TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

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CHIEF CLERKS OFFICE

IN THE MATTER OF	§	**BEFORE THE TEXAS COMMISSION**
RADIOACTIVE MATERIAL	§	**ON ENVIRONMENTAL QUALITY**
LICENSE NO. R04100	§	

WASTE CONTROL SPECIALISTS LLC'S
RESPONSE TO REQUESTS FOR CONTESTED HEARING

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

WASTE CONTROL SPECIALISTS LLC ("WCS"), the applicant for Radioactive Material License No. R04100 authorizing the disposal of low-level radioactive waste ("LLRW"), files this Response to Requests for Contested Hearing, and would show the Commissioners of the Texas Commission on Environmental Quality ("TCEQ") the following:

I. Introduction

On August 4, 2004, WCS applied to the TCEQ for a radioactive material license authorizing the construction and operation of a LLRW disposal site in Andrews County, Texas ("license application"). The LLRW disposal site will be located on a 1,338-acre tract of land ("facility") within the boundaries of the WCS property comprising nearly 15,000 acres. The LLRW disposal site will consist of two land disposal facilities – a Compact waste disposal facility, and a Federal facility waste disposal facility.[1] WCS currently conducts commercial hazardous waste and toxic substances storage and disposal operations, and radioactive materials treatment and storage operations on separate portions of the facility pursuant to multiple state authorizations. WCS' authorizations include a license issued by the Commissioners on May 29, 2008, for the construction and operation of a facility to dispose of by-product material, which is also defined as a form of radioactive material under the Act.[2]

On February 18, 2005, TCEQ declared WCS' license application to be administratively complete. TCEQ held a public meeting in the City of Andrews on March 31, 2005, to receive public comment on the license application. On May 2, 2005, TCEQ published its Evaluation of Merit Report, which recognized WCS' license application as the application with the highest comparative merit in accordance with Subchapter F of the Act. TCEQ then initiated technical review of WCS' license application.

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[1] Section 401.2005 of the Texas Radiation Control Act of the Texas Health & Safety Code ("Act") defines "disposal facility site" to mean the tract of land on which the compact waste disposal facility and the federal facility waste disposal facility are located, and the immediate area surrounding the facilities. TEX. HEALTH & SAFETY CODE §401.2005(3).

[2] By Order dated May 29, 2008, the Commission issued Radioactive Material License No. R05807 to WCS after denying all requests for contested hearing on WCS' by-product disposal license application. *See* TCEQ Docket No. 2008-0428-RAW.

On August 13, 2008, the TCEQ declared WCS' license application to be technically complete. The Chief Clerk notified WCS and other interested parties of the Executive Director's completion of technical review of WCS' license application, preliminary decision, and issuance of a draft license and draft environmental analysis. WCS published Notice of Completion of Technical Review in the *Andrews County News* on August 17, 2008. TCEQ published Notice of Completion of Technical Review in the *Texas Register* on August 29, 2008.[3] On September 8, 2008, TCEQ conducted a second public meeting in Andrews to receive public comment on WCS' license application.

The following were among those declaring their support for WCS' license application during the public comment period: (1) Kel Seliger - Texas Senator; (2) Tryon Lewis – Texas Representative-Elect; (3) Richard Dolgener - Andrews County Judge; (4) Brad Young - Andrews County Commissioner; (5) Robert Zap - City of Andrews Mayor; (6) Glen Hackler - Andrews City Manager; (7) Judd Porter - Andrews City Councilmember; (8) Gregg Fulfer - Lea County, New Mexico Commissioner; (9) Randall McCormick – Lea County Commissioner; (10) Matt White - City of Eunice, New Mexico Mayor; (11) Curtis Schrader – Eunice City Manager; (12) Lloyd Eisenrich – Andrews Industrial Foundation; (13) Dr. E.W. Harper – Permian Regional Hospital Board; (14) Russell Shannon – President and Chief Executive Officer (CEO) of National Bank of Andrews; and (15) Len Wilson – Former Andrews City Manager.

Requests for contested hearing on WCS' license application were submitted to the TCEQ by the Sierra Club, an association whose request for party status on a licensing action authorizing WCS' management of radioactive material was denied by Order of the Commission less than seven months ago,[4] and the following parties: Nuclear Information and Resource Service ("NIRS"); Cruz Montanez;[5] and Rose Gardner.[6]

NIRS is an association headquartered in Takoma Park, Maryland. NIRS has not identified any specific, individual member of its association that resides in Andrews County or a county adjacent to Andrews County. Cruz Montanez' purported residence is in Odessa. Odessa is located over 50 miles from WCS' facility. **Exhibit A** is a map identifying the location of Rose Gardner and Fletcher Williams' purported residences.[7] None of the Requestors own property adjacent to the WCS property.

On December 2, 2008, the Executive Director filed with the Office of the Chief Clerk his Response to Public Comment and revised Draft License No. R04100. On December 12,

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[3] 33 *Tex. Reg.* 7343-7344 (August 29, 2008).
[4] See Footnote No. 2.
[5] Cruz Montanez submitted a request for contested hearing on April 29, 2005.
[6] Rose Gardner personally submitted a request for contested hearing. Rose Gardner is also one of two "members" relied upon by Sierra Club in seeking associational standing in this matter. The associations and individuals that filed requests for contested hearing in this matter are hereinafter collectively referred to as the "Requestors" where appropriate.
[7] Sierra Club claims standing through its members, Rose Gardner and Fletcher Williams. Rose Gardner resides over 5 ½ miles away from WCS' facility. Her claimed flower shop is also over 5 ½ miles away from the facility. Fletcher Williams resides 3.69 miles from WCS' facility.

2008, the Chief Clerk notified WCS and all other interested persons that the Commissioners' meeting at which the Commission will determine whether any of the Requestors have standing to pursue a formal hearing on the merits of WCS' license application is scheduled for January 14, 2008.

As discussed below, none of the Requestors in this matter qualify as a "person affected" under applicable Texas law. Because the Requestors do not satisfy the standing requirement in this matter, a contested hearing on WCS' license application should not be granted.

II. Purpose of Standing in Administrative Hearings

The standing requirement is a fundamental, procedural hurdle to formally contesting a regulatory agency's reasoned decision on the merits of a license application. It ensures the license applicant and regulatory agency are not forced to exhaust additional time, effort and resources defending the license application and the decision of the agency unless there is a substantiated purpose for further scrutiny. Contested hearings are strictly for purposes of developing necessary information and reasonable claims by individuals and entities that will be directly aggrieved by the proposed activity. The right to a contested hearing does not exist to frustrate agency actions and license applicants by those who do not like the permissions to conduct legal activities or the general concepts underlying the legal activities. Therefore, the standing requirement must be considered a mechanism for distinguishing an aggrieved person's justified right to a hearing from those hearing requests that are arbitrary, without merit, or that do not involve a legally protected interest.

