WASTE CONTROL SPECIALISTS

February 12, 2024

Via USPS & Email: comments@tllrwdcc.org

Stephen Raines
Executive Director
Texas Low-Level Radioactive Waste Disposal Compact Commission
919 Congress Avenue, Suite 830
Austin, Texas 78701

Subject: Rules

Re: Comments of Waste Control Specialists, LLC on the proposed changes to 31 Tex. Admin. Code § 675.24 (the "Management Rule"), published on January 12, 2024 at 49 Tex. Reg. 123

Dear Executive Director Raines:

Waste Control Specialists, LLC ("WCS") appreciates the opportunity to comment on current proposed changes to the Texas Low-Level Radioactive Waste Disposal Compact Commission's (the "Compact Commission's" or the "Commission's") Management Rule, as published at 49 Tex. Reg. 123 (the "Proposed Rule").[1] We commend the Commission for modifying some problematic aspects of its earlier proposed rule, which had been published on April 7, 2023 and later withdrawn (the "Withdrawn Rule"). But, as discussed in detail below, serious issues remain. The Proposed Rule (i) exceeds the federally established Commission's statutory authority and usurps powers that belong to the State of Texas, (ii) is vague, internally inconsistent, and therefore confusing, (iii) imposes more onerous conditions on Texas entities, vis-à-vis Vermont entities, (iv) duplicates existing regulations by agencies that are statutorily charged with regulating radioactive materials, and (v) imposes significant compliance costs on regulated entities and reviewing costs on the Commission.

I. The Proposed Rule unlawfully expands the Commission's powers beyond those conferred upon it by law.

Pursuant to its power under the Commerce Clause, Congress authorized states to enter into compacts to facilitate the management and disposal of low-level radioactive waste ("LLRW") generated in their states.[2] For such purpose, Texas and Vermont[3] entered into a Congressionally approved agreement (the "Compact") that imposed requirements on both states and that established the Compact Commission as an independent entity under

[1] The thirty-day deadline, which ended on a Sunday, rolls over to the next working day under § 311.014 of the Code Construction Act, which applies to Chapter 2001 of the Government Code.
[2] *See* 42 U.S.C. § 2021d(a)(2); PL 105–236.
[3] Maine, which was also an original party to the Compact, later withdrew.

Article III of the Compact.[4] The Compact Commission is authorized to regulate the import of LLRW that is destined for disposal in the Compact Facility and the export of LLRW generated within the party states to a non-party state.[5] However, as discussed below, the Proposed Rule goes beyond the Compact Commission's statutory powers by regulating the import of materials that are neither LLRW nor destined for the Compact facility. The Commission exceeds its statutory power by attempting to regulate substances and entities that it was never given authority to regulate.

A. The Commission cannot usurp powers the Compact confers on the State of Texas.

The Compact, a federal law codified into state law at Texas Health & Safety Code § 403.006, confers upon the Compact Commission the rights and responsibilities in Article III and the enforcement authority in Article VI. Regardless, the preamble to the Proposed Rule states that the rule changes are authorized by the following sections of the Compact: 3.05(6), 4.02, 4.04(2), (5), 4.05(1)-(4), 6.01 and 6.02. However, Article IV, which sets out sections 4.02, 4.04(2), (5), 4.05(1)-(4), establishes the rights, responsibilities, and obligations of the party states—not the Commission, which is an entity separate from the party states.[6] The Commission exceeds its authority by usurping powers reserved to Texas and Vermont.[7]

B. Even if the Commission could exercise those powers, the sections of the Compact that the Commission cites as authorizing the regulation of the import of materials that are *not* LLRW destined for the Compact facility, do not.

