

Comments By Michael S. Ford, C.H.P  
 Chairman, Texas Low Level Radioactive Waste Disposal Compact Commission  
 On the  
 Sunset Advisory Committee, Staff Report  
 Regarding the  
 Texas Commission on Environmental Quality  
 November 2010

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Introduction

Verbatim excerpts were taken from the Staff Report as show below. Edits are shown using Track Changes, and comments are also provided to provide the bases for the requested changes.

**Issue 7**

**Texas Law Lacks Specific Guidance on How the Texas Low-Level Radioactive Waste Disposal Compact Commission is Funded by the State.**

Due to the absence of specific guidance within HSC Chapter 403 regarding how the State funds the operations of the Texas Low Level Radioactive Waste Disposal Compact Commission ("Compact Commission"), the task of funding the Commission has fallen to the TCEQ. The Compact Commission, a legal entity, separate and distinct from the party states, is responsible managing the terms of the Texas Compact (P.L. 105-236), which principally involves constraining interstate commerce in the area of management and disposal of low level radioactive waste. (LLRW). Disposal of LLRW for Texas Compact generators will occur at the compact waste disposal facility licensed by TCEQ, and located in Andrews County.

Once this disposal facility is operating, as is expected within the next biennium, statute provides that the Compact Commission is funded by a portion of a disposal fee, to be adopted by TCEQ rule.

However, statute does not specify how this funding will flow to the Compact Commission. Since Texas ultimately holds the liability for compact waste brought into the state, the Compact Commission's decisions related to the volume of waste to be accepted into the compact site will be important to the State's long-term environmental and financial health. Given the ambiguity of TCEQ's and the Compact Commission's current funding

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**Comment [1]:** This is incorrect. The volume of waste ultimately disposed at the site will be in accordance with the conditions of the license issued by TCEQ and any such waste volumes and activities will have first been evaluated for both environmental impacts and the financial assurance requirements to address any such postulated environmental consequences and long-term stewardship of the site following closure.

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arrangement and statute, time is ripe for the Legislature to consider how the funding mechanism between the State and the Compact Commission will be structured.

**Key Recommendation:** Clarify the Compact Commission's funding mechanism.

## Issue 7

### **TCEQ Lacks Guidance on How to Fund the Texas Low-Level Radioactive Waste Disposal Compact Commission.**

#### Background

In 1993, Texas promulgated a law that would lead to the formation of a compact (the Compact) with Vermont and Maine – the latter of which withdrew from the Compact in 2004 – to provide a solution for the disposal of low-level radioactive waste (low-level waste) in Texas and the party states by building a facility in Texas. Each of the party states passed identical laws in 1993 that also created the Texas Low-Level Radioactive Waste Disposal Compact Commission (Compact Commission) to administer the terms of the Compact for management and disposal of low-level radioactive waste (LLRW) generated in compact states. Although the Legislature originally intended to have a state-owned and operated disposal facility, after a 20 year effort, the State was never able to approve the license for the site developed in Sierra Blanca, Texas. As a result, in 2003, the Legislature amended state law to allow the TCEQ to issue a license to operate a compact waste disposal facility to a single successful applicant following a 30-day period during which time the TCEQ accepted applications from any entity pursuant to HSC 401.227.

In 2009, the Texas Commission on Environmental Quality (TCEQ) granted a license to a private company to construct and operate a disposal facility in Andrews County to dispose of both compact and federal waste in adjacent, but separate disposal areas. The facility is in the pre-construction phase, but the licensee expects that the facility will be operational and ready to accept compact waste within the next 18 months. By state law, 60-days prior to the acceptance of waste for disposal at the compact disposal facility, the licensee will

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provide \$136.5 in financial security and transfer the title of the land and facilities currently owned by the licensee. Upon acceptance of the waste at the compact disposal facility, the State takes title to the material, and in this way, the State has the liability for the compact waste and disposal site, is the fee simple owner of the compact waste disposal site, and is responsible for the long-term care and monitoring of the site following closure and for responding to any possible future contamination post-closure.

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TCEQ regulates the disposal of low-level radioactive waste by (a) issuing a disposal license with terms and conditions that ensure the health and safety of the workers, and the protection of the public and the environment, (b) monitoring the disposal facility, (c) establishing a compact waste disposal fee schedule, and (d) enforcing the disposal license conditions under applicable law and rule.

By rule, the Compact Commission is charged with establishing the volume of compact waste to be disposed of by Texas generators in the compact disposal facility through 2045, while TCEQ, through conditions in the disposal license, determines the maximum volume and total radioactivity to be accepted into the disposal facility during an initial, defined period of 15-years.