III. "Person Affected" Standard Under Texas Law

To be granted a contested hearing on the merits of WCS' license application, a Requestor must meet his or her burden of demonstrating to the Commissioners that he or she is a "person affected." Two statutory definitions of who is affected are relevant to matters concerning the disposal of LLRW, which is defined as a form of regulated radioactive material under Section 401.004 of the Act. "Affected person" in Chapter 5 of the Water Code is generally applicable to air, water, and waste licensure matters under the TCEQ's jurisdiction. "Person affected" in Chapter 401 of the Act is specifically applicable to LLRW disposal licensure matters.[8] As discussed below, none of the Requestors has standing under the definition of "affected person" in either Chapter 5 of the Water Code or Chapter 401 of the Act.

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[8] The Texas Legislature adopted the "person affected" standard in Chapter 401 of the Act nearly two decades ago. 1989 TEX. GEN. LAWS Ch. 678, §7 71st Leg., eff. Sept 1, 1989.

A. Chapter 5 of the Water Code & TCEQ Rule 55.256

Chapter 5 of the Water Code governs the general structure and duties of the TCEQ.[9] The subchapter in which the provision construing "affected person" is found, Subchapter D, establishes the "general powers and duties of the [TCEQ]."[10] As such, Chapter 5 is legislation of general application. However, the statute establishing the scope of Subchapter D, Section 5.101, limits the application of the subchapter, stating that the TCEQ "has other specific powers and duties as prescribed in other sections of the code and other laws of this state."[11] That section therefore establishes that Chapter 5 is not the sole source of the TCEQ's authority or the sole description of its permissible activities.

Section 5.115(a) of the Water Code states:

> "For the purpose of an administrative hearing held by or for the commission involving a contested case, "affected person," or "person affected," or "person who may be affected" means a person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing. **An interest common to members of the general public does not qualify as a personal justiciable interest.** The commission shall adopt rules specifying factors which must be considered in determining whether a person is an affected person in any contested case arising under the air, waste, or water programs within the commission's jurisdiction and whether an affected association is entitled to standing in contested case hearings."[12]

Section 5.115(a) requires a person seeking a hearing to demonstrate that his or her interest is personal and is not common to the general public. Applicable case law additionally requires that a person's affected status must be demonstrated by more than unfounded predictions and unsupported assumptions.[13]

Section 5.115(a) also requires the TCEQ to adopt rules specifying factors to be applied in determining whether or not a hearing requestor is a "person affected." These rules are set out in 30 T.A.C. Chapter 55, governing requests for contested case hearings generally. Like Section 5.115(a) in the Water Code, the rule construing "person affected" is of general applicability within the confines of the TCEQ's jurisdiction.

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[9] *See* TEX. WATER CODE §5.011 (stating that the purpose of Chapter 5 is to provide an organizational structure for the TCEQ and to define "the duties, responsibilities, authority, and functions of the commission and the executive director").
[10] TEX. WATER CODE §5.101.
[11] *Id.*
[12] TEX. WATER CODE §5.115(a) (Emphasis added). In Chapter 5 of the Water Code, "person affected" and "affected person" are used interchangeably.
[13] *See Collins v. Texas Natural Res. Conservation Comm'n,* 94 S.W.3d 876, 883 (Tex. App.—Austin 2002, no writ) (holding that TCEQ properly denied hearing request of person whose affected person status was premised on the prediction that liners will fail and unsupported assumption that the failure will be of such magnitude as to contaminate his groundwater).

TCEQ Rule 55.256(c) sets out the factors to be applied by the TCEQ in determining whether or not an individual is a "person affected." It states:

> All relevant factors shall be considered, including, but not limited to, the following:
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> (1) whether the interest claimed is one protected by the law under which the application will be considered;
> (2) distance restrictions or other limitations imposed by law on the affected interest;
> (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
> (4) likely impact of the regulated activity on the health, safety, and use of property of the person;
> (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
> (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.[14]

TCEQ Rule 55.256(c) requires a person seeking party status to demonstrate an adverse effect on the person's health, safety, use of private property, or use of natural resources resulting from WCS' proposed activities. Rule 55.256(c) also recognizes that a person's ability to gain party status for a contested hearing on a license application is subject to the specific laws and statutory limitations under which the application will be considered. This is significant in the current matter because Chapter 401 of the Act expressly governs WCS' license application. Thus, in addition to meeting the criteria specified in Chapter 5 of the Water Code and the implementing regulations, a person seeking party status for a contested hearing on the merits of WCS' license application is also subject to the substantive restrictions and limitations imposed by Chapter 401 of the Act, including the "person affected" standard at Section 401.003(15) therein.[15]

B. Chapter 401 of the Act

Under Chapter 401 of the Act, the Texas Legislature has defined the universe of persons who are entitled to a contested hearing on license applications for the disposal of LLRW. A requestor seeking to contest a state agency's decision concerning a LLRW disposal license has the burden of demonstrating through admissible evidence that it is a "person affected," as expressly defined in Section 401.003(15) of the Act. Section 401.003(15) states:

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[14] 30 T.A.C. §55.256(c).

[15] This is consistent with the fact that there is no other purpose served by the Legislature's act of adopting an exclusive "person affected" standard in Chapter 401, other than for direct application of that standard in contested matters involving activities expressly governed by Chapter 401, such as the disposal of LLRW.

> "Person affected" means a person who demonstrates that the person has suffered or will suffer **actual** injury or economic damage and, if the person is not a local government:
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> (A) Is a resident of a county, or a county adjacent to that county, in which nuclear or radioactive material is or will be located; or
> (B) Is doing business or has a legal interest in land in the county or adjacent county.[16]

The standard of actual injury or economic damage requires a demonstration of an injury in fact or an actual threat thereof. This requirement is at least as stringent as the "injury in fact" element of the three-part test applied by the U.S. Supreme Court in determining whether a party has met the "irreducible constitutional minimum of standing."[17] According to the U.S. Supreme Court, an "injury in fact" is an "invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical."[18]

The injury has to be traceable to the challenged action and not the result of the independent action of some third party.[19] In fact, a causal relationship between an injury and licensed activities was required for meeting the same "person affected" standard set forth in Chapter 401 of the Act in a 1997 contested case involving WCS' application for its Radioactive Materials License No. L04971.[20] The Texas Commissioner of Health found that the requestors did not meet their burden of demonstrating through admissible evidence in the preliminary hearing that there was a causal relationship between the injury claimed and the licensing action.[21] The presiding Administrative Law Judges ("ALJs") explained in their Proposal for Decision that a causal relationship is only established if the injury or economic damage affects the particular requestor, *not merely be a general public concern*, and such injury or economic damage cannot be based on conjecture or supposition.[22]

In 2005, the Sierra Club through its new member, Rose Gardner, sought standing to contest WCS' radioactive material license amendment application concerning the storage of byproduct material. After a two-day preliminary hearing to determine party status, the ALJs in that matter issued a Proposal for Decision wherein associational standing was

