

The Texas Natural Resource Conservation Commission (commission) adopts amendments to Chapter 37, Subchapter A, §§37.1, 37.11, 37.21, 37.31, 37.41, 37.51, 37.52, 37.61, and 37.71, concerning general financial assurance requirements; Subchapter B, §§37.100, 37.101, 37.111, 37.121, 37.131, 37.141, 37.151, and 37.161, concerning financial assurance requirements for closure, post closure, and corrective action; Subchapter C, §§37.201, 37.211, 37.221, 37.231, 37.241, 37.251, and 37.261, concerning financial assurance mechanisms for closure, post closure, and corrective action; Subchapter D, §§37.301, 37.311, 37.321, 37.331, 37.341, 37.351, and 37.361, concerning wording of the mechanisms for closure, post closure, and corrective action; Subchapter E, §37.400 and §37.411, concerning financial assurance requirements for liability coverage; Subchapter F, §§37.501, 37.511, 37.521, 37.531, 37.541, and 37.551, concerning financial assurance mechanisms for liability; Subchapter G, §§37.601, 37.611, 37.621, 37.631, 37.641, 37.651, and 37.661, concerning wording of the mechanisms for liability; Subchapter J, §§37.901, 37.911, 37.921, and 37.931, concerning financial assurance for permitted compost facilities; Subchapter K, §§37.1001, 37.1011, and 37.1021, concerning financial assurance requirements for Class A or B petroleum-substance contaminated soil storage, treatment, and reuse facilities; Subchapter L, §§37.2001, 37.2011, and 37.2021, concerning financial assurance for used oil recycling; Subchapter M, §37.3001 and §37.3011, concerning financial assurance requirements for scrap tire sites; Subchapter N, §§37.4001, 37.4011, and 37.4021, concerning financial assurance requirements for the Texas Risk Reduction Program rules; and to Subchapter O, §37.5011, concerning financial assurance for public drinking water systems and utilities.

The commission adopts the repeal of §§37.271, 37.281, 37.371, 37.381, and 37.401.

The commission adopts new §§37.200, 37.271, 37.281, 37.371, 37.381, 37.402, 37.404, 37.671, 37.1005, 37.2003, 37.2013, 37.2015, 37.3003, 37.3021, 37.3031, and 37.4031.

The commission also adopts new Subchapters P-U, relating to financial assurance issues that are specific to particular program areas. New Subchapter P, §§37.6001, 37.6011, 37.6021, 37.6031, and 37.6041, concern financial assurance for hazardous and nonhazardous industrial solid waste facilities and for municipal hazardous waste facilities; new Subchapter Q, §§37.7001, 37.7011, 37.7021, 37.7031, 37.7041, and 37.7051, concern financial assurance for underground injection control well facilities; new Subchapter R, §§37.8001, 37.8011, 37.8021, 37.8031, 37.8041, 37.8051, 37.8061, and 37.8071, concern financial assurance for municipal solid waste facilities; new Subchapter S, §§37.9001, 37.9005, 37.9010, 37.9015, 37.9020, and 37.9025, concern financial assurance for alternative methods of disposal of radioactive material; new Subchapter T, §§37.9030, 37.9035, 37.9040, 37.9045, 37.9050, and 37.9055, concern financial assurance for near-surface land disposal of radioactive waste; and finally, new Subchapter U, §§37.9060, 37.9065, 37.9070, 37.9075, 37.9080, and 37.9085, concern financial assurance for medical waste transporters.

Sections 37.271, 37.631, 37.641, 37.651, 37.671, 37.2011, 37.3001, 37.3003, 37.7021, 37.7031, 37.8021, 37.8031, 37.8071, and 37.9070 are adopted with changes to the proposed text as published in the October 22, 1999 issue of the *Texas Register* (24 TexReg 9152). The remaining sections are adopted without changes and will not be republished.

This action constitutes the commission's adoption of the rules contained in Chapter 37, in accordance with Texas Government Code, §2001.39, implementing the requirements of Senate Bill (SB) 178, 76th Legislature, 1999.

REVIEW OF AGENCY RULES

The commission adopts the rules contained in Chapter 37, concerning Financial Assurance, as mandated by Texas Government Code, §2001.39, implementing the requirements of SB 178, 76th Legislature, 1999. SB 178 requires state agencies to review and consider for readoption those rules that are adopted under the Administrative Procedure Act. The reviews must include an assessment that the reason for the rules continues to exist. The commission has reviewed the rules in Chapter 37 and determined that the rules continue to be necessary because they implement critical provisions of Texas Water Code (TWC), §26.352 and §27.073; and Texas Health and Safety Code (HSC), §§341.035, 341.0355, 361.085, 371.026, and 401.108, which provide authority for the commission to require demonstrations of financial assurance, and because the provisions implement the financial assurance requirements of federal programs delegated from the United States Environmental Protection Agency (EPA) to the State of Texas. The purpose of the financial assurance requirements is to assure that adequate funds will be readily available to cover the costs of closure, post closure, and corrective action associated with certain types of facilities. Financial assurance is important for two primary reasons. First, to prevent delays in addressing environmental needs at facilities, owners and operators need to have funds that are readily available. Moreover, if the owner or operator lacks sufficient funds, environmental needs may have to be addressed through state or federal cleanup funds rather than by the entity responsible for the facility. Additionally, some programs require liability coverage to protect

third parties from bodily injury and property damage that may result from a permittee's waste management activities. Chapter 37 provides necessary rules to carry out the statutory mandates which require evidence of financial assurance regarding certain waste facilities. The adoption of the rule review is concurrently published in the Rule Review section of this issue of the *Texas Register*.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

Changes have been adopted in Chapter 37 as the result of ongoing efforts by the commission for regulatory reform. This rulemaking focuses on financial assurance and is based upon a two-step process. The first step involved identification of all commission programs which contain a financial assurance component and transfer of those requirements into Chapter 37. The second step involved processing of the rules to eliminate redundant requirements, to remove duplicative mechanisms, and to consolidate provisions whenever possible. Modifications are being simultaneously adopted in 30 TAC Chapters 305, 324, 330, 331, 334, 335, and 336. Entities who are required to provide financial assurance are specifically instructed to do so in each relevant, technical chapter. Those requirements that are overseen by the commission's technical program staff, such as the calculation of closure, post closure, and corrective action costs, will remain in the technical rule chapters. Each technical chapter refers the reader to Chapter 37 for the rules pertaining to financial assurance and to the financial assurance mechanisms.

The financial assurance rules being adopted are consolidated in accordance with the commission's ongoing regulatory reform initiative. For example, previously, several programs had rules with a separate subchapter concerning financial assurance and the allowed mechanisms. Frequently, the

requirements were repetitive and identical. This rule adoption consolidates financial requirements to reduce duplicative language while retaining the integrity of the previous requirements. The owner or operator must comply with the requirements of closure, the requirements of post closure, and the requirements of corrective action, or any combination of the three, as is appropriate for the particular activity conducted at the type of facility or site being considered. The mere consolidation, or inclusion, of all three types of activities in a single rule section does not alter the scope of the applicability of the rule, nor does it impose a more or less stringent regulation.

The adoption of these financial assurance rules is also for the purpose of clarification, in accordance with the commission's ongoing regulatory reform initiative. For example, the adoptions clarify and use cross-references to indicate that the owner or operator is subject to the provisions of the relative technical chapters, the general subchapters of Chapter 37, the mechanism requirements, the mechanism wordings, and the specific program subchapters of Chapter 37.

This rule adoption is for simplification and clarification and the adoption involves few substantive changes to the procedures and criteria that are used by the commission and the regulated community for providing financial assurance and other associated activities that are regulated under this chapter. Substantive changes are minimal and occur, when necessary, for the purposes of consolidation, clarification, compatibility, and consistency with commission rules and federal requirements, and protection of human health and the environment. Substantive changes in the regulations were specifically articulated in the proposal preamble published in the October 22, 1999 issue of the *Texas Register* to make those instances easily identifiable. In general, these rule amendments involve

organization, editorial modifications, reordering requirements into a more logical sequence, and correcting cross-reference citations.

Texas law requires the commission to adopt rules requiring financial assurance for various program areas, including TWC, §26.352 for underground storage tanks; TWC, §27.073 for underground injection well facilities; HSC, §341.035 and §341.0355 for public drinking water supply systems; HSC, §361.085 for solid waste, hazardous waste, and permitted facilities; HSC, §371.026 for used oil handlers; HSC, §401.108 for licensed facilities; and HSC, §401.051 and §401.412 for radioactive substances.

The purpose of the financial assurance requirements is to assure that adequate funds will be readily available to cover the costs of closure, post closure, and corrective action associated with certain types of facilities. Financial assurance is important for two primary reasons. First, to prevent delays in addressing environmental needs at facilities, owners and operators need to have funds that are readily available. Moreover, if the owner or operator lacks sufficient funds, environmental needs may have to be addressed through state or federal cleanup funds rather than by the entity responsible for the facility. Additionally, some programs require liability coverage to protect third parties from bodily injury and property damage that may result from a permittee's waste management activities.

The adopted amendments are necessary to maintain consistency of commission rules and to fulfill the statutory mandates requiring financial assurance.

SECTION BY SECTION DISCUSSION

Corrections to the proposed rules for Chapter 37 were published in the *Texas Register* on November 26, 1999 (24 TexReg 10606). The changes were primarily to include a statutory authority reference. The corrections are included in the adopted rule text. Additionally, the commission adopts §§37.271, 37.631, 37.641, 37.651, 37.671, 37.2011, 37.3001, 37.3003, 37.7021, 37.7031, 37.8021, 37.8031, 37.8071, and 37.9070 with changes as follows.

EPA furnished definitions to the states for the accounting terms used in the local government financial test. During the regulatory reform for Chapter 37 a client of the commission who was applying the definition of debt service noted that the word “principal” may have been omitted from Enterprise Funds and Internal Service Funds. Staff received confirmation from EPA that the word “principal” should be added to the debt service term for reporting that expense along with the interest expense in Enterprise Funds and Internal Service Funds. The commission adopts §37.271(1)(D)(v) with changes to include the phrase “principal and” which is necessary to correct the definition of debt service. Section 37.271(1)(D)(v) will be adopted as follows: “Debt service is ... plus all principal and interest expense in Enterprise Funds....”

The commission adopts the figure in §37.631 with a change to delete the word “facility” from the second sentence for the purpose of clarification and to avoid redundancy. The section will be adopted to read as follows: “... The coverage applies at (list permit number, name, and physical and mailing addresses for each facility)....”

The commission adopts the figure in §37.641 with a change to delete the word “facility” from the second sentence for the purpose of clarification and to avoid redundancy. The section will be adopted to read as follows: “... The coverage applies at (list permit number, name, and physical and mailing addresses for each facility)...”

The commission adopts the figure in §37.651 with the addition of a comma in the third paragraph to correct a grammatical mistake. The section will be adopted to read as follows: “... The firm identified above is the owner or operator of the following facilities for which liability coverage for (sudden or nonsudden, or both sudden and nonsudden) accidental occurrences”

The commission adopts the figure in §37.671(a) with a correction to capitalize the word “Indemnification” in the title to Section 16 of the standby trust agreement. The section title will be adopted to read as follows: “Section 16. Immunity and Indemnification.”

The commission adopts §37.2011 with changes to include the statement that used oil handlers who are required to demonstrate financial assurance must do so in an amount as specified in §324.22(c) or (d). This change is necessary in order to be consistent with the technical chapter. The section will be adopted to read as follows: “In addition to the requirements of this subchapter, used oil handlers who must demonstrate financial assurance for soil remediation must do so in an amount as specified in §324.22(c) or (d) of this title (relating to Financial Responsibility Technical Requirements) and must comply with Subchapters A, B, C, and D”

The commission adopts §37.3001 and §37.3003 with changes to clarify and correct the obsolete cross-references. In both sections, the commission will now add a reference to indicate that owners and operators of scrap tire sites should refer to existing Chapter 328, Subchapter F. Now, the obsolete reference to Chapter 330, Subchapter R, which is no longer applicable, will be deleted.

Section 37.3001, concerning Applicability, will now read as follows: “This subchapter applies to an owner or operator required to provide financial assurance under Chapter 328, Subchapter F of this title (relating to Management of Used or Scrap Tires). This subchapter establishes requirements and mechanisms for demonstrating financial assurance for closure.” Section §37.3003, concerning Definitions, will now read as follows: “Definitions for terms that appear throughout this subchapter may be found in Subchapter A of this chapter (relating to General Financial Assurance Requirements), as well as Chapter 328, Subchapter F of this title (relating to Management of Used or Scrap Tires).”

The commission adopts §37.7021(d) with changes to include the word “annual” to clarify and prevent the potential confusion to owners and operators of underground injection control facilities regarding methodology for calculating inflation adjustments. The rule, as proposed, requires that the inflation adjustments are to be derived from “the most recent Implicit Price Deflator.” Section 37.131 clearly specifies that the inflation adjustment is to be based on the “latest published annual Deflator”; however, owners and operators of underground injection control facilities might mistakenly base their inflation adjustments on quarterly inflation deflators. To prevent this possible confusion, section §37.7021(d) is adopted as follows: “Owners or operators shall comply with §37.131 of this title (relating to Annual Inflation Adjustments to Current Cost Estimates), except that adjustments must be made by 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*.”

The commission adopts §37.7031(d) with two changes. First, the phrase “of this title” will be added in compliance with *Texas Register* format requirements. Second, the word “annual” will be included for the same reason the modification is being made in §37.7021(d), that being to clarify the methodology for calculating inflation adjustments for underground injection well facilities. Section 37.7031(d) is adopted as follows: “Owners or operators shall comply with §37.131 of this title (relating to Annual Inflation Adjustments to Current Cost Estimates), except that adjustments must be made by 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*.”

The commission adopts §37.8021 with two changes. First, the phrase “of this title” is added for compliance with *Texas Register* formatting requirements. Second, the adopted rule will add a provision which clarifies that annual inflation adjustments are to be made during the post closure period. This change is required in order to be consistent with EPA’s rules. Section 37.8021 will be adopted as follows: “In addition to the requirements of this subchapter, owners or operators required to demonstrate for closure, post closure, or corrective action must comply with Subchapters A, B, C, and D of this chapter (relating to General Financial Assurance Requirements; Financial Assurance Requirements for Closure, Post Closure, and Corrective Action; Financial Assurance Mechanisms for Closure, Post Closure, and Corrective Action; and Wording of the Mechanisms for Closure, Post Closure, and Corrective Action) except that §37.131 of this title (relating to Annual Inflation

Adjustments to Current Cost Estimates) shall be modified to mean annual inflation adjustments are required during the active life of the facility and during the post closure care period.”

The commission adopts §37.8031(b) with changes to clarify that the pay-in period may be over the life of the municipal solid waste facility. However, if the pay-in period exceeds ten years, annual certifications must be provided from an independent registered professional engineer. The commission adopts this change in response to a comment from National Solid Waste Management Association (NSWMA); however, the commission notes additional changes that are necessary. The term “corrective action” is deleted from the rule text, as it was proposed, because it was inadvertently added.

This deletion will make the rule consistent with 40 Code of Federal Regulations (CFR) §258.74(a)(2).

The clause “whichever is shorter” is added for clarification, to make the rule consistent with 40 CFR §258.74(a)(2), and to ensure that a facility with a remaining life of less than ten years has a pay-in period commensurate with its remaining life. During the proposal phase of this rulemaking, the clause was removed with the repeal §330.285(b)(2), but was addressed with an approval process by the executive director for a pay-in period other than ten years. This rule adoption deletes the approval process that was previously proposed; therefore, it is necessary to reinstate this previously existing requirement.

The term “landfill unit” is replaced with “facility” so that the rule can be applied by owners and operators of municipal solid waste facilities and not solely by owners and operators of municipal solid waste landfill units.

To accommodate the changes suggested by NSWMA, which delete the requirement that the executive director approve pay-in periods that are in excess of ten years, the commission identified additional amendments that are required. These changes clarify the framework for the timing of submissions of annual certifications, the form of the certification, and the consequences of not providing the annual certification in a complete and timely manner and on an appropriate form.

These provisions are required to assure that technical staff consistently obtain information necessary to adequately determine the remaining life of the facility and the financial assurance required at that point in time; to set due dates for the annual certifications so that the annual payment can be determined and provided on a consistent basis; and to assure that the financial assurance is adequate for the facility at any point in time, because it is the annual certification which assists in determining the annual payment. If the certification is not submitted on the approved form, is not complete, or is not timely, then the payment cannot be determined.

The commission adopts the figure in §37.8071 with changes to delete the phrase “(relating to Corporate Financial Test for Municipal Solid Waste Facilities)” to avoid the redundancy of identifying a reference which is identified in a preceding paragraph of the document. The section will be adopted to read as follows: “... In States where TNRCC is not administering the financial requirements of 30 TAC Chapter 37, this firm, as owner, operator, or guarantor, is demonstrating financial assurance for the current cost estimates of the following facilities through the use of a test equivalent to the financial test specified in 30 TAC §37.8061. The current cost estimates”

The commission adopts §37.9070(c)(3)(A) with changes to include the phrase “(not tractor-trailer units)” which is necessary to describe the type of transport vehicles. Section 37.9070(c)(3)(A) will be adopted as follows: “\$10,000, if three or less self-contained trucks or transport vehicles (not tractor-trailer units) are registered.”

FINAL REGULATORY IMPACT ANALYSIS

The commission has reviewed the rulemaking in light of the regulatory analysis requirements of the Texas Government Code, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a “major environmental rule” as defined in the Administrative Procedure Act. Although the rules are adopted to protect the environment and reduce risk to human health, this rulemaking is not a major environmental rule because it 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 rules do not adversely affect in a material way the aforementioned aspects of the state because, generally, the changes are made to the financial assurance rules for the purposes of consolidation and organization. In the few instances where a substantive change is being adopted, there are no such changes which modify the procedures and criteria used by the commission and the regulated entities in such a manner that the rules, as adopted, are a “major environmental rule.” The rules, as adopted, provide better-written, better-organized, and easier to use financial assurance rules, which in turn provides an overall benefit to the affected economy, sectors of the economy, productivity, competition, jobs, the environment, and the public health and safety of the state and affected sectors of the state. The economy, a sector of the economy, productivity, competition, or jobs, are not adversely affected in a material way by the few substantive

changes. In fact, the changes should benefit the economy, a sector of the economy, and productivity by clarifying existing requirements and by making the rules easier to understand. As the previously existing rules were protective of human health and the environment, this rule adoption does not decrease the protection of the environment or human health. More simply stated, the adoption revises the commission's rules in a manner which could provide a benefit to the economy while enhancing the protection of the environment and public health and safety.

Furthermore, these rules do not meet any of the four applicability requirements listed in Texas Government Code §2001.0225(a). The rules do not exceed a standard set by federal law because one of the purposes of this rulemaking is to adopt state rules which are accordant with the corresponding federal regulations. Any requirements in the rules are in accord with the corresponding federal regulations, and they do not exceed an express requirement of state law because they implement state law provisions to require financial assurance. This adoption does not exceed the requirements of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state or federal program because there is no federal financial assurance program. There are, however, federal financial assurance requirements for many of the delegated programs, and these rules are consistent with the corresponding federal financial assurance requirements. The adoption is not made solely under the general powers of the commission, but is also made under the requirements of specific state law (including TWC, §27.019 and §27.073; and HSC, §§361.011, 361.015, 361.017, 361.018, 361.024, 361.085, 361.428, 371.024, 371.026, 371.028, 401.108, 401.051, and 401.412) that allows the commission to provide these programs. The rules are also adopted under a requirement of Texas Government Code, §2001.039, implementing SB 178, 76th

Legislature, 1999, which requires state agencies to review and consider for re adoption the rules adopted under the Administrative Procedure Act. The existing rules are still needed because they implement critical portions of the state law concerning financial assurance. Finally, these rules are not being adopted on an emergency basis to protect the environment or to reduce risks to human health.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these rules under Texas Government Code, §2007.043. The following is a summary of that assessment. The purpose of this rulemaking is to meet the statutory requirement for the commission to review its rules every four years as stated in the Government Code; to delete obsolete language; to make the rules consistent with commission and federal rules; and to implement the commission's guidelines on regulatory reform as well as to provide clarifications to existing rule language. Promulgation and enforcement of the rules does not create a burden on private real property. There are no significant, new requirements being added. In the few instances where a substantive change is being adopted, there are no such changes which modify the financial assurance rules, procedures, or criteria in such a manner that a burden on private real property is modified or created. A landowner's rights in private real property will not be affected by the adoption of these rules.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the rulemaking for consistency with the Texas Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council and found that the rules are subject to the CMP and must be consistent with applicable CMP

goals and policies which are found in 31 TAC §501.12 and §501.14. The CMP goal applicable to the rules is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of Coastal Natural Resource Areas (CNRAs). CMP policies applicable to the rules include the administrative policies and the policies for specific activities related to construction and operation of solid waste treatment, storage, and disposal facilities. In particular, the CMP policy most applicable to these rules is to ensure that new solid waste facilities and areal expansions of existing solid waste facilities are sited, designed, constructed, and operated to prevent releases of pollutants that may adversely affect CNRAs and comply with standards established under the Solid Waste Disposal Act, 42 United States Code, §§6901 et seq.

This rulemaking is related to financial assurance, which in turn impacts the issuance of permits, including those permits relating to solid waste facilities. Thus, this rulemaking is subject to the CMP. The commission has prepared a consistency determination for the rules pursuant to 31 TAC §505.22 and has found that this rulemaking is consistent with the applicable CMP goals and policies. The commission determined that the rule adoption is consistent with the applicable CMP goals and policies because the modification implemented by these rules is insignificant in relationship to the CMP and has no impact upon CNRAs.

The rulemaking does contain minor, substantive changes. In the few instances where a substantive change is made, it is for the purposes of achieving consistency with state and federal law and to achieve consistency with commission rules. However, the commission has determined that these rules will not have a direct or significant, adverse effect on CNRAs. This adoption does not change the technical

permitting requirements of waste facilities nor change the amount of financial assurance that must be demonstrated. Instead, these financial assurance rules address the means by which demonstrations of financial assurance can be made.

Because this rule adoption does not modify the amount of financial assurance that is required to be demonstrated for permits for owners and operators of hazardous waste storage, processing, or disposal facilities, promulgation and enforcement of these rules has no new effect on the CNRAs. The rules continue having the original effect, which is to require demonstrations of financial assurance in order to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of CNRAs, and also the rules continue to ensure that new solid waste facilities and areal expansions of existing solid waste facilities are sited, designed, constructed, and operated to prevent releases of pollutants that may adversely affect CNRAs and comply with standards established under the Solid Waste Disposal Act, 42 United States Code, §§6901 et seq.

The CMP goal applicable to the rules is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of CNRAs. Because the rules do not change the amount of financial assurance required by the previously existing rules, the rules are consistent with the applicable CMP goal. CMP policies applicable to the rules include the administrative policies and the policies for specific activities related to construction and operation of solid waste treatment, storage, and disposal facilities.

Promulgation and enforcement of these rules is consistent with the applicable CMP goals and policies because the adoption does not change the amount of financial assurance required in the previously existing rules. The rule modifications do not relax the existing requirements which encourage safe and appropriate storage, management, and treatment of hazardous waste, and thereby the rule modifications result in no substantive effect on the management of coastal areas of the state. In addition, these rules do not violate any applicable provisions of the CMP's stated goals and policies. Therefore, in compliance with 31 TAC §505.22(e), the commission affirms that these rules are consistent with CMP goals and policies, and the rules have no new impact upon the coastal area.

HEARING AND COMMENTERS

A public hearing was not requested or held concerning these rules. The public comment period closed November 22, 1999 at 5:00 p.m. central standard time. Written comments were received from the National Solid Waste Management Association (NSWMA) and from the Phillips Petroleum Company (Phillips). The law firm of Potts and Reilly (Potts) provided two additional sets of comments which were received by the Commission after the close of the comment period. The first of these two sets was provided on behalf of the Texas Beneficial Use Coalition (T-BUC) and the second set was provided on behalf of the law firm itself. While these two sets are not official comments, the Commission appreciates the commenter's suggestions and provides informal responses to the unofficial comments.