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Overall, the Compact Commission is charged with managing the terms of the Texas Compact (P.L. 105-236), which principally involves constraining interstate commerce in the area of management and disposal of LLRW, and in particular, the Compact Commission is authorized to make decisions relating to LLRW importation and exportation into or out of the Compact for management and disposal. The terms of the Compact, including the creation of the Compact Commission, have the force of both state and federal law as they were enacted by the Legislature and ratified by the United States Congress in 1998.

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The Compact Commission is a legal entity, separate and distinct from the party states. The Compact Commission itself is made up of eight members, six of whom represent Texas and are appointed by the Governor, and two of whom represent Vermont and are appointed by its Governor. The Compact Commission met for the first time in early 2009. As the compact disposal facility begins operating, the Compact Commission will likely become more active, meeting more frequently to pass rules and consider importation and exportation decisions.

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**Comment [2]:** I'm not sure what "more active" means, but we've met 13 times in two years. That seems pretty active already.  
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Law requires the Compact Commission to conduct its business, hold meetings, and maintain public records according to the laws of the host state – in this case this includes adhering to the Open Meetings Act and the Public Information Act. In addition, the Compact Commission must adhere to the Administrative Procedure Act in adopting its rules.

As it is a separate legal entity from member states and not a state agency, and has only recently been formed, the Compact Commission has no appropriations pattern or full-time equivalent positions, though it has employed an interim executive director to oversee the Compact Commission's business as funding allows. In addition, state law provides that the members of the Compact Commission are entitled to reimbursement for actual and necessary expenses in performing their duties. Law requires the Compact Commission to keep accurate accounting of all receipts and disbursements subject to annual audit to be included in its annual report to the Legislature.

As specified in the Compact, the Compact Commission is required to approve a budget and adopt a fiscal year that conforms with Texas' fiscal year (HSC 403, section 3.04(6)). Each party state (Texas and Vermont) is required to provide financial support for the Compact Commission's activities prior to the date of the compact disposal 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 (Texas 75%, Vermont 25%), incurred for administrative, legal, and other purposes of the commission (HSC 403, section 4.05(6)).

In accordance with the law, the Compact Commission approved a budget of \$700,000 per annum in February of 2009; however, due to the timing of the appointments, only a \$100,000 rider covering Compact Commissioner travel had been allocated through TCEQ's appropriation pattern for each of the fiscal years 2010 and 2011. Under this arrangement TCEQ provides travel and meeting expense reimbursements to the Compact Commission under a contract. The Compact Commission is seeking operational and contingency appropriations for the next biennium through TCEQ's Legislative Appropriations Request.

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**Comment [3]:** This is not correct. Texas has not provided its pro rata share of funding. It has only provided 19% of its pro-rata share of \$525,000 per annum. And further, the monetary support provided by the Rider is strictly limited to travel and meeting expenses.

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**Deleted:** The Compact Commission is currently funded by a pro rata share between Texas and Vermont, with Texas providing 75 percent of funding.

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However, this funding stream is a short-term arrangement before the compact waste disposal facility is operational. State law requires TCEQ to establish, in rule, reasonable disposal fees to be paid by persons who deliver for disposal LLRW to the compact waste disposal facility that is collected by the licensed operator, a private company. By law, the disposal fee schedule will include the costs of state regulation and be sufficient to reasonably support the activities of the Compact Commission. State law also requires that Texas and Andrews County each receive 5 percent of gross receipts generated by waste disposal activities. TCEQ is currently considering a proposed compact waste disposal fee application submitted by the licensed compact disposal facility operator, but has not yet published a rule. TCEQ's fee schedule adoption process is subject to public participation and the schedule will be finalized through expedited rulemaking after any contested case hearing.

### Findings

The Legislature has little budget oversight over the Compact Commission, whose actions will have a significant impact on the environmental and financial health of Texas.

**State Liability.** Texas, and not the Compact Commission nor the disposal facility licensee, holds liability for compact waste brought into the state. LLRW can be radioactive for a long time, and potential future contamination could not only have a severe impact to the environment and human health, but to the State, which bears the ultimate financial responsibility for maintaining and cleaning up the compact waste disposal facility site.

When the Legislature created the Compact Commission, state law contemplated that the State would own and operate the disposal facility and maintain ultimate responsibility for the compact waste and liability associated with it. Since that time the State has changed course – the State retains responsibility but the facility will be operated by a private company that may not be liable for long-term costs. This shift – from state-control to a private for-profit venture – has created a different dynamic, bringing to light potential gaps in legislative oversight on how decisions related to acceptance of commercial low-level radioactive waste to the compact waste disposal facility will be made. The bottom line, however, is that the State continues to have an interest in ensuring these decisions will

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**Comment [4]:** Two Comments:

1. A reading of the Compact reveals that the party states intentionally structured the Compact as an isolated entity ("legal entity, separate and distinct"). The Compact also states that the liabilities of the Commission do not become the liabilities of the Party states. So it is clear that in creating the Compact, the party states were desirous of something akin to a Limited Liability Corporation.

