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HAND-DELIVERED

October 31, 2008

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TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2008 OCT 31 PM 3:26
CHIEF CLERKS OFFICE

RE: TCEQ Docket No. 2005-1994-RAW
Waste Control Specialists LLC
Petition to the Commission to Request the Attorney General to Institute Condemnation Proceedings

Dear Ms. Castanuela:

On behalf of our client, Waste Control Specialists LLC, please find enclosed the original and eleven (11) copies of our Brief in Response to the Executive Director's Brief on Petition to the Commission to Request the Attorney General to Institute Condemnation Proceedings in the matter above.

Thank you for your assistance. Please contact me with any questions.

Sincerely,

Clay Nance

Enclosures

TCEQ DOCKET NO. 2005-1994-RAW

2008 OCT 31 PM 3: 26

PETITION TO THE COMMISSION BY WASTE CONTROL SPECIALISTS LLC TO REQUEST THE ATTORNEY GENERAL TO INITIATE CONDEMNATION PROCEEDINGS	§ § § § §	BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY	CHIEF CLERKS OFFICE
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**WASTE CONTROL SPECIALISTS LLC'S RESPONSE TO THE EXECUTIVE
DIRECTOR'S BRIEF ON PETITION TO THE COMMISSION TO REQUEST
THE ATTORNEY GENERAL TO INSTITUTE CONDEMNATION
PROCEEDINGS**

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

WASTE CONTROL SPECIALISTS LLC ("WCS"), the petitioner in the above-referenced matter, files this Response to the Executive Director's Brief on Petition to the Commission to Request the Attorney General to Institute Condemnation Proceedings dated October 20, 2008. WCS respectfully requests that the Commissioners of the Texas Commission on Environmental Quality enter an order requesting the Attorney General of Texas to condemn all remaining mineral interests in Section 25, Block A-29, Public School Lands Survey, Andrews County, Texas ("Section 25").

I. SUMMARY

WCS supports the Executive Director's recommendation that the Commission issue a condemnation order requesting the Attorney General to condemn Section 25 mineral interests for WCS' near-surface land disposal of low-level radioactive waste ("LLRW") project. The purpose of this Response is to clarify that WCS requests condemnation of all remaining mineral interests in Section 25 not owned by WCS. Condemnation of all remaining Section 25 mineral interests is authorized under Texas law. Such condemnation is necessary to protect the entire disposal facility site, which touches and concerns all portions of Section 25, against intrusion by third parties. It is also necessary to satisfy the land ownership requirement for a LLRW disposal operation in this state.

II. BACKGROUND INFORMATION

This matter relates to WCS' application for a license authorizing the near-surface land disposal of LLRW.¹ As the sole applicant, WCS proposes to dispose of two types of LLRW – Compact waste and Federal facility waste – pursuant to Subchapter F of the Texas Radiation Control Act (“Act”) and 30 T.A.C. Chapter 336.² WCS' disposal operations would occur at its LLRW disposal facility site, which consists of a Compact waste disposal facility (“Compact Facility”), a Federal facility waste disposal facility (“Federal Facility”), and the immediate area surrounding the facilities known as the buffer zone or restricted perimeter.³ The entire disposal facility site will be located in Section 25 of Andrews County. It does not touch and concern other tracts of land.

Section 25 consists of 606 acres due to the Texas-New Mexico state line serving as its western boundary.⁴ The Section 25 surface and mineral estates are identically subdivided into the following three portions for legal description purposes: the Northwest Quarter consisting of 151.50 acres (“NW/4”); the Northeast Quarter consisting of 151.50 acres (“NE/4”); and the South Half consisting of 303 acres (“S/2”).

The remaining mineral interests not owned by WCS are found in all three portions of the Section 25 mineral estate. Each undivided mineral interest is legally described as being a

¹ On August 4, 2004, WCS filed its Application for a License to Authorize Near-Surface Land Disposal of LLRW (“license application”) with the TCEQ. On February 18, 2005, WCS' license application was declared to be administratively complete by the Commission. On May 2, 2005, the Executive Director selected WCS' license application as the application with the highest comparative merit in accordance with Section 401.232 of the Act. After completion of technical review, the Commission's Office of Chief Clerk mailed the Notice of Technical Summary and Executive Director's Preliminary Decision, Final Draft Licensing Order, Final Draft License and the Draft Environmental Analysis to WCS on August 12, 2008.

² The Act is codified as Chapter 401 of the Texas Health & Safety Code. Subchapter F of the Act states that the TCEQ may issue only one license for the disposal of Compact waste. The same license holder is the only entity that can be authorized to dispose of Federal facility waste in this state. See TEX. HEALTH & SAFETY CODE §§401.202(b), 401.216(a).

³ WCS' proposed disposal facility site is designed to be consistent with the Legislature's description of “disposal facility site” set forth in the Act. See TEX. HEALTH & SAFETY CODE §401.2005(3). The Act also defines “Compact waste,” “Compact waste disposal facility,” “Federal waste,” and “Federal facility waste disposal facility.” See TEX. HEALTH & SAFETY CODE §401.2005(1), (2), (4), (5).

⁴ The standard section is a tract of land comprising one square mile or 640 acres.

certain percentage or fraction of a quarter-section or half-section of Section 25.⁵ The undivided mineral interests are not described by a metes and bounds description like pieces of property in a typical surface estate. As a result, a given mineral interest cannot be pinpointed in terms of a specific location within a quarter-section or half-section of Section 25 (other than being located within the general boundaries of the quarter-section or half-section). One person's mineral interest is merely a fraction of the entire quarter-section or half-section of Section 25, similar to all other interests comprising the remainder fraction in the same quarter-section or half-section.

WCS' disposal facility site will be located in all three portions of Section 25. The disposal facilities and buffer zone, or restricted perimeter, surrounding the facilities will touch and concern the NW/4, NE/4 and S/2 of Section 25. A survey of WCS' disposal facility site in Section 25 depicting the Compact and Federal facilities, and the restricted perimeter is attached hereto as **Exhibit A**.

Absolute ownership of the property where the disposal facility site will be located is an integral part of the regulatory scheme for LLRW disposal. State and federal law requires an undivided ownership in fee simple title of the surface and mineral estate of the tract of land where the LLRW disposal operations will occur.⁶ The intent of the mandatory requirement is to safeguard the disposal facility site and corresponding operations from harm caused by third party intrusion via the surface or subsurface estates. No unrelated, third party can own an interest in the tract of land used for LLRW disposal operations.

Since 2004, WCS has made an assertive, good faith effort to satisfy the property ownership requirement. WCS owns an undivided, 100% fee simple interest in the surface estate of Section 25. WCS has also acquired a super-majority interest in the mineral estate of Section 25. Because the remaining, minority interest owners of the

⁵ An example of the description of a given interest in the Section 25 mineral estate is "1/576 interest in the NW/4 of Section 25." This is equal to 0.263 net mineral acres.

⁶ See 10 C.F.R. 61.59(a); TEX. HEALTH & SAFETY CODE ANN. §§401.204, 401.205(a)(2), 401.205(b)(2); 401.209(a); 30 T.A.C. §§336.207, 336.734(a), 336.808(a).

Section 25 mineral estate have not agreed to sell or exchange their interests, WCS is requesting that the State of Texas intervene pursuant to its statutory authority.

In accordance with Section 401.204(c) of the Act and 30 T.A.C. 336.808(c), WCS has petitioned the Commission to request the Attorney General to institute condemnation proceedings pursuant to Chapter 21 of the Texas Property Code to condemn the remaining mineral interests beneath Section 25.⁷ WCS' condemnation petition includes: (a) a description of the communications between WCS and the remaining Section 25 mineral interest owners; (b) evidence of WCS' good faith effort to acquire the remaining Section 25 mineral interests or enter a surface use agreement; (c) an appraisal of the fair market value of the remaining Section 25 mineral interests; (d) a demonstration that WCS' license application has been selected by the TCEQ as the application with the highest technical merit; and (e) a demonstration of WCS' ability to pay for all costs in obtaining the remaining Section 25 mineral interests, including legal fees. WCS' condemnation petition satisfies the requirements of 30 T.A.C. §336.808(c).

If the remaining Section 25 mineral interests are condemned per WCS' request, the land ownership requirement set forth in the Act will be satisfied. WCS and/or the custodial agencies for the LLRW disposal project would be the owners of record of any and all interests in the surface and mineral estates of Section 25. No other party would have an interest in the tract of land where WCS' disposal facility site and corresponding operations will be located.

III. ANALYSIS

A. Texas Condemnation Laws

Condemnation of all remaining Section 25 mineral interests is appropriate under Texas case law. The Texas Constitution authorizes a condemning authority to take private

⁷ See TEX. HEALTH & SAFETY CODE ANN. §401.204(c). WCS' Petition to the Commission to Request the Attorney General to Institute Condemnation Proceedings was submitted to the Commission on November 29, 2005. WCS' Supplement to the Petition was submitted to the Commission on March 15, 2007. WCS' Second Supplement to the Petition was submitted to the Commission on July 3, 2008.

property for a public use.⁸ A legislative declaration that a use is public and the delegation of power of eminent domain are to be given great weight by the courts in determining whether a particular use is public or private.⁹ “Where the Legislature declares a particular use to be a public use the presumption is in favor of this declaration and will be binding of the courts unless the use is clearly and palpably of a private character.”¹⁰

The taking must be necessary for the declared public use.¹¹ Acquisition of an individual property that is “reasonably essential” to successful completion of a public project is an acquisition for a public use.¹² The condemning authority’s discretion to determine what and how much land to condemn for its purposes (*i.e.*, to determine public necessity) is nearly absolute.¹³ Once a condemning authority’s governing body makes this determination, it is not subject to judicial review unless the property owner can establish that the condemning authority has committed fraud or has acted purely arbitrarily.¹⁴

B. Condemnation of Mineral Interests for LLRW Disposal

Condemnation of private property that is necessary for a LLRW disposal project is specifically authorized by the Texas Legislature. In 2003, the Legislature passed House Bill 1567, which implemented the substantive law governing LLRW disposal now

⁸ Tex. Const. art. I, §17.

⁹ See *Malcomson Road Utility Dist. v. Newsom*, 171 S.W.3d 257 (Tex.App.—Houston [1st Dist.] 2005, pet. denied).

¹⁰ See *West v. Whitehead*, 238 S.W. 976, 978 (Tex.Civ.App.—San Antonio 1922, writ ref’d); see also *Malcomson*, 171 S.W.3d at 266.

¹¹ See *Imperial Irr. Co. v. Jayne*, 138, S.W. 575 (1911) (holding that the necessity for a taking under an exercise of the power of eminent domain is a political or legislative question and not a judicial one).

¹² See *Hardwicke v. City of Lubbock*, 150 S.W.3d 708 (Tex.App.—Amarillo 2004, no pet.) (taking of private property was for “public use” due to compliance with provisions of Tax Increment Financing Act, which authorizes condemnation of private property to encourage redevelopment in areas of distress, declining population, high crime rates, etc.); *City of Arlington v. Golddust Twins Realty Corp.*, 41 F.3d 960, 966 (5th Cir. 1994); see also *Atwood v. Willacy Cty. Nav. Dist.*, 271 SW2d. 137 (Tex.Civ.App.—San Antonio 1954), *appeal dismissed*, 350 U.S. 804 (1955) (stating that one of the tests of a public use within the meaning of the constitutional provision prohibiting the taking of private property for other than public use is whether the purposes for which the land is acquired are reasonably essential to the successful operation of the governmental entity).

¹³ *Id.* (Emphasis added).

