The Texas Commission on Environmental Quality (TCEQ, agency or commission) adopts amended §§336.1, 336.101, 336.103, 336.105, 336.107, 336.1105, 336.1109, 336.1113, 336.1125, and 336.1235. The commission adopts new §§336.114, 336.208, 336.210, 336.1301, 336.1303, 336.1305, 336.1307, 336.1309, 336.1311, 336.1313, 336.1315, and 336.1317.

Sections 336.1, 336.210, 336.1105, 336.1125, 336.1235, 336.1303, 336.1305, 336.1307, 336.1309, 336.1311, 336.1315, and 336.1317 are adopted *with changes* to the proposed text and will be republished. Sections 336.101, 336.103, 336.105, 336.107, 336.114, 336.208, 336.1109, 336.1113, 336.1301, and 336.1313 are adopted *without changes* to the proposed text as published in the September 5, 2008, issue of the *Texas Register* (33 TexReg 7487) 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 336 establish the qualifications and duties of the radiation safety officer (RSO) and establish requirements for emergency plans for responding to radioactive material releases; establish financial assurance requirements for licensees for source material recovery, by-product material disposal, and radioactive waste storage and processing; establish application fees for radioactive materials licenses; establish fees for the disposal of low-level radioactive waste; and clarify requirements that apply to source material recovery and by-product material disposal.

The commission specifically invited public comments on new Subchapter N for the establishment of rates to be charged for low-level radioactive waste disposal fees, and regarding whether the opportunity for a contested case hearing before the State Office of Administrative Hearings should be available to provide a proposal for decision to be considered by the commission to establish the maximum disposal rates by rule. The commission received many comments in response to these issues and they are addressed in the RESPONSE TO COMMENTS section of the preamble.

Corresponding rulemaking is published in this issue of the *Texas Register* concerning 30 TAC Chapters 37, 39, 55, 305, and 331.

SECTION BY SECTION DISCUSSION

The commission adopts the amendment to §336.1, Scope and General Provisions, to correct typographical errors. In particular, Texas Mining and Reclamation Association (TMRA) noted that the abbreviation for

picocuries per gram is "pCi/g" and not "PCi/G" as shown in §336.1(f)(3), and this was corrected in the adopted amendments.

The commission adopts the amendment to §336.101(a) to include fees for commercial disposal of radioactive material, including fees for compact waste disposal as provided in THSC, §401.245. The commission also adopts the amendment to §336.101(b)(2) to spell out the acronym CFR (Code of Federal Regulations).

The commission adopts the amendment to establish various application fees for amendment and renewal of licenses under Chapter 336. The current rules do not address the applicable fee for all types of applications under Chapter 336. Under THSC, §401.301 and §401.412, the commission may assess and collect a fee for each application in an amount sufficient to recover reasonable costs to administer its authority under THSC, Chapter 401.

The commission adopts §336.103(d) to establish an application fee of $50,000 for a major amendment of a license issued under Chapter 336, Subchapter H, Licensing Requirements for Near-Surface Land Disposal of Low-Level Radioactive Waste. The commission determined that this application fee amount was sufficient to recover the cost to administer a major amendment of a license under Subchapter H.

The commission adopts §336.103(e) to establish an application fee of $300,000 for renewal of a license issued under Subchapter H. The commission determined that this application fee amount was sufficient to recover the cost to administer the renewal of a license under Subchapter H.

The commission adopts §336.103(f) to implement THSC, §401.2445, which requires a compact waste disposal facility license holder to remit to the commission 5% of the gross receipts from compact waste received at the compact waste disposal facility and any federal facility waste received at the federal facility waste disposal facility. Payments should be made within 30 days of the end of each quarter.

The commission adopts §336.103(g) to implement THSC, §401.244, which requires compact waste disposal facility license holders to remit directly to the host county 5% of the gross receipts from compact waste received at the compact waste disposal facility and any federal facility waste received at the federal facility waste disposal facility. Payments should be made within 30 days of the end of each quarter.

The commission adopts the amendment to §336.105(c) to establish an application fee of $10,000 for major amendment of a license issued under Chapter 336, Subchapter L, Licensing of Source Material Recovery and By-Product Material Disposal Facilities, and Subchapter M, Licensing of Radioactive Substances Processing and Storage Facilities. The commission determined that this application fee amount was sufficient to recover the cost to administer a major amendment of a license under Subchapter L.

The commission adopts the amendment to §336.105(d) to establish an application fee of $35,000 for renewal of a license issued under Subchapters L and M. The commission determined that this application fee amount was sufficient to recover the cost to administer the renewal of a license under Subchapters L and M.

The commission adopts the amendment to §336.105(e) to reference the applicable fee schedules for holders of licenses issued under Subchapters L and M, upon permanent cessation of all disposal activities and approval of the final decommissioning plan. The commission determined that the current applicable fee schedules were appropriate for those licenses under Subchapters L and M to recover the administrative cost.

The commission adopts the amendment to §336.105(f) to implement THSC, §401.301(f) to provide for cost recovery for any application for a license issued under Chapter 336.

The commission adopts §336.105(h) to provide an additional 5% annual fee assessed under §336.105(b) to be deposited to the perpetual care account, a dedicated general revenue fund. This provision is adopted to implement THSC, §401.301(d).

The commission adopts §336.105(i) to implement THSC, §401.271(1), which requires the holder of a license authorizing disposal of a radioactive substance from other persons to remit to the commission 5% of the holder's gross receipts received from disposal operations under a license. The Comptroller's office requested the commission collect the 5% of the holder's gross receipts and deposit it into the General Revenue account. Section 336.105(i) does not apply to the disposal of low-level radioactive waste, neither compact waste nor federal facility waste.

The commission adopts §336.105(j) to implement THSC, §401.271(2), which requires the holder of a license authorizing disposal of a radioactive substance from other persons to remit directly to the host

county 5% of the gross receipts. The remission to the host county under this subsection does not apply to disposal of low-level radioactive waste, neither compact waste nor federal facility waste.

The commission adopts the amendment to §336.107(a) to require that payment for annual fees shall be due on or before October 31st of each year. Section 336.107(b) is adopted as amended to provide that annual fees may be prorated for a period less than 12 months to accommodate the due date established in §336.107(a).

The commission adopts new §336.114, Fee For Fixed Nuclear Facilities, to implement THSC, §401.302, which requires an annual fee from the operator of each nuclear reactor or other fixed nuclear facility in the state that uses special nuclear material. The amount of fees collected may not exceed the actual expenses that arise from emergency planning and implementation and environmental surveillance activities.

The commission adopts new §336.208, Radiation Safety Officer, to include requirements for RSO qualifications and duties. This rule language is taken from 25 TAC §289.202 and was inadvertently left out in the SB 1604 Implementation Phase I Rulemaking (Rule Project Number 2007-028-336-PR). New §336.208 establishes the minimum qualifications for an RSO for all licenses under Chapter 336.

The commission adopts new §336.210, Emergency Plan for Responding to a Release, to include requirements for emergency plans. This rule language is taken from 25 TAC §289.202 and was inadvertently left out in the SB 1604 Implementation Phase I Rulemaking. New §336.210 establishes the requirements for emergency planning for all licenses under Chapter 336.

The commission adopts the amendment to §336.1105, Definitions, by clarifying the definitions of "Surface Impoundments" and "Uranium Recovery"; adding definitions for "By-Product Material Disposal Cell," "By-Product Material Pond," "In situ leach," and "In situ recovery"; modifying and adding language to the definition of "Operation"; and adding definitions for "Reclamation" and "Restoration." These changes are made in an effort to clearly differentiate between conventional and in situ uranium recovery and to specify that reclamation and restoration are decommissioning activities. In response to comments from TMRA and Mesteña Uranium, L.L.C., the proposed definition for "closure" was modified so that it could be used for either by-product material production alone or in combination with by-product material disposal. The definition for "reclamation plan" was expanded to include in situ recovery facilities and by-product material disposal facilities. A definition for "decommissioning plan" was added to clarify its meaning and to link it to the definition of "decommission" in §336.2(30). Finally, the definition for "Uranium Recovery" was modified to demonstrate the equivalency of the term "uranium milling" used by the United States Nuclear Regulatory Commission (NRC) by dropping the phrase "source material recovery" and adding the phrase "and as it pertains to uranium ore only." Definitions were also renumbered due to the addition of the new definition.

The commission adopts the amendment to §336.1109, General Requirements for the Issuance of Specific Licenses, to eliminate the language for RSO qualifications and refer to §336.208 for that information. This allows the consolidation of RSO requirements to one section in the rules that apply to all licenses under Chapter 336.

The commission adopts the amendment to §336.1113, Specific Terms and Conditions of Licenses, by adding new paragraph (4) to require submission of written reports after certain spills or releases. This change ensures that the licensee reports on a spill and includes information about location, cause, corrective steps, and schedule for remediation.

The commission adopts the amendment to §336.1125, Financial Assurance Requirements, by replacing the terms "financial security" to "financial assurance," and "security arrangements" to "financial assurance mechanism." These adopted changes would ensure that they are consistent with the terminology used in Chapter 37, Financial Assurance. The commission also adopts the amendment to §336.1125 by adding the phrase, "injection operations into a production area" to the actions that are prohibited before the establishment of financial assurance mechanism and adding language that would require the licensee or applicant to calculate restoration financial assurance amount using certain data. This adopted change would ensure that financial assurance is provided prior to any injection operations and that the licensee uses the correct data when calculating financial assurance for restoration.

The commission adopts §336.1125(d) - (i) to establish requirements for financial assurance. The commission adopts these new subsections to provide that financial assurance mechanisms submitted to comply with the requirements of Subchapter L must meet the requirements of Chapter 37, Subchapter T. The commission's financial assurance requirements are consolidated in Chapter 37 and establish specific requirements for the type of financial assurance mechanisms and the wording for specific financial assurance instruments. Clarifying language has been added since proposal in order to distinguish between certain financial assurance mechanisms that have been submitted to the Department of State Health Services. Due to the complexity of changing the financial assurance that was provided to the Department

of State Health Services complicated by the tightening of credit markets that would likely provide financial assurance mechanisms, additional time has been given to those licensees currently using performance bonds since they will not be acceptable under Chapter 37, Subchapter T and will ultimately need to be converted to another mechanism. Chapter 37, Subchapter T allows the use of payment bonds but does not allow performance bonds. Licensees using financial assurance mechanisms other than performance bonds will have until June 1, 2009 to provide mechanisms that meet all requirements of Chapter 37, Subchapter T. Adopted subsection (i) provides that existing licensees currently using performance bonds who do not choose to provide a new financial assurance mechanism meeting the requirements of Chapter 37, Subchapter T must make certain changes to those performance bonds by June 1, 2009 relating to the change in regulatory authority from the Department of State Health Services to TCEQ. Additionally, they must replace performance bonds with mechanisms meeting the requirements of Chapter 37, Subchapter T by March 31, 2010. The commission believes that this provides a suitable amount of time for licensees to make arrangements for submission of financial assurance mechanisms that are in compliance with commission requirements. In response to comments, §336.1125(e) was revised to be consistent with THSC, §401.305(b).

The commission adopts the amendment to §336.1235, Financial Assurance for Storage and Processing, to establish financial assurance requirements for facilities licensed under Subchapter M. Decommissioning and financial assurance for facilities licensed under Subchapter M are required under the provisions of Chapter 336, Subchapter G, Decommissioning Standards. Financial assurance mechanisms must be provided in accordance with Chapter 37, Subchapter T, Financial Assurance for Radioactive Substances and Aquifer Restoration. New licensees must provide acceptable financial assurance 60 days prior to receipt or possession of radioactive substances. Existing licensees must provide acceptable financial

assurance meeting the requirements of Chapter 37, Subchapter T by June 1, 2009. In addition, once financial assurance is established, a licensee must provide a cost estimate report annually to allow review of cost estimates for decommissioning and submit additional financial assurance to reflect any increase in the cost estimate. In response to comment, the proposed provision prohibiting the use of "self-insurance" has been deleted to eliminate confusion about the use of a parent company guarantee or financial test. Under Chapter 37, Subchapter T, a license for the storage and processing of radioactive waste authorized under Chapter 336, Subchapter M may use a parent company guarantee or financial test. And, all financial assurance required under Chapter 336, Subchapter M must comply with the requirements of Chapter 37.

The commission adopts new Subchapter N to establish fees for low-level radioactive waste disposal. The primary purpose of the rulemaking is to implement HB 1567, 78th Legislature, 2003, SB 1604, 80th Legislature, 2007, and its amendments to THSC, Chapter 401, also known as the TRCA. THSC, §401.245 requires the commission to adopt and periodically revise rules for compact waste disposal fees according to a schedule based on the projected volume of waste received, the projected annual volume of waste, the relative hazard presented by types of waste, and various costs associated with the operating, maintaining and closing of the waste disposal facility. Subchapter N of these rules sets up the process for the submission of a rate application by the licensee to establish maximum disposal rates for low-level radioactive waste disposal. Under this process, the licensee submits a rate application to the executive director for review. The executive director reviews the rate application and recommends a final rate to the commission. In evaluating a proposed rate, the commission uses methods used by the Public Utility Commission of Texas (PUC) under Texas Utilities Code, §§36.051, 36.052, and 36.053, to the extent practicable. The application process is subject to review and participation by the rate payers, the

generators of low-level radioactive waste subject to the Texas compact. A waste generator may request an opportunity for a contested case hearing on the maximum disposal rate. After the conclusion of a hearing on a rate, the commission would consider a proposal for decision and establish the maximum rates that would be the basis of an expedited commission rulemaking setting the final rate schedule in rule. If the rate application is uncontested, the executive director would use the recommended rate as the basis for setting the final rate schedule in a rule adopted by the commission. The process provided in Subchapter N provides an application process, with an opportunity for a contested case hearing, followed by an expedited rulemaking.

The commission adopts new §336.1301, Purpose and Scope, to establish the procedures the commission will use to determine the disposal rate component subject to waste disposed under the provisions of the Texas Low-Level Radioactive Waste Disposal Compact. This disposal rate component does not include any surcharges, importation fees, or any other fees that may be assessed to waste from other entities that is contracted for disposal under the provisions of the Texas Low-Level Radioactive Waste Disposal Compact.

The commission adopts new §336.1303, Definitions, to establish definitions for Subchapter N. Section 336.1303 implements THSC, §401.246(b). These definitions are consistent with the terms used by the PUC under Texas Utilities Code, §§36.051, 36.052, and 36.053. In response to public comments, the commission adds one new definition - "allowable expenses" to clarify which expenses can be added to invested capital. In addition, the commission renames the proposed "capital investment" to "invested capital" in response to comment and to be consistent with terms used in the PUC rules, and adds additional language to "reasonable rate of return" to clarify that the calculation is based on an after-tax

amount. In addition, concerning the term "generator," the commission has clarified that the Compact Commission has the authority to accept other states' low-level radioactive waste, as provided in THSC, Chapter 403.

The commission adopts new §336.1305, Commission Powers, to implement the commission's jurisdiction to establish rates charged by the compact waste disposal license holder in accordance with THSC, §401.245(b). The commission adopts new §336.1305(a) to provide that in establishing the rates, the commission ensures they are fair, just, reasonable, and sufficient. The commission adopts new §336.1305(b) to provide methods by which the commission may arrive at the objective of prescribing and authorizing fair, just, reasonable, and sufficient rates. In response to public comments, the commission adds and adopts a new §336.1305(c) to provide that the licensee bears the burden of proof in showing that a proposed rate is just and reasonable. Due to the addition of this subsection, the commission renumbers the remaining subsections, accordingly. The commission adopts new §336.1305(d) to provide that the commission may refer a request for a contested case hearing to the State Office of Administrative Hearings on the establishment of a rate under Subchapter N. The commission adopts new §336.1305(e) to provide that the commission holds audit authority over the licensee in pursuant to THSC, §401.272. The commission adopts new §336.1305(f) to provide that the commission shall establish, by rule, the maximum disposal rate and schedule. The commission adopts new §336.1305(g) to provide that the commission may delegate the authority to establish the rate under Subchapter N to the executive director if the application is not contested. On an uncontested rate matter, the executive director uses the recommended rate as the basis for setting the final rate schedule in a rule adopted by the commission. The commission adopts new §336.1305(h) to provide that the executive director may initiate revision to the maximum disposal rate when there is good cause, subject to notice and opportunity for a contested case

hearing. In response to public comments, the commission added and adopts new §336.1305(h) to provide that a waste generator may request the executive director initiate a revision to the maximum disposal rate under new §336.1305(h).

