



May 5, 2023

Via Email at comments@tllrwddc.org and stephen.raines@tllrwddc.org

Texas Low-Level Radioactive Waste Disposal Compact Commission
c/o Stephen Raines, Executive Director
1502 West Avenue
Austin, Texas 78701

Subject: Rules

Re: Comments from Waste Control Specialists, LLC (“WCS”) on the proposed changes to 31 Texas Administrative Code (TAC) § 675.24 concerning importation of Certain Low-Level Radioactive Waste for Management or Disposal that is not Required to be Disposed of in the Compact Facility (the “*Management Rule*”)

Dear Executive Director Raines,

WCS is grateful for the opportunity to provide public comments to the Texas Low-Level Radioactive Waste Disposal Compact Commission (the “*Compact Commission*”) on the proposed changes to 31 TAC § 675.24 concerning importation of Certain Low-Level Radioactive Waste for Management or Disposal that is not Required to be Disposed of in the Compact Facility (the “*Proposed Changes*” and, the Management Rule as proposed to be amended by the Proposed Changes, the “*Proposed Rule*”) that were posted to the Texas Register on April 7, 2023.

WCS is against adoption of the Proposed Changes and believes the Proposed Changes, if adopted, would (i) provide no discernable benefit, (ii) duplicate the activities of existing State of Texas regulatory agencies, (iii) confuse definitions relating to radioactive materials and waste, and (iv) cause other issues as identified below. Absent the Compact Commission’s substantive revision of the Proposed Rule to address WCS’s concerns in this letter, WCS will be forced to evaluate its next steps with respect to the Proposed Rule.

A. The Benefits of the Proposed Changes are Unclear and May not Exist.

The preamble to the Proposed Changes includes references to “the public interest” and “improved process” but it is not clear what the benefit is, how the benefit occurs, or how the proposed changes provide an improvement over current regulation by TCEQ and DSHS. The preamble also states that the proposed changes are exempt from Texas Government Code

2001.0045 because “the rule is necessary to protect the health, safety, and welfare of the residents of the state”. However, the Proposed Changes do not identify any health, safety, and welfare risks to Texas residents that this Proposed Change prevents or mitigates—because there are none. Therefore, the Proposed Changes should not be exempted from evaluation of costs to the regulated entity.

B. The Proposed Changes Duplicate the Authority and Requirements of Texas Regulatory Agencies.

The proposed changes are applicable to only the host state (Texas) and to entities that are licensed by the State of Texas. The state agencies that license these entities already regulate the “process with respect to the presence of low-level radioactive waste in Texas” which the proposed changes are intended to “improve”. Specifically:

- TCEQ licenses facilities for storage of low-level radioactive waste (“*LLRW*”) and for waste processing in the State of Texas. All LLRW that is located at licensed waste storage or processing facilities is tracked and reported to TCEQ per the conditions of those licenses. TCEQ has full-time technical staff assigned to these activities and has enforcement authority for compliance with the terms of those licenses.
- DSHS licenses the use and storage of radioactive materials such as sources in the State of Texas. DSHS is also responsible for transportation of radioactive materials within Texas. Those radioactive materials are tracked and reported to DSHS per the conditions of those licenses and authorizations. DSHS has full-time technical staff assigned to these activities and has enforcement authority for compliance with the terms of those licenses and authorizations.

The Proposed Changes would authorize a non-agency of the State of Texas to duplicate authorities that have been delegated to the State of Texas by the federal Nuclear Regulatory Commission. WCS asserts that unitary regulation of Texas licensed activities by Texas agencies should take priority over dual regulation by the Compact Commission.

The Proposed Changes would duplicate the authority and requirements of TCEQ and DSHS and would require reports on nearly the same information. If the regulated entity did not provide these reports to the Compact Commission, the Compact Commission could report the regulated entity to the actual regulatory body that issued the regulated entity’s license or permit. This clearly is establishing unnecessary dual oversight of LLRW and radioactive material. This dual oversight of radioactive materials, including, without limitation, LLRW that are not intended for disposal at the Compact Facility, does not “improve” the management of these materials, it only adds cost and effort both to the Compact Commission and to the regulated entities while providing no incremental benefit.

