

October 2, 2003

Susan Jablonski, Technical Advisor
Office of Permitting, Remediation and Registration
Texas Commission on Environmental Quality
Resource Conservation
MC122
P.O. Box 13087
Austin, TX 78711-3087

Dear Ms. Jablonski

We have reviewed the proposed revisions and additions to the Texas Low-Level Radioactive Waste Disposal Rules in chapters of Title 30, Texas Administrative Code (TAC), received by our office electronically on August 8, 2003. These regulations were reviewed by comparison to the equivalent Nuclear Regulatory Commission (NRC) Regulations in 10 CFR 20 and 61.

As a result of our review, we have enclosed nine comments and one editorial suggestion. The most significant of these comments involves the proposed regulation as it relates to Federal facility waste and governmental ownership of disposed Federal facility waste and the associated land and buildings. The proposed 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. Section 336.734 provides that disposal of waste received from other persons may be permitted only on land owned in fee by the State or Federal government. 30 TAC 336.909(2) provides for a commitment from the Federal government, before the licensee can accept Federal facility waste, to assume all right, title, and interest in land and buildings for the disposal of Federal facility waste, together with the rights of access to the land and buildings. However, 30 TAC 336.909(3) provides the licensee convey to the Federal government the right, title, and interest in the Federal facility waste and associated land and property before license termination rather than before license issuance.

In addition, this regulation is based on the recent Texas statute (Section 401.205(b) of Texas's Health and Safety Code) that requires the commitment for future conveyance and actual conveyance to be pursuant to Subtitle D of the Nuclear Waste Policy Act (NWPA) which is Section 151(b) of the NWPA.¹ We read the Texas legislation as a direction that the State of Texas not own right, title and interest in Federal waste or the land and facility used for disposal of Federal waste. Thus, as indicated in the preamble to the proposed regulations, an exemption from the requirement in 30 TAC 336.734 is needed to allow the licensing of a facility to dispose of Federal waste. (Please comment if our understanding is not correct.) In our view, there is a substantial question as to whether the Federal Government can accept title of waste at a facility licensed by Texas, under Section 151(b) of the NWPA. Our view is based on a

¹ Section 401.205(b)(2) of the State statute requires that the conveyance of the land to the Federal government occur at decommissioning pursuant to Subtitle D of the NWPA. Section 401.205(b)(4) of the State statute also requires that the licensee, before accepting Federal waste, submit an agreement signed by an official of the Federal government, stating that the Federal government will assume all title and interest in land and buildings together with requisite rights of access to the land and buildings pursuant to Subtitle D of the NWPA

number of reasons including: a) Section 151(b) does not appear to provide for the conveyance to the Secretary of Energy until termination of an NRC license (for the instant case, Texas would be the licensing authority, not the NRC); b) Section 151(b) requires that the NRC, after finding that its license termination requirements were met, make a finding that Federal ownership is necessary or desirable to protect the public health and safety and the environment, a finding NRC would not make for a Texas facility since NRC has discontinued its regulatory authority in Texas under the State Agreement, pursuant to Section 274 of the Atomic Energy Act; c) even if Section 151(b) were applicable in this case, the provision contemplates a post-closure determination, not a pre-operation prediction that license termination requirements have been met and that Federal ownership and management of the site is necessary or desirable, in order to protect the public health and safety and the environment; and d) Section 151(b) does not obligate the Secretary to accept title even if NRC makes the required findings. We also believe, a radiation control program that would rely on Section 151 (b) for land disposition, as a part of the initial licensing process, could raise potential questions on overall program adequacy given the determinations required by Section 151 (b) (i.e. that transfer to the Federal government is necessary to protect public health and safety and the environment.)

We would appreciate a final amended version of your rules showing the location of any changes made in response to our comments. If there are any comments which the State believes are in error, the State should identify the section of their regulations that addresses the comment or meets the designated compatibility category. Please note that we have limited our review to regulations required for compatibility or health and safety.

If you have any questions regarding the comments, the compatibility and health and safety categories, or any of the NRC regulations used in the review, please contact me, or John Zabko of my staff at (301)415-2308 or JGZ@NRC.GOV.

Sincerely,

IRA By P.H. Lohaus

Paul H. Lohaus, Director
Office of State and Tribal Programs

Enclosures:
As stated

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Sincerely,

RA By PH Lohaus

Paul H. Lohaus, Director
Office of State and Tribal Programs

Enclosures: As stated

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**COMMENTS ON PROPOSED TEXAS LOW LEVEL WASTE REGULATIONS
AGAINST COMPATIBILITY AND HEALTH AND SAFETY CATEGORIES**