The commission adopts new §336.1307, Factors Considered for Maximum Disposal Rates, which provides factors that must be considered in establishing maximum disposal rates. In response to public comments, the commission revises and adopts new §336.1307(1), which provides that the maximum disposal rate should be sufficient to allow the licensee to recover only allowable expenses. This provision is adopted to implement THSC, §401.246(a)(1). In response to public comments, the commission eliminates the proposed new §336.1307(2) and renumbers the remaining subsections accordingly. The elimination of this subsection was made as a result of the changes made in new §336.1307(1) and the expanded definition of "Allowable expenses." The commission adopts new §336.1307(2) to establish that the maximum disposal rate is sufficient to provide for an amount to fund local public projects as required under THSC, §401.244. This provision is adopted to implement THSC, §401.246(a)(3). The commission adopts new §336.1307(3) to establish that the maximum disposal rate is sufficient to provide for a reasonable rate of return to invested capital in the compact waste disposal facility. This provision is adopted to implement THSC, §401.246(a)(4). In response to public comments, the commission adds additional language to clarify which classes of capital shall be considered to determine the reasonable rate of return on invested capital. New §336.1307(4) establishes that the maximum disposal rate is sufficient to provide for an amount necessary to pay the fees required by rule or statute, financial assurance for the facility, and reimburse the commission for the resident inspectors as required under THSC, §401.206. This provision is adopted to implement THSC, §401.246(a)(5).

The commission adopts new §336.1309, Initial Determination of Rates and Fees, to establish the procedures for filing a rate application package by the licensee. The commission adopts new §336.1309(a) to provide that the licensee shall file an application with the commission to establish an initial maximum disposal rate. The application for the initial maximum disposal rate will include all the required documents, and the licensee's revenue requirements. The application will consider all five factors as specified in §336.1307. In response to public comments, the commission adds language that the licensee shall also file with the application a proposed reasonable rate of return on invested capital. New §336.1309(a)(1) provides that the licensee shall submit a rate filing application package in accordance with the application prescribed by the executive director. New §336.1309(a)(2) provides that the executive director shall review the application and recommend a maximum disposal rate to the commission for approval. The rule will also allow the executive director to request additional information during the review process. New §336.1309(a)(3) provides that the licensee shall notify all known customers that will ship or deliver waste to the disposal facility that will submit an application for the initial maximum disposal rate. The notice will be provided by any method directed by the executive director. New §336.1309(a)(4) provides that the executive director shall maintain a website available to the public to monitor the status of the application. In addition, the executive director shall provide notice by publication in the *Texas Register*.

The commission adopts new §336.1309(b) to provide that the commission will establish the initial maximum disposal rate after the notices in §336.1309(c) of this section and the opportunity for a contested case hearing have been made. This will ensure that the waste generators and those affected by this subchapter are given an opportunity to request a contested case hearing. In response to public comments, the commission adds additional language to clarify that only the executive director, licensee or

a waste generator has a right to a contested case hearing. After establishing the initial maximum disposal rates under this section, the commission set the rates by rule as provided in new §336.1305(f). In response to public comments, the commission adds and adopts new §336.1309(c), which provides that a waste generator that requested a contested case hearing must provide certain information from each signatory generator. In response to public comments, the commission adds and adopts new §336.1309(d), which provides that waste generators may initiate a request for contested case hearing by filing individually rather than by joint requests. Due to the addition of §336.1309(c) and (d), the commission renumbers the remaining subsections, accordingly. The commission adopts new §336.1309(e), which provides that the commission shall determine the factors necessary to calculate the inflation, volume, and extraordinary volume adjustments. In response to public comments, the commission adds and adopts new §336.1309(f), which provides a true-up mechanism for the licensee to determine whether the initial interim rates were sufficient to cover the actual cost of the waste disposal. New §336.1309(g) is added since proposal to clarify that the maximum disposal rates determined by the commission under Subchapter N provide the basis for the rate schedule that is adopted by rule.

The commission adopts new §336.1311, Revisions to Maximum Disposal Rates, to establish the procedures for determining maximum disposal rates to comply with THSC, §§401.245, 401.246 and 401.247 and to be consistent, to the extent practicable, with the process used by the PUC under the Texas Utilities Code, §§36.051, 36.052, and 36.053. The commission adopts new §336.1311(a), which provides the procedure for determining the maximum disposal rates that a licensee may charge waste generators. The commission adopts new §336.1311(b), which establishes that initially, the maximum disposal rate shall be the initial rates established pursuant to §336.1309. The commission adopts new §336.1311(c), which provides the maximum disposal rates shall be adjusted in January of each year. The commission

adopts new §336.1311(d), which establishes procedures for the licensee to file for revisions to the maximum disposal rates. In response to public comments, the commission adds the term "application" to the subsection for clarification. In addition, the commission adds language to clarify that the licensee may file for a revision to the maximum disposal rates due to changes in the licensee's revenue requirements. An application for a revision is subject to the same process and opportunities for contested case hearing as an application for the initial disposal rates. The commission adopts new §336.1311(e), which establishes that an application for revisions to the maximum disposal rate must comply with the requirements of §336.1309(a) and (b) of Subchapter N. In response to public comments, the commission adds language for clarification that when considering revisions to maximum disposal rates allowable expenses will only include the licensee's known and measurable test year expenses. The commission adopts new §336.1311(f), which establishes that a licensee must provide notice to its customers concurrent with the filing of an application, as consistent with §336.1309(a)(3), for revisions to the maximum disposal rate, including inflation and volume adjustments.

The commission adopts new §336.1313, Extraordinary Volume Adjustment, to establish the procedures for determining an extraordinary volume adjustment to be considered for disposal of non-routine, large volumes of waste, such as components of a nuclear power reactor. The commission adopts new §336.1313(a) to provide a method for establishing the extraordinary volume adjustment. The commission adopts new §336.1313(b) to provide a method for subsequent calculation of the volume adjustment.

The commission adopts new §336.1315, Revenue Statements and Consideration of Payment to Affiliate, to establish the procedures for revenue statements and fees to implement THSC, §§401.245, 401.246, and 401.247 and to establish the criteria for consideration of payments to affiliates. The commission adopts

new §336.1315(a) for the licensee of a compact waste facility to file the audited financial statement showing its gross operating revenue for the preceding calendar year for determination of the waste disposal fee. The commission determined that an audited financial statement showing gross operating revenue is required to calculate the waste disposal fee as described in THSC, §401.246(a). The licensee shall also include a validation of payments made in §336.103(f) and (g) of Subchapter B. In response to public comments, the month of March was changed to April to provide the licensee sufficient time to complete the audited financial statements. In addition, the commission adds new language that the licensee shall provide a statement to reflect the licensee's revenues and allowable expenses for the previous year.

The commission adopts new §336.1315(b) to establish the acceptable form of an audited financial statement. It must be prepared in accordance with Generally Accepted Accounting Principles (GAAP) and audited by a Certified Public Accounting (CPA) firm. The licensee will also include the Auditor's Report from the CPA indicating an "unqualified" opinion of the licensee's financial statements. In response to public comments, the commission adds and adopts new §336.1315(c) for the licensee to provide an audited cost statement of all investment and operating cost for the preceding calendar year. In response to public comments, the commission adds and adopts new §336.1315(d) for the licensee to provide all revenues and costs upon request by the executive director to evaluate whether revision of the disposal rates under §336.1305 may be necessary.

In response to public comments, the commission adds and adopts new §336.1315(e) - (i) to establish the criteria for consideration of payments to affiliates. The new subsections are consistent with PUC under Texas Utilities Code, §36.058, (Consideration of Payment to Affiliate). The commission adds and adopts

new §336.1315(e) to establish the allowable expenses and capital cost acceptable for payment to affiliates of the licensee. The commission adds and adopts new §336.1315(f) to establish that the commission must issue a finding as to what extent the payments to affiliates are deemed as reasonable and necessary for each item or class of items. The commission adds and adopts new §336.1315(g) to provide that a finding must include a specific finding of the reasonableness and necessity of each item or class of item allowed and that a price charged to the licensee is not higher than prices charged by the supplying affiliate for the same item or class of items to others. The commission adds and adopts new §336.1315(h) to provide for the commission to determine whether the affiliate transaction based on the conditions and circumstances are reasonably comparable to quantity, terms, date of contract, and place of delivery, and allow for appropriate differences based on that determination. The commission adds and adopts new §336.1315(i) to provide the commission the ability to determine a reasonable level of the affiliate expense if it finds that an affiliate expense for the test period is unreasonable.

The commission adopts new §336.1317, Contracted Disposal Rates, to establish the procedures for determining contracted disposal rates. The commission adopts new §336.1317(a) to allow the licensee to contract with any person to provide a contract disposal rate that is lower than the maximum disposal rate. The commission adopts new §336.1317(b) to provide a mechanism for commission approval of a contract or contract amendment. In response to public comments, the commission adds the word "unreasonable" to this section to clarify that a contract disposal rate must not result in unreasonable discrimination between generators for the same services provided by the licensee.

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 amends Chapter 336 for the regulation of radioactive materials. The rulemaking to Chapter 336 establishes the qualifications and duties of the RSO and radiation safety committee, establishes requirements for emergency plans for responding to releases, establishes application fees for radioactive materials licenses, establishes fees for the disposal of low-level radioactive waste, and clarifies requirements that apply to source material recovery and by-product disposal. The rulemaking does not 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 adopted rules for the RSO, radiation safety committee, and emergency plans are requirements that already applied to the licensing programs at the Department of State Health Services, but were inadvertently omitted from the rules transferred from the department during the Phase 1 rulemaking implementing SB 1604. Additional amendments clarify requirements in Subchapter L that apply to source material recovery or by-product disposal. While these rules do address application fees and waste disposal fees, the commission does not anticipate that the new fees will adversely affect in a material way the economy, productivity, competition, or jobs because costs associated with license application fees or waste disposal fees would be passed on to the various customers of the licensee or waste generators. The rulemaking action also amends application requirements for these licensing programs in Chapter 305, amends technical requirements for injection wells and other wells for in situ

uranium recovery in Chapter 331, amends financial assurance requirements in Chapter 37, amends public notice requirements in Chapter 39, and amends public participation requirements in Chapter 55.

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.

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 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 fees, for the licensing and disposal of radioactive

substances, source material recovery, and commercial radioactive substances storage and processing. THSC, §401.245 requires the commission to adopt compact waste disposal fees by rule. The purpose of the rulemaking is to implement statutory requirements consistent with recent amendments to THSC, Chapter 401, as provided in SB 1604 and HB 1567.

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 the THSC, Chapter 401. THSC, §§401.051, 401.103, 401.104, 401.245, 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 on the Draft Regulatory Impact Analysis Determination. No comments were received.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these rules and performed a preliminary assessment under the Private Real Property Rights Preservation Act, Texas Government Code, Chapter 2007. The commission's preliminary assessment is that implementation of these adopted rules would not constitute a taking of real property.

The purpose of these rules is to implement changes to the TRCA required by SB 1604, 80th Legislature, 2007 and HB 1567, 78th Legislature, 2003 for the licensing of by-product material, recovery of source material, commercial radioactive substances processing and storage, and low-level radioactive waste disposal; as well as fee setting for the disposal of low-level radioactive waste. The adopted rules to Chapter 336 would substantially advance this purpose by establishing the requirements for the licenses that are subject to the transfer of jurisdiction under SB 1604 or changes in HB 1567 and establishing the rate-setting process for the assessment of fees for the disposal of low-level radioactive waste under HB 1567.

Promulgation and enforcement of these adopted 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 address licensing and fee requirements and do not affect real property. The adopted rules would affect those who choose to conduct licensed radioactive materials activities under Chapter 336 or those who generate and dispose low-level radioactive. Therefore, the adopted rules do not affect real property in a manner that is different than would have been affected without these revisions.

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 Advocates for Responsible Disposal in Texas (ARDT), Entergy, Mesteña Uranium, LLC (Mesteña), Lone Star Chapter of the Sierra Club (Sierra Club), South Texas Project (STP), Texas Mining and Reclamation Association (TMRA), URI, Inc. (URI), Hance Scarborough, LLP on behalf of Waste Control Specialists LLC (WCS), and one individual.

RESPONSE TO COMMENTS

General

TMRA commented on §336.1(f)(3) pointing out that the abbreviation for picocuries per gram is "pCi/g" and not "PCi/G."

The radioactivity concentration units shown in the proposed rules have been revised to reflect the correct abbreviations for picocuries per gram.

Radioactive Substance Fees

Mesteña and TMRA commented on §336.105(a)(4), which relates to the amounts of various fees involved with new applications, stating that fees should be justified and equal the cost to conduct a review and appear to be excessive.

The commission assumes this comment refers to §336.105(b)(4) rather than §336.105(a)(4). No changes were proposed to the application fees in §336.105(a)(4) or §336.105(b)(4) as part of this rulemaking. Section 336.105(b)(4) was part of the SB 1604 Implementation Phase I and became effective on February 28, 2008. The application fees reflect the anticipated costs for commission action on a new application. No changes were made in response to this comment.

Mesteña and TMRA commented on §336.105(a)(7) asking for clarification on the word "noncontiguous."

The commission assumes this comment refers to §336.105(b)(7) since there is no §336.105(a)(7). The meaning of noncontiguous is the same as the Webster dictionary definition - (1) not being in actual contact; (2) not touching along a boundary or a point. No changes were proposed to §336.105(b)(7) as part of this rulemaking. Section 336.105(b)(7) was part of the SB 1604 Implementation Phase I and became effective on February 28, 2008. Source material licenses with noncontiguous facilities such as uranium mines in two different locations are subject to a higher annual fee. No changes were made in response to this comment.

Mesteña and TMRA commented on §336.105(a)(9) which relates to the fees proposed in §336.105(a)(7) and the commenter's perception of "double-dipping."

The commission assumes this comment refers to §336.105(b)(9) since there is no §336.105(a)(9). No changes were proposed to §336.105(b)(9) as part of this rulemaking. Section §336.105(b)(9) was part of the SB 1604 Implementation Phase I and became effective on February 28, 2008. Section

336.105(b)(4) lists the annual fees charged for facilities regulated under Subchapter L. Section 336.105(b)(7) identifies two classes of noncontiguous facilities added to a license for which the annual fee is increased by 25%. This 25% increase would cover the additional annual administrative costs to the agency for review and regulation of a larger licensed uranium recovery operation. Section 336.105(b)(9) adds a one-time fee of $28,658 for an in situ wellfield on noncontiguous property to cover the one-time license amendment review costs. No changes were made in response to this comment.

Sierra Club suggested higher fees for a major amendment for Subchapter L or Subchapter M, since they could involve very complicated analysis given the nature of the waste. Sierra Club suggested adding language which would state that an application for a major amendment of a license issued under Subchapter L or M of Chapter 336 be accompanied by an application fee of $25,000.

The commission does not agree with this comment. The commission believes that an application fee of $10,000 is appropriate to recover the commission's cost for a major amendment. Additionally, a provision already exists in §336.105(f) which allows the commission to assess and collect additional fees from the applicant to recover costs such as costs that exceed the $10,000 application fee. No changes were made in response to this comment.

General Licensing

Mesteña and TMRA commented on §336.208(a)(2) which relates to the experience requirement for a RSO. Both commenters suggested that an additional phrase be added to §336.208(a)(2) that would read

"working with radiation detection and measurement equipment and have an understanding of the uranium recovery process" consistent with NRC Regulatory Guide 8.30.

The commission does not agree with this comment. Section 336.208(a)(2) is written to describe general requirements for all RSOs for TCEQ radioactive material licenses, not just RSOs at uranium recovery facilities. The commission agrees that an RSO should have specific knowledge and expertise related to the activity actually authorized in a radioactive material license. It is presumed that the one year of relevant experience working under the direct supervision of the RSO at a uranium or mineral extraction/recovery, radioactive waste processing, or radioactive waste or by-product material disposal facility would include the use of radiation detection and measurement equipment, among other radiologically related activities involved with such work. If specific training requirements warrant identification based on the type of activities authorized in a license, the commission will, and has, listed additional requirements for an RSO in individual licenses. Thus, it was not considered necessary to list in rule all activities that would comprise the desired suite of work experience (e.g., air sampling, both occupational and environmental; bioassay program; radiation survey/detection program in operational areas and at restricted or controlled area boundaries; conduct of a personnel dosimetry program; radon monitoring program; records management; determination of committed effective dose equivalent from monitoring data; calculation of total effective dose equivalent for workers; etc.). No changes were made in response to this comment.

