

DATED: OCT 7, 1994;

SIGNED BY RICHARD L. BANGART

David R. Smith, M.D.
Commissioner
Texas Department of Health
1100 West 49th Street
Austin, TX 78756

Anthony C. Grigsby, Executive
Director
Texas Natural Resource
Conservation Commission
P.O. Box 13087
1700 North Congress Avenue
Austin, TX 78711

Dear Dr. Smith and Mr. Grigsby:

As you may be aware, the Office of State Programs is experiencing significant delays in transmitting the reports to the Agreement States documenting the results from our routine and follow-up reviews. However, in order to facilitate State action prior to transmission of the final report, we would like to provide you, at this time, a summary of the preliminary significant findings noted during the review and evaluation of the Texas radiation control program concluded on March 11, 1994.

From our review, significant preliminary comments were noted in the categories of Legal Authority and Status and Compatibility of Regulations. Both of these comments apply only to the Texas Natural Resource Conservation Commission's radiation control program. These comments are: 1) the definition of low-level radioactive waste in the Texas Low-Level Radioactive Waste Disposal Authority Act (TLLRWDA) is not compatible with NRC's definition and it places limitations on radioactive materials with a half-life greater than 35 years and transuranics in concentrations greater than 10 nanocuries per gram; 2) the definition of byproduct material in subsection 401.003(3)(b) of the Texas statute, Radioactive Materials, Title 5 is not compatible with NRC's definition; 3) provisions in Texas Part 45, "Licensing Requirements for Near-Surface Land Disposal of Radioactive Waste," prohibit the disposal of transuranics in concentrations greater than 10 nanocuries per gram; and 4) the regulation establishing a prohibition against the use of self-insurance as the surety arrangement for uranium recovery facilities has not been adopted within the 3-year period required by the NRC. For further details see Enclosure 1.

While these findings are preliminary and have not been reviewed by the Commission, these issues were documented in previous program reviews and have not been addressed by the State of Texas. Once the report is approved, it will likely recommend that the State take legislative action to change the definition of low level radioactive waste, the definition of byproduct material, and the prohibition on disposal of transuranics in concentrations

greater than 10 nanocuries per gram to conform to NRC's provisions in these areas. The final report will also likely recommend that the State take measures to adopt the overdue regulation on prohibition against the use of self-insurance as soon as possible.

We apologize for the delay in our transmittal resulting from NRC's program transition impacts and appreciate your cooperation on this matter. The Texas program review report is in the process of final staff review and will be issued after Commission review and approval.

Sincerely,

Richard L. Bangart, Director
Office of State Programs

Enclosures:
As stated

cc w/enclosures:
Richard A. Ratliff, Chief
Texas Bureau of Radiation Control, TDH
Susan S. Ferguson, Director
Industrial and Hazardous Waste Division, TNRCC
Susan Rieff, State Liaison Officer

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PRELIMINARY SIGNIFICANT FINDINGS OF THE TEXAS RADIATION CONTROL PROGRAM
MARCH 27, 1992 TO MARCH 11, 1994

1. Legal Authority (Category I)

NRC Guidelines¹

Clear statutory authority should exist, designating a State radiation control agency and providing for promulgation of regulations, licensing, inspection and enforcement.

States regulating uranium or thorium recovery and associated wastes pursuant to the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA) must have statutes enacted to establish clear authority for the State to carry out the requirements of UMTRCA.

States regulating the disposal of low-level radioactive waste in permanent disposal facilities must have statutes that provide authority for the issuance of regulations for low-level waste management and disposal. The statutes should also provide regulatory program authority and provide for a system of checks to demonstrate that conflicts of interest between the regulatory function and the developmental and operational functions shall not occur. (The level of separation [e.g., separate agencies] should be determined for each State individually.)

a. Assessment

During previous routine reviews, compatibility concerns had been raised regarding Texas statutory authority relating to the regulation of byproduct materials and the corresponding regulations implementing this authority. These previous compatibility concerns were assessed during the March 1994 review and were discussed with Texas management. This assessment disclosed that Texas statutes and regulations continue to have provisions which are of compatibility concern.

The TLLRWAA defines low-level waste as:

"Low-level waste" means any radioactive material that has a half-life of 35 years or less or that has less than 10 nanocuries per gram of transuranics and may include radioactive material not excluded by this subdivision with a half-life of more than 35 years if special criteria are established by the agency for disposal of that waste. The term does not include irradiated reactor fuel and high-level radioactive waste as defined by Title 10, Code of Federal Regulations."