ANALYSIS OF TESTIMONY

NSWMA suggested modification of §37.8031(b) in order to allow a municipal solid waste land fill (MSWLF) operator to pay into the trust over the life of the MSWLF unit because NSWMA suggested

that the period will better match revenues received and costs incurred. NSWMA suggested that a ten-year period is a disincentive to using the trust mechanism for a MSWLF unit that will be open for much longer than ten years because of the greater cash flow burden in the early years of the MSWLF unit operation. NSWMA suggested that §37.8031(b) be modified to appear as follows: “(b) An owner or operator may use a fully funded trust, pay-in trust, or standby trust as provided in §37.201 of this title (relating to Trust Fund), except the pay-in period is ten years or over the remaining life of the municipal solid waste landfill unit. If a pay-in period in excess of ten years is used, the owner or operator shall submit, on an annual basis, certification from an independent registered professional engineer that there is adequate financial assurance for closure, post closure, or corrective action.”

The commission agrees with NSWMA’s comment and has amended the section; however, additional modifications were also necessary. The term “corrective action” was deleted, the term “landfill unit” was replaced with “facility,” the clause “whichever is shorter” was added, and additional amendments were made to ensure proper administration of the pay-in periods. The term “corrective action” was deleted from the rule language, as it was proposed, because it had been inadvertently added. This deletion will make the rule consistent with 40 CFR §258.74(a)(2). The clause “whichever is shorter” is added for clarification, to make the rule consistent with 40 CFR §258.74(a)(2), and to ensure that a facility with a remaining life of less than ten years has a pay-in period commensurate with its remaining life. During the proposal phase of this rulemaking, the clause was removed with the repeal of §330.285(b)(2), but was addressed in the proposed rule through an approval process by the executive director for a pay-in period other than ten years. This rule adoption deletes the approval process that was previously proposed; therefore, it is necessary to reinstate this formerly existing requirement. The

term “landfill unit” was replaced with “facility” so that the rule can be applied by owners and operators of municipal solid waste facilities and not solely by owners and operators of municipal solid waste landfill units.

Three other amendments were necessary to protect human health and the environment by ensuring that there are adequate funds for closure or post closure when needed. Financial assurance is important for two primary reasons. First, to prevent delays in addressing environmental needs at facilities, owners and operators need to have funds that are readily available. Moreover, if the owner or operator lacks sufficient funds, environmental needs may have to be addressed through state or federal cleanup funds rather than by the entity responsible for the facility.

The first provision requires that the annual certification provided by the independent registered professional engineer be on a form approved by the executive director. This provision is needed to assure that technical staff obtain consistent and necessary information to adequately determine the remaining life of the facility and the financial assurance required up to that point in time.

The second provision provides the timing of the submission of the initial and the annual certifications. The provision is needed to set due dates for the annual certifications so that the annual payment can be determined and will be provided on a consistent basis.

The third provision identifies the consequences to an owner or operator who does not provide timely and proper certifications on an annual basis. The provision is needed because it is the annual

certification which determines the annual payment and assures that financial assurance is adequate for the facility, up to that point in time. If the certification is not on the approved form, is not complete, or is not timely, then the payment cannot be determined. Consequently, the provision states that if the executive director notifies the owner or operator of any of these events, then the pay-in trust reverts to a fully funded trust and the amount in the trust must equal the current closure or post closure cost estimate.

Owners and operators must be aware that choosing the pay-in trust option with payments over the remaining life of the facility will require timely, annual certifications and that payments will vary based on the calculated remaining life of the facility as well as the current closure or post closure cost estimate. Therefore, staff have also included consequences in §37.8031(b)(2) that the pay-in trust will revert to a fully funded trust and the entire current closure or post closure cost estimate is due if the owner or operator fails to meet the annual certification requirements in a complete and timely manner and on an appropriate agency form.

NSWMA also suggested that a ten-year pay-in period is more restrictive than the federal requirements. NSWMA suggested that the federal limits in 40 CFR §258.74(a)(2) allow a MSWLF operator to pay into the trust over the term of the initial permit (which does not apply in Texas because there are no permit terms) or over the remaining life of the MSWLF unit (as NSWMA is proposing), whichever is shorter. NSWMA suggested that this is a more restrictive requirement and that it is contrary to the commitment made by the Texas Water Commissioners to the governor on July 17, 1992, when the Texas Water Commission stated: “The Commission will not establish any regulations relative to

municipal solid waste that exceed the new federal Subtitle D requirements unless such measures are necessary to protect key resources such as the Edwards Aquifer (Underground River). The agency's basic policy position is this: Subtitle D is the upper limit of our regulatory authority on solid waste management. We further recognize that we must be as flexible as possible as we implement Subtitle D regulations and consider local variables and conditions."

The commission disagrees with this portion of NSWMA's comment. The ten-year pay-in period is not more restrictive than the federal requirements, since the owner or operator is provided a choice of using either a ten-year period or a longer period. The federal requirement in 40 CFR §258.74(a)(2) states: "Payments into the trust fund must be made annually by the owner or operator over the term of the initial permit or over the remaining life of the MSWLF unit, whichever is shorter," In Texas, MSWLF permits do not have permit terms so the federal rule, as written, could not be applied in Texas. Commission staff met with the Municipal Solid Waste Advisory Council on June 13, 1997 to discuss this issue and to receive its suggestions. Members supported the idea of offering a choice between a set pay-in term and a longer term. The commission believes that this choice provides options equivalent to the federal requirements. The ten-year pay-in period was selected to be consistent with the permit terms applied to industrial solid waste and municipal hazardous waste facilities and underground injection control facilities. Staff believes that the longer term could be supported with an engineer's annual certification that verifies there is adequate financial assurance to perform closure, post closure, or corrective action in relation to the waste that exists at the site. No changes to the rule will be made in response to this portion of NSWMA's comment.

Phillips submitted a comment which focuses on §37.151 and which pertains to cost estimates for post closure care and how these estimates are evaluated annually. Phillips comment read: “In this section, the TNRCC provides a mechanism to reduce the cost estimate for either closure or post closure when there is a change in the plan or activity. However, there does not seem to be a mechanism to routinely reduce the cost estimate for a unit undergoing post closure without petitioning the executive director annually. Once post closure starts, facilities incur a cost for the post closure activities. It seems reasonable that this expenditure would be deducted from the post-closure estimate. However, Phillips is unaware of a mechanism whereby the post closure estimate may be reduced by this amount prior to adjusting the estimate for inflation. Instead, the estimate for post closure contained in the facility’s permit must be inflated and used in the financial assurance mechanism. Phillips would like to see this issue addressed in the final regulations.”

The commission disagrees with Phillip’s comment. Section 37.151 allows the owner or operator to request a reduction in post closure financial assurance whenever the current cost estimate decreases below the amount of financial assurance provided as a result of changes in the post closure plan or activities. This will take place as part of a permit modification, thereby reducing the financial assurance requirement.

It would be fiscally imprudent for the Commission to allow the automatic release of post closure funds without ensuring that the required post closure work is in fact being performed and that there are adequate funds to complete the remaining work. Federal rules require that the remaining amount of financial assurance be in sufficient amount to accommodate the remaining

cost of post closure care. See 40 CFR §§264.145, 265.145, and 258.72(a)(4). Otherwise, if the owner or operator fails to adequately perform the required post closure care, the citizens of Texas, through the response of the commission, would be unfairly burdened with expenses to assure that a facility does not present a threat to human health and the environment. Requiring a permit modification allows the agency to confirm that there are adequate funds to complete the remaining work prior to approving fund release.

Once an industrial solid waste facility enters the post closure phase, inflation adjustments are no longer required as indicated in §37.131. To a large degree, this offsets the potential annual reduction that could be allowed once the remaining costs are calculated in current dollars. As such, the rule should not result in a significant overstatement of remaining post closure costs.

If an industrial solid waste unit is undergoing post closure while the facility continues in operation, then inflation adjustments are still required to be consistent with federal rule. However, owners and operators are free to seek a permit modification when the inflated cost estimate for that unit is shown to be excessive. No changes to the rule will be made in response to Phillip's comment.

In its two sets of unofficial suggestions, Potts made several comments. First, Potts desires that the financial assurance requirements will not be applied to non-permitted recycling facilities. Secondly, Potts does not believe that creating a new definition of the term "permit" which includes "registration" is consistent with legislative intent, recent court pronouncements, or prior commission practice. Potts

believes that the definition creates unnecessary confusion for the regulated community. Finally, Potts also suggested that the existing financial assurance rules applicable to Municipal Solid Waste facilities apply only to permitted sites, not to registered sites. Potts elaborated on this concept to suggest that application of the financial assurance rules to registered facilities is a requirement that is more stringent than the federal regulations, is inconsistent with Texas Health and Safety Code, §361.085, and was not given adequate notice to the public because the requirement would deviate from previous commission practice.

The commission disagrees with Potts' suggestion that the rules might thwart recycling. It is evident in the language of the rule that non-permitted recycling activities are not subject to the financial assurance requirements in Chapter 37. Stated very simply, the Chapter 37 financial assurance requirements apply to those facilities which are required to demonstrate financial assurance. To determine whether financial assurance is a requirement for a particular type of facility or activity, owners and operators must refer to the corresponding technical chapter requirements.

The commission disagrees with Potts' suggestion that the Chapter 37 definition of "permit" which includes "registration" is confusing to the regulated community and inconsistent with prior commission practice. Section 37.11, entitled *Definitions*, clearly states that the terms have the meanings provided for use in Chapter 37. This is a standard practice and is used throughout commission rules, particularly in rules such as these which cover several program areas. For the purposes of Chapter 37, the use of the term "permit" is defined to include written permission

from the commission including a permit, license, registration, or other authorization to facilitate consolidation of the rules across the various program areas. This language is consistent with the definition of “permit” in both 30 TAC Chapter 3, “a license *or other authorization...*” (emphasis added) and the definition of “permit” in Chapter 305, “a written document issued by the commission which, by its conditions, may authorize the permittee to construct, install, modify or operate, in accordance with stated limitations, a specified facility for waste discharge, for solid waste storage, processing or disposal....”

The commission also disagrees with Potts’ comment that the commission is expanding the financial assurance requirements to include registered facilities. The concept that registered facilities must demonstrate financial assurance has been present in the commission’s rules since at least 1994.

The commission is not changing its application of the financial assurance rules; rather, it is clarifying that the financial assurance requirements are indeed applicable to registered facilities.

While it is true that HSC, §361.085 uses the term “permit” in reference to solid waste facilities, this term is not defined by the statute. However, HSC, §361.017 provides the commission with the “powers and duties specifically prescribed in this chapter and all other powers necessary or convenient to carry out its responsibilities under this chapter.” In addition, HSC, §361.024 provides the commission with the authority to adopt rules consistent with this chapter and “establish minimum standards of operation for the management and control” of solid waste.

These two provisions provide authority for the commission to define the term “permit.” Further, the language of HSC, §361.085(f) clearly indicates legislative intent that activities such as processing and storage of solid waste be regulated by HSC, §361.085, “The agency to which the

application is submitted shall require an assurance of financial responsibility as may be necessary or desirable consistent with the degree and duration of risks associated with the *processing, storage, or disposal of specified solid waste.*” (Emphasis added.)

As a matter of policy, it would be imprudent to discontinue the requirement that registered process facilities, including transfer stations, are required to demonstrate financial assurance.

The commission disagrees with Potts’ suggestions that the public was not given adequate notice of this rule because requiring registered facilities to demonstrate financial assurance does not deviate from previous commission practice. As stated previously, the commission is not changing its application of the rules, but is clarifying that the financial assurance requirements remain applicable to registered facilities.

No changes to the rule will be made in response to any of Pott’s unofficial comments.

STATUTORY AUTHORITY

The amendments are adopted under TWC, §5.103, and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the laws of this state.

These rules are also adopted under TWC, §26.011, which provides the commission with the authority to adopt rules to regulate water quality; TWC, §26.352, which provides the commission with the authority to adopt rules relating to financial assurance for underground storage tanks; TWC, §26.346, which requires the commission to establish rules relating to the registration of underground and aboveground storage tanks; TWC, §27.019, which provides the commission with the authority to adopt

rules and procedures necessary for the management of underground injection well facilities; TWC, §27.073, which provides the commission with the authority to require financial assurance for underground injection well facilities; HSC, §341.031, which provides authority for the commission to adopt rules to implement the federal Safe Drinking Water Act; HSC, §341.035 and §341.0355, which provide the commission with the authority to require financial assurance for public drinking water systems; Solid Waste Disposal Act in HSC, §361.011, which provides the commission with the authority to manage municipal solid waste; HSC, §361.015 and §361.018, which provide the commission with the authority to manage radioactive waste; HSC, §361.017, which provides the commission with the authority to manage industrial solid waste and hazardous municipal waste; HSC, §361.024, which provides the commission with the authority to adopt any rules and establish standards of operation for the management of solid waste; HSC, §361.085, which provides the commission with the authority to require financial assurance demonstrations for solid waste, hazardous waste, and permitted facilities; HSC, §361.428, which provides the commission with the authority to regulate compost facilities; Used Oil Collection, Management, and Recycling Act in HSC, §371.024 and §371.028, which require the commission to adopt rules and procedures necessary to implement the used oil recycling program relating to used oil; HSC, §371.026, which provides the authority for the commission to require financial assurance from used oil handlers; HSC, §401.108, which provides the authority for the commission to require financial assurance from licensed facilities; and finally, HSC, §401.051 and §401.412, which provide authority for the commission to adopt rules relating to radioactive substances.

Together, these statutes authorize the commission to adopt any rules necessary to carry out its powers and duties under TWC and other laws of Texas and to establish and approve all general policy of the commission. These rules are also adopted in accordance with Texas Government Code, §2001.39, implementing SB 178, 76th Legislature, 1999, which requires a quadrennial review of commission rules.

SUBCHAPTER A : GENERAL FINANCIAL ASSURANCE REQUIREMENTS

§§37.1, 37.11, 37.21, 37.31, 37.41, 37.51, 37.52, 37.61, 37.71

§37.1. Applicability.

This chapter applies to an owner or operator required to provide financial assurance. The terms “owner or operator” and “owner and operator” are used throughout this chapter to indicate any or all of the following: owner, operator, licensee, permittee, registrant, or person. Refer to the applicable subchapter(s) of this chapter for guidance specific to a program area.

§37.11. Definitions.

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

(1) **Assets** - All existing and all probable future economic benefits obtained or controlled by a particular entity.

(2) **Closure plan** - The plan for closure prepared in accordance with commission requirements.

(3) **Corporate guarantor** - Must be the direct or higher-tier parent corporation or a firm with a substantial business relationship with the owner or operator.

(4) **Current assets** - Cash or other assets or resources commonly identified as those which are reasonably expected to be realized in cash or sold or consumed during the normal operating cycle of the business.

(5) **Current closure cost estimate** - The most recent of the estimates prepared for closure.

(6) **Current cost estimate** - The most recent estimates prepared in accordance with commission requirements for the purpose of demonstrating financial assurance for closure, post closure, or corrective action.

(7) **Current liabilities** - Obligations whose liquidation is reasonably expected to require the use of existing resources properly classifiable as current assets or the creation of other current liabilities.

(8) **Current post closure cost estimate** - The most recent of the estimates prepared in accordance with commission requirements.

(9) **Current plugging and abandonment cost estimate** - The most recent of the estimates prepared in accordance with Chapter 331 of this title (relating to Underground Injection Control).

(10) **Entity** - For the purposes of this chapter, means a legal organization engaged in lawful business or purpose, such as a corporation, partnership, sole proprietorship, limited liability company, limited liability partnership, or limited partnership or similar business organization.

(11) **Face amount** - The total amount the insurer is obligated to pay under an insurance policy, excluding legal defense costs.

(12) **Financial responsibility** - This term shall be used interchangeably with financial assurance.

(13) **Independent audit** - An audit performed by an independent certified public accountant in accordance with generally accepted auditing standards.

(14) **Liabilities** - Probable future sacrifices of economic benefits arising from present obligations to transfer assets or provide services to other entities in the future as a result of past transactions or events.

(15) **Net working capital** - Current assets minus current liabilities.

(16) **Net worth** - Total assets minus total liabilities and equivalent to owner's equity.

(17) **Parent corporation** - A corporation which directly owns at least 50% of the voting stock of the corporation which is the facility owner or operator; the latter corporation is deemed a subsidiary of the parent corporation.

(18) **Permit** - Written permission from the commission, including a permit, license, registration, or other authorization, to engage in a business or occupation, to perform an act (such as to build, install, modify, or operate a facility), or to engage in a transaction, which would be unlawful absent such permission.

(19) **Post closure** - This term shall be used interchangeably with the term "Post closure care."

(20) **Post closure plan** - The plan for post closure care prepared in accordance with commission requirements.

(21) **Program area** - Texas Natural Resource Conservation Commission areas under which the facility is permitted, licensed, or registered to operate, including, but not limited to, Industrial and Hazardous Waste, Underground Injection Control, Municipal Solid Waste, or Petroleum Storage Tanks.

(22) **Standby trust** - An unfunded trust established to meet the requirements of this chapter.

(23) **Substantial business relationship** - A relationship where the guarantor is a corporation and owns at least 50% of the entity guaranteed.

(24) **Tangible net worth** - The tangible assets that remain after deducting liabilities; such assets would not include intangibles such as goodwill and rights to patents or royalties.

§37.21. Wording and Approval of Mechanisms.

The mechanisms submitted for compliance with this chapter must be worded as they appear in Subchapter D or G of this chapter (relating to Wording of the Mechanisms for Closure, Post Closure, and Corrective Action or Wording of the Mechanisms for Liability). The executive director shall determine the acceptability of the mechanisms submitted.

§37.31. Submission of Documents.

(a) An owner or operator required by this chapter to provide financial assurance for closure, post closure, or liability coverage must submit an originally signed financial assurance mechanism to the executive director 60 days prior to acceptance of waste. The mechanism must be in effect before the initial receipt of waste.

(b) An owner or operator required by this chapter to provide financial assurance for corrective action must submit an originally signed financial assurance mechanism 60 days after the permit or order requiring the corrective action financial assurance is signed by the executive director or commission. The mechanism must be in effect when submitted.

§37.41. Use of Multiple Financial Assurance Mechanisms.

(a) An owner or operator may satisfy the requirements of this chapter by establishing more than one financial assurance mechanism per facility. These mechanisms are limited to those specified in this chapter. For closure, post closure, or corrective action, the financial test or corporate guarantee may not be combined with another mechanism. For liability coverage, the owner or operator may not combine a financial test covering part of the liability coverage requirement with a guarantee unless the financial statement of the owner or operator is not consolidated with the financial statement of the guarantor.

(b) It shall be the combination of mechanisms, rather than the single mechanism, which shall provide financial assurance for an amount that must be at least equal to the minimum financial assurance requirements of this chapter.

(c) If an owner or operator uses a trust fund in combination with a surety bond or irrevocable standby letter of credit, the owner or operator may use that trust fund as the standby trust fund for the other mechanisms.

(d) A single standby trust may be established for two or more mechanisms.

(e) The executive director may call on any or all of the mechanisms to satisfy the requirements for which financial assurance was provided.

(f) If an owner or operator demonstrates the required liability coverage through the use of a combination of financial assurance mechanisms, the owner or operator shall specify at least one such assurance as “primary” coverage and shall specify other assurance as “excess.”

§37.51. Use of a Financial Assurance Mechanism for Multiple Facilities.

An owner or operator may use a financial assurance mechanism as specified in this chapter to meet the requirements of this chapter for more than one facility, provided that the facilities are in the same program area. Financial assurance submitted to the executive director shall include a list showing for each facility covered by the mechanism: the name, physical and mailing addresses of the facility, each program area and permit number, the rules regulating the program under which the facility is permitted, and the amount of funds demonstrated for each permit, for closure, post closure, corrective action, and liability. The amount of funds available through the mechanism must be no less than the sum of funds that would be available if a separate mechanism had been established and maintained for each facility. In directing funds available through the mechanism for any of the facilities covered by the mechanism, the executive director may call on only the amount of funds designated for that facility, unless the owner or operator agrees to the use of additional funds available under the mechanism.

§37.52. Use of a Universal Financial Assurance Mechanism for Multiple Facilities and Program Areas.

(a) An owner or operator may use a universal mechanism to meet the requirements of this chapter for multiple facilities permitted in multiple program areas, provided the mechanism is allowed to be used in the program areas represented. The amount of funds demonstrated by the universal mechanism must be no less than the sum of funds that would be available if separate mechanisms were established and maintained. The wording of the mechanisms must be in a form satisfactory to the executive director. The available mechanisms are those specified in this chapter, except that the financial test or corporate guarantee may not be combined with other specified mechanisms and a standby trust fund shall be required in certain circumstances. For liability coverage, the owner or operator may not combine a financial test covering part of the liability coverage requirement with a guarantee unless the financial statement of the owner or operator is not consolidated with the financial statement of the guarantor.

(b) A universal mechanism submitted to the executive director shall include a list showing, for each facility covered by the mechanism: the name, physical and mailing addresses of the facility, each program area and permit number, the rules regulating the program under which the facility is permitted, and the amount of funds demonstrated for each permit for closure, post closure, corrective action, and liability. The anniversary date of the universal mechanism is the date on which owners or operators shall make an annual inflation adjustment for all facilities demonstrating through the universal mechanism. In directing funds available through the universal mechanism for any of the facilities

covered by the mechanism, the executive director may call on only the amount of funds designated for each permit for that facility, unless the owner or operator agrees to the use of additional funds available under the mechanism.

(c) An owner or operator who intends to use the financial test or corporate guarantee as a universal mechanism, must certify the ability to meet the financial test or corporate guarantee requirements for each of the corresponding program areas for which the universal mechanism is intended to cover.

§37.61. Termination of Mechanisms.

Upon written request by the owner or operator, the executive director shall provide written consent to termination of a financial assurance mechanism when:

(1) an owner or operator substitutes and receives approval from the executive director for alternate financial assurance as specified in this chapter; or

(2) the executive director releases the owner or operator from the requirements of this chapter.

§37.71. Incapacity of Owners or Operators, Guarantors, or Issuing Institutions.

(a) An owner or operator must notify the executive director by certified mail of the commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), United States Code, naming the owner or operator as debtor, within ten business days after the commencement of the proceeding. As required under the terms of the guarantee, a guarantor of a corporate guarantee as specified in §37.261 of this title (relating to Corporate Guarantee) and a corporate guarantee as specified in §37.551 of this title (relating to Corporate Guarantee for Liability) shall make such a notification if named as a debtor.

(b) An owner or operator who fulfills the requirements of this chapter shall be deemed to be without the required financial assurance coverage in the event of bankruptcy of the trustee or issuing institution, or a suspension or revocation of the authority of the trustee institution to act as trustee or of the institution issuing the surety bond, irrevocable standby letter of credit, or insurance policy to issue such mechanisms. The owner or operator must establish other acceptable financial assurance within 60 days after such an event.

SUBCHAPTER B : FINANCIAL ASSURANCE REQUIREMENTS
FOR CLOSURE, POST CLOSURE, AND CORRECTIVE ACTION
§§37.100, 37.101, 37.111, 37.121, 37.131, 37.141, 37.151, 37.161

STATUTORY AUTHORITY

The amendments are adopted under TWC, §5.103, and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the laws of this state.

