The Texas Commission on Environmental Quality (TCEQ, agency or commission) adopts amended §§37.9001, 37.9030, 37.9035, 37.9040, 37.9045, and 37.9050.

Sections 37.9040, 37.9045, and 37.9050 are adopted *with changes* to the proposed text and will be republished. Sections 37.9001, 37.9030, and 37.9035 are adopted *without changes* to the proposed text as published in the September 5, 2008, issue of the *Texas Register* (33 TexReg 7422) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The changes adopted to this chapter are part of a larger adoption to revise the commission's radiation control and underground injection control (UIC) rules. The purpose of this rulemaking is to implement the remaining portions of Senate Bill (SB) 1604, 80th Legislature, 2007, its amendments to Texas Health and Safety Code (THSC), Chapter 401 (also known as the Texas Radiation Control Act (TRCA)), and House Bill (HB) 3838, 80th Legislature, 2007. This rulemaking incorporates new provisions for notice and contested case hearing opportunities related to Production Area Authorizations and UIC Area Permits, financial assurance requirements, and new state fees on gross receipts associated with the radioactive waste disposal. HB 3838 specifically addresses the period between uranium exploration, which is regulated by the Railroad Commission of Texas (RRC), and permitting of injection wells for in situ uranium mining, which is regulated by TCEQ. HB 3838 requires TCEQ to establish a registration program for exploration wells permitted by the RRC that are used for development of the UIC area permit application. In response to a previous petition for rulemaking, the commission has also directed staff to review, seek stakeholder input on, and recommend revision of commission rules related to in situ uranium recovery. The adopted amendments to Chapter 37 establish the financial assurance requirements for

licenses for source material recovery, by-product material disposal, and radioactive substances storage and processing. The commission adopts the existing financial assurance requirements of Chapter 37, Subchapter T to be used for the licensing programs subject to the transfer of jurisdiction in SB 1604. SB 1604 also establishes a new state fee for disposal of radioactive substances and amends UIC requirements for uranium mining.

Corresponding rulemaking is published in this issue of the *Texas Register* concerning 30 TAC Chapters 39, 55, 305, 331, and 336.

SECTION BY SECTION DISCUSSION

The commission adopts the amendment 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 and Commercial NORM Disposal" to be more accurate. Prior to SB 1604, the commission had responsibilities under the 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 the amendment to §37.9001 to clarify that the financial assurance requirements of Subchapter S only apply to radioactive material licenses for alternative methods of disposal of radioactive material under 30 TAC Chapter 336, (Radioactive Substance Rules), Subchapter F and licenses for the commercial disposal of naturally-occurring radioactive material (NORM) waste from public water systems under Chapter 336, Subchapter K. The financial assurance requirements of Chapter 37, Subchapter T will apply to decommissioning of facilities under Chapter 336, Subchapter G, licenses for

the disposal of low-level radioactive waste under Chapter 336, Subchapter H, licenses for the recovery of source material and by-product material disposal under Chapter 336, Subchapter L, and licenses for the processing and storage of radioactive substances under Chapter 336, Subchapter M, Licensing of Radioactive Substances Processing and Storage Facilities.

The commission adopts the amendment to §37.9030 to establish financial assurance requirements under Chapter 37, Subchapter T for decommissioning activities under Chapter 336, Subchapter G, licenses for the disposal of low-level radioactive waste under Chapter 336, Subchapter H, licenses for the recovery of source material or by-product disposal under Chapter 336, Subchapter L, and licenses for the storage and processing of radioactive substances under Chapter 336, Subchapter M. The primary difference between Subchapter S and Subchapter T of Chapter 37 is that there are additional requirements for the use of insurance as a financial assurance mechanism under Subchapter T. The commission intends to use 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 the amendment to §37.9035 to change the definition of "Facility" to be synonymous with the term "Site" as defined in §336.702 and include the recovery of source material under Chapter 336, Subchapter L or the processing and storage of radioactive substances under Chapter 336, Subchapter M.

The commission adopts the amendment to §37.9040 to require that effective financial assurance mechanisms must be provided to the executive director 60 days prior to the initial receipt, production, or

possession of radioactive substances. In response to comments, §37.9040 was revised to include the term "injection operations" in lieu of "injection of mining fluid" to promote consistency among other rule provisions and to use defined terms. Similarly, Chapter 336 will also be changed to reflect "injection operations." Financial assurance for aquifer restoration shall be required 60 days prior to injection operations.

