



April 13, 2010
CD10-0107

VIA E-MAIL TO: margaret.henderson@tllrwdec.org

Ms. Margaret Henderson
Interim Executive Director
3616 Far West Boulevard, Suite 117, #294
Austin, Texas 78731

Re: Comments on Proposed Rule, "Exportation and Importation of Waste" (31 TAC §§675.21 - 675.23), 35 TexReg 1028 (Feb. 12, 2010)

Dear Ms. Henderson:

EnergySolutions, Inc. submits these comments on the Proposed Rule, "Exportation and Importation of Waste," which was published in the Texas Register on February 12, 2010. EnergySolutions, headquartered in Salt Lake City, Utah, is an international nuclear services company with operations throughout the United States, Canada, the United Kingdom and other countries around the world.

EnergySolutions has entered into long-term contracts with companies that operate nuclear facilities located within the Texas Compact that generate low level radioactive waste (LLRW). Under the terms of these contracts, EnergySolutions has reserved disposal capacity in its Clive, Utah facility ("Clive Facility") that is sufficient to guarantee disposal capacity for all of the LLRW, of the types that can be disposed at the Clive Facility, expected to be generated during the operating lives of the covered nuclear facilities. The parties to these existing contracts have agreed to various terms and conditions, including price, and the parties have made investments and incurred costs to implement the contracts, including procedures for packaging and transportation in order to assure compliance with the terms of the license for the Clive Facility and other applicable regulations.

The Proposed Rule would require that waste generators in the Texas Compact obtain an export permit before making arrangements to dispose of LLRW at a disposal facility located outside of the Texas Compact. Thus, the new rules could restrict future exports of LLRW to the Clive Facility and impair the rights of parties to existing contracts. This is not equitable, because it would deprive waste generators of their rights under existing contracts, and it would act to penalize EnergySolutions and its Clive Facility, which heretofore has been providing the waste disposal solution for a large amount of LLRW generated in the Texas Compact.

In order to address these inequities, the Proposed Rule should be modified to include a new provision in Section 675.21(f)(11) to add a consideration of pre-existing contracts when an Export permit is reviewed, as follows:

- (11) The existence of an agreement governing the export and disposal of waste at a facility in a non-party state that was entered into prior to the adoption these regulations governing “Exportation of Waste to a Non-Party State for Disposal,” in which case this factor shall be dispositive so as to authorize the Export Permit.

While *EnergySolutions* agrees that the Texas Compact has authority to adopt new rules that would restrict exports of waste from the Compact prospectively, the rules must do so in a way that does not impair pre-existing contract rights of waste generators within the Party states. It has been long-established that laws and regulations should not have the retroactive effect of impairing existing contract rights. In fact, Section 16 of Article 1 of the Texas Constitution prohibits the making of a “retroactive law, or any law impairing the obligations of contracts.” Though the courts have narrowed the application of the Texas “Contracts Clause,” the implications of this clause should especially be considered here, where the impairment of existing contract rights will act to deprive private parties of their rights for the explicit purpose of promoting the enterprise of another private company (the operator of the Compact facility).

Moreover, any failure to respect the terms of existing contracts raises issues as to whether future restrictions on the issuance of Export Permits constitute “takings” in violation of the Takings Clauses in the Fifth Amendment of the United States Constitution and Section 17 of Article 1 of the Texas Constitution. It is therefore imperative that the Proposed Rules be revised to indicate that pre-existing contracts will be respected and not impaired by the implementation of the new rules.

In addition to the specific legal argument described above, *EnergySolutions* provides specific comments to the rule analysis and proposed rule.

Impact to State of Texas

This section fails to recognize that requiring all waste generated within the Texas Compact be disposed at the WCS facility may have a negative impact on generators within the Texas Compact. Rates have yet to be established for the WCS facility. These rates may not be competitive with disposal rates currently received by generators who send waste outside of the Texas Compact. It is agreed that wastes exported will have a negative effect on the State of Texas General Revenue Fund, but the recognition of a negative effect of in-compact generators needs to be analyzed. Whereas the Powers and Policies of the Texas Compact are to provide for the “economical management” of radioactive wastes, failure to recognize that exportation may be the economical choice is an oversight.

Regulatory Analysis

This Commission determined that this proposed rule is not a “major environmental rule.” A “major environmental rule” is defined to mean “a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and

that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of the state or a sector of the state.” As mentioned previously, the proposed rule will have a direct negative financial effect on generators in the Compact who will now be required to send waste to the Regional Compact Facility at an undetermined cost. In addition, the importation of waste from outside the compact will have a direct environmental impact on the state that was not contemplated during the licensing of the facility. These two factors make this a “major environmental rule” and should be administered as such.