Licensing of Source Material Recovery and By-Product Material Disposal Facilities

Mesteña and TMRA commented on §336.1105 which relates to definitions for the terms "closure," "closure plan," "reclamation," "reclamation plan," restoration," and "decommissioning plan," which is not defined. The commenters suggested that the definitions of the listed terms are internally inconsistent. For instance, "reclamation" appears consistent with "closure," but "reclamation plan" appears to pertain only to disposal areas. TMRA commented that the definition of closure in Chapter 37 is broader in scope. TMRA also commented that "restoration" is limited to groundwater cleanup which is excluded from any financial assurance requirements as proposed in §37.9040.

The definitions for "closure" and "reclamation plan" in §336.1105 have been modified to clarify the differences between in situ recovery and by-product material disposal facilities. An "/or" has been added to the definition of "closure" to indicate the use of the term for either by-product material production alone or in combination with by-product disposal. The definition for "reclamation plan" has been expanded to include the use of reclamation plan for in situ recovery facilities as well as by-product material disposal facilities. A definition for "decommissioning plan" has been added in §336.1105 to clarify its meaning and to link it to the definition of "decommission" in §336.2(29). The definition of closure in Chapter 37, Subchapter T is broader than the definition in Chapter 336, Subchapter L, because Chapter 37, Subchapter T covers financial assurance requirements for various closure activities for various Chapter 336 licensed activities requiring financial assurance, and not just closure as required under Subchapter L of Chapter 336.

Mesteña and TMRA commented about the need to include "thorium" in the definition of uranium recovery in §336.1105(36).

The commission does not agree with this comment. This definition is meant specifically and narrowly for "Uranium Recovery" and to demonstrate the equivalency of the term "uranium milling" used by the NRC. For that purpose, the phrase "source material recovery" was dropped from the definition and the phrase ". . . and as it pertains to uranium ore only . . . " was added to the first sentence in the definition.

Mesteña, TMRA, and URI commented about aquifer restoration and financial security as explained in §336.1125(a)(3), and how it is inconsistent with §37.9040.

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. Section 336.1125(a)(3) as proposed is consistent with Subchapter L for uranium recovery. Aquifer restoration of in situ uranium recovery facility is a component of closure, and financial assurance for closure, including aquifer restoration is required. No changes were made in response to this comment.

TMRA and URI commented that in §336.1125(a)(3) the TCEQ should avoid using the issuance of a production area authorization as the occasion to set or approve the form or amount of financial assurance to be provided by a permittee. TMRA and URI suggested revising §336.1125(a)(3) to remove reference to the production area.

The commission does not agree with this comment. The commission notes that in accordance with proposed new §305.49(b)(6), Additional Contents of Application for an Injection Well Permit, an application for a production area authorization shall be submitted with and contain a cost estimate for aquifer restoration and well plugging and abandonment. The commission intends that the cost estimate for aquifer restoration be included as part of an application for a production area authorization under Chapter 331. The requirement to maintain financial assurance for aquifer restoration based on those cost estimates is required under the radioactive material licensing rules in Subchapter L of Chapter 336. As part of preparing an application for a production area authorization, the owner or operator has completed detailed work on delineating the ore-body to be mined (both in terms of depth and area), installed required monitor wells, and investigated and identified the aquifer characteristics of the production zone for determination of Class III well spacing, at least on an initial basis. Thus, the development of the production area authorization application is the appropriate time to determine the cost estimates for aquifer restoration of the proposed production area. Furthermore, any decision to pursue mining (and obtaining the necessary production area authorization) is based on economic considerations, and the cost required for plugging and abandonment of all wells and for aquifer restoration certainly must be included in any economic analysis. The commission realizes that these cost estimates will be adjusted over time. Submission of these estimates in an application for a production area authorization provides the commission the opportunity to review and comment on the factors taken into consideration to estimate these costs as part of the application process. For example, factors such as required pore volumes, flare factors, effective porosity of the production zone, pumping and electrical costs, water treatment and disposal costs, and laboratory analytical costs all are factors to be considered regarding the cost of aquifer restoration. If a permittee believes that it will be too

difficult to establish a cost estimate for restoring an entire production area up front as part of the application of the production area authorization, the permittee should consider reducing the size of the production area. In any case, as required under proposed new §305.49(b)(6), these estimates must be included in an application for a production area authorization. In addition, as part of an application, these cost estimates would be available for review by the public and subject to public comment.

TMRA further 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, §336.1125(a) has been revised to reflect this change.

Mesteña, TMRA, and URI commented on a conflict between §336.1125(d), which requires a licensee to take into account total costs resulting from the hiring of a third-party contractor to perform decommissioning work in establishing financial assurance mechanisms, and §331.143, which requires an owner or operator to prepare a financial assurance estimate for well plugging based on the point in the facility's operating life when plugging and abandonment is the most expensive.

The commission does not agree with this comment. Responsibility for financial assurance for plugging and abandonment of wells is required for an UIC control permit under Chapter 331 and

is not a radioactive material licensing requirement under Chapter 336. Because the NRC considers aquifer restoration as part of the closure and decommissioning of an in situ uranium recovery facility, financial assurance for aquifer restoration must be included as part of the licensing requirements to maintain compatibility with the NRC. Financial assurance for aquifer restoration is a requirement for a radioactive material license for in situ recovery of uranium under Subchapter L of Chapter 336. However, the initial cost estimate for aquifer restoration of an individual production area will be included as part of an application for a production area authorization. Subsequent annual review of the financial assurance and cost estimates is required for the radioactive material license under §336.1125(f). No changes were made in response to this comment.

Mesteña, TMRA, and URI commented that financial assurance in §336.1125(e) should be payable to the State of Texas, not the State of Texas Perpetual Care Account.

The commission agrees in part with this comment. THSC, §401.305(b), states, in part, that money received by the commission shall be deposited to the credit of the perpetual care account. Therefore, §336.1125(e) has been revised to be consistent with the statute.

TMRA and URI supported the scope of the proposed §336.1125(f) annual review. The term "performance" includes and is preferable to the term "completion" to describe the legal obligation. The text should make clear that the amount of financial assurance required at any given time does not exceed that required to pay for third-party performance of the outstanding closure obligations under the license under the closure plan at any given time. TMRA and URI further commented that §336.1125(f) should be

revised as follows: "The licensee's financial assurance mechanism and the underlying cost estimates will be reviewed annually by the agency to assure that sufficient funds are available for performance of the licensee's outstanding decommissioning and reclamation obligations under the license in the manner set out in the plan if the work had to be performed by an independent contractor . . .."

The commission does not agree with the comment. Financial assurance in an amount sufficient to complete the closure of the facilities is required. The financial assurance and underlying cost estimates should be reviewed annually to determine if the amount continues to be sufficient to complete the closure based on an assumption that the closure work is performed by an independent contractor. No changes were made in response to the comment.

Licensing of Radioactive Substances Processing and Storage Facilities

WCS commented that proposed §336.1235 would restrict the ability to use "self-insurance, or any arrangement that essentially constitutes self-insurance" in satisfaction of financial assurance requirements. This restriction implements an NRC financial assurance requirement found at 40 CFR §61.62(g) established for the disposal of radioactive waste. This restrictive requirement should not be imposed in the commission's licensing programs where the use of financial test and corporate guarantee mechanisms is expressly permitted. This language may create ambiguity, even though it is clear that financial test and corporate guarantee mechanisms are available for licensees in the commission's storage and processing programs. Proposed §336.1235(d) may wrongly be interpreted to limit the use of such beneficial arrangements with the government and impose additional unwarranted public costs. For these reasons, WCS suggested §336.1235(d) be deleted or at a minimum clarified.

The commission agrees in part and disagrees in part with this comment. Section 336.1235(d) has been deleted to avoid confusion about the use of a parent company guarantee or financial test as an acceptable form of financial assurance and the rest of the section has been renumbered. The parent company guarantee or financial test may be used for financial assurance for a radioactive material license for a radioactive waste storage and processing facility authorized under Subchapter M of Chapter 336. The deletion of proposed §336.1235(d) does not mean that other arrangements, such as contracts with a state or federal agency, provide an acceptable form of financial assurance. Under adopted §336.1235(d), financial assurance required for a license under Subchapter M of Chapter 336 must comply with the requirements of Chapter 37, Subchapter T.

Sierra Club commented that §336.1235(f) contains a potential loophole since the Waste Control Specialists by-product material license was issued by TCEQ, not by the Department of State Health Services. Sierra Club suggested clarifying language be added to state licenses with financial assurance mechanisms issued prior to September 1, 2008, including those issued to meet the requirements of the Texas Department of State Health Services, must submit a replacement mechanism(s).

Existing licensees must provide acceptable financial assurance meeting the requirements of Chapter 37, Subchapter T by June 1, 2009. The license issued to Waste Control Specialists 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) and (i). The commission has not issued any new licenses under Subchapter M. The license issued to Waste Control Specialists for storage and

processing was issued at the Department of State Health Services under the rules governing them at the time. No changes were made in response to this comment.

Fees for Low-Level Radioactive Waste Disposal

General

ARDT commented that a rate application should be subject to an opportunity for a contested case hearing. Entergy commented that it supports the provisions that allow for the opportunity for a contested case hearing and believes it is very important to provide generators with the ability to conduct discovery and examine witness on a rate application. STP commented that it is important for nuclear facilities subject to the Texas Low-Level Radioactive Waste Disposal Compact to have an opportunity to request a contested case hearing on a rate application. STP commented that an application process subject to opportunity for a contested case hearing is needed to test the veracity of information and assumptions used to establish a rate. Sierra Club was supportive of the nuclear industry's position concerning the right to a contested case hearing when determining the maximum disposal rates. Sierra Club generally supported that the provisions in the PUC's regulations for rate cases should be applied in the TCEQ regulations when establishing the maximum disposal rates.

The commission agrees with the comments. Fairness and transparency of the process dictate that the rate setting be subjected to an application process where the executive director can review submitted information, request additional information, and that the ratepayers have an opportunity for a contested case hearing on the application. THSC, §401.245(b) does require that the commission establish waste disposal fees by rule. The process provided in Subchapter N integrates these necessary components into an application process, with an opportunity for a

contested case hearing, followed by an expedited rulemaking. Under the process established in Chapter 336, Subchapter N, the licensee submits an application to establish initial maximum disposal rates. The executive director reviews the application with the ability to seek additional information on the application from the licensee and recommends a rate to the commission. The executive director provides notice with an opportunity for a contested case hearing on the rate. If the rate is uncontested, the executive director would proceed with rulemaking to establish the recommended rate in rule for final adoption by the commission. If the matter is contested, the executive director would refer the application to the State Office of Administrative Hearing for a hearing on the rate application. At the conclusion of the hearing, the commission would consider the administrative law judge's proposal and the evidentiary record. The commission would order the executive director to initiate an expedited rulemaking on a rate based on the commission's decision on the contested rate application. The rate would be final when adopted by rule by the commission. The same process would be used for any subsequent revision of the rate. No changes were made in response to this comment.

Definitions

ARDT and WCS suggested that a definition of "Allowable expenses" be added to the rules because it is one of the components for determining cost service (or revenue requirements) upon which disposal rates are based. This clarifies that the maximum disposal rates will only be based on the actual costs of disposal. ARDT and WCS stated that the definition should apply to services rendered to "generators" rather than to the "public." WCS further stated that the "allowable expenses" for depreciation, and a cap on other expenses (advertising, contributions and donations) should be defined as stated in the PUC Rule, 16 TAC §25.231(b).

The commission agrees with these comments. The definition of "Allowable expenses," consistent with the PUC's definition of "Allowable expenses" in 16 TAC §25.231(b), has been added to the rule which outlines what components to consider for determining the cost service upon which the disposal rates are based. The definition also defines depreciation to be computed on a straight-line basis with the option that other method of depreciation may be used where it is more equitable to recover the cost of the facility, and the cap of three-tenths of one percent (0.3%) maximum of gross receipts. The commission has added the term "gross receipts" for further clarification in §336.1303(1)(f).

WCS commented that "Allowable expenses" include "reasonable and necessary rate case expenses." However, ARDT did not agree with inclusion of rate case expenses in the proposed definition for "Allowable expense." WCS believed that regulated entities may incur rate-making expenses should there be any disputes to recover those costs. WCS commented that the rate case expenses in a PUC proceeding are recoverable and are amortized over a very short period.

Although the decision was made to not add the specific term "rate case expenses" in the definition of "allowable expenses," there is not an implied prohibition for an applicant to seek reimbursement of rate case expenses in the rate setting proceeding. Rather, specific issues related to allowable expenses are intended to be addressed in the rate setting process. No change was made in response to this comment.

ARDT and WCS recognized the authority under the Texas Low-Level Radioactive Waste Disposal Compact. Therefore, they suggested that the definition of "generator" be clarified to include generators in states other than Texas and Vermont in the event that the Compact Commission allows low-level radioactive waste to be accepted at the compact site from other states. The purpose of the clarification is to ensure that waste generated outside of Texas or Vermont and disposed of at the compact site is subject to the same maximum disposal rates as waste generated in Texas and Vermont, and to ensure that the maximum disposal rates reflect the actual volume of waste.

The definition of "generator" was changed to clarify that the Compact Commission has the authority to accept other states' low-level radioactive waste, as provided in THSC, Chapter 403. Under the terms of the compact, new states can be added as party states to the compact or the Compact Commission can approve a contract for the importation of waste into the host state for disposal. Specifically, the definition was revised to include "and is subject to the compact." These rules establish procedures the commission will use to determine a disposal rate which may only be a component of a Compact Commission disposal rate under the provisions of the Texas Low-Level Radioactive Waste Disposal Compact. The disposal rate subject to these rules does not include any surcharges, importation fees, or any other fees that may be assessed to waste from other entities that is contracted for disposal under the provisions of the Texas Low-Level Radioactive Waste Disposal Compact.

ARDT and WCS suggested that the proposed definition "Capital investment" be changed to "Invested capital" which is consistent with the term most often used in the THSC, Chapter 401. ARDT supports the

proposed definition of the term whether it is named "Capital investment" or "Invested capital," as it provides maximum flexibility to determine the costs for inclusion in the disposal rate base.

The commission agrees with the comments. The definition "Capital investment" was renamed as "Invested capital" which is consistent with the THSC, Chapter 401, and 16 TAC §25.231(c)(2). In addition, the commission added the word "accumulated" to depreciation within the definition of "Invested capital," which is consistent with 16 TAC §25.231(c)(2).

WCS commented that the definition "Invested capital" should be expanded to include working capital allowances, certain adjustments for intangible assets (regulatory assets and customer deposits), construction work in progress, self-insurance reserve accounts, permits, and post-test year adjustments for known and measurable rate case additions or decreases. WCS stated that the definition should allow for "known and measurable" adjustments to invested capital to ensure that the maximum disposal rates will be reasonable for the effective period of time. ARDT opposed the expanded definition of "Invested capital" and supported the language originally proposed as "Capital investment."

Although the decision was made to not add the illustrative list in the definition of "invested capital," there is not an implied exclusion of those possible cost components in the rate setting proceeding. Rather, specific issues related to recoverable costs as "invested capital" are intended to be addressed in the rate setting process. No change was made in response to this comment.

An individual suggested that the term "Reasonable rate of return" should include additional language to clarify that the rate of return be on an "after-tax" basis. The individual stated that investors evaluate all

investments on an "after-tax" basis and identify all the risk factors to determine which investment provides the biggest return. Therefore, TCEQ should calculate the "reasonable rate of return" on invested capital on an "after-tax" basis. This will ensure that the licensee will have sufficient funds to meet its working capital needs and environmental obligations, such as monitoring, cleanup, and restoration.

The commission agrees with the comment. The definition "Reasonable rate of return" was modified to clarify that the calculation should be on an "after-tax" basis.

ARDT suggested that curies be deleted from the definition of "Relative hazard" in order to limit the ability of the licensee to impose an additional surcharge based on curies. ARDT stated that maximum disposal rates are a more useful measure of hazard than curies, and measuring hazard by dose rate encompasses the same risk factors. The ability to charge for curies would allow increased costs disproportionably without consideration of the radiotoxicity over the numerous isotopes to be shipped to the compact facility. Thus, maximum disposal rates based on both dose rate and on curies was tantamount to allowing the licensee to charge two or more times for essentially the same risk factor. WCS agreed with the definition of "Relative hazard" as proposed with the distinction that relative hazard be based on curies.

