department that were effective on the effective date of the Act. The commission rules maintain the department's technical requirements for this licensing program in §336.1129. No changes were made in response to these comments.**~~

WCS comments that WCS disagrees with the commission statement in the Takings Impact Analysis of the proposed rules that "financial assurance was required by the department for these programs and the proposed rules do not substantially change the existing requirements that were in place under the department's programs."

The commission disagrees with the comment because the commission's statement was in the context of the Takings Impact Analysis. The commission stated that the proposed rules relating to financial assurance do not affect a landowner's rights in real property because the department's rules already required financial assurance for the transferring licensing programs. The commission's rules do not substantially change the department's rules as they relate to rights in private real property because neither the department~~~~'s~~ rules nor the commission rules on financial assurance address or affect rights in private real property. No changes were made in response to this comment.

WCS disagrees with the TCEQ conclusion stating that "no fiscal implications are anticipated for businesses and individuals as a result of the proposed rules" is not correct because WSC believes there

will be substantial financial burden to obtain new financial assurance mechanisms under TCEQ rules for existing licensees who use a parent company guarantee under department rules.

The commission has addressed this concern by providing a parent company guarantee as a financial assurance mechanism. The commission agrees that the parent company guarantee was an option available under the department rules. The commission now includes a provision in Subchapter T to provide for wording similar to 25 TAC §289.252(ii)(3). Because the parent company guarantee financial assurance mechanism continues to be available, there should be no new financial burden or fiscal implications for the commission's financial assurance requirements. ~~**agrees with the comment in part and disagrees with the comment in part. The commission acknowledges that there may be some cost to a licensee that has previously relied upon a parent company guarantee and that will need to provide acceptable financial assurance under Subchapter T of Chapter 37. The commission does not agree that the costs would be substantial, detrimental or prohibitive. Based on the commission's experience with financial assurance, it is expected that a financial mechanism under Subchapter T may have an annual cost of up to 2 percent of the covered amount. But, a parent company guarantee also has a cost and may affect bond and credit ratings of the guarantor for providing the guarantee. The commission also expects that commercial waste processors and disposal facilities will pass on costs for regulatory compliance, including financial assurance, in assessing fees to their customers. No changes were made in response to this comment.**~~

Definitions

Mesteña and TMRA commented that the definition of "facility" in §37.9035(4) is broad, vague and could impact the amount of financial assurance that must be posted. Mesteña and TMRA also commented that

the definition of facility incorporates the definition of "site," which is also a place where an "activity" takes place. They express concern with the ambiguous nature of "activity." TMRA requests clarification of these terms and explanation on how these terms relate to financial assurance coverage.

The specific subchapters of Chapter 336 cover the activities that require financial assurance and the methods for determining the amount of financial assurance. For licenses issued under Subchapter L of Chapter 336, financial assurance is required for decontamination, decommissioning, reclamation, disposal, or any other activity required under §336.1125. Definitions in Chapter 37 are intended to ensure that all activities requiring financial assurance under Chapter 336 are covered by the specific financial assurance requirements within Chapter 37. Chapter 37 definitions are not used for expanding the types of activities requiring financial assurance or determining the amount of financial assurance required. No changes were made in response to this comment.

WCS comments that the definition of "closure" in §37.9035(2) should be revised so that the term does not include "post closure observation and maintenance."

The commission disagrees with the comment and notes that this particular definition was not proposed for amendment as part of this rulemaking. Definitions in Chapter 37 are intended to ensure that all required activities associated with closure are captured as "closure" for financial assurance purposes since mechanism wordings for multiple financial assurance programs all refer simply to "closure" rather than many program specific items. Requirements for closure and post-closure are appropriately differentiated in Chapter 336 along with the specific requirements for

each. Chapter 37 definitions do not change Chapter 336 requirements. No changes were made in response to this comment.

Submission of Documents

UAU commented that §37.9040 requires the submission of financial assurance 60 days prior to the *receipt* of radioactive substances. UAU claims that the provision is unclear because uranium production facilities do not "receive" radioactive substances. TMRA also commented that "production" would be the correct triggering requirement for financial assurance for a uranium recovery facility.

The commission agrees with the comment in part. As proposed, the submission of financial assurance is required 60 days prior to the receipt *or possession* of radioactive substances. To avoid any confusion, though, §37.9040 is modified to provide that the financial assurance mechanisms must be submitted 60 days prior to the initial receipt, production, or possession of radioactive substances.