As stated above, the Commission unlawfully usurps powers that the Compact confers on the states of Texas and Vermont. But even if it could exercise the powers under those sections, the sections do not authorize the Proposed Rule: nothing in Sections 3.05(6), 4.02, 4.04(2), (5), 4.05(1)-(4), 6.01 or 6.02 authorizes the Commission to gather information on radioactive materials (that are not LLRW) or to preclude the importation of NCFW (that is not LLRW) until an amended NCFW agreement is executed and complied with. In fact, one of the sections, Section 4.05(4), shows that the parties anticipated that the Commission would obtain any information it needed from the state. Section 4.05(4) provides that the party states must:

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[4] *See, e.g.*, Public Law 105-236, "Texas Low-Level Radioactive Waste Disposal Compact Consent Act," which was signed into law by President Clinton. Congressional approval makes the compact federal law. *EnergySolutions, LLC v. Utah*, 625 F.3d 1261, 1271 (10th Cir. 2010).

[5] TEX. HEALTH & SAFETY CODE ANN. §§ 403.006, Secs. 3.05-.06.

[6] Sec. 3.03 of the Compact provides, "The commission is a legal entity separate and distinct from the party states." TEX. HEALTH & SAFETY CODE ANN. § 403.006. *See also* TEX. HEALTH & SAFETY CODE ANN. § 403.0051(a).

[7] *See generally Alabama v. North Carolina*, 560 U.S. 330, 352 (2010).

> Provide the commission with any data and information necessary for the implementation of the commission's responsibilities, including taking those actions necessary to obtain this data or information.

It is the respective states—and here, in particular, the State of Texas—not the Commission, that must provide the Commission with any additional information the Commission needs to implement its responsibilities.[8]

C. The Compact Commission is authorized to regulate only the import of LLRW destined for disposal at the Compact facility.

The Proposed Rule exceeds the Commission's power by attempting to regulate the import of materials that are not LLRW destined for disposal at the Compact facility. The Compact Commission states that this Proposed Rule will "protect[] the health, safety, and welfare of the residents of Texas by allowing the Commission to be fully informed of the nature, volume, and curie count of radioactive material entering the [sic] Texas."[9] This is because, the Commission says, radioactive material "may become waste that either will need to be disposed of in the Compact Facility, disposed of at another alternate approved facility or will need to be exported."[10] The Proposed Rule goes well beyond regulating the management of LLRW at the Compact facility,[11] the import of LLRW for disposal at the Compact facility, or the export of LLRW from a Compact state,[12] which are the Commission's only charges. Indeed, as discussed below, it is either the Texas Commission on Environmental Quality ("TCEQ") or the Texas Department of State Health Services ("DSHS") that is charged with licensing, registering, or exempting any person who uses, manufactures, produces, transports, receives, acquires, owns, possesses, processes, or disposes of a source of radiation in Texas that is not LLRW—not the Commission.[13]

Further, just as the Commission cannot usurp powers that the Compact confers on Texas, the Commission cannot usurp powers that Texas inherently exercises: the Commission has no power at all to regulate to "protect[] the health, safety, and welfare of the residents of Texas." The party states, Texas and Vermont, possess as sovereigns the general police powers to protect the health, safety, and welfare of their states.[14] The states

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[8] *See, e.g.*, TEX. HEALTH & SAFETY CODE ANN. §§ 403.006, Secs. 3.05(6) (can agree to import LLRW for management or disposal); 3.05(7) can allow the export of LLRW outside the party states).
[9] 49 Tex. Reg. 123, 124 (Jan. 12, 2024).
[10] *Id.* at 124.
[11] The Compact Commission's authority to place limitations and conditions on, or to otherwise limit, the importation of radioactive materials for management or disposal is expressly limited to LLRW. Section 3.05(6) of the Compact, to which the Compact Commission cites, in part, to in support of its authority to promulgate the Proposed Rule, is limited to requiring agreements for "the importation of low-level radioactive waste into the compact for management or disposal." The purpose of Section 3.05(6) is to regulate the importation of LLRW that was generated outside of the party states for management or disposal within the party states, which is otherwise prohibited under Section 6.02 of the Compact.
[12] *See* Self-Evaluation Report; *see generally* TEX. HEALTH & SAFETY CODE ANN. § 403.006 & 10 C.F.R. 110.9(b).
[13] TEX. HEALTH & SAFETY CODE ANN. § 401.101.
[14] *Williams v. State*, 176 S.W.2d 177, 182 (Tex. 1943, no pet.); *Wylie v. Hays*, 263 S.W. 563, 565 (Tex. 1924); *Logan v. State*, 1878 WL 9110, at *5 (Tex. App. 1878, no pet.).

