

TO: Chairman Ford and Fellow Commissioners of the Texas Low-Level Radioactive Waste Disposal Compact Commission

FROM: Commissioner Bob Gregory

CC: Susan Jablonski; Jim Crowson; Nichole Bunker-Henderson

DATE: November 13, 2010

SUBJECT: Proposed Amendments to 31 TAC § 675.21-24 November 13, 2010 Draft Rule (as provided by Chairman Ford 11/9/10 and 11/12/10)

Dear Commissioners,

I am proposing the draft rule 31 TAC § 675.21-24, as provided by email to us by Chairman Ford on November 9 and 12, 2010, and dated November 13, 2010, be further amended by the changes listed in red below. Most of these proposed amendments were provided by me to the Commission at the June 12, 2010 meeting and they have also been posted on the Compact Commission website since last June. A few of my proposed amendments were incorporated in Chairman Ford's November 13th draft, although they were not redlined. I believe the remaining amendments should also be incorporated in any republished draft rule in order to insure compact generators have adequate capacity, to allow time for important information and resources to be gathered, and to protect Texas from any additional liability due to any imported out-of-Compact low-level radioactive waste. I also believe the revisions presented in red below should be reviewed by, and we should receive written comments from, all interested parties, so that they may be thoroughly discussed during the debate on the rule to be finally adopted.

It is my intent to ask for a record vote on each individual section with substantive revisions. My comments supporting my motions are included below in green type.

1. Motion to amend §675.23(a) to read as follows:

(a) It is the policy of the Commission that any savings generated by importation accrue to the benefit of the party states ~~s~~ generators and that the legislatures and administering agencies for the party states have asserted a demonstrated willingness to allow out-of-compact waste into the Compact facility for management and/or disposal. It is also the policy of the Commission that it will not accept the importation of low-level radioactive waste of international origin.

- The Compact Commission should recognize that the Texas and Vermont Legislatures and the Texas state licensing agency should approve of importation of low-level radioactive waste (or at least have adequate time to object to imports) before allowing the receipt, management or disposal of waste from non-Compact states.
- The legislative intent of the Compact was to exclude waste from outside the Compact states except for special circumstances. I submit that each state legislature should at least have

the opportunity to reverse prior legislative intent (to exclude non-Compact waste) before implementing this rule. Otherwise, we risk bringing down the wrath of the same legislature we will depend upon to provide funding to operate our Compact Commission.

- The Compact facility should not be available for the disposal of foreign waste, regardless of whether it has or has not been processed and re-characterized under a new manifest coming out of a Tennessee radioactive waste processing facility. I am pleased that language has been added to this new proposed rule to be used to insure this protection.

2. Motion to amend §675.23(b) to read as follows:

(b) Disposal capacity is reserved for Texas and Vermont ~~calculated by~~ for total estimated, as-disposed volume and total activity, and neither shall be reduced by non-Compact waste. Any ~~such~~ disposal capacity available for imports shall be established at least every 5-years by a report of the Commission based upon the host state's demonstrated willingness to receive specific volumes of waste from non-Compact generators. The Commission's report shall be informed by the annual report by the host State on the status of the facility, including projections of the facility's anticipated future capacity.

- The 2.3 million cubic feet of currently authorized capacity should be utilized by Compact generators first. Whatever capacity is left over, if any, can be used for importation, subject to the approval of the Compact Commission and no immediate objection of the majority of the Texas and Vermont legislatures to the acceptance of imported waste.
- Available disposal capacity for importation should be determined by the Compact Commission every 5 years and reduced to a report, assuming the Texas Legislature continues to be willing to accept certain volumes of waste from outside the Compact since Texas, as the owner, will have long-term liability.
- Remaining disposal capacity shall be estimated based on the total volume and activity in the Compact facility without consideration of any volume reduction treatment.
- Question for TCEQ: Does the state currently have a capacity report as required by Compact Sec. 4.04(5) and, if not, how long will it take to complete a capacity report?
- Question for TCEQ and WCS: Can anyone explain and discuss the impact of imports on the 80/20% statutory capacity split between Texas and Vermont? And, how Vermont's allocation of capacity can be reserved and protected while also allowing the acceptance of out of Compact waste imports? Why wouldn't this consume landfill space, as well as a portion of the authorized activity disposal allowance?
- If the 2.3 million cubic feet of authorized disposal capacity is consumed by imported waste within a few years, how will the need of Texas and Vermont generators be met and how could that impact the cost of disposal if WCS is, or is not, able to receive additional space authorization?

- What will Vermont do if the 2.3 million cubic feet capacity is consumed before it is able to dispose of its decommissioning waste?
- Question: If the NRC allows “dilution” to take place, will this potentially increase the amount of LLRW that could be disposed of by Compact generators at the Compact site? (i.e., an every 5 year review may not be sufficient.)

3. Motion to amend §675.23(c) to read as follows:

(c) No petition for an agreement to import low-level radioactive waste for disposal shall be granted by the Commission unless: ~~the Compact Facility operator has provided to the Commission a recommended total annual volume to be imported for disposal to the Compact Facility and certify that the disposal of imported waste will not reduce capacity for Party State generated waste, based on the currently licensed volume and activity. The recommendation shall become final after Commission approval. The approval shall be based on timely renewal of the Compact Facility License by the licensee, assigns, or successors.~~

(1) The Compact disposal Facility is fully open, operational, and state of Texas owned.

- This insures the Compact Commission cannot consider any import petitions prior to the compact facility actually disposes of any waste. This will also protect the Compact Commission from a legal challenge for not considering requests for authorizations of imports at an earlier date. This is important since the Compact Commission has little to no ability to defend itself from such a legal challenge.
- Question of TCEQ and WCS: What is the current status of construction and the authorizations to construct the facility? Are there pending matters?
- Question: Since the state of Texas will own all of the land and improvements, as well as this imported waste, when does a change in property ownership take place? Does the state have a deed, or how does that work? Is there a lease that explains how the liability related to the ownership of the waste changes hands?

(2) The host state has submitted an annual report to the Commission on the status of the facility, including the state’s estimate of any waste volume and activity capacity in the Compact disposal facility available for consumption by imported waste from non-Compact generators during the next fiscal year, considering the volume of disposal capacity remaining under the existing disposal license and the volume capacity Compact states will require through 2045;

- The TCEQ needs to update the capacity report to have the most current data in order to determine if capacity is available for imports. This should be done prior to any vote to authorize the import of low-level radioactive waste for management or disposal in the Compact facility.

(3) The rate for the disposal of out-of-Compact generated waste has been approved by the TCEQ and there is a funding in the Compact Commission account to cover the cost of reviewing, monitoring, and defending itself from legal challenges related to the approval or disapproval of import petitions;

- The rate case application has been filed and the comment period has been extended. It needs to be approved and funding made available to the Compact Commission before the Compact Commission should accept and/or approve any import petitions. This will insulate the Compact Commission from the potential wrath of the Texas Legislature for pursuing waste import authorizations before the legislature has had the opportunity to form an opinion on the subject.

(4) The Compact Commission has at least \$1,000,000 in unencumbered funds in its checking account to fund staff support and legal challenges to the approval and/or the denial of import and export petitions;

- This amount will insure the Compact Commission has sufficient funds to handle all litigation that will ensue from waste import petitions and any claims that the Compact Commission acted improperly by denying an import petition request.
- Will Vermont continue to fund the Compact activities if the Texas Legislature does not appropriate sufficient funds?

(5) The 2011 Texas and Vermont legislative sessions have transpired without the passage of legislation to prohibit the import of non-Compact LLR waste or materials for management or disposal in the Compact facility;

- The Texas and Vermont Legislatures should at least have the opportunity to expressly indicate their intent for the Compact facility to accept waste from non-compact states.

(6) The Compact Commission Bylaws have been finalized and approved;

- The Compact should complete its bylaws to provide a clear process for considering import petitions, among other things.

(7) The Nuclear Regulatory Commission has completed its pending low level radioactive waste rulemaking process and guidance documents regarding:

(A) downblending, and

(B) depleted uranium storage and disposal, and TCEQ and the Compact Commission have had time to review and adopt positions as appropriate;

- The NRC action could significantly increase of total volume and activity available for disposal at a low-level facility through import petitions.
- It could also increase “In” Compact volumes from Compact states (i.e., less room for out-of-Compact waste).
- In addition to the Texas Water Development Board and the Bureau of Economic Geology, I would like to also request a report from the Texas Department of State Health Services for input on transportation of low-level radioactive waste.

(8) Texas, the host state, and each party state has met its obligation under Texas Health and Safety Code Title 5, Subtitle D, Chapter 403, Sections 4.04 and 4.05; and,

- This means Texas should:
 - make sure the Compact facility is opened
 - make sure the Compact facility is operating properly
 - establish reasonable disposal fees
 - establish fees sufficient to support the Compact Commission
 - update the annual report on future capacity
 - regulate the means and routes of transportation of the waste in Texas
- This also means Texas and Vermont should:
 - develop and enforce packaging procedures
 - maintain a registry of all generators in the state
 - enforce procedures to minimize the volume of waste

(9) The Texas Department of Health Services has finalized regulations on the transportation of low-level radioactive waste.

4. Motion to amend by adding a new §675.23(d) to read as follows:

(d) It is the policy of the Commission that the host state receive monetary benefit from any import agreement through a liability surcharge and access surcharge imposed by the Commission. The additional charges will be paid directly to the Texas Comptroller of Public Accounts.

- (1) Each import agreement will include a liability fee of at least \$55.00 per cubic foot for disposal into the compact facility with funds to benefit dedicated Fund 0088 of the state of Texas.
- (2) Each import agreement will include an access fee of at least \$240.00 per cubic foot for disposal into the compact facility with funds to benefit the general revenue of the state of Texas.

- The State of Texas should receive a greater percentage of revenue from any non-Compact waste imports than the 5% of gross receipts received from Compact generators, because non-Compact generators have not contributed financially to the Compact like Texas and Vermont generators. The non-Compact generators should compensate the State of Texas for the long-term liability associated with Texas taking title to that waste once accepted into the state-owned Compact facility.

5. Motion to amend by adding a new §675.23(e) to read as follows:

(e) The approval shall be based on timely renewal of the Compact Facility License by the licensee, assigns, or successors, and the host state's willingness to accept imports from non-Compact generators. Import volumes for disposal shall not exceed the five-year estimate update of the volume capacity Compact states will need to reserve through 2045. All waste disposal in the Compact facility must be characterized for disposal at the original point of waste generation and the pedigree of the waste must be described and revealed within the final disposal waste characterization.

- The approval of an import petition should not go beyond the expiration date of the Compact facility license.
- The Compact facility should not accept any waste imports unless the host state can trace the waste back to a domestic generator and ensure itself the waste has not been downblended.

6. Motion to amend §675.23(d) to read as follows:

~~(d)~~ Agreement Required—No person shall import any low-level radioactive waste for disposal that was generated in a non-party state unless the Commission has entered into an agreement for the importation of that waste pursuant to this rule. ~~Neither mixed radioactive and hazardous waste nor foreign radioactive waste shall be imported into the Compact facility for disposal.~~

(1) Violations of paragraph ~~(d)~~ (f) may result in prohibiting the violator from disposing of low-level radioactive waste in the Compact Facility, or in the imposition of penalty surcharges on shipments to the facility, as determined by the Commission.

- Texas should not accept mixed hazardous and radioactive waste into the Compact facility until the license is amended to allow such waste disposal, and because of the unknown long-term impact on the mixed waste on the containers and the Compact facility liner system.
- Texas also should not use up valuable low-level radioactive waste capacity on foreign generated waste; particularly with the remaining uncertainty of the Compact Commission's ability to regulate the acceptance of such waste.

7. Motion to amend §675.23(e) to read as follows:

(ge) Form of Agreement—The form of the agreement shall be promulgated by the Commission and posted on the Commission’s web site, or otherwise made readily accessible to generators and to the public. ~~Each import agreement must be entered into by the Compact with:~~

(1) a state,

(2) a regional body, or

(3) group of states.

- The Compact Commission could be overwhelmed with petitions if it has to deal directly with all non-Compact generators. This rule allows the Compact Commission to instead enter into Compact agreements with entities, which can represent the individual waste generators. Otherwise, the Compact Commission could be left with WCS acting as the representative for each out-of-Compact generator, or have an administrative burden too great for the Compact Commission’s budget to cover.