The commission does not agree with revision of the definition of "Relative hazard." The term "Relative hazard" is used in THSC, §401.245 as one of the criteria to establish Compact waste disposal fees. In determining relative hazard, the commission is required to consider the radioactive, physical, and chemical properties of each type of low-level radioactive waste. Dose rate does not necessarily encompass the same risk factors as the total radioactivity of the waste in curies; that is, dose rate and curies are not the same. Limits on the total number of curies are

specified in the license because the total radioactivity of the waste impacts the performance assessment of the waste disposal facility. Further, basing the fees solely on dose rate rather than the total radioactivity of the waste as well as dose rate may disproportionately impact some small generators. No changes were made in response to this comment.

ARDT suggested that the proposed definition "Revenue requirement" be modified to include the name change of "Capital investment" to "Invested capital," and "Allowable expenses." WCS agreed with this proposed change.

The commission agrees with the comments. The definition "Revenue requirement" was modified to reflect the new term "Allowable expenses" and the renamed term "Invested capital."

Commission Powers

WCS suggested changing the term "leasehold" to "real property." WCS stated that leasehold is one type of real property interest that a licensee may own. By using the term "real property" instead would be more encompassing which includes all types of real property interest that a licensee may obtain.

The commission agrees with this comment. The term "leasehold" has been changed to "real property" in §336.1305(a).

ARDT supported the proposed language of §336.1305(b) where the "commission may use any standard, formula, method, or theory of valuation reasonably calculated to arrive at the objective of prescribing and authorizing fair, just, reasonable, and sufficient rates." WCS suggested deleting the proposed language, as

it appears to be in conflict with THSC, §401.246(b), which prescribes that the commission shall use the methods used by the PUC.

The commission partially agrees with the comments. The proposed language is consistent with the general principles of administrative law which prohibit a rate from being arbitrary and capricious. THSC, §401.246(b) requires the commission to use the methods used by the PUC, to the extent practicable, when establishing overall revenues, reasonable return, and invested capital for the purpose of establishing compact waste disposal fees. Because the licensee submits a rate application to the commission, the licensee can propose the standard, method, theory of valuation calculated to arrive at a fair, just, reasonable and sufficient rate. No change was made in response to this comment.

ARDT and WCS commented that §336.1305 should include a new subsection stating that the licensee bears the initial burden of proving that the disposal rates are reasonable if a rate rulemaking is ordered. The language proposed is consistent with the Texas Utilities Code, §36.006.

The commission agrees with the comments. New §336.1305(c) was added to require that the licensee bears the burden of proving that the disposal rates are reasonable in a contested case hearing on a rate application.

ARDT suggested that §336.1305 include a mechanism to allow for a "true-up proceeding" after the initial rate determination. The maximum disposal rates should be based on actual costs of a test year as opposed to projected costs. Testing the validity of projected costs may be futile and could result in rates that do not

reflect true costs of services, thus requiring subsequent corrective action to align charged rates with actual costs of service. In a test year, rates are based on actual costs instead of projected costs, and the rate adopted at the end of the test year may be adjusted over time based on known and measurable changes.

The commission agrees with the comment. Section 336.1305(h) was amended to include a "true-up proceeding" for revising an existing disposal rate. This change will allow a mechanism to determine the true cost for the disposal of waste if there is shortfall or overage in money collected. In addition, the licensee may submit an application for a rate revision under §336.1311.

ARDT proposed that §336.1305 should include a new subsection that allows the generator the opportunity to initiate a revision to the maximum disposal rates if a generator can demonstrate to the executive director that good cause exists. Without this opportunity, the rules could be interpreted to allow only a rate revision if requested by the licensee or if the executive director determined a rate revision should be initiated.

The commission agrees with the comment. The commission has added §336.1305(i) to allow a generator the opportunity to initiate a revision to the maximum disposal rates if they can demonstrate that good cause exists.

Factors Considered for Maximum Disposal Rates

ARDT commented that §336.1307 include the ratemaking concept from Texas Utilities Code, §36.201 as a factor in determining the maximum disposal rates, which does not allow a rate which is automatically adjusted and passes through a change in costs.

The commission agrees with this comment. THSC, §401.246(b) requires the commission to use the methods used by the PUC, to the extent practicable, when establishing overall revenues, reasonable return, and invested capital for the purpose of establishing compact waste disposal fees. The ratemaking concepts as described in the Texas Utilities Code, §36.201 for the most part were incorporated into the various sections of the subchapter.

ARDT and WCS suggested that the language as previously commented on the "Allowable expenses" be used in lieu of §336.1307(1) and (2). The new language should include specific expenses that are not allowed as "Allowable expenses."

The commission agrees with the comments. The definition "Allowable expenses" was added to the definition section in §336.1303, and §336.1307 was revised to include all the disallowable expenses that would not be considered for determining the cost service upon which the disposal rates are based. This subsection is consistent with the PUC's rules in 16 TAC §25.231(b)(2).

ARDT and WCS suggested that this §336.1307 include more details regarding the proper criteria for establishing a reasonable rate of return on invested capital, similar to the language found in 16 TAC §25.231(c). WCS further stated that adding the details would assist the investor to determine whether the return on equity for a low-level radioactive waste disposal facility was reasonable in terms of the financial risk. This would allow WCS to attract venture capital for financing.

The commission agrees with the comments. The PUC's requirements in 16 TAC §25.231(c) does provide sufficiently detailed language to establish proper criteria to determine a reasonable rate of return on invested capital. Section 336.1307(3) was revised to include similar language that pertains to reasonable rate of return on invested capital.

Initial Determination of Rates and Fees

An individual suggested that additional language be added to the list of items that would be submitted with an application to establish the initial waste disposal rate. The individual suggested that "a proposed reasonable rate of return on investment" be identified as basis for the determination of the waste disposal rate.

The commission agrees with the comment. Section 336.1309(a) was modified to include "a proposed reasonable rate of return on investment."

ARDT suggested modifying and adding rule language in §336.1309 to provide that generators also have a right to a contested case hearing on the licensee's rate filing application. However, WCS commented that the proposed language in §336.1309 was not consistent with THSC, §§401.245 - 401.247, where it requires the commission to establish the disposal rate through the rulemaking process and not through the contested case hearing process.

The commission agrees with the comments to allow for an opportunity for a contested case hearing on a rate application. However, the final rate schedule will be established by rule as required by THSC, §401.245(b). Section 336.1309(b) was modified and new §336.1309(c) was added in response

to the comment to allow the generator, licensee or executive director the opportunity for a contested case hearing on the application. The executive director reviews the application with the ability to seek additional information on the application from the licensee and recommends a rate to the commission. The executive director provides notice with an opportunity for a contested case hearing on the rate. New §336.1309(d) was added to clarify that requests for contested case hearings must be filed by individual generators and cannot be filed jointly. If the rate is uncontested, the executive director would proceed to the initiation of a rulemaking to establish the recommended rate in rule for final adoption by the commission. After considering the record in a contested rate application, the commission would determine the maximum disposal rates and direct the executive director to initiate rulemaking to establish the rates in a schedule set out by rule as described in new §336.1309(g).

ARDT supported rates charged during the test year which are temporary or interim rates established by rule of the commission that will remain in effect until a final rate is established. However, ARDT recommended that the commission require a "true-up proceeding." It would require the licensee to either refund to the generators, who paid interim rates, money collected under interim rates that is in excess of the rates finally adopted, or authorize the licensee to bill the generator a surcharge for the shortfall. In both situations, interest would be collected on the refund or billed amount at a rate determined by the commission. This "true-up proceeding" is consistent with Texas Utilities Code, §36.155, relating to Interim Order Establishing Temporary Rates.

The commission partially agrees with this comment. Section 336.1309(f) was amended to include the "true-up proceeding," except for the interest collection, in response to the comment. This

change will allow the licensee a mechanism to determine the true cost for the disposal of waste if there is shortfall or refund in money collected.

Revisions to Maximum Disposal Rates

An individual suggested that additional language be added to §336.1311(c). The individual suggested that "any adjustment shall include a review and updated calculation of reasonable rate of return on investment after taxes, and shall be based on audited financial statements as required by §336.1315(d)."

The commission does not agree with the comment. Section 336.1311(c) allows the commission to adopt a rate schedule with automatic adjustments for inflation and extraordinary volume. If revision of rates are needed because of an updated calculation of reasonable rate of return after taxes or because of new information provided in audited financial statements, the executor director may initiate a rate revision under §336.1305 or the licensee may submit an application to revise the rate under §336.1311. No change has been made in response to this comment.

ARDT suggested adding a new subsection to §336.1311 to allow the licensee to request revisions to the maximum disposal rates based on factors other than the factors enumerated in §336.1311(d) as proposed.

The commission agrees with this comment. New §336.1311(d)(3) was added to this section which states that "changes in the licensee's revenue requirements or in any of the other factors in §336.1307 of this title (relating to Factors Considered for Maximum Disposal Rates) that necessitate a change in the licensee's maximum disposal rates."

ARDT suggested modifying §336.1311 to require that an application to revise the maximum disposal rates which comply with §336.1309(b). This modification is to clarify that the generators have a right to request for a contested case hearing on applications to set or revise the initial maximum disposal rate. ARDT also suggest adding new language to this section to address that "only the licensee's test year expenses as adjusted for known and measurable changes will be considered" for revisions to maximum disposal rates. This is consistent with the requirements in PUC rules, 16 TAC §25.231(b).

The commission agrees with this comment. A generator should have the same opportunities to participate on an application for an initial rate and any subsequent rate revision. The executive director reviews the application with the ability to seek additional information on the application from the licensee and recommends a rate to the commission. The executive director provides notice with an opportunity for a contested case hearing on the rate. If the rate is uncontested, the executive director would proceed to rulemaking to establish the recommended rate in rule for final adoption by the commission. Section 336.1311(e) has been amended in response to this comment.

WCS suggested amending §336.1311 to define "affected generators," include procedures for addressing "affected generators," and the ability to combine the contested case hearing with the rulemaking proceedings. WCS stated that without these suggested changes, the executive director and the licensee would be subjected to substantial resource demands of processing numerous rate revision requests, and increased cost for a contested case hearing and rulemaking proceedings.

The commission does not agree with this comment. The "affected generators" as defined by WCS is not appropriate in this case. Typically, the 10% threshold is useful when the regulated entity has

numerous customers like those of water and wastewater utilities. However in this case, there are only a limited number of waste generators who may use the services of the compact facility. No changes were made in response to this comment.

Extraordinary Volume Adjustment

ARDT supported the proposed language for "Extraordinary Volume Adjustment" in §336.1313. ARDT stated that it would allow for an extraordinary volume of waste received to be factored into the maximum disposal rates as a rate reduction. However, WCS stated that the TCEQ rules should not include proposed language for extraordinary volume adjustments, as the Texas statutes do not speak to those types of adjustments. WCS suggested changing the proposed language for "Extraordinary Volume Adjustment" to include that any revisions to the maximum disposal rates for future years be calculated without any revenues or cost associated to the extraordinary volume adjustments in a prior year. The proposed changes would still provide for the generators to receive a lower price for their disposal of their extraordinary volume, while WCS would benefit by not having that volume used in any calculation of a revision of the maximum disposal rates.

The commission agrees with the comments to include an extraordinary volume adjustment. THSC, §401.245(b) states that "the commission by rule shall adopt and periodically revise compact waste disposal fees according to a schedule that is based on the projected annual volume of low-level radioactive waste received . . .." Even though Texas statutes do not specifically provide for volume discounts, a rate reduction may be appropriate and necessary for large volume shipments. No changes were made in response to these comments.

Revenue Statements

ARDT and WCS suggested some changes to the proposed language for §336.1315 by adding language that the "executive director prescribe a reporting form to adequately reflect the licensee's revenues and allowable expenses." This would ensure that the interested parties receive the information they need (gross receipts and expenses) to review whether WCS' rates are reasonable. In addition, they suggested changing the filing date from March to April to ensure that WCS has time to prepare an accurate report, and correcting the name of the guidance document - "Generally Accepted Accounting Principles."

The commission agrees with the comments. The additional language for a prescribed reporting form will provide additional confidence that executive director will be able to ascertain the correct dollar amounts as required under the THSC, Chapter 401 and §336.103(f) and (g), where certain dollar amounts are allocated to the host county of the compact waste facility and to the Texas Comptroller of Public Accounts, for deposit. Section 336.1315 has been amended to reflect the changes as requested, the filing dates and the spelling correction.

An individual suggested that additional language be added to §336.1315. The individual suggested that "the licensee shall provide an audited cost statement that provides all investment and operating costs for the preceding calendar year." In addition, he suggested that "all revenues and costs shall be provided by the licensee for the commission's annual evaluation of any adjustment in rates as required by §336.1311(c)."

The commission agrees with the comment. New §336.1315(c) and (d) was added in response to the comment. In addition to the required information submitted under §336.1315, the licensee must

provide any information on revenues and costs when requested by the executive director to determine if revision to the disposal rates may be necessary.

Consideration of Payment to Affiliate

ARDT and WCS suggested adding a new section which would govern payments to affiliates of the licensee. The suggested language is from the Texas Utility Code, §36.058 (relating to Consideration of Payment to Affiliate), which governs the recovery of payments made to affiliates by an electric utility. They stated that having this language in the TCEQ rules would eliminate the possibility of TCEQ following the same path that PUC had dealing with recovery of payments to affiliates where they had a great deal of litigation for decades.

The commission agrees with the comment with one exception. Because the compact waste disposal license applicant has a parent company that may request payment for their services from the applicant, special consideration of payments to affiliates may be necessary. However, one of the provisions proposed in the comment allows the licensee to include the affiliate payments in the charges to the generators if there is a mechanism for making the affiliate charges subject to refund pending the commission's finding. In the case of the disposal rates in question, this is not appropriate. The commission does not allow the licensee to charge the generators an interim disposal rate until the commission determines the final maximum disposal rate as provided in the ratemaking process. In response to the comment, the commission has added new subsections to §336.1315 which includes similar language found in Texas Utilities Code, §36.058 that are consistent with this subchapter and ratemaking process.

Contracted Disposal Rates

ARDT and WCS suggested adding the word "unreasonable" to the filing requirement that a contract with a generator does not result in "discrimination between generators receiving like and contemporaneous service under substantially similar circumstances and provides for the recovery of all costs associated with the provision of service." They have indicated this is consistent with PUC's practices and with Texas Utilities Code, §36.003 (Just and Reasonable Rates).

The commission agrees with the comment. The word "unreasonable" was added before the word "discrimination" in §336.1317(b). The general language of the section is consistent with PUC's requirements under the Texas Utilities Code, §36.003, which provided additional clarification.

SUBCHAPTER A: GENERAL PROVISIONS

§336.1

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 SB 1604, 80th Legislature, 2007; THSC, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.202, 401.262, 401.412, and 401.2625.

§336.1. Scope and General Provisions.

(a) Except as otherwise specifically provided, the rules in this chapter apply to all persons who dispose of radioactive substances; all persons who recover or process source material; and all persons who receive radioactive substances from other persons for storage or processing.

(1) However, nothing in these rules shall apply to any person to the extent that person is subject to regulation by the United States Nuclear Regulatory Commission (NRC) or to radioactive material in the possession of federal agencies.

(2) Any United States Department of Energy contractor or subcontractor or any NRC contractor or subcontractor of the following categories operating within the state, is exempt from the rules in this chapter, with the exception of any applicable fee set forth in Subchapter B of this chapter (relating to Radioactive Substance Fees), to the extent that such contractor or subcontractor under his contract receives, possesses, uses, transfers, or acquires sources of radiation:

(A) prime contractors performing work for the United States Department of Energy at a United States government-owned or controlled site, including the transportation of radioactive

material to or from the site and the performance of contract services during temporary interruptions of transportation;

(B) prime contractors of the United States Department of Energy performing research in or development, manufacture, storage, testing, or transportation of atomic weapons or components thereof;

(C) prime contractors of the United States Department of Energy using or operating nuclear reactors or other nuclear devices in a United States government-owned vehicle or vessel; and

(D) any other prime contractor or subcontractor of the United States Department of Energy or the NRC when the state and the NRC jointly determine that:

(i) the exemption of the prime contractor or subcontractor is authorized by law; and

(ii) under the terms of the contract or subcontract, there is adequate assurance that the work thereunder can be accomplished without undue risk to the public health and safety or the environment.

