

CAUSE NO. D1-GN 10 004503

Filed in The District Court
of Travis County, Texas

DEC 30 2010 AMC

At 1:00 PM
Amalia Rodriguez-Hernandez, Clerk

PUBLIC CITIZEN, INC. and TEXAS
CIVIL RIGHTS PROJECT

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IN THE DISTRICT COURT

v.

LOW-LEVEL RADIOACTIVE WASTE
DISPOSAL COMPACT COMMISSION
and its Executive Director,
MARGARET HENDERSON

TRAVIS COUNTY, TEXAS

261 JUDICIAL DISTRICT

ORDER

Public Citizen, Inc. and Texas Civil Rights Project (hereinafter referred to as "Plaintiffs") have filed in this cause Plaintiffs' Original Petition and Application for Temporary Restraining Order, Temporary Injunction, and Permanent Injunction (the "Petition"). The Petition is verified and requests issuance of a temporary restraining order. It clearly appears from the facts set forth in the Petition that unless the Low-Level Radioactive Waste Disposal Compact Commission ("the Commission") and its Executive Director, Margaret Henderson ("Henderson") are immediately restrained from the following acts, they will commit these acts before notice can be given and a hearing held on Plaintiffs' request for a temporary injunction:

1. Defendants will conduct a hearing on January 4, 2011, in Andrews, Texas, on the agenda items previously published by the Commission, as appears on the Commission's website, *About the Texas Low Level Radioactive Waste Compact Commission*, <http://www.tllrwdcc.org/about.html>;
2. At the January 4, 2011 Commission meeting, Defendants will consider action on the referenced agenda items despite the fact that the Commission provided and relied

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upon a defective email address for interested persons to use to provide public comments, resulting in a substantial number of non-delivery reports or “bounced” messages, preventing interested persons, including Plaintiffs and their members, from presenting such comments concerning the proposed rules that the Commission is scheduled to consider at the January 4, 2011 meeting;

3. Defendants will consider and potentially act on the proposed rules published at 35 Tex. Reg. 10425;
4. Defendants will violate the Texas Administrative Procedure Act, Texas Government Code § 2001.029(a), which requires that “[b]efore adopting a rule, a state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing”;
5. Defendants will violate Texas Government Code § 2001.029(c), which requires that a state agency “shall consider fully all written and oral submissions about a proposed rule,” because by proceeding with the scheduled meeting on January 4, 2011, the Commission would be unable to “consider fully” the emailed written comments that it did not receive because of the defective email address, and because the Commission has received over 4,000 comments concerning the proposed rules and it appears to be physically impossible for the Commission to “consider fully” that volume of comments in the limited time available before the January 4, 2011 meeting;
6. The Commission will violate the Texas Administrative Procedure Act, Texas Government Code § 2001.033, which provides that “(a) A state agency order finally adopting a rule must include: . . . (1) a reasoned justification for the rule as adopted

consisting solely of: (A) a summary of comments received from parties interested in the rule that shows the names of interested groups or associations offering comment on the rule and whether they were for or against its adoption; (B) a summary of the factual basis for the rule as adopted which demonstrates a rational connection between the factual basis for the rule and the rule as adopted; and (C) the reasons why the agency disagrees with party submissions and proposals”

7. Because of the defective email address, if the Commission meets at the scheduled January 4, 2011 meeting in Andrews, Texas and approves the proposed rules, it will do so without having responded to or having been required to respond to the missing public comments before voting on the proposed rules;
8. The Defendants will violate the Texas Constitution, art. I, § 27, which provides that “A citizen shall have the right . . . to apply to those invested with the powers of government for redress of grievances or other purposes, by petition, address or remonstrance”;
9. Defendants will violate the Texas Open Meetings Act (TOMA), which requires in Texas Government Code § 551.041 that a governmental body “shall give written notice of the date, hour, place, and subject of each meeting held by a governmental body,” and Defendants will violate the underlying purpose of TOMA to “assure that the public has the opportunity to be informed concerning the transactions of public business,” because the published agenda notice for the January 4, 2011 meeting inaccurately states that the Commission will consider discussion and possible action on changes and language to the proposed new rules “after consideration of public

comments provided during the thirty-day comment period,” when the defective email address means that the Commission will not have received a substantial number of public comments and thus will not consider those public comments, and further, the agenda states that the Commission will consider discussion and possible action on changes in language to the draft order adopting the proposed rules, including “responses to comments, and any other changes necessary in response to comments,” when again the Commission will not have received a substantial number of public comments because of the defective email address.