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[16] TEX. HEALTH & SAFETY CODE §401.003(15) (Emphasis added).
[17] *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136 (1992).
[18] *Id.*
[19] *Id.* (Standing requires a causal connection between the injury and the conduct complained of— the injury has to be fairly traceable to the challenged action, and not the result of the independent action of some third party).
[20] Tex. Dep't. of Health, *Application of Waste Control Specialists, LLC for Texas Department of Health License No. LO4971*, SOAH Docket No. 501-97-1364, Proposal for Decision (Sept. 24, 1997).
[21] In the 1997 matter, the Commissioner of Health adopted the Administrative Law Judges' Findings of Fact and Conclusions of Law in the Proposal for Decision, and denied party status to the requestors.
[22] Tex. Dep't. of Health, *Application of Waste Control Specialists, LLC for Texas Department of Health License No. LO4971*, SOAH Docket No. 501-97-1364, Proposal for Decision at p. 4 (Sept. 24, 1997) (Emphasis added).

denied to the Sierra Club because its member, Rose Gardner, did not meet the "person affected" standard under Chapter 401 of the Act. The Commissioner of the Texas Department of State Health Services (DSHS) entered a final order dated February 24, 2006, adopting the ALJs' Findings of Fact and Conclusions of Law and denying party status to the Sierra Club.[23]

Less than eight months ago, the Sierra Club, through its members, Rose Gardner and Fletcher Williams, and other individual requestors sought standing to contest WCS' radioactive materials license application concerning the disposal of byproduct material ("byproduct disposal licensure matter"). This Commission denied standing to all requestors, including Sierra Club, because they did not meet TCEQ's standing requirements, including the "person affected" standard set forth in Chapter 401 of the Act.[24]

Federal decisions involving the federal counterpart agency to the TCEQ in commercial radioactive materials disposal matters, the U.S. Nuclear Regulatory Commission ("NRC"), provide persuasive authority regarding the requirements for meeting the "person affected" standard in administrative hearings.[25] Specifically, several federal decisions involving NRC licensing actions provide examples of what does not constitute "injury in fact." Mere proximity to a project site does not establish "injury in fact," and a mere interest in or concern about a geographic area or environmental matters does not suffice to establish standing.[26] The NRC also held that general assertions by persons merely living close to transportation routes upon which LLRW and components would be transported is insufficient to establish "injury in fact."[27]

Texas statutory law and federal and state agency decisions clearly require a person seeking standing for a contested hearing on a radioactive materials license application to meet his or her burden of satisfying a restrictive "person affected" standard.

The Commission should rely solely on the "person affected" standard in Chapter 401 of the Act for determining whether a Requestor has standing in this matter. Because Chapter 401 of the Act specifically governs radioactive materials licensure matters, which expressly includes the disposal of LLRW, the exclusive application of the Chapter 401 standard is appropriate. Equally important, the "person affected" standard in Chapter 401 has been the standard applied by the State of Texas in past licensure matters involving WCS' radioactive material authorizations. Thus, a strong precedent exists for determination of party status in this matter based on the "person affected" standard in Chapter 401 of the Act.

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[23] Tex. Dep't. of State Health Services, *In the Matter of Waste Control Specialists LLC License Amendment No. 32*, SOAH Docket No. 537-05-5206 (February 24, 2006).
[24] Order of the TCEQ Commissioners, TCEQ Docket No. 2008-0428-RAW (May 29, 2008).
[25] As charged under 189(a)(1) of the Atomic Energy Act, the NRC grants a contested hearing only to those who meet the standard of a "person affected." *See* 42 U.S.C. §2239(a)(1).
[26] *See In the Matter of Cleveland Electric Illuminating Co.*, CLI-93-21, 38 NRC 87, 92 (1993); *In the Matter of Umetco Minerals Corp.*, LBP-94-18, 39 NRC 369, 370 (1994).
[27] *See Yankee Atomic Electric Co.*, CLI-94-3, 39 NRC 95-98 (1994).

However, if the Commission chooses to originate its standing analysis under Chapter 5 of the Water Code, it would ultimately lead to the same result. Section 5.115(a) of the Water Code mandates consideration of the factors specified in TCEQ Rule 55.256 for determining standing. In addition to requiring a person requesting a contested hearing to show the interest claimed in the matter is not an interest common to members of the general public, TCEQ Rule 55.256 mandates an analysis of "whether the interest claimed is one protected by the law under which the application will be considered" and "other limitations imposed by law on the affected interest."[28] By law, the Commission is required to consider WCS' license application under Chapter 401 of the Act. A material limitation imposed by Chapter 401 on the Requestors' alleged interests is the "person affected" standard in Section 401.003(15) of the Act. As a result, the "person affected" standard in Chapter 401 of the Act governs this matter even though the Commission may choose to begin their standing analysis with Chapter 5 of the Water Code.

It is clear that the Requestors have the burden of satisfying the "person affected" standard in Chapter 401 of the Act to be granted a contested hearing on the merits of WCS' license application.

IV. Sierra Club Does Not Have Associational Standing

A group or association seeking party status on behalf of its members is subject to an even higher burden. As a general rule, one may not maintain an action based upon the harm allegedly suffered by another.[29] Associations are subject to increased scrutiny to determine whether the association in fact does represent the actual and demonstrated best interests of its members and whether the tribunal may rightly adjudicate the claims presented. The association's right to appear requires the representational relationship to be a strong one, in order to ensure the fidelity of the organization to those for whom it claims to speak. Accordingly, in order for an association to be granted party status, it is required to meet the following three-prong test for associational standing:

(1) At least one of its members would otherwise have standing to request a hearing in their own right (i.e., a member meets the "person affected" standard in Chapter 5 of the Water Code and Chapter 401 of the Act);

(2) The interests the group or association seeks to protect are germane to the organization's purpose; and

(3) Neither the claim asserted nor the relief requested requires the participation of the individual members in the case.[30]

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[28] *See* 30 T.A.C. 55.256(c)(1), (2).
[29] *Nobles v. Marcus,* 533 S.W.2d 923 (Tex. 1976).
[30] 30 T.A.C. §55.252(a); *Hunt v. Washington State Apple Advertising Commission*, 97 S.Ct. 2434, 2441 (1977); *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 447 (Tex. 1993).

In order for an organization to be granted standing in this matter, the organization must show that at least one of its individual members has a "personal justiciable interest" as required by Section 5.115 of the Water Code and has suffered or will suffer actual injury or economic damage, as required by the "person affected" standard in Chapter 401 of the Act.[31] At a minimum, an organization must demonstrate the existence of a substantial risk of injury to one of its individual members to satisfy the first prong of the associational standing test.[32]

By letter dated September 16, 2008, Sierra Club submitted comments and requested a contested hearing on WCS' license application. Sierra Club specifically states, "[W]e are through this letter identifying two members in good standing that have specifically asked us to request a contested case hearing on Radioactive Material License Number R04001 [sic] on their behalf...These two individual members will be adversely affected by the issuance of the license."[33] The Sierra Club then identifies Rose Gardner and Fletcher Williams, two individuals residing in Eunice, New Mexico, as members of the association whom will serve as the association's "affected" members in this matter.[34] Rose Gardner and Fletcher Williams are the same members who were relied upon by the Sierra Club in seeking a contested hearing in the byproduct disposal licensure matter, which was denied by the Commission. In fact, Sierra Club's accusations and discussion of Rose Gardner and Fletcher Williams in its current request for contested hearing mirror Sierra Club's previous discussion in its request for contested hearing in the byproduct disposal licensure matter.