STATE SECTION	NRC SECTION	CATEGORY	SUBJECT and COMMENTS
<p>1 Section 401.205(b) of Texas's Health and Safety Code and 336.734</p>	<p>61.14</p>	<p>H&S</p>	<p>Institutional Information</p> <p>The proposed 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. In addition, this regulation is based on the recent Texas statute (section 401.205(b) of Texas's Health and Safety Code) that requires the commitment for future conveyance and actual conveyance to be pursuant to Subtitle D of the Nuclear waste Policy Act (NWPA) which is section 151(b) of the NWPA. It does not appear that the Federal government can commit in advance to accept title of waste at a facility licensed by Texas under section 151(b) of the NWPA, for reasons described in the cover letter.</p> <p>The State needs to provide a mechanism that would enable the existing regulations to provide for Federal or State land ownership to be in effect for that part of the facility that would be accepting Federal waste before issuance of a license.</p>
<p>2 37.9045 (a)(5), 37.9050 (a)</p>	<p>61.62(e), (f), and (g)</p>	<p>H&S</p>	<p>Funding For Disposal Site Closure and Stabilization</p> <p>The Texas regulation at 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 assurance within the required time frame. However, this is not addressed in the context of insurance as part of section 37.9050(f). The certificate of insurance requirements in 37.9052 are silent on this issue. 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)</p> <p>The State needs to amend the language in the certificate of insurance to replace the terms prescribed in section "37.9050(f)" with "37.9045(a)(5) and 37.9050(f)" in the three places it appears in the certificate.</p>

STATE SECTION		NRC SECTION	CATEGORY	SUBJECT and COMMENTS
3	3336.703	61.7	H&S	<p>Concepts</p> <p>Section 336.703 states that the State proposes to incorporate 10 CFR 61.7 into its regulations. However, the actual wording of the proposed regulation only provides that the applicant <u>consider</u> the provisions of section 61.7. Section 61.7 is a Compatibility Category H&S. "Consideration" is not equivalent to adopting it by incorporation.</p> <p>The State needs to clarify this section by stating in section 336.703 that "the concepts and requirements of 10 FR 61.7 guide the application of the regulations in Part 336."</p>
4	37.9045 (a) (5) & (6)	61.62	H&S	<p>Funding For Disposal Site Closure and Stabilization</p> <p>The State is using a perpetual care fund rather than stand by trusts. 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. The State may need to consider appropriation authority, such as multi-year spending authority, to ensure that these funds are available when needed.</p> <p>The State should define the process for accessing these funds.</p>
5	37.737	61.63 (b)	H&S	<p>Financial Assurance for Institutional Controls</p> <p>The State does not require the licensee to submit to the regulatory body changes made in its arrangements for institutional control. The State rule is less restrictive than NRC regulations in this regard.</p> <p>The State rule needs to be revised to include this requirement.</p>

STATE SECTION		NRC SECTION	CATEGORY	SUBJECT and COMMENTS
6	336.808	61.50 (a) (4)	H&S	<p>Disposal site suitability requirements for land disposal</p> <p>Section 336.808 allows an owner to submit an application if the applicant does not have fee simple title to both surface and subsurface estates. Specifically, the proposed regulation provides that if an applicant cannot acquire mineral rights the applicant to the “extent permissible under federal law” may request an exemption if there is a surface use agreement that restricts mineral rights including slant drilling and subsurface mining to the extent necessary to prevent intrusion into the disposal facility. It is not clear what the phrase “extent permissible under Federal law means.”</p> <p>The State needs to more specifically define the phrase “extent permissible under Federal law” to ensure its use is clear in the regulation.</p>
7	336.808	61.50 (a) (4)	H&S	<p>Disposal site suitability requirements for land disposal</p> <p>The State uses the term “natural resources” not “mineral resources.” It is not clear that the State intends to have a common meaning for these terms.</p> <p>The State should clarify in its preamble that mineral resources is intended to be read broadly to encompass “natural resources” the term used in.10 CFR 61.50 (a)(4).</p>
8	336.808	61.50	H&S	<p>Disposal Site Suitability Requirements for Land Disposal</p> <p>The exemption for the requirements under 336.5 does not state when the exemption is effective.</p> <p>The wording of the rule and preamble should provide that the exemption for acquiring mineral/natural resources is not effective until after the surface agreement is entered into.</p>

STATE SECTION	NRC SECTION	CATEGORY	SUBJECT and COMMENTS
9 Texas Statute HB1567 401.205 and Section 336.2 (49)	Section 3 (b)(2) of the Low Level Waste Policy Act (LLWPA)	B	<p>Definitions</p> <p>Section 336.2(49) defines "Federal Facility Waste" as Low Level Waste (LLW) which is the responsibility of the Federal government under the LLWPA. This means that it includes Greater than Class C Waste (GTCC) waste under section 3(b)(1) (D) of the LLWPA. Thus, Texas is providing that Texas will regulate the disposal of GTCC waste. Section 3(b)(2) of the LLWPA provides that GTCC that results from activities licensed by the NRC shall be disposed of in a facility licensed by the NRC. Texas cannot regulate the disposal of such GTCC waste.</p> <p>The State needs to alter its definition to exclude GTCC that results from activities of NRC licensees to meet compatibility.</p>

EDITORIAL SUGGESTIONS

1. In 336.808 the reference to “61.5(a)(4)” should be to” 61.50(a)(4)”.