10. The Commission will violate the Administrative Procedure Act of Texas, Government Code, § 2001.0225, by failing to conduct the statutory regulatory analysis before adopting “a major environmental rule”;
11. Defendants at the January 4, 2011 meeting will consider action on adopting a new Subchapter B to Chapter 675 concerning exportation and importation of waste, despite the violations cited above;
12. Defendants will potentially take “action on changes in language to the proposed new rules to be contained in a proposed new Subchapter B to be to be added to Chapter 675, Part 21, Title 31, Texas Administrative Code,” as stated in Commission’s published agenda notice for the scheduled January 4, 2011 meeting;
13. Defendants will potentially take “action on changes in language to the draft order adopting the proposed new rules to be contained in a proposed new Subchapter to be added to Chapter 675, Part 21, Title 31, Texas Administrative Code,” as stated in the published agenda notice for the scheduled January 4, 2011 meeting;

14. Defendants will potentially take “action on final adoption of a new Subchapter B to be added to Chapter 675, Part 21, Title 31, Texas Administrative Code, such subchapter to be captioned “Exportation and Importation of Waste” (including Section 675.21 to be captioned "Exportation of Waste to a Non-Party State for Disposal," Section 675.22 to be captioned “Exportation of Waste to a Non-Party State for Management or Processing and Return to the Party States for Management or for Disposal and Return to the Party State for Management or Disposal in the Compact Facility,” Section 675.23 to be captioned “Importation of Waste from a Non-Compact Generator for Disposal,” and Section 675.24 to be captioned “Importation of Waste from a Non-Compact Generator for Management”),” as stated in the published agenda notice for the scheduled January 4, 2011 meeting;
15. Defendants will potentially take “action to amend or rescind Resolution to Consider Export Petitions Pursuant to Texas Compact (P.L. 105236) Section 3.05(7), passed December 11, 2009,” as stated in the published agenda notice for the scheduled January 4, 2011 meeting;
16. Defendants will potentially take “action to adopt a resolution or resolutions with respect to exportation of waste to a non-party state for disposal, exportation of waste to a non-party state for management or processing and return to the party states for management or for disposal in the compact facility, importation of waste from a non-compact generator for disposal, and importation of waste from a non-compact generator for management,” as stated in the published agenda notice for the scheduled January 4, 2011 meeting.

17. Defendants will potentially take action “with regard to low-level radioactive waste export or import requests, petitions or agreements made by: (a) Compact Generators seek authority to export (i) Allergan, Inc., (ii) Houston NW Medical Center, (iii) Baylor University, (iv) IHI Southwest, (v) Texas Children's Hospital, (vi) VA Medical Center Houston, (vii) Memorial Hermann – Texas Medical Center, (viii) Lockheed Martin, (ix) Cleveland High School, (x) Clean Harbors; (b) Compact Facility seeks authority to import,” as stated in the published agenda notice for the scheduled January 4, 2011 meeting.

If the commission of the foregoing acts is not immediately restrained, Plaintiffs will suffer irreparable injury because:

Plaintiffs will suffer deprivation of their rights under the Texas Administrative Procedure Act, the Texas Open Meetings Act, and the Texas Constitution, art. I, § 27;

Plaintiffs and their members and supporters, and other persons interested in the Commission’s proposed rules that would be considered at the January 4, 2011 Commission meeting in Andrews, Texas, will have their statutory rights under the Texas Open Meetings Act, Texas Government Code, § 551.041, violated by the Commission’s use of and reliance upon a defective email address, thus failing to provide proper notice sufficient to assure that interested persons, including Plaintiffs’ members, have had the opportunity to be accurately informed concerning the proposed transactions and public business at the aforementioned meeting;

Plaintiffs and their members and other interested persons will potentially be subjected to an unnecessary meeting in a distant location, requiring for some such persons many hours

of travel from different parts of the state, to Andrews, Texas, when the Defendants have failed to comply with the Administrative Procedure Act's regulatory process requirements for a "major environmental rule," under Texas Government Code § 2001.0225;

Plaintiffs' members and supporters, other interested persons, and persons similarly situated, will be denied the opportunity to provide, and to have considered by the Commission, before the Commission votes on the rules, written public comment concerning the proposed rules; and prevented from receiving the benefit of their statutory rights to have the Commission consider their comments and input; and prevented from having the Commission provide a reasoned justification for any proposed rule, including a summary of comments received from interested parties, showing the names of interested groups or associations offering comment on the rule and whether they were for or against its adoption, and the reasons why the Commission disagrees with party submissions and proposals, if it disagrees; and prevented from exercising their rights of remonstrance and to petition the government under the Texas Constitution, Article I, § 27; and prevented from having the opportunity to exercise their rights to public participation under the Texas Open Meetings Act, including to receive accurate and truthful "written notice of the . . . subject of each meeting" and to be informed concerning the transactions of public business"; and prevented from exercising their rights to have the Commission conduct the statutorily required regulatory analysis of the proposed rules under § 2001.0225(b) of the Texas Government Code before adopting major environmental rules.