exercised those powers when they entered into the Compact.[15] But the states did not cede their general police powers to the Compact Commission by that agreement.[16] The particular duties the Compact authorizes the Commission to perform are narrowly circumscribed and limited to the import of LLRW for disposal at the Compact facility and the export of LLRW from the party states. The Compact is not a governmental entity with general welfare powers but a commission implementing a federally sanctioned compact—*i.e.*, a federal law—between the states.[17] Not only does the Compact not cede any authority over the health, safety and welfare to the Commission, but the federal statute under which the Compact was created expressly states that, "Nothing contained in sections 2021b to 2021j of this title or any compact may be construed to confer any new authority on any compact commission or State . . . to regulate health, safety, or environmental hazards from source material, byproduct material, or special nuclear material . . . ."[18] The Proposed Rule violates that constraint.

Despite changes from the Withdrawn Rule, the Proposed Rule still wrongly attempts to regulate radioactive materials that are ***not*** waste. The Commission states in (c)(4) that "information ***gathering*** . . . does not begin until after the radioactive material is declared waste." However, the information gathering must begin when the radioactive material is received, in order for the information to be available for possible later reporting under (d). It is only the ***reporting*** of the previously gathered information that begins after the radioactive material is declared waste. The Proposed Rule also requires that an importer of "Non-Compact-Facility Low-Level Radioactive Waste" ("NCFW") must enter into an agreement before importing NCFW, even though it is not yet waste, much less LLRW waste.

The Proposed Rule goes so far as to provide that the Commission may "unilaterally revoke or amend" an agreement made compulsory under the Proposed Rule for NCFW. Subsection (k) of the Proposed Rule would grant the Compact Commission the power to prohibit the importation of NCFW—even if such NCFW does not constitute LLRW—until the importing party has an "NCFW agreement" with the Compact Commission, which the Compact Commission would be able to unilaterally revoke. But the only authority the Compact grants to the Compact Commission to block the importation of materials is found in Section 6.03 of the Compact, which allows the Compact Commission to prohibit persons from disposing of LLRW in the compact facility for violations of Sections 6.01 or 6.02 of the Compact. Section 6.01 requires that LLRW generated in the party states be disposed of only at the Compact facility (unless the Commission allows it to be exported) and Section 6.02 prohibits anyone from managing or disposing of LLRW within the party states unless the LLRW was generated within the party states (unless the Commission allows the

[15] TEX. HEALTH & SAFETY CODE ANN. §§ 403.006, Art. I.
[16] *Compare, e.g., Entergy Arkansas, Inc. v. Nebraska*, 358 F.3d 528, 534 (8th Cir. 2004).
[17] *Com. of Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. 518, 566 (1851); EnergySolutions,* 625 F.3d at 1271.
[18] 42 U.S.C.A. § 2021d.

waste to be imported). The Commission's attempt to restrain the importation of NCFW (that may never constitute LLRW) from persons who are not in violation of Sections 6.01 or 6.02 of the Compact is ultra vires and outside of the Commission's authority. And, because the Commission's regulation of waste that is not LLRW is not Congressionally authorized, it is also an unconstitutional restraint on trade.[19]

II. The Proposed Rule is vague, internally inconsistent, and confusing.

The following inconsistencies make it difficult to understand which entities and wastes are subject to the Proposed Rule and what is expected of such entities.

First, the Proposed Rule is unclear whether a particular burden is imposed on the facility receiving the waste or material, or on the generator of that waste or material—or both.