Sierra Club fails again to satisfy the first prong of the three-prong test for associational standing.[35] Sierra Club has <u>not</u> made a showing that either of its identified members has a personal justiciable interest or has suffered or will suffer actual injury or economic damage resulting from WCS' proposed LLRW disposal activities. Given the information presented in Sierra Club's submittal, Rose Gardner and Fletcher Williams' accusations rest on unfounded scenarios and hypotheticals.[36] Neither Rose Gardner nor Fletcher Williams is an adjacent landowner to WCS' 15,000-acre property on which the LLRW disposal facility site is located. Simply put, there is no adequate demonstration that Rose Gardner or Fletcher Williams has suffered or will suffer an "injury in fact" due to WCS' proposed activities, or any reasonable relationship between what Sierra Club may argue the individuals' interests are and the activities that would be authorized.[37] There is no

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[31] The Texas Supreme Court has stated that the first prong of the associational standing test is "to weed out plaintiffs who try to bring cases, which could not otherwise be brought by manufacturing allegations of standing lacking any real foundation." *See Texas Ass'n of Bus. v. Texas Air Control Bd.,* 852 S.W.2d, 440, 447 (Tex. 1993).
[32] *Id.*
[33] Sierra Club Request Letter, p. 26.
[34] Sierra Club Request Letter, p. 26-29.
[35] Because Sierra Club fails to overcome the first prong, it is not necessary to discuss why Sierra Club also fails to satisfy the remaining elements of the three-prong test for establishing associational standing.
[36] *See Collins*, 94 S.W.3d at 883 (Tex. App.—Austin 2002, no writ).
[37] *See Lujan v. Defenders of Wildlife*; 112 S.Ct. at 2136 (1992); *see* Tex. Dep't of Health, *Application of Waste Control Specialists LLC for Texas Department of Health License No. LO4971*, SOAH Docket No. 501-97-1364, Proposal for Decision (Sept. 24, 1997).

adequate demonstration of at least a substantial risk of injury to the individuals resulting from WCS' proposed activities.[38] Rose Gardner and Fletcher Williams merely express positions that are common to members of the general public.[39] Rose Gardner and Fletcher Williams do not meet the requirements for individual standing. Thus, Sierra Club does not qualify for associational standing in this matter.

A. Rose Gardner, a member of Sierra Club, is not a "person affected."

Sierra Club relies heavily upon the circumstances of Rose Gardner in order to demonstrate that it has associational standing in this matter. However, Sierra Club fails to meet its burden. Sierra Club merely describes Rose Gardner's personal and business activities as a resident of Eunice, New Mexico, including the following: her two businesses located in the City of Eunice; real properties located in the City of Eunice;[40] use of the "Waste Management" landfill; ownership of livestock located on her property in the City of Eunice; use of water drawn from her water well located on her real property in the City of Eunice; use of public roadways; and residence in an area with gusty winds.[41] Sierra Club's discussion of Rose Gardner's activities only proves that Rose Gardner is <u>not</u> anymore impacted than other members of the general public by the proposed activities at the WCS site.[42]

Sierra Club has not demonstrated that Rose Gardner will suffer an "injury in fact" resulting from WCS' proposed activities.[43] There is absolutely no invasion of a legally protected interest afforded to her that is concrete and particularized, and actual or imminent.[44] There is no demonstration that Rose Gardner would be exposed to a substantial risk of injury resulting from WCS' proposed activities.[45] Sierra Club does not establish standing by generally asserting Rose Gardner's proximity to, and use of, potential transportation routes upon which LLRW and components would be transported to the LLRW disposal facility site.[46] Sierra Club's demonstration is mere conjecture and hypothetical. In sum, the information set forth in Sierra Club's request for contested hearing leads to only one reasonable conclusion: Rose Gardner is <u>not</u> a "person affected."

Because Rose Gardner is not a "person affected," Sierra Club fails to meet its burden of demonstrating that it has associational standing in this matter.

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[38] *See Tex. Ass'n of Business*, 852 S.W.2d at 447 (Tex. 1993).
[39] Party status shall not be granted to a person with an interest(s) common to members of the general public. *See* 30 T.A.C. §55.256(a).
[40] Rose Gardner resides <u>over 5 ½ miles</u> from the WCS facility. Her flower shop is also located <u>over 5 ½ miles</u> from the WCS facility. *See* **Exhibit A**.
[41] Sierra Club Request Letter, p. 26-28.
[42] *See* 30 T.A.C. §55.256(a).
[43] *See* TEX. HEALTH & SAFETY CODE §401.003(15).
[44] *See Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136 (1992).
[45] *See Tex. Ass'n of Business*, 852 S.W.2d at 447 (Tex. 1993).
[46] *See Yankee Atomic Electric Co.*, CLI-94-3, 39 NRC 95-98 (1994).

B. Fletcher Williams, allegedly a member of Sierra Club, is not a "person affected."

Sierra Club's attempt to gain associational standing is not anymore strengthened by its description of Fletcher Williams' circumstances. Like Rose Gardner, Sierra Club merely describes the personal and business activities of Fletcher Williams, another resident of Eunice, New Mexico, including: her residence near potential LLRW transportation routes; use of groundwater from "wells in the area"; exposure to high winds common in the area; and use of public roadways.[47] Such demonstration does not suffice in satisfying the "person affected" standard for standing in this matter.

Fletcher Williams' interests in this matter are indistinguishable from those of other members of the general public.[48] Sierra Club has not adequately demonstrated that Fletcher Williams has suffered or will suffer an "injury in fact" due to WCS' proposed activities. Sierra Club's discussion of Fletcher Williams' closer proximity to the WCS property, as compared to the distance between Rose Gardner's residence and the WCS property, does not establish an "injury in fact."[49] Sierra Club's discussion does not demonstrate a substantial risk of injury to Fletcher Williams resulting from the proposed activities.[50] Fletcher Williams' mere interest in or concern about the geographic area and environmental matters concerning the proposed activities at the LLRW disposal facility site does not suffice to establish standing.[51]

Fletcher Williams is <u>not</u> a "person affected." Because Fletcher Williams is not a "person affected," Sierra Club fails to meet its burden of demonstrating that it has associational standing in this matter.

C. The doctrine of *res judicata* bars Sierra Club, through its members, Rose Gardner and Fletcher Williams, from obtaining party status in this matter.

