



April 13, 2010

Texas Low-Level Radioactive Waste Disposal Compact Commission
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Re: Subchapter B. “Exportation and Importation of Waste,” 31 TAC §§675.21 – 675.23
proposed by the Texas Low-Level Radioactive Waste Disposal Compact Commission,
35 TexReg 1028-1034

Dear Compact Commissioners,

The Sustainable Energy and Economic Development (SEED) Coalition is a Texas-based nonprofit organization advocating for sustainable economic development and clean, affordable energy solutions. We appreciate this opportunity to provide comments on Subchapter B. “Exportation and Importation of Waste,” 31 TAC §§675.21 – 675.23 proposed by the Texas Low-Level Radioactive Waste Disposal Compact Commission, published in the Texas Register on February 12, 2010.

We have support and endorsement for these comments from major environmental organizations. Some are national organizations and others are based in Texas, New Mexico, and California. These comments are made on behalf of all of the organizations signed on below and all signers request written response from the Commission.

Our organizations oppose going forward with proposed rule for the reasons set forth below in these comments.

We enclose and incorporate analysis by nuclear energy expert Dr. Arjun Makhijani, President of the Institute for Energy and Environmental Research¹ and a report by the Nuclear Information and Resource Service, “United States Commercial ‘Low-Level’ Radioactive Waste Disposal Sites Fact Sheet.”

¹ Dr. Makhijani’s report was written for SEED Coalition based on a draft version of the rule, but the report’s main points are still pertinent and valid. SEED Coalition would like to briefly comment on the mischaracterization of Dr. Makhijani’s report at the January 22, 2010 Compact Commission meeting by Commissioners Ford and White. They characterized the report as saying that the rule *would allow* the described amount of radioactive waste to be imported into Texas. However the Commissioners have missed the main point of the report, which is to show the amount of radioactive waste that *could potentially* end up being imported to the Texas site, if the Commission was to approve import petitions under the rule and the licensed capacity of the site was increased.

Needlessly Rushed Rulemaking Process

Our organizations oppose Compact Commission approval of the proposed rule. The Compact Commission is needlessly rushing the rulemaking process for importation of radioactive waste into Texas. There has been no reason given by the Commission, generators or the public as to why approving the proposed rule at this time is imperative or appropriate.² There are however a multitude of procedural reasons for not approving the rule at this time.

- The Waste Control Specialists' (WCS) site in Andrews County is not yet operational nor has an estimated one-year construction of the site began.
- The TCEQ license for the WCS facility has been appealed and WCS has not met all of the conditions of the license.
- The Compact Commission does not have adequate resources.
 - The Commission does not have the funding for staff to review proposed importation agreements.
 - The Commission presumably cannot afford to come to the public hearings on the rule.
 - The Commission presumably cannot afford to hire an independent financial expert to review WCS' economic analysis alleging the viability of the site is dependent on importation.³

² One of the reasons Waste Control Specialists (WCS) puts forth for going forward with the rule now is that it allows WCS to “get contracts and set rates.” Giving WCS this ability is inappropriate for all of the reasons put forth in these comments opposing the rule, namely that this Compact Commission was formed to govern radioactive waste in the Compact states, Texas and Vermont, not to open Texas to waste from around the country and possibly the world before the construction of the site has even begun.

³ Another reason given by WCS for going forward with the rule now is that the economic viability of the company depends on its ability to import waste from commercial generators outside the Compact. WCS has essentially threatened the Commission by saying that it will not be able to open the site to dispose of Texas and Vermont waste unless the Commission approves this rule. At the January 22, 2010 meeting the Vermont Commissioners requested WCS to provide the Commission with the economic analysis proving these claims. It is incumbent upon the Commission to independently verify the analysis that WCS provides.

We question the veracity of WCS' claims that the viability of WCS as a company depends on importation of out-of-Compact radioactive waste into the Compact facility. How can this be true when the Compact facility is only licensed for 2.31 million cubic feet and WCS 1) has an operational hazardous waste facility, 2) is currently disposing of 3.2 million tons of carcinogenic polychlorinated biphenyls contaminated river silt from the Hudson, 3) is disposing of radioactive waste from Ohio in its byproduct facility licensed to receive 31.563 million cubic feet, 4) is the preferred DOE site for 11,000 tons of elemental mercury, 5) has a license for a federal facility to dispose of 26 million cubic feet of DOE weapons waste, and 6) is currently storing radioactive waste from around the country and possibly the world under its storage license? WCS has a number of revenue streams apart from the Compact generated waste and the out-of-Compact waste it wants to import. The Commission must take this into account when verifying WCS' claims and threats that WCS will be unable to dispose of Texas and Vermont waste without importation.