C. The Proposed Changes Render the Management Rule Unclear.

- i. The Proposed Changes mistakenly conflate radioactive material with waste.*

All LLRW is “radioactive material” but radioactive material that is in use or in storage and has not been declared to be “waste” is not LLRW.

The definition of Non Compact Facility Waste (“*NCFW*”) that is embedded in the current version of the Management Rule limits this term to only LLRW. 31 TAC § 675.24(b). However, the Proposed Rule now provides no definition of NCFW yet uses the acronym throughout.¹ The context, however, seems to indicate (but is wholly unclear) that NCFW would include radioactive material that is not LLRW. 31 TAC § 675.24(c)(3). However, the Compact Commission does not have statutory authority over radioactive materials that are not LLRW, and cannot create this authority through rulemaking.

Moreover, the Proposed Changes render the Management Rule, at a minimum, confusing and renders it insufficient to provide notice as to who is a regulated entity and the reporting requirements under the Proposed Rule. For example, the Proposed Rule includes reporting requirements for both LLRW and radioactive materials “that may subsequently be declared NCFW” but it is unclear how or when this determination would be made. Additionally, the Proposed Rule uses the terms “LLRW,” “NCFW,” “radioactive material,” and “waste” interchangeably despite the fact that they have different meanings and, in some instances, no definition. Finally, Sections 675.24(g)–(k) of the Proposed Changes refer exclusively to NCFW, which is in direct conflict to the requirements that are stated in the Proposed Changes to Section 674.24(d).

ii. The scope of application of the Proposed Rule is unclear.

Section (b) of the Proposed Rule states that “This section is applicable only to State of Texas licensed waste processors or brokers, or source consolidators, of certain radioactive waste (LLRW) . . .” However, “source consolidator” is an undefined term and it is unclear if the Proposed Rule intends to include parties that manufacture, refurbish, or recycle sources and source devices under license from DSHS, or if the term is limited solely to entities licensed by TCEQ. In fact this undefined term potentially includes entities that consolidate and dispose sources as a service to other industries such as the oil and gas industry.

References to importation of radioactive material from a foreign country under 10 CFR Part 110 is written broadly enough that it could be interpreted to include radioactive materials that are commonly imported by many industries, including, without limitation, uranium miners, medical services, oil and gas service providers, and the nuclear power industry.

As noted above, the Proposed Rule, as written, is not only likely to cause uncertain regulatory application and unintended errors but reads to govern radioactive materials the Compact Commission does not have the authority to regulate. WCS respectfully requests that the Compact

¹ WCS believes that if the Compact Commission were to add a new definition for NCFW (as a result of the comment process) that includes radioactive material that is not LLRW, the Compact Commission would need to republish the amended proposed rule because the change would affect entities who were not on notice that they are intended regulated entities (and thus did not participate in the current comment process).

Commission require the reporting of only LLRW and, at a minimum, requests that the Compact Commission make clear the Proposed Rule's scope and the materials required to be reported prior to enacting any amendments to the Management Rule.

D. The Proposed Changes Improperly Attempts to Establish Authority over Interstate Commerce of Radioactive Materials.

As a Commissioner stated in the Compact Commission's public meeting held on October 28, 2021, the Management Rule is simply a reporting rule.² This was also the position the Compact Commission held in 2018, when responding to comments to a prior amendment, stated:

New §675.24 is not intended to set up a system to approve or disprove of the importation into the host state of waste described in §675.24(b). The rule is intended to require entities within the host state who do import the described waste for management or disposal to report such importations to the Commission on a regular basis.³

The Proposed Rule is drafted, however, in a way to prohibit interstate commerce, giving the Compact Commission the right to "unilaterally revoke" the right to import radioactive material from those persons who do not comply with the Management Rule—despite the fact that such person may otherwise be licensed and authorized to import such radioactive materials under state and/or federal authorities. The Proposed Rule offers no right to appeal or challenge the amendment or revocation if and when the Compact Commission decides to unilaterally revoke or amend an agreement entered into under the Proposed Rule.