Proposed Rule

§675.21 This section discusses the exportation of waste to a non-party state for disposal. Section §675.21(d)(2)(A), provides direction that the fee will be based on the actual cost of evaluating the petition. *EnergySolutions* requests that an estimate be provided to the petitioner prior to incurring costs associated with review. It would be impossible for a petitioner to evaluate actual costs associated with an export petition (due to review) if fees are not determined until after the review. Therefore, *EnergySolutions* requests that the Texas Compact provide a cost estimate for any evaluation that exceeds the \$500 application fee and that the \$500 application fee be refunded should the petitioner decide to withdraw the petition based on excessive review costs.

§675.21(e) states “The proposed import agreement shall be accompanied by a certification by Texas Commission on Environmental Quality that the waste acceptance criteria have been met for the proposed waste importation.” “Import” and “importation” should be changed to “export” and “exportation.” This section also assumes that TCEQ will be required to “certify” that the waste acceptance criteria are met at the out of compact disposal facility. This puts a burden on TCEQ to “certify” that the waste acceptance criteria are met at facility not regulated by TCEQ. Typically, this “certification” would be provided by the petitioner and the disposal facility.

§675.21(f) addresses how the Commission will review export petitions. Economic impacts of the petitioner and the Host County, the Host State, and the Compact Facility operator will be considered in this review. The Commission should describe for public comment how this economic evaluation will be accomplished, including the proposal of criteria that the Commission will use to determine the trade-off of the economic impact on the petitioner versus the economic impact on the Host County, the Host State, and the Compact Facility operator.

§675.21(g) addresses how the decisions the Commission will make with respect to export petitions. We are assuming this is by a majority vote, but that should be specifically stated.

§675.22 This section discusses the 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. §675.22(a), however, discusses exportation to manage or process “material.” Materials are not necessarily wastes. §675.22(a) also discusses recycling of “materials” and then requires the “material” be returned for disposal in the compact facility. As written, a radioactive material licensee in the Texas Compact would be required to send usable materials out for recycling, and then those materials would need to be returned to Texas for disposal. EnergySolutions proposes that this section be revised to address radioactive waste, rather than radioactive materials.

This subsection is specific to wastes/materials sent for processing and then returning for disposal. Wastes exported for processing and subsequent disposal at a non-compact facility are not addressed in the proposed rule. §675.21 should include wastes sent for processing and disposal at a non-compact facility.

§675.23 This section discusses the importation of waste from a non-party state to the Texas Compact Regional Disposal Facility.

§675.23(b) states that “disposal capacity is reserved for Texas and Vermont as calculated by total pre-treatment volume and total activity, and neither shall be reduced by non-Compact waste”. §675.23(c) reiterates this and adds that import petitions will not be granted unless the operator has provided the total annual volume and that this volume will not reduce capacity for the Party States. The Radioactive Material License (RML) as currently approved authorizes the maximum disposal volume of 2,310,000 cubic feet at the Compact Disposal Facility. The Texas Compact Commission approved Rule 31 TAC Section 675.1 as required by 3.04.(11) “Commission Duties” which estimates that Texas will dispose of 5,000,000 cubic feet of LLRW during the period 1995-2045. The process to increase capacity at the facility will be lengthy, especially since the volume and source term will need to double just to accommodate the State of Texas. The Texas Compact should not consider importation of LLRW until after the facility is operational and a new license is approved with increased capacity and source terms.

§675.23(f) provides how fees will be determined as part of the evaluation of an import petition. It is impossible for a petitioner to evaluate actual



costs associated with an import petition (due to review) if fees are not determined until after the review. EnergySolutions proposes that the Texas Compact provide a cost estimate for any evaluation that exceeds the \$500 application fee and that the \$500 application fee be refunded should the petitioner decide to withdraw the petition based on excessive review costs.

§675.23(h) addresses how the Commission will review import petitions. Economic impacts of the petitioner and the Host County, the Host State, and the Compact Facility operator will be considered in this review. The Commission should describe for public comment how this economic evaluation will be accomplished. In addition, we recommend that the Commission receive approval from the exporting compact as part of the administrative controls.

§675.23(i) addresses how the decisions the Commission will make with respect to import petitions. We are assuming this is by a majority vote, but that should be specifically stated.

We commend the Texas Compact for the efforts taken so far to provide clear regulation on the export and import of radioactive wastes. We look forward to working with Texas Compact on this and future issues. If you have any questions or would like to discuss these comments further, please contact me at 801.649.2109 or 801-580-3201.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Daniel B. Shrum". The signature is fluid and cursive.

Daniel B. Shrum
Senior Vice President, Regulatory Affairs
EnergySolutions