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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
Protecting Texas by Reducing and Preventing Pollution

SENT ELECTRONIC MAIL
November 18, 2003

Mr. Paul H. Lohaus
Director
Office of State and Tribal Programs
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Dear Mr. Lohaus:

The Texas Commission on Environmental Quality (TCEQ) appreciates your October 2, 2003 letter providing comments on the proposed revisions to Low-Level Radioactive Waste Disposal Rules in Title 30, Texas Administrative Code (TAC), Chapters 37, 39, 305, and 336. Based on our follow-up conversations on the rulemaking, I would like to take this opportunity to respond to the comments made in your letter.

The TCEQ's rulemaking implements recent state legislation that authorizes the licensing of a low-level radioactive disposal facility to a private entity applicant. The statute authorizes the licensing of a compact waste disposal facility and a federal facility waste disposal facility under one license. The State of Texas is committed to retaining its status as an Agreement State, and the statute requires that the TCEQ assure that the management of low-level radioactive waste is compatible with applicable U.S. Nuclear Regulatory Commission (NRC) standards. Our rulemaking implements and harmonizes the legislation into our existing regulations that have been previously determined to be compatible with applicable federal standards by the NRC. The TCEQ is hopeful that compatibility issues can be resolved in this rulemaking phase so that the agency may move forward in the statutorily-mandated regulation of low-level radioactive waste disposal in order to provide management alternatives to waste generators of the Texas Low-Level Radioactive Waste Disposal Compact.

To address the individual issues raised by the NRC in its letter and attached table in an organized manner, this response letter has been formatted in a similar fashion. The following discussion in text format is provided to address the overlying issue in the NRC comment letter of site ownership. Based on changes made in response to NRC comment, the TCEQ is requesting a determination of compatibility for its rulemaking with the understanding that any specific rule exemption that may be granted by the TCEQ in the future is subject to NRC compatibility review at the time of consideration. In other words, the TCEQ is requesting that there not be a pre-judgement of compatibility based on the availability of the exemption process. The issue is not the existence of an exemption process in Texas rules, but rather, whether the "exercise of the exemption provision poses a sufficient safety problem as to require the NRC to revoke or suspend" an agreement state program. (60 Fed. Reg. 6570, 6571 (1995)).

The topic of "Institutional Information - Ownership of Federal Facility Waste Disposal Facility" was specifically identified as an issue of NRC concern. The NRC stated that the proposed Texas regulation does not meet the essential objectives of 10 CFR §61.14 which requires federal or state ownership of land before issuance of a license. The TCEQ would like to specifically address the NRC concerns with respect to land ownership. The TCEQ's rules in 30 TAC §§336.710 and 336.734(a) require disposal on land owned by the state or federal government and are equivalent to 10 CFR §§61.14 and 61.59(a). These sections have not been amended in the TCEQ's proposed rulemaking. The existing rule in 30 TAC §336.5, subject to previous NRC compatibility review, details an exemption process from any rule if the exemption is not prohibited by law, will not result in a significant risk to public health and safety or the environment, and is at least as protective of the environment and the public health as the method or standard prescribed by the TCEQ.

The new Texas statute does provide in Texas Health and Safety Code §401.205(b)(2) that if authorized to dispose of federal facility waste, the licensee shall convey to the federal government as provided in the Nuclear Waste Policy Act (NWPA) of 1982, Subtitle D, all required right, title, and interest in land and buildings and rights of access to the property *on decommissioning*. This statute, in section 401(b)(4), requires that before accepting federal facility waste, the licensee must submit to TCEQ a written agreement, signed by an official of the federal government, stating that the federal government will assume all required right, title and interest in land and buildings, in accordance with the federal Nuclear Waste Policy Act. Additionally, an applicant must successfully demonstrate that it is entitled to an exemption from the land ownership requirements prior to accepting federal facility waste. Thus, the statute allows land transfer at decommissioning, rather than prior to receipt of waste, provided that there is an agreement for land transfer at decommissioning and the applicant has demonstrated that it should be exempt from the land ownership requirements until decommissioning. The same statute also provides that the TCEQ may issue the license for a single compact waste disposal facility only for a facility that meets the requirements of Texas Health and Safety Code, Subchapter F, the requirements of TCEQ rules, *and*

requirements for disposal adopted by the TCEQ that meet federal requirements for disposal. The TCEQ notes that the statute intends for the State of Texas to maintain a state licensing program that is compatible with federal standards and regulatory programs as provided in Texas Health and Safety Code §§401.001(1)(A), 401.059(b), 401.103(c), 401.151, and 401.412(c). Further, the new statute does not provide for state ownership of any proposed federal facility waste disposal facility.