(3) Radioactive material that is physically received from the federal government by a non-federal facility is subject to state jurisdiction except as provided in paragraph (2) of this subsection.

(4) The rules of this chapter do not apply to transportation of radioactive materials. This provision does not exempt a transporter from other applicable requirements.

(5) The rules in this chapter do not apply to the disposal of radiation machines as defined in this subchapter or electronic devices that produce non-ionizing radiation.

(b) Regulation by the State of Texas of source material, by-product material, and special nuclear material in quantities not sufficient to form a critical mass is subject to the provisions of the agreement between the State of Texas and the NRC and to 10 Code of Federal Regulations Part 150 (10 CFR Part 150) (Exemptions and Continued Regulatory Authority in Agreement States and in Offshore Waters Under Section 274). (A copy of the Texas agreement, "Articles of 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" (Agreement), may be obtained from this commission.) Under the Agreement and 10 CFR Part 150, the NRC retains certain regulatory authorities over source material, by-product material, and special nuclear material in the State of Texas. Persons in the State of Texas are not exempt from the regulatory requirements of the NRC with respect to these retained authorities.

(c) No person may receive, possess, use, transfer, or dispose of radioactive material, which is subject to the rules in this chapter, in such a manner that the standards for protection against radiation prescribed in these rules are exceeded.

(d) Each person licensed by the commission under this chapter shall confine possession, use, and disposal of licensed radioactive material to the locations and purposes authorized in the license.

(e) No person may cause or allow the release of radioactive material, which is subject to the rules in this chapter, to the environment in violation of this chapter or of any rule, license, or order of the Texas Commission on Environmental Quality (commission).

(f) No person shall:

(1) dispose of low-level radioactive waste on site, except as authorized under §336.501(b) of this title (relating to Scope and General Provisions);

(2) receive low-level radioactive waste from other persons for the purpose of disposal, except for a person specifically licensed for the disposal of low-level radioactive waste;

(3) dispose of radioactive materials other than low-level radioactive waste, except for diffuse naturally occurring radioactive material waste having concentrations of less than 2,000 picocuries per gram (pCi/g) radium-226 or radium-228;

(4) dispose of radioactive materials from other persons other than low-level radioactive waste, except for naturally occurring radioactive material waste in accordance with Subchapter K of this chapter (relating to Commercial Disposal of Naturally Occurring Radioactive Material Waste from Public Water Systems);

(5) recover or process source material, except in accordance with Subchapter L of this chapter (relating to Licensing of Source Material Recovery and By-Product Material Disposal Facilities);

(6) store, process, or dispose of by-product material, except in accordance with Subchapter L of this chapter; or

(7) receive radioactive substances from other persons for storage or processing, except in accordance with Subchapter M of this chapter (relating to Licensing of Radioactive Substances Processing and Storage Facilities).

(g) For the purpose of this chapter, any time the term "low-level radioactive waste" is used, the provision also applies to accelerator-produced radioactive material.

SUBCHAPTER B: RADIOACTIVE SUBSTANCE FEES

§§336.101, 336.103, 336.105, 336.107, and 336.114

STATUTORY AUTHORITY

The amendments and new section 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 the TWC and other laws of the state. The amendments and new section 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 and new section implement SB 1604, 80th Legislature, 2007; THSC, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.202, 401.262, 401.412, and 401.2625.

§336.101. Purpose and Scope.

(a) This subchapter establishes fees for licensing, commercial disposal, emergency response activities including training, and other regulatory services and provides for their payment.

(b) Except as otherwise specifically provided, this subchapter applies to any person who is:

(1) an applicant for or holder of a radioactive material license issued under this chapter; or

(2) the holder of a fixed nuclear facility construction permit or operating license issued by the United States Nuclear Regulatory Commission under 10 Code of Federal Regulations Part 50 (Domestic Licensing of Production and Utilization Facilities); or

(3) the operator of any other fixed nuclear facility.

§336.103. Schedule of Fees for Subchapter H Licenses.

(a) An application for a low-level radioactive waste disposal site license under Subchapter H of this chapter (relating to Licensing Requirements for Near-Surface Land Disposal of Low-Level

Radioactive Waste) shall be accompanied by a nonrefundable application processing fee of $500,000. If the commission's costs in processing an application under Subchapter H of this chapter exceed the $500,000 application processing fee, the commission may assess and collect additional fees from the applicant to recover the costs. Recoverable costs include costs incurred by the commission for administrative review, technical review, and hearings associated with the application.

(b) An applicant shall submit an annual fee for the actual costs incurred by the commission for hearings associated with an application for a low-level radioactive waste disposal site under Subchapter H of this chapter. The executive director shall send an invoice for the amount of the costs incurred during the period September 1 through August 31 of each year. Payment shall be made within 30 days following the date of the invoice.

(c) A holder of a license for a low-level radioactive waste disposal site issued under Subchapter H of this chapter shall submit an annual license fee for the services received. This fee shall recover for the state the actual expenses arising from the regulatory activities associated with the license. This fee shall include reimbursement for the salary and other expenses of the resident inspectors as provided by §336.743 of this title (relating to Resident Inspector). The executive director shall send an invoice for the amount of the costs incurred during the period September 1 through August 31 of each year. Payment shall be made within 30 days following the date of the invoice.

(d) An application for a major amendment of a license issued under Subchapter H of this chapter must be accompanied by an application fee of $50,000.

(e) An application for renewal of a license issued under Subchapter H of this chapter must be accompanied by an application fee of $300,000.

(f) The compact waste disposal facility license holder shall remit to the commission 5% of the gross receipts from compact waste received at the compact waste disposal facility and any federal facility waste received at the federal facility waste disposal facility. Payment shall be made within 30 days of the end of each quarter. The end of each quarter is the last day of the months of November, February, May, and August.

(g) The compact waste disposal facility license holder shall remit directly to the host county 5% of the gross receipts from compact waste received at the compact waste disposal facility and any federal facility waste received at the federal facility waste disposal facility as required in Texas Health and Safety Code, §401.244. Payment shall be made within 30 days of the end of each quarter. The end of each quarter is the last day of the months of November, February, May, and August.

§336.105. Schedule of Fees for Other Licenses.

(a) Each application for a license under Subchapter F of this chapter (relating to Licensing of Alternative Methods of Disposal of Radioactive Material), Subchapter G of this chapter (relating to Decommissioning Standards), Subchapter K of this chapter (relating to Commercial Disposal of Naturally Occurring Radioactive Material Waste from Public Water Systems), Subchapter L of this chapter (relating to Licensing of Source Material Recovery and By-product Material Disposal Facilities), or Subchapter M

of this chapter (relating to Licensing of Radioactive Substances Processing and Storage Facilities) must be accompanied by an application fee as follows:

(1) facilities regulated under Subchapter F of this chapter: $50,000;

(2) facilities regulated under Subchapter G of this chapter: $10,000;

(3) facilities regulated under Subchapter K of this chapter: $50,000;

(4) facilities regulated under Subchapter L of this chapter: $463,096 for conventional mining; $322,633 for in situ mining; $325,910 for heap leach; and $374,729 for disposal only; or

(5) facilities regulated under Subchapter M of this chapter: $3,830 for Waste Processing - Class I Exempt; $39,959 for Waste Processing - Class I; $94,661 for Waste Processing - Class II; and $273,800 for Waste Processing - Class III.

(b) An annual license fee shall be paid for each license issued under Subchapter F, Subchapter G, Subchapter K, Subchapter L, and Subchapter M of this chapter. The amount of each annual fee is as follows:

(1) facilities regulated under Subchapter F of this chapter: $25,000;

(2) facilities regulated under Subchapter G of this chapter: $8,400;

(3) facilities regulated under Subchapter K of this chapter: $25,000;

(4) facilities regulated under Subchapter L of this chapter that are operational: $60,929.50;

(5) facilities regulated under Subchapter L of this chapter that are in closure: $60,929.50;

(6) facilities regulated under Subchapter L of this chapter that are in post-closure: $52,011.50 for conventional mining; $26,006 for in situ mining; and $52,011.50 for disposal only;

(7) facilities regulated under Subchapter L of this chapter, if additional noncontiguous source material recovery facility sites are authorized under the same license, the annual fee shall be increased by 25% for each additional site and 50% for sites in closure;

(8) facilities regulated under Subchapter L of this chapter, if an authorization for disposal of by-product material is added to a license, the annual fee shall be increased by 25%;

(9) facilities regulated under Subchapter L of this chapter, the following one-time fees apply if added after an environmental assessment has been completed on a facility:

(A) $28,658 for in situ wellfield on noncontiguous property;

(B) $71,651 for in situ satellite;

(C) $11,235 for wellfield on contiguous property;

(D) $50,756 for non-vacuum dryer; or

(E) $71, 651 for disposal (including processing, if applicable) of by-product material; or

(10) facilities regulated under Subchapter M of this chapter: $3,830 for Waste Processing - Class I Exempt; $39,959 for Waste Processing - Class I; $94,661 for Waste Processing - Class II; and $273,800 for Waste Processing - Class III.

(c) An application for a major amendment of a license issued under Subchapter F, Subchapter G, Subchapter K, Subchapter L, or Subchapter M of this chapter must be accompanied by an application fee of $10,000.

(d) An application for renewal of a license issued under Subchapter F, Subchapter G, Subchapter K, Subchapter L, or Subchapter M of this chapter must be accompanied by an application fee of $35,000.

(e) Upon permanent cessation of all disposal activities and approval of the final decommissioning plan, holders of licenses issued under Subchapter F, Subchapter K, Subchapter L, or Subchapter M of this chapter shall use the applicable fee schedule for subsections (b) and (c) of this section.

(f) For any application for a license issued under this chapter, the commission may assess and collect additional fees from the applicant to recover costs. Recoverable costs include costs incurred by the

commission for administrative review, technical review, and hearings associated with the application. The executive director shall send an invoice for the amount of the costs incurred during the period September 1 through August 31 of each year. Payment shall be made within 30 days following the date of the invoice.

(g) If a licensee remitted a biennial licensing fee to the Texas Department of State Health Services during the one year period prior to June 17, 2007, the licensee is not subject to an annual fee under subsection (b) of this section until the expiration of the second year for which the biennial fee was paid.

(h) The commission may charge an additional 5% of annual fee assessed under subsection (b) of this section. The fee is non-refundable and will be deposited to the perpetual care account.

(i) The holder of a license authorizing disposal of a radioactive substance from other persons shall remit to the commission 5% of the holder's gross receipts received from disposal operations under a license. Payment shall be made within 30 days of the end of each quarter. The end of each quarter is the last day of the months of November, February, May, and August. This subsection does not apply to the disposal of compact waste or federal facility waste.

(j) The holder of a license authorizing disposal of a radioactive substance from other persons shall remit directly to the host county 5% of the gross receipts disposal operations under a license as required in Texas Health and Safety Code, §401.271(2). Payment shall be made within 30 days of the end of each

quarter. The end of each quarter is the last day of the months of November, February, May, and August. This subsection does not apply to the disposal of compact waste or federal facility waste.

§336.107. Annual License Fee Due Date and Period Covered.

(a) Payment for annual fees set forth in §336.105(b) of this title (relating to Schedule of Fees for Other Licenses) shall be due on or before October 31st of each year.

(b) The period covered by each annual fee set forth in §336.105(b) of this title shall be the 12 months preceding the fee payment due date, except fees may be prorated for a period less than 12 months to accommodate the due date established in subsection (a) of this section.

§336.114. Fee for Fixed Nuclear Facilities.

The commission may set and collect an annual fee from the operator of each nuclear reactor or other fixed nuclear facility in the state that uses special nuclear material. The amount of fees collected may not exceed the actual expenses that arise from emergency planning and implementation and environmental surveillance activities.

SUBCHAPTER C: GENERAL LICENSING REQUIREMENTS

§336.208, §336.210

STATUTORY AUTHORITY

The new sections 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 the TWC and other laws of the state. The new sections 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 new sections implement SB 1604, 80th Legislature, 2007; THSC, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.202, 401.262, 401.412, and 401.2625.

§336.208. Radiation Safety Officer.

(a) Qualifications of the designated radiation safety officer (RSO) are adequate for the purpose requested and include as a minimum:

(1) have earned at least a bachelor's degree in a physical or biological science, industrial hygiene, health physics, radiation protection, or engineering from an accredited college or university, or an equivalent combination of training and relevant experience, with two years of relevant experience equivalent to a year of academic study, from a uranium or mineral extraction/recovery, radioactive waste processing, or a radioactive waste or by-product material disposal facility;

(2) have at least one year of relevant experience, in addition to that used to meet the educational requirement, working under the direct supervision of the RSO at a uranium or mineral extraction/recovery, radioactive waste processing, or radioactive waste or by-product material disposal facility; and

(3) have at least four weeks of specialized training in health physics or radiation safety applicable to uranium or mineral extraction/recovery, radioactive waste processing, or radioactive waste or by-product material disposal operations from a course provider that has been evaluated and approved by the agency.

(b) The specific duties of the RSO include, but are not limited to, the following:

(1) to establish and oversee operating, safety, emergency, and as low as reasonably achievable procedures, and to review them at least annually to ensure that the procedures are current and conform with this chapter;

(2) to oversee and approve all phases of the training program for operations and/or personnel so that appropriate and effective radiation protection practices are taught;

(3) to ensure that required radiation surveys and leak tests are performed and documented in accordance with this chapter, including any corrective measures when levels of radiation exceed established limits;

(4) to ensure that individual monitoring devices are used properly by occupationally-exposed personnel, that records are kept of the monitoring results, and that timely notifications are made in accordance with §336.405 of this title (relating to Notifications and Reports to Individuals);

(5) to investigate and cause a report to be submitted to the agency for each known or suspected case of radiation exposure to an individual or radiation level detected in excess of limits established by this chapter and each theft or loss of source(s) of radiation, to determine the cause(s), and to take steps to prevent a recurrence;

(6) to investigate and cause a report to be submitted to the executive director for each known or suspected case of release of radioactive material to the environment in excess of limits established by this chapter;

(7) to have a thorough knowledge of management policies and administrative procedures of the licensee;

(8) to assume control and have the authority to institute corrective actions, including shutdown of operations when necessary in emergency situations or unsafe conditions;

(9) to ensure that records are maintained as required by this chapter;

(10) to ensure the proper storing, labeling, transport, use and disposal of sources of radiation, storage, and/or transport containers;

(11) to ensure that inventories are performed in accordance with the activities for which the license application is submitted;

(12) to perform an inventory of the radioactive sealed sources authorized for use on the license every six months and make and maintain records of the inventory of the radioactive sealed sources authorized for use on the license every six months, to include, but not be limited to, the following:

(A) isotope(s);

(B) quantity(ies);

(C) radioactivity(ies); and

(D) date inventory is performed.

(13) to ensure that personnel are complying with this chapter, the conditions of the license, and the operating, safety, and emergency procedures of the licensee; and

(14) to serve as the primary contact with the agency.

§336.210. Emergency Plan for Responding to a Release.

(a) A new or renewal application for each specific license to possess radioactive materials in unsealed form, on foils or plated sources, or sealed in glass in excess of the quantities in subsection (e) of this section shall contain either:

(1) an evaluation showing that the maximum dose to a person off-site due to a release of radioactive material would not exceed 1 rem effective dose equivalent or 5 rems to the thyroid; or

(2) an emergency plan for responding to a release of radioactive material.

(b) One or more of the following factors may be used to support an evaluation submitted in accordance with subsection (a)(1) of this section:

(1) the radioactive material is physically separated so that only a portion could be involved in an accident;

(2) all or part of the radioactive material is not subject to release during an accident because of the way it is stored or packaged;

(3) the release fraction in the respirable size range would be lower than the release fraction in subsection (e) of this section due to the chemical or physical form of the material;

(4) the solubility of the radioactive material would reduce the dose received;

(5) facility design or engineered safety features in the facility would cause the release fraction to be lower than that in subsection (e) of this section;

(6) operating restrictions or procedures would prevent a release fraction as large as that in subsection (e) of this section; or

(7) other factors appropriate for the specific facility.

(c) An emergency plan for responding to a release of radioactive material submitted in accordance with subsection (a)(1) of this section shall include the following information.

