

Texas Low Level Radioactive Waste Disposal Compact Commission

Chair

Michael S. Ford, C.H.P.

Vice-Chair

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Hon. Richard H. Dolgener
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March 9, 2009

The Honorable Byron Cook, Chair
The Honorable Warren Chisum, Vice Chair
House Environmental Regulation Committee
EXT E2. 154
P.O. Box 2910
Austin, TX 78768-2910

RE: Texas Low-Level Radioactive Waste Disposal Compact Commission
Request for Clarification

Dear Chairman Cook and Chairman Chisum:

As you know, Commissioners of the Texas Low-Level Radioactive Waste Disposal Compact Commission, established in Chapter 403 of the Health and Safety Code, have been appointed recently. The Commission had its first face-to-face meeting among members last week, on February 26 and 27, 2009. A large portion of that meeting was in regard to funding and operations.

When the Texas Compact Commission members were named in November 2008, the realization set in that there was no current funding specifically set aside for initial operations. In order that operations could commence, the Governor's office, the Comptroller's office and the Texas Commission on Environmental Quality (TCEQ) cooperated to make some funding available for the current fiscal year through an interagency contract. The Commission's first in person meeting was made possible as a result of those efforts, and we are grateful.

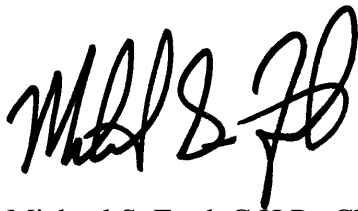
Because our Compact Commission has just begun operating, we are entering the appropriations process late and need to receive some assurance that funds will be available for our operations into the next biennium, through the time that the site begins its operations and collecting fees. When the site operator begins to collect fees, there will be additional practical questions about the Compact Commission's receipt and use of those fee proceeds.

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During our meeting last week it became apparent that there are a number of questions that the Compact Commission needs to resolve regarding how we are to go about performing the statutory duties of the Commission. At this time we are seeking your recommendations and guidance about funding and in making decisions about commencing and then continuing operations. In particular, we are asking about the wording of specific sections of the laws codified in Chapter 403 of the Texas Health and Safety Code, the group of laws that establish the Commission and that contain the wording of the Compact that exists after being approved by the United States Congress.

I am including a list of the some specific questions about funding and operations that have been discussed at this point together with references to the statutory language that gives rise to the questions, for your consideration.

We look forward to your response and guidance on appropriate legislation so that we may proceed with the set up and operation of the Commission. Please contact me at 806-477-5727 if you have any questions or would like to discuss further.

A handwritten signature in black ink, appearing to read "Michael S. Ford". The signature is stylized and cursive.

Michael S. Ford, C.H.P., Chair

Attachments: Questions Regarding Funding and Operations
Statutory References

Texas Low-Level Radioactive Waste Disposal Compact Commission Questions Regarding Funding and Operations

Introduction

The Commission is defined as a legal entity separate and distinct from the party states. Several statutory references reinforce this status:

- The Commission may enter into contracts to carry out its duties and authority, subject to projected resources; however no contract made by the commission shall bind a party state.
- Jurisdiction and venue of any action contesting any action of the commission shall be in the United States District Court in the district where the commission maintains its office, not in state court where a state agency would be sued.
- Financial support of the Commission is to be provided by the party states prior to the date of facility operation and subsequent to the date of congressional ratification of the compact.
- Each party state is responsible for annual payments equaling its pro-rata share of the commission's expenses, incurred for administrative, legal, and other purposes of the commission.
- Fees for disposal at the low-level radioactive waste facility are to be established sufficient to reasonably support the activities of the Commission.

Sec. 3.04 of the Compact requires that the Commission conduct its business, hold meetings, and maintain public records pursuant to laws of the host state. As any independent entity would be required to do, the Commission is prepared to conduct its operations within state law and additionally, to hold its meetings and maintain public records according to state provisions as the statute directs.

However, the Commission believes it may meet these requirements of law without necessarily following *all* administrative procedures set forth by various governmental entities. Other questions relate to how funding and reimbursements will be accomplished.

Initial Questions

1. In Article III, Section 3.03 of the Compact Act (which is in Section 6 of Chapter 403), the Compact uses the phrase, “[t]he commission is a legal entity separate and distinct from the party states...”. One question the Compact Commission is attempting to answer is: how does that phrase interact with language in Section 3.04(2) that specifies that the commission shall “...conduct its business ... pursuant to the laws of the host state ...”?

It is our position that the interstate Compact Commission of member states Texas and Vermont is to operate under the *jurisdiction* of Texas law, but that the Compact Commission itself is *not* an entity of the State of Texas (i.e., is not bound to all host state *procedures* regarding contracting, hiring, etc.). Section 3.03 does make it clear that the *posting requirements* of Vermont, as well as Texas, are to be met, thereby applying *dual jurisdiction* in that instance.

With respect to Section 3.03, we are in the process of answering questions such as:

- Because the Commission employees are not state employees, how would the Commission be bound to follow state hiring procedures?
 - Because the Commission may enter into contracts, but the contracts cannot be binding on the party states, how would the Commission be bound to follow state contracting procedures?
2. Practical questions flowing from interpretation of the language requiring the Commission to “conduct its business pursuant to the laws of the host state” are:

- What mechanism is to be used for reimbursement of initial operating expenses by the state?

