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Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

December 19, 2008

LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2008 DEC 19 PM 2:49
CHIEF CLERKS OFFICE

**RE: WASTE CONTROL SPECIALISTS, LLC
TCEQ DOCKET NO. 2005-1994-RAW**

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Response to Requests for Hearing in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Christina Mann" followed by a small flourish.

Christina Mann, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 • P.O. BOX 13087 • AUSTIN, TEXAS 78711-3087 • 512-239-6363

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TCEQ DOCKET NO. 2005-1994-RAW

2008 DEC 19 PM 2:49

<p>IN THE MATTER OF THE APPLICATION OF WASTE CONTROL SPECIALISTS, LLC FOR RADIOACTIVE LICENSE NO. R04100</p>	<p>§ § § §</p>	<p>BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY</p>
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**THE OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO REQUESTS FOR HEARING**

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (the Commission or TCEQ) and files this Response to Requests for Hearing in the above-referenced matter, and would respectfully recommend referring this matter to the State Office of Administrative Hearings (SOAH).

I. INTRODUCTION AND PROCEDURAL BACKGROUND

On August 4, 2004, Waste Control Specialists, LLC (WCS or Applicant) submitted an application to TCEQ, requesting authorization to license facility for disposal of low-level radioactive waste subject to the Texas Low-Level Radioactive Waste Disposal Compact. The application also requests authorization under a license for a federal facility waste disposal facility for disposal of low-level radioactive waste that is the responsibility of the federal government. In addition, WCS requests an exemption from a Commission rule requirement in Title 30 Texas Administrative Code §336.734(a).¹ The application was declared administratively complete on February 18, 2005 and notice was mailed on February 28, 2005.

An initial public meeting was held on March 31, 2005. The application was declared technically complete on August 11, 2008 and a combined notice of public meeting and completion of technical review and draft license was mailed on August 13, 2008, and published

¹ Relating to the ownership of land on which low-level radioactive waste is disposed.

on August 17, 2008. This notice appears to comply with the specific requirements found in Texas Health and Safety Code § 401.238.

TCEQ conducted a second public meeting in Andrews, Texas on September 8, 2008. The comment period/hearing request period ended on September 17, 2008. Timely hearing requests were filed by Rose Gardner, the Nuclear Information and Resource Service (NIRS), the Sierra Club, and Cruz Montanez.

II. PROPER NOTICE AND THE APPLICABILITY OF TEXAS HEALTH AND SAFETY CODE § 401.24

A. Notice

By letter dated and mailed December 12, 2008, the Chief Clerk of the TCEQ announced that all hearing requests will be heard by the Commissioners at the public meeting (Commissioner's Agenda) scheduled on January 14, 2008. OPIC notes that this application *should* have been processed under 30 TAC Chapter 55, subchapter G. Specifically, 30 TAC §55.254 (d) requires that:

The chief clerk shall mail notice to the applicant, executive director, public interest counsel, and the persons making a timely hearing request at least *35 days before* the first meeting at which the commission considers the request.

In order for this application to be properly on the January 14, 2009 Agenda, the package should have been mailed out at least 35 days before January 14, 2009 on December 10, 2008. Although there was little time difference to the protesting parties, OPIC is concerned about any deficiencies of notice, especially on an application which is noticed over the Christmas and New Year's holiday season.

B. Texas Health and Safety Code § 401.24

According to the notice of completion of technical review and draft license, WCS is requesting an exemption (for the federal waste disposal facility) from TCEQ's rule which

requires that the state or federal government own the land on which low-level radioactive waste is disposed. 30 TAC §336.734. However, Sierra Club raises the issue of whether WCS has complied with the requirements of Texas Health and Safety Code §401.204. The Executive Director recommends granting the license provisionally until condemