

DOCKET NO. 2005-1994-RAW

2009 JAN -9 AM 8: 23

IN THE MATTER OF  
RADIOACTIVE MATERIAL  
LICENSE NO. R04100

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§  
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BEFORE THE TEXAS  
COMMISSION ON  
ENVIRONMENTAL QUALITY

CHIEF CLERKS OFFICE

**WASTE CONTROL SPECIALISTS LLC'S  
RESPONSE TO SIERRA CLUB'S REQUEST FOR EXTENSION OF TIME TO  
SUBMIT REPLIES TO RESPONSES TO HEARING REQUESTS AND  
EXTENSION OF PUBLIC MEETING DATE FOR COMMISSION  
CONSIDERATION OF HEARING REQUESTS**

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

WASTE CONTROL SPECIALISTS LLC ("WCS") submits this Response to Sierra Club's January 5, 2009 Request for Extension of Time to Submit Replies to Responses to Hearing Requests and Extension of Public Meeting Date. WCS recognizes that, by letter dated January 7, 2009, the Commission extended filing deadlines applicable to Sierra Club and the other requesters. WCS offers this Response to Sierra Club's January 5 filing to make clear that WCS fully complied with Commission rules for serving its Response to Requests for Contested Case Hearing, to show that Sierra Club has not been harmed by the apparent postal delay, and to refute Sierra Club's efforts to distract from the merits of WCS's Response. For the reasons detailed by both WCS and the Executive Director in their earlier Responses to Hearing Requests, none of the hearing requests should be granted.

**DISCUSSION**

WCS filed its Response to Requests for Contested Case Hearing five days early and completed service of that Response in full compliance with Commission rules. By

letter dated December 12, 2008, the Chief Clerk announced the deadline for filing of written responses to the hearing requests as December 23, 2008. WCS filed its Response *five days before the deadline*, on December 18, 2008. On that same day, WCS served the Response on Ken Kramer, Director of Sierra Club's Lone Star Chapter, and all other requesters, via certified mail, return receipt requested, in accordance with TCEQ rules. *See* 30 TEX. ADMIN. CODE § 1.11(c).<sup>1</sup> All requesters but Sierra Club signed for the Response on December 22, 2008.<sup>2</sup>

WCS cannot address the reasons why Sierra Club was unable to obtain the WCS Response from its post office box until December 29, nor can WCS explain why Sierra Club declined to take any action to secure a copy of the Response at an earlier time. Sierra Club was well aware of the December 23 deadline and had every reason to expect that WCS would respond to this set of hearing requests in timely fashion, just as it always does.<sup>3</sup> Sierra Club could have called counsel for WCS and requested a copy beginning the day the Response was filed or on any of the five business days between December 18 and December 29. Sierra Club could have called the Chief Clerk's office. Sierra Club could have accessed the Chief Clerk's on-line database at any time to learn the status of the Response, and Sierra Club could have obtained an electronic copy of the Response once it was posted to the Commission website with the other back-up materials for the upcoming public meeting. Instead, Sierra Club chose to do nothing, to maximize the

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<sup>1</sup> *See* Exhibit A: Affidavit of Michael L. Woodward.

<sup>2</sup> The Response originated in Austin, TX. Sierra Club's P.O. Box is located in Austin, TX. Other requesters are located in Odessa, TX; Eunice, NM; and Takoma Park, MD. Sierra Club received the Executive Director's response and the Public Interest Counsel's response on December 22, 2008 and December 24, 2008, respectively, according to Exhibit A of Sierra Club's Request for Extension.

<sup>3</sup> In the past, WCS has served filings on Sierra Club via certified mail, return receipt requested. WCS utilized this method on 4/28/08 to serve Sierra Club its Response to Request for Contested Case Hearing relating to WCS' license application concerning the disposal of byproduct material.

delay, and then to petition the Commission in a disingenuous effort to delay the proceedings and disrupt the travel plans of more than 100 Andrews-area residents as well as the state and local elected officials expected to attend the January 14 public meeting. The Commission should recognize that Sierra Club's actions speak to its motives on this issue.

Given that service was completed in accordance with TCEQ rules, no relief to Sierra Club or the other requesters was necessary. The Commission's action to grant additional time to all requesters, not just Sierra Club, should leave no doubt going forward that the Commission has granted ample opportunity for all requesters to complete their replies by any measure. After the Commission's extension, Sierra Club's filing deadline now falls 25 days after the WCS Response was filed and 14 days after it was retrieved from Sierra Club's post office box. The new deadline falls 21 days after Sierra Club received the Executive Director's Response, which also recommends denial of all hearing requests.<sup>4</sup> The new deadline is 7 days after January 5, 2009, the date that Sierra Club was "concerned" might have been the deadline despite the clear direction of the Chief Clerk's December 12 letter. (Sierra Club's failure to make any substantive filing on January 5, 2009, suggests that Sierra Club was not all that concerned about this date.) Finally, all other requesters now have 21 days from their actual receipt of the WCS Response to file replies. With such abundant time to complete its reply, Sierra Club cannot credibly say that it has been harmed by the apparent postal delay.

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<sup>4</sup> The affidavit of Ken Kramer, attached to Sierra Club's January 5 request, states that Sierra Club received the Executive Director's response on December 22, 2008.