These rules are also adopted under TWC, §26.011, which provides the commission with the authority to adopt rules to regulate water quality; TWC, §26.352, which provides the commission with the authority to adopt rules relating to financial assurance for underground storage tanks; TWC, §26.346, which requires the commission to establish rules relating to the registration of underground and aboveground storage tanks; TWC, §27.019, which provides the commission with the authority to adopt rules and procedures necessary for the management of underground injection well facilities; TWC, §27.073, which provides the commission with the authority to require financial assurance for underground injection well facilities; HSC, §341.031, which provides authority for the commission to adopt rules to implement the federal Safe Drinking Water Act; HSC, §341.035 and §341.0355, which provide the commission with the authority to require financial assurance for public drinking water systems; Solid Waste Disposal Act in HSC, §361.011, which provides the commission with the authority to manage municipal solid waste; HSC, §361.015 and §361.018, which provide the commission with the authority to manage radioactive waste; HSC, §361.017, which provides the commission with the authority to manage industrial solid waste and hazardous municipal waste; HSC, §361.024, which provides the commission with the authority to adopt rules and establish standards of

operation for the management of solid waste; HSC, §361.085, which provides the commission with the authority to require financial assurance demonstrations for solid waste, hazardous waste, and permitted facilities; HSC, §361.428, which provides the commission with the authority to regulate compost facilities; Used Oil Collection, Management, and Recycling Act in HSC, §371.024 and §371.028, which require the commission to adopt rules and procedures necessary to implement the used oil recycling program relating to used oil; HSC, §371.026, which provides the authority for the commission to require financial assurance from used oil handlers; HSC, §401.108, which provides the authority for the commission to require financial assurance from licensed facilities; and finally, HSC, §401.051 and §401.412, which provide authority for the commission to adopt rules relating to radioactive substances.

Together, these statutes authorize the commission to adopt any rules necessary to carry out its powers and duties under TWC and other laws of Texas and to establish and approve all general policy of the commission. These rules are also adopted in accordance with Texas Government Code, §2001.39, implementing Senate Bill 178, 76th Legislature, 1999, which requires a quadrennial review of commission rules.

§37.100. Applicability.

This subchapter applies to an owner or operator required to provide financial assurance for closure, post closure, or corrective action.

§37.101. Drawing on the Financial Assurance Mechanisms.

The executive director may call on the financial assurance mechanism(s) when an owner or operator who is required to comply with this chapter has:

- (1) failed to perform closure, post closure, or corrective action when required;
- (2) failed to provide an alternate financial assurance mechanism, when required; or
- (3) failed to provide continuous financial assurance coverage.

§37.111. Continuous Financial Assurance Required.

The owner or operator of a facility required by this chapter to provide financial assurance for closure, post closure, or corrective action, shall provide continuous financial assurance until the executive director provides written consent to termination in accordance with §37.61 of this title (relating to Termination of Mechanisms).

§37.121. Current Cost Estimate.

The owner or operator of each facility required by this chapter to provide financial assurance for closure, post closure, or corrective action must establish financial assurance in an amount no less than the current cost estimate.

§37.131. Annual Inflation Adjustments to Current Cost Estimates.

During the active life of the facility, the owner or operator must adjust the current cost estimate for inflation within 60 days prior to the anniversary date of the first establishment of the financial assurance mechanism. For owners or operators using the financial test or corporate guarantee, the current cost estimate must be updated for inflation within 30 days after the close of the firm's fiscal year and before submission of updated information to the executive director as specified in this chapter. The adjustment may be made by recalculating the maximum costs of closure, post closure, or corrective action, in current dollars, or by using an inflation factor derived from the most recent Implicit Price Deflator for Gross National Product published by the United States Department of Commerce in its *Survey of Current Business*, as specified in paragraphs (1) and (2) of this section. The inflation factor is the result of dividing the latest published annual Deflator by the Deflator for the previous year.

(1) The first adjustment is made by multiplying the current cost estimate by the inflation factor. The result is the adjusted current cost estimate.

(2) Subsequent adjustments are made by multiplying the latest adjusted cost estimate by the latest inflation factor.

§37.141. Increase in Current Cost Estimate.

Whenever the current cost estimate increases to an amount greater than the amount being provided in the financial assurance mechanism(s) as a result of changes in the closure, post closure, or corrective action, plan or activities, the owner or operator must either cause the amount of the financial assurance to be increased and submit evidence of such increase to the executive director, or obtain additional financial assurance in accordance with this chapter to cover the increase. This adjustment must be made within 60 days after the owner or operator becomes aware, or is notified by the executive director, of the increase. The revised current cost estimate must be adjusted for inflation as specified by this subchapter.

§37.151. Decrease in Current Cost Estimate.

Whenever the current cost estimate decreases to an amount less than the amount being provided in the financial assurance mechanism(s) as a result of changes in the closure, post closure, or corrective action, plan or activities, the owner or operator may submit a written request for a reduction in the amount of the financial assurance to the executive director. Following written approval by the executive director, the amount of the financial assurance may be reduced to the amount of the current cost

estimate. The revised current cost estimate must be adjusted for inflation as specified by this subchapter.

§37.161. Establishment of a Standby Trust.

An owner or operator who uses a surety bond or an irrevocable standby letter of credit to satisfy the requirements of this chapter must establish a standby trust fund. Under the terms of the bond or letter of credit, all payments made under the bond or all amounts paid pursuant to a draft by the executive director shall be deposited by the surety or issuing institution directly into the standby trust fund or in accordance with instructions from the executive director. This standby trust fund must meet the requirements of the trust fund specified in §37.201 of this title (relating to Trust Fund), except that:

(1) an originally signed duplicate of the trust agreement must be submitted to the executive director with the surety bond or irrevocable standby letter of credit; and

(2) unless the standby trust fund is funded pursuant to the requirements of this chapter, the following are not required by this section:

(A) payments into the trust fund as specified in §37.201 of this title;

(B) updating of Schedule A of the trust agreement to show current cost estimates for closure, post closure, or corrective action;

(C) annual valuations as required by the trust agreement; and

(D) notices of nonpayment as required by the trust agreement.

**SUBCHAPTER C : FINANCIAL ASSURANCE MECHANISMS FOR
CLOSURE, POST CLOSURE, AND CORRECTIVE ACTION**

§§37.200, 37.201, 37.211, 37.221, 37.231, 37.241, 37.251, 37.261, 37.271, 37.281

STATUTORY AUTHORITY

The amendments and new sections are adopted under TWC, §5.103, and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the laws of this state. These rules are also adopted under TWC, §26.011, which provides the commission with the authority to adopt rules to regulate water quality; TWC, §26.352, which provides the commission with the authority to adopt rules relating to financial assurance for underground storage tanks; TWC, §26.346, which requires the commission to establish rules relating to the registration of underground and aboveground storage tanks; TWC, §27.019, which provides the commission with the authority to adopt rules and procedures necessary for the management of underground injection well facilities; TWC, §27.073, which provides the commission with the authority to require financial assurance for underground injection well facilities; HSC, §341.031, which provides authority for the commission to adopt rules to implement the federal Safe Drinking Water Act; HSC, §341.035 and §341.0355, which provide the commission with the authority to require financial assurance for public drinking water systems; Solid Waste Disposal Act in HSC, §361.011, which provides the commission with the authority to manage municipal solid waste; HSC, §361.015 and §361.018, which provide the commission with the authority to manage radioactive waste; HSC, §361.017, which provides the commission with the authority to manage industrial solid waste and hazardous municipal waste; HSC, §361.024, which provides the commission with the authority to adopt rules and establish standards of

operation for the management of solid waste; HSC, §361.085, which provides the commission with the authority to require financial assurance demonstrations for solid waste, hazardous waste, and permitted facilities; HSC, §361.428, which provides the commission with the authority to regulate compost facilities; Used Oil Collection, Management, and Recycling Act in HSC, §371.024 and §371.028, which require the commission to adopt rules and procedures necessary to implement the used oil recycling program relating to used oil; HSC, §371.026, which provides the authority for the commission to require financial assurance from used oil handlers; HSC, §401.108, which provides the authority for the commission to require financial assurance from licensed facilities; and finally, HSC, §401.051 and §401.412, which provide authority for the commission to adopt rules relating to radioactive substances.

Together, these statutes authorize the commission to adopt any rules necessary to carry out its powers and duties under TWC and other laws of Texas and to establish and approve all general policy of the commission. These rules are also adopted in accordance with Texas Government Code, §2001.39, implementing Senate Bill 178, 76th Legislature, 1999, which requires a quadrennial review of commission rules.

§37.200. Applicability.

This subchapter applies to an owner or operator required to provide financial assurance for closure, post closure, or corrective action. For additional requirements relating to specific mechanisms and exceptions allowed under a program area, refer to the applicable subchapter(s) of this chapter.

§37.201. Trust Fund.

(a) An owner or operator may satisfy the requirements of financial assurance by establishing either a fully funded trust or a pay-in trust which conforms to the requirements of this section, in addition to the requirements specified in Subchapters A and B of this chapter (relating to General Financial Assurance Requirements and Financial Assurance Requirements for Closure, Post Closure, and Corrective Action), and submitting an originally signed duplicate of the executed trust agreement to the executive director.

(b) The trustee must be an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by a federal or state agency.

(c) The wording of the trust agreement must be identical to the wording specified in §37.301(a) of this title (relating to Trust Agreement) including a formal certification of acknowledgment as specified in §37.301(b) of this title.

(d) Schedule A of the trust agreement as specified in §37.301(a) of this title must be updated within 60 days after an approved change in the amount of the current cost estimate or annual inflation adjustments.

(e) A fully funded trust requires that the initial payment into the trust fund be at least equal to the current cost estimate, or when a combination of mechanisms are used in accordance with §37.41 of

this title (relating to Use of Multiple Financial Assurance Mechanisms), the initial payment plus the amount of the combined mechanism(s) must be at least equal to the current cost estimate. A receipt from the trustee for the initial payment must be submitted by the owner or operator to the executive director with the originally signed duplicate of the trust agreement.

(f) In the case of a pay-in trust for closure or post closure, payments into the trust fund must be made annually by the owner or operator over the term of the initial permit or over the remaining life of the facility, whichever is shorter. In the case of a pay-in trust for corrective action for known releases, the payments into the trust fund must be made annually by the owner or operator over one-half of the estimated length of the corrective action program. The periods referred to in this subsection are the pay-in periods. The payments into the trust fund must be made in accordance with this subsection. During the period of post closure, a pay-in trust for post closure may not be used.

(1) For a pay-in trust used to demonstrate financial assurance for closure and post closure, the first payment into the fund must be at least equal to the current cost estimate for closure or post closure, less the amount of the combined mechanisms, divided by the number of years in the pay-in period. Subsequent payments must be made no later than 30 days after each anniversary date of the first payment. The amount of subsequent payments must be determined by the following formula:

Figure: 30 TAC §37.201(f)(1)

(2) For a pay-in trust used to demonstrate financial assurance for corrective action, the first payment into the trust fund must be at least equal to one-half of the current cost estimate for

corrective action, less the amount of the combined mechanisms, divided by the number of years in the corrective action pay-in period. The amount of subsequent payments must be determined by the following formula:

Figure: 30 TAC §37.201(f)(2)

(3) The owner or operator may accelerate payments into the trust fund or may deposit the full amount of the current cost estimate at the time the fund is established. However, the owner or operator must maintain the value of the fund at no less than the value that the fund would have if annual payments were made as specified in paragraphs (1) or (2) of this subsection.

(4) If the owner or operator establishes a trust fund after having used another financial assurance mechanism, the first payment must be at least equal to the amount that the fund would contain if the trust fund was established when the permit was initially issued, and subsequent payments must be made as specified in paragraphs (1) or (2) of this subsection.

(g) After the initial payment for a fully funded trust or after the pay-in period is completed for a pay-in trust, whenever the current cost estimate changes, the owner or operator must compare the new estimate with the trustee's most recent annual valuation of the trust fund. If the value of the fund is less than the amount of the new estimate, the owner or operator, within 30 days after the change in the current cost estimate, must either deposit an amount into the fund so that its value after this deposit at least equals the amount of the current cost estimate, or obtain an additional financial assurance mechanism as specified in this subchapter to cover the difference.

(h) If the value of the trust fund is greater than the total amount of the current cost estimate, the owner or operator may submit a written request to the executive director for release of the amount in excess of the current cost estimate.

(i) Within 60 days after receiving a request from the owner or operator for release of funds as specified in subsection (h) of this section, the executive director shall instruct the trustee to release to the owner or operator such funds as the executive director specifies in writing.

(j) An owner or operator or any other person authorized by the executive director to perform closure, post closure, or corrective action may request reimbursement for closure, post closure, or corrective action expenditures by submitting itemized bills to the executive director. The request shall include an explanation of the expenses and all applicable itemized bills. The owner or operator may request reimbursements for partial closure only if sufficient funds are remaining in the trust fund to cover the maximum costs of closing the facility over its remaining operating life. After receiving bills for closure, post closure, or corrective action activities, the executive director shall instruct the trustee to make reimbursement in such amounts as the executive director specifies in writing, if the executive director determines that the partial or final closure, post closure, or corrective action expenditures are in accordance with the approved closure plan, post closure plan, or corrective action activities, or are otherwise justified. If the executive director has reason to believe that the cost of closure, post closure, or corrective action over the remaining life of the facility will be greater than the value of the trust fund, the executive director may withhold reimbursement of such amounts as deemed prudent until it is determined, in accordance with Subchapters A and B of this chapter (relating to General Financial

Assurance Requirements and Financial Assurance Requirements for Closure, Post Closure, and Corrective Action) that the owner or operator is no longer required to maintain financial assurance for final closure, post closure, or corrective action at the facility.

(k) If an owner or operator substitutes other financial assurance as specified in this section for all or part of the trust fund, the owner or operator may submit a written request to the executive director for release of the amount in excess of the current cost estimate covered by the trust fund.

§37.211. Surety Bond Guaranteeing Payment.

(a) An owner or operator may satisfy the requirements of financial assurance by obtaining a surety bond which conforms to the requirements of this section, in addition to the requirements specified in Subchapters A and B of this chapter (relating to General Financial Assurance Requirements and Financial Assurance Requirements for Closure, Post Closure, and Corrective Action), and submitting an originally signed surety bond to the executive director.

(b) The surety company issuing the bond must, at a minimum, be among those listed as acceptable sureties on Federal bonds in Circular 570 of the United States Department of the Treasury.

(c) The wording of the surety bond must be identical to the wording specified in §37.311 of this title (relating to Payment Bond).

(d) The bond must guarantee that the owner or operator shall:

(1) fund the standby trust fund as required in §37.161 of this title (relating to Establishment of a Standby Trust) in an amount equal to the penal sum of the bond before the beginning of final closure of, or corrective action at, the facility;

(2) fund the standby trust fund as required in §37.161 of this title in an amount equal to the penal sum within 15 days after an administrative order to begin final closure or corrective action issued by the executive director becomes final, or within 15 days after an order to begin final closure or corrective action is issued by the United States district court or other court of competent jurisdiction; or

(3) provide alternate financial assurance as specified in this subchapter, and obtain the executive director's written approval of the assurance provided, within 90 days after receipt by both the owner or operator and the executive director of a notice of cancellation of the bond from the surety.

(e) Under the terms of the bond, the surety shall become liable on the bond obligation when the owner or operator fails to perform as guaranteed by the bond.

(f) The penal sum of the bond must be in an amount at least equal to the current cost estimate, except as provided in §37.41 of this title (relating to Use of Multiple Financial Assurance Mechanisms), §37.51 of this title (relating to Use of a Financial Assurance Mechanism for Multiple Facilities), or

§37.52 of this title (relating to Use of a Universal Financial Assurance Mechanism for Multiple Facilities and Program Areas).

(g) Under the terms of the bond, the surety may cancel the bond by sending notice of cancellation by certified mail to the owner or operator and to the executive director. Cancellation may not occur, however, during the 120 days beginning on the date of receipt of the notice of cancellation by both the owner or operator and the executive director, as evidenced by the return receipts.

§37.221. Surety Bond Guaranteeing Performance.

(a) An owner or operator may satisfy the requirements of financial assurance by obtaining a surety bond which conforms to the requirements of this section, in addition to the requirements specified in Subchapters A and B of this chapter (relating to General Financial Assurance Requirements and Financial Assurance Requirements for Closure, Post Closure, and Corrective Action), and submitting an originally signed surety bond to the executive director.

(b) The bond must, at a minimum, be among those listed as acceptable sureties on federal bonds in Circular 570 of the United States Department of Treasury.

(c) The wording of the surety bond must be identical to the wording specified in §37.321 of this title (relating to Performance Bond).

(d) A surety bond guaranteeing performance of closure, post closure, or corrective action must guarantee that the owner or operator shall:

(1) perform closure or post closure in accordance with the closure plan, post closure plan, and other applicable requirements of the permit, or perform corrective action in accordance with the permit or other applicable requirements; and

(2) provide alternate financial assurance as specified in this subchapter, and obtain the executive director's written approval of the assurance provided within 90 days after receipt by both the owner or operator and the executive director of a notice of cancellation of the bond from the surety.

(e) Under the terms of the bond, the surety shall become liable on the bond obligation when the owner or operator fails to perform as guaranteed by the bond. Following a determination by the executive director that the owner or operator has failed to perform closure or post closure in accordance with the closure plan, post closure plan, or other applicable requirements of the permit, or has failed to perform corrective action in accordance with the permit or other applicable requirements, under terms of the bond, the surety shall either perform closure, post closure, or corrective action as guaranteed by the bond or deposit the amount of the penal sum of the bond into a standby trust, in accordance with §37.161 of this title (relating to Establishment of a Standby Trust).

(f) Under the terms of the bond, the surety may cancel the bond by sending notice of cancellation by certified mail to the owner or operator and to the executive director. Cancellation of the

bond may not occur, however, during the 120 days beginning on the date of the receipt of the notice of cancellation by both the owner or operator and the executive director, as evidenced by the return receipts. If the owner or operator fails to provide an alternate financial assurance mechanism as specified in this subchapter within 90 days of the receipt of notice of cancellation from the surety to the executive director and to the owner or operator, and obtain written approval of the alternate assurance from the executive director, the surety shall be required to perform under the terms of the bond.

(g) The penal sum of the bond must be in an amount at least equal to the current cost estimate, except as provided in §37.41 of this title (relating to Use of Multiple Financial Assurance Mechanisms) or §37.52 of this title (relating to Use of a Universal Financial Assurance Mechanism for Multiple Facilities and Program Areas).

(h) The surety shall not be liable for deficiencies in the performance of closure, post closure, or corrective action by the owner or operator after the executive director releases the owner or operator from the requirements of this section, in accordance with Subchapter A of this chapter.

§37.231. Irrevocable Standby Letter of Credit.

(a) An owner or operator may satisfy the requirements of financial assurance by obtaining an irrevocable standby letter of credit which conforms to the requirements of this section, in addition to the requirements specified in Subchapters A and B of this chapter (relating to General Financial Assurance

Requirements and Financial Assurance Requirements for Closure, Post Closure, and Corrective Action), and submit an originally signed irrevocable standby letter of credit to the executive director.

(b) The financial institution issuing the irrevocable standby letter of credit shall be an entity that has the authority to issue irrevocable standby letters of credit and whose operations are regulated and examined by a federal or state agency.

(c) The wording of the irrevocable standby letter of credit must be identical to the wording specified in §37.331 of this title (relating to Irrevocable Standby Letter of Credit).

(d) The originally signed irrevocable standby letter of credit must be accompanied by a letter from the owner or operator referring to the irrevocable standby letter of credit by number, issuing institution, and date, and providing the following information for each facility: the permit number, name and physical and mailing addresses of the facility, and the amount of funds assured for closure, post closure, or corrective action by the irrevocable standby letter of credit.

(e) The letter of credit must be irrevocable and issued for a period of at least one year. The irrevocable standby letter of credit must provide that the expiration date shall be automatically extended for a period of at least one year unless, at least 120 days before the current expiration date, the issuing institution notifies both the owner or operator and the executive director by certified mail of a decision not to extend the expiration date. Under the terms of the irrevocable standby letter of credit, the 120

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

(f) The irrevocable standby letter of credit must be issued in an amount at least equal to the current cost estimate, except as provided in §37.41 of this title (relating to Use of Multiple Financial Assurance Mechanisms), §37.51 of this title (relating to Use of a Financial Assurance Mechanism for Multiple Facilities), or §37.52 of this title (relating to Use of a Universal Financial Assurance Mechanism for Multiple Facilities and Program Areas).

(g) Following a determination that the owner or operator has failed to perform closure or post closure in accordance with the closure plan, post closure plan, and other applicable requirements of the permit, or has failed to perform corrective action in accordance with the permit or other applicable requirements, the executive director may draw on the irrevocable standby letter of credit.

(h) If the owner or operator does not establish alternate financial assurance as specified in this subchapter and obtain written approval of such alternate assurance from the executive director within 90 days after receipt by both the owner or operator and the executive director of a notice from the issuing institution that it has decided not to extend the irrevocable standby letter of credit beyond the current expiration date, the executive director shall draw on the irrevocable standby letter of credit. The executive director may delay the drawing if the issuing institution grants an extension of the term of the letter of credit. During the last 30 days of any such extension, the executive director shall draw on the irrevocable standby letter of credit if the owner or operator has failed to provide alternate financial

assurance as specified in this subchapter and obtain written approval of such assurance from the executive director.

(i) Upon termination, in accordance with §37.61 of this title (relating to Termination of Mechanisms), the executive director shall return the irrevocable standby letter of credit to the issuing institution.

§37.241. Insurance.

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

(b) At a minimum, the insurer must be licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more states.

(c) The wording of the certificate of insurance must be identical to the wording specified in §37.341 of this title (relating to Certificate of Insurance).

(d) The insurance policy must be issued for a face amount at least equal to the current cost estimate for closure, post closure, or corrective action, except when a combination of mechanisms are used in accordance with §37.41 of this title (relating to Use of Multiple Financial Assurance Mechanisms) or §37.52 of this title (relating to Use of a Universal Financial Assurance Mechanism for Multiple Facilities and Program Areas). Actual payments by the insurer shall not change the face amount, although the insurer's future liability shall be lowered by the amount of the payments.

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

(f) An owner or operator or any other person authorized to perform closure, post closure, or corrective action may request reimbursement for closure, post closure, or corrective action expenditures by submitting itemized bills to the executive director. The request shall include an explanation of the expenses and all applicable itemized bills. The owner or operator may request reimbursement for partial closure only if the remaining value of the policy is sufficient to cover the maximum costs of closing the facility over its remaining operating life. Within 60 days after receiving bills for closure, post closure, or corrective action activities, the executive director shall determine whether the closure, post closure, or corrective action expenditures are in accordance with the approved closure, post closure, or corrective action activities or are otherwise justified, and if so, shall instruct the insurer to

make reimbursement in such amounts as the executive director specifies in writing. If the executive director has reason to believe that the maximum cost of closure, post closure, or corrective action over the remaining life of the facility will be greater than the face amount of the policy, the executive director may withhold reimbursement of such amounts as deemed prudent until the executive director determines, in accordance with Subchapters A and B of this chapter, that the owner or operator is no longer required to maintain financial assurance requirements for closure, post closure, or corrective action of the facility. If the executive director does not instruct the insurer to make such reimbursements, the executive director shall provide the owner or operator with a detailed written statement of reasons.

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

(h) The policy must provide that the insurer may not cancel, terminate, or fail to renew the policy except for failure to pay the premium. The automatic renewal of the policy shall, at a minimum, provide the insured with the option of renewal at the face amount of the expiring policy. If there is a failure to pay the premium, the insurer may elect to cancel, terminate, or fail to renew the policy by

sending notice by certified mail to the owner or operator and the executive director. Cancellation, termination, or failure to renew may not occur, however, during 120 days beginning with the date of receipt of the notice by both the executive director and the owner or operator, as evidenced by the return receipts.

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

(1) the executive director deems the facility abandoned; or

(2) the permit expires, is terminated, is revoked, or a new or renewal permit is denied;

or

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

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

(5) the premium due is paid.

(j) Each policy must contain a provision allowing assignment of the policy to a successor owner or operator. Such assignment may be conditional upon consent of the insurer, provided such consent is not unreasonably refused.

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

§37.251. Financial Test.

(a) An owner or operator may satisfy the requirements of financial assurance by establishing a financial test which conforms to the requirements of this section, in addition to the requirements specified in Subchapters A and B of this chapter (relating to General Financial Assurance Requirements and Financial Assurance Requirements for Closure, Post Closure, and Corrective Action).