The Compact Commission may not utilize the Management Rule as a means to prohibit interstate commerce of materials that it does not have authority to regulate. *See supra* Section C.

E. Implementation and Compliance with the Proposed Changes to the Management Rule Increases Costs, Contrary to the Compact Commission's Determinations.

It is unclear what method or analysis the Compact Commission performed to determine there would be:

- No fiscal implications on state or local governments.
- No probable economic cost to business or individuals required to comply with the Management Rule.
- No impact on local employment or economy.
- No cost to regulated persons.

² October 28, Meeting, at 1:51:37–54, TEXAS LOW LEVEL RADIOACTIVE WASTE DISPOSAL COMPACT COMMISSION, available at <https://www.youtube.com/watch?v=gNOa0DshIKg> (last visited March 8, 2022).

³ 43 Tex. Reg. 1873.

- No adverse economic impact on small businesses, microbusinesses, and rural communities.
- No decrease in fees paid to a state agency.

As one of the regulated entities, WCS does not agree with these assessments. Upon information and belief, the Compact Commission has not engaged in the required analysis⁴ for proposing a rule under the Administrative Procedure Act (*see* Chapter 2001 of the Texas Government Code), including, without limitation, Sections 2001.0221 and 2006.002 of the Texas Government Code.⁵ *See, e.g., Unified Loan, Inc., et al. v. Pettijon*, 955 S.W.2d 649 (Tex. App.—Austin 1997, no pet.) (holding conclusory statement in preamble of proposed rule regarding effect on small businesses was insufficient to provide notice as required by the Administrative Procedure Act).

Costs that would be imposed on regulated persons will generally fall into two significant categories: (i) the cost to collect the additional supporting information and documentation that would be required under Section 675.24(d)(6) and (7) of the Proposed Changes, and (ii) the cost of reporting. Costs may also be extended to additional regulated entities as the scope of the Management Rule has expanded.

- WCS typically tracks up to 2000 individual inventory items for reporting to the Compact Commission. Based on the current level of effort that is required -- to ensure complete and adequate documentation is provided to meet the Proposed Rule, WCS projects the need to employ one additional full time equivalent technical specialist employee.
- WCS' cost of reporting would include the manual assembling of information for all of the tracked items, quality assurance reviews of the data, manual preparation of reports, and manual entry of the information into the Compact Commission electronic forms. This work is estimated to require at least another half time equivalent technical specialist employee. While many of WCS' current reports to regulators can be more efficiently produced directly from the WCS' waste tracking database, including these Proposed Changes in the database would require a significant additional programming and restructuring of the system at an estimated cost in excess of \$200,000. Based on the unclear effective date of the Proposed Rule, it is unclear if WCS would even be able to meet the deadline for implementation of the revised reporting.

The Proposed Changes would also increase costs on other business and individuals who would have to provide information (that was not previously required) to regulated entities to allow

⁴ WCS is currently investigating this claim and will provide a supplemental response based on its findings.

⁵ "A rule is voidable unless a state agency adopts it in substantial compliance with Sections 2001.0225 through 2001.034." TEX. GOV'T CODE ANN. § 2001.035.

the regulated entities to remain in compliance with the Proposed Rule. These costs could be extensive based on the volume of activity of that other business or individual.

Costs to the state include additional reviews of a six-fold increase in reports which would expand to include the additional scope of radioactive materials, additional supporting information and documentation, and potentially an increased number of regulated entities. It is clear that anything more than a cursory review will require significant additional technical support to perform detailed reviews and to follow up with discussions with the regulated entities, and therefore an increase in Compact Commission employees or contractors (and an associated increase in future legislative appropriations).

It is highly likely that the Proposed Rule will have the impact of reducing fees paid to the state and/or the local government. The increased burden and the perceived burden of the additional information that is required by the Proposed Changes, and the risk of inadvertent reporting infractions, will be viewed as a hurdle that is likely to drive customers to alternative waste management options in other states that are not subject to similar rules. This would reduce fees to the state and/or local government from the Compact Facility or the exempt facility or both.