2. It is difficult to conceive how the Compact Commission's activities would have a "significant impact" on the environmental and financial health of Texas since,

- a. As the regulator for the state, the TCEQ is responsible creating an operating license who conditions are protective of the environment, and
- b. The \$136.5M financial assurance provided by the compact disposal facility operator is intentionally formulated to address the possible financial liabilities that may occur as a result of the facility operations.

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**Comment [5]:** See Comment 4. This is intentionally provided for via the financial assurance paid to the state 60-days prior to the commencement of operations.

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**Comment [6]:** This is incorrect. The very large financial assurance deposit to the state treasury is completely ignored here.

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**Comment [7]:** How does a change from state owned and operator to state owned/licensee operated bring about gaps in legislative oversight??

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protect the State financially and environmentally. As the site begins operations in the near future, the Compact Commission's consideration of importation and exportation decisions will be of great importance to the State, as described in the in the textbox, Low-Level Radioactive Waste Importation.

[TEXTBOX] Low-Level Radioactive Waste Importation

Federal and state law establish compacts for the effective management and disposal of low-level radioactive waste generated in member states. To encourage states to participate in compacts, federal law authorizes compacts to prohibit or limit importation of low-level waste for management and disposal.

The Texas Compact requires party states to contribute \$25 million to the State. The Compact Commission has the authority to enter into agreements to allow for importation of waste generated outside of party states. However, the Compact does not require these import agreements to include any financial contribution to Texas to account for risk or liability associated with the imported waste.

The Compact Commission recently proposed a rule to allow the importation of waste from 36 non-party states and other potential sources, none of which potentially would be subject to the \$25 million contribution. Texas will take title and be responsible for all low-level radioactive waste accepted into the compact waste disposal facility regardless of whether the waste is generated by party states or is allowed for importation through an agreement. As the Compact Commission considers revisions and republishes its importation rule, Texas will continue to have a vested interest in its outcome.

**Lack of Legislative Guidance.** State law does not specify how the compact waste disposal fee revenue allocated to support the Compact Commission's operations will flow to the Compact Commission. Since the compact waste disposal facility may be operational before the 2013 legislative session, timing is ripe for the Legislature to make decisions on how to structure Compact Commission funding. Without action, decisions about how funds will be remitted to the Compact Commission, whether directly or through the State, will happen without legislative guidance. In contrast, state law provides for how the collection of the 5

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**Comment [8]:** Financial and environmental protections fall to the responsibility of the TCEQ. The Compact Commission cannot take any action that would allow the licensee to violate its license conditions.

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**Comment [9]:** That is not correct. HSC 403 section 5.01 covering party state contributions does not state for what purpose the payments are intended.

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**Comment [10]:** While the Compact does not require additional "premium" fees to be paid by a non-compact generator, both import and export agreements may possess conditions and restrictions in the agreement as the Compact Commission deems advisable.

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**Comment [11]:** This is incorrect. The rule proposed by the Compact Commission merely creates **procedures** by which the Commission may administer the facets of the Compact that have existed since 1993 in Texas law. The rule was **not** proposed to ensure that any questions coming before the Commission that regard exportation or importation of waste for management or disposal are properly and thoroughly vetted and are not interpreted directly from federal law as has been the case for two years with all export permits issued by the Commission.

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percent of gross receipts statutorily allocated to Texas will flow, and TCEQ has an agreement with the Comptroller of Public Accounts for TCEQ to accept the transfer of funds and audit the funds required to be remitted to general revenue.

**Potential Conflict.** If the licensed disposal facility were to remit the allocation of the compact waste disposal fee directly to the Compact Commission, without the benefit of legislative oversight, a potential conflict could occur. The licensed disposal facility's total revenue is dependent on both the regulatory authority of TCEQ and the total amount of waste disposed at the site – an amount that could be affected by importation decisions made by the Compact Commission. This situation puts the Compact Commission in the conflicting position of impacting total disposal volume of commercial low-level radioactive waste that directly affects its revenue source, essentially holding its own purse strings. The Legislature commonly sees comparable funding mechanisms at state agencies, such as TCEQ, which receives major funding from fees assessed on entities it regulates. However, in these cases, the Legislature retains oversight of state agencies' budgets through the appropriations process, ensuring agencies only spend the money authorized, and are not incentivized to overcharge to build their budgets.