(b) To pass this test, the owner or operator must meet the criteria of either paragraph (1) or (2) of this subsection:

(1) the owner or operator must have:

(A) two of the following three ratios: a ratio of total liabilities to net worth less than 2.0; a ratio of the sum of net income plus depreciation, depletion, and amortization to total liabilities greater than 0.1; and a ratio of current assets to current liabilities greater than 1.5; and

(B) net working capital and tangible net worth each at least six times the sum of the current cost estimates, liability coverage requirements, and any other financial assurance obligations under the Texas Natural Resource Conservation Commission (TNRCC) or other federal or state environmental regulations assured by a financial test; and

(C) tangible net worth of at least \$10 million; and

(D) assets located in the United States amounting to at least 90% of the owner's or operator's total assets or at least six times the sum of the current cost estimates, liability coverage requirements, and any other financial assurance obligations under the TNRCC or other federal or state environmental regulations assured by a financial test;

(2) the owner or operator must have:

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

(B) tangible net worth at least six times the sum of the current cost estimates, liability coverage requirements, and any other financial assurance obligations under TNRCC or other federal or state environmental regulations assured by a financial test; and

(C) tangible net worth of at least \$10 million; and

(D) assets located in the United States amounting to at least 90% of the owner's or operator's total assets or at least six times the sum of the current cost estimates, liability coverage requirements, and any other financial assurance obligations under TNRCC or other federal or state environmental regulations assured by a financial test.

(c) To demonstrate that the requirements of the test are being met, the owner or operator shall submit the following items to the executive director:

(1) a letter signed by the owner's or operator's chief financial officer worded identically to the wording specified in §37.351 of this title (relating to Financial Test). If an owner or operator is using the financial test to demonstrate assurance for closure, post closure, or corrective action as specified in Subchapter B of this chapter and liability coverage as specified in Subchapter E of this chapter (relating to Financial Assurance Requirements for Liability Coverage), the owner or operator must submit the letter specified in the Financial Test for Liability, Part B in §37.651 of this title (relating to Financial Test for Liability) to cover both forms of financial responsibility. A separate letter as specified in §37.351 of this title is not required; and

(2) a copy of the owner's or operator's independently audited year-end financial statements for the latest fiscal year including the "unqualified opinion" of the auditor; and

(3) a special report from the owner's or operator's independent certified public accountant to the owner or operator stating that:

(A) the accountant has compared the data which the letter from the chief financial officer specifies as having been derived from the independently audited, year-end financial statements for the latest fiscal year with the amounts in such financial statements; and

(B) in connection with that procedure:

(i) such amounts were found to be in agreement; or

(ii) no matters came to the attention of the accountant which caused them to believe that the specified data should be adjusted; and

(4) a written verification of the current bond rating from the applicable bond rating agency, if the owner or operator is using Alternative II of the letter signed by the owner's or operator's chief financial officer specified in §37.351 of this title; and

(5) a schedule identifying intangible assets used to calculate tangible net worth.

(d) After the initial submission of items specified in subsection (c) of this section, the owner or operator must send updated information to the executive director within 90 days after the close of each succeeding fiscal year. This information shall consist of all items specified in subsection (c) of this section.

(e) If the owner or operator no longer meets the requirements of subsection (b) of this section, a notice shall be sent to the executive director of intent to establish alternate financial assurance as specified in this subchapter. The notice must be sent by certified mail within 90 days after the end of the fiscal year for which the year-end financial data show that the owner or operator no longer meets the requirements. The owner or operator shall provide the alternate financial assurance within 120 days after the end of such fiscal year.

(f) The executive director may, based on a reasonable belief that the owner or operator may no longer meet the requirements of subsection (b) of this section, require reports of financial condition at any time from the owner or operator in addition to those specified in subsection (c) of this section. If the executive director finds, on the basis of such reports or other information, that the owner or operator no longer meets the requirements of subsection (b) of this section, the owner or operator must provide alternate financial assurance as specified in this subchapter within 30 days after notification of such a finding.

(g) The executive director may disallow use of this test on the basis of qualifications in the opinion expressed in the independent certified public accountant's report on examination of the owner's

or operator's financial statements. An adverse opinion or disclaimer of opinion shall be cause for disallowance. The executive director shall evaluate other qualifications on an individual basis. The owner or operator shall provide alternate financial assurance as specified in this subchapter within 30 days after notification of the disallowance.

§37.261. Corporate Guarantee.

(a) An owner or operator may satisfy the requirements of financial assurance for closure, post closure, or corrective action by obtaining a written guarantee, hereafter referred to as “corporate guarantee,” which conforms to the requirements of this section, in addition to the requirements as specified in Subchapters A and B of this chapter (relating to General Financial Assurance Requirements and Financial Assurance Requirements for Closure, Post Closure, and Corrective Action).

(b) The guarantor shall be the direct or higher-tier parent corporation of the owner or operator or a corporation with a substantial business relationship with the owner or operator. The guarantor must meet the requirements for owners or operators as specified in §37.251 of this title (relating to Financial Test). The guarantor must comply with the terms of the corporate guarantee.

(c) The wording of the corporate guarantee must be identical to the wording specified in §37.361 of this title (relating to Corporate Guarantee). The corporate guarantee shall accompany the items sent to the executive director as specified in §37.251(c) of this title.

(d) If the guarantor has a substantial business relationship with the owner or operator, in addition to the requirements specified in this chapter for the financial test and corporate guarantee, the guarantor will submit a description of the substantial business relationship and the value received in consideration of the guarantee; an original or certified original copy of the Resolution by the Board of Directors or a certified letter from the chief financial officer, authorizing the corporate guarantee on behalf of the entity; an original or certified original copy of the Resolution by the Board of Directors authorizing the formation or acquisition of the guaranteed entity; an organizational chart which shows the relationship between the two entities; the partnership agreement or other agreements, articles, or bylaws which set out the formation, structure, and operation of the guaranteed entity.

(e) The terms of the corporate guarantee shall provide that:

(1) if the owner or operator fails to perform closure, post closure, or corrective action at the facility(ies) covered by the corporate guarantee in accordance with the permits and other applicable requirements whenever required to do so, the guarantor shall do so or establish a trust fund as specified in §37.201 of this title (relating to Trust Fund) in the name of the owner or operator in the amount of the current cost estimate;

(2) the corporate guarantee shall remain in force unless the guarantor sends notice of termination by certified mail to the owner or operator and the executive director and the owner or operator has obtained, and the executive director has approved, alternative financial assurance; and

(3) if the owner or operator fails to provide alternate financial assurance as specified in this subchapter and obtain the written approval of such alternate assurance from the executive director within 90 days after receipt by both the owner or operator and the executive director of a notice of termination of the corporate guarantee from the guarantor, the guarantor shall provide such alternate financial assurance in the name of the owner or operator.

§37.271. Local Government Financial Test.

An owner or operator may satisfy the requirements of financial assurance for closure, post closure, or corrective action by establishing a local government financial test or a local government financial test and local government guarantee which conforms to the requirements of this section, in addition to the requirements specified in Subchapters A and B of this chapter (relating to General Financial Assurance Requirements and Financial Assurance Requirements for Closure, Post Closure, and Corrective Action). An owner or operator who satisfies the requirements of paragraphs (1), (2), and (3) of this section may demonstrate financial assurance up to the amount specified in paragraph (4) of this section.

(1) In order to satisfy the financial component of the test, the owner or operator must meet the criteria of either subparagraph (A) or (B) of this paragraph and in addition must meet certain general conditions outlined in subparagraph (C) of this paragraph.

(A) The owner or operator must satisfy each of the following financial ratios based on its most recent audited annual financial statement:

(i) a ratio of cash plus marketable securities to total expenditures greater than or equal to 0.05; and

(ii) a ratio of annual debt service to total expenditures less than or equal to 0.20.

(B) If the owner or operator has outstanding, rated, general obligation bonds that are not secured by insurance, a letter of credit, or other collateral or guarantee, it must have a current rating of Aaa, Aa, A, or Baa, as issued by Moody's, or AAA, AA, A, or BBB, as issued by Standard and Poor's on all such general obligation bonds.

(C) In addition to meeting the criteria listed under subparagraph (A) or (B) of this paragraph, the following general conditions must be met.

(i) The owner or operator shall prepare its financial statements in conformity with Generally Accepted Accounting Principles for governments and have its financial statements audited by an independent certified public accountant (or appropriate state agency).

(ii) The owner or operator must not have operated at a deficit equal to 5.0% or more of total annual revenue in each of the past two fiscal years.

(iii) The owner or operator must not currently be in default on any outstanding general obligation bonds.

(iv) The owner or operator must not have any outstanding general obligation bonds rated lower than Baa as issued by Moody's or BBB as issued by Standard and Poor's.

(v) The owner or operator must not have received an adverse opinion, disclaimer of opinion, or other qualified opinion from the independent certified public accountant (or appropriate state agency) auditing its financial statements as required under clause (i) of this subparagraph. However, the executive director may evaluate qualified opinions on a case-by-case basis and allow use of the financial test in cases where the executive director deems the qualification insufficient to warrant disallowance of use of the test.

(D) The following terms used in this section are defined as follows.

(i) Deficit equals total annual revenues minus total annual expenditures.

(ii) Total revenues is the sum of the following seven items:

(I) "Total Revenues" of the General Fund;

(II) "Total Revenues" of Special Revenue Funds;

(III) "Total Revenues" of the Debt Service Fund;

(IV) "Total Revenues" of Capital Project Funds;

(V) "Total Operating Revenues" of Enterprise Funds;

(VI) if positive, "Total Non-Operating Revenues (Net)" of

Enterprise Funds; and

(VII) if positive, "Total Non-Operating Revenues (Net)" of

Internal Service Funds.

(iii) Total expenditures is the sum of the following six items:

(I) "Total Expenditures" of the General Fund;

(II) "Total Expenditures" of Special Revenue Funds;

(III) "Total Expenditures" of the Debt Service Fund;

(IV) "Total Operating Expenses Before Depreciation" of
Enterprise Funds;

(V) if negative, "Total Non-Operating Revenues (Net)" of
Enterprise Funds; and

(VI) if negative, "Total Non-Operating Revenues (Net)" of
Internal Service Funds; except if the local government is not using accrual accounting and is not
including depreciation in its expenditures, include routine capital outlays and debt repayment as a
substitute for depreciation.

(iv) Cash and current investments is the sum of "Cash," "Cash
Equivalents" (e.g., bank deposits, very short-term debt securities, money market funds), and "Current
Investments" (e.g., interest or dividend bearing securities that are expected to be held for less than one
year), in the General Fund, Special Revenue Funds, Debt Service Fund, Enterprise Funds, and Internal
Service Funds, as reported on the Comprehensive Annual Financial Report's (CAFR) Combined
Balance Sheet. Note that cash, cash equivalents, and current investments are included in this term even
if they are: pooled; with a fiscal agent; or restricted, provided that the assets belong to the General
Fund, Special Revenue Funds, Debt Service Fund, Enterprise Funds, and Internal Service Funds.

Specifically excluded from this definition are accounts receivable, retirement assets, real property, fixed assets, and other non-current assets, as well as any assets (including cash) in Capital Project Funds; and

(v) Debt service is the sum of all amounts in any Debt Service category (including bond principal, other debt principal, interest on bonds, interest on other debt) in the General Fund, Special Revenue Funds, Debt Service Fund, and Capital Projects Funds as reported on the CAFR's Combined Statement of Revenues, Expenditures and Changes in Fund Balances/Equity; plus all principal and interest expense in Enterprise Funds and Internal Service Funds, as reported on the CAFR's Combined Statement of Revenues, Expenses and Changes in Retained Earnings/Fund Balances.

(2) In order to satisfy the public notice component of the test, the local government owner or operator must place a reference to the closure, post closure, or corrective action costs assured through the financial test into its next CAFR after the effective date of this section or prior to the initial receipt of waste at the facility, whichever is later. Disclosure must include the nature and source of closure, post closure, or corrective action requirements; the reported liability at the balance sheet date; the estimated total closure or post closure cost remaining to be recognized; the percentage of landfill capacity used to date; and the estimated landfill life in years. A reference to corrective action costs must be placed in the CAFR not later than 120 days after the corrective action remedy has been selected in accordance with the requirements of §330.238 of this title (relating to Implementation of the Corrective Action Program). For the first year the financial test is used to assure costs at a particular facility, the reference may instead be placed in the operating record until issuance of the next available

CAFR if timing does not permit the reference to be incorporated into the most recently issued CAFR or budget. For closure and post closure costs, conformance with Government Accounting Standards Board Statement 18 assures compliance with the public notice component.

(3) In order to satisfy the recordkeeping and reporting component of the test, the local government owner or operator must submit the following four items to the executive director:

(A) a letter signed by the local government's chief financial officer worded as specified in §37.371 of this title (relating to Local Government Financial Test) that:

(i) lists all the current cost estimates covered by a financial test as described in paragraph (4) of this section;

(ii) provides evidence and certifies that the local government meets the conditions of either paragraph (1)(A) or (B), and (1)(C) of this section; and

(iii) certifies that the local government meets the conditions of paragraphs (2) and (4) of this section;

(B) the local government's independently audited year-end financial statements for the latest fiscal year, including the unqualified opinion of the auditor. The auditor must be an

independent certified public accountant (CPA) or an appropriate state agency that conducts equivalent comprehensive audits;

(C) a report to the local government from the local government's independent CPA or the appropriate state agency which:

(i) is based on performing an agreed upon procedures engagement relative to the financial ratios required by paragraph (1)(A) of this section, if applicable, and the requirements of paragraph (1)(C)(i), (ii), and (v) of this section; and

(ii) the CPA or state agency's report states the procedures performed and the CPA or state agency's findings; and

(D) a copy of the CAFR used to comply with paragraph (2) of this section and certification that the requirements of General Accounting Standards Board Statement 18 have been met.

(4) The portion of the closure, post closure, or corrective action costs for which an owner or operator can assure under this paragraph is determined as follows.

(A) If the local government owner or operator does not assure other environmental obligations through a financial test, it may assure closure, post closure, or corrective action costs that equal up to 43% of the local government's total annual revenue.

(B) If the local government owner or operator assures other environmental obligations through a financial test, including, but not limited to, those associated with hazardous waste treatment, storage, and disposal facilities under Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste) and 40 Code of Federal Regulations (CFR) Parts 264 and 265, petroleum underground storage tank facilities under Chapter 334 of this title (relating to Underground and Aboveground Storage Tanks) and 40 CFR Part 280, underground injection control facilities under Chapter 331 of this title (relating to Underground Injection Control) and 40 CFR 144.62, polychlorinated biphenyl storage facilities under 40 CFR Part 761, it must add those costs to the closure, post closure, or corrective action costs it seeks to assure under this paragraph. The total that may be assured must not exceed 43% of the local government's total annual revenue.

(5) Annual updates of the financial test documentation must be submitted to the executive director within 180 days after the close of each succeeding fiscal year. This information must consist of all the items required under paragraph (3) of this section.

(6) A local government must satisfy the requirements of the financial test at the close of each fiscal year. If the local government owner or operator no longer meets the requirements of paragraphs (1), (2), (3), and (4) of this section, the local government must send notice to the executive director of intent to establish alternate financial assurance. This notice must be sent within 90 days after the end of the fiscal year for which the year-end financial data shows that the local government no longer meets the requirements. The local government must provide alternate financial assurance within 120 days after the end of such fiscal year.

(7) The local government is no longer required to comply with the requirements of this section when the conditions as specified in §37.61 of this title (relating to Termination of Mechanisms) are met.

(8) The executive director, based on a reasonable belief that the local government owner or operator may no longer meet the requirements of the local government financial test, may require additional reports of financial condition from the local government at any time. If the executive director finds on the basis of such reports or other information, that the local government owner or operator no longer meets the requirements of the financial test, the local government must provide alternate financial assurance as specified in this subchapter within 30 days after notification of such a finding.

§37.281. Local Government Guarantee.

An owner or operator may satisfy the requirements of financial assurance for closure, post closure, or corrective action by obtaining a local government guarantee provided by a local government. The local government guarantee must meet the requirements of this section, in addition to the requirements in Subchapters A and B of this chapter (relating to General Financial Assurance Requirements and Financial Assurance Requirements for Closure, Post Closure, and Corrective Action). The local government guarantor must meet the requirements of the local government financial test in §37.271 of this title (relating to Local Government Financial Test) and must comply with the following terms of the local government guarantee.

(1) If the owner or operator fails to perform closure, post closure, or corrective action of a facility covered by the guarantee, the guarantor will:

(A) perform, or pay a third party to perform, closure, post closure, or corrective action as required; or

(B) establish a fully funded trust fund as specified in §37.201 of this title (relating to Trust Fund) in the name of the owner or operator.

(2) The guarantee will remain in force unless the guarantor sends notice of cancellation by certified mail to the owner or operator and to the executive director. Cancellation may not occur, however, during the 120 days beginning on the date of the receipt of the notice of cancellation by both the owner or operator and the executive director, as evidenced by the return receipts.

(3) If a guarantee is canceled, the owner or operator must, within 90 days following receipt of the cancellation notice by the owner or operator and the executive director, obtain alternate financial assurance and submit evidence of that alternate financial assurance to the executive director. If the owner or operator fails to provide alternate financial assurance within the 90-day period, the guarantor must provide that alternate assurance within 120 days following the guarantor's notice of cancellation.

(4) The owner or operator must submit to the executive director an originally signed local government guarantee worded as specified in §37.381 of this title (relating to Local Government Guarantee) along with the items required in §37.271(3) of this title. The items must be updated annually in accordance with the requirements of the local government financial test.

(5) The owner or operator is no longer required to comply with the requirements of this section when the conditions as specified in §37.61 of this title (relating to Termination of Mechanisms) are met.

(6) If a local government guarantor no longer meets the requirements of §37.271 of this title, the owner or operator must, within 90 days, obtain alternate financial assurance, and submit such evidence of the alternate financial assurance to the executive director. If the owner or operator fails to obtain alternate financial assurance within that 90-day period, the guarantor must provide that alternate financial assurance within the next 30 days.

**SUBCHAPTER C : FINANCIAL ASSURANCE MECHANISMS FOR
CLOSURE, POST CLOSURE, AND CORRECTIVE ACTION**

§37.271, §37.281

STATUTORY AUTHORITY

The repeals are adopted under TWC, §5.103, and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the laws of this state.

The repeals are also adopted under TWC, §26.011, which provides the commission with the authority to adopt rules to regulate water quality; TWC, §26.352, which provides the commission with the authority to adopt rules relating to financial assurance for underground storage tanks; TWC, §26.346, which requires the commission to establish rules relating to the registration of underground and aboveground storage tanks; TWC, §27.019, which provides the commission with the authority to adopt rules and procedures necessary for the management of underground injection well facilities; TWC, §27.073, which provides the commission with the authority to require financial assurance for underground injection well facilities; HSC, §341.031, which provides authority for the commission to adopt rules to implement the federal Safe Drinking Water Act; HSC, §341.035 and §341.0355, which provide the commission with the authority to require financial assurance for public drinking water systems; Solid Waste Disposal Act in HSC, §361.011, which provides the commission with the authority to manage municipal solid waste; HSC, §361.015 and §361.018, which provide the commission with the authority to manage radioactive waste; HSC, §361.017, which provides the commission with the authority to manage industrial solid waste and hazardous municipal waste; HSC, §361.024, which provides the commission with the authority to adopt rules and establish standards of

operation for the management of solid waste; HSC, §361.085, which provides the commission with the authority to require financial assurance demonstrations for solid waste, hazardous waste, and permitted facilities; HSC, §361.428, which provides the commission with the authority to regulate compost facilities; Used Oil Collection, Management, and Recycling Act in HSC, §371.024 and §371.028, which require the commission to adopt rules and procedures necessary to implement the used oil recycling program relating to used oil; HSC, §371.026, which provides the authority for the commission to require financial assurance from used oil handlers; HSC, §401.108, which provides the authority for the commission to require financial assurance from licensed facilities; and finally, HSC, §401.051 and §401.412, which provide authority for the commission to adopt rules relating to radioactive substances.

Together, these statutes authorize the commission to adopt any rules necessary to carry out its powers and duties under TWC and other laws of Texas and to establish and approve all general policy of the commission. The adopted are in accordance with Texas Government Code, §2001.39, implementing Senate Bill 178, 76th Legislature, 1999, which requires a quadrennial review of commission rules.

§37.271. Local Government Financial Test for Closure.

§37.281. Local Government Guarantee for Closure.

SUBCHAPTER D : WORDING OF THE MECHANISMS

FOR CLOSURE, POST CLOSURE, AND CORRECTIVE ACTION

§§37.301, 37.311, 37.321, 37.331, 37.341, 37.351, 37.361, 37.371, 37.381

STATUTORY AUTHORITY

The amendments and new sections are adopted under TWC, §5.103, and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the laws of this state. These rules are also adopted under TWC, §26.011, which provides the commission with the authority to adopt rules to regulate water quality; TWC, §26.352, which provides the commission with the authority to adopt rules relating to financial assurance for underground storage tanks; TWC, §26.346, which requires the commission to establish rules relating to the registration of underground and aboveground storage tanks; TWC, §27.019, which provides the commission with the authority to adopt rules and procedures necessary for the management of underground injection well facilities; TWC, §27.073, which provides the commission with the authority to require financial assurance for underground injection well facilities; HSC, §341.031, which provides authority for the commission to adopt rules to implement the federal Safe Drinking Water Act; HSC, §341.035 and §341.0355, which provide the commission with the authority to require financial assurance for public drinking water systems; Solid Waste Disposal Act in HSC, §361.011, which provides the commission with the authority to manage municipal solid waste; HSC, §361.015 and §361.018, which provide the commission with the authority to manage radioactive waste; HSC, §361.017, which provides the commission with the authority to manage industrial solid waste and hazardous municipal waste; HSC, §361.024, which provides the commission with the authority to adopt rules and establish standards of

operation for the management of solid waste; HSC, §361.085, which provides the commission with the authority to require financial assurance demonstrations for solid waste, hazardous waste, and permitted facilities; HSC, §361.428, which provides the commission with the authority to regulate compost facilities; Used Oil Collection, Management, and Recycling Act in HSC, §371.024, and §371.028, which require the commission to adopt rules and procedures necessary to implement the used oil recycling program relating to used oil; HSC, §371.026, which provides the authority for the commission to require financial assurance from used oil handlers; HSC, §401.108, which provides the authority for the commission to require financial assurance from licensed facilities; and finally, HSC, §401.051 and §401.412, which provide authority for the commission to adopt rules relating to radioactive substances.

Together, these statutes authorize the commission to adopt any rules necessary to carry out its powers and duties under TWC and other laws of Texas and to establish and approve all general policy of the commission. These rules are also adopted in accordance with Texas Government Code, §2001.39, implementing Senate Bill 178, 76th Legislature, 1999, which requires a quadrennial review of commission rules.

37.301. Trust Agreement.

(a) A trust agreement for closure, post closure, or corrective action, as specified in §37.201 of this title (relating to Trust Fund), must be worded as specified in the Trust Agreement in this

subsection, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.

Figure: 30 TAC §37.301(a)

(b) The Certification of Acknowledgment in this subsection is the certification of acknowledgment which must accompany the trust agreement for a trust fund as specified in §37.201 of this title.

Figure: 30 TAC §37.301(b)

§37.311. Payment Bond.

A surety bond guaranteeing payment for closure, post closure, or corrective action, as specified in §37.211 of this title (relating to Surety Bond Guaranteeing Payment), must be worded as specified in the Payment Bond in this section, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.

Figure: 30 TAC §37.311

§37.321. Performance Bond.

A surety bond guaranteeing performance for closure, post closure, or corrective action, as specified in §37.221 of this title (relating to Surety Bond Guaranteeing Performance), must be worded

as specified in the Performance Bond in this section, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.

Figure: 30 TAC §37.321

§37.331. Irrevocable Standby Letter of Credit.

An irrevocable standby letter of credit for closure, post closure, or corrective action, as specified in §37.231 of this title (relating to Irrevocable Standby Letter of Credit), must be worded as specified in the Irrevocable Standby Letter of Credit in this section, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.

Figure: 30 TAC §37.331

§37.341. Certificate of Insurance.

A certificate of insurance for closure, post closure, or corrective action, as specified in §37.241 of this title (relating to Insurance), must be worded as specified in the Certificate of Insurance in this section, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.

Figure: 30 TAC §37.341

§37.351. Financial Test.

A letter from the chief financial officer for closure, post closure, or corrective action, as specified in §37.251 of this title (relating to Financial Test), must be worded as specified in the Financial Test in this section, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.