This is not the first time that Sierra Club has attempted to obtain associational standing through its members, Rose Gardner and Fletcher Williams, in licensure matters concerning WCS' radioactive materials management operations in Andrews County. In the byproduct disposal licensure matter, Sierra Club submitted the <u>same</u> accusations and discussion of Ms. Gardner and Ms. Williams' daily activities and personal circumstances to the Commission in an effort to obtain associational standing for a contested hearing.[52] The Commission entered an Order denying standing to Sierra Club because neither Ms. Gardner nor Ms. Williams were a "person affected" under Texas law. The other hearing

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[47] *See* Sierra Club Request Letter, pg. 28-29. Sierra Club's claim that Fletcher Williams uses groundwater from "wells in the area" is patently vague and does not result in a viable claim of an interest that is protected under Chapter 401 of the Act.
[48] *See* 30 T.A.C. 55.256(a).
[49] Fletcher Williams resides <u>3.69 miles</u> from WCS' facility. *See* **Exhibit A.**
[50] *See Tex. Ass'n of Business*, 852 S.W.2d at 447 (Tex. 1993).
[51] *See Yankee Atomic Electric Co.*, CLI-94-3, 39 NRC 95-98 (1994).
[52] *See* Sierra Club Request Letter, pg. 16-18; TCEQ Docket No. 2008-0428-RAW.

requestors were also denied standing. This Commission issued the byproduct disposal license to WCS on May 29, 2008.[53]

In 2005, Sierra Club failed to demonstrate to SOAH, and ultimately the Commissioner of the DSHS, that it had associational standing through Rose Gardner to contest the merits of WCS' proposed radioactive materials management activities.[54] In that matter, WCS sought a license amendment from the DSHS for the storage of byproduct material at its site. Sierra Club, among others, requested a contested hearing. DSHS referred the matter to SOAH, which held an extensive, two-day preliminary hearing to determine whether any of the persons, including Sierra Club, had standing to pursue a contested hearing on the merits.[55] During the preliminary hearing, the ALJs considered evidence presented by Sierra Club, including the testimony of Rose Gardner.[56] Based on the evidence presented, the ALJs made the following Findings of Fact:[57]

> 27. The WCS facility comprises 1,338 acres on a 15,000-acre ranch owned by WCS.
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> 28. The town nearest to the facility is Eunice, in Lea County, New Mexico, located approximately five to six miles to the west.
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> 29. The Texas community closest to the facility site is the City of Andrews, which is about 35 miles east of the site.
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> 36. Ms. Gardner is a resident of Eunice, New Mexico.[58]

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[53] Order of the TCEQ Commissioners, TCEQ Docket No. 2008-0428-RAW. Sierra Club's Motion for Rehearing was denied.

[54] Tex. Dep't. of State Health Services, *In the Matter of Waste Control Specialists LLC License Amendment No. 32*, SOAH Docket No. 537-05-5206.

[55] Tex. Dep't. of State Health Services, *In the Matter of Waste Control Specialists LLC License Amendment No. 32*, SOAH Docket No. 537-05-5206, Proposal for Decision (Dec. 16, 2005). Other persons besides Sierra Club were also afforded the opportunity to be heard during the 2005 preliminary hearing. Upon the conclusion of their testimony, these persons were expeditiously denied standing in the matter. Thus, the two-day preliminary hearing overwhelmingly focused on whether Sierra Club through its member, Rose Gardner, met its burden of proving that she is a "person affected," thereby satisfying the first prong of the three-prong test for associational standing.

[56] *Id.* at p. 5-7. Sierra Club also submitted a Closing Argument Brief for the ALJs' consideration in its attempt to seek party status for a contested hearing on WCS' application.

[57] *Id.* at p. 11-12.

[58] Testimony during the 2005 preliminary hearing indicated that Ms. Gardner's residence and real property adjacent thereto are located in the *southernmost* portion of Eunice whereas WCS' facility is located "*five to six miles east*" of the Eunice city limits. *See* Tex. Dep't. of State Health Services, *In the Matter of Waste Control Specialists LLC License Amendment No. 32*, SOAH Docket No. 537-05-5206, Transcript, p. 198, lines 20-23 (Emphasis added). However, Sierra Club specifically claims, "Rose Gardner lives in Eunice, New Mexico, approximately four miles due west from the proposed WCS commercial byproduct facility." *See* Sierra Club Request Letter, p. 16. It is evident that Sierra Club is attempting to paint a picture of a Eunice resident living much closer to the WCS site than what is actually the case for purposes of establishing associational standing. *See* **Exhibit A.**

> 37. Ms. Gardner goes to the Lea County landfill, which is immediately southwest of the WCS site, up to five times a year to discard waste from her flower shop.[59]
>
> 38-40. Ms. Gardner drives close to the WCS site on State Highway 176 for various reasons.
>
> 42. Ms. Gardner's occasional use of the Lea County landfill and her traveling and visits in the vicinity of the WCS site do not establish a sufficient connection between her and Amendment No. 32 to make her a person affected by this proceeding.[60]

Recognizing the applicability of the "person affected" standard in Chapter 401 of the Act, the ALJs concluded that the Sierra Club failed to establish standing under either Chapter 5 of the Water Code or Chapter 401 of the Act.[61] The ALJs recommended that the DSHS issue the radioactive materials authorization to WCS without a contested hearing.[62] Although Sierra Club filed a post-Proposal for Decision Exceptions Brief further claiming that it had standing to pursue a contested hearing,[63] the Commissioner of the DSHS adopted the ALJs Proposal for Decision, Findings of Fact and Conclusions of Law on February 24, 2006.[64] Sierra Club did not appeal the DSHS decision.

There is no doubt that the facts underlying Sierra Club's pending request for contested hearing are no different than what was presented during the byproduct disposal licensure matter before this Commission and the 2005 byproduct storage licensure matter before

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[59] The "Lea County landfill" is the same facility as the landfill managed by Waste Management, which is referenced in Sierra Club's request for contested hearing in current matter.

[60] *See* Tex. Dep't. of State Health Services, *In the Matter of Waste Control Specialists LLC License Amendment No. 32*, SOAH Docket No. 537-05-5206, Proposal for Decision at p. 12 (Dec. 16, 2005). This Finding of Fact was made even though Sierra Club argued during the preliminary hearing that Rose Gardner's concerns are distinguished from those of the general public because she could "face exposure to toxic runoff or windblown toxic particles" from the WCS site while she visits the Lea County landfill. *Id.* at p. 6. Testimony during the 2005 preliminary hearing also indicated that area winds blow from east to west approximately *6 to 6 ½ percent* of the time and east-northeast to west-southwest approximately *5 percent* of the time. Thus, it is well established that area winds in the vicinity of the WCS site do not blow in the direction of the City of Eunice or its landfill during the vast majority of the time. *See* Tex. Dep't. of State Health Services, *In the Matter of Waste Control Specialists LLC License Amendment No. 32*, SOAH Docket No. 537-05-5206, Transcript, pg. 47, lines 5-25, p. 48, lines 1-7, Sierra Club Exhibit No. 4 (Emphasis added).

[61] The ALJs' analysis is unambiguous. The ALJs expressly stated, "No party status requestor in this case established a sufficient connection with the subject of Amendment No. 32 to warrant party status under either traditionally applicable requirements for standing or a heightened standard." *See* Tex. Dep't. of State Health Services, *In the Matter of Waste Control Specialists LLC License Amendment No. 32*, SOAH Docket No. 537-05-5206, Proposal for Decision at p. 5, 8 (Dec. 16, 2005).

[62] *Id.* at p. 1, 14.

[63] *See* Tex. Dep't. of State Health Services, *In the Matter of Waste Control Specialists LLC License Amendment No. 32*, SOAH Docket No. 537-05-5206, Exceptions of the Sierra Club to the Proposal for Decision (January 6, 2006).