The TCEQ's rules harmonize Texas Health and Safety Code, §401.205, which provides for the possible transfer of ownership of the federal facility waste disposal facility on decommissioning, and the existing requirement in 30 TAC §336.734(a), which requires disposal of LLRW only on land owned in fee by the state or federal government by use of the exemption process in 30 TAC §336.5. The provision in 30 TAC §336.734(a) is based on the federal requirement found in 10 CFR §61.59(a) for licensing requirements for land disposal of radioactive waste. The NRC has identified this provision as an element that has particular health and safety significance and provides that an agreement state, such as Texas, should adopt the essential objectives of such a program element in order to maintain an adequate program. Under the Articles of Agreement, the State of Texas agreed to use its best efforts to cooperate with the NRC and other agreement states in the formulation of standards and regulatory programs of the state and the NRC for protection against hazards of radiation, and to assure that the state's program will continue to be compatible with the program for the regulation of like materials. Existing requirements in 30 TAC §336.710 are based on the requirements in 10 CFR §61.14 and are not changed in this rulemaking.

An exemption process is available to applicants seeking to obtain an exemption from the requirements of TCEQ rules. An applicant could pursue an exemption from any requirement, including the requirement in 30 TAC §336.734(a) to authorize the ownership transfer of a federal facility waste disposal facility at decommissioning rather than at license issuance. An application for exemption does not guarantee that an exemption will be granted. The exemption process in 30 TAC §336.5 is authorized by Texas Health and Safety Code, §401.106(b), and is similar to the federal exemption process in 10 CFR §61.6. The process requires the applicant to submit an application to the agency using the regulatory flexibility process under 30 TAC Chapter 90 of the TCEQ's rules.

If an applicant seeks authorization to license the disposal of federal facility waste at a federal facility waste disposal facility and the proposed disposal would occur on land not owned by the state or federal government, an applicant may apply for exemption from the requirement that disposal occur on land owned by the state or federal government. Among other requirements, an application for the exemption would have to describe the nature of the requested exemption, demonstrate that the exemption is not prohibited by federal law, including any requirement for a federally approved or authorized program, demonstrate that the exemption will not result in a significant risk to public health and safety and the environment, and demonstrate that the applicant's proposed alternative requirement is at least as protective of the environment and public health as the method or standard

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that would otherwise apply. An exemption that may be granted must not affect the TCEQ's enforcement and regulatory authority over a site or affect the continuing responsibilities of the licensee. Specific considerations that may be involved in an exemption decision related to land ownership include, but are not limited to, the following: license restrictions on the amount of undisposed waste allowed on the site at any one time; restrictive covenant provisions that are enforceable by the state or federal custodial agency during the institutional control period; and the corrective action financial assurance amount that is required to be available prior to accepting waste on the site.

The TCEQ is aware that the State of Utah has used a similar exemption process for land ownership requirements with a private company as the licensee. The issue for Utah was not the existence of an exemption process, but rather, whether the exercise of the exemption provision posed a sufficient safety problem as to require the NRC to revoke or suspend Utah's Agreement State program. The NRC found that the granting of the exemption did not justify revoking Utah's Agreement State status as Utah's regulations provided control of the disposal site that would be equivalent to the control provided in 10 CFR §61.59. (60 Fed. Reg. 6570, 6571, 6573 (1995)). The Texas rules have provided and continue to provide control of the disposal site that is equivalent to the control provided in 10 CFR Part 61. The new statute added additional controls, that include, but are not limited to, the following: the required submission of a written commitment, prior to accepting federal facility waste, from a federal government official that the federal government will take ownership of land and buildings; and a minimum of \$20 million in financial assurance dedicated for unplanned corrective action that must be held for a Texas low-level radioactive waste disposal site, including the portion of the site that will be owned by the federal government in the future should the applicant be licensed to accept federal facility waste.

In response to NRC comment and to avoid confusion about the ownership of *land*, the proposed language in 30 TAC §336.909(3) has been recommended for amendment by the TCEQ Executive Director to require formal conveyance of the right, title, and interest in federal facility *waste* to the federal government before termination of the license.

The table that follows provides responses to those issues specifically commented on in tabular format in the NRC response letter with citation to the applicable state and federal rule. Please note that the TCEQ Executive Director has recommended amendments to the rule language based on NRC comments provided in the table. However, final action by the TCEQ commissioners is required for the adoption of these recommended amendments.