The commission adopts the amendment to §37.9045(a)(4) to reference appropriate subchapters of Chapter 336. An amendment to §37.9045(a)(6) is adopted to include citations to §336.1125 and §336.619 should the executive director be required to convert a financial assurance mechanism into cash for deposit to the credit of the perpetual care account. Additionally, §37.9045(a)(5) and (6) are revised in response to comments under Chapter 336 requesting that funds be payable to the State of Texas but consistent with THSC, §401.305(b) that states, in part, that money received by the commission shall be deposited to the credit of the perpetual care account.

The commission adopts amendments to add a new subsection (b) requiring that financial assurance for aquifer restoration be provided in at least the amount established in the cost estimate under each production area authorization. The commission is adopting corresponding amendments to Chapter 331 to require that an applicant for a production area authorization include, as part of the application, a cost estimate for restoring groundwater within the entire production area. Although the cost estimates for aquifer restoration are included as part of the UIC program's production area authorizations, the requirement to have financial assurance for aquifer restoration is part of the radioactive materials license under Subchapter L of Chapter 336. The commission determined that the evaluation of cost estimates for the amount of financial assurance required for aquifer restoration of an entire production area should be

included as part of the production area authorization application and subject to opportunities for public participation in the application process rather than the provision of financial assurance on a piecemeal basis and outside of an application process. Adopted subsection (b) also provides the executive director with the flexibility to use financial assurance for aquifer restoration of any production area under the same area permit. Existing subsection (b) is adopted to be relettered as subsection (c).

The commission adopts the amendment to §37.9050 to provide for the financial test and the parent company guarantee financial assurance mechanisms for licenses under Chapter 336, Subchapter M. The financial test was an option available under the Department of State Health Services (DSHS or Department) rules for licensees for storage and processing. The parent company guarantee was also an option available under the Department rules. Therefore, the commission is adding a provision in Subchapter T, §37.9050 to provide for wording similar to the Department rule in 25 TAC §289.252(ii)(3). THSC, §401.109(a) states that the commission may require a holder of a license issued by the agency to provide security acceptable to the agency to assure performance of the license holder's obligations under this chapter. THSC, §401.109(c) states that the amount and type of security required shall be determined under agency rules and lists criteria. The financial test is considered other security acceptable to the agency as stated in THSC, §401.109(d)(7). This financial assurance mechanism already existed in the Department rule in 25 TAC §289.252(ii)(3) and the commission now adds a similar rule. Additionally, §37.9050(f)(4) and (11) are revised in response to comments under Chapter 336 requesting that funds be payable to the State of Texas but consistent with THSC, §401.305(b) that states, in part, that money received by the commission shall be deposited to the credit of the perpetual care account.

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 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 adopted amendments to Chapter 37 establish the financial assurance requirements for radioactive material licenses for source material recovery, by-product disposal and commercial radioactive substances storage and processing. Financial assurance was already required by the DSHS prior to the transfer of these programs to the commission. The adopted rules implement financial assurance requirements that utilize financial instruments approved by the TCEQ, determine the timing for establishing financial assurance, and the triggers for the commission to call upon posted financial assurance. The adopted 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 financial assurance was already required for these licensing programs. The amendments only change requirements for how financial assurance is administered by the commission including the type and wording of allowable financial instruments, the timing for establishing financial assurance, and the triggering events for calling financial assurance. While there could be new costs associated with obtaining a financial assurance mechanism that meets the requirements of the adopted rules, the commission does not expect that the costs to adversely affect the

economy, productivity, or competition in a material way. The rulemaking action also amends technical requirements for these licensing programs and establishes fees for applications and waste disposal in Chapter 336, amends technical requirements for injection wells and other wells for in situ uranium recovery in Chapter 331, amends public notice requirements in Chapter 39, amends public participation requirements in Chapter 55, and amends application requirements and injection well permit term limits in Chapter 305.

Furthermore, the adopted 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.

THSC, Chapter 401, authorizes the commission to regulate the disposal of most radioactive substances in Texas. THSC, §§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 adopted rules are compatible with federal law.

