

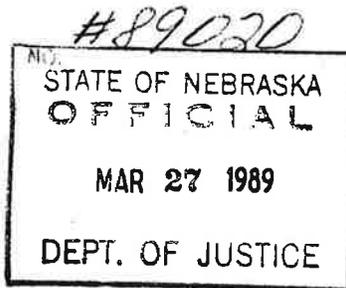
DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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STATE CAPITOL

LINCOLN, NEBRASKA 68509



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Attorney General
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DATE: March 24, 1989

SUBJECT: Low-Level Radioactive Waste local monitoring committees

REQUESTED BY: Dennis Grams, Director
Department of Environmental Control

WRITTEN BY: Robert M. Spire, Attorney General
Linda L. Willard, Assistant Attorney General

You have asked several questions regarding the composition of the local monitoring committees for the Low-Level Radioactive Waste Act as set forth in Neb.Rev.Stat. §81-15,101.01 (1988 Cum. Supp.). We will attempt to address each of your questions individually.

Your first question is whether members of the local committee selected from municipalities set out in subpart (2)(a) of the above statute are required to be residents of such municipalities or live within the prescribed zoning jurisdiction of the municipalities. Subpart (2)(a) states:

Each local monitoring committee shall be composed of the following nine members: (a) two members selected from municipalities which have zoning jurisdiction within fifteen miles of the proposed site or if there are no such municipalities, from the municipality in closest proximity to the proposed site, to be appointed by the chief executive officer of each municipality by the governing body if there is no chief executive officer;

. . .

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The Nebraska Supreme Court has often said "in the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; this court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous." In re Interest of G.B., 227 Neb. 512, 418 N.W.2d 258 (1988); see, also, In re Interest of Richter, 226 Neb. 874, 415 N.W.2d 476 (1987) and Lawson v. Ford Motor Company, 225 Neb. 725, 408 N.W.2d 256 (1987).

The above statute clearly states that two members of the local committee are to be selected from the appropriate municipalities. Black's Law Dictionary (Fifth Edition, 1979) defines the word "from" as follows: "As used as a function word, implies a starting point, whether it be of time, place, or condition; and meaning having a starting point of motion, noting the point of departure, origin, withdrawal . . . One meaning of 'from' is 'out of' . . ."

In Silva v. McAuley, 135 Cal.App. 249, 26 P.2d 887 (1934), the California Court of Appeal was faced with the interpretation of "from" in regard to a statute which made it illegal to transport fish from a certain zone in the State to a point outside of the State. Fishermen had captured fish outside of this zone but were shipping the fish from within the zone to points outside of the State. The California Court of Appeals held that the fish were merely passing through the zone since the word "from" always implies a starting point whether it be of time, place or condition.

Since Neb.Rev.Stat. §81-15,101.01(2)(a) (1988 Cum. Supp.) provides for appointment of an individual from the municipality, it is our determination that the individual appointed must have a starting place or origin from within the designated area at the time of his or her appointment. In other words, the appointee must reside in the municipality at the time of the appointment. The Nebraska Supreme Court has long interpreted "residence" to be equivalent to "domicile" and "to effect a change of domicile there must not only be a change of residence, but an intention to permanently abandoned the former home." Wood v. Roeder, 45 Neb. 311, 63 N.W. 853 (1895). In Berry v. Wilcox, 44 Neb. 82, 62 N.W. 249 (1895), a case relating to residence for voting purposes, the Nebraska Supreme Court held

The generally accepted definition of "residence" when the term is used with reference to the qualifications of voters, is synonymous with "domicile" -- "that place . . . in which his habitation is fixed, without any present intention of removing therefrom.

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44 Neb. at 85. This would also answer your second question as to whether a person could establish a temporary residence for the sole purpose of serving as a committee member. Residence, as the definitions above indicate, is equivalent to domicile and carries with it the intent, at least for the time, of remaining at that location. Our determination that the appointees must be residents of the local area is also inferred from the declared legislative intent of the statute "that the local monitoring committees provide significant input concerning local needs and resources. . . ." Presumably local residents would have more knowledge of the local needs and resources.

Your third question is whether the at-large member and owner of real property selected from the county in (2)(b) are required to be residents of the county. Subpart (2)(b) of the above cited statute states

Each local monitoring committee shall be composed of the following nine members: . . . (b) two members from the county in which the site is proposed, to be appointed by the governing body of the county. One member shall be an owner of real property that is within a three mile radius of the proposed site, and one member shall be an at-large member; . . .

As indicated on our response to your first question, the word "from" indicates a starting point or point of origin. Therefore, the two members from the county must be residents of the county at the time of appointment.

Your next question is whether the governing bodies specificized in (2)(a) and (b) are required to make the appointments, and if appointments are not made if there is a duty on the Department of Environmental Control to enforce appointments.

Neb.Rev.Stat. §81-15,101 (1988 Cum. Supp.) states that the Committee shall be composed of nine members and the officers or governing bodies indicated in the statute are to make those appointments. Generally the word "shall" appearing in a statute implies that whatever "shall" be done is mandatory. Minden Beef Company v. Cost of Living Council, 362 F.Supp. 298 (Neb. 1973). Generally, in construction of statutes, the word "shall" is considered mandatory and inconsistent with the idea of discretion. State v. Stratton, 220 Neb. 854, 374 N.W.2d 31 (1985); N.C. Plus Hybrids v. Growers Seed Association, 219 Neb. 296, 363 N.W.2d 362 (1985).

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The statute specifically provides that the committee shall have nine members, two of whom shall be selected from municipalities, two from the county, two appointed by the natural resources district, and three appointed by the Governor. Therefore, it is our determination that the entities named have been given the authority to make the appointments and are mandated by statute to make said appointments. The statute in question, however, does not contain a penalty clause for failure to make the appointments.

Your question then is whether the Department of Environmental Control has a duty to enforce the appointment of representatives if the statutorily designated officer or officers do not so appoint. Neb.Rev.Stat. §81-1599 (Reissue 1987) sets out the powers and duties of the Department of Environmental Control. The statutes impose no duty upon the Department relative to the appointment of members to the local committees. While the Department is authorized to exercise all incidental powers necessary to carry out the purposes of the Low-Level Radioactive Waste Disposal Act, the Department has been given no power to impose sanctions against the appointing authorities for their failure to appoint. The remedy in this case, if such there be, appears to be in the nature of a mandamus action brought by a party or parties shown to have an interest in representation on the local committee.

Your final question is whether a committee would fail to be established if all appointments were not made. It is our determination that the failure to appoint all committee members does not mean that the committee does not exist. However, it may limit some actions of the committee. As with any other committee established by statute, the failure to fill all vacancies on the committee would not mean that the committee itself did not exist. However, if a quorum is necessary for the conducting of business or a majority vote is needed to pass on certain actions of the

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committee, the failure to have all positions filled may seriously effect the committee's ability to function.

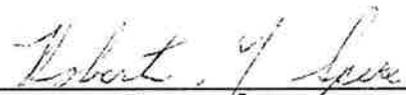
Sincerely yours,

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Approved:



Attorney General

28-141-3