[64] *See* Tex. Dep't. of State Health Services, *In the Matter of 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 (February 24, 2006).

SOAH.[65] The three matters involve the *same* requestor for associational standing, the *same* member(s) through whom standing is sought, the *same* personal and business activities of the member(s) through whom standing is sought, the *same* WCS 1,338-acre tract of land in Andrews County, the *same* regional characteristics, the *same* local geology, the *same* local weather climate, and the *same* standard for party status under Chapter 401 of the Act. Sierra Club is merely repeating itself in its attempt to meet the "person affected" standard, which it has failed to satisfy on multiple occasions. Sierra Club's request for contested hearing based on the circumstances of its members, Rose Gardner and Fletcher Williams, should be barred under the legal doctrine of *res judicata*.

In a case involving the Texas Natural Resource Conservation Commission (now the TCEQ), the Austin Court of Appeals recognized the common law doctrine of *res judicata*:

> "A question of fact or law, distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery or defense in a suit or action between parties *sui juris*, is conclusively settled by the final judgment or decree therein, so that it cannot be further litigated in a subsequent suit between the same parties or their privies, whether the second suit be for the same or a different cause of action."[66]

The Texas Supreme Court only requires the presence of the following elements for *res judicata* to apply: (1) a prior final judgment on the merits by a court of competent jurisdiction; (2) the same parties or those in privy with them; and (3) a second action based on the same claims as were raised or could have been raised in the first action.[67] Thus, a party may not pursue a claim determined by the final judgment of a court of competent jurisdiction in a prior suit as a ground of recovery in a later suit against the same parties.[68]

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[65] In addition to the information listed in the ALJs Findings of Fact, Sierra Club also introduced evidence during the 2005 preliminary hearing that: Rose Gardner, a lifelong resident of Eunice, owns a floral shop located at 1700 Main Street in Eunice; Rose Gardner owns a feed store located on her property adjacent to her residence in the southernmost portion of Eunice; Rose Gardner uses groundwater from a water well located on her property within the Eunice city limits for multiple purposes; Rose Gardner receives city water at her properties located within the Eunice city limits; and Rose Gardner has experienced weather events in the Eunice-Hobbs-Andrews area over her lifetime, including high winds, tornadoes, dust storms, and earthquakes. *See* Tex. Dep't. of State Health Services, *In the Matter of Waste Control Specialists LLC License Amendment No. 32*, SOAH Docket No. 537-05-5206, Transcript, p. 81-113.

[66] *See McMillan v. Tex. Nat. Resources. Conserv. Comm.*, 983 S.W.2d 359 (Tex.Civ.App. –Austin, 1998, pet. den.).

[67] *Igal v. Brightstar Info. Technology Group & BRBA, Inc.*, No. 04-0931 (Tex. 2007); *Citizens Ins. Co. of Am. V. Daccach*, 217 S.W.3d 430, 452-53 (Tex. 2007).

[68] *Tex. Water Rights Comm'n v. Crow Iron Works*, 582 S.W.2d 768, 771-72 (Tex. 1979) ("The scope of *res judicata* is not limited to matters actually litigated; the judgment in the first suit precludes a second action by the parties and their privies not only on matters actually litigated, but also on causes of action or defenses which arise out of the same subject matter and which might have been litigated in the first suit").

The Texas Supreme Court recently confirmed that final orders of state administrative agencies could bar the same claims from being re-litigated in the court system.[69] Further, the Austin Court of Appeals stated, "It is settled that the doctrine [of *res judicata*] may apply by analogy to final decisions made by administrative agencies in their adjudication of contested cases, as opposed to their other decisions and actions."[70] Likewise, on the federal level, the U.S. Supreme Court has opined that when an administrative agency is acting in a judicial capacity, *res judicata* bars subsequent litigation following the agency's decision.[71]

Because case law holds that final agency decisions are given preclusive effect and therefore bar the same claims from being re-litigated in the court system, it is only logical that final decisions of state agencies bar the same claims from being re-litigated before another state agency that subsequently obtains jurisdiction over the specific regulatory program. The 2007 Texas Supreme Court opinion in *Igal* supports this conclusion: "[A] claimant generally cannot pursue one remedy to an unfavorable conclusion and then pursue the same remedy in another proceeding before the same or a different tribunal. *Res judicata* bars the re-litigation of claims that have been finally adjudicated or that *could have been* litigated in the prior action."[72]

In accordance with case law, the issue of whether Sierra Club, through its members, Rose Gardner and Fletcher Williams, has associational standing to contest WCS' authorization to manage radioactive materials in Andrews County should be barred from further consideration. The Commissions' Order dated May 29, 2008 and the DSHS Commissioner's Order dated February 24, 2006 serve as prior final judgments of state agencies on the merits of whether Sierra Club, through its members, Rose Gardner and Fletcher Williams, has standing. The same parties subject to the prior final judgments are directly involved in the current matter. The current matter is a subsequent action based on the same claims as were raised or could have been raised in the previous actions. In essence, the current matter concerns the same question of law distinctly put in issue (i.e., whether Sierra Club, through its members, Rose Gardner and Fletcher Williams, has standing to contest WCS' authorization to conduct radioactive materials management

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[69] *Igal*, No. 04-0931 (Tex. 2007), *citing Westheimer ISD v. Brockette*, 567 S.W.2d 780, 787 (Tex. 1978) (applying the doctrine of *res judicata* to a ruling of the Texas Commissioner of Education), and *Coalition of Cities for Affordable Util. Rates v. Pub. Util. Comm'n*, 798 S.W.2d 560, 563 (Tex. 1990) (applying *res judicata* to a Public Utilities Commission ruling).

[70] *McMillan*, 983 S.W.2d at 363 (Tex. Civ. App. –Austin, 1998). Other Texas Courts of Appeals have held that *res judicata* bars re-litigation of claims previously finally determined by an administrative agency. *See Tricon Tool & Supply, Inc. v. Thumann*, 226 S.W.3d 494, 511 (Tex.App.—Houston [1st Dist.] 2006, pet. denied); *Ex parte Serna*, 957 S.W.2d 598, 601 (Tex.App.—Fort Worth 1997, no pet.).

[71] *U.S. v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966), *superseded by statute*, Contract Disputes Act of 1978, 41 U.S.C. 601-613 ("When an administrative agency is acting in a judicial capacity and resolve[s] disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose"); *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991).

[72] *Igal,* No. 04-0931 (Tex. 2007) (Emphasis added).

activities at its site in Andrews County) based on the same set of facts. Thus, the Texas Supreme Court's three-part test for *res judicata* is clearly met.[73]

Sierra Club's party status demonstration at issue in the pending matter has been thoroughly considered and wholly rejected. Nothing has changed since Sierra Club's last attempts to satisfy the "person affected" standard applicable to radioactive materials licensure matters in this state. The pending matter is a classic example of why the common law doctrine of *res judicata* is still enforced by Texas courts and regulatory agencies today.