The adopted rules do not exceed an express requirement of state law. THSC, Chapter 401, establishes general requirements, including requirements for public notices, 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 THSC, Chapter 401, as provided in SB 1604.

The adopted 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 adopted 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 THSC, Chapter 401. THSC, §§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 comments regarding the draft regulatory impact analysis during the public comment period. No comments were received on the draft regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these rules and performed a preliminary assessment of whether the Private Real Property Rights Preservation Act, Texas Government Code, Chapter 2007 is applicable. The commission's preliminary assessment indicates that the Private Real Property Rights Preservation Act does not apply to these adopted rules because these adopted rules implement SB 1604, transferring certain regulatory responsibilities from the department to the commission and is an action reasonably taken to fulfill an obligation mandated by federal law. Financial assurance is required for these licensing programs under the NRC's requirements.

Nevertheless, the commission further evaluated these adopted rules and performed a preliminary assessment of whether these adopted rules constitute a taking under Texas Government Code, Chapter 2007. The purpose of these rules is to implement changes to the TRCA required by SB 1604, 80th Legislature, 2007, for the establishment of financial assurance for licenses authorizing disposal of by-product material, recovery of source material, and commercial radioactive substances processing and storage. The adopted rules to Chapter 37 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 adopted 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 adopted rules establish financial assurance requirements and do not affect real property. Financial assurance was already required by DSHS prior to the transfer of these programs to the commission. Therefore, the adopted 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 invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received on the coastal management program.

PUBLIC COMMENT

The commission held a public hearing on September 16, 2008. The public comment period closed on October 6, 2008. The commission received comments from Mesteña Uranium, LLC (Mesteña), NRC, Lone Star Chapter of the Sierra Club (Sierra Club), Texas Mining and Reclamation Association (TMRA), URI, Inc. (URI), and Hance Scarborough L.L.P. on behalf of Waste Control Specialists, LLC (WCS).

RESPONSE TO COMMENTS

Definitions

The NRC commented that the definition of "closure" in §37.9035 is inconsistent with its definition of "closure" in §336.1105. The latter definition is compatible with the NRC's definition of "closure." The former definition is more closely associated with closure activities. NRC requested the TCEQ to have a consistent definition of "closure" throughout its regulations or more explicitly refine the definition of

"closure" in §37.9035 to specify how it relates to the financial assurance requirements to avoid duplication and to meet the Compatibility Category A assigned to the definitions of 10 Code of Federal Regulations (CFR) Part 40 Appendix A.

The definition of "closure" in §336.1105 is the correct comparison for meeting the Compatibility Category A assigned to the definitions of 10 CFR Part 40 Appendix A. The §336.1105 definition of closure is specifically related to source material recovery and is comparable to the terms given in 10 CFR Part 40. The definition of closure in Chapter 37, Subchapter T is broader than the definition of closure in Chapter 336, Subchapter L because the Chapter 37 definition applies to a variety of closure activities and licenses under various Chapter 336 subchapters. The definition of closure in Chapter 336, Subchapter L is compatible with the NRC definition and is also encompassed by the broader Chapter 37 definition. No changes were made in response to this comment.

Submission of Documents

Mesteña and TMRA commented that the proposed language in §37.9040 appears to imply that aquifer restoration is not considered a component of site closure since the language "(other than aquifer restoration)" follows the term "closure." Mesteña requested that "(other than aquifer restoration)" be removed to ensure that the language in §37.9040 remains consistent with other regulatory requirements.

The commission agrees with these comments in part, and disagrees, in part. The term "closure" in §37.9040 does include aquifer restoration. However, changes are not required since the proposed rule did not contain the phrase "(other than aquifer restoration)." The commenters may have reviewed an earlier version of the proposed rules in Chapter 37 prior to *Texas Register* publication

as the proposed rule in §37.9040, as published, did not exclude aquifer restoration. No changes were made in response to this comment.

TMRA commented that the term "injection operations" be used as opposed to "injection of mining fluid" to more fully describe the subsurface emplacement of fluids and therefore harmonize with §331.2(51).

The commission agrees with this comment and has changed the reference from "injection of mining fluid" to "injection operations" for consistency with other rule provisions. Therefore, §37.9040 as well as §336.1125(a) have been revised to reflect this change.

TMRA also expressed concern during the public meeting that the proposed financial assurance language was very confusing and convoluted.