8. Motion to amend §675.23(f) to read as follows:

(hf) Fee for Proposed Importation Agreements.

9. Motion to amend §675.23(g) to read as follows:

(ig) Notice and Timing of Agreement—A person shall file a proposed import agreement with the Commission and receive approval by the Commission prior to ~~any importation of waste for disposal the proposed importation date.~~

(1) The proposed import agreement shall be accompanied by a ~~certification verification from the Texas Commission on Environmental Quality and~~ by the Compact Facility operator that the waste acceptance criteria have been met for the proposed waste importation.

- Why should we rely on WCS alone to verify? Shouldn’t the certification come from the TCEQ or from both the TCEQ and WCS?

(2) By electronic mail, the petitioner shall deliver to the Compact Facility operator a copy of the ~~proposed~~ import agreement (and any supplements or amendments thereto) at the time of filing with the Commission, and a copy shall also be delivered by Certified mail.

(3) Proposed import agreements received by the Commission during any calendar month may be processed in aggregate at the beginning of the following calendar month. The date of receipt of proposed import agreements shall be deemed the first business day of the following calendar month. Within 15-days of the date of receipt, the Commission shall post the import agreement to the Commission’s web site and transmit it to the *Texas Register*.

- (4) Any comments by the Compact Facility operator on the import agreement shall be filed in writing with the Commission not later than 30 days after the deemed date of receipt of the proposed import agreement. By electronic mail, the Compact Facility operator shall deliver to the petitioner a copy of all comments (and any supplements or amendments thereto) submitted to the Commission at the time of filing with the Commission, and a copy shall also be delivered by Certified mail.
- (5) Within 15-days of the date of receipt of the Compact Facility operator comments, the Commission shall post the import agreement to the Commission's web site.
- (6) Comments on the proposed import application may be submitted by any person, other than the Compact Facility operator, during the 60-day period following the date of posting to the Commission's website.
- (7) The Commission shall distribute the import agreement and comments received from the Compact Facility operator, petitioner, and public to other interested parties by mail or email for information and comment and shall post the import agreement, comments received and other pertinent information on the Commission's web site. The Commission shall distribute the proposed import agreement and any comments received from the Compact Facility or others to the members of the Commission, and distribute comments from others to the Compact Facility operator, the petitioner, and the public.

10. Motion to amend §675.23(h) to read as follows:

~~(h)~~ Review of Proposed Import Agreement— After import petitions are eligible to be considered by the Commission as identified under §675.23(c) and Aafter receiving the proposed import agreement and any comments that have been made thereon, the Commission at a meeting held promptly, but no sooner than 60 days nor later than 365 days, subject to the financial resources of the Commission, after the date the proposed import agreement was filed with the Commission, shall act upon the import agreement utilizing the follow factors;

- (1) The volume, type, physical form and activity of waste proposed for importation;
- (2) The policy and purpose of the Compact;
- (3) The availability of disposal capacity not needed by party states in the Compact Facility for the disposal of the waste proposed to be imported;
- (4) The economic impact, including both potential benefits and liabilities, on the Host County, the Host State, and the Compact Facility operator of entering into the import agreement;
- (5) Whether the Compact Facility operator has or will obtain, prior to importation, authorization from TCEQ to dispose of the proposed waste;
- (6) The effect on the Compact Facility's total annual volume allowed recommended for importation;

- (7) The existence of unresolved violations pending against the petitioner with any other regulatory agency with jurisdiction to regulate radioactive material, and any comments by the regulatory agency with which the petitioner has unresolved violations;
- (8) Any unresolved violation, complaint, unpaid fee, or past due report that the petitioner has with the Commission;
- (9) Any relevant comments received from the Compact Facility operator, compact generators, the person proposing to export the waste, the Host County, the Host State, interested state or federal regulatory agencies, or the public;
- (10) The authorization of a person to export (if applicable);
- (11) The impacts, if any, on the availability of disposal capacity on the Compact Facility to meet the current and future needs of Compact generators;
- (12) Any other factor the Commission deems relevant to carry out the policy and purpose of the Compact; and
- (13) The Host State's demonstrated willingness to receive the specific waste for import into its Compact facility.