- Section 675.24(b) states that the rule applies only to Texas licensed "waste processors or brokers, or source consolidators," which makes it appear that it is the entity ***receiving the waste*** that is subject to the rule, rather than the generator of the waste. However, in § 675.24(c), the use of the undefined term "importation" implies that the ***generators*** of the NCFW must seek import approval of this material, as non-party generators must under § 675.23. But § 675.24(d), although it also refers to the entity that "imports" NCFW into the state (once again, the same term used in § 675.23), provides that the agreement must require the entity to report certain information "with respect to each shipment of NCFW that it has ***received*** in the previous month," suggesting that it is the receiving facility that must enter into the agreement.
- Later, though, § 675.24(i) requires an "entity that imports NCFW into the host state" to submit an application for entry into an agreement, and under § 675.24(j), the Commission can report a failure to comply with the agreement to the state or federal agency that has licensed or otherwise authorized the operation of that entity. The applicability portion of § 675.24(i)—an "entity that imports NCFW into the host state"—differs from that of § 675.24(d), which requires any "entity in the host state that imports NCFW" to enter into an agreement with the Commission. This makes it appear that (h)-(k) apply to an ***out-of-state generator*** rather than the receiving facility. Also, (h)-(k) are extraneous to the extent they apply to an out-of-state entity that imports "NCFW" into Texas, because NCFW is defined as LLRW in § 675.24(b), the importation of which is addressed by § 675.23(d).

WCS requests that the Commission define the terms it uses, use those terms consistently, and clearly state which entity is required to enter into a contract with the Commission and for what purpose.[20]

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[19] *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or*., 511 U.S. 93, 100 (1994); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 146 (1970).

[20] Using headings and subsections would also add clarity.

Second, § 675.24(b), which provides that the section applies only to LLRW as defined in 30 TAC § 336.2(89), seems to conflict with § 675.24(c)(2) and (c)(3).

- Section 675.24(c)(1) and (2) excludes waste that is neither waste for which the federal government is responsible or that is shipped pursuant to an import agreement under § 675.23 but includes waste that is required to be listed on a NRC waste manifest or "other shipping paperwork (including but not limited to Bill of Lading, Hazardous Waste Manifest or other manifest)…." It is unclear whether "other shipping paperwork" is limited to only that required for LLRW waste as defined in 30 TAC § 336.2(89), which paperwork can vary; if not, it opens wide the universe of regulated materials that are not LLRW at the time of shipment but still may be radioactive material. It is also unclear whether § 675.24(c)(2) applies when the shipped material is not LLRW as defined by 30 TAC § 336.2(89). Please clarify that the "importer" of a waste that is not LLRW as defined by 30 TAC § 336.2(89) does not have to have an agreement with the Commission and has no responsibilities under § 675.24 and also that the "other shipping paperwork" that includes any "Bill of Lading, Hazardous Waste Manifest, or other manifest" refers only to the shipping paperwork required for LLRW waste as defined in 30 TAC § 336.2(89).
- Section 675.24(c)(3) applies to a broader category, radioactive material, that is "received" for processing, recycling or consolidation and is subsequently declared to be LLRW as result of such processing, recycling or consolidation. The term "radioactive materials" is broad and is not limited to waste, much less LLRW. As discussed above, even if the reporting requirements do not apply until the material becomes waste (which type of waste remaining unclear), the requirement that the entity (which type of entity remaining unclear) must enter into a NCFW agreement and gather information begins either before or on receipt of the material, respectively.

Third, the Proposed Rule includes reporting requirements for both NCFW and radioactive materials "that may subsequently be declared NCFW" but it is unclear how or when this determination would be made.