Table 1. NRC Comment and State Response

NRC Subject and Comment	State Regulation	NRC Regulation	State Response to NRC Comment
<p><u>Authority of Federal Government to Accept Title of Waste</u> The NRC questions whether the Federal Government can accept title of waste at a facility licensed by Texas, under Section 151(b) of the NWPA because Section 151(b) requires a post-closure determination that federal ownership is necessary or desirable and not a pre-operation prediction that termination requirements have been met and federal ownership is necessary.</p>	<p>30 TAC §336.909(2)</p>		<p><i>Section 151(b) of the Nuclear Waste Policy Act, relating to title and custody, clearly contemplates that not all low-level radioactive waste disposal sites are owned by the federal government at the time of disposal. Section 336.909 provides that if the federal facility waste is to be disposed of within the state, then the federal government must assume all right, title, and interest in land and buildings and in the federal facility waste disposed of at the federal facility waste disposal facility. The federal government must also agree, in writing and prior to waste acceptance at the federal facility waste disposal facility, to assume all right, title, and interest in federal facility and in the federal facility waste at the time of decommissioning. Neither the Texas statute nor the proposed rules require a federal facility waste disposal facility at the site. The existence of the federal facility waste disposal facility portion of a licensed site is an optional addition to the Compact waste disposal facility.</i></p>

NRC Subject and Comment	State Regulation	NRC Regulation	State Response to NRC Comment
<p><u>Funding for Disposal Site Closure and Stabilization</u> NRC commented that 37.9045(a)(5) provides for the financial assurance provider to pay the face amount of the financial assurance if the owner does not obtain replacement financial assurance within the required time frame. However, this is not addressed as part of 37.9050(f) and 37.9052. NRC commented that the regulations should require that the insurance company must agree to this term in the insurance policy to be compatible with 10 CFR §61.62(f). The state needs to amend the language in the insurance certificate to replace the terms prescribed in “§37.9050(f)” with “§37.9045(a)(5) and §37.9050(f)” in the three places it appears in the certificate.</p>	<p>30 TAC §37.9045(a)(5) and 30 TAC §37.9050(a)</p>	<p>10 CFR §61.62(e), (f), and (g)</p>	<p><i>The TCEQ Executive Director has recommended an amendment to the adoption rule language to provide conforming changes to §37.9050(f)(4) and the endorsement to the insurance policy under §37.9052. The Insurance Certificate has been replaced by an endorsement to the insurance policy based on other comments received by the TCEQ.</i></p>

NRC Subject and Comment	State Regulation	NRC Regulation	State Response to NRC Comment
<p><u>Concepts</u> The NRC stated that proposed 30 TAC §336.703 needs to be clarified by stating that the concepts and requirements of 10 CFR §61.7 guide the application of regulations in Chapter 336.</p>	<p>30 TAC §336.703</p>	<p>10 CFR §61.7</p>	<p><i>The TCEQ Executive Director has recommended an amendment to the adoption rule language to provide that the concepts and requirements of 10 CFR §61.7 guide the application of rules in 30 TAC Chapter 336.</i></p>
<p><u>Funding for Disposal Site Closure and Stabilization</u> NRC commented that the State should define the process for accessing the perpetual care account funds. The NRC commented that the state is using a perpetual care fund rather than standby trusts as the ultimate depository for financial assurance. This raises an issue if the state requires legislative approval each time it seeks to expend funds from this account which is described as a general revenue fund.</p>	<p>30 TAC §37.9045(a)(5) and 30 TAC §37.9045(a)(6)</p>	<p>10 CFR §61.62</p>	<p><i>The TCEQ agrees that any expenditure out of the perpetual care account requires appropriation authority from the legislature. It would be reasonable for the TCEQ to request an appropriation or a rider appropriation from the perpetual care account in the 2006 - 2007 biennial Legislative Appropriations Request. As long as there is an appropriation, expenditures can be made against the account. However, the legislature can remove appropriation authority any time when in session. The TCEQ also notes that Texas Health and Safety Code, §401.305, identifies how the TCEQ and the Texas Department of Health may use the perpetual care account.</i></p>