Figure: 30 TAC §37.351

§37.361. Corporate Guarantee.

A corporate guarantee for closure, post closure, or corrective action, as specified in §37.261 of this title (relating to Corporate Guarantee), must be worded as specified in the Corporate Guarantee in this section, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.

Figure: 30 TAC §37.361

§37.371. Local Government Financial Test.

A letter signed by the local government's chief financial officer, as specified in §37.271 of this title (relating to Local Government Financial Test) must be worded as specified in the Local Government Financial Test in this section, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.

Figure: 30 TAC §37.371

§37.381. Local Government Guarantee.

The local government guarantee, as specified in §37.281 of this title (relating to Local Government Guarantee), must be worded as specified in the Local Government Guarantee in this section, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.

Figure: 30 TAC §37.381

**SUBCHAPTER D : WORDING OF THE MECHANISMS
FOR CLOSURE, POST CLOSURE, AND CORRECTIVE ACTION**

§37.371, §37.381

STATUTORY AUTHORITY

The repeals are adopted under TWC, §5.103, and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the laws of this state.

The repeals are also adopted under TWC, §26.011, which provides the commission with the authority to adopt rules to regulate water quality; TWC, §26.352, which provides the commission with the authority to adopt rules relating to financial assurance for underground storage tanks; TWC, §26.346, which requires the commission to establish rules relating to the registration of underground and aboveground storage tanks; TWC, §27.019, which provides the commission with the authority to adopt rules and procedures necessary for the management of underground injection well facilities; TWC, §27.073, which provides the commission with the authority to require financial assurance for underground injection well facilities; HSC, §341.031, which provides authority for the commission to adopt rules to implement the federal Safe Drinking Water Act; HSC, §341.035 and §341.0355, which provide the commission with the authority to require financial assurance for public drinking water systems; Solid Waste Disposal Act in HSC, §361.011, which provides the commission with the authority to manage municipal solid waste; HSC, §361.015 and §361.018, which provide the commission with the authority to manage radioactive waste; HSC, §361.017, which provides the commission with the authority to manage industrial solid waste and hazardous municipal waste; HSC, §361.024, which provides the commission with the authority to adopt rules and establish standards of

operation for the management of solid waste; HSC, §361.085, which provides the commission with the authority to require financial assurance demonstrations for solid waste, hazardous waste, and permitted facilities; HSC, §361.428, which provides the commission with the authority to regulate compost facilities; Used Oil Collection, Management, and Recycling Act in HSC, §371.024, and §371.028, which require the commission to adopt rules and procedures necessary to implement the used oil recycling program relating to used oil; §371.026, which provides the authority for the commission to require financial assurance from used oil handlers; HSC, §401.108, which provides the authority for the commission to require financial assurance from licensed facilities; and finally, HSC, §401.051 and §401.412, which provide authority for the commission to adopt rules relating to radioactive substances.

Together, these statutes authorize the commission to adopt any rules necessary to carry out its powers and duties under TWC and other laws of Texas and to establish and approve all general policy of the commission. These rules are also adopted in accordance with Texas Government Code, §2001.39, implementing Senate Bill 178, 76th Legislature, 1999, which requires a quadrennial review of commission rules.

§37.371. Local Government Financial Test for Closure.

§37.381. Local Government Guarantee for Closure.

**SUBCHAPTER E : FINANCIAL ASSURANCE REQUIREMENTS
FOR LIABILITY COVERAGE**

§§37.400, 37.402, 37.404, 37.411

STATUTORY AUTHORITY

The amendments and new sections are adopted under TWC, §5.103, and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the laws of this state. These rules are also adopted under TWC, §26.011, which provides the commission with the authority to adopt rules to regulate water quality; TWC, §26.352, which provides the commission with the authority to adopt rules relating to financial assurance for underground storage tanks; TWC, §26.346, which requires the commission to establish rules relating to the registration of underground and aboveground storage tanks; TWC, §27.019, which provides the commission with the authority to adopt rules and procedures necessary for the management of underground injection well facilities; TWC, §27.073, which provides the commission with the authority to require financial assurance for underground injection well facilities; HSC, §341.031, which provides authority for the commission to adopt rules to implement the federal Safe Drinking Water Act; HSC, §341.035 and §341.0355, which provide the commission with the authority to require financial assurance for public drinking water systems; Solid Waste Disposal Act in HSC, §361.011, which provides the commission with the authority to manage municipal solid waste; HSC, §361.015 and §361.018, which provide the commission with the authority to manage radioactive waste; HSC, §361.017, which provides the commission with the authority to manage industrial solid waste and hazardous municipal waste; HSC, §361.024, which provides the commission with the authority to adopt rules and establish standards of

operation for the management of solid waste; HSC, §361.085, which provides the commission with the authority to require financial assurance demonstrations for solid waste, hazardous waste, and permitted facilities; HSC, §361.428, which provides the commission with the authority to regulate compost facilities; Used Oil Collection, Management, and Recycling Act in HSC, §371.024 and §371.028, which require the commission to adopt rules and procedures necessary to implement the used oil recycling program relating to used oil; HSC, §371.026, which provides the authority for the commission to require financial assurance from used oil handlers; HSC, §401.108, which provides the authority for the commission to require financial assurance from licensed facilities; and finally, HSC, §401.051 and §401.412, which provide authority for the commission to adopt rules relating to radioactive substances.

Together, these statutes authorize the commission to adopt any rules necessary to carry out its powers and duties under TWC and other laws of Texas and to establish and approve all general policy of the commission. These rules are also adopted in accordance with Texas Government Code, §2001.39, implementing Senate Bill 178, 76th Legislature, 1999, which requires a quadrennial review of commission rules.

§37.400. Applicability.

This subchapter applies to an owner or operator required to provide financial assurance for sudden or nonsudden liability coverage.

§37.402. Definitions.

In the liability insurance requirements, the terms “bodily injury” and “property damage” shall have the meanings given these terms by applicable state law. However, these terms do not include those liabilities which, consistent with standard industry practices, are excluded from coverage in liability policies for bodily injury and property damage. The agency intends the meanings of other terms used in the liability insurance requirements to be consistent with their common meanings within the insurance industry. The following definitions given of several of the terms are intended to assist in the understanding of these regulations and are not intended to limit their meanings in a way that conflicts with general insurance industry usage.

(1) **Accidental occurrence** - An accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

(2) **Legal defense costs** - Any expenses that an insurer incurs in defending against claims of third parties brought under the terms and conditions of an insurance policy.

(3) **Nonsudden accidental occurrence** - An occurrence which takes place over time and involves continuous or repeated exposure.

(4) **Sudden accidental occurrence** - An occurrence which is not continuous or repeated in nature.

§37.404. Liability Requirements for Sudden and Nonsudden Accidental Occurrences.

(a) An owner or operator shall establish liability coverage for bodily injury and property damage to third parties caused by sudden or nonsudden accidental occurrences arising from operations of the facility or group of facilities. The owner or operator shall have and maintain liability coverage for sudden or nonsudden accidental occurrences, exclusive of legal defense costs. The owner or operator shall choose from one or more mechanisms as specified in Subchapter F of this chapter (relating to Financial Assurance Mechanisms for Liability) to meet the liability requirements for sudden or nonsudden accidental occurrences.

(b) An owner or operator shall notify the executive director in writing within 30 days whenever:

(1) a claim results in a reduction in the amount of financial assurance for liability coverage provided by a financial assurance mechanism authorized in Subchapter F of this chapter; or

(2) a Certification of Valid Claim for bodily injury or property damage caused by a sudden or nonsudden accidental occurrence arising from the operation of a facility is entered between

the owner or operator and third-party claimant for liability coverage under Subchapter F of this chapter;
or

(3) a final court order establishing a judgment for bodily injury or property damage caused by a sudden or nonsudden accidental occurrence arising from the operation of a facility is issued against the owner or operator, or a financial assurance mechanism that is providing financial assurance for liability coverage under Subchapter F of this chapter.

§37.411. Adjustments to the Level of Liability Coverage.

If the executive director determines that the levels of financial responsibility required are not consistent with the degree and duration of risk associated with the facility or group of facilities, the executive director may adjust the levels of financial responsibility required for liability coverage as may be necessary to protect human health and the environment. An owner or operator must furnish to the executive director, within 30 days, any information which the executive director requests to determine whether cause exists for such adjustments of level of coverage. Any adjustment to the amount of financial assurance due to a change in the degree and duration of risk associated with the permitted facility will be treated as a permit modification.

**SUBCHAPTER E : FINANCIAL ASSURANCE REQUIREMENTS
FOR LIABILITY COVERAGE**

§37.401

STATUTORY AUTHORITY

The repeal is adopted under TWC, §5.103, and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the laws of this state.

The repeal is also adopted under TWC, §26.011, which provides the commission with the authority to adopt rules to regulate water quality; TWC, §26.352, which provides the commission with the authority to adopt rules relating to financial assurance for underground storage tanks; TWC, §26.346, which requires the commission to establish rules relating to the registration of underground and aboveground storage tanks; TWC, §27.019, which provides the commission with the authority to adopt rules and procedures necessary for the management of underground injection well facilities; TWC, §27.073, which provides the commission with the authority to require financial assurance for underground injection well facilities; HSC, §341.031, which provides authority for the commission to adopt rules to implement the federal Safe Drinking Water Act; HSC, §341.035 and §341.0355, which provide the commission with the authority to require financial assurance for public drinking water systems; Solid Waste Disposal Act in HSC, §361.011, which provides the commission with the authority to manage municipal solid waste; HSC, §361.015 and §361.018, which provide the commission with the authority to manage radioactive waste; HSC, §361.017, which provides the commission with the authority to manage industrial solid waste and hazardous municipal waste; HSC, §361.024, which provides the commission with the authority to adopt rules and establish standards of operation for the management of

solid waste; HSC, §361.085, which provides the commission with the authority to require financial assurance demonstrations for solid waste, hazardous waste, and permitted facilities; HSC, §361.428, which provides the commission with the authority to regulate compost facilities; Used Oil Collection, Management, and Recycling Act in HSC, §371.024 and §371.028, which require the commission to adopt rules and procedures necessary to implement the used oil recycling program relating to used oil; HSC, §371.026, which provides the authority for the commission to require financial assurance from used oil handlers; HSC, §401.108, which provides the authority for the commission to require financial assurance from licensed facilities; and finally, HSC, §401.051 and §401.412, which provide authority for the commission to adopt rules relating to radioactive substances.

Together, these statutes authorize the commission to adopt any rules necessary to carry out its powers and duties under TWC and other laws of Texas and to establish and approve all general policy of the commission. These rules are also adopted in accordance with Texas Government Code, §2001.39, implementing Senate Bill 178, 76th Legislature, 1999, which requires a quadrennial review of commission rules.

§37.401. Liability Requirements for Sudden Accidental Occurrences.

SUBCHAPTER F : FINANCIAL ASSURANCE MECHANISMS FOR LIABILITY

§§37.501, 37.511, 37.521, 37.531, 37.541, 37.551

STATUTORY AUTHORITY

The amendments are adopted under TWC, §5.103, and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the laws of this state.

These rules are also adopted under TWC, §26.011, which provides the commission with the authority to adopt rules to regulate water quality; TWC, §26.352, which provides the commission with the authority to adopt rules relating to financial assurance for underground storage tanks; TWC, §26.346, which requires the commission to establish rules relating to the registration of underground and aboveground storage tanks; TWC, §27.019, which provides the commission with the authority to adopt rules and procedures necessary for the management of underground injection well facilities; TWC, §27.073, which provides the commission with the authority to require financial assurance for underground injection well facilities; HSC, §341.031, which provides authority for the commission to adopt rules to implement the federal Safe Drinking Water Act; HSC, §341.035 and §341.0355, which provide the commission with the authority to require financial assurance for public drinking water systems; Solid Waste Disposal Act in HSC, §361.011, which provides the commission with the authority to manage municipal solid waste; HSC, §361.015 and §361.018, which provide the commission with the authority to manage radioactive waste; HSC, §361.017, which provides the commission with the authority to manage industrial solid waste and hazardous municipal waste; HSC, §361.024, which provides the commission with the authority to adopt rules and establish standards of operation for the management of solid waste; HSC, §361.085, which provides the commission with the

authority to require financial assurance demonstrations for solid waste, hazardous waste, and permitted facilities; HSC, §361.428, which provides the commission with the authority to regulate compost facilities; Used Oil Collection, Management, and Recycling Act in HSC, §371.024 and §371.028, which require the commission to adopt rules and procedures necessary to implement the used oil recycling program relating to used oil; HSC, §371.026, which provides the authority for the commission to require financial assurance from used oil handlers; HSC, §401.108, which provides the authority for the commission to require financial assurance from licensed facilities; and finally, HSC, §401.051 and §401.412, which provide authority for the commission to adopt rules relating to radioactive substances.

Together, these statutes authorize the commission to adopt any rules necessary to carry out its powers and duties under TWC and other laws of Texas and to establish and approve all general policy of the commission. These rules are also adopted in accordance with Texas Government Code, §2001.39, implementing Senate Bill 178, 76th Legislature, 1999, which requires a quadrennial review of commission rules.

§37.501. Trust Fund for Liability.

(a) An owner or operator may satisfy the requirements of financial assurance for liability as specified in Subchapter E of this chapter (relating to Financial Assurance Requirements for Liability Coverage) by establishing a fully funded trust fund that conforms to the requirements of this section, in addition to the requirements specified in Subchapter A of this chapter (relating to General Financial

Assurance Requirements), and submitting an originally signed duplicate of the executed trust agreement to the executive director.

(b) The trustee shall be an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by a federal or state agency.

(c) The wording of the trust agreement must be identical to the wording specified in §37.601(a) of this title (relating to Trust Agreement for Liability), including a formal certification of acknowledgment as specified in §37.601(b) of this title.

(d) The trust fund for liability shall be funded for the full amount of the liability coverage to be provided by the trust before it may be relied upon to satisfy the requirements of financial assurance for liability. If at any time after the trust is created the amount of funds in the trust is reduced below the full amount of the liability coverage to be provided, the owner or operator, by the anniversary date of the establishment of the trust, shall either add sufficient funds to the trust to cause its value to equal the full amount of liability coverage to be provided, or obtain another financial assurance mechanism as specified in this subchapter to cover the difference. For purposes of this section, "the full amount of liability coverage to be provided" means the amount of coverage for sudden and/or nonsudden accidental occurrences required to be provided less the amount of financial assurance for liability coverage being provided by other financial assurance mechanisms being used to demonstrate financial assurance by the owner or operator.

(e) If the value of the trust fund is greater than the total amount of the required liability coverage, the owner or operator may submit a written request to the executive director for release of the amount in excess of the required liability coverage.

(f) If an owner or operator substitutes other financial assurance as specified in this subchapter for all or part of the trust fund, the owner or operator may submit a written request to the executive director for release of the amount in excess of the required liability coverage as covered by the trust fund.

(g) Within 60 days after receiving a request from the owner or operator for release of funds as specified in subsection (e) or (f) of this section, the executive director, if the request is approved, shall instruct the trustee in writing to release to the owner or operator such funds.

§37.511. Surety Bond Guaranteeing Payment for Liability.

(a) An owner or operator may satisfy the requirements of financial assurance for liability as specified in Subchapter E of this chapter (relating to Financial Assurance Requirements for Liability Coverage) by obtaining a surety bond which conforms to the requirements of this section, in addition to the requirements specified in Subchapter A of this chapter (relating to General Financial Assurance Requirements), and submitting a signed duplicate original of the bond to the executive director.

(b) The surety company issuing the bond shall be among those listed as acceptable sureties on Federal bonds in the most recent Circular 570 of the United States Department of the Treasury.

(c) The wording of the surety bond must be identical to the wording specified in §37.611 of this title (relating to Payment Bond for Liability).

(d) A surety bond may be used to satisfy the requirements of Subchapter E of this chapter only if the Attorneys General or Insurance Commissioners of the state in which the surety is incorporated, and the State of Texas have submitted a written statement to the executive director that a surety bond executed as described in this subchapter and §37.611 of this title is a legally valid and enforceable obligation in that state.

§37.521. Irrevocable Standby Letter of Credit for Liability.

(a) An owner or operator may satisfy the requirements of financial assurance for liability as specified in Subchapter E of this chapter (relating to Financial Assurance Requirements for Liability Coverage) by obtaining an irrevocable standby letter of credit which conforms to the requirements of this section, in addition to the requirements specified in Subchapter A of this chapter (relating to General Financial Assurance Requirements), and submitting an originally signed irrevocable standby letter of credit to the executive director.

(b) The financial institution issuing the irrevocable standby letter of credit shall be an entity that has the authority to issue irrevocable standby letters of credit and whose letter of credit operations are regulated and examined by a federal or state agency.

(c) The wording of the irrevocable standby letter of credit must be identical to the wording specified in §37.621 of this title (relating to Irrevocable Standby Letter of Credit for Liability).

(d) An owner or operator who uses an irrevocable standby letter of credit to satisfy the requirements of this section may also establish a standby trust fund. Under the terms of such a letter of credit, all amounts paid pursuant to a draft by the trustee of the standby trust will be deposited by the issuing institution into the standby trust in accordance with instructions from the trustee. The trustee of the standby trust fund must be an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by a federal or state agency.

(e) The wording of the standby trust fund must be identical to the wording specified in §37.671 of this title (relating to Standby Trust Agreement).

§37.531. Insurance for Liability.

(a) An owner or operator may satisfy the requirements of financial assurance for liability as specified in Subchapter E of this chapter (relating to Financial Assurance Requirements for Liability Coverage) by obtaining insurance which conforms to the requirements of this section, in addition to the

requirements specified in Subchapter A of this chapter (relating to General Financial Assurance Requirements), and submitting a signed duplicate original of the endorsement or certificate of insurance to the executive director.

(b) At a minimum, the insurer must be licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more states.

(c) The wording of the certificate of insurance must be identical to the wording specified in §37.631 of this title (relating to Certificate of Insurance for Liability). The wording of the endorsement must be identical to the wording specified in §37.641 of this title (relating to Endorsement for Liability).

(d) The insurance policy shall be amended by attachment of the Endorsement for Liability or evidenced by a Certificate of Insurance for Liability. If requested by the executive director, the owner or operator shall provide a signed duplicate original of the insurance policy.

§37.541. Financial Test for Liability.

(a) An owner or operator may satisfy the requirements of financial assurance for liability as specified in Subchapter E of this chapter (relating to Financial Assurance Requirements for Liability Coverage) by demonstrating that it passes a financial test which conforms to the requirements of this

section, in addition to the requirements specified in Subchapter A of this chapter (relating to General Financial Assurance Requirements).

(b) To pass this test, the owner or operator must meet the criteria of either paragraph (1) or (2) of this subsection:

(1) the owner or operator must have:

(A) net working capital and tangible net worth each at least six times the amount of liability coverage to be demonstrated by this test; and

(B) tangible net worth of at least \$10 million; and

(C) assets in the United States amounting to either:

(i) at least 90% of his total assets; or

(ii) at least six times the amount of liability coverage to be demonstrated by this test.

(2) the owner or operator must have:

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

(B) tangible net worth of at least \$10 million; and

(C) tangible net worth at least six times the amount of liability coverage to be demonstrated by this test; and

(D) assets in the United States amounting to either:

(i) at least 90% of his total assets; or

(ii) at least six times the amount of liability coverage to be demonstrated by this test.

(c) The phrase "amount of liability coverage" refers to the annual aggregate amounts for which coverage is required for sudden or nonsudden liability.

(d) To demonstrate that the owner or operator meets this test, the owner or operator shall submit the following items to the executive director:

(1) a letter signed by the owner's or operator's chief financial officer and worded as specified in the Financial Test for Liability, Part A, §37.651 of this title (relating to Financial Test for Liability). An owner or operator using the financial test to demonstrate assurance for closure, post closure, or corrective action as specified in Subchapter B of this chapter (relating to Financial Assurance Requirements for Closure, Post Closure, and Corrective Action), and liability coverage must submit the letter specified in the Financial Test for Liability, Part B, §37.651 of this title to cover both forms of financial responsibility. A separate letter as specified in §37.351 of this title (relating to Financial Test) is not required; and

(2) a copy of the independent certified public accountant's report on examination of the owner's or operator's financial statements for the latest completed fiscal year; and

(3) a special report from the owner's or operator's independent certified public accountant to the owner or operator stating that:

(A) the accountant has compared the data which the letter from the chief financial officer specifies as having been derived from the independently audited, year-end financial statements for the latest fiscal year with the amounts in such financial statements; and

(B) in connection with that procedure:

(i) such amounts were found to be in agreement; or

(ii) no matters came to the attention of the independent certified public accountant which indicated that the specified data should be adjusted.

(e) After the initial submission of items specified in subsection (d) of this section, the owner or operator shall send updated information to the executive director within 90 days after the close of each succeeding fiscal year. This information shall consist of all three items specified in subsection (d) of this section.

(f) If the owner or operator no longer meets the requirements of subsection (b) of this section, the owner or operator must obtain alternate financial assurance as specified in this subchapter for the entire amount of required liability coverage. Evidence of liability coverage must be submitted to the executive director within 90 days after the end of the fiscal year for which the year-end financial data show that the owner or operator no longer meets the test requirements.

(g) The executive director may, based on a reasonable belief that the owner or operator may no longer meet the requirements of subsection (b) of this section, require reports of financial condition at any time from the owner or operator in addition to those specified in subsection (d) of this section. If the executive director finds, on the basis of such reports or other information, that the owner or operator no longer meets the requirements of subsection (b) of this section, the owner or operator shall provide alternate financial assurance as specified in this subchapter within 30 days after notification of such a finding.

(h) The executive director may disallow use of this test on the basis of qualifications in the opinion expressed by the independent certified public accountant's report on examination of the owner's or operator's financial statements. An adverse opinion or disclaimer of opinion shall be cause for disallowance. The executive director shall evaluate other qualifications on an individual basis. The owner or operator shall provide alternate financial assurance as specified in this subchapter within 30 days after notification of the disallowance.

§37.551. Corporate Guarantee for Liability.

(a) An owner or operator may meet the requirements of financial assurance for liability as specified in Subchapter E of this chapter (relating to Financial Assurance Requirements for Liability Coverage) by obtaining a written guarantee for liability coverage, hereinafter referred to as "corporate guarantee," which conforms to the requirements of this section, in addition to the requirements as specified in Subchapter A of this chapter (relating to General Financial Assurance Requirements).

(b) The guarantor must be the direct or higher-tier parent corporation of the owner or operator or a corporation with a substantial business relationship with the owner or operator. The guarantor must meet the requirements for owners or operators as specified in §37.541 of this title (relating to Financial Test for Liability). The guarantor must comply with the terms of the corporate guarantee.

(c) The wording of the corporate guarantee must be identical to the wording specified in §37.661 of this title (relating to Corporate Guarantee for Liability). The corporate guarantee shall accompany the items sent to the executive director as specified in §37.541(d) of this title.

(d) If the guarantor has a substantial business relationship with the owner or operator, in addition to the requirements specified in this chapter for the financial test and corporate guarantee, the guarantor will submit the following:

(1) a description of the substantial business relationship and the value received in consideration of the guarantee;

(2) an original or certified original copy of the Resolution by the Board of Directors or a certified letter from the chief financial officer, authorizing the corporate guarantee on behalf of the entity;

(3) an original or certified original copy of the Resolution by the Board of Directors authorizing the formation or acquisition of the guaranteed entity;

(4) an organizational chart which shows the relationship between the two entities; and

(5) the partnership agreement or other agreements, articles, or bylaws which set out the formation, structure, and operation of the guaranteed entity.

(e) The terms of the corporate guarantee shall provide that if the owner or operator fails to satisfy a judgement based on a determination of liability for bodily injury or property damage to third parties caused by sudden or nonsudden accidental occurrences (or both, as the case may be), arising from the operation of facilities covered by this corporate guarantee, or fails to pay an amount agreed to in settlement of claims arising from or alleged to arise from such injury or damage, the guarantor shall do so up to the limits of coverage.