These deadlines should also be viewed in the larger context of the licensing proceeding at hand, which is approaching four years since administrative completeness.<sup>5</sup> The hearing requests currently before the Commission have been pending for nearly four months, since September 17, 2008. Sierra Club has concocted its latest procedural concerns in an effort to unnecessarily delay and add cost to the licensing proceedings for this important facility that will benefit the State of Texas. Sierra Club and the other requesters, who have the burden of establishing the grounds for their requests, had ample time both to develop their original requests and now to reply to responses to those requests. Moreover, Sierra Club's unfounded claims for party status simply mirror its past arguments that have been rejected in the past by this Commission in connection with WCS's license application concerning disposal of byproduct material and also by the Texas Department of State Health Services.<sup>6</sup> As detailed in WCS's Response, Sierra Club's inability to obtain party status through its members Rose Gardner and Fletcher Williams is *res judicata*.<sup>7</sup> Sierra Club does not have associational standing necessary for a contested hearing. The Commission should not be distracted from the merits of WCS's Response and application by Sierra Club's unfounded arguments, particularly in light of the additional time that the Commission has now awarded all requesters.

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<sup>5</sup> WCS's application was declared administratively complete on February 18, 2005.

<sup>6</sup> See Tex. Dep't of State Health Servs., *In re: Waste Control Specialists LLC License Amendment No. 32*, SOAH Docket No. 537-05-5206, Order of the Commissioner of the Department of State Health Services (Feb. 24, 2006); Order of the TCEQ Commissioners, TCEQ Docket No. 2008-0428-RAW (May 29, 2008).

<sup>7</sup> See *Waste Control Specialists LLC's Response to Requests for Contested Case Hearing* at 15-16, TCEQ Docket No. 2005-1994-RAW (Dec. 18, 2008).

WHEREFORE PREMISES CONSIDERED, Waste Control Specialists LLC respectfully requests the Commission consider this Response to Sierra Club's Request for Extension of Time to Submit Replies to Responses to Hearing Requests and Extension of Public Meeting Date.

Respectfully submitted,



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**ATTORNEYS FOR APPLICANT,  
WASTE CONTROL SPECIALISTS LLC**

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CHIEF CLERKS OFFICE

**CERTIFICATE OF SERVICE**

In accordance with 30 T.A.C. §55.254(e), I hereby certify that on this 8 day of January 2009, a true and correct copy of the above and foregoing was duly served by hand delivery or certified mail, return receipt requested, on the following persons:

FOR THE EXECUTIVE DIRECTOR:

Don Redmond, Staff Attorney  
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FOR OFFICE OF PUBLIC ASSISTANCE:

Ms. Bridget Bohac, Director  
Texas Commission on Environmental Quality, Office of Public Assistance, MC-108  
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FOR PUBLIC INTEREST COUNSEL:

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Waste Control Specialists LLC  
Response to Request for Extension  
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FOR ALTERNATIVE DISPUTE  
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FOR THE CHIEF CLERK:

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ODESSA TX 79762-6947

  
Michael L. Woodward

# Exhibit A

**AFFIDAVIT**

**THE STATE OF TEXAS**           §  
  §  
**COUNTY OF TRAVIS**           §

**BEFORE ME**, the undersigned authority, on this day personally appeared **MICHAEL L. WOODWARD**, who being by me duly sworn under oath, deposed and said:

“My name is **MICHAEL L. WOODWARD**. I am over eighteen (18) years of age, and I am fully competent to make this Affidavit. I have personal knowledge of the facts stated herein, and they are true and correct.

1. On December 18, 2008, our law firm filed a Response to Requests for Contested Hearing with the Office of the Chief Clerk of the Texas Commission on Environmental Quality concerning Docket No. 2005-1994-RAW on behalf of our client, Waste Control Specialists LLC, via hand delivery.

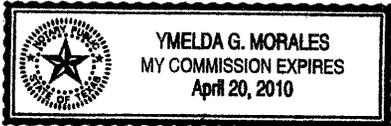
2. That same day, our law firm timely mailed a copy of the Response to Requests for Contested Hearing to the interested persons on the service list attached thereto, including Ken Kramer of the Sierra Club, P.O. Box 1931, Austin, Texas 78767-1931, via certified mail, return receipt requested, in accordance with 30 T.A.C. §1.11.”

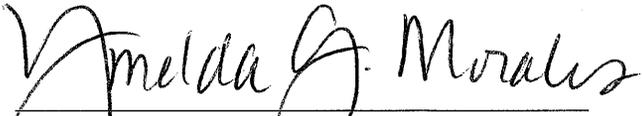
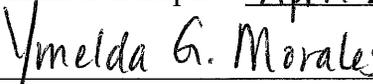
“I have read this Affidavit, and it is true and correct.”

**FURTHER AFFIANT SAYETH NOT.**

  
\_\_\_\_\_  
**MICHAEL L. WOODWARD**

**SUBSCRIBED AND SWORN TO BEFORE ME** on this 8<sup>th</sup> day of January 2009.



  
\_\_\_\_\_  
**NOTARY PUBLIC, STATE OF TEXAS**  
My Commission Expires: April 20, 2010  
  
\_\_\_\_\_  
Printed Name