The Sierra Club commented that for uranium mining, the deadline for submission of financial assurance should be upon drilling of wells. The Sierra Club commented that SB 1604 requires such documentation before the license is issued. The Sierra Club also commented that strict requirements for existing uranium mines should provide that no new areas can be mined until documentation is submitted.

The commission disagrees with the comment as these rules apply to financial assurance required for radioactive materials licenses. *In situ* uranium mining operations are also permitted under the commission's underground injection control (UIC) program. The UIC rules require that there be

sufficient financial assurance to plug and abandon each well used for in situ mining operations. The UIC financial assurance must be provided sixty days prior to the drilling and construction of the well. The financial assurance for the radioactive material license under Subchapter L for uranium recovery includes coverage for decommissioning, groundwater restoration, and reclamation. The financial assurance required under the license will be subject to annual review and update under §336.1125. No changes were made in response to the comment.

TMRA commented that §37.9040 ended with the word "waste."

Under Texas Register formatting, words in brackets are deleted from the amended rule. The word "waste" is bracketed and was proposed to be deleted from the rule. No change was made in response to the comment.

SUBCHAPTER S: FINANCIAL ASSURANCE FOR ON SITE DISPOSAL OF RADIOACTIVE SUBSTANCES [RADIOACTIVE MATERIAL]

§37.9001

STATUTORY AUTHORITY

The amendment 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 amendment 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, the processing or storage of low-level radioactive waste or naturally occurring radioactive material, the recovery or processing of source material, and the processing of by-product material; §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 substances; §401.202, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate commercial processing and disposal of low-level radioactive waste; §401.262, concerning Management of Certain By-Product Material, which provides the commission authority to regulate by-product storage and processing facilities; and §401.412, concerning

Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances.

The adopted amendment implements Texas Health and Safety Code, as amended by SB 1604, 80th Legislature, 2007, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.202, 401.262, 401.2625, and 401.412.

§37.9001. Applicability.

This subchapter applies to an owner or operator, including a state or federal government owner or operator, required to provide evidence of financial assurance under Chapter 336, Subchapter F of this title (relating to Licensing of Alternative Methods of Disposal of Radioactive Material) or Subchapter K of this title (relating to Commercial Disposal of Naturally Occurring Radioactive Material Waste From Public Water Systems) [Radioactive Substance Rules), except owners or operators of a facility licensed 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.

SUBCHAPTER T: FINANCIAL ASSURANCE FOR RADIOACTIVE SUBSTANCES [NEAR-SURFACE LAND DISPOSAL OF LOW-LEVEL RADIOACTIVE WASTE]

§§37.9030, 37.9035, 37.9040, 37.9045

STATUTORY AUTHORITY

The amendments 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 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, the processing or storage of low-level radioactive waste or naturally occurring radioactive material, the recovery or processing of source material, and the processing of by-product material; §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 substances; §401.202, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate commercial processing and disposal of low-level radioactive waste; §401.262, concerning Management of Certain By-Product Material, which provides the commission authority to regulate by-product storage and processing facilities; and §401.412, concerning

Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances.

The adopted amendments implement Texas Health and Safety Code, as amended by SB 1604, 80th Legislature, 2007, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.202, 401.262, 401.2625, and 401.412.

§37.9030. Applicability.

This subchapter applies to owners or operators required to provide financial assurance under Chapter 336, Subchapters G, H, L, or M [Subchapter H] of this title (relating to Decommissioning Standards; Licensing Requirements for Near-Surface Land Disposal of Low-Level Radioactive Waste; Licensing of Source Material ~~Uranium~~ Recovery and By-Product Material Disposal Facilities; or Licensing of Radioactive Substances Processing and Storage Facilities). 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**--The term "Facility" has the same meaning as the term "Site" as defined in §336.702 of this title (relating to Definitions). Facility also means all [All] contiguous land, water, buildings, structures, and equipment which are or were used for activities associated with:

(A) the disposal of radioactive material, including disposal, receipt, storage, processing, or handling of radioactive material, waste, soil, and groundwater contaminated by radioactive material; [.]

(B) the recovery of source material ~~uranium~~ as provided in Chapter 336, Subchapter L of this title (relating to Licensing of Source Material ~~Uranium~~ Recovery and By-Product Material Disposal Facilities); or

(C) the processing and storage of radioactive substances as provided in Chapter 336, Subchapter M of this title (relating to Licensing of Radioactive Substances Processing and Storage Facilities). [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, production or possession of radioactive substances [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) **or subsections (c) or (d) of this section** 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 **or subsections (c) or (d) of this section**.