(1) Facility description. A brief description of the licensee's facility and area near the site.

(2) Types of accidents. An identification of each type of radioactive materials accident for which protective actions may be needed.

(3) Classification of accidents. A classification system for classifying accidents as alerts or site area emergencies.

(4) Detection of accidents. Identification of the means of detecting each type of accident in a timely manner.

(5) Mitigation of consequences. A brief description of the means and equipment for mitigating the consequences of each type of accident, including those provided to protect workers onsite, and a description of the program for maintaining the equipment.

(6) Assessment of releases. A brief description of the methods and equipment to assess releases of radioactive materials.

(7) Responsibilities. A brief description of the responsibilities of licensee personnel should an accident occur, including identification of personnel responsible for promptly notifying off-site response organizations and the agency; also, responsibilities for developing, maintaining, and updating the plan.

(8) Notification and coordination. A commitment to and a brief description of the means to promptly notify off-site response organizations and request off-site assistance, including medical assistance for the treatment of contaminated injured onsite workers when appropriate. A control point shall be established. The notification and coordination shall be planned so that unavailability of some personnel, parts of the facility, and some equipment will not prevent the notification and coordination. The licensee shall also commit to notify the agency immediately after notification of the appropriate off-site response organizations and not later than one hour after the licensee declares an emergency. These reporting requirements do not supersede or release licensees from complying with the requirements in accordance with the Emergency Planning and Community Right-to-Know-Act of 1986, Title III, Publication L. 99-499 or other state or federal reporting requirements.

(9) Information to be communicated. A brief description of the types of information on facility status, radioactive releases, and recommended protective actions, if necessary, to be given to off-site response organizations and to the agency.

(10) Training. A brief description of the frequency, performance objectives, and plans for the training that the licensee will provide workers on how to respond to an emergency, including any special instructions and orientation tours the licensee would offer to fire, police, medical, and other emergency personnel. The training shall familiarize personnel with site-specific emergency procedures. Also, the training shall thoroughly prepare site personnel for their responsibilities in the event of accident scenarios postulated as most probable for the specific site, including the use of team training for such scenarios.

(11) Safe shutdown. A brief description of the means of restoring the facility to a safe condition after an accident.

(12) Exercises. Provisions for conducting quarterly communications checks with off-site response organizations at intervals not to exceed three months and biennial onsite exercises to test response to simulated emergencies. Communications checks with off-site response organizations shall include the check and update of all necessary telephone numbers. The licensee shall invite off-site response organizations to participate in the biennial exercises. Participation of off-site response organizations in biennial exercises, although recommended, is not required. Exercises shall use accident scenarios postulated as most probable for the specific site and the scenarios shall not be known to most exercise participants. The licensee shall critique each exercise using individuals not having direct implementation responsibility for the plan. Critiques of exercises shall evaluate the appropriateness of the plan, emergency procedures, facilities, equipment, training of personnel, and overall effectiveness of the response. Deficiencies found by the critiques shall be corrected.

(13) Hazardous chemicals. A certification that the applicant has met its responsibilities in accordance with the Emergency Planning and Community Right-to-Know Act of 1986, Title III, Publication L. 99-499, if applicable to the applicant's activities at the proposed place of use of the radioactive material.

(d) The licensee shall allow the off-site response organizations expected to respond in case of an accident 60 days to comment on the licensee's emergency plan before submitting it to the agency. The licensee shall provide any comments received within the 60 days to the agency with the emergency plan.

(e) The following indicates release fractions for radioactive material.

Figure: 30 TAC §336.210(e)

Radioactive Material*	Release Fraction	Quantity (curies)	Radioactive Material*	Release Fraction	Quantity (curies)	Radioactive Material*	Release Fraction	Quantity (curies)
Ac-228 (89)	0.001	4,000	In-114m (49)	0.01	1,000	Xe-133 (54)	1.0	900,000
Am-241 (95)	0.001	2	Ir-192 (77)	0.001	40,000	Y-91 (39)	0.01	2,000
Am-242 (95)	0.001	2	Fe-55 (26)	0.01	40,000	Zn-65 (30)	0.01	5,000
Am-243 (95)	0.001	2	Fe-59 (26)	0.01	7,000	Zr-93 (40)	0.01	400
Sb-124 (51)	0.01	4,000	Kr-85 (36)	1.0	6,000,000	Zr-95 (40)	0.01	5,000
Sb-126 (51)	0.01	6,000	Pb-210 (82)	0.01	8	Any other ß-emitter	0.01	10,000
Ba-133 (56)	0.01	10,000	Mn-56 (25)	0.01	60,000			
Ba-140 (56)	0.01	30,000	Hg-203 (80)	0.01	10,000	Mixed fission products	0.01	1,000
Bi-207 (83)	0.01	5,000	Mo-99 (42)	0.01	30,000			
Bi-210 (83)	0.01	600	Np-237 (93)	0.001	2	Mixed corrosion products	0.01	10,000
Cd-109 (48)	0.01	1,000	Ni-63 (28)	0.01	20,000			
Cd-113 (48)	0.01	80	Nb-94 (41)	0.01	300			
Ca-45 (20)	0.01	20,000	P-32 (15)	0.5	100	Contaminated equipment, ß-	0.001	10,000
Cf-252 (98)	0.001	9(20mg)	P-33 (15)	0.5	1,000			
C-14 (6)**	0.01	50,000	Po-210 (84)	0.01	10			
Ce-141 (58)	0.01	10,000	K-42 (19)	0.01	9,000	Irradiated material, any form other than solid non-combustible	0.01	1,000
Ce-144 (58)	0.01	300	Pm-145 (61)	0.01	4,000			
Cs-134 (55)	0.01	2,000	Pm-147 (61)	0.01	4,000			

Cs-137 (55)	0.01	2,000	Ru-106 (44)	0.01	200			
Cl-36 (17)	0.5	100	Sm-151 (62)	0.01	4,000			
Cr-51 (24)	0.01	300,000	Sc-46 (21)	0.01	3,000			
Co-60 (27)	0.001	5,000	Se-75 (34)	0.01	10,000	Irradiated material, solid non-combustible	0.001	10,000
Cu-64 (29)	0.01	200,000	Ag110m (47)	0.01	1,000			
Cm-242 (96)	0.001	60	Na-22 (11)	0.01	9,000			
Cm-243 (96)	0.001	3	Na-24 (11)	0.01	10,000			
Cm-244 (96)	0.001	4	Sr-89 (38)	0.01	3,000	Mixed radioactive waste, ß-	0.01	1,000
Cm-245 (96)	0.001	2	Sr-90 (38)	0.01	90			
Eu-152 (63)	0.01	500	Sr-35 (16)	0.5	900			
Eu-154 (63)	0.01	400	Tc-99 (43)	0.01	10,000	Packaged waste, ß-***	0.001	10,000
Eu-155 (63)	0.01	3,000	Tc-99m (43)	0.01	400,000			
Ge-68 (32)	0.01	2,000	Te-127m(52)	0.01	5,000			
Gd-153 (64)	0.01	5,000	Te-129m(52)	0.01	5,000	Any other α-emitter	0.001	2
Au-198 (79)	0.01	30,000	Tb-160 (65)	0.01	4,000			
Hf-172 (72)	0.01	400	Tm-170 (69)	0.01	4,000	Contaminated equipment, α	0.0001	20
Hf-181 (72)	0.01	7,000	Sn-113 (50)	0.01	10,000			
Ho-166 (67)	0.01	100	Sn-123 (50)	0.01	3,000	Packaged waste***	0.0001	20
H-3 (1)	0.5	20,000	Sn-126 (50)	0.01	1,000			
I-125 (53)	0.5	10	Ti-144 (22)	0.01	100			
I-131 (53)	0.5	10	V-48 (23)	0.01	7,000			

* For combinations of radionuclides, consideration of the need for an emergency plan is required if the sum of the ratios of the quantity of each radionuclide authorized to the quantity listed for that radionuclide in this paragraph exceeds one. ( ) indicates atomic number.

** Non CO forms only.

*** Waste packaged in Type B containers does not require an emergency plan.

SUBCHAPTER L: LICENSING OF SOURCE MATERIAL RECOVERY AND BY-PRODUCT MATERIAL DISPOSAL FACILITIES

§§336.1105, 336.1109, 336.1113, and 336.1125

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 the 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 SB 1604, 80th Legislature, 2007; THSC, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.202, 401.262, 401.412, and 401.2625.

§336.1105. Definitions.

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise.

(1) **Aquifer**--A geologic formation, group of formations, or part of a formation capable of yielding a significant amount of groundwater to wells or springs. Any saturated zone created by uranium or thorium recovery operations would not be considered an aquifer unless the zone is or potentially is:

(A) hydraulically interconnected to a natural aquifer;

(B) capable of discharge to surface water; or

(C) reasonably accessible because of migration beyond the vertical projection of the boundary of the land transferred for long-term government ownership and care in accordance with §336.1131 of this title (relating to Land Ownership of By-Product Material Disposal Sites).

(2) **As expeditiously as practicable considering technological feasibility**--As quickly as possible considering the physical characteristics of the by-product material and the site, the limits of "available technology" (as defined in this section), the need for consistency with mandatory requirements of other regulatory programs, and "factors beyond the control of the licensee" (as defined in this section). The phrase permits consideration of the cost of compliance only to the extent specifically provided for by use of the term "Available technology."

(3) **Available technology**--Technologies and methods for emplacing a final radon barrier on by-product material piles or impoundments. This term must not be construed to include extraordinary measures or techniques that would impose costs that are grossly excessive as measured by practice within the industry (or one that is reasonably analogous), (for example, by way of illustration only, unreasonable overtime, staffing, or transportation requirements, etc., considering normal practice in the industry; laser fusion of soils; etc.), provided there is reasonable progress toward emplacement of the final radon barrier. To determine grossly excessive costs, the relevant baseline against which costs must be compared is the cost estimate for tailings impoundment closure contained in the licensee's approved reclamation plan, but costs beyond these estimates shall not automatically be considered grossly excessive.

(4) **By-product material**--Tailings or wastes produced by or resulting from the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content, including discrete surface wastes resulting from uranium solution extraction processes. Underground ore bodies depleted by such solution extraction operations do not constitute "by-product material" within this definition.

(5) **By-product material disposal cell**--A man-made excavation and/or construction designed, sited, and built in accordance with the requirements of §336.1129 of this title (relating to Technical Requirements) for the purpose of disposal of by-product material.

(6) **By-product material pond**--A man-made excavation designed, constructed, and sited in accordance with the requirements of §336.1129 of this title (relating to Technical Requirements).

(7) **Capable fault**--As used in this section, "Capable fault" has the same meaning as defined in Section III(g) of Appendix A of Title 10 Code of Federal Regulations (CFR) Part 100.

(8) **Closure**--The post-operational activities to decontaminate and decommission the buildings and site used to produce by-product materials and/or reclaim the tailings or disposal area, including groundwater restoration, if needed.

(9) **Closure plan**--The plan approved by the agency to accomplish closure. The closure plan consists of a decommissioning plan and may also include a reclamation plan.

(10) **Commencement of construction**--Any clearing of land, excavation, or other substantial action that would adversely affect the environment of a site, but does not include changes desirable for the temporary use of the land for public recreational uses, necessary borings to determine site characteristics or other preconstruction monitoring to establish background information related to the suitability of a site, or to the protection of the environment.

(11) **Compliance period**--The period of time that begins when the agency sets secondary groundwater protection standards and ends when the owner or operator's license is terminated and the site is transferred to the state or federal government for long-term care, if applicable.

(12) **Decommissioning plan**--The plan approved by the agency to accomplish decommissioning. Decommission is defined in §336.2(29) of this title (relating to Definitions).

(13) **Dike**--An embankment or ridge of either natural or man-made materials used to prevent the movement of liquids, sludges, solids, or other materials.

(14) **Disposal area**--The area containing by-product materials to which the requirements of §336.1129(p) - (aa) of this title (relating to Technical Requirements) apply.

(15) **Existing portion**--As used in §336.1129(i)(1) of this title (relating to Technical Requirements), "existing portion" is that land surface area of an existing surface impoundment on which significant quantities of uranium or thorium by-product materials had been placed prior to September 30, 1983.

(16) **Factors beyond the control of the licensee**--Factors proximately causing delay in meeting the schedule in the applicable reclamation plan for the timely emplacement of the final radon barrier notwithstanding the good faith efforts of the licensee to complete the barrier in compliance with

§336.1129(x) of this title (relating to Technical Requirements). These factors may include, but are not limited to:

(A) physical conditions at the site;

(B) inclement weather or climatic conditions;

(C) an act of God;

(D) an act of war;

(E) a judicial or administrative order or decision, or change to the statutory, regulatory, or other legal requirements applicable to the licensee's facility that would preclude or delay the performance of activities required for compliance;

(F) labor disturbances;

(G) any modifications, cessation or delay ordered by state, federal, or local agencies;

(H) delays beyond the time reasonably required in obtaining necessary government permits, licenses, approvals, or consent for activities described in the reclamation plan proposed by the licensee that result from government agency failure to take final action after the licensee

has made a good faith, timely effort to submit legally sufficient applications, responses to requests (including relevant data requested by the agencies), or other information, including approval of the reclamation plan; and

(I) an act or omission of any third party over whom the licensee has no control.

(17) **Final radon barrier**--The earthen cover (or approved alternative cover) over by-product material constructed to comply with §336.1129(p) - (aa) of this title (relating to Technical Requirements) (excluding erosion protection features).

(18) **Groundwater**--Water below the land surface in a zone of saturation. For purposes of this subchapter, groundwater is the water contained within an aquifer as defined in this section.

(19) **Hazardous constituent**--Subject to §336.1129(j)(5) of this title (relating to Technical Requirements), "hazardous constituent" is a constituent that meets all three of the following tests:

(A) the constituent is reasonably expected to be in or derived from the by-product material in the disposal area;

(B) the constituent has been detected in the groundwater in the uppermost aquifer; and

(C) the constituent is listed in 10 Code of Federal Regulations Part 40, Appendix A, Criterion 13.

(20) **In situ leach**--Refers to the actual oxidation and dissolution of uranium in an underground formation.

(21) **In situ recovery**--Refers to the process of stripping, precipitating, de-watering, and drying uranium in a surface processing plant.

(22) **Leachate**--Any liquid, including any suspended or dissolved components in the liquid, that has percolated through or drained from the by-product material.

(23) **Licensed site**--The area contained within the boundary of a location under the control of persons generating or storing by-product materials under a license.

(24) **Liner**--A continuous layer of natural or man-made materials, beneath or on the sides of a surface impoundment that restricts the downward or lateral escape of by-product material, hazardous constituents, or leachate.

(25) **Maximum credible earthquake**--That earthquake that would cause the maximum vibratory ground motion based upon an evaluation of earthquake potential considering the regional and local geology and seismology and specific characteristics of local subsurface material.

(26) **Milestone**--An action or event that is required to occur by an enforceable date.

(27) **Operation**--

(A) The period of time during which a by-product material disposal area is being used for the continued placement of by-product material or is in standby status for such placement. A disposal area is in operation from the day that by-product material is first placed in it until the day final closure begins; and

(B) The period of time during which an in situ leach uranium recovery operation is actively leaching or recovering uranium.

(28) **Point of compliance**--The site-specific location in the uppermost aquifer where the groundwater protection standard shall be met. The objective in selecting the point of compliance is to provide the earliest practicable warning that an impoundment is releasing hazardous constituents to the groundwater. The point of compliance is selected to provide prompt indication of groundwater contamination on the hydraulically downgradient edge of the disposal area.

(29) **Principal activities**--Activities authorized by the license that are essential to achieving the purpose(s) for which the license is issued or amended. Storage during which no licensed material is accessed for use or disposal and activities incidental to decontamination or decommissioning are not principal activities.

(30) **Reclamation**--Those activities at a uranium recovery licensed facility that work towards achieving the criteria under this subchapter for release of equipment, facilities and/or the site (including land) to unrestricted use or termination of the license.