NRC Subject and Comment	State Regulation	NRC Regulation	State Response to NRC Comment
<p><u>Financial Assurance for Institutional Controls</u> The NRC commented that the state does not require the licensee to submit to the regulatory body changes made in its arrangements for institutional control. The state rule needs to be revised to include this requirement.</p>	<p>30 TAC §336.737(b)</p>	<p>10 CFR §61.63(b)</p>	<p><i>The TCEQ Executive Director has recommended an amendment to the adoption rule language in §336.737(b) by adding "Any changes to institutional control proposed by the licensee shall be submitted to the TCEQ in the form of an application for a license amendment."</i></p>
<p><u>Disposal Site Suitability Requirements for Land Disposal</u> The NRC stated that the TCEQ needs to define what the phrase "extent permissible under Federal Law" means in 30 TAC §336.808</p>	<p>30 TAC §336.808, 30 TAC §336.5, and 30 TAC §90.10</p>	<p>10 CFR §61.50(a)(4) and 10 CFR §61.6</p>	<p><i>The TCEQ Executive Director interprets the statutory phrase "to the extent permissible under federal law" to mean that a surface use agreement may be used in lieu of state or federal ownership of the mineral interests underlying the disposal site in fee simple title if the use of such an agreement is consistent and compatible with federal law. To use a surface use agreement, an applicant would have to apply for an exemption from the requirement that waste be disposed on land owned in fee by the state or federal government. Under the exemption process in §336.5, the applicant has the burden to demonstrate that the exemption is not prohibited by state or federal law.</i></p>

NRC Subject and Comment	State Regulation	NRC Regulation	State Response to NRC Comment
<p><u>Disposal Site Suitability Requirements for Land Disposal</u> The NRC stated that the TCEQ should clarify that "mineral resources" in 30 TAC §336.808(b) is intended to be read broadly to encompass natural resources as used in 10 CFR §61.50(a)(4).</p>	<p>30 TAC §336.808(b)</p>	<p>10 CFR § 61.50(a)(4)</p>	<p><i>The TCEQ Executive Director has recommended an amendment to the adoption rule language in §336.808(b) to reflect that the surface use agreement must restrict access to natural resources, including slant drilling and subsurface mining, to the extent necessary to prevent intrusion into the site. The surface use agreement must prohibit the use of the surface in the development and access of natural resources in perpetuity by the owner of the mineral estate, heirs, and successors and the agreement is enforceable by the state or federal government.</i></p>

NRC Subject and Comment	State Regulation	NRC Regulation	State Response to NRC Comment
<p><u>Disposal Site Suitability Requirements for Land Disposal</u> The NRC stated that the exemption for acquiring mineral resources should not be effective until after the surface agreement is entered into.</p>	<p>30 TAC §336.808(b)</p>	<p>10 CFR §61.50</p>	<p><i>The TCEQ Executive Director has recommended an amendment to the adoption rule language in §336.808(b) in response to this NRC comment to state that the applicant must have entered into a surface use agreement to prevent intrusion into the site. An exemption under §336.5 is subject to the process for regulatory flexibility under 30 TAC Chapter 90. Under §90.14(a), TCEQ action on an application is subject to 30 TAC Chapter 50, Action on Applications and Other Authorizations. After TCEQ action on the license application, the Office of the Chief Clerk mails notice of the order to the applicant, the Executive Director, persons who commented on the application, and to persons who requested reconsideration or a contested case hearing. If a motion for rehearing is denied on the application, the TCEQ's decision is final and appealable to Texas district court under Texas Water Code, §5.351. In considering a request for an exemption as described in §336.808(b) to authorize the use of a surface use agreement rather than outright ownership of the mineral interests, the TCEQ would consider, among other things, the effective date and the enforceability of the surface use agreement.</i></p>

NRC Subject and Comment	State Regulation	NRC Regulation	State Response to NRC Comment
<p><u>Definitions</u> NRC commented that the definition of federal facility waste should exclude greater than Class C waste to meet compatibility requirements because Texas cannot regulate the disposal of this waste. Moreover, the disposal of greater than Class C waste is the responsibility of the federal government under the Low-level Radioactive Waste Policy Act.</p>	<p>30 TAC §336.2 and 30 TAC §336.701(b)</p>	<p>10 CFR §61.2</p>	<p><i>The TCEQ notes that 30 TAC §336.1(a)(1) already excludes application of state requirements to persons subject to regulation by the NRC or to radioactive material in the possession of federal agencies. The TCEQ Executive Director has recommended an amendment to the adoption rule language for the definition of "Federal facility waste" in §336.2 to exclude greater than Class C LLRW for disposal at a site licensed by the TCEQ. Additionally, the TCEQ changed §336.701(b) to add a new paragraph (5) to exclude greater than Class C LLRW for disposal at a site licensed by the TCEQ.</i></p>
<p><u>Editorial Suggestion</u> The NRC commented that the reference to 10 CFR §61.5(a)(4) in §336.808 should be to 10 CFR §61.50(a)(4).</p>			<p><i>The TCEQ Executive Director has corrected the preamble reference to 10 CFR §61.50(a)(4).</i></p>

If you have any questions, please feel free to contact me at (512) 239-6731 or by electronic mail at sjablons@tceq.state.tx.us

Sincerely,

ORIGINAL SIGNED

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