(f) In the case of corporations incorporated in the United States, a guarantee may be used to satisfy the requirements of this section only if the Attorneys General or Insurance Commissioners of:

(1) the state in which the guarantor is incorporated; and

(2) each state in which a facility covered by the guarantee is located have submitted a written statement to the commission that a guarantee executed as described in this section and §37.661 of this title (relating to Corporate Guarantee) is a legally valid and enforceable obligation in that state.

(g) In the case of corporations incorporated outside the United States (U.S.), a guarantee may be used to satisfy the requirements of this section only if:

(1) the non-U.S. corporation has identified a registered agent for service of process in each state in which a facility covered by the guarantee is located and in the state in which it has its principal place of business; and

(2) the Attorneys General or Insurance Commissioners of each state in which a facility covered by the guarantee is located and the state in which the guarantor corporation has its principal place of business, has submitted a written statement to the commission that a guarantee executed as described in this section and §37.661 of this title is a legally valid and enforceable obligation in that state.

SUBCHAPTER G : WORDING OF THE MECHANISMS FOR LIABILITY

§§37.601, 37.611, 37.621, 37.631, 37.641, 37.651, 37.661, 37.671

STATUTORY AUTHORITY

The amendments and new section are adopted under TWC, §5.103, and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the laws of this state. These rules are also adopted under TWC, §26.011, which provides the commission with the authority to adopt rules to regulate water quality; TWC, §26.352, which provides the commission with the authority to adopt rules relating to financial assurance for underground storage tanks; TWC, §26.346, which requires the commission to establish rules relating to the registration of underground and aboveground storage tanks; TWC, §27.019, which provides the commission with the authority to adopt rules and procedures necessary for the management of underground injection well facilities; TWC, §27.073, which provides the commission with the authority to require financial assurance for underground injection well facilities; HSC, §341.031, which provides authority for the commission to adopt rules to implement the federal Safe Drinking Water Act; HSC, §341.035 and §341.0355, which provide the commission with the authority to require financial assurance for public drinking water systems; Solid Waste Disposal Act in HSC, §361.011, which provides the commission with the authority to manage municipal solid waste; HSC, §361.015 and §361.018, which provide the commission with the authority to manage radioactive waste; HSC, §361.017, which provides the commission with the authority to manage industrial solid waste and hazardous municipal waste; HSC, §361.024, which provides the commission with the authority to adopt rules and establish standards of operation for the management of solid waste; HSC, §361.085, which provides the commission with the

authority to require financial assurance demonstrations for solid waste, hazardous waste, and permitted facilities; HSC, §361.428, which provides the commission with the authority to regulate compost facilities; Used Oil Collection, Management, and Recycling Act in HSC, §371.024 and §371.028, which require the commission to adopt rules and procedures necessary to implement the used oil recycling program relating to used oil; HSC, §371.026, which provides the authority for the commission to require financial assurance from used oil handlers; HSC, §401.108, which provides the authority for the commission to require financial assurance from licensed facilities; and finally, HSC, §401.051 and §401.412, which provide authority for the commission to adopt rules relating to radioactive substances.

Together, these statutes authorize the commission to adopt any rules necessary to carry out its powers and duties under TWC and other laws of Texas and to establish and approve all general policy of the commission. These rules are also adopted in accordance with Texas Government Code, §2001.39, implementing Senate Bill 178, 76th Legislature, 1999, which requires a quadrennial review of commission rules.

§37.601. Trust Agreement for Liability.

(a) A trust agreement for a liability trust fund, as specified in §37.501 of this title (relating to Trust Fund for Liability), must be worded as specified in the Trust Agreement in this subsection, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.

Figure: 30 TAC §37.601(a)

(b) A Certification of Acknowledgement must be worded as specified in the Certification of Acknowledgement in this subsection and must accompany the trust agreement for a trust fund as specified in §37.501 of this title (relating to Trust Fund for Liability).

Figure: 30 TAC §37.601(b)

§37.611. Payment Bond for Liability.

A surety bond guaranteeing payment for liability, as specified in §37.511 of this title (relating to Surety Bond Guaranteeing Payment for Liability), must be worded as specified in the Payment Bond for Liability in this section, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.

Figure: 30 TAC §37.611

§37.621. Irrevocable Standby Letter of Credit for Liability.

An irrevocable standby letter of credit for liability, as specified in §37.521 of this title (relating to Irrevocable Standby Letter of Credit for Liability), must be worded as specified in the Irrevocable Standby Letter of Credit for Liability in this section, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.

Figure: 30 TAC §37.621

§37.631. Certificate of Insurance for Liability.

A certificate of liability insurance, as specified in §37.531 of this title (relating to Insurance for Liability), must be worded as specified in the Certificate of Insurance for Liability in this section, except that instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.

Figure: 30 TAC §37.631

§37.641. Endorsement for Liability.

A liability endorsement as specified in §37.531 of this title (relating to Insurance for Liability), must be worded as specified in the Endorsement for Liability in this section, except that instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.

Figure: 30 TAC §37.641

§37.651. Financial Test for Liability.

A letter from the chief financial officer for liability, as specified in §37.541 of this title (relating to Financial Test for Liability) must be worded as specified in the Financial Test for Liability in this section, except that instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.

Figure: 30 TAC §37.651

§37.661. Corporate Guarantee for Liability.

A corporate guarantee for liability as specified in §37.551 of this title (relating to Corporate Guarantee for Liability) must be worded as specified in the Corporate Guarantee for Liability in this section, except that instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.

Figure: 30 TAC §37.661

§37.671. Standby Trust Agreement.

(a) A standby trust agreement for liability, as specified in §37.521 of this title (relating to Irrevocable Standby Letter of Credit for Liability), must be worded as specified in the Standby Trust Agreement in this subsection, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.

Figure: 30 TAC §37.671(a)

(b) A certification of acknowledgment must be worded as specified in the Certification of Acknowledgment in this subsection and must accompany the trust agreement for a standby trust fund as specified in this chapter.

Figure: 30 TAC §37.671(b)

**SUBCHAPTER J : FINANCIAL ASSURANCE FOR PERMITTED
COMPOST FACILITIES**

§§37.901, 37.911, 37.921, 37.931

STATUTORY AUTHORITY

The amendments are adopted under TWC, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the laws of this state.

These rules are also adopted under the Solid Waste Disposal Act in HSC, §361.024, which provides the commission with the authority to adopt any rules and establish standards of operation for the management of solid waste; HSC, §361.085, which provides the commission with the authority to require financial assurance demonstrations for solid waste, hazardous waste, and permitted facilities; and HSC, §361.428, which provides the commission with the authority to regulate compost facilities.

Together, these statutes authorize the commission to adopt any rules necessary to carry out its powers and duties under TWC and other laws of Texas and to establish and approve all general policy of the commission. These rules are also adopted in accordance with Texas Government Code, §2001.39, implementing Senate Bill 178, 76th Legislature, 1999, which requires a quadrennial review of commission rules.

§37.901. Applicability.

This subchapter applies to an owner or operator of a compost facility required to provide evidence of financial assurance under Chapter 332 of this title (relating to Composting). This subchapter establishes requirements and mechanisms for demonstrating financial assurance for closure.

§37.911. Definitions.

Definitions for terms that appear throughout this subchapter may be found in Subchapter A of this chapter (relating to General Financial Assurance Requirements), as well as Chapter 332 of this title (relating to Composting).

§37.921. Financial Assurance Requirements for Closure.

In addition to the requirements of this subchapter, owners or operators of a compost facility required to demonstrate financial assurance for closure must comply with Subchapters A, B, C, and D of this chapter (relating to General Financial Assurance Requirements; Financial Assurance Requirements for Closure, Post Closure, and Corrective Action; Financial Assurance Mechanisms for Closure, Post Closure, and Corrective Action; and Wording of the Mechanisms for Closure, Post Closure, and Corrective Action).

§37.931. Financial Assurance Mechanisms.

An owner or operator subject to this subchapter may use any of the financial assurance mechanisms as specified in Subchapter C of this chapter (relating to Financial Assurance Mechanisms for Closure, Post Closure, and Corrective Action) to demonstrate financial assurance for closure.

SUBCHAPTER K : FINANCIAL ASSURANCE REQUIREMENTS
FOR CLASS A OR B PETROLEUM-SUBSTANCE CONTAMINATED SOIL
STORAGE, TREATMENT, AND REUSE FACILITIES

§§37.1001, 37.1005, 37.1011, 37.1021

STATUTORY AUTHORITY

The amendments and new section are adopted under TWC, §5.103, and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the laws of this state. These rules are also adopted under TWC, §26.352, which provides the commission with the authority to adopt rules relating to financial assurance for underground storage tanks; TWC, §26.346, which requires the commission to establish rules relating to the registration of underground and aboveground storage tanks; and HSC, §361.085, which provides the commission with the authority to require financial assurance demonstrations for solid waste, hazardous waste, and permitted facilities.

Together, these statutes authorize the commission to adopt any rules necessary to carry out its powers and duties under TWC and other laws of Texas and to establish and approve all general policy of the commission. These rules are also adopted in accordance with Texas Government Code, §2001.39, implementing Senate Bill 178, 76th Legislature, 1999, which requires a quadrennial review of commission rules.

§37.1001. Applicability.

This subchapter applies to an owner or operator of Class A or B petroleum-substance contaminated soil storage, treatment, or reuse facilities required to provide evidence of financial assurance under Chapter 334, Subchapter K of this title (relating to Storage, Treatment, and Reuse Procedures for Petroleum-Substance Contaminated Soil). This subchapter establishes requirements and mechanisms for demonstrating financial assurance for closure and liability.

§37.1005. Submission of Documents.

An owner or operator required by this subchapter to provide financial assurance must submit originally signed financial assurance mechanisms for closure and liability coverage prior to issuance of registration. The signed financial assurance mechanisms must be in effect at the time they are submitted.

§37.1011. Financial Assurance Requirements for Closure of Class A and B Facilities.

(a) An owner or operator of a Class A or B petroleum-substance contaminated soil storage, treatment, or reuse facility subject to this subchapter shall establish financial assurance for the closure of the facility that meets the requirements of this section, in addition to the requirements specified under Subchapters A, B, C, and D of this chapter (relating to General Financial Assurance Requirements; Financial Assurance Requirements for Closure, Post Closure, and Corrective Action; Financial

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

(b) An owner or operator subject to this subchapter may use any of the financial assurance mechanisms as specified in Subchapter C of this chapter to demonstrate financial assurance for closure, except a pay-in trust mechanism may not be used.

§37.1021. Liability Requirements for Class A and B Facilities.

An owner or operator of a Class A or B petroleum-substance contaminated soil storage, treatment, or reuse facility subject to this subchapter shall establish financial assurance for sudden liability coverage for bodily injury and property damage to third parties caused by sudden accidental occurrences arising from operations of the facility that meets the requirements of this section, in addition to the requirements specified under Subchapters A, E, F, and G of this chapter (relating to General Financial Assurance Requirements; Financial Assurance Requirements for Liability Coverage; Financial Assurance Mechanisms for Liability; and Wording of the Mechanisms for Liability).

(1) An owner or operator must have and maintain liability coverage for sudden accidental occurrences in the amount of at least \$1 million per occurrence with an annual aggregate of at least \$2 million, exclusive of legal defense costs.

(2) An owner or operator subject to this subchapter may use any of the financial assurance mechanisms as specified in Subchapter F of this chapter to demonstrate financial assurance for sudden liability.

**SUBCHAPTER L : FINANCIAL ASSURANCE FOR
USED OIL RECYCLING**

§§37.2001, 37.2003, 37.2011, 37.2013, 37.2015, 37.2021

STATUTORY AUTHORITY

The amendments and new sections are adopted under TWC, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the laws of this state. These rules are also adopted under HSC, §361.085, which provides the commission with the authority to require financial assurance demonstrations for solid waste, hazardous waste, and permitted facilities; HSC, Used Oil Collection, Management, and Recycling Act, §371.024 and §371.028, which require the commission to adopt rules and procedures necessary to implement the used oil recycling program relating to used oil; and under HSC, §371.026, which provides the authority for the commission to require financial assurance from used oil handlers.

Together, these statutes authorize the commission to adopt any rules necessary to carry out its powers and duties under TWC and other laws of Texas and to establish and approve all general policy of the commission. These rules are also adopted in accordance with Texas Government Code, §2001.39, implementing Senate Bill 178, 76th Legislature, 1999, which requires a quadrennial review of commission rules.

§37.2001. Applicability.

This subchapter applies to used oil transporters required to provide evidence of financial assurance under §324.22 of this title (relating to Soil Remediation for Used Oil Handlers). This subchapter also applies to an owner or operator of a used oil transfer, processing, rerefining, and off-specification used oil burning facilities, hereinafter referred to as “used oil handlers,” which are required to provide evidence of financial assurance under §324.22 of this title. This subchapter establishes requirements and mechanisms for demonstrating financial assurance for soil remediation and automobile insurance.

§37.2003. Definitions.

Definitions for terms that appear throughout this subchapter may be found in Subchapter A of this chapter (relating to General Financial Assurance Requirements), as well as Chapter 324 of this title (relating to Used Oil).

§37.2011. Financial Assurance Requirements for Used Oil Handlers.

In addition to the requirements of this subchapter, used oil handlers who must demonstrate financial assurance for soil remediation must do so in an amount as specified in §324.22(c) or (d) of this title (relating to Financial Responsibility Technical Requirements) and must comply with Subchapters A, B, C, and D of this chapter (relating to General Financial Assurance Requirements; Financial

Assurance Requirements for Closure, Post Closure, and Corrective Action; Financial Assurance Mechanisms for Closure, Post Closure, and Corrective Action; and Wording of the Mechanisms for Closure, Post Closure, and Corrective Action) , except that wherever the terms “Closure,” “Post Closure,” and “Corrective Action” are cited, they will need to be replaced with the term “Soil Remediation.”

§37.2013. Financial Assurance Mechanisms for Used Oil Handlers.

A used oil handler subject to this subchapter may use any of the financial assurance mechanisms as specified in Subchapter C of this chapter (relating to Financial Assurance Mechanisms for Closure, Post Closure, and Corrective Action) to demonstrate financial assurance for soil remediation except a pay-in trust fund may not be used.

§37.2015. Submission of Documents.

An owner or operator required to provide financial assurance must submit an originally signed financial assurance mechanism prior to issuance of registration. The signed financial assurance mechanism must be in effect at the time it is submitted.

§37.2021. Financial Assurance Requirements for Transporters of Used Oil.

A used oil transporter must show proof of insurance to the commission in the forms and levels as prescribed by the Texas Department of Transportation (Texas Civil Statutes, Articles 6675c, 6675c-1, 911m, and 6687-9a) or the U.S. Department of Transportation (49 USC §11506). The document issued by the Texas Department of Transportation or the U.S. Department of Transportation which shows the used oil transporter is currently satisfying department requirements for transporting used oil will be an acceptable form of demonstrating proof of insurance and should be submitted to the commission. If a used oil transporter is not required to be registered as a motor carrier with either of these agencies, then proof of insurance in the form of an original signed certificate of insurance and in levels sufficient to pay for bodily injury and property damage liability caused by the used oil must be submitted to the commission directly by an insurance agent. In all cases, the name of the used oil transporter must be identical to the party named on the applicable insurance form.

**SUBCHAPTER M : FINANCIAL ASSURANCE REQUIREMENTS
FOR SCRAP TIRE SITES**

§§37.3001, 37.3003, 37.3011, 37.3021, 37.3031

STATUTORY AUTHORITY

The amendments and new sections are adopted under TWC, §5.103, and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the laws of this state. These rules are also adopted under the Solid Waste Disposal Act, in HSC, §361.011, which provides the commission with the authority to manage municipal solid waste; and HSC, §361.024, which provides the commission with the authority to adopt rules and establish standards of operation for the management of solid waste; and HSC, §361.085, which provides the commission with the authority to require financial assurance demonstrations for solid waste, hazardous waste, and permitted facilities.

Together, these statutes authorize the commission to adopt any rules necessary to carry out its powers and duties under TWC and other laws of Texas and to establish and approve all general policy of the commission. These rules are also adopted in accordance with Texas Government Code, §2001.39, implementing Senate Bill 178, 76th Legislature, 1999, which requires a quadrennial review of commission rules.

§37.3001. Applicability.

This subchapter applies to an owner or operator required to provide financial assurance under Chapter 328, Subchapter F of this title (relating to Management of Used or Scrap Tires). This subchapter establishes requirements and mechanisms for demonstrating financial assurance for closure.

§37.3003. Definitions.

Definitions for terms that appear throughout this subchapter may be found in Subchapter A of this chapter (relating to General Financial Assurance Requirements), as well as Chapter 328, Subchapter F of this title (relating to Management of Used or Scrap Tires).

§37.3011. Financial Assurance Requirements.

In addition to the requirements of this subchapter, owners or operators of a scrap tire site required to demonstrate financial assurance for closure must comply with Subchapters A, B, C, and D of this chapter (relating to General Financial Assurance Requirements; Financial Assurance Requirements for Closure, Post Closure, and Corrective Action; Financial Assurance Mechanisms for Closure, Post Closure, and Corrective Action; and Wording of the Mechanisms for Closure, Post Closure, and Corrective Action).

§37.3021. Financial Assurance Mechanisms.

An owner or operator subject to this subchapter may use any of the financial assurance mechanisms as specified in Subchapter C of this chapter (relating to Financial Assurance Mechanisms for Closure, Post Closure, and Corrective Action) for demonstrating financial assurance for closure, except:

(1) a pay-in trust fund may not be used;

(2) in §37.301(a), Section 10 shall be revised as follows: Section 10. Quarterly Valuation. The trustee shall quarterly, within 15 days of quarter-end, furnish to the Grantor and to the executive director a statement confirming the value of the Trust. Quarter-ends are designated as March 31, June 30, September 30, and December 31. Any securities in the Fund shall be valued at market value as of quarter-end. The failure of the Grantor to object in writing to the Trustee within 90 days after the statement has been furnished to the Grantor and the executive director shall constitute a conclusively binding assent by the Grantor barring the Grantor from asserting any claim or liability against the Trustee with respect to matters disclosed in the statement;

(3) Section 37.161 of this title (relating to Establishment of a Standby Trust) does not apply to an owner or operator who utilizes either a surety bond or irrevocable standby letter of credit under this subchapter;

(4) an owner or operator who utilizes the insurance mechanism as specified in §37.241 of this title (relating to Insurance) shall replace the wording specified in §37.241(b) of this title to read as follows: At a minimum, the insurer must be licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in Texas.

§37.3031. Submission of Documents.

An owner or operator required to provide financial assurance must submit an originally signed financial assurance mechanism prior to issuance of registration. The signed financial assurance mechanism must be in effect at the time it is submitted.

**SUBCHAPTER N : FINANCIAL ASSURANCE REQUIREMENTS FOR
THE TEXAS RISK REDUCTION PROGRAM RULES**

§§37.4001, 37.4011, 37.4021, 37.4031

STATUTORY AUTHORITY

The amendments and new section are adopted under TWC, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the laws of this state. These rules are also adopted under TWC, §26.011, which provides the commission with the authority to adopt rules to regulate water quality; TWC, §26.352, which provides the commission with the authority to adopt rules relating to financial assurance for underground storage tanks; TWC, §26.346, which requires the commission to establish rules relating to the registration of underground and aboveground storage tanks; TWC, §27.019, which provides the commission with the authority to adopt rules and procedures necessary for the management of underground injection well facilities; TWC, §27.073, which provides the commission with the authority to require financial assurance for underground injection well facilities; HSC, §341.031, which provides authority for the commission to adopt rules to implement the federal Safe Drinking Water Act; Solid Waste Disposal Act in HSC, §361.011, which provides the commission with the authority to manage municipal solid waste; HSC, §361.015 and §361.018, which provide the commission with the authority to manage radioactive waste; HSC, §361.017, which provides the commission with the authority to manage industrial solid waste and hazardous municipal waste; HSC, §361.024, which provides the commission with the authority to adopt rules and establish standards of operation for the management of solid waste; HSC, §361.085, which provides the commission with the authority to require financial assurance

demonstrations for solid waste, hazardous waste, and permitted facilities; HSC, §361.428, which provides the commission with the authority to regulate compost facilities; Used Oil Collection, Management, and Recycling Act in HSC, §371.024 and §371.028, which require the commission to adopt rules and procedures necessary to implement the used oil recycling program relating to used oil; HSC, §371.026, which provides the authority for the commission to require financial assurance from used oil handlers; HSC, §401.108, which provides the authority for the commission to require financial assurance from licensed facilities; and finally, HSC, §401.051 and §401.412, which provide authority for the commission to adopt rules relating to radioactive substances.

Together, these statutes authorize the commission to adopt any rules necessary to carry out its powers and duties under TWC and other laws of Texas and to establish and approve all general policy of the commission. These rules are also adopted in accordance with Texas Government Code, §2001.39, implementing Senate Bill 178, 76th Legislature, 1999, which requires a quadrennial review of commission rules.

§37.4001. Applicability.

(a) This subchapter applies to persons required to provide financial assurance under §350.33 of this title (relating to Remedy Standard B) and §350.135 of this title (relating to Application Requirements).

(b) This subchapter establishes requirements and mechanisms for demonstrating financial assurance for post response action care under Remedy Standard B as specified in §37.4021 of this title (relating to Financial Assurance Requirements for Post Response Action Care) and for corrective action at Facility Operations Areas as specified in §37.4031 of this title (relating to Financial Assurance Requirements for Facility Operations Areas). In addition to the requirements of this subchapter, persons are also required to comply with Subchapters A, B, C, and D of this chapter (relating to General Financial Assurance Requirements; Financial Assurance Requirements for Closure, Post Closure, and Corrective Action; Financial Assurance Mechanisms for Closure, Post Closure, and Corrective Action; and Wording of the Mechanisms for Closure, Post Closure, and Corrective Action).

§37.4011. Definitions.

Definitions for terms that appear throughout this subchapter may be found in Subchapter A of this chapter (relating to General Financial Assurance Requirements) and Chapter 350 of this title (relating to Risk Reduction Program Rule), except where the following terms are used in this subchapter, the following definitions shall apply.

(1) **Post-response action care** - This term shall be used interchangeably with closure.

(2) **Post-response action care estimate** - The most recent written cost estimate for post-response action care for an affected property as required by §350.33(l) and (m) of this title

(relating to Remedy Standard B) and approved by the executive director. For purposes of this subchapter, it shall be mean the same as “current cost estimate.”

(3) **Response action plan** - The same as “closure plan.”

§37.4021. Financial Assurance Requirements for Post-Response Action Care.

(a) The financial assurance provided shall be in the amount specified in the most recent post response action care cost estimate required by §350.33(l), (m), or (n), as applicable, of this title (relating to Remedy Standard B).

(b) A person subject to this subchapter may use any of the financial assurance mechanisms specified in Subchapter C of this chapter (relating to Financial Assurance Mechanisms for Closure, Post Closure, and Corrective Action) to demonstrate financial assurance for post response action care, except that a pay-in trust fund may not be used and a standby trust as specified in §37.161 of this title (relating to Establishment of a Standby Trust) is not required.

(c) A person who is required to provide financial assurance shall do so in accordance with §37.31 of this title (relating to Submission of Documents), but must submit the financial assurance within 90 days of the executive director's approval of the Response Action Plan.

(d) A person required to provide financial assurance is not subject to §37.131 of this title (relating to Annual Inflation Adjustments to Closure Estimates).

(e) If an affected property undergoing post response action care does not have an agency registration or permit number, any references to the agency registration or permit number in the wording of mechanisms specified in Subchapter D of this chapter (relating to Wording of the Mechanisms for Closure, Post Closure, and Corrective Action) may be replaced with any other applicable name or number assigned by the agency to the subject property.

§37.4031. Financial Assurance Requirements for Facility Operations Areas.

(a) A person who is subject to this subchapter may use any of the financial assurance mechanisms specified in Subchapter C of this chapter (relating to Financial Assurance Mechanisms for Closure) to demonstrate financial assurance for corrective action at a facility operations area, except that a pay-in trust fund may not be used.

(b) A person required to provide financial assurance shall submit it in accordance with §37.31 of this title (relating to Submission of Documents), but must do so within 60 days after the effective date of the permit or commission corrective action order authorizing the facility operations area.

