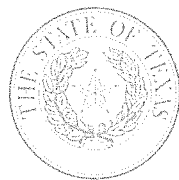


Jon Niermann, *Chairman*
Emily Lindley, *Commissioner*
Toby Baker, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

November 28, 2018

Ms. Leigh Ing, P.E.
Executive Director
Texas Low Level Radioactive Waste Disposal Compact Commission
505 West 15th St.
Austin, Texas 78701

Re: TCEQ's Role Under a Potential Contingency Plan for the Low-Level Radioactive Waste Compact Disposal Facility in Andrews County, Texas

Dear Ms. Ing:

As the Texas Low Level Radioactive Waste Disposal Compact Commission deliberates its draft contingency plan for the Texas Compact Waste Facility in Andrews, Texas, the TCEQ has prepared the attached document describing our role in a potential contingency situation for your consideration.

We are happy to discuss our role further with you at your convenience. Please contact my Executive Assistant, Ms. Dennise Braeutigam at 512-239-0598 if you wish to schedule a meeting or contact Ms. Ashley Forbes, Director of the Radioactive Materials Division at 512-239-0493 with any questions regarding the attached document.

Sincerely,

A handwritten signature in black ink, appearing to read "Toby Baker".

Toby Baker
Executive Director

Enclosure

TCEQ's Role Under a Potential Contingency Plan for the Low-Level Radioactive Waste Compact Disposal Facility in Andrews County, Texas

November 2018

Background

In 1980, and as amended in 1985, Congress passed the Low-Level Radioactive Waste Policy Act (LLRWPA) (Public Law 96-573) (42 U.S.C. Sections 2021b-2021j). This act created a regional approach to low-level radioactive waste (LLRW) disposal by providing that LLRW produced by non-DOE activities would be managed on a state or regional level. It encouraged the formation of regional compacts and in each compact one state would be designated as the host state for siting and constructing a LLRW disposal facility.

In 1993, Texas, Vermont and Maine approved legislation for the formation of the Texas Compact. In 2002, the Maine Legislature passed emergency legislation to repeal the enactment of the Texas Compact, due to the early closing and decommissioning of the State's only nuclear reactor, Maine Yankee. The Texas Compact is now composed of Texas and Vermont.

The Texas Health and Safety Code (TH&SC) Section 403.006 contains the text of the compact which establishes the Texas Low-Level Radioactive Waste Disposal Compact Commission (TLLRWDC) and outlines the rights, responsibilities, and obligations of the party states (Texas and Vermont). One provision of the compact includes Article III, Section 3.04, which states that the TLLRWDC shall:

“Prepare, adopt, and implement contingency plans for the disposal and management of low-level radioactive waste in the event that the compact facility should be closed. Any plan which requires the host state to store or otherwise manage the low-level radioactive waste from all the party states must be approved by at least four host state members of the commission. The commission, in a contingency plan or otherwise, may not require a nonhost party state to store low-level radioactive waste generated outside of the state.”

As a result of SB 1504 (82nd regular session), TH&SC in Chapter 401, Section 401.207 was amended to allow for a system of importation of nonparty waste into the Compact Waste Facility (CWF). The TLLRWDC was established primarily to oversee importation and exportation of LLRW for of the Texas Compact. The TLLRWDC promulgated revised rules (2015) in 31 Texas Administrative Code (TAC) Chapter 675 regarding its authority for importation and export of LLRW. In conjunction with the TLLRWDC, the TCEQ reviews proposed import petitions and where appropriate provides written confirmation that imported LLRW is authorized for disposal under the disposal site license.

In 2017, HB 2662 (85th regular session) established an interim legislative oversight committee. The committee was created for the purpose of assessing the CWF and making recommendations based on its findings regarding several important aspects of the disposal site operations including, but not limited to, the contingency plan as required under the Texas Low-Level Radioactive Waste Disposal Compact.

In 2018, the interim legislative oversight committee held a hearing and charged the TCEQ with providing input on what actions TCEQ would take should a contingency plan be initiated by an unplanned closure or temporary interruption of operations. Although the probability of unplanned closure or temporary interruption of operations is low, the following discussion addresses actions that TCEQ could take to properly close or to continue operations of the CWF.

Legal Requirements for Transfer of CWF Property to the State of Texas

Role of Texas Commission on Environmental Quality (TCEQ)

Upon initiation of a contingency plan, the TCEQ will secure the site until a determination is made to either continue operations or permanently close the site. TH&SC Chapter 401 mandates that TCEQ have two Resident Inspectors at the CWF. Resident Inspectors serve as the TCEQ (State) agent for the receipt and disposal of LLRW at the CWF. Acceptance and disposal of commercial LLRW are conducted in accordance with TH&SC Chapter 401, Title 30 TAC, Chapter 336 and Radioactive Material License R04100. In case of an unplanned closure, as necessary, the TCEQ Resident Inspectors will continue the compliance monitoring at the CWF to protect human health and safety and the environment until a determination has been made on the path forward for the CWF.

As discussed further below, if the desired path forward was for the State to continue to operate the CWF, additional authority would be necessary. Specifically, there would need to be statutory amendments to create authority and funding for a separate entity apart from TCEQ to hold a license to treat, process, store and dispose of LLRW compact waste.

