

In Brief: Tennessee's Perpetual Care Trust Fund

In November of 1999, DOE and the Tennessee Department of Environment and Conservation (TDEC) reached an agreement regarding a trust fund for an Oak Ridge disposal cell for hazardous, radioactive, and mixed waste. The State of Tennessee initially received a negative response from DOE Oak Ridge regarding its proposed trust fund. However, TDEC was able to compel DOE to finance a "perpetual care trust fund" by refusing to move forward with the CERCLA ROD that authorized use of the disposal cell in remedial actions. In making its case, TDEC relied on a clause in the RCRA sovereign immunity waiver that gave states power to administer a "reasonable service charge" to responsible parties. (RCRA sec. 6001, 42 USCA sec. 6961) In addition to RCRA, TDEC cited a state law with language regarding a "perpetual care mechanism" (Tenn. Code Ann. 68-212-108)

DOE has agreed to pay \$1 million per year over a 14-year period to TDEC to be placed in a perpetual care trust fund. The amount reflects in part a sum large enough to generate sufficient interest payments to cover annual O&M costs following the closure of the disposal cell after 14 years of operation. DOE cannot, according to Department officials, administer the fund because it lacks express statutory authority to create a trust fund at the federal level. Additionally, fiscal law prohibits DOE from accepting funds that fall outside of the appropriation process to perform its mission. This "augmentation" issue prevents DOE from drawing on a trust fund to fulfill obligations.

Though TDEC is confident it will receive DOE funding for the perpetual care trust fund, DOE maintains that its financial commitment is "subject to the availability of appropriated funds." DOE has relied on the Anti-Deficiency Act, which states that the federal government cannot make irrevocable commitments about future funding, to support this claim. TDEC rejects DOE's use of the Anti-Deficiency Act, arguing that the federal law does not apply to DOE obligations pertaining to the perpetual care trust fund. In any event, both parties have agreed that it is premature "to raise and adjudicate the existence of such a defense [by DOE]."