Fourth, NCFW is ill-defined. "NCFW" is defined in § 675.24(b) as "the material described in this subsection."[21] However, to the extent any material is "described" in subsection (b), it only describes "certain radioactive waste (LLRW) that is included in the definition of low-level radioactive waste found in 30 TAC § 336.2(89)." If the intent is for the defined term "NCFW" to include the materials described in subsection (c), the defined

[21] Proposed Rule, at § 675.24(b), provides: "This section is applicable only to State of Texas licensed waste processors or brokers, or source consolidators, of certain radioactive waste (LLRW) that is included within the definition of low-level radioactive waste found in 30 TAC §336.2(89) (relating to Definitions) as the definition is in effect on the date this section becomes effective, or as 30 TAC §336.2(89) may be amended or renumbered in the future. ***For the purposes of this section, the material described in this subsection will be referred to as Non-Compact-Facility Low-Level Radioactive Waste ("NCFW")***." (Emphasis added.)

term for "NCFW" should be defined as "the material described in subsection (c)," not as currently defined as the material described in subsection (b).

Finally, the Proposed Rule uses undefined or ill-defined terms, which leads to its vague application and contradictory interpretations. 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. Terms that should be defined (or better defined) include NCFW, waste processor, broker, and source consolidator.

III. The Proposed Rule apparently sweeps into the Commission's purview entities it does not currently regulate and that are not subject to its statutory jurisdiction.

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, refurbish or recycle sources as a service to other industries such as the oil and gas industry, which is vital to the economy of the State of Texas.

Potential issues that could arise include the following:

- If an oil and gas operator uses radioactive sources in its operations in New Mexico and ships the materials to one of its locations in Texas for consolidation, eventually sending the consolidated materials to WCS on an NRC shipping form, is the oil and gas operator's facility in Texas or New Mexico the "importer" that is required to have the "NCFW agreement"?
- Moreover, if these materials described above were oil and gas NORM, which is not LLRW, would these materials constitute NCFW, just because they are shipped on a NRC form?
- If an entity operating under a Texas DSHS radioactive material license that is authorized for NORM, byproduct, and other radioactive materials, none of which are LLRW as defined in 30 TAC § 336.2(89), receives materials from either in or out-of-state sources, consolidates some or all of the waste, and then ships it on an NRC shipping form to WCS, must either the DSHS licensee or WCS have a NCFW agreement with the Commission?
- If an industrial operator in Oklahoma ships his NORM waste to another company in Oklahoma, which consolidates that waste with other NORM waste, none of which is LLRW, and then ships it to WCS on a shipping form,

must either WCS or the out-of-state company who shipped it to WCS required to have a NCFW agreement with the Commission?

- If a Texas uranium mine sends radioactive byproduct waste that is not LLRW (as defined by 30 TAC § 336.2(90)) to WCS, for exemption and disposal in its RCRA Subtitle C landfill, is WCS required to report this radioactive waste processing and disposal on its NCFW monthly report?

Additionally, the reference to the 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 and equipment 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, not only gives rise to uncertain regulatory applications and unintended errors but appears to regulate radioactive materials the Commission clearly does not have the authority to regulate. WCS respectfully requests that the Commission require the reporting of only LLRW and, at a minimum, requests that the Commission make clear the Proposed Rule's scope and the materials required to be reported prior to enacting any amendments to the Management Rule.

IV. The Proposed Rule imposes more onerous conditions on Texas entities, vis-à-vis Vermont entities.

To the extent that the Proposed Rule requires "waste processors or brokers, or source consolidators" licensed by Texas to enter into a contract, keep records, and submit reports, but does not require "waste processors or brokers or source consolidators" licensed by Vermont to enter into a contract, keep records, and submit reports, the Proposed Rule imposes more onerous conditions on Texas entities than on Vermont entities. This is unacceptable.

V. As with the Withdrawn Rule, the Proposed Rule duplicates the authority and requirements of Texas regulatory agencies.

The Proposed Rule states that it applies only the host state (Texas) and to entities that are licensed by the State of Texas.[22] The state agencies that license these entities already regulate the "with respect to the presence of low-level radioactive waste in Texas" which the proposed changes are intended to "improve."[23] Specifically:

- TCEQ licenses facilities for the 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

[22] However, as discussed throughout, the Proposed Rule would apparently halt the importation of materials that are not LLRW into the state, in certain circumstances.
[23] 49 Tex. Reg. 124 (Jan. 12, 2024).

activities and has enforcement authority for compliance with the terms of those licenses. In addition to copies of reports WCS files at the TCEQ that the Commission has already received from the TCEQ, WCS has specific license conditions that require detailed inventory reporting such as License Condition 187, which is provided monthly to TCEQ.