Whereas, the Low-Level Waste Policy Amendments Act defines low-level waste as:

"Low-level radioactive waste means radioactive waste that--(A) is not high-level radioactive waste, spent nuclear fuel, or byproduct material (as defined in section 11e(2) of the Atomic Energy Act of 1954 (42 U.S.C. 2014(e)(2)); and (B) the Nuclear Regulatory

¹The guideline statements are a summary of the guideline provisions provided in the May 28, 1992, policy statement, "Guidelines for NRC Review of Agreement State Radiation Control Programs."

Commission, consistent with existing law and in accordance with paragraph (A), classifies as low-level waste."

In addition, Section 45.1(b)(4) of the Texas Regulations for Control of Radiation (TRCR) Part 45, "Licensing Requirements for Near-Surface Disposal of Radioactive Waste," limits the disposal of transuranics to concentrations less than 10 nanocuries per gram. Section 45.1(b)(4) of TRCR Part 45 states the following:

"(b) The rules in this part do not apply to:

(4) disposal of radioactive waste containing transuranic radioisotopes in concentrations exceeding 10 nanocuries per gram."

The NRC regulations in 10 CFR Part 61, "Licensing Requirements for Land Disposal of Radioactive Waste," Section 61.55, "Waste Classification," provides that alpha emitting transuranics with a half-life greater than five years is limited to 100 nanocuries per gram. The provisions of the Texas law and regulations cited above conflict with the LLRWPA provisions and those of the NRC. For LLRW as defined by Section 61.55 of Title 10 CFR, States have disposal responsibility pursuant to the Low-Level Radioactive Waste Policy Amendments Act of 1985 (LLRWPA). The Texas provisions have the potential of creating a situation in which there is no agency, either State or Federal, which under law is required to accept responsibility for disposal of the radioactive waste being excluded by these two provisions. Thus, there is the establishment of an "orphan waste" category.

Recommendation

We recommend that the State take legislative action to change the definition of low level waste and the limitations on the disposal of transuranic concentrations greater than 10 nanocuries per gram to conform to the LLRWPA and NRC's provisions in these areas. If these revisions are not corrected by the time of the licensing of the low-level waste facility in Texas, we will consider finding the Texas program incompatible with that of the NRC.

b. Assessment

The Texas statute (Section 401, Radioactive Materials, Title 5) subsection 401.003(B) defines byproduct material (AEA definition 11e(2)) in the same manner as 10 CFR Part 40 with the exception of the additional phrase, "and other tailings having similar radiological characteristics." This definition was repeated in the Texas Health Department rules in Parts 11 and 43. These rules have been included by reference in the TNRC rules. The Office of State Programs, Internal Procedure B.7, "Criteria for Compatibility Determinations," provides that States should adopt definitions in a manner that is essentially verbatim to those of the NRC. The Texas expanded definition raises the following concerns:

- (1) The regulations for byproduct material consider the radiological and nonradiological hazards associated with the material. The expanded definition only considers the radiological properties of the other tailings material. This definition could allow the introduction of material that could be classified as mixed waste.
- (2) Material disposed of under the expanded definition may jeopardize the transfer of an 11e(2) disposal site to the Department of Energy (DOE), since prior approval by DOE has not been established.

- (3) The definition is not compatible with NRC's definition of byproduct material as defined in 10 CFR Part 40 and in the Atomic Energy Act 11e(2) definition.

Recommendation

We recommend that the State change the statutory definition of byproduct material in subsection 401.003(3)(B) to remove the phrase, "and other tailings having similar radiological characteristics," from the definition.

2. Status and Compatibility of Regulations (Category I)

NRC Guidelines

The State should adopt regulations to maintain a high degree of uniformity with NRC regulations. For those regulations deemed a matter of compatibility by NRC, State regulations should be amended as soon as practicable, but no later than 3 years after the effective date.

Assessment

The State was provided a chronology of amendments that are needed for compatibility for comparison with the Texas regulations that have been adopted. This chronology was compared with the State's regulations, and the amendments that were adopted by the State since the last review.

During the review meeting of March 7-11, 1994, the reviewers found that TNRCC had not adopted one regulation within the three years allowed by the NRC. This regulation concerns the unacceptability of self-insurance as a surety arrangement for uranium recovery licensees (10 CFR Part 40, appendix A, Criterion 9), which became effective on November 17, 1980. The following language is missing language from the State's regulation:

"However, self-insurance or any arrangement which essentially constitutes self-insurance (e.g., a contract with a State or Federal agency), will not satisfy the surety requirement since this provides no additional assurance other than that which already exists through license requirements."

Recommendation

We recommend that this amendment be promulgated as an effective regulation as soon as possible.