If there is any truth to WCS' claims, it is proof of misrepresentations they made before both the Texas Legislature and TCEQ about their ability to maintain economic viability as a **Compact** facility. Now that WCS has its license and has the Compact Commission and the Texas and Vermont governments committed to the disposition of Compact waste in its facility, it wants to change the rules. **WCS is holding the Compact Commission hostage with claims that Texas and Vermont radioactive waste disposal is in jeopardy.**

- The Commission stated at their last meeting that they didn't know if they would have enough funds to make it through this rulemaking process.
- The Commission cannot afford an attorney to represent the Commission or individual Commissioners in the event of litigation against the Commission.
- The Commission does not have bylaws yet.

It is irresponsible and detrimental to the public interest to move forward with the proposed rule in these circumstances. This rulemaking process must be halted until the Commission has adequate funding, all of these procedural issues have been dealt with, and the WCS site is fully operational.

Limitations on Radioactive Waste

Our organizations ask the Compact Commission to limit the radioactive waste that can be disposed of at the Compact facility to just the Compact member states – Texas and Vermont. The proposed rule does not limit the amount or curie levels of radioactive waste that can be imported from out-of-Compact states into the Texas Compact facility. We contend that the proposed rule is contradictory to the primary purpose of the Compact Commission, to adequately and safely dispose of radioactive waste generated in the Compact states.^{4,5} Other Compacts in the country have excluded out-of-Compact radioactive waste, and the Texas-Vermont Compact should do the same.

There is currently not enough capacity at the WCS site as licensed for the Texas and Vermont waste. The TCEQ issued license for the Compact facility is for 2,310,000 cubic feet of low-level radioactive waste, but the Compact Commission has estimated Texas and Vermont disposal needs at 6 million cubic feet in its volume rule. The accuracy of the estimated disposal needs in the volume rule has been questioned by WCS and some of the Commissioners.⁶ The Commission is moving forward on the rule, while dismissing the volume rule it created. The Commission must reconcile this discrepancy before a rulemaking process on import can begin.⁷

Assuming the Commission's estimated disposal needs are correct, the Commission is not in a position to move forward with the rule at this time nor is it in the position to assume that the capacity of the site will increase to accommodate out-of-Compact low-

⁴ "The party states recognize a responsibility for each state to seek to manage low-level radioactive waste generated *within its boundaries*...." Texas Low-Level Radioactive Waste Disposal Compact, Health and Safety Code, Chapter 403, Article I. (emphasis added)

⁵ The SEED Coalition incorporates Section 1 of Dr. Makhijani's expert analysis submitted to the Commission on January 15, 2010, where Dr. Makhijani details how the proposed rule does not fulfill the purposes of the Compact.

⁶ January 22, 2010 Texas Low-Level Radioactive Waste Disposal Compact Commission Meeting

⁷ The Vermont Commissioners requested language be added to the rule in an attempt to reserve capacity at the site for Texas and Vermont disposal needs. (§675.23(b)) However, this section is insufficient. The report referenced in the rule to establish the disposal needs of Vermont and Texas should have been completed prior to this rulemaking process, but at a very minimum must be completed prior to adopting the rule. Such a report must be prepared by an independent expert with no ties to WCS and no interest in seeing the WCS Compact facility open up for import to out-of-Compact states.

level radioactive waste, without a technical review of the site. At a very minimum, the rule must include a limit to how much waste, in volume and curie levels, can be imported.

TCEQ Technical Approval

The proposed rule would allow WCS to obtain contracts to bring in more radioactive waste with no environmental analysis and without adequate licensed capacity. Furthermore, no radioactive waste streams outside of Texas and Vermont have been evaluated by TCEQ. The rule must require TCEQ technical evaluation and approval of the waste before it is imported into the state and the WCS license must be amended with full public participation to allow the specific waste and permit the specific origin for out-of-Compact waste.

The rule must require that before the Compact Commission can consider an import agreement, WCS needs a TCEQ amendment to its license for the waste it wishes to import. While we appreciate the addition in §675.23 (g), requiring a TCEQ certification that the waste criteria have been met, it does not truly change the status quo. Approving the proposed rule without an amended license allowing for the additional waste would create political pressure on TCEQ to expand the license without technical support. Technical approval of expansion must come before the policy approval to expand.