The commission acknowledges that financial assurance is a complex topic and must be viewed within the overall framework of financial assurance regulations. The agency's proposed financial assurance rules list which programs are applicable to Chapter 37, Subchapters S and T. Each subchapter is designed to include the type of available financial assurance mechanisms and relevant criteria regarding their use. Changes have been made to the rules in response to comments to add clarification. No additional changes were made in response to this comment.

Financial Assurance Requirements for Closure, Post Closure, and Corrective Action

URI commented that aquifer restoration cost estimates be provided in an amount no less than the cost estimate as specified in the most recent annual report instead of being approved for each production area

authorization. TMRA additionally commented that the proposed §37.9045(b) does not establish a due date for providing financial assurance for aquifer restoration and that such financial assurance is specifically excluded by proposed rule §37.9040.

The commission does not agree with URI's comment because allowing aquifer restoration cost estimates to be based on the most recent annual report would forfeit the commission's regulatory responsibility to ensure that a formal review and approval process is conducted. The commission agrees with TMRA's comment in part, and disagrees, in part. It is true that §37.9045(b) does not establish a due date for providing financial assurance for aquifer restoration. However, such deadline already exists in §37.9040 which requires financial assurance for closure to be submitted to the executive director 60 days prior to injection operations. By definition, closure includes aquifer restoration in §37.9035. The commenters may have reviewed an earlier version of the proposed rules in Chapter 37 prior to *Texas Register* publication as the proposed rule in §37.9040, as published, did not exclude aquifer restoration. No changes were made in response to this comment.

Financial Assurance Mechanisms

WCS commented that proposed §37.9050(i) restricts the use of the financial test by the licensee in any situation whereby the licensee has a parent company holding majority control of the voting stock of the licensee. WCS argues that most of the commission's other regulatory programs allow licensees the option of a financial self test regardless of parent affiliation due to the protectiveness of the stringent terms of the financial test alone. WCS stated that if the licensee itself satisfies the financial test, it should be allowed to do so even if it has a parent company that holds majority control of its voting stock.

The commission agrees with this comment in part, and disagrees, in part. The commission agrees that a more restrictive criteria exists, however, this requirement was already included in rules promulgated under DSHS, 25 TAC §289.252(gg)(6)(B) pursuant to 10 CFR §30.35(f)(2) and §40.36(e)(2) as well as guidance documents issued by the NRC, NUREG-1757, Vol. 3. DSHS and NRC had determined that such appropriate restriction was warranted and the commission concurs with their assessment. No changes were made in response to this comment.

Sierra Club commented that they would prefer to have aquifer recovery and source-recovery related to in-situ mining captured under Chapter 37, Subchapter T and therefore, Chapter 37, Subchapter Q should be captured under Chapter 37, Subchapter T. Additionally, Sierra Club expressed their support of having all uranium licensees as governed under Chapter 336, Subchapters L and M meet the same strict financial assurance standards as other facilities captured under Chapter 37, Subchapter T thereby disallowing the use of the financial test and parent corporate guarantee completely.

The commission agrees that financial assurance for aquifer restoration should be captured under Chapter 37, Subchapter T and are adopting rules accordingly. However, the commission disagrees that financial assurance for plugging and abandonment of in-situ mining should be moved from Subchapter Q to Chapter 37, Subchapter T. The commission did not propose rules for Subchapter Q since the existing financial assurance mechanisms for plugging and abandonment have performed as required. The commission proposed amendments to §37.9050 to provide for the financial test and the parent company guarantee financial assurance mechanisms for Chapter 336, Subchapter M only for licenses authorizing commercial storage and processing of radioactive

waste. The financial test was an option available under the DSHS rules for storage and processing licensees. The parent company guarantee was also an option available under the DSHS rules. Therefore, the commission proposes a provision in Subchapter T, §37.9050 to provide for such mechanisms similar to the DSHS rules under 25 TAC, §289.252, Subchapter F. THSC, §401.109(a) states that the commission may require a holder of a license issued by the agency to provide security acceptable to the agency to assure performance of the license holder's obligations under this chapter. THSC, §401.109(c) states that the amount and type of security required shall be determined under agency rules and lists criteria. The financial test is considered other security acceptable to the agency as stated in THSC, §401.109(d)(7). No changes were made in response to this comment.