(c) If a facility operations area does not have an agency registration or permit number, any references to the registration or permit number in the wording of mechanisms specified in Subchapter D

of this chapter (relating to Wording of the Mechanisms for Closure) may be replaced with any other applicable name or number assigned by the agency to the subject property.

SUBCHAPTER O : FINANCIAL ASSURANCE FOR PUBLIC DRINKING

WATER SYSTEMS AND UTILITIES

§37.5011

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103, and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the laws of this state.

This rule is also adopted under TWC, §26.011, which provides the commission with the authority to adopt rules to regulate water quality; and HSC, §341.031, which provides authority for the commission to adopt rules to implement the federal Safe Drinking Water Act; and HSC, §341.035 and §341.0355, which provide the commission with the authority to require financial assurance for public drinking water systems.

Together, these statutes authorize the commission to adopt any rules necessary to carry out its powers and duties under TWC and other laws of Texas and to establish and approve all general policy of the commission. This rule is also adopted in accordance with Texas Government Code, §2001.39, implementing Senate Bill 178, 76th Legislature, 1999, which requires a quadrennial review of commission rules.

§37.5011. Financial Assurance for a Public Water System or Retail Public Utility.

(a) Financial assurance demonstrations shall comply with the wordings of the mechanisms as described in Subchapter A of this chapter (relating to General Financial Assurance Requirements), Subchapter B of this chapter (relating to Financial Assurance Requirements for Closure, Post Closure, and Corrective Action), Subchapter C of this chapter (relating to Financial Assurance Mechanisms for Closure, Post Closure, and Corrective Action), and Subchapter D of this chapter (relating to Wording of the Mechanisms for Closure, Post Closure, and Corrective Action), except operation should be substituted for closure and the appropriate statutory reference to Public Drinking Water or Utility Regulation should be cited in the mechanism.

(b) The prospective owner or operator of a public water system may be ordered to provide adequate financial assurance to operate the system as specified in §290.39(f) of this title (relating to General Provisions). A public water system that was constructed without approval or has a history of noncompliance or is subject to commission enforcement action as specified in §290.39(n) of this title, may be required to provide financial assurance to operate the system in accordance with applicable laws and rules. Financial assurance may be required of an applicant requesting approval for a certificate or a certificate amendment or a person establishing, purchasing or acquiring a retail public utility as specified in §291.102(d) of this title (relating to Criteria for Considering and Granting Certificates or Amendments), and §291.109(c) of this title (relating to Report of Sale, Merger, Etc: Investigation; Disallowance of Transaction). A person acquiring a controlling interest in a utility may be required to demonstrate adequate financial assurance as specified in §291.111(c) of this title (relating to Purchase of

Voting Stock in Another Utility). The commission may order a utility that has failed to provide continuous and adequate service to provide financial assurance to ensure that the system will be operated as required by §291.114 of this title (relating to Requirements to Provide Continuous and Adequate Service). Such financial assurance will allow for payment of improvements and repairs to the water or sewer system.

(c) If rate increases or customer surcharges are determined by the executive director to be an acceptable form for demonstrating financial assurance in accordance with §290.39(n)(3) of this title, such funds shall be deposited into an escrow account with an escrow agent that has the authority to act as an escrow agent and whose escrow operations are regulated and examined by a Federal or State agency. At least annually a statement of the account shall be submitted to the executive director.

**SUBCHAPTER P : FINANCIAL ASSURANCE FOR HAZARDOUS AND
NONHAZARDOUS INDUSTRIAL SOLID WASTE FACILITIES**

§§37.6001, 37.6011, 37.6021, 37.6031, 37.6041

STATUTORY AUTHORITY

The new sections are adopted under TWC, §5.103, and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the laws of this state.

These rules are also adopted under the Solid Waste Disposal Act, in HSC, §361.017, which provides the commission with the authority to manage industrial solid waste and hazardous municipal waste;

HSC, §361.024, which provides the commission with the authority to adopt rules and establish standards of operation for the management of solid waste; and finally, HSC, §361.085, which provides the commission with the authority to require financial assurance demonstrations for solid waste, hazardous waste, and permitted facilities.

Together, these statutes authorize the commission to adopt any rules necessary to carry out its powers and duties under TWC and other laws of Texas and to establish and approve all general policy of the commission. These rules are also adopted in accordance with Texas Government Code, §2001.39, implementing Senate Bill 178, 76th Legislature, 1999, which requires a quadrennial review of commission rules.

§37.6001. Applicability.

(a) This subchapter applies to an owner or operator of interim status hazardous waste facilities required to provide financial assurance under §335.128 of this title (relating to Financial Assurance); owners or operators of hazardous waste facilities required to provide financial assurance under §335.179 of this title (relating to Financial Assurance); owners or operators of industrial solid waste or municipal hazardous waste facilities required to provide financial assurance under §335.7 of this title (relating to Financial Assurance Required); and owners or operators required to provide financial assurance for corrective action under §335.167 of this title (relating to Corrective Action for Solid Waste Management Units).

(b) This subchapter does not apply to owners or operators which are state or federal government entities whose debts and liabilities are the debts and liabilities of a state or the United States.

(c) This subchapter establishes requirements and mechanisms for demonstrating financial assurance for closure, post closure, or corrective action.

§37.6011. Definitions.

Definitions for terms that appear throughout this subchapter may be found in Subchapter A of this chapter (relating to General Financial Assurance Requirements) and Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste).

§37.6021. Financial Assurance Requirements for Closure, Post Closure, and Corrective Action.

(a) In addition to the requirements of this subchapter, owners or operators required to demonstrate for closure, post closure, or corrective action must comply with Subchapters A, B, C, and D of this chapter (relating to General Financial Assurance Requirements; Financial Assurance Requirements for Closure, Post Closure, and Corrective Action; Financial Assurance Mechanisms for Closure, Post Closure, and Corrective Action; and Wording of the Mechanisms for Closure, Post Closure, and Corrective Action), §335.112 of this title (relating to Standards), and §335.152 of this title (relating to Standards).

(b) Owners or operators subject to this subchapter may use any of the following mechanisms as specified in Subchapter C of this chapter to demonstrate financial assurance for closure, post closure, or corrective action:

- (1) trust fund (fully funded or pay-in trust), except that:

(A) owners or operators of interim status hazardous waste facilities required to provide evidence of financial assurance under §335.128 of this title (relating to Financial Assurance) must make annual payments to fully fund the trust fund by July 6, 2002 or must make annual payments into the trust fund over the remaining operating life of the facility as estimated in the closure plan, whichever period is shorter;

(B) owners or operators of permitted hazardous waste facilities required to provide evidence of financial assurance under §335.179 of this title (relating to Financial Assurance), who previously operated under interim status rules and choose to establish a trust fund after having used one or more alternate mechanisms specified in this chapter, must make an initial payment in at least the amount that the fund would contain if the trust fund were established initially and annual payments made as specified in subparagraph (A) of this paragraph; and

(C) the executive director will respond in writing within 60 days to requests for reimbursements made in accordance with §37.201(j) of this title (relating to Trust Fund);

(2) surety bond guaranteeing payment;

(3) surety bond guaranteeing performance, except that this mechanism may not be used by interim status hazardous waste facilities required to provide evidence of financial assurance under §335.128 of this title (relating to Financial Assurance);

- (4) irrevocable standby letter of credit;
 - (5) insurance;
 - (6) financial test; or
 - (7) corporate guarantee.
- (c) References in Subchapter D of this chapter to permit numbers should be changed to solid waste registration numbers.
- (d) Owners or operators using a financial test or corporate guarantee must comply with §37.141 of this title (relating to Increase in Current Cost Estimate) except that mechanism increases must be made within 90 days after the close of each succeeding fiscal year.

§37.6031. Financial Assurance Requirements for Liability.

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

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

(c) An owner or operator of a hazardous waste surface impoundment, landfill, land treatment facility, or disposal miscellaneous unit used to manage hazardous waste subject to this section must demonstrate financial assurance for bodily injury and property damage to third parties caused by nonsudden accidental occurrences arising from operations of the facility or group of facilities. An owner or operator must have and maintain liability coverage for nonsudden accidental occurrences in the amount of at least \$3 million per occurrence with an annual aggregate of at least \$6 million, exclusive of legal defense costs.

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

(e) Owners or operators subject to this subchapter may use any of the mechanisms specified in Subchapter F of this chapter to demonstrate financial assurance for sudden and for nonsudden liability.

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

§37.6041. State Assumption of Responsibility.

(a) If the State of Texas either assumes legal responsibility for an owner's or operator's compliance with the closure, post closure, corrective action, or liability requirements of this chapter, or assures that funds will be available from state sources to cover those requirements, the owner or operator will be in compliance with the requirements of this chapter if the executive director determines that the state's assumption of responsibility is at least equivalent to the financial mechanisms specified in this chapter. The executive director will evaluate the equivalency of state guarantees principally in terms of certainty of the availability of funds for the required closure, post closure, or corrective action activities, or liability coverage; and the amount of funds that will be made available. The executive director may also consider other factors as the executive director deems appropriate. The owner or operator must submit to the executive director a letter from the State of Texas describing the nature of the state's assumption of responsibility together with a letter from the owner or operator requesting that the state's assumption of responsibility be considered acceptable for meeting the requirements of this

chapter. The letter from the state must include, or have attached to it, the following information: the facility's permit number, name, physical and mailing addresses, and the amount of funds for closure, post closure, or corrective action or liability coverage that are guaranteed by the state. The executive director will notify the owner or operator of the determination regarding the acceptability of the state's guarantee in lieu of financial mechanisms specified in this chapter. The executive director may require the owner or operator to submit additional information as is deemed necessary to make this determination. Upon approval by the executive director, the owner or operator will be deemed to be in compliance with the requirements of this chapter.

(b) If the State of Texas' assumption of responsibility is found acceptable as specified in subsection (a) of this section except for the amount of funds available, the owner or operator may satisfy the requirements of this chapter by use of both the state's assurance and additional financial mechanisms as specified in this chapter. The amount of funds available through the state and the owner or operator's mechanisms must at least equal the required amount.

**SUBCHAPTER Q : FINANCIAL ASSURANCE FOR
UNDERGROUND INJECTION CONTROL WELLS
§§37.7001, 37.7011, 37.7021, 37.7031, 37.7041, 37.7051**

STATUTORY AUTHORITY

The new sections are adopted under TWC, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the laws of this state.

These rules are also adopted under TWC, §27.019, which provides the commission with the authority to adopt rules and procedures necessary for the management of underground injection well facilities; TWC, §27.073, which provides the commission with the authority to require financial assurance for underground injection well facilities; and HSC, §361.085, which provides the commission with the authority to require financial assurance demonstrations for solid waste, hazardous waste, and permitted facilities.

Together, these statutes authorize the commission to adopt any rules necessary to carry out its powers and duties under TWC and other laws of Texas and to establish and approve all general policy of the commission. These rules are also adopted in accordance with Texas Government Code, §2001.39, implementing Senate Bill 178, 76th Legislature, 1999, which requires a quadrennial review of commission rules.

§37.7001. Applicability.

This subchapter applies to an owner or operator required to provide financial assurance under Chapter 331 of this title (relating to Underground Injection Control). This subchapter establishes requirements for demonstrating financial assurance for plugging and abandonment, post closure, and liability.

§37.7011. Definitions.

Definitions for terms that appear throughout this subchapter may be found in Subchapter A of this chapter (relating to General Financial Assurance Requirements) and Chapter 331 of this title (relating to Underground Injection Control), except the term “plugging and abandonment” shall mean the same as “closure.”

§37.7021. Financial Assurance Requirements for Plugging and Abandonment.

(a) An owner or operator subject to this subchapter shall establish financial assurance for the plugging and abandonment of each existing and new Class I well, Class III well, Class I salt cavern disposal well and associated salt cavern, or as otherwise directed by the executive director, in a manner that meets the requirements of this section, in addition to the requirements specified under Subchapters A, B, C, and D of this chapter (relating to General Financial Assurance Requirements; Financial Assurance Requirements for Closure, Post Closure, and Corrective Action; Financial Assurance

Mechanisms for Closure, Post Closure, and Corrective Action; and Wording of the Mechanisms for Closure, Post Closure, and Corrective Action) and §331.143 of this title (relating to Cost Estimate for Plugging and Abandonment).

(b) An owner or operator subject to this subchapter may use any of the following mechanisms as specified in Subchapter C of this chapter to demonstrate financial assurance for plugging and abandonment:

(1) trust fund (fully funded or pay-in trust), except that the executive director will respond in writing within 60 days to requests for reimbursement made in accordance with §37.201(j) of this title (relating to Trust Fund);

(2) surety bond guaranteeing payment;

(3) surety bond guaranteeing performance;

(4) irrevocable standby letter of credit;

(5) insurance;

(6) financial test; or

(7) corporate guarantee.

(c) Owners or operators shall comply with §37.31 of this title (relating to Submission of Documents), except that evidence of financial assurance shall be submitted at least 60 days prior to commencement of drilling operations for new wells and for salt cavern disposal wells. All financial assurance mechanisms shall be in effect before commencement of drilling operations. For converted wells and other previously constructed wells, financial assurance shall be provided at least 30 days prior to permit issuance and be in effect upon permit issuance.

(d) Owners or operators shall comply with §37.131 of this title (relating to Annual Inflation Adjustments to Current Cost Estimates), except that adjustments must be made by 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*.

(e) Owners or operators using a financial test or corporate guarantee must comply with §37.141 of this title (relating to Increase in Current Cost Estimate) except that mechanism increases must be made within 90 days after the close of each succeeding fiscal year.

§37.7031. Financial Assurance Requirements for Post Closure.

(a) An owner or operator subject to this subchapter may be required to establish financial assurance for post closure of each existing and new Class I hazardous well and each existing and new

Class I salt cavern disposal well and associated salt cavern, in a manner that meets the requirements of this section, in addition to the requirements specified under Subchapters A, B, C, and D of this chapter (relating to General Financial Assurance Requirements; Financial Assurance Requirements for Closure, Post Closure, and Corrective Action; Financial Assurance Mechanisms for Closure, Post Closure, and Corrective Action; and Wording of the Mechanisms for Closure, Post Closure, and Corrective Action), §331.68 of this title (relating to Post-Closure Care), and §331.171 of this title (relating to Post-Closure Care).

(b) An owner or operator required to provide financial assurance for post closure may use any of the mechanisms specified in Subchapter C of this chapter to demonstrate financial assurance for post closure, except the Local Government Financial Test and Local Government Guarantee.

(c) Owners or operators shall comply with §37.31 of this title (relating to Submission of Documents), except that evidence of financial assurance for post closure shall be submitted at least 60 days prior to commencement of drilling operations for new wells and for salt cavern disposal wells. All financial assurance mechanisms shall be in effect before commencement of drilling operations. For converted wells and other previously constructed wells, financial assurance for post closure shall be provided at least 30 days prior to permit issuance and shall be in effect upon permit issuance.

(d) Owners or operators shall comply with §37.131 of this title (relating to Annual Inflation Adjustments to Current Cost Estimates), except that adjustments must be made by 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*.

(e) Owners or operators using a financial test or corporate guarantee must comply with §37.141 of this title (relating to Increase in Current Cost Estimate) except that mechanism increases must be made within 90 days after the close of each succeeding fiscal year.

§37.7041. Financial Assurance Requirements for Liability.

(a) An owner or operator of hazardous waste injection wells subject to this subchapter may be required to establish and maintain liability coverage for sudden and nonsudden bodily injury and property damage to third parties caused by accidental occurrences arising from operations of the facility that meets the requirements of this section, in addition to the requirements specified under Subchapters A, E, F, and G of this chapter (relating to General Financial Assurance Requirements; Financial Assurance Requirements for Liability Coverage; Financial Assurance Mechanisms for Liability; and Wording of the Mechanisms for Liability), §305.154(a)(11) of this title (relating to Standards), and §331.142 of this title (relating to Financial Responsibility).

(1) An owner or operator required to establish and maintain liability coverage for sudden accidental occurrences must do so in the amount of at least \$1 million per occurrence with an annual aggregate of at least \$2 million, exclusive of legal defense costs.

(2) An owner or operator required to establish and maintain liability coverage for nonsudden accidental occurrences must do so in the amount of at least \$3 million per occurrence with an annual aggregate of at least \$6 million, exclusive of legal defense costs.

(3) Owners or operators who combine coverage levels for sudden and nonsudden accidental occurrences must maintain liability coverage in the amount of at least \$4 million per occurrence and \$8 million annual aggregate.

(b) An owner or operator subject to this subchapter may use any of the mechanisms specified in Subchapter F of this chapter to demonstrate financial assurance for sudden and nonsudden liability.

(c) Owners or operators required to provide liability coverage may not use a claims made insurance policy as security unless the applicant places in escrow, as provided by the executive director, an amount sufficient to pay an additional year of premiums for renewal of the policy by the state on notice of termination of coverage.

§37.7051. State Assumption of Responsibility.

(a) If the State of Texas either assumes legal responsibility for an owner's or operator's compliance with plugging and abandonment, post closure, or liability requirements of this chapter or assures that funds will be available from state sources to cover the requirements, the owner or operator will be in compliance with the requirements of this chapter if the executive director determines that the

state's assumption of responsibility is at least equivalent to the mechanisms specified in this chapter.

The executive director will evaluate the equivalency of state guarantees principally in terms of certainty of the availability of funds for the required plugging and abandonment, post closure, or liability coverage; and the amount of funds that will be made available. The executive director may also consider other factors. The owner or operator must submit to the executive director a letter from the State of Texas describing the nature of the state's assumption of responsibility together with a letter from the owner or operator requesting that the state's assumption of responsibility be considered acceptable for meeting the requirements of this chapter. The letter from the state must include, or have attached to it, the following information: the facility's permit number, name, physical and mailing addresses, and the amount of funds for plugging and abandonment, post closure, or liability coverage that are guaranteed by the state. The executive director will notify the owner or operator of the determination regarding the acceptability of the state's guarantee in lieu of the mechanisms specified in this chapter. The executive director may require the owner or operator to submit additional information as is deemed necessary to make this determination. Upon approval by the executive director, the owner or operator will be deemed to be in compliance with the requirements of this chapter.

(b) If the State of Texas' assumption of responsibility is found acceptable as specified in subsection (a) of this section except for the amount of funds available, the owner or operator may satisfy the requirements of this chapter by use of both the state's assurance and additional financial mechanisms as specified in this chapter. The amount of funds available through the state and owner or operator's mechanisms must at least equal the required amount.

**SUBCHAPTER R : FINANCIAL ASSURANCE FOR
MUNICIPAL SOLID WASTE FACILITIES**

§§37.8001, 37.8011, 37.8021, 37.8031, 37.8041, 37.8051, 37.8061, 37.8071

STATUTORY AUTHORITY

The new sections are adopted under TWC, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the laws of this state.

These rules are also adopted under the Solid Waste Disposal Act, in HSC, §361.011, which provides the commission with the authority to manage municipal solid waste; HSC, §361.024, which provides the commission with the authority to adopt rules and establish standards of operation for the management of solid waste; and HSC, §361.085, which provides the commission with the authority to require financial assurance demonstrations for solid waste, hazardous waste, and permitted facilities.

Together, these statutes authorize the commission to adopt any rules necessary to carry out its powers and duties under TWC and other laws of Texas and to establish and approve all general policy of the commission. These rules are also adopted in accordance with Texas Government Code, §2001.39, implementing Senate Bill 178, 76th Legislature, 1999, which requires a quadrennial review of commission rules.

§37.8001. Applicability.

This subchapter applies to an owner or operator required to provide financial assurance under Chapter 330 of this title (relating to Municipal Solid Waste). This subchapter does not apply to state or federal governmental entities whose debts and liabilities are the debts and liabilities of a state or the United States. This subchapter establishes requirements and mechanisms for demonstrating financial assurance for closure, post closure, and corrective action.

§37.8011. Definitions.

Definitions for terms that appear throughout this subchapter may be found in this section, in Subchapter A of this chapter (relating to General Financial Assurance Requirements), as well as Chapter 330 of this title (relating to Municipal Solid Waste). **Local government** - A city, town, county, district, association, or other public body (including an intermunicipal agency of two or more of the foregoing entities) created by or under state law; an Indian tribe or an authorized Indian tribal organization having jurisdiction over solid waste management. This definition includes a special district created under state law.

§37.8021. Financial Assurance Requirements.

In addition to the requirements of this subchapter, owners or operators required to demonstrate for closure, post closure, or corrective action must comply with Subchapters A, B, C, and D of this

chapter (relating to General Financial Assurance Requirements; Financial Assurance Requirements for Closure, Post Closure, and Corrective Action; Financial Assurance Mechanisms for Closure, Post Closure, and Corrective Action; and Wording of the Mechanisms for Closure, Post Closure, and Corrective Action), except that §37.131 of this title (relating to Annual Inflation Adjustments to Current Cost Estimates) shall be modified to mean annual inflation adjustments are required during the active life of the facility and during the post closure care period.

§37.8031. Financial Assurance Mechanisms.

(a) An owner or operator subject to this subchapter may use any of the financial assurance mechanisms in Subchapter C of this chapter (relating to Financial Assurance Mechanisms for Closure, Post Closure, and Corrective Action), to provide financial assurance, except as specified in this section. The mechanisms must ensure that the funds necessary to meet the costs of closure, post closure, or corrective action shall be available when requested by the executive director.

(b) An owner or operator may use a fully funded trust, pay-in trust, or standby trust as provided in §37.201 of this title (relating to Trust Fund), except the pay-in period is ten years or over the remaining life of the municipal solid waste facility, whichever is shorter, unless the owner or operator satisfies the requirements of paragraph (1) of this subsection.

(1) If a pay-in period in excess of ten years is used, the owner or operator shall submit, on an annual basis, certification from an independent registered professional engineer that there is adequate financial assurance for closure or post closure. The owner or operator must:

(A) submit the completed certification on the form provided by the executive director;

and

(B) submit the initial certification with the initial trust payment with subsequent annual certifications to be submitted with the subsequent payments which are due no later than 30 days after the anniversary date of the initial payment.

(2) The pay-in trust will revert to a fully funded trust and the entire current closure or post closure cost estimate shall be paid into the trust upon direction of the executive director if:

(A) the owner or operator fails to submit the annual certification by the required time frame in paragraph (1) of this subsection;

(B) the certification is incomplete; or

(C) the certification is not submitted on the form provided by the executive director.

(c) An owner or operator may use a surety bond guaranteeing payment as provided in §37.211 of this title (relating to Surety Bond Guaranteeing Payment), or a surety bond guaranteeing performance as provided in §37.221 of this title (relating to Surety Bond Guaranteeing Performance), except a payment bond may not be used to provide financial assurance for corrective action.

(d) An owner or operator may use insurance as provided in §37.241 of this title (relating to Insurance), except:

- (1) insurance may not be used to provide financial assurance for corrective action;
- (2) the insurer must be licensed in Texas; and
- (3) the following provision found in §37.241(g) of this title does not apply: within 60 days after receiving bills for closure, post closure, or corrective action activities, the executive director shall determine whether the closure, post closure, or corrective action expenditures are in accordance with the approved closure, post closure, or corrective action activities or otherwise justified, and if so, shall instruct the insurer to make reimbursement in such amounts as the executive director specifies in writing.

(e) An owner or operator may use a corporate financial test as provided in §37.8061 of this title (relating to Corporate Financial Test for Municipal Solid Waste Facilities), except the owner or operator may not use the financial test under §37.251 of this title (relating to Financial Test).

§37.8041. State Assumption of Responsibility.

If the executive director either assumes legal responsibility for an owner's or operator's compliance with the closure, post closure, or corrective action requirements of this chapter, or assures that the funds shall be available from state sources to cover the requirements, the owner or operator shall be in compliance with the requirements of this section. The language of the mechanisms for any state assumption of responsibility shall ensure:

(1) the amount of funds assured is sufficient to cover the costs of closure, post closure, and corrective action for known releases when needed;

(2) the funds shall be available immediately;

(3) the financial assurance mechanisms shall be obtained by the owner or operator at least 60 days prior to the initial receipt of solid waste in the case of closure and post closure, and no later than 120 days after the corrective action remedy has been selected in accordance with the requirements of the corrective action plan, until the owner or operator is released from the financial assurance requirements under §§330.281, 330.282, 330.283, or 330.284 of this title (relating to Closure for Landfills; Closure for Process Facilities; Post Closure Care for Landfills; or Corrective Action for Landfills); and

(4) the financial assurance mechanisms shall be legally valid, binding, and enforceable under state and federal law.