- 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 Rule 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. In the Compact, Texas did not consent to such dual regulation by the Commission.

The Proposed Rule would duplicate the authority and requirements of TCEQ and DSHS and would require reports on much of the same information, although for different purposes and in different format. 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 establishes unnecessary and unauthorized dual oversight of LLRW and radioactive material. This dual oversight of radioactive materials, including, without limitation, waste that is 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.

VI. The Proposed Rule improperly attempts to establish authority over the interstate commerce of radioactive materials.

As discussed above, the Commission improperly attempts to establish authority over the interstate commerce of radioactive materials, an ultra vires act. The Commission also knew that, at one time. A Commissioner stated in the Compact Commission's public meeting held on October 28, 2021 that the Management Rule is simply a reporting rule.[24] 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

[24] 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 Feb. 12, 2024).

waste for management or disposal to report such importations to the Commission on a regular basis.[25]

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 that is not LLRW 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.[26]

VII. The Benefits of the Proposed Rule are unclear and may not exist.

The preamble to the Proposed Rule states that it will improve the "reporting, processing, and transparency with respect to the presence of low-level radioactive waste in Texas"[27] 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" because it provides a means of "[k]nowing the nature, volume, and curie count of radioactive material entering Texas." However, as discussed, the Commission has no authority to regulate for health, safety and welfare. Further, neither the preamble nor the Proposed Rule identify any health, safety and welfare risks to Texas residents that the Proposed Rule prevents or mitigates.

Additionally, the preamble states that the rule is exempt from the requirements of Texas Government Code § 2001.0045 because "the Commission is an independent entity established by federal law and governed by the compact and is not a 'state agency.'" While it is true that the Compact Commission is an independent entity, the Compact requires that any rules the Compact Commission promulgates "shall be adopted in accordance with Chapter 2001, Government Code."[28] Therefore, the Proposed Rule is not exempt from the evaluation of costs to the regulated entity.

VIII. Implementation of and compliance with the Proposed Rule increases costs, contrary to the Commission's determinations.

Costs that would be imposed on regulated persons will generally fall into two significant categories: (i) the cost to gather the additional supporting information and

[25] 43 Tex. Reg. 1871, 1873 (March 23, 2018).
[26] *See supra Section* I.
[27] 49 Tex. Reg. 123, 124 (Jan. 12, 2024).
[28] TEX. HEALTH & SAFETY CODE ANN. §§ 403.006, at Sec. 3.05(4).

documentation that would be required under § 675.24(d) and (ii) the cost of reporting. Costs may also be extended to additional regulated entities as the scope of the Management Rule has expanded.

A. The cost to gather and track the additional information would be considerable.

It is unclear what method or analysis the Compact Commission performed to determine there would be little costs associated with the Proposed Rule, particularly when WCS (and NSSI) has given the Commission information that contradicts some of the statements. The preamble to the Proposed Rule states that 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 other than the development of a database query.
- No impact on local employment or economy.
- No adverse economic impact on small businesses, apart from a one-time cost of $416.32 to NSSI.
- No adverse economic impact on microbusinesses and rural communities.
- No decrease in fees paid to a state agency.

Contrary to some of those determinations, WCS has advised the Commission and its consultant that its cost to track the additional information would be considerable.

- WCS typically tracks thousands of individual items regarding radioactive waste. Based on the current level of effort that would be 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, and manual preparation of reports. 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. Because the effective date of the Proposed Rule is unclear, it is also unclear whether WCS would be able to meet the deadline for implementation.