The Sierra Club commented that all facilities should be required to meet the stricter standards under Subchapter T by June of 2009 and that there appears to be a loophole in the proposed rules to preempt facilities under existing DSHS rules, such as WCS's by-product material license, from meeting the stricter Subchapter T requirements.

The commission agrees that all facilities should be required to meet the stricter standards under Subchapter T; however, those licensees with performance bond(s) issued under DSHS rules will have until March 31, 2010 to fully convert their financial assurance. All other licensees will have until June 1, 2009. These revisions are explained in further detail in the corresponding rulemaking under §336.1125 and §336.1235. The commission disagrees with Sierra Club's comment regarding a "loophole" since §336.1125(f), (g) and (i) sufficiently address this issue. The license issued to WCS for by-product material disposal was under Chapter 336, Subchapter L, not Subchapter M which is

for licensing of storage and processing of radioactive waste, and financial assurance for by-product material disposal is addressed in §336.1125(f), (g) and (i). The commission has not issued any new licenses under Subchapter M. No changes were made to this chapter in response to this comment.

Contested Case Hearing

TMRA and URI commented that if an application for a production area authorization is required to include cost estimates for aquifer restoration and plugging and abandonment of injection wells, then every application will have the effect of seeking to amend the form or amount of financial assurance for that production area. Then, according to TMRA and URI, all applications for a production area authorization would be subject to an opportunity for a contested case hearing in contradiction of the intent of SB 1604 and Texas Water Code, §27.0513(d). TMRA and URI commented that production area authorization applications should be required by rule to include cost estimates for aquifer restoration or plugging and abandonment.

The commission does not agree that the requirement to include cost estimates for aquifer restoration and plugging and abandonment of wells as part of an application for a production area authorization conflicts with the intent of SB 1604 and Texas Water Code, §27.0513(d). The commission agrees that cost estimates for aquifer restoration and plugging and abandonment of wells should be included as part of an application for a production area authorization. As an application requirement, cost estimates will be subject to administrative and technical review by the executive director, will be available as part of the application provided in a public location for public review, and will be subject to public comment. A new production area authorization would establish the *initial* cost estimates for aquifer restoration of the production area and plugging and

abandonment of wells within the production area. The commission does not agree that providing an initial cost estimate for aquifer restoration of a production area constitutes an amendment to the type of bond required for aquifer restoration that is contemplated under Texas Water Code, §27.0513(d)(1). The applicant is providing the *initial* cost estimate for aquifer restoration of the production area, not an *amendment* to the type or amount of a bond required for aquifer restoration of the production area. Furthermore, the applicant is providing a *cost estimate* for aquifer restoration as part of the application, not the *financial assurance*. Texas Water Code, §27.0513(d) distinguishes the initial establishment of production area authorization requirements from subsequent amendment of production area authorization requirements. An application for a new production area authorization that provides cost estimates for aquifer restoration of the production area and cost estimates for plugging and abandonment of wells will not be subject to an opportunity for a contested case hearing under the applicability of Texas Water Code, §27.0513(d)(3) or §55.201(i)(11)(C) because the application is not seeking an *amendment* to the type or amount of financial assurance. In order to maintain compatibility with the NRC's requirements, the financial assurance for aquifer restoration is held under the requirements of the radioactive materials license. While the cost estimate for aquifer restoration will be established in a production area authorization, the financial assurance, based on that cost estimate, will be required under the license. The licensee's financial assurance requirements are addressed in Chapter 336, Subchapter L and Chapter 37. Because the financial assurance for aquifer restoration is held under the licensing requirements of Chapter 336, and the financial assurance for well plugging and abandonment is held under the area permit requirements of Chapter 331, an amendment application for the production area authorization is not required and the exception in TWC, §27.0513(d)(3) or §55.201(i)(11)(C) would not be triggered for subsequent updates to financial

assurance for aquifer restoration or well plugging and abandonment for inflation adjustments or cost increases. No changes were made in response to this comment.

SUBCHAPTER S: FINANCIAL ASSURANCE FOR ON SITE DISPOSAL OF RADIOACTIVE SUBSTANCES AND COMMERCIAL NORM DISPOSAL

§37.9001

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §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 TWC and other laws of the state. The amendment is also adopted under Texas Health and Safety Code (THSC), 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 Senate Bill 1604, 80th Legislature, 2007; THSC, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.202, 401.262, 401.412, and 401.2625.