(31) **Reclamation plan**--

(A) For the purposes of paragraph (21) and §336.1115 of this title (relating to In situ recovery and Expiration and Termination of Licenses; Decommissioning of Sites; Separate Buildings or Outdoor Areas, respectively), "reclamation plan" is the plan detailing activities to accomplish reclamation of the licensed site (land surface) where in situ recovery and related activities are licensed to occur. The reclamation plan shall include a schedule for reclamation milestones that are key to the clean-up of the in situ recovery plant location, well fields, and any by-product waste storage location; or

(B) For the purposes of §336.1129(p) - (aa) of this title (relating to Technical Requirements), "reclamation plan" is the plan detailing activities to accomplish reclamation of the by-product material disposal area in accordance with the technical criteria of this section. The reclamation plan shall include a schedule for reclamation milestones that are key to the completion of the final radon barrier, including as appropriate, but not limited to, windblown tailings retrieval and placement on the pile, interim stabilization (including dewatering or the removal of freestanding liquids and recontouring), and final radon barrier construction. Reclamation of by-product material shall also be addressed in the closure plan. The detailed reclamation plan may be incorporated into the closure plan.

(32) **Restoration**--Those activities that seek to return the groundwater at an underground injection control permitted site to restoration levels established by permit.

(33) **Security**--This term has the same meaning as financial assurance.

(34) **Surface impoundment**--A natural topographic depression, man-made excavation, or diked area at a conventional uranium mill, which is designed to receive waste from the milling process which may contain liquid wastes or wastes containing free liquids, solid wastes, mill site demolition materials and debris, and other by-product materials from the milling site.

(35) **Unrefined and unprocessed ore**--Ore in its natural form before any processing, such as grinding, roasting, beneficiating, or refining.

(36) **Uppermost aquifer**--The geologic formation nearest the natural ground surface that is an aquifer, as well as lower aquifers that are hydraulically interconnected with this aquifer within the facility's property boundary.

(37) **Uranium recovery,** --Any uranium extraction or concentration activity that results in the production of "by-product material" as it is defined in this chapter and as it pertains to uranium ore only. As used in this definition, "Uranium recovery" has the same meaning as "uranium milling" in 10 Code of Federal Regulations §40.4.

§336.1109. General Requirements for the Issuance of Specific Licenses.

A license application may be approved if the agency determines that the applicant has met the requirements of §336.207 of this title (relating to General Requirements for Issuance of a License) and the following:

(1) qualifications of the designated radiation safety officer as stated in §336.208 of this title (relating to Radiation Safety Officer); and

(2) the applicant satisfies all applicable special requirements in this subchapter.

§336.1113. Specific Terms and Conditions of Licenses.

Unless otherwise specified, each license issued in accordance with this section is subject to the requirements of §305.125 of this title (relating to Standard Permit Conditions) and the following.

(1) Daily inspection of any by-product material retention systems shall be conducted by the licensee. General qualifications for individuals conducting inspections shall be approved by the agency. Records of the inspections shall be maintained for review by the agency.

(2) In addition to the applicable requirements of §336.350 and §336.352 of this title (relating to Reports of Stolen, Lost, or Missing Licensed Radioactive Material and Reports of Exposures, Radiation Levels, and Concentrations of Radioactive Material Exceeding the Limits), the licensee shall immediately notify the agency of the following:

(A) any failure in a by-product material retention system that results in a release of by-product material into unrestricted areas;

(B) any release of radioactive material that exceeds the concentrations for water listed in Table II, Column 2, of §336.359 of this title (relating to Appendix B. Annual Limits in Intake (ALI) and Derived Air Concentrations (DAC) of Radionuclides for Occupational Exposure; Effluent Concentrations; Concentrations for Release to Sanitary Sewerage) and that extends beyond the licensed boundary;

(C) any spill that exceeds 20,000 gallons and that exceeds the concentrations for water listed in Table II, Column 2, of §336.359 of this title; or

(D) any release of solids that exceeds the limits in §336.1115(e) of this title (relating to Expiration and Termination of Licenses; Decommissioning of Sites, Separate Buildings or Outdoor Areas) and that extends beyond the licensed boundary.

(3) In addition to the applicable requirements of Chapter 327 of this title (relating to Spill Prevention and Control) and §336.350 and §336.352 of this title, the licensee shall notify the agency within 24 hours of the following:

(A) any spill that extends:

(i) beyond the wellfield monitor well ring;

(ii) more than 400 feet from an injection or production well pipe artery to or from a recovery plant; or

(iii) more than 200 feet from a recovery plant; or

(B) any spill that exceeds 2,000 gallons and that exceeds the concentrations for water listed in Table II, Column 2, of §336.359 of this title.

(4) A written report to the executive director within 30 days after learning of the occurrence of a spill as described in subparagraph (A) or (B) of this paragraph. The report shall include the following:

(i) location of the spill;

(ii) cause of the spill;

(iii) corrective steps taken or planned to ensure against a recurrence; and

(iv) timely schedule for remediation of the spill or release, if required.

(5) At any time before termination of the license, the licensee shall submit written statements under oath upon request of the commission or executive director to enable the commission to determine whether or not the license should be modified, suspended, or revoked.

(6) The licensee shall be subject to the applicable provisions of Texas Health and Safety Code, Chapter 401, also known as the Texas Radiation Control Act (TRCA) now or hereafter in effect and to applicable rules and orders of the commission. The terms and conditions of the license are subject to amendment, revision, or modification, by reason of amendments to TRCA or by reason of rules and orders issued in accordance with terms of TRCA.

(7) Any license may be revoked, suspended, or modified, in whole or in part, for any material false statement in the application or any statement of fact required under provisions of TRCA, or because of conditions revealed by any application or statement of fact or any report, record or inspection or other means that would warrant the commission to refuse to grant a license on the original application, or for failure to operate the facility in accordance with the terms of the license, or for any violation of or failure to observe any of the terms and conditions of TRCA or the license or of any rule or order of the commission.

(8) Each person licensed by the commission under this subchapter shall confine possession and use of radioactive materials to the locations and purposes authorized in the license.

(9) No by-product may be disposed of until the executive director has inspected the facility and has found it to be conformance with the description, design, and construction described in the

application for a by-product disposal license. No by-product may be received for disposal at the facility until the executive director has approved financial assurance.

(10) The commission may incorporate in any license at the time of issuance, or thereafter, by appropriate rule or order, additional requirements or conditions with respect to the licensee's receipt, possession, or disposal of by-product as it deems appropriate or necessary in order to:

(A) protect the health and safety of the public and the environment; or

(B) require reports and recordkeeping and to provide for inspections of activities under the licenses that may be necessary or appropriate to effectuate the purposes of TRCA and rules thereunder.

§336.1125. Financial Assurance Requirements.

(a) Financial assurance for decontamination, decommissioning, reclamation, restoration, disposal, and any other requirements of the agency shall be established by each licensee 60 days prior to the initial receipt, production, or possession of radioactive substances, or injection operations in a production area to assure that sufficient funds will be available to carry out the decontamination and decommissioning of buildings and the site and for the reclamation of any by-product material disposal areas. The amount of funds to be ensured by such financial assurance mechanism shall be based on agency-approved cost estimates in an agency-approved closure plan for:

(1) decontamination and decommissioning of buildings and the site to levels that allow unrestricted use of these areas upon decommissioning; and

(2) the reclamation of by-product material disposal areas in accordance with technical criteria delineated in §336.1129 of this title (relating to Technical Requirements); or

(3) the aquifer restoration which is based on the physical characteristics of the mining aquifer; the costs of equipment, labor, and administration; and any other data required under Chapter 331 of this title (relating to Underground Injection Control) for a production area authorization application.

(b) The licensee shall submit this closure plan in conjunction with an environmental report that addresses the expected environmental impacts of the licensee's operation, decommissioning and reclamation, and evaluates alternatives for mitigating these impacts.

(c) The financial assurance shall also cover the payment of the charge for long-term surveillance and control for by-product material disposal areas required by §336.1127(c) of this title (relating to Long-Term Care and Maintenance Requirements).

(d) The licensee's cost estimates must take into account total costs that would be incurred if an independent contractor were hired to perform the decommissioning and reclamation work in establishing specific financial assurance mechanisms. The agency may accept financial assurance mechanisms that have been consolidated with financial or security arrangements established to meet requirements of other federal or state agencies and/or local governing bodies for such decommissioning, decontamination,

reclamation, and long-term site surveillance and control, provided such arrangements are considered adequate to satisfy these requirements and that the portion of the security that covers the decommissioning and reclamation of the buildings, site, and by-product material disposal areas, and the long-term funding charge is clearly identified and committed for use in accomplishing these activities.

(e) The financial assurance mechanism shall be continuous for the term of the license and shall be payable to the State of Texas and deposited to the credit of the perpetual care account.

(f) The licensee's financial assurance mechanism and the underlying cost estimates will be reviewed annually by the agency to assure that sufficient funds are available for completion of the decommissioning and reclamation plan if the work had to be performed by an independent contractor. The amount of financial assurance must be adjusted to recognize any increases resulting from inflation, changes in engineering plans, activities performed, and any other conditions affecting costs. A licensee must submit a cost estimate report annually for decommissioning and reclamation of the facility in accordance with the decommissioning and reclamation plans by no later than an anniversary date as determined by the executive director. The licensee must provide any increase in the amount of financial assurance within 60 days of a determination of the cost estimate by the executive director.

(g) Except as provided in subsection (i) of this section, financial assurance required under this subchapter must meet the requirements specified in Chapter 37, Subchapter T of this title (relating to Financial Assurance for Radioactive Substances and Aquifer Restoration) by June 1, 2009. Regardless of whether reclamation is phased through the life of the operation or takes place at the end of operations, an appropriate portion of financial assurance amount as determined by the executive director shall be

retained until final compliance with the reclamation plan is determined. This will yield a financial assurance mechanism that is at least sufficient at all times to cover the costs of decommissioning and reclamation of the areas that are expected to be disturbed before the next license renewal.

(h) Self-insurance, or any arrangement that essentially constitutes self-insurance (for example, a contract with a state or federal agency), will not satisfy the financial assurance requirement since this provides no additional assurance other than that which already exists through license requirements.

(i) A licensee with a performance bond mechanism(s) issued in favor of Texas Department of State Health Services and submitted to Texas Department of State Health Services or its predecessor with an original effective date prior to June 15, 2007 that does not provide a new mechanism(s) under subsection (g) of this section must:

(1) amend the performance bond by June 1, 2009 to:

(A) reflect Texas Commission on Environmental Quality as the beneficiary,

(B) reflect the current total penal sum, and

(C) correct regulatory citations and Texas Commission on Environmental Quality license number, and

(2) provide replacement financial assurance mechanism(s) that meets the requirements specified in Chapter 37, Subchapter T of this title by March 31, 2010.

SUBCHAPTER M: LICENSING OF RADIOACTIVE SUBSTANCES PROCESSING AND STORAGE FACILITIES

§336.1235

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 SB 1604, 80th Legislature, 2007; THSC, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.202, 401.262, 401.412, and 401.2625.

§336.1235. Financial Assurance for Storage and Processing.

(a) A licensee must establish financial assurance for decommissioning and any other requirements of this subchapter 60 days prior to the initial possession of radioactive substances.

(b) In establishing financial assurance, the licensee's cost estimates must take into account total costs that would be incurred if an independent contractor were hired to perform the decommissioning. The amount of financial assurance must be in an amount approved by the agency.

(c) The licensee's financial assurance mechanism and the underlying cost estimates will be reviewed annually by the agency to assure that sufficient funds are available for completion of decommissioning. The amount of financial assurance must be adjusted to recognize any increases resulting from inflation, changes in engineering plans, activities performed, and any other conditions affecting costs. A licensee must submit a cost estimate report annually for decommissioning the facility in accordance with the decommissioning plan by no later than an anniversary date as determined by the executive director. The licensee must provide any increase in the amount of financial assurance within 60 days of a determination of the cost estimate by the executive director.

(d) Financial assurance required under this subchapter must meet the requirements specified in Chapter 37, Subchapter T of this title (relating to Financial Assurance for Radioactive Substances and Aquifer Restoration) by June 1, 2009. Regardless of whether reclamation is phased through the life of the operation or takes place at the end of operations, an appropriate portion of financial assurance amount as determined by the executive director shall be retained until final compliance with the reclamation plan is determined. This will yield a financial assurance mechanism that is at least sufficient at all times to cover the costs of decommissioning and reclamation of the areas that are expected to be disturbed before the next license renewal.

SUBCHAPTER N: FEES FOR LOW-LEVEL RADIOACTIVE WASTE DISPOSAL

§§336.1301, 336.1303, 336.1305, 336.1307, 336.1309, 336.1311, 336.1313, 336.1315, 336.1317

STATUTORY AUTHORITY

The new sections 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 the TWC and other laws of the state. The new sections 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; §401.245, concerning Compact Waste Disposal Fees; §401.246, concerning Waste Disposal Fee Criteria; §401.262, concerning Management of Certain By-Product Material, which provides the commission authority to regulate by-product storage and processing facilities; §401.412, concerning

Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances; and §401.2625, concerning Licensing Authority.

The adopted new sections implement House Bill 1567, 78th Legislature, 2003; Senate Bill 1604, 80th Legislature, 2007; THSC, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.202, 401.245, 401.246, 401.262, 401.412, and 401.2625.

§336.1301. Purpose and Scope.

(a) State and national policy directs that the management of low-level radioactive waste be accomplished by a system of interstate compacts and the development of regional disposal sites. Under federal law, Texas is responsible for managing the low-level radioactive waste generated within its borders. The Texas Low-Level Radioactive Waste Disposal Compact, comprised of the states of Texas and Vermont, has as its disposal facility the compact waste disposal facility licensed under Subchapter H of this chapter (relating to Licensing Requirements Near-Surface Land Disposal of Low-Level Radioactive Waste). The compact waste disposal facility is expected to be the sole facility for disposal of low-level radioactive waste for generators within the states of Texas and Vermont.

(b) Low-level radioactive waste is generated by essential activities and services that benefit the citizens of the state. For the Compact Waste Facility Disposal, the price of disposing of low-level radioactive waste at the Texas low-level radioactive waste disposal site will be determined by the commission. To protect Texas and Vermont compact states' businesses and services, such as electrical production, medical and university research, and private industries, upon which the public relies, the

commission will establish the maximum disposal rates charged by the licensee in accordance with the rules in this subchapter.

(c) A licensee who receives low-level radioactive waste for disposal pursuant to the Texas Low-Level Radioactive Waste Disposal Compact established under Texas Health and Safety Code, Chapter 403 shall collect a fee to be paid by each person who delivers low-level radioactive waste to the compact waste disposal facility for disposal. This fee shall be based on the commission approved maximum disposal rate, as specified in this subchapter.

§336.1303. Definitions.

Terms used in this subchapter are defined in §336.2 of this title (relating to Definitions). Additional terms used in this subchapter have the following definitions.

(1) **Allowable expenses--**Only those expenses which are reasonable and necessary to provide service to the public shall be included in allowable expenses. Allowable expenses to the extent they are reasonable and necessary, may include but are not limited to the following general categories:

(A) operation and maintenance expense incurred in providing normal compact waste disposal facility services and in maintaining compact waste disposal facility used and useful to the licensee in providing such services. Payments to affiliated interests shall be allowed as described in §336.1317 of this title (relating to Consideration of Payment to Affiliate);

(B) expense to meet future costs of decommissioning, closing, and post closure maintenance and surveillance of the compact waste disposal facility;

(C) depreciation expense based on original cost and computed on a straight-line basis as approved by the commission. Other methods of depreciation may be used when it is determined that such depreciation methodology is a more equitable means of recovering the cost of the facility;

(D) assessments and taxes other than income taxes;

(E) federal income tax on a normalized basis;

(F) expenses for advertising, contributions, and donations may be allowed as a cost of service provided that the total sum of all such items allowed in the cost of service shall not exceed three-tenths of one percent (0.3%) maximum of the gross receipts; and

(G) accruals credited to reserve accounts for self-insurance under a plan requested by a licensee and approved by the commission. The commission shall consider approval of a self-insurance plan in a rate case in which expenses or rate base treatments are requested for such a plan. For the purposes of this section, a self-insurance plan is a plan providing for accruals to be credited to reserve accounts. The reserve accounts are to be charged with property and liability losses which occur, and which could not have been reasonably anticipated and included in operating and maintenance expenses, and are not paid or reimbursed by commercial insurance. The commission will approve a self-insurance plan to the extent it finds it to be in the public interest.

(2) **Compact**--The Texas Low-Level Radioactive Waste Disposal Compact established under Texas Health and Safety Code, §403.006 and Texas Low-Level Radioactive Waste Disposal Compact Consent Act, Public Law Number 105-236 (1998).