During the period after the Compact is ratified but before the host state’s site begins taking waste, reimbursement for Compact Commission expenses is to come from party states (pro-rata). Once the site begins its operations the host state (Texas) is supposed to have fees in place “... sufficient to reasonably support the activities of the commission” per Section 4.04(4).

- What mechanisms are available to provide reimbursement to the Commission?
- How may the Commission submit invoices and expenses for reimbursement to the State of Texas considering the following financial issues:
 - The party states (Texas and Vermont) are required to reimburse the compact for its expenses during the time after which the Commission has been stood up and before which the Compact Facility is operating and beginning to collect fees established by TCEQ. [H&S 403.006, Article IV, Section 4.05(6)]

- Once fees are being collected through Compact Facility operations (mid FY 10), the Commission may no longer constitute a financial obligation to the party states and may possibly no longer require any state monies. [H&S 403.006, Article IV, Section 4.04(4)]; and
- Any additional fees collected to support Commission reviews and/or actions not supported by normal fees may also come directly to the Commission. [H&S 403.006, Article III, Sections 3.05(6-7)]

3. The Compact Commissioners have the following questions related to the appropriations process:

- How can funds be appropriated for the biennium 2010-2011 to support the operating costs incurred by the Compact Commission?

Because Commissioners were not appointed until well after the appropriations process began, a Legislative Appropriations Request (LAR) has not been submitted. The Texas Commission on Environmental Quality (TCEQ) has included an exceptional item on its request for \$200,000 in funding for the Commission during FY 10 and 11. However, this falls short of the budget adopted by the Commission of \$700,000 for each year of the biennium. (The statute requires the Commission to adopt a budget that conforms to the host state fiscal years. February 27, 2009, the Commission adopted budgets for FY 10 and 11.)

- Would a state agency (e.g., the TCEQ) need to submit a LAR at this time for the purpose of supporting Compact Commission expenses, or could the appropriation for FY 10 and 11 be made by Rider?
- Would a Rider on the Appropriations bill be needed to authorize party state funds to be used for the reimbursement to the Commission for operational costs via invoicing of authorized state agencies? (i.e., How can TCEQ be authorized to pay an invoice submitted by the Compact Commission?)
- Can a supplemental appropriation for support of the Commission's total operating costs for FY 09 be made, effective on passage of legislation?

The initial \$100,000 funding through FY 09, arranged through the interagency contract with TCEQ, will not be enough to accomplish the initial statutory duties of the Compact Commission. The Commission has a statutory deadline (Sec. 3.04(11)) to adopt a rule to establish the total volume low-level radioactive waste that will be disposed in the compact facility through the year 2045. The deadline is six months after the last Commission was appointed, which is approximately August 8, 2009, since the Vermont Commissioner was appointed on February 9, 2009. The Commission has budgeted \$40,000 for the contracting of professional personnel to complete this rulemaking along with additional legal and administrative costs, making an additional appropriation of \$50,000 necessary.

Statutory References

HEALTH AND SAFETY CODE, TITLE 5. SANITATION AND ENVIRONMENTAL QUALITY, SUBTITLE D. NUCLEAR AND RADIOACTIVE MATERIALS, CHAPTER 403. TEXAS LOW-LEVEL RADIOACTIVE WASTE DISPOSAL COMPACT

(Italicized emphasis added in the quoted language)

Article III. The Commission

1. Sec. 3.03. *The commission is a legal entity separate and distinct from the party states and has governmental immunity to the same extent as an entity created under the authority of Article XVI, Section 59, of the Texas Constitution. Members of the commission shall not be personally liable for actions taken in their official capacity. The liabilities of the commission shall not be deemed liabilities of the party states.*
2. Sec. 3.05. The commission may: (1) Employ staff necessary to carry out its duties and functions. The commission is authorized to use to the extent practicable the services of existing employees of the party states. Compensation shall be as determined by the commission.
3. Sec. 3.04. The commission shall: (2) *Conduct its business, hold meetings, and maintain public records pursuant to laws of the host state, except that notice of public meetings shall be given in the nonhost party states in accordance with their respective statutes.*
4. Sec. 3.05. The commission may: (3) Enter into contracts to carry out its duties and authority, subject to projected resources. *No contract made by the commission shall bind a party state.*
5. Sec. 3.05. The commission may: (5) Sue and be sued and, when authorized by a majority vote of the members, seek to intervene in administrative or judicial proceedings related to this compact.

Article IV. Rights, Responsibilities and Obligations of Party States

1. Sec. 4.04. The host state shall do the following: (4) Establish reasonable fees for disposal at the facility of low-level radioactive waste generated in the party states based on disposal fee criteria set out in Sections 402.272 and 402.273, Texas Health and Safety Code. The same fees shall be charged for the disposal of low-level radioactive waste that was generated in the host state and in the nonhost party states. *Fees shall also be sufficient to reasonably support the activities of the commission.*
2. Sec. 4.04. The Host State shall do the following: (6) Provide financial support for the commission's activities *prior to the date of facility operation and subsequent to the date of congressional ratification of this compact under Section 7.07 of Article VII.* Each party state will be responsible for annual payments equaling its pro-rata share of the commission's expenses, incurred for administrative, legal, and other purposes of the commission.

Section 403.004, Texas Health and Safety Code

A host state commissioner is not entitled to compensation for performing the duties of commissioner but is entitled to reimbursement for actual and necessary expenses incurred in the performance of the duties of commissioner.