We seek a written comment to the following question: What additional approvals are still needed by TCEQ in order for disposal to commence, including unmet license conditions and the recent permit modification request?

International Waste

The proposed rule does not restrict waste for import to waste generated within the United States. The rule is silent on the ability of the Commission to authorize the import of radioactive waste generated outside of the United States. Moreover, it has no safeguards to prevent foreign waste from coming in either directly or through processors who take ownership and attribution. In order to limit liability for the State of Texas, our organizations ask that an absolute ban on the import of foreign radioactive waste be added to the proposed rule and that the ban include foreign waste that comes in directly or through processors.⁸

We request a written answer to the following question: How can the Commission assure that foreign waste is not coming in directly or by re-characterization through processing?

⁸ Makhijani, Arjun, PhD. Memo to SEED Coalition Re: Proposed Rule, January 15, 2010. “[T]he Proposed Rule does not restrict potential waste imports to U.S.-origin wastes. Imports from foreign countries where the waste classification systems, waste compositions regulatory requirements, and other matters impacting the ability to handle and dispose of the waste in the U.S. safely, could be different [which] would complicate matters even more. They could also greatly increase the environmental impact.”

Major Environmental Rule and Environmental Impact Analysis

Our organizations assert that the proposed rule should be considered a Major Environmental Rule, under Section 2001.0225 of the Texas Government Code, and the necessary regulatory analysis associated with a Major Environmental Rule should be required.⁹ Approving this rule would be putting forth a Major Environmental Rule without the required impact analysis. The SEED Coalition relies on Section 2 of Dr. Makhijani's expert analysis, which is attached here and was previously submitted to the Commission on January 15, 2010.¹⁰

We recognize the Commission's reasoning for not considering the proposed rule as a Major Environmental Rule.¹¹ The Commission however is failing to take into account the fact that this rule says to those generators outside of Vermont and Texas that the West Texas site is open for business and essentially invites import. This rule, if approved, will be used by utilities wanting to build new nuclear power reactors to justify creating more waste even though the WCS site currently has limited licensed capacity. Although the rule does not approve specific imports, it sets up the procedures for authorizing import and in essence encourages it. Through the proposed rule, the Commission is encouraging the building of new reactors around the country and the generation of new waste, in complete contradiction with part of the Commission's purpose, "to encourage the reduction of the generation" of low-level radioactive waste.¹²

If this rule allows WCS to "get contracts and set rates," there will be a political push on TCEQ to expand the site, in turn increasing the environmental risks at the site.¹³ As discussed in Dr. Makhijani's report, this rule could dramatically increase the volume and curies of waste that comes to the site and increase the threats to the environment and public health. The rule should therefore be considered a Major Environmental Rule.

Additionally, under the National Environmental Policy Act (NEPA), 42 U.S.C. 4322, there is a requirement for an environmental impact statement (EIS) before this rule can

⁹ An environmental analysis performed by the Texas Commission on Environmental Quality found problems with the site, including possible pathways to underground aquifers. The politically appointed TCEQ Commissioners ignored the scientists' findings and unanimous recommendation not to issue the license and issued the license anyway. Three TCEQ staff members have resigned as a result. Considering this controversy, it is incumbent upon the Compact Commission to minimize the liability to Texas and require an environmental impact analysis in accordance with TX Gv. Code § 2001.0225.

¹⁰ Dr. Makhijani describes why the proposed rule should be considered a Major Environmental Rule. "[A] 'Major Environmental Rule' is, among other things one 'that may adversely affect, in a material way... the environment or the public health and safety of the state or a sector of the state.'" If the Texas facility is opened to 19 times the total reactor capacity, the likely environmental impact can be expected to increase commensurately."

¹¹ Reasons given by Commissioners for not considering the proposed rule as a Major Environmental Rule include: TCEQ issues and enforces the license and that the Commission can't affect the base amount at the site, the waste criteria stays the same, and the license cannot be broken with this rule.

¹² Texas Low-Level Radioactive Waste Disposal Compact, Health and Safety Code, Chapter 403, Article I.

¹³ See footnote 2 and the section entitled "TCEQ Technical Approval"

go forward. The rule could significantly affect the quality of the environment, and the proposed importation of waste, if approved by the Commission, would require an expansion of the site.¹⁴ For the same reasons that the proposed rule should be considered a Major Environmental Rule under Texas law, an EIS should be required under NEPA.