(3) **Compact waste**--Low-level radioactive waste that:

(A) is generated in a host state or a party state; or

(B) is not generated in a host state or a party state, but has been approved for importation to this state by the compact commission under §3.05 of the Texas Low-Level Radioactive Waste Disposal Compact established under Texas Health and Safety Code, §403.006.

(4) **Compact waste disposal facility**--The low-level radioactive waste land disposal facility licensed by the commission under Subchapter H of this chapter (relating to Licensing Requirements for Near-Surface Land Disposal of Low-Level Radioactive Waste) for the disposal of compact waste.

(5) **Extraordinary volume**--Volumes of low-level radioactive waste delivered to a site caused by nonrecurring events, outside normal operations of a generator, that are in excess of 20,000 cubic feet or 20% of the preceding year's total volume at such site, whichever is less.

(6) **Extraordinary volume adjustment**--A mechanism that allocates the potential rate reduction benefits of an extraordinary volume between all generators and the generator responsible for such extraordinary volume as described in §336.1313 of this title (relating to Extraordinary Volume Adjustment).

(7) **Generator**--A person, partnership, association, corporation, or any other entity whatsoever that, as a part of its activities, produces low-level radioactive waste and is subject to the Compact.

(8) **Gross receipts**--Includes, with respect to an entity or affiliated members, owners, shareholders, or limited or general partners, all receipts from the entity's disposal operations in Texas licensed under this chapter including any bonus, commission, or similar payment received by the entity from a customer, contractor, subcontractor, or other person doing business with the entity or affiliated members, owners, shareholders, or limited or general partners. This term does not include receipts from the entity's operations in Texas, or affiliated members, owners, shareholders, or limited or general partners, for capital reimbursements, bona fide storage, treatment, and processing, and federal or state taxes or fees on waste received uniquely required to meet the specifications of a license or contract.

(9) **Inflation adjustment**--A mechanism that adjusts the maximum disposal rate by a percentage equal to the change in price levels in the preceding period. The adjustment shall be made using an inflation factor derived from the most recent annual Implicit Price Deflator for Gross National Product published by the United States Department of Commerce in its Survey of Current Business.

(10) **Invested capital**--The original cost, less accumulated depreciation, of property used by and useful to the licensee in providing service. The original cost of property shall be determined at the time the property is dedicated to public use, whether by the licensee that is the present owner or by a predecessor. In this subchapter, "original cost" means the actual money cost, or the actual money value of any consideration paid other than money.

(11) **Licensee**--The holder of the license authorizing the compact waste disposal facility license issued by the commission under this chapter.

(12) **Maximum disposal rate**--The rate described in §336.1311 of this title (relating to Revisions to Maximum Disposal Rates).

(13) **Reasonable rate of return**--The return on invested capital based on calculations of revenue and operating costs on an after-tax basis which may include the following applicable factors:

(A) the efforts and achievements of the licensee in conserving resources;

(B) the quality of the licensee's services;

(C) the efficiency of the licensee's operations; and

(D) the quality of the licensee's management.

(14) **Relative hazard** --The properties of a waste stream for disposal that may present a particular hazard or danger for safe management based on the radioactivity in curies and dose rate as well as special handling requirements due to size, shape, or configuration.

(15) **Revenue requirement**--Based on a formula which is the invested capital multiplied by the rate of return on invested capital , plus the allowable expenses , where all amounts are only those used and useful for the compact facility.

(16) **Volume adjustment**--A mechanism that adjusts the maximum disposal rate in response to material changes in volumes of waste deposited at the site during the preceding period so as to provide a level of total revenues sufficient to recover the costs to operate and maintain the site.

§336.1305. Commission Powers.

(a) The commission shall establish rates to be charged by the licensee. In establishing the rates, the commission shall ensure that they are fair, just, reasonable, and sufficient considering the value of the licensee's real property and license interests, the unique nature of its business operations, the licensee's liability associated with the site, its investment incurred over the term of its operations, and the reasonable rate of return equivalent to that earned by comparable enterprises.

(b) The commission may use any standard, formula, method, or theory of valuation reasonably calculated to arrive at the objective of prescribing and authorizing fair, just, reasonable, and sufficient rates.

(c) In any proceeding involving an initial or a change of rate, the burden of proof shall be on the licensee to show that the proposed rate, if proposed by the licensee, or that the existing rate, if it is proposed to reduce the rate, is just and reasonable. In any other matters or proceedings, the burden of proof is on the moving party.

(d) The commission may refer a request for a contested case hearing to the State Office of Administrative Hearings on the establishment of a rate under this subchapter.

(e) The commission may audit a licensee's financial records and waste manifest information to ensure that the fees imposed under this chapter are accurately charged and paid. The licensee shall comply with the commission's audit-related requests for information.

(1) To achieve the purposes, proper administration, and enforcement of this chapter, the executive director may conduct audits or investigations of waste disposal rates, payments and fees authorized by Texas Health and Safety Code, Chapter 401, and the veracity of information submitted to the commission.

(2) Each person subject to or involved with an audit or investigation under subsection (a) of this section shall cooperate fully with the audit or investigation by the executive director.

(f) After consideration of initial rate application or revision, the commission shall establish, by rule, the maximum disposal rate and schedule.

(g) The authority to establish the rates under this subchapter maybe delegated to the executive director if the application is not contested.

(h) Initiation of rate revision by the executive director.

(1) If good cause exists, the executive director may initiate revisions to the maximum disposal rates established under this subchapter which may include a true-up proceeding, subject to notice and opportunity for a contested case hearing. No revision to the maximum disposal rate is final until approved in the commission's rules establishing the maximum disposal rate. Good cause includes, but is not limited to:

(A) there are material and substantial changes in the information used to establish the maximum disposal rates ;

(B) information, not available at the time the maximum rates were established, is received by the executive director, justifying a rate revision; or

(C) the rules or statutes on which the maximum disposal rates were based have been changed by statute, rule, or judicial decision after the establishment of the maximum disposal rates .

(2) One or more generators may petition the executive director to initiate a revision to the maximum disposal rate under the requirements of this subsection. The generator must provide a copy of the petition to the licensee at the time the petition is submitted to the executive director. The executive

shall grant or deny the petition within 90 days of filing, or request more information from the petitioner. The executive director's decision on a petition filed under this paragraph is subject to a motion to overturn filed with the commission under Chapter 50 of this title (relating to Actions on Applications and Other Authorizations).

§336.1307. Factors Considered for Maximum Disposal Rates.

Maximum disposal rates adopted by the commission shall consider the following factors and be sufficient to:

(1) allow the licensee to recover allowable expenses. Allowable expenses shall never include: legislative advocacy expenses; political expenditures or contributions; expenses in support of or promoting political movements, or political or religious causes; funds expended for membership in or support of social, fraternal, or religious clubs or organizations; costs, including interest expense, of processing a refund or credit ordered by the commission; or any expenditure found by the commission to be unreasonable, unnecessary or against public interest, including but not limited to, executive salaries, legal expenses, penalties, fines, or costs not used or useful for the provision of compact waste disposal finality services;

(2) provide an amount to fund local public projects under Texas Health and Safety Code, §401.244;

(3) provide a reasonable opportunity to earn a reasonable rate of return on invested capital in the facilities used for management, disposal, processing, or treatment of compact waste at the compact waste disposal facility, which rate of return is expressed as a percentage of invested capital. In addition to the factors set forth in §336.1303(13) of this title (relating to Definitions), the rate of return should be reasonably sufficient to assure confidence in the financial soundness of the licensee and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time and become too high or too low because of changes affecting opportunities for investment, the money market, and business conditions generally. The commission may, in addition, consider inflation, deflation, and the need for the licensee to attract new capital. The rate of return must be high enough to attract new capital but need not go beyond that. In each case, the commission shall consider the licensee's cost of capital, which is the weighted average of the costs of the various classes of capital used by the licensee:

(A) Debt capital. The cost of debt capital is the actual cost of the debt at the time of issuance, plus adjustments for premiums, discounts, and refunding and issuance costs.

(B) Equity capital. For companies with ownership expressed in terms of shares of stock, equity capital commonly consists of the following classes of stock:

(i) Common stock capital. The cost of common stock capital shall be based upon a fair return on its market value; or

(ii) Preferred stock capital. The cost of preferred stock capital is the actual cost of preferred stock at the time of issuance, plus an adjustment for premiums, discounts and refunding and issuance costs; and

(4) provide an amount necessary to pay compact waste disposal facility licensing fees, to pay compact waste disposal facility fees set by rule or statute, to provide financial assurance for the compact waste disposal facility as required by the commission under law and commission rules, and to reimburse the commission for the salary and other expenses of two or more resident inspectors employed by the commission pursuant to Texas Health and Safety Code, §401.206.

§336.1309. Initial Determination of Rates and Fees.

(a) The licensee shall file an application with the executive director to establish initial maximum disposal rates that consider the factors identified in §336.1307 of this title (relating to Factors Considered for Maximum Disposal Rates). The application shall include exhibits, workpapers, summaries, annual reports, cost studies, a proposed reasonable rate of return on invested capital, proposed fees, and other information as requested by the executive director to demonstrate rates that meet the requirements of this subchapter. In addition, the application shall include revenue requirements for cost recovery from the compact waste disposal facility.

(1) The licensee shall submit a rate filing application package in accordance with the application prescribed by the executive director.

(2) After receipt of the application, the executive director shall review the application and recommend one or more rates to the commission for approval. In reviewing the application and evaluating the rate information, the executive director may request additional information from the licensee.

(3) The licensee shall provide notice of the application to all known customers that will ship or deliver waste to the compact waste disposal facility and shall provide notice of the application to any person by any method as directed by the executive director.

(4) The executive director shall maintain a Web site to inform the public on the process for consideration of the rate application and shall provide notice by publication in the *Texas Register*.

(b) After notice and the opportunity for a contested case hearing, the commission shall establish the initial maximum disposal rates that may be charged by the licensee. Upon request for a contested case hearing by a waste generator in the Texas Compact, the executive director shall directly refer an application to establish maximum disposal rates to the State Office of Administrative Hearings for a contested case hearing. Only the executive director, the licensee, or a generator has a right to a contested case hearing.

(c) A request for a contested case hearing filed by a generator shall contain the following information for each signatory generator:

(1) a clear and concise statement that the application is a request for a contested case hearing; and

(2) the generator's licensing numbers indicating the location or locations where the compact waste is generated.

(d) Generators must initiate a request for a contested case hearing by filing individual requests rather than joint requests.

(e) In the initial rate proceeding, the commission also shall determine the factors necessary to calculate the inflation adjustment, volume adjustment, extraordinary volume adjustment, and relative hazard.

(f) Initial rates shall be interim rates subject to a true-up in the first revision to maximum disposal rates pursuant to §336.1311 of this title (relating to Revisions to Maximum Disposal Rates). The true-up will measure the differences between projected and actual volumes of cubic feet of waste, allowable expenses, and invested capital for the time period that the interim rates are in effect, based on actual, historical amounts during that time period. The licensee shall refund to the generators who paid interim rates where money collected under the interim rates that is in excess of the adopted rates; or the licensee shall surcharge bills to the generators who paid interim rates to recover the amount by which the money collected under interim rates is less than the money that would have been collected under adopted rates.

(g) After determining the initial maximum disposal rates, inflation adjustment, and volume adjustment under this subchapter, the commission shall direct the executive director to initiate expedited rulemaking to establish the rate by rule.

§336.1311. Revisions to Maximum Disposal Rates.

(a) The maximum disposal rates that a licensee may charge generators shall be determined in accordance with this section, and §336.1307 of this title (relating to Factors Considered for Maximum Disposal Rates). The rates shall include all charges for disposal services at the site.

(b) Initially, the maximum disposal rates shall be the initial rates established pursuant to §336.1309 of this title (relating to Initial Determination of Rates and Fees).

(c) Subsequently, the maximum disposal rates shall be adjusted in January of each year to incorporate inflation adjustments and volume adjustments. Such adjustments shall take effect unless the commission authorizes that the adjustments take effect according to an alternate schedule.

(d) The licensee may also file an application for revisions to the maximum disposal rates due to:

(1) changes in any governmentally imposed fee, surcharge, or tax assessed on a volume or a gross receipts basis against or collected by the licensee, including site closure fees, perpetual care and maintenance fees, business and occupation taxes, site surveillance fees, commission regulatory fees, taxes, and a tax or payment in lieu of taxes authorized by the state to compensate the county in which a site is located for that county's legitimate costs arising out of the presence of that site within that county;

(2) factors outside the control of the licensee such as a material change in regulatory requirements regarding the physical operation of the site; or

(3) changes in the licensee's revenue requirements or in any of the other factors in §336.1307 of this title that necessitate a change in the licensee's maximum disposal rates.

(e) For revisions to maximum disposal rates, the application must meet the requirements in §336.1309(a) and (b) of this title. In computing allowable expenses for revisions to maximum disposal rates, only the licensee's test year expenses as adjusted for known and measurable changes will be considered.

(f) For any revisions to the maximum disposal rates , including inflation and volume adjustments, the licensee shall provide notice to its customers concurrent with the filing as consistent with §336.1309(a)(3) of this title (relating to Initial Determination of Rates and Fees).

§336.1313. Extraordinary Volume Adjustment.

(a) In establishing the extraordinary volume adjustment, unless the licensee and generator of the extraordinary volume agree to a contract disposal rate, one-half of the extraordinary volume delivery shall be priced at the maximum disposal rate and one-half shall be priced at the licensee's incremental cost to receive the delivery. Such incremental cost shall be determined in the initial rate proceeding.

(b) For purposes of the subsequent calculation of the volume adjustment, one-half of the total extraordinary volume shall be included in the calculation.

§336.1315. Revenue Statements and Consideration of Payment to Affiliate.

(a) The licensee shall, on or before April 1st of each year, file with the commission:

(1) an audited financial statement showing its gross receipts for the preceding calendar year;

(2) a statement in a form prescribed by the executive director reflecting the licensee's revenues and allowable expenses for the previous calendar year from its low-level radioactive waste disposal activities; and

(3) a validation of payments made in §336.103(f) and (g) of this title (relating to Schedule of Fees for Subchapter H Licenses) must also be included.

(b) The financial statement as specified in subsection (a) of this section shall be prepared in accordance with Generally Accepted Accounting Principles and audited by a Certified Public Accounting (CPA) firm. The audited financial statement shall include an Auditor's Report from the CPA indicating an "unqualified" opinion of the licensee's financial statements.

(c) In addition to the financial statement on gross receipts, the licensee shall provide an audited cost statement that provides all investment and operating costs for the preceding calendar year.

(d) In addition to information submitted under this section, all revenues and costs shall be provided by the licensee upon request by the executive director to consider revision of rates under §336.1305(c) of this title (relating to Commission Powers.)

(e) Except as provided by subsection (f) of this section, the commission may not allow as capital cost or as allowable expenses a payment to an affiliate for:

(1) the cost of service, property, right, or other item; or

(2) interest expense.

(f) The commission may allow a payment described by subsection (e) of this section only to the extent that the commission finds the payment is reasonable and necessary for each item or class of items as determined by the commission.

(g) A finding under subsection (f) of this section must include:

(1) a specific finding of the reasonableness and necessity of each item or class of items allowed; and

(2) a finding that the price charged to the licensee is not higher than the prices charged by the supplying affiliate for the same item or class of items to:

(A) its other affiliates or divisions; or

(B) a nonaffiliated person within the same market area or having the same market conditions.

(h) In making a finding regarding an affiliate transaction, the commission shall:

(1) determine the extent to which the conditions and circumstances of that transaction are reasonably comparable relative to quantity, terms, date of contract, and place of delivery; and

(2) allow for appropriate differences based on that determination.

(i) If the commission finds that an affiliate expense for the test period is unreasonable, the commission shall:

(1) determine the reasonable level of the expense; and

(2) include that expense in determining the licensee's cost of service.

§336.1317. Contracted Disposal Rates.

(a) At any time, a licensee may contract with any person to provide a contract disposal rate that is lower than the maximum disposal rate.

(b) A contract or contract amendment shall be submitted to the executive director for approval at least 30 days before its effective date. If the executive director takes no action within 30 days of filing, the contract or amendment shall go into effect according to its terms. Each contract filing shall be accompanied with documentation to show that the contract does not result in unreasonable discrimination between generators receiving like and contemporaneous service under substantially similar circumstances and provides for the recovery of all costs associated with the provision of the service.