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

January 8, 2004

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

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Dear Mr. Lohaus:

The Texas Commission on Environmental Quality (TCEQ) took final action on December 17, 2003 to adopt revisions to the Low-Level Radioactive Waste Disposal Rules in Title 30, Texas Administrative Code (TAC), Chapters 37, 39, 305 and 336. Enclosed is a hard copy of the adopted rules. The final rule package was published in the *Texas Register*. The *Texas Register* can be located on-line at <http://www.sos.state.tx.us/texreg/index.shtml>. The rule package was published on January 2, 2004 with an effective date of January 8, 2004.

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.

We have incorporated the comments cited in your October 2, 2003 letter regarding our proposed version of these regulations as indicated in Table 1. Please refer to our response letter to you dated November 18, 2003 for further discussion in response to your October 2, 2003 comments. In addition to rules which were amended in response to comment from the NRC and others, two rules were changed based on direction from the Commission at agenda. First, the Commission directed that applicants should place a copy of their application on a web site that is linked to the TCEQ web site. Second, the Commission will review and approve financial assurance for the low-level facility on an annual basis. We believe that adoption of the attached revisions to our rules satisfies the compatibility and the health and safety categories established in the Office of State and Tribal Programs Procedure SA-200.

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 NWSA 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 the federal facility waste at the time of decommissioning. In response to comment, §336.909(2) has been amended to specify that the United States Secretary of Energy is the individual that must sign the agreement. Neither the Texas statute nor the proposed rules require a federal facility waste disposal facility at the site, if a signed agreement can not be attained. 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>Adoption rule language provides 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>Adoption rule language provides 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>Adoption rule language provides an amendment to §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 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>Adoption rule language provides an amendment to §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>Adoption rule language provides an amendment to §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. Adoption rule language provides for the definition of "Federal facility waste" in §336.2 to specifically exclude greater than Class C LLRW for disposal at a site licensed by the TCEQ. Additionally, the TCEQ amended §336.701(b) in response to comment 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>10 CFR §61.50(a)(4)</p>	<p><i>Adoption rule language provides a corrected preamble reference to 10 CFR §61.50(a)(4).</i></p>

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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, or contact Mr. Devane Clarke at (512) 239-5604 or by electronic mail at dclarke@tceq.state.tx.us.

Sincerely,

Devane Clarke for

Susan M. Jablonski
Low-Level Radioactive Waste Specialist
Texas Commission on Environmental Quality

cc: Devane Clarke, RML, MC-126