It is therefore ORDERED that from the date of entry of this Order until and to the fourteenth (14th) day after entry or until further order of this court, the Low-Level Radioactive Waste Disposal Compact Commission and its Executive Director, Margaret Henderson, Defendants in this cause, be, and they hereby are, commanded forthwith to desist and refrain from the following:

- (i) adopting, approving, or otherwise implementing a new Subchapter B to Chapter 675 concerning exportation and importation of waste;
- (ii) adopting, approving, or otherwise implementing any new or modified rules permitting the exportation or importation of waste;
- (iii) taking any action that would authorize or permit the importation or exportation of radioactive waste, including low-level radioactive waste, in a manner or to an extent not currently authorized or permitted by Commission rules, policies, and agreements that are already in existence and in effect;
- (iv) adopting, approving, or otherwise implementing any new or modified rule that would permit importation into Texas of radioactive waste, including low-level radioactive waste, from any state other than Vermont;
- (v) taking any “action on changes in language to the proposed new rules to be contained in a proposed new Subchapter B to be to be added to Chapter 675, Part 21, Title 31, Texas Administrative Code”;
- (vi) taking any “action on changes in language to the draft order adopting the proposed new rules to be contained in a proposed new Subchapter to be added to Chapter 675, Part 21, Title 31, Texas Administrative Code”;
- (vii) taking any “action on final adoption of a new Subchapter B to be added to Chapter 675, Part 21, Title 31, Texas Administrative Code, such subchapter to be captioned “Exportation and Importation of Waste” (including Section 675.21 to be captioned “Exportation of Waste to a Non-Party State for Disposal,” Section 675.22 to be captioned “Exportation of Waste to a Non-Party State for Management or Processing and Return to the Party States for Management or for Disposal and Return to the Party State for Management or Disposal in the Compact Facility,” Section 675.23 to be captioned

“Importation of Waste from a Non-Compact Generator for Disposal,” and Section 675.24 to be captioned “Importation of Waste from a Non-Compact Generator for Management”);

(viii) taking any “action to amend or rescind Resolution to Consider Export Petitions Pursuant to Texas Compact (P.L. 105236) Section 3.05(7), passed December 11, 2009”;

(ix) taking any “action to adopt a resolution or resolutions with respect to exportation of waste to a non-party state for disposal, exportation of waste to a non-party state for management or processing and return to the party states for management or for disposal in the compact facility, importation of waste from a non-compact generator for disposal, and importation of waste from a non-compact generator for management”;

(x) taking any “action by the Commission with regard to low-level radioactive waste export or import requests, petitions or agreements made by: (a) Compact Generators seeking authority to export (i) Allergan, Inc., (ii) Houston NW Medical Center, (iii) Baylor University, (iv) IHI Southwest, (v) Texas Children's Hospital, (vi) VA Medical Center Houston, (vii) Memorial Hermann – Texas Medical Center, (viii) Lockheed Martin, (ix) Cleveland High School, (x) Clean Harbors; (b) Compact Facility seeking authority to import.”

It is further ORDERED that the Low-Level Radioactive Waste Disposal Compact Commission and its Executive Director, Margaret Henderson, Defendants, appear before _____, Travis County District Judge, on January 13, 2011, at 9:00 o'clock a.m., in the courtroom of the _____ District Court in the Herman Marion Sweatt Travis County Courthouse, 1000 Guadalupe Street, Austin, Travis County, Texas, then and there to show cause, if any, why a temporary injunction should not be issued as requested by Plaintiffs. The clerk of this court is hereby directed to issue a show cause notice to Defendants to appear at the temporary injunction hearing.

The clerk of the Court shall forthwith, on the filing by Plaintiffs of the bond hereinafter required, and on approving the same according to the law, issue a temporary restraining order in conformity with the law and the terms of this order.

This order shall not be effective unless and until the Plaintiffs, or either of them, executes and files with the clerk a bond, in conformity with the law, in the amount One hundred Dollars (\$ 100⁰⁰).

SIGNED this the 30 day of December, 2010, at 11:56 o'clock, a.m.



JUDGE PRESIDING