¹⁴ See *Davis v. City of Lubbock*, 326 S.W.2d 699, 706 (Tex. 1959); *Dallas Housing Authority v. Higginbotham*, 143 S.W.2d 79, 83 (Tex. 1940).

codified in the Act.¹⁵ Among its provisions, H.B. 1567 established a three-step process for a LLRW disposal license applicant to follow in satisfying the land ownership requirement.¹⁶ The three-step process is set forth in Section 401.204 of the Act. The last step in the property acquisition process mandates the Attorney General, upon request of the Commission, to institute condemnation proceedings to acquire a fee simple interest in the mineral estate where a LLRW disposal facility site would be located. H.B. 1567 further specifies that the legislation relates “to the disposal of low-level radioactive waste; authorizing the exercise of the power of eminent domain.”¹⁷ This evidences the Legislature’s assertive delegation of the power of eminent domain to the Commission (and the Attorney General) for purposes of a LLRW disposal project.¹⁸

In 2005, the Legislature passed Senate Bill 7 in light of the U.S. Supreme Court’s eminent domain ruling in *Kelo v. City of New London*.¹⁹ Senate Bill 7 limits the use of the power of eminent domain in this state by identifying takings that are considered to be for private, economic development purposes, thereby not qualifying as lawful takings under the Texas Constitution. Importantly, Senate Bill 7 excludes “a waste disposal project” from the limitation on the use of eminent domain. The waste disposal project referred to in Senate Bill 7 is the LLRW disposal project proposed by WCS. Thus, the Texas Legislature determined that the LLRW disposal project is not a private, economic development project. It is a public project for purposes of eminent domain.

Condemnation of all remaining Section 25 mineral interests is necessary for the completion of the LLRW disposal project – a declared public project in this state. Ownership of an undivided, fee simple interest in the mineral estate of the tract of land on which WCS’ disposal facility site will be located cannot be accomplished unless the remaining Section 25 mineral interests are condemned. Limiting condemnation to only the portion of the mineral estate directly beneath WCS’ disposal facility site would be

¹⁵ H.B. 1567, 78th Leg., R.S. (2003).

¹⁶ *See Id.*

¹⁷ *See Id.*

¹⁸ *See Malcomson*, 171 S.W.3d at 266.

¹⁹ S.B. 7, 79th Leg., 2nd C.S. (2005), now codified as Chapter 2206 of the Government Code; *See Kelo et al. v. City of New London et al.*, 545 U.S. 469 (2005).

difficult and impractical. Limited condemnation would require further subdivision of the already small, fractional mineral interests held by the remaining owners in all three portions of the Section 25 mineral estate. While the remaining owners' interests directly beneath the site might be condemned under the limited condemnation approach, they would still possess fractional interests in the same mineral estate that are not condemned. Condemnation of all remaining Section 25 mineral interests would prevent confusion in the title and ownership of the Section 25 mineral estate, and would protect against intrusion into the disposal facility site by non-related activities otherwise occurring in the subsurface nearby. Full condemnation would be consistent with the intentions of the Texas Legislature. Condemnation of all remaining Section 25 mineral interests by the State of Texas pursuant to Section 401.204(c) of the Act is necessary, appropriate, and authorized by law.

The Commission has full authorization to seek condemnation of all remaining mineral interests in the NW/4, NE/4, and S/2 of Section 25 because: (1) condemnation of all remaining Section 25 mineral interests is essential and necessary for WCS' LLRW disposal project, which has been designated as a public project by the Legislature; (2) the Legislature has delegated the power of eminent domain to the Commission (and the Attorney General) for mineral interests related to the LLRW disposal project; and (3) the Commission's discretion to determine what and how much land to condemn for such purposes (*i.e.*, to determine public necessity) is nearly absolute.

IV. CONCLUSION

Waste Control Specialists LLC respectfully requests that the Commission pursue condemnation of all remaining mineral interests in Section 25 of Andrews County in accordance with WCS' condemnation petition.

Respectfully submitted,



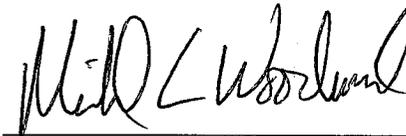
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CERTIFICATE OF SERVICE

I certify that the original and eleven (11) copies of the foregoing Brief was filed in the Office of the Chief Clerk of the Texas Commission on Environmental Quality and sent by first-class mail to all persons on the mailing list below.



Michael L. Woodward

CHIEF CLERK'S OFFICE

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EXHIBIT A

LLRW DISPOSAL FACILITY SITE

SECTION 25

ANDREWS COUNTY, TEXAS