We also rely on the attached Nuclear Information and Resource Service Report detailing the problems and leaks at many of the other low-level radioactive waste disposal facilities around the country. This report further illustrates why an EIS should be conducted and the proposed rule should be considered a Major Environmental Rule.

Consideration of Texas Liability

Texas will take title and liability to the radioactive waste to be disposed of at the Compact facility once it enters the state and will be responsible for cleanup costs if and when the site leaks or if there are accidents in transport within the state. The proposed rule discusses the positive fiscal benefits of import to the State and the host County but none of the liabilities. The rule should discuss the increased liabilities that the importation of radioactive waste would create for Texas taxpayers, who will ultimately face the financial and environmental burden of radioactive waste lasting thousands of years.

The Compact Commission should conduct a thorough independent analysis of the increased liability resulting from import before approving the proposed rule. The results should be reported to the public and incorporated into the rule.

The radioactive waste at the Compact facility will remain lethal for tens of thousands of years, and the potential clean-up costs to the state of Texas could be exceptionally high. The SEED Coalition asserts that the fiscal note for the proposed rule should be drafted to reflect the actual timeline of potential costs to the state, well beyond the 5 years required by law (Sec. 2001.024, Texas Government Code).

We also rely on the attached Nuclear Information and Resource Service Report detailing the problems and leaks at many of the other low-level radioactive waste disposal facilities around the country. This report illustrates the potential costs and liabilities that could result from approval of the proposed rule.

¹⁴ *Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission*, 481 F.2d 1079, 1088 (C.A.D.C. 1973). "The statutory phrase "actions significantly affecting the quality of the environment" is intentionally broad, reflecting the Act's attempt to promote an across-the-board adjustment in federal agency decision making so as to make the quality of the environment a concern of every federal agency." And "The legislative history of the Act indicates that the term "actions" refers not only to construction of particular facilities, but includes "project proposals, proposals for new legislation, regulations, policy statements, or *expansion* or revision of ongoing programs" (emphasis added)

Transportation Assessment

There are no provisions in the rule governing the transport of radioactive waste which would come in on trucks and trains through Texas communities. If an accident occurs, state and local governments would be responsible for emergency response and taking actions to protect the public health and safety.

The Compact Commission should conduct an independent and comprehensive transportation safety and impact study before approving the proposed rule. Transport routes should be identified. The results should be reported to emergency responders and the public and be incorporated into the rule.

The Compact Commission should verify that municipalities along radioactive waste transportation routes have first responders trained to deal with radioactive waste accidents and that they have the proper equipment to do so. The rule should also include notification strategies and a requirement to notify emergency service providers 24 hours in advance of import and export shipments so that they can be prepared and have proper equipment available in case they need to respond to a train or truck accident during the transport of radioactive waste.

The Compact Commission also needs to detail in the rule how it is going to notify and coordinate with the Department of Energy, the Nuclear Regulatory Commission and the Department of Transportation regarding the transportation of radioactive waste. The rule must also specify how the Commission will comply with all regulations, state and federal, that govern transportation of radioactive waste.

The possibility and consequences of a transportation accident should be analyzed and be incorporated in the rule as a liability for Texas.

Additionally, a written comparison of the manifest of the waste from its point of origin to the waste that arrives at the WCS site should be required.

Importing Waste for Storage

WCS is currently importing waste under their storage license. The Compact Commission governs the management and disposal of waste, and management includes storage.¹⁵ The Compact Commission must assert its authority over import for storage and stop out-of-Compact storage until it is fully analyzed. The proposed rule must require WCS to seek Compact Commission approval to import out-of-Compact waste under their existing storage license.

¹⁵ Texas Low-Level Radioactive Waste Disposal Compact, Health and Safety Code, Chapter 403, Article I and II. “Management” means collection, consolidation, storage, packaging, or treatment.” Compact, Article II, Sec. 2.01(11).

Public Participation Process

The 20-day comment period briefly mentioned in the rule is inadequate and essentially prevents public participation. It should be extended to at least 60 days. The rule itself must specifically outline the public input process, including how and when the public will be informed of an import petition, how the public can participate, and how public comments will be considered by the Commission.

We ask that you respond in writing to these comments to the SEED Coalition and all of those signed on below. We ask that you cease all consideration of the import rule, at the very minimum until after the Commission can responsibly deal with the legal, technical and practical responsibilities involved and the site has proven itself capable of operation.

Sincerely,



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