(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, Subchapters G, H, L and M [Subchapter H] of this title (relating to Decommissioning Standards; Licensing Requirements for Near-Surface Land Disposal of Low-Level Radioactive Waste; Licensing of Source Material ~~Uranium~~ Recovery and By-Product Material Disposal Facilities; and Licensing of Radioactive Substances Processing and Storage Facilities).

(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, 336.1125(c), (f) and (g), 336.619 and 37.101 of this title (relating to Funding for Disposal Site Closure and Stabilization; Funding for Institutional Control; Funding for Corrective Action; Financial Security Requirements; Financial Assurance for Decommissioning; 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.

(c) This subsection applies only to owners or operators required to provide financial assurance under Chapter 336, Subchapter M of this title. Owners and operators required to provide financial assurance under Chapter 336, Subchapter M of this title may satisfy the requirements of financial assurance by demonstrating that it passes a financial test as provided in §37.251 of this title (relating to Financial Test), except the owner or operator which has issued rated bonds must also meet the criteria of paragraphs (1) and (3) of this subsection, or the owner or operator which has not issued rated bonds must also meet the criteria of paragraphs (2) and (3) of this subsection.

(1) The owner or operator must have:

(A) tangible net worth of at least ten times the total current cost estimate (or the current amount required if a certification is used) for all closure activities;

(B) assets located in the United States amounting to at least 90% of total assets or at least ten times the total current cost estimate (or the current amount required if a certification is used) for all closure activities;

(C) a current rating for its most recent bond issuance of AAA, AA, or A as issued by Standard and Poor's, or Aaa, Aa, A as issued by Moody's; and

(D) at least one class of equity securities registered under the Securities Exchange Act of 1934.

(2) The owner or operator must have:

(A) tangible net worth greater than $10 million, or of at least ten times the total current cost estimate (or the current amount required if a certification is used) for all closure activities, whichever is greater;

(B) assets located in the United States amounting to at least 90% of total assets or at least ten times the total current cost estimate (or the current amount required if a certification is used) for all closure activities;

(C) a ratio of cash flow divided by total liabilities greater than 0.15; and

(D) a ratio of total liabilities divided by net worth less than 1.5.

(3) To demonstrate that the owner or operator meets the test, it must submit the following items to the executive director:

(A) a letter signed by the owner's or operator's chief financial officer and worded identically to the wording specified in §37.9025(a) of this title (relating to Wording of Financial Assurance Mechanisms); and

(B) a written guarantee, hereafter referred to as "self-guarantee," signed by an authorized representative which meets the requirements specified in §37.261 of this title (relating to Corporate Guarantee). The wording of the self-guarantee shall be acceptable to the executive director and must include the following:

(i) the owner or operator will fund and carry out the required closure or post closure activities, or upon issuance of an order by the executive director, the owner or operator will set up and fund a trust, as specified in §37.201 of this title (relating to Trust Fund) in the name of the owner or operator, in the amount of the current cost estimates; and

(ii) if, at any time, the owner's or operator's most recent bond issuance ceases to be rated in any category of "A" or above by either Standard and Poor's or Moody's, the owner or operator will provide notice in writing of such fact to the executive director within 20 days after publication of the change by the rating service. If the owner's or operator's most recent bond issuance ceases to be rated in any category of "A" or above by both Standard and Poor's and Moody's, the owner or operator no longer meets the requirements of paragraph (1) of this subsection.

(d) This subsection only applies to owners or operators required to provide financial assurance under Chapter 336, Subchapters L and M of this title. A parent company controlling a majority of the voting stock of the owner or operator may satisfy the requirements of financial assurance by demonstrating that it passes a financial test as specified in §37.251 of this title, and by meeting the requirements of a corporate guarantee as specified in §37.261 of this title. The guarantor shall also comply with the requirements identified in this subsection.

(1) The wording of the corporate guarantee as specified in §37.361 of this title (relating to Corporate Guarantee) shall also include:

(A) the signatures of two officers of the owner or operator and two officers of the guarantor who are authorized to bind the respective entities; and

(B) the corporate seals.

(2) The guarantor shall also certify and submit to the executive director that the guarantor has:

(A) majority control of the owner or operator;

(B) full authority under the laws of the state under which it is incorporated and its articles of incorporation and bylaws to enter into this corporate guarantee;

(C) full approval from its board of directors to enter into this corporate guarantee; and

(D) authorization for each signatory.

(e) A parent company guarantee may not be used in combination with other financial assurance mechanisms to satisfy the requirements of this subchapter. A financial test by the owner or operator may not be used in combination with any other financial assurance mechanisms to satisfy the requirements of this subchapter or in any situation where the owner or operator has a parent company holding majority control of the voting stock of this company.