11. Motion to amend §675.23(i) to read as follows:

~~(j)~~ (k) Decision by the Commission—The Commission may take one of the following actions on the Proposed importation agreement, in whole or in part; approve the proposed agreement; deny the proposed agreement; ~~or~~ approve the proposed agreement subject to terms and conditions as determined by the Commission; or request additional information needed for a decision.

12. Motion to amend §675.23(j) to read as follows:

~~(j)~~ Terms and Conditions—The Commission may impose any terms or conditions on the import agreement reasonably related to furthering the policy and purpose of the Compact.

13. Motion to amend §675.23(k) to read as follows:

~~(m)~~ Importation Agreement Duration, Amendment, Revocation, Reporting, Assignment and fees.

(1) An importation agreement shall be issued for the term specified in the agreement and shall remain in effect for that term unless amended, revoked, or canceled by the Commission.

(2) The Commission may, on its own motion or in response to a petition by the agreement holder for amendment of an importation agreement for which prior written notice has been given to the ~~permit~~ agreement holder and the Compact Facility operator, add or delete requirements or

limitations to the agreement. The Commission may provide a reasonable time to allow the existing ~~agreement holder exporter~~ and the Compact Facility operator to make the changes necessary to comply with any additional requirements imposed by the Commission.

(3) An Import Agreement is not assignable or transferable to any other person.

(4) The Commission continues to consider the policy issues related to assessment of fees for the importation of low-level radioactive waste based on volume or activity of the waste. Upon conclusion of consideration of this issue, the Commission may provide for such fees in this section.

14. Motion to amend §675.23(l) to read as follows:

(~~n~~) The Compact Facility operator shall file with the Commission a Quarterly Import Report, no later than 30 days after the end of each calendar quarter, describing the imported waste that was disposed and stored under the import agreement during the quarter by the Compact Facility, including the physical, radiological and chemical properties of the waste consistent with the identification required by the Compact Waste Facility license. Each Quarterly Import Report will provide the ~~identity of the generator, the~~ manifested volume and activity of each imported class of waste (A,B, and C, or in the case of waste imported for management, Greater Than Class C), the state or other place of origin, and the date(s) of waste disposal, if applicable. The Quarterly Report shall provide this information for the imported waste disposed of during the most recent quarter, as well as the cumulative information for imported waste ~~managed or~~ disposed of in prior quarters under this Agreement. The forms of the Quarterly Import Report shall be prescribed by the Commission and shall be posted on the Commission's website, or may be obtained at a location that will be posted on the Commission's website.

15. Motion to amend §675.23(m) to read as follows:

(~~o~~) Agreements to Import—Nothing in this subchapter shall be construed to prohibit the storage or management of low-level radioactive waste by a generator, nor its disposal pursuant to 10 CFR §20.2002.

16. Motion to amend §675.23(n) to read as follows:

(~~p~~) Form of Import Agreement—The import agreement shall be on a form promulgated by the Commission, posted on the Commission's website, and shall contain at a minimum the criteria contained in subsection (~~h~~)(i) of this section. The form may be amended by the Commission from time to time.

17. Motion to amend §675.23(o) to read as follows:

(~~o~~) (q) Notwithstanding any other provision of this Section 675.23, the Commission shall receive but will not begin to process applications for agreements to import waste from a non-compact generator for disposal under Section 675.23 until such time as the Commission

determines by vote taken pursuant to Section 3.02 of the Compact as compiled at Section 403.006, Texas Health and Safety Code that it has adequate resources to properly examine applications to enter into agreements prior to entering into such agreements and thereafter to enforce the terms and conditions of such agreements as are entered into.

18. Motion to allow a 90 day comment period as follows:

I make a further motion to include a 90 day comment period when the proposed rule is published in the Texas Register to allow adequate time for all interested parties to review the proposal and to submit written comments.

- The current proposed 30 day comment during the Thanksgiving and Christmas holiday period does not allow adequate time for interested parties to:
 - review the draft rule proposal;
 - reconsider and/or resubmit comments submitted earlier this year concerning the draft rules withdrawn 6/12/10; and/or
 - to submit comments on the new language added to the draft rule since last published in the Texas Register.