The Proposed Rule amends the Management Rule by increasing the breadth of reportable materials and the reporting frequency which flies in the face of the Compact Commission's unsupported (and false) statement that: "The new rules impose no additional reporting requirements."

i. Increased Reporting Requirements

The Proposed Changes would increase the reporting requirements to monthly from the current semi-annual reporting requirement. Increasing the reporting frequency to monthly ignores that in 2018, the Compact Commission found quarterly reporting to be too burdensome (and thus settled on semi-annual reporting).⁶ WCS is not aware of any changes since that time that now support monthly reporting.

Furthermore, it is unclear how the Compact Commission will review the six-fold increase in reports (along with the additional reporting of radioactive materials not previously subject to the Management Rule) without incurring any additional costs. The Compact Commission is currently limited to an Executive Director and an assistant to the Executive Director, but has no technical staff. Moreover, the Compact Commissioners themselves meet only every 6-8 weeks (having met six times in 2019, seven times in 2020, six times in 2021, and six times in 2022).⁷

⁶ 43 Tex. Reg. 1874.

⁷ *Public Meetings*, TEXAS LOW LEVEL RADIOACTIVE WASTE DISPOSAL COMPACT COMMISSION, available at <http://www.tllrwdec.org/about-the-comission/public-meetings/> (last visited April 10, 2023).

ii. Unreasonable Effective Date

An adopted rule is typically effective 20 days after the date of filing of the adoption (not when the adoption is published) with the Texas Secretary of State (“SOS”) unless required by statute or the rule specifies otherwise.⁸ The Proposed Changes do not specify an effective date for the significantly revised reporting requirements, so it must be assumed that the Compact Commission would intend to provide the standard effectiveness of 20 days following filing of the adoption with the SOS. This is an inadequate time frame for each regulated entity to complete a revised agreement with the Compact Commission, create new systems to capture data, accumulate data on hundreds of individual items, conduct appropriate quality assurance and management reviews, assemble the data into electronic forms that are specified by the Compact Commission (and that are not currently available), and submit the completed forms on time.

The Compact Commission should, at a minimum, provide a delayed effective date to allow entities to adequately prepare for the Proposed Changes.

iii. Burdensome Reporting Deadlines

The Proposed Changes would require accelerated reporting—before the fifteenth day of each month. WCS reads this as not on the fifteenth day but before the fifteenth day (*i.e.*, on or before the fourteenth day).⁹ This 14 calendar day deadline is in stark contrast to similar tracking reports that are provided to TCEQ (typically with a deadline of one month after the end of the period), the Railroad Commission of Texas (such as the last day of the month requirement for monthly oil and gas production reports), or even the Compact Commission’s current 31-day reporting requirement.

F. Request for Statement of Reasons for or Against Adoption of the Proposed Changes (including Proposed Rule) Pursuant to Section 2001.030 of the Texas Government Code.

WCS hereby requests the Compact Commission “issue a concise statement of the principal reasons for and against” the adoption of the Proposed Changes (including Proposed Rule) pursuant to Section 2001.030 of the Texas Government Code.

G. The Proposed Changes Contain Clerical Errors.

- a. The Proposed Changes deletes the definition of the acronym “NCFW” despite saying it is “defined in this section.” Thus, NCFW would be undefined in the Proposed Rule.

⁹ WCS is unclear of the deadline if the fourteenth day falls on a Saturday, Sunday, or legal holiday (*i.e.*, is the due date the next business day).

NCFW is also not defined in 21 TAC §675.20 “Definitions”. A definition of NCFW should be proposed.¹⁰

- b. In 675.24(a)(3) the phrase “and becomes low-level radioactive waste as a result of the processing, recycling, or consolidation” is repeated. One instance should be removed.

WCS appreciates the opportunity to provide this input and values its ongoing relationship with the Compact Commission. We look forward to continuing to work with the Compact Commission.

Sincerely,

WASTE CONTROL SPECIALISTS, LLC

A handwritten signature in black ink that reads "David S. Carlson". The signature is written in a cursive, flowing style.

David Carlson,
President and Chief Operating Officer

¹⁰ See *supra* note 1.