§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 or K of this title (relating to Licensing of Alternative Methods of Disposal of Radioactive Material; Commercial Disposal of Naturally Occurring Radioactive Material Waste From Public Water Systems, respectively). This subchapter establishes requirements and mechanisms for demonstrating financial assurance for closure and post closure.

SUBCHAPTER T: FINANCIAL ASSURANCE FOR RADIOACTIVE SUBSTANCES AND AQUIFER RESTORATION

§§37.9030, 37.9035, 37.9040, 37.9045, and 37.9050

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §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 TWC and other laws of the state. The amendments are also adopted under Texas Health and Safety Code (THSC), 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 THSC, as amended by Senate Bill 1604, 80th Legislature, 2007; THSC, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.202, 401.262, 401.412, and 401.2625.

§37.9030. Applicability.

This subchapter applies to owners or operators required to provide financial assurance under Chapter 336, Subchapters G, H, L, or M of this title (relating to Decommissioning Standards; Licensing Requirements for Near-Surface Land Disposal of Low-Level Radioactive Waste; Licensing of Source Material 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, aquifer 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 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 as provided in Chapter 336, Subchapter L of this title (relating to Licensing of Source Material 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).

(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 or injection operations in a production area.

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

(a) An owner or operator subject to this subchapter shall establish financial assurance for the closure, post closure, and corrective action of the facility that meets the requirements of this section, in addition to the requirements specified under Subchapters A, B, C, and D of this chapter (relating to

General Financial Assurance Requirements; Financial Assurance Requirements for Closure, Post Closure, and Corrective Action; Financial Assurance Mechanisms for Closure, Post Closure, and Corrective Action; and Wording of the Mechanisms for Closure, Post Closure, and Corrective Action).

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

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

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

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

Material 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 to the State of Texas for deposit to the credit of the perpetual care account.

(6) All financial assurance required to be converted to cash by direction of the executive director under §§336.619, 336.736 - 336.738, 336.1125, 336.1235, and 37.101 of this title (relating to Financial Assurance for Decommissioning; Funding for Disposal Site Closure and Stabilization; Funding for Institutional Control; Funding for Corrective Action; Financial Security Requirements; Financial Assurance for Storage and Processing; and Drawing on the Financial Assurance Mechanisms) and paragraph (5) of this subsection shall be payable to the State of Texas for deposit to the credit of the perpetual care account.

(b) Financial assurance for aquifer restoration shall be provided in an amount no less than the cost estimate for aquifer restoration approved for each production area authorization. The executive director shall have discretion to apply financial assurance approved for one production area to the restoration of any other production area.

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

§37.9050. Financial Assurance Mechanisms.

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

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

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

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

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

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

(1) the letter of credit shall be automatically extended unless the issuer provides notice of cancellation at least 90 days before the current expiration date. Under the terms of the letter of credit, the 90 days shall begin on the date when both the owner or operator and the executive director have received the notice, as evidenced by the return receipts; and

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

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

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

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

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

(4) corresponding current cost estimates.

(e) An owner or operator may satisfy the requirements of financial assurance by establishing an external sinking fund as specified in this subsection. An external sinking fund has two components: a sinking fund account and a financial assurance mechanism such that the total of both equals, at all times, the current cost estimate. A sinking fund account is an account segregated from the owner's or operator's assets and is outside the owner's or operator's administrative control. As the value of the sinking fund account increases, the value of the second financial assurance mechanism decreases. When the external sinking fund account is equal to the current cost estimate, the second financial assurance mechanism will no longer be required to be maintained.

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

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

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

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

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

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

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

to the State of Texas for deposit to the credit of the perpetual care account if the executive director does not approve acceptable replacement financial assurance within 90 days of receiving notice by certified mail from the insurer of its election to cancel, terminate, or not renew the policy.

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

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

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

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

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

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

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

(g) This subsection applies only to owner or operators required to provide financial assurance under Chapter 336, Subchapter M of this title (relating to Licensing of Radioactive Substances Processing and Storage Facilities). Owners or 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 or 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.

(h) This subsection only applies to owners or operators required to provide financial assurance under Chapter 336, Subchapter 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 of each signatory.

(i) 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 the company.