Sierra Club's repeated efforts in pursuing standing through its members, Rose Gardner and Fletcher Williams, are barred under the facts, the law, and the doctrine of *res judicata.* Sierra Club lacks standing and has no right to a contested hearing in this matter under Texas law.[74]

V. NIRS Does Not Have Associational Standing

By letter dated September 16, 2008, NIRS filed a request for contested hearing on WCS' license application. Like the Sierra Club, NIRS does not satisfy the first prong of the three-prong test for associational standing.[75] NIRS does not demonstrate that at least one of its members would otherwise have standing to request a hearing in their own right. NIRS does not demonstrate that its member has suffered or will suffer actual injury or economic damage resulting from WCS' proposed operations. In fact, NIRS' request for contested hearing does not identify any specific, individual member of NIRS residing in Andrews County or an adjacent county that would be "personally affected" by WCS' proposed operations.[76] NIRS' interest or concern about a geographic area or environmental matter does not suffice to establish standing.[77] NIRS lacks standing and has no right to a contested hearing in this matter under Texas law.

VI. Cruz Montanez Does Not Have Standing

By letter dated April 29, 2005, Cruz Montanez filed a request for contested hearing on WCS' license application.[78] Cruz Montanez' purported residence is located over 50 miles from the WCS facility. Cruz Montanez does not demonstrate that he has suffered or will suffer an invasion of a legally protected interest that is concrete and particularized,

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[73] *Id.*

[74] Although the Act and TCEQ rules were implemented to protect the people of the State of Texas, Sierra Club does not seek associational standing through any members who are Texas residents (or Andrews County residents). This material fact further supports a finding that a contested hearing is not warranted in this matter.

[75] 30 T.A.C. §55.252(a); *Hunt v. Washington State Apple Advertising Commission*, 97 S.Ct. 2434, 2441 (1977); *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 447 (Tex. 1993).

[76] *See* NIRS Request Letter; TEX. HEALTH & SAFETY CODE §401.003(15).

[77] *See Yankee Atomic Electric Co.*, CLI-94-3, 39 NRC 95-98 (1994).

[78] Cruz Montanez' request for contested hearing was submitted before the TCEQ initiated technical review of WCS' license application.

and actual or imminent.[79] Cruz Montanez merely states unfounded predictions and unsupported assumptions.[80] Cruz Montanez' concerns are indistinguishable from those of the general public.[81] Equally important, Cruz Montanez does not demonstrate that he has suffered or will suffer actual injury or economic damage resulting from WCS' proposed operations.[82] Cruz Montanez lacks standing and has no right to a contested hearing in this matter under Texas law.

VII. Rose Gardner Does Not Have Standing

By letters file-stamped on September 9, 2008 and September 16, 2008, Rose Gardner, individually, submitted a request for contested hearing on WCS' license application. Rose Gardner does not demonstrate that she has suffered or will suffer an invasion of a legally protected interest that is concrete and particularized, and actual or imminent.[83] Rose Gardner merely states unfounded predictions and unsupported assumptions.[84] Rose Gardner's concerns are indistinguishable from those of the general public.[85] Rose Gardner does not demonstrate that she has suffered or will suffer actual injury or economic damage resulting from WCS' proposed operations.[86]

Rose Gardner is the same person relied upon by the Sierra Club in seeking associational standing in this matter. Rose Gardner's daily personal and business activities have been discussed, reviewed and considered on multiple occasions in past licensure matters involving WCS' radioactive materials management authorizations. Rose Gardner has never met the requirement for standing in a licensure matter in this state. Rose Gardner's circumstances have not changed since she was determined not to be a "person affected" in the byproduct disposal licensure matter before the Commissioners less than eight months ago. Rose Gardner does not meet the standing requirement in this matter. For further discussion of Rose Gardner, please refer to Section IV A. and C. of this submittal.

Rose Gardner lacks standing and has no right to a contested hearing in this matter under Texas law.

VIII. Conclusion

Sierra Club and the other requestors do not have standing in this matter. The Requestors fail to meet their burden of demonstrating that they (or any of its members in the case of Sierra Club and NIRS) are "persons affected" under Chapter 401 of the Act, Chapter 5 of the Water Code or TCEQ Rule 55.256. There is no demonstration of an actual injury, economic damage or substantial risk of injury resulting from WCS' proposed activities.

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[79] *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136 (1992).
[80] *See Collins*, 94 S.W.3d at 883 (Tex. App.—Austin 2002, no writ).
[81] 30 T.A.C. §55.256(a).
[82] *See* Cruz Montanez Request Letter; TEX. HEALTH & SAFETY CODE §401.003(15).
[83] *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136 (1992).
[84] *See Collins*, 94 S.W.3d at 883 (Tex. App.—Austin 2002, no writ).
[85] 30 T.A.C. §55.256(a).
[86] *See* Rose Gardner Request Letters; TEX. HEALTH & SAFETY CODE §401.003(15).

The Requestors merely express claims that are unjustified and indistinguishable from those of the general public. Thus, the Requestors have no right to a contested hearing under Texas law.

WHEREFORE PREMISES CONSIDERED, Waste Control Specialists LLC respectfully requests the Commission consider this Response to Requests for Contested Hearing and deny party status to each and every Requestor because they have not met their burden of demonstrating that they are "persons affected" under either Chapter 5 of the Texas Water Code and TCEQ Rule 55.256, or Chapter 401 of the Texas Radiation Control Act.