Conveyance of Waste at Time of Acceptance

The TCEQ, acting on behalf of the State, may acquire title to the LLRW accepted for disposal at the facility.¹ The license holder of the compact facility will convey title to the State of Texas for the waste in the CWF. Only waste that has met the acceptance criteria detailed in the license will be transferred to the State and the waste may be administered as property in the name of the State.²

Potential Transfer of Real Property

Section 401.209 of TH&SC states that TCEQ may acquire title to the land, affected mineral rights, and buildings at which LLRW can be or is being disposed of. The TCEQ may also lease property that it owns for operating a LLRW disposal site. Property acquired by TCEQ may only be used for disposing of LLRW until the TCEQ determines that another use would not endanger the health, safety, or general welfare of the public or the environment. The right, title, and interest in LLRW accepted for disposal and any other interest acquired are the property of the commission, acting on behalf of the State, and shall be administered and controlled by the commission in the name of the State.³

Cost

The transfer of LLRW, land, and buildings to the State shall be transferred without cost, other than administrative and legal costs incurred in making the transfer.⁴ Transfer does not relieve the license holder of any liability incurred before the transfer or while the license holder is in possession and control of waste, land, or buildings associated with LLRW.

Legal Authority in an Emergency

If the TCEQ finds an emergency exists that requires immediate action to protect the public health and safety and the environment, the agency, without notice or hearing, may issue an order stating the existence of the emergency and requiring that action be taken at the agency's direction.⁵ If the license holder managing the LLRW is unable to remove the threat, the agency

¹ TH&SC §§ 401.209(d) and 401.2051.

² TH&SC § 401.2051.

³ Texas Health & Safety Code (TH&SC) § 401.209.

⁴ TH&SC § 401.211.

⁵ TH&SC § 401.056.

by order may require any action, including a corrective measure, that is necessary to remove the threat.⁶

Additionally, the TCEQ may undertake monitoring, maintenance, and emergency measures that are necessary to protect the public health and safety and the environment in connection with LLRW and property for which the State has assumed custody.⁷

Permanent Closure and Decommissioning

The CWF must be closed in accordance with the license and approved closure and decommissioning plans as was submitted in the original license application and any other applicable regulatory requirements. If the Licensee is unable to perform decommissioning and closure, the TCEQ will exercise its rights to draw on the financial assurance posted by the Licensee to ensure proper decommissioning and closure. Once decommissioning is complete the site will go into post-closure and ultimately into institutional control.

Continued Operations

Upon unplanned closure of the CWF, the State of Texas may choose to continue operations. The most plausible options are discussed below. This will be dependent on several factors, primarily funding for continued operations. Disposal operations must provide enough revenue annually to maintain operations without requiring funding appropriations from the state legislature. However, there is statutory language regarding acceptance of compact waste at the CWF in TH&SC §§ 401.215 and 403.006 Art. III Sec. 3.04(7) that has been viewed as mandating waste acceptance. Conversely, TH&SC 403.006 Art. IV Sec. 4.04(6) states that the host state shall do the following:

“Notify the commission immediately upon the occurrence of any event that could cause a possible temporary or permanent closure of the facility and identify all reasonable options for the disposal of low-level radioactive waste at alternate compact facilities or, by arrangement and commission vote, at noncompact facilities.”

Chapter 403 defines the “host state” as the State of Texas; however, the State of Texas is not defined. The State of Texas is not defined in Chapter 401, but in some sections, the statute is clear that the TCEQ acts on behalf of the State of Texas. Clarification of these terms before a contingency plan is implemented could help facilitate implementation.

License Transfer

The existing disposal license could simply be transferred with minor modifications. Any funding impacts for this option would likely be minimal as the recent transfer of ownership has demonstrated.

New State Entity as Licensee

This option would require legislative action to create a new state entity responsible for treating, processing, storing and disposing of LLRW Compact waste. This may also require statutory changes to several provisions of the Texas Radiation Control Act TH&SC Chapter 401 and other laws. Furthermore, the new state entity may be required to satisfy the TCEQ’s existing licensing requirements. This entity would need staffing, a significant budget, and contracting authority to operate the disposal and storage site.

Private Entity

The process for transferring the license to a private entity would need to comply with TCEQ’s applicable requirements for transferring the license. No legislative action would be necessary.

⁶ THSC § 401.152.

⁷ THSC § 401.212.

Financial Requirements for Response and Implementation of Contingency Plan

Neither TCEQ rules nor the license conditions require the Licensee to provide financial breakdowns of profits, overheads and other corporate information other than the cost estimates for decommissioning and closure required to set the financial assurance. Therefore, the cost of operating the CWF as a stand-alone operation, separate and apart from the other adjacent facilities that share common areas such as the gates and entrance, fencing, guards, etc., is available and known to the Licensee, but not the TCEQ at this time. To adequately estimate the costs, the TCEQ would need to examine the full financial documents of the Licensee to determine the amount of funding needed to sustain operations in critical units. The TCEQ identified two major sources of funds it currently has as a means to potentially fund continuing operations at the facility by the TCEQ, financial assurance and the existing fee structure.

Financial Assurance

TCEQ currently holds \$157 Million in surety bonds provided by the Licensee in satisfaction of its financial assurance requirements. The terms of the bonds limit the ability of the TCEQ to draw on these funds and specifically designate their use for the performance of closure, post-closure, decommissioning and corrective action in accordance with both statute (TH&SC § 401.241) and TCEQ rules (30 TAC Chapter 336). It should be emphasized that the terms of the current mechanisms prevent these funds from being used to continue operations at the CWF.

Funding Continued Operations

Legislative action would be necessary for continued operations. Continued operations in a contingency scenario would require identification and appropriation of funding sources.