As WCS advised the Commission's consultant by letter dated November 30, 2023, the changes the Commission made in this Proposed Rule to the Withdrawn Rule does not

change its estimate of costs. NSSI, in its comments on the Proposed Rule, also stated that the Commission's preamble did not accurately state its costs.

The Proposed Rule would also newly impose costs on entities that are not currently regulated but who would be regulated under the Proposed Rule. These costs could be extensive depending on the volume of activity of those entities.

Costs to the state—to the extent the state reimburses the Commission—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 Commission employees' or contractors' time (and an associated increase in future legislative appropriations).

As WCS has advised the Commission, 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 Rule, 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. As an example of financial impacts to the state and/or local government, for a typical 10,000-ton project relating to WCS's RCRA disposal facility, the state fee would be $84,000 (state fee of $8.40 per ton). If a customer was to find alternative waste management options in another state, this fee would not be collected by the state.

The Proposed Rule amends the Management Rule by increasing the breadth of reportable materials and the reporting frequency, which will impose costs and expenses upon regulated entities, far and beyond a mere "database query that would produce a report that contains the information meeting the requirements of the [Proposed Rule]."[29]

As one of the regulated entities, WCS does not agree with these assessments and has provided evidence to the contrary.

B. There are costs associated with the increased reporting requirements.

The Proposed Rule 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).[30] Nothing has changed to support monthly reporting.

[29] 49 Tex. Reg. 123, 124 (Jan. 12, 2024).
[30] 43 Tex. Reg. 1871, 1874 (March 23, 2018).

Although the preamble states that the only cost imposed on regulated persons as a result of the Proposed Rule would be "to develop a database query that would produce a report that contains the information meeting the requirements of this rule,"[31] WCS, as it advised the Commission's consultant by letter dated November 30, 2023, does not currently track the following information:

- The various low-level radioactive waste compacts;
- The specific processing locations;
- Other waste management areas;
- Export approvals/authorizations for waste not coming to the Compact Waste Facility;
- Federal documentation for import of any foreign waste received; or
- Changes in material classification.

Adding these new fields to WCS's tracking and reporting software would require a significant initial expenditure and time to reconfigure software as well as making changes to associated processes and procedures. Also, additional staff would be required to gather, maintain, update and report this information. Thus, WCS will incur significant costs to comply with the Proposed Rule, above and beyond developing a "database query."

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 Commission is currently limited to an Executive Director and an assistant to the Executive Director, but has no technical staff. Moreover, the Commissioners themselves meet only every 6-8 weeks (having met seven times in 2020, six times in 2021, six times in 2022, and seven times in 2023).[32]

IX. Additional issues include the unclear and unreasonable effective date and the burdensome reporting deadlines.

A. The apparent effective date is unclear and unreasonable.

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. The Proposed Rule does 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

[31] 49 Tex. Reg. 123, 124 (Jan. 12, 2024).
[32] *Public Meetings*, TEXAS LOW-LEVEL RADIOACTIVE WASTE DISPOSAL COMPACT COMMISSION, available at http://www.tllrwdcc.org/about-the-comission/public-meetings/ (last visited Feb. 12, 2024).

(seeing the Compact Commission only meets every 6–8 weeks), 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 Rule.

B. The reporting deadline is burdensome.

The Proposed Rule would require accelerated reporting—on or before the fifteenth day of each month.[33] This 15 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 following month requirement for monthly oil and gas production reports), or even the Commission's current 31-day reporting requirement.

X. Request for statement of reasons for or against adoption of the 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 Rule pursuant to Section 2001.030 of the Texas Government Code.