Respectfully submitted,

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ATTORNEYS FOR APPLICANT,
WASTE CONTROL SPECIALISTS LLC

CERTIFICATE OF SERVICE

In accordance with 30 T.A.C. §55.254(e), I hereby certify that on this 18th day of December 2008, 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:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
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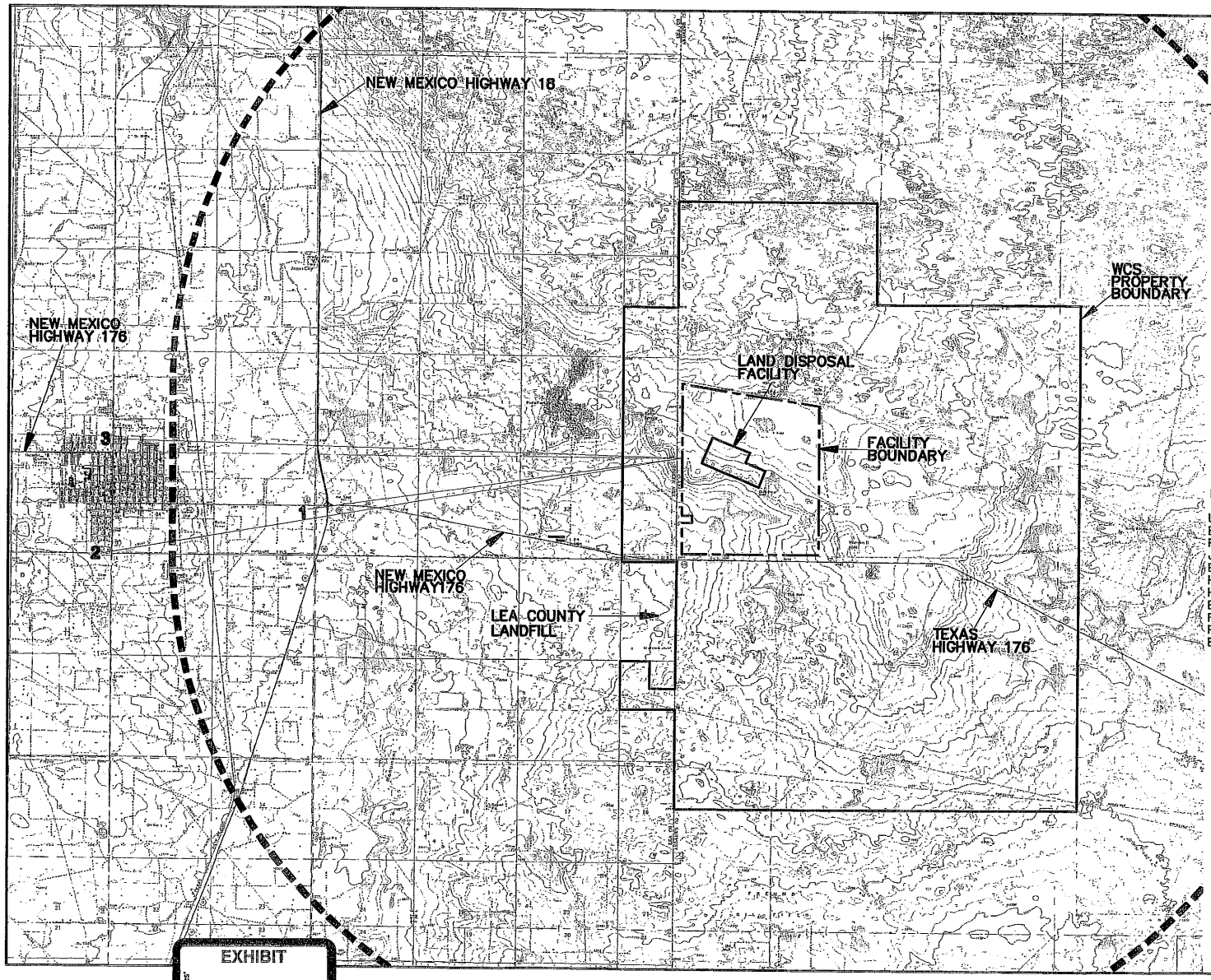

N

5000 2500 0 5000

(SCALE IN FEET)

LEGEND

FACILITY BOUNDARY

WCS PROPERTY BOUNDARY

5 MILE RADIUS

1	WILLIAMS	3.69 MILES
2	GARDNER	5.75 MILES
3	GARDNER FLOWER STORE	5.56 MILES

NOTE:
DISTANCES MEASURED BY TOM JONES USING A GPS.

BASE MAP SOURCE: WWW.GEOCOMM.COM

USGS 7.5 MIN. TOPOGRAPHIC QUADRANGLE:
EUNICE NE, 1969, PHOTOREVISED 1979
FRANKEL CITY SW, 1971
JUMBO HILL, 1971
BRINSON RANCH, 1971
HOBBS SE, 1969, PHOTOREVISED 1979
HOBBS SW, 1969, PHOTOREVISED 1979
EUNICE, 1969, PHOTOREVISED 1979
RATTLESNAKE CANYON, 1969, PHOTOREVISED 1979
EUNICE SE, 1969, PHOTOREVISED 1979

REV.	DATE	DESCRIPTION	DR BY	APP BY

COOK-JOYCE INC.
ENGINEERING AND CONSULTING
812 WEST ELEVENTH 512-474-9097
AUSTIN, TEXAS 78701

PROJECT:
WASTE CONTROL SPECIALISTS LLC
ANDREWS COUNTY, TEXAS

SHEET TITLE:
LOCATIONS/DISTANCES TO RESIDENCES

DES BY			SCALE: SEE BAR SCALE
DR BY	SDB		PROJECT NO. 03089.04
CHK BY	SLC		CJI NO. 03089250
APP BY	SLC		SHEET 1 OF 1 SHEETS
DATE ISSUED: 12-15-2006			FIGURE NO. 1

EXHIBIT
A

AFFIDAVIT

THE STATE OF TEXAS §
§
COUNTY OF ANDREWS §

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

"My name is **TOM JONES.** 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. I am an employee of Waste Control Specialists ("WCS") located in Andrews County, Texas. On September 16, 2008, Sierra Club, through its members, Rose Gardner and Fletcher Williams, filed a request for contested hearing on WCS' low-level radioactive waste disposal license application that is currently pending before the Texas Commission on Environmental Quality ("Commission"). Rose Gardner, individually, and Nuclear Information and Resource Service ("NIRS") also filed requests for contested hearing the same day. Cruz Montanez filed a request for contested hearing on April 29, 2005. The hearing requests disclosed the requestors' names and addresses.

2. According to the hearing requests, Rose Gardner and Fletcher Williams reside in or near the City of Eunice, Lea County, New Mexico. Rose Gardner also owns a flower shop located in Eunice.

3. I traveled to the street addresses identified by Rose Gardner and Fletcher Williams as their respective residential addresses in the hearing requests filed with the Commission. I also traveled to the street address identified by Rose Gardner as the location of her flower shop. Once I located the addresses, I used a Garmin GPS Map 60CS navigator device ("GPS unit") to retrieve the latitude and longitude coordinates of the public street where I was located in front of the residences and flower shop. The GPS unit was showing an average accuracy of +/- 20 feet.

4. After obtaining and recording the coordinates identifying the location of the public street in front of the residences and flower shop, I compared the addresses to the known coordinates of the western boundary of the WCS facility in Andrews County, Texas. With this information, I calculated the approximate distances between the western

boundary of the WCS facility and the residences of Rose Gardner and Fletcher Williams. I also calculated the approximate distance between the western boundary of the WCS facility and the address of Rose Gardner's flower shop.

5. I then delivered the information above to Cook-Joyce, Inc. so that a map could be produced to portray the locations of Rose Gardner and Fletcher Williams' residences, the location of Rose Gardner's flower shop, the location of the western boundary of the WCS facility, the distances between the residences and the western boundary of the WCS facility, and the distance between the flower shop and the western boundary of the WCS facility.

6. Cruz Montanez' purported residence is 3610 Maple Ave., Odessa, Texas 78762. Given the lengthy distance between Odessa and the WCS facility, I did not attempt to obtain the coordinates for the residence of Cruz Montanez.

7. NIRS' purported address is 6930 Carroll Ave., Suite 340, Takoma Park, Maryland 20912. Given the lengthy distance between Takoma Park, Maryland and the WCS facility, I did not attempt to obtain the coordinates for the address of NIRS.

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

FURTHER AFFIANT SAYETH NOT.

TOM JONES

SUBSCRIBED AND SWORN TO BEFORE ME on this 16 day of December 2008.

WENDY L. INLOW
Notary Public, State of Texas
My Commission Expires
October 03, 2010

NOTARY PUBLIC, STATE OF TEXAS