**Cumbersome Budgeting Structure.** Without further statutory direction, TCEQ will determine the Compact Commission's allocation through its rule establishing the compact waste disposal fee as required by the Compact law – putting TCEQ in a position in which it de facto determines the Compact Commission's budget and by rule has excluded the Compact Commission from participating in the rate-setting process. The review of a disposal rate application and the TCEQ rulemaking process, which take a significant amount of time, is not structured to be responsive to changing budget needs from year to year, the way the biennial appropriations process is. Given that the Compact Commission's funding source is dependent on the future compact waste disposal at the site, setting its long-term budget – through specifying the allocation of the compact disposal fee for Compact Commission expenses – in rule without opportunity to make timely changes, is an exercise that could result in under- or over-funding. In addition, TCEQ's current funding agreement with the Compact Commission – to reimburse the Compact Commission for travel and meeting-related expenses in accordance with appropriations rider – is untenable

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**Comment [12]:** And what about export decisions? Importation may be used to offset losses due to export to ensure that the compact disposal facility operator can maintain a financially stable operation and provide a disposal pathway for all compact generators.

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**Comment [13]:** How does the Legislature retain oversight of the budget of an organization that is disclaimed in federal law to be a legal entity, separate and distinct from the state? That oversight is intended to come from the legally mandated, independent audit of the Commission's books.

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**Comment [14]:** There is a fundamental misunderstanding here. The Compact Commission will be informed every year by reports from the TCEQ and the compact disposal facility regarding projected disposal quantities and any volumes that may be made available for importation based on planned exports or anticipated waste volumes that have not materialized. This is all a balancing act to ensure the volumes needed to maintain affordable disposal rates — and upon which the rates are based — for Compact generators are kept intact.

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on a long-term basis, as it inappropriately places TCEQ in the position of determining what expenditures are appropriate, and wastes TCEQ resources to oversee Compact Commission reimbursements.

**Quasi-governmental? Status.** Finally, while the Compact Commission is a legal entity separate from the State, it also has responsibilities directly related to the State's financial and environmental health. State and federal law already acknowledge the Compact Commission's quasi-governmental? status, requiring it to adhere to Texas' open meetings, public information, and administrative procedure law in conducting its business.

The Legislature funds five interstate river compact Commissions through TCEQ's appropriations pattern.

TCEQ administers other interstate compact commissions, including acting as a mechanism for those compact commissions to receive funding appropriated by the Legislature. In 2005, the Legislature rolled Texas' five independent interstate River Compact Commissions – those for the Canadian, Pecos, Red, Rio Grande, and Sabine Rivers – into TCEQ and began to fund them through the agency's appropriations. The five Commissions are funded by line item in TCEQ's appropriations pattern, and TCEQ has a memorandum of agreement that allows the River Compacts to retain their operational independence, even though they are technically a part of TCEQ.

## Recommendation

### *Change in Statute*

#### **7.1 Clarify the Compact Commission's funding mechanism.**

Under this recommendation, revenue allocated by TCEQ's rule-based compact waste disposal fee to the Compact Commission's operation would be remitted to a newly created General Revenue Dedicated Account. The dedicated fund would receive only the portion of the compact waste disposal fee allocated to cover the costs of the Compact Commission's operations from the licensed disposal facility, as defined by TCEQ's adopted rule. The Legislature would then appropriate funds to the Compact Commission from this account

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**Comment [15]:** This has been mischaracterized as taking on unfunded liabilities and it needs to be corrected. Again, the \$136.5M of financial assurance required by TCEQ and being provided by the licensee 60-days prior to operations is being completely ignored here.

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through the Compact Commission's rider in TCEQ's appropriations pattern. Since state and federal law both provide that this allocation go toward reasonably supporting the operations of the Compact Commission, this recommendation would provide that the funds deposited into this new account only be used for that purpose.

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**Comment [16]:** It would be very beneficial to define what "reasonable support" means.

This recommendation does not intend to make the Compact Commission a state agency, and it does not provide for full-time equivalent positions for the Compact Commission in TCEQ's appropriations. Rather, legislative appropriations would be made in either a lump sum or up to a limit, and the Compact Commission would have control over expenditures according to its adopted budget. The Compact Commission would continue to submit funding requests to the Legislature through TCEQ's Legislative Appropriations Request. However, moving forward, TCEQ would simply transfer the money to the Compact Commission, and not be in the position of overseeing or controlling reimbursements.

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**Comment [17]:** There needs to be an alternative path established for this given that this puts the TCEQ in the position of approving or disproving or modifying LARs that we are requested to submit, but not provided any direction or standing in the LAR process by law.

### **Fiscal Implication Summary**

This recommendation would not result in a fiscal impact to the State.

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**Comment [18]:** We would respectfully request that we are not financially attached to a state organization that has a specific role within the Compact and that has at times taken different positions from the Compact Commission that have led to tangible effects regarding the ability of the Commission to operate.

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