XI. The Proposed Rule contains clerical errors.

i. The Proposed Rule moves the definition of the acronym "NCFW" to subsection (b), rendering the definition of NCFW ambiguous. The definition of NCFW should be clarified.

ii. In § 675.24(c)(3), the phrase "and becomes low-level radioactive waste as a result of the processing, recycling, or consolidation" is repeated (and, in the first instance, the sentence states "and is subsequently declared to becomes [sic]."). One instance should be removed and it should be clarified whether this is applying to materials "declared" or that merely "becomes" LLRW.

iii. In § 675.24(g), there should be a space between "or" and "before" in the phrase "on or before."

iv. In § 675.24(h), the Proposed Rule states that "[a]n entity that imports NCFW into the host state must shall have entered into an agreement . . . ." Either "must" or "shall" should be deleted.

[33] The rules do not state whether the deadline rolls over to the next business day if the fifteenth day falls on a Saturday, Sunday, or legal holiday. *See, e.g.*, 16 TEX. ADMIN. CODE § 1.9 (2023), 30 TEX. ADMIN. CODE § 1.7 (2023).

XII. Summary and conclusion.

In summary, the Proposed Rule exceeds the Commission's statutory authority and leads to unintended consequences. The Commission exceeds its authority in the following ways:

- The Commission exceeds its authority by usurping powers reserved to the party states, *i.e.*, those in Article IV of the Compact.
- Even if the Commission could also exercise the powers in Article IV of the Compact, none of the sections upon which the Commission relies to promulgate this rule authorize its actions (and in fact, they contradict that power).
- The Commission exceeds its authority by usurping the general police power of the State of Texas.
- The Commission exceeds its authority by attempting to regulate entities and materials that it is not authorized to regulate: although it is solely authorized to regulate the import of LLRW that is disposed of in the Compact facility, it attempts to regulate the import of radioactive materials and also materials that are not destined for the Compact facility (hence the term "Non-Compact-Facility Low-Level Radioactive Waste").
- The Commission's attempt to prevent the importation of NCFW (that may never constitute LLRW) from persons who are not in violation of Sections 6.01 or 6.02 of the Compact is ultra vires, outside of the Commission's authority, and unconstitutional.
- Despite the statement in (c)(4) that "information gathering . . . does not begin until after the radioactive material is declared waste," it is only information reporting that does not begin until after the radioactive material is declared waste. The information gathering must begin when the radioactive material is received, to be available for possible later reporting under (d). Also, the entity must enter into a NCFW agreement before the radioactive material is received. The Commission seeks to regulate radioactive materials that are neither waste nor LLRW, an ultra vires act.
- In exceeding its authority, the Commission exercises authority delegated to Texas state agencies, such as the TCEQ and DSHS.

There are also, as discussed in Sections II and III, vague, confusing, and internally inconsistent language that will make compliance difficult or impossible. Unanswered questions include:

- Whether parties that manufacture, refurbish, or recycle sources and source devices under license from DSHS are subject to this rule?
- Whether the Commission intends to regulate the disposal of excess tracer materials that are used in oil and gas operations?
- Whether the Proposed Rule covers contaminated equipment that is currently managed under a site license and that will eventually become LLRW?
- Whether the generator or the receiver of the radioactive material must enter into a NCFW contract with the Commission?
- What is the meaning of the terms waste processor, broker, and source consolidator?
- Whether the "other shipping paperwork" specified in (c)(3) refers only to paperwork required for waste that is LLRW waste (as defined in 30 TAC § 336.2(89)) at the time of shipment or whether it also includes any "Bill of Lading, Hazardous Waste Manifest, or other manifest" for any non-LLRW waste—which includes an exceedingly wide range of materials?
- Whether entities that are not currently regulated by the Commission, including oil and gas operators, must enter into a NCFW agreement with the Commission if they move radioactive material from an out-of-state site to an in-state site, if that radioactive material ***might*** later become LLRW?
- Whether radioactive materials that are commonly imported by many industries, including, without limitation, uranium miners, medical services providers, oil and gas service providers, and the nuclear power industry, are included by the reference to importation of radioactive material from a foreign country under 10 CFR Part 110?

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 on the Proposed Rule.

Sincerely,

WASTE CONTROL SPECIALISTS, LLC

David Carlson

David Carlson
President and Chief Operating Officer