§37.8051. Submission of Documents.

An owner or operator may satisfy the requirements as provided in §37.31 of this title (relating to Submission of Documents), except the owner or operator required by this chapter to provide financial assurance for corrective action must submit an originally signed financial assurance mechanism no later than 120 days after the corrective action remedy has been selected. The signed financial assurance mechanism must be in effect when submitted.

§37.8061. Corporate Financial Test for Municipal Solid Waste Facilities.

An owner or operator may satisfy the requirements of financial assurance for closure, post closure, or corrective action by obtaining a corporate financial test or a corporate financial test and corporate guarantee, which conforms to the requirements of this section, in addition to the requirements specified in Subchapters A and B of this chapter (relating to General Financial Assurance Requirements and Financial Assurance Requirements for Closure, Post Closure, and Corrective Action).

(1) To pass this test, the owner or operator must satisfy one of the following three conditions:

(A) the owner or operator must have a current bond rating for its senior unsecured debt of AAA, AA, A, or BBB as issued by Standard and Poor's or Aaa, Aa, A, or Baa as issued by Moody's;

(B) a ratio of total liabilities to net worth less than 1.5; or

(C) a ratio of the sum of net income plus depreciation, depletion, and amortization, minus \$10 million, to total liabilities greater than 0.10.

(2) The tangible net worth of the owner or operator must be greater than:

(A) the sum of the current cost estimates, and any other environmental obligations under the Texas Natural Resource Conservation Commission (TNRCC) or other federal or state environmental regulations, including guarantees, covered by a financial test, plus \$10 million, except as provided in subparagraph (B) of this paragraph; or

(B) \$10 million in tangible net worth plus the amount of any guarantees that have not been recognized as liabilities on the financial statements provided all of the current cost estimates and any other environmental obligations covered by a financial test are recognized as liabilities on the owner's or operator's audited financial statements and subject to the approval of the executive director.

(3) The owner or operator must have assets located in the United States amounting to at least the sum of the current cost estimates, and any other environmental obligations covered by a financial test as described in paragraph (8) of this section.

(4) To demonstrate that the requirements of the test are being met, the owner or operator shall submit the following items to the executive director:

(A) a letter signed by the owner's or operator's chief financial officer worded identically to the wording specified in §37.8071 of this title (relating to Wording of Financial Assurance Mechanisms) that:

(i) lists all the current cost estimates covered by a financial test, including, but not limited to, cost estimates required for municipal solid waste management facilities under Chapter 330 of this title (relating to Municipal Solid Waste) and 40 Code of Federal Regulations (CFR) Part 258; cost estimates required for underground injection control (UIC) facilities under Chapter 331 of this title (relating to Underground Injection Control) and 40 CFR Part 144; cost estimates required for petroleum underground storage tank facilities under Chapter 334 of this title (relating to Underground and Aboveground Storage Tanks) and 40 CFR Part 280; cost estimates required for polychlorinated biphenyl (PCB) storage facilities under 40 CFR Part 761; and cost estimates required for hazardous waste treatment, storage, and disposal facilities under Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste) and 40 CFR Parts 264 and 265; and

(ii) provides evidence demonstrating that the firm meets the conditions of either paragraph (1)(A) or (B) or (C) of this section and paragraphs (2) and (3) of this section;

(B) a copy of the independent certified public accountant's unqualified opinion of the owner's or operator's financial statements for the latest completed fiscal year. To be eligible to use the financial test, the owner's or operator's financial statements must receive an unqualified opinion from the independent certified public accountant. An adverse opinion, disclaimer of opinion, or other qualified opinion will be cause for disallowance by the executive director. The executive director may evaluate qualified opinions on a case-by-case basis and allow use of the financial test in cases where the executive director deems that the matters which form the basis for the qualification are insufficient to warrant disallowance of the test. If the executive director does not allow use of the test, the owner or operator must provide alternate financial assurance that meets the requirements of this section; and

(C) a special report which is based upon an agreed procedures engagement in accordance with professional auditing standards which:

(i) describes the procedures performed in comparing the data in the chief financial officer's letter derived from the independently audited year-end financial statements for the latest fiscal year with the amounts in such financial statements;

(ii) states the findings of that comparison and the reasons for any differences;
and

(iii) includes a report from the independent certified public accountant verifying that all of the environmental obligations covered by a financial test have been recognized as liabilities on the audited financial statements, verifying how these obligations have been measured and reported, and verifying that the tangible net worth of the firm is at least \$10 million plus the amount of any guarantees provided. This report is required if the chief financial officer's letter has assured for environmental obligations as provided in paragraph (2)(B) of this section.

(5) After the initial submission of items specified in paragraph (4) of this section, the owner or operator must annually send updated information to the executive director within 90 days following the close of the owner's or operator's fiscal year. This information shall consist of all items specified in paragraph (4) of this section. An additional 45 days may be provided to an owner or operator who can demonstrate that 90 days is insufficient time to acquire audited financial statements.

(6) If the owner or operator no longer meets the requirements of paragraphs (1) - (3) of this section, the owner or operator shall send notice to the executive director of intent to establish alternate financial assurance as specified in this subchapter and provide the alternate financial assurance mechanism within 120 days following the close of the owner's or operator's fiscal year.

(7) The executive director may, based on a reasonable belief that the owner or operator may no longer meet the requirements of paragraphs (1) - (3) of this section, require at any time the owner or operator to provide reports of its financial condition in addition to or including current financial test documentation as specified in paragraph (4) of this section. If the executive director finds,

on the basis of such reports or other information, that the owner or operator no longer meets the requirements of paragraphs (1) - (3) of this section, the owner or operator must provide alternate financial assurance as specified in this subchapter within 30 days after notification of such a finding.

(8) When calculating the current cost estimates for closure, post closure, or corrective action, or the sum of the combination of such costs to be covered, and any other environmental obligations assured by a financial test referred to in this section, the owner or operator must include cost estimates required for municipal solid waste management facilities under Chapter 330 of this title and 40 CFR Part 258. The owner or operator must also include current cost estimates required for the following environmental obligations, if the owner or operator assures them through a financial test: obligations including, but not limited to, UIC facilities under Chapter 331 of this title and 40 CFR Part 144; petroleum underground storage tank facilities under Chapter 334 of this title and 40 CFR Part 280; PCB storage facilities under 40 CFR Part 761; and hazardous waste treatment, storage, and disposal facilities under Chapter 335 of this title and 40 CFR Parts 264 and 265.

§37.8071. Wording of Financial Assurance Mechanisms.

A letter from the chief financial officer for closure, post closure, or corrective action, as specified in §37.8061 of this title (relating to Corporate Financial Test for Municipal Solid Waste Facilities) must be worded as specified in the Corporate Financial Test in this section, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.

Figure: 30 TAC §37.8071

**SUBCHAPTER S : FINANCIAL ASSURANCE FOR ALTERNATIVE METHODS OF
DISPOSAL OF RADIOACTIVE MATERIAL**

§§37.9001, 37.9005, 37.9010, 37.9015, 37.9020, 37.9025

STATUTORY AUTHORITY

The new sections are adopted under TWC, §5.103, and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the laws of this state.

These rules are also adopted under the Solid Waste Disposal Act in HSC, §361.015 and §361.018, which provide the commission with the authority to manage radioactive waste; HSC, §361.085, which provides the commission with the authority to require financial assurance demonstrations for solid waste, hazardous waste, and permitted facilities; HSC, §401.108, which provides the authority for the commission to require financial assurance from licensed facilities; and HSC, §401.051 and §401.412, which provide authority for the commission to adopt rules relating to radioactive substances.

Together, these statutes authorize the commission to adopt any rules necessary to carry out its powers and duties under TWC and other laws of Texas and to establish and approve all general policy of the commission. These rules are also adopted in accordance with Texas Government Code, §2001.39, implementing Senate Bill 178, 76th Legislature, 1999, which requires a quadrennial review of commission rules.

§37.9001. Applicability.

This subchapter applies to an owner or operator, including a state or federal government owner or operator, required to provide evidence of financial assurance under Chapter 336, Subchapter F of this title (relating to Licensing of Alternative Methods of Disposal of Radioactive Material). This subchapter establishes requirements and mechanisms for demonstrating financial assurance for closure and post closure.

§37.9005. Definitions.

Definitions for terms that appear throughout this subchapter may be found in this section, Subchapter A of this chapter (relating to General Financial Assurance Requirements), §336.2 of this title (relating to Definitions), and §336.502 of this title (relating to Definitions), except the following definitions shall apply for this subchapter.

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

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

(3) **Control and maintenance** - Shall be referenced as post closure.

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

(5) **Post Closure** - Shall be the same as control and maintenance as used in Chapter 336, Subchapter G of this title (relating to Decommissioning Standards).

(6) **Site** - Shall be used interchangeably with facility.

§37.9010. Submission of Documents.

An owner or operator required by this subchapter to provide financial assurance for closure or post closure must submit originally signed and effective financial assurance mechanisms to the executive director 60 days prior to commencement of operations.

§37.9015. Financial Assurance Requirements for Closure and Post Closure.

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

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

(1) An owner or operator subject to this subchapter may use any of the mechanisms as specified in §37.9020 of this title (relating to Financial Assurance Mechanisms) to demonstrate financial assurance for closure or post closure. On a case-by-case basis, the executive director may approve other alternative financial assurance mechanisms.

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

(3) An owner or operator may use multiple financial assurance mechanisms provided in §37.41 of this title (relating to Use of Multiple Financial Assurance Mechanisms), but must use only those financial assurance mechanisms specified in §37.9020 of this title.

(4) Insurance, a surety bond for guaranteeing payment, or a surety bond guaranteeing performance for closure or post closure, must provide that the full face amount be paid to the beneficiary automatically prior to the expiration without proof of forfeiture if the owner or operator fails to provide a replacement acceptable to the executive director within 30 days after receipt of notification of cancellation.

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

§37.9020. Financial Assurance Mechanisms.

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

(b) An owner or operator may satisfy the requirements of a surety bond guaranteeing payment as provided in §37.211 of this title (relating to Surety Bond Guaranteeing Payment), or a surety bond guaranteeing performance as provided in §37.221 of this title (relating to Surety Bond Guaranteeing Performance), except:

- (1) the surety must also be licensed in the State of Texas;
- (2) cancellation may not occur during the 90 days beginning on the date of receipt of the notice of cancellation; and

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

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

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

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

(d) An owner or operator may satisfy the requirements of insurance as provided in §37.241 of this title (relating to Insurance), except:

(1) the insurer must be licensed in Texas; and

(2) cancellation, termination, or failure to renew may not occur during the 90 days beginning with the date of receipt of the notice by both the executive director and the owner or operator, as evidenced by the return receipts.

(e) An owner or operator may satisfy the requirements of financial assurance by demonstrating that it passes a financial test as provided in §37.251 of this title (relating to Financial Test), except the owner or operator which has issued rated bonds must also meet the criteria of paragraphs (1) and (3) of this subsection, or the owner or operator which has not issued rated bonds must also meet the criteria of paragraphs (2) and (3) of this subsection.

(1) The owner or operator must have:

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

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

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

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

(2) The owner or operator must have:

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

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

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

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

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

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

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

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

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

(f) A parent company controlling a majority of the voting stock of the owner or operator may satisfy the requirements of financial assurance by demonstrating that it passes a financial test as specified in §37.251 of this title, and by meeting the requirements of a corporate guarantee as specified in §37.261 of this title, except a guarantor that is a corporation who has a substantial business relationship with the owner or operator may not use the corporate guarantee. The guarantor shall also comply with the requirements identified in this subsection.

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

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

(B) the corporate seals.

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

(A) majority control of the owner or operator;

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

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

(D) authorization for each signatory.

(g) An owner or operator that is a nonprofit college, university, or hospital may satisfy the requirements of financial assurance by demonstrating that it passes a financial test as specified in §37.251 of this title, except colleges and universities must also meet either the criteria of paragraphs (1) and (5) or (2) and (5) of this subsection, and hospitals must also meet either the criteria in paragraphs (3) and (5) or (4) and (5) of this subsection.

(1) Colleges or universities that issue bonds must have a current rating for its most recent uninsured, uncollateralized, and unencumbered bond issuance of AAA, AA, or A as issued by Standard and Poor's or Aaa, Aa, or A as issued by Moody's.

(2) For colleges or universities that do not issue bonds, unrestricted endowment must consist of assets located in the United States of at least \$50 million or at least 30 times the total current cost estimate (or the current amount required if a certification is used), whichever is greater, for all closure and post closure activities for which the college or university is responsible as a self-guaranteeing owner or operator.

(3) Hospitals that issue bonds must have a current rating for its most recent uninsured, uncollateralized, and unencumbered bond issuance of AAA, AA, or A as issued by Standard and Poor's or Aaa, Aa, or A as issued by Moody's.

(4) Hospitals that do not issue bonds must meet the following criteria:

(A) total revenues less total expenditures divided by total revenues must be equal to or greater than 0.04;

(B) long-term debt divided by net fixed assets must be less than or equal to 0.67;

(C) current assets plus depreciation fund divided by current liabilities must be greater than or equal to 2.55; and

(D) operating revenues must be at least 100 times the total current cost estimate (or the current amount required if a certification is used) for all closure and post closure activities for which the hospital is responsible as a self-guaranteeing owner or operator.

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

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

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

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

(ii) if, at any time, the owner's or operator's most recent bond issuance ceases to be rated in any category of "A" or above by either Standard and Poor's or Moody's, the owner or operator will provide notice in writing of such fact to the executive director within 20 days after publication of the change by the rating service.

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

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

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

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

(4) corresponding current cost estimates.

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

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

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

§37.9025. Wording of Financial Assurance Mechanisms.

(a) Except as provided in subsection (b) of this section, an owner or operator providing a self-guarantee, as specified in §37.9020(e) of this title (relating to Financial Assurance Mechanisms), must provide a letter from the chief financial officer as specified in §37.351 of this title (relating to Financial Test), except Alternative I and Alternative II as specified in §37.351 of this title shall be replaced with Alternative I and Alternative II of this subsection.

Figure: 30 TAC §37.9025(a)

(b) An owner or operator that is a nonprofit college, university, or hospital providing a self-guarantee as specified in §37.9020(g) of this title, must provide a letter from the chief financial officer of the owner or operator as specified in §37.351 of this title, except Alternative I and Alternative II as specified in §37.351 of this title shall be replaced with Alternative I and Alternative II of this subsection.

Figure: 30 TAC §37.9025(b)

SUBCHAPTER T : FINANCIAL ASSURANCE FOR NEAR-SURFACE LAND

DISPOSAL OF RADIOACTIVE WASTE

§§37.9030, 37.9035, 37.9040, 37.9045, 37.9050, 37.9055

STATUTORY AUTHORITY

The new sections are adopted under TWC, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the laws of this state.

These rules are also adopted under the Solid Waste Disposal Act in HSC, §361.015 and §361.018, which provide the commission with the authority to manage radioactive waste; HSC, §361.085, which provides the commission with the authority to require financial assurance demonstrations for solid waste, hazardous waste, and permitted facilities; HSC, §401.108, which provides the authority for the commission to require financial assurance from licensed facilities; and HSC, §401.051 and §401.412, which provide authority for the commission to adopt rules relating to radioactive substances.

Together, these statutes authorize the commission to adopt any rules necessary to carry out its powers and duties under TWC and other laws of Texas and to establish and approve all general policy of the commission. These rules are also adopted in accordance with Texas Government Code, §2001.39, implementing Senate Bill 178, 76th Legislature, 1999, which requires a quadrennial review of commission rules.

§37.9030. Applicability.

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

§37.9035. Definitions.

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

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

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

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

(4) **Institutional control** - Shall be referenced as post closure.

(5) **Post closure** - The same as institutional control as specified in §336.734 of this title (relating to Institutional Requirements).

§37.9040. Submission of Documents.

An owner or operator required by this subchapter to provide financial assurance for closure or post closure must submit originally signed and effective financial assurance mechanisms to the executive director 60 days prior to commencement of operations.

§37.9045. Financial Assurance Requirements for Closure and Post Closure.

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

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

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

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

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

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

(5) Proof of forfeiture must not be necessary to collect the financial assurance, so that in the event that the owner or operator does not provide an acceptable replacement financial assurance within the required time, the financial assurance mechanism shall be automatically collected prior to its expiration.

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

§37.9050. Financial Assurance Mechanisms.

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

(b) An owner or operator may satisfy the requirements of a surety bond guaranteeing payment as provided in §37.211 of this title (relating to Surety Bond Guaranteeing Payment), or a surety bond guaranteeing performance as provided in §37.221 of this title (relating to Surety Bond Guaranteeing Performance), except:

- (1) the surety must also be licensed in the State of Texas;
 - (2) cancellation may not occur during the 90 days beginning on the date of receipt of the notice of cancellation; and
 - (3) the bond must guarantee that the owner or operator will provide alternate financial assurance within 30 days after receipt of a notice of cancellation of the bond.
- (c) An owner or operator may satisfy the requirements of an irrevocable standby letter of credit as provided in §37.231 of this title (relating to Irrevocable Standby Letter of Credit), except:
- (1) the letter of credit shall be automatically extended unless the issuer provides notice of cancellation at least 90 days before the current expiration date. Under the terms of the letter of credit, the 90 days shall begin on the date when both the owner or operator and the executive director have received the notice, as evidenced by the return receipts; and
 - (2) in accordance with §37.231(h) of this title, the executive director shall draw on the letter of credit within 30 days after receipt of notice from the issuing institution that the letter of credit will not be extended, or within 60 days of an extension, if the owner or operator fails to establish and obtain approval of such alternate financial assurance from the executive director.

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

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

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

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

(4) corresponding current cost estimates.

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

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

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

§37.9055. Institutional Control Requirements.

The institutional control requirements of this chapter shall apply to owners or operators specified under Chapter 336, Subchapter H of this title (relating to Licensing Requirements for Near-Surface Land Disposal of Radioactive Waste) whose ownership of the site is subject to being transferred to the state or federal government.

**SUBCHAPTER U: FINANCIAL ASSURANCE FOR
MEDICAL WASTE TRANSPORTERS**

§§37.9060, 37.9065, 37.9070, 37.9075, 37.9080, 37.9085

STATUTORY AUTHORITY

The new sections are adopted under TWC, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the laws of this state.

These rules are also adopted under the Solid Waste Disposal Act in HSC, §361.011, which provides the commission with the authority to manage municipal solid waste; HSC, §361.024, which provides the commission with the authority to adopt rules and establish standards of operation for the management of solid waste; and HSC, §361.085, which provides the commission with the authority to require financial assurance demonstrations for solid waste, hazardous waste, and permitted facilities.

Together, these statutes authorize the commission to adopt any rules necessary to carry out its powers and duties under TWC and other laws of Texas and to establish and approve all general policy of the commission. These rules are also adopted in accordance with Texas Government Code, §2001.39, implementing Senate Bill 178, 76th Legislature, 1999, which requires a quadrennial review of commission rules.

§37.9060. Applicability.

This subchapter applies to all owners or operators required to provide financial assurance under Chapter 330, Subchapter Y of this title (relating to Medical Waste Management). This subchapter establishes requirements and mechanisms for demonstrating financial assurance for automobile liability and pollution liability.

§37.9065. Definitions.

Definitions for terms that appear throughout this subchapter are defined in Subchapter A of this chapter (relating to General Financial Assurance Requirements) and in Chapter 330, Subchapter Y of this title (relating to Medical Waste Management).

§37.9070. Financial Assurance Requirements.

(a) Owners or operators registered to transport medical waste are required to demonstrate for automobile liability and pollution liability and must comply with Subchapters A and B of this chapter (relating to General Financial Assurance Requirements and Financial Assurance Requirements for Closure, Post Closure, and Corrective Action), except the following sections do not apply:

(1) Section 37.11 of this title (relating to Definitions); §37.31 of this title (relating to Submission of Documents); §37.41 of this title (relating to Use of Multiple Financial Assurance

Mechanisms); §37.51 of this title (relating to Use of a Financial Assurance Mechanism for Multiple Facilities); and §37.52 of this title (relating to Use of a Universal Financial Assurance Mechanism for Multiple Facilities and Program Areas);

(2) §37.131 of this title (relating to Annual Inflation Adjustments to Current Cost Estimates) and §37.161 of this title (relating to Establishment of a Standby Trust).

(b) Owners or operators required to provide financial assurance under this subchapter may only use those financial assurance mechanisms as specified in §37.9075 of this title (relating to Financial Assurance Mechanisms).

(c) Owners or operators who transport medical waste are required to demonstrate financial assurance for automobile liability and pollution liability in the dollar limits specified in this subsection and are responsible for any liability costs that exceed these dollar limits. Such owners or operators must provide:

(1) a combined, single-limit automobile liability insurance policy with limits of at least \$1 million per accident, exclusive of legal defense costs, that meets the requirements of subsection (d) of this section; and

(2) a pollution liability policy with a limit of \$500,000, exclusive of legal defense costs, if the transporter registers one to seven vehicles or a pollution liability policy with a limit of \$1 million, exclusive of legal defense costs, if the transporter registers more than seven vehicles; or

(3) an irrevocable letter of credit that meets the requirements specified in this subchapter, made payable to the Texas Natural Resource Conservation Commission in the following amount:

(A) \$10,000, if three or less self-contained trucks or transport vehicles (not tractor-trailer units) are registered;

(B) \$35,000, if more than three self-contained trucks or transporter vehicles (not tractor-trailer units) are registered;

(C) \$25,000, if three or less tractor-trailer vehicles are registered; or

(D) \$50,000, if more than three tractor-trailer vehicles are registered.

(d) Owners or operators who transport medical waste shall comply with the following insurance requirements.

(1) The owner or operator who transports medical waste must be the named insured on the certificate of insurance and the certificate holder must be listed as the Texas Natural Resource Conservation Commission.

(2) The cancellation statement on the certificate shall read exactly as follows: "Should any of the above described policies be canceled before the expiration date thereof, the issuing company will mail a 60-day written cancellation notice to the certificate holder."

(3) Upon the executive director's receipt of a cancellation notice, the owner or operator who transports medical waste shall obtain alternate insurance coverage and submit evidence of such coverage to the commission before the effective date of the cancellation. Failure to do so will result in revocation of the registration.

(4) Evidence of pollution liability coverage is demonstrated by submitting an MCS 90 form along with the original certificate for the automobile coverage. The schedule of insured vehicles must accompany the certificate of insurance.

(5) Insurance coverage must be issued for at least one year by a carrier that is licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer in Texas. The insurer must be acceptable to the executive director.

(6) An original or certified copy of the insurance policy shall be provided within 30 days from the date requested by the executive director.

§37.9075. Financial Assurance Mechanisms.

Owners or operators subject to this subchapter may use the following financial assurance mechanisms:

- (1) a certificate of insurance to demonstrate automobile liability coverage; and
- (2) an MCS 90 form or letter of credit to demonstrate pollution liability coverage. The letter of credit is subject to the requirements specified in §37.231 of this title (relating to Irrevocable Standby Letter of Credit), except:
 - (A) whenever the terms “closure,” “post closure,” “corrective action,” or “current cost estimate” are cited, replace with “pollution liability”; and
 - (B) in §37.231(h) of this title, the following statement will be added: “Failure to obtain alternate insurance coverage and submit evidence of such coverage to the executive director before the effective date of the cancellation will result in revocation of the registration.”

§37.9080. Submission of Documents.

An owner or operator required to provide financial assurance must submit an originally signed financial assurance mechanism prior to issuance of registration. The signed financial assurance mechanism must be in effect at the time it is submitted.

§37.9085. Incapacity of Owners or Operators Registered to Transport Medical Waste or of the Issuing Institution.

The requirements specified in §37.71 of this title (relating to Incapacity of Owners or Operators, Guarantors, or Issuing Institutions) shall be satisfied, except 60 days should be changed to 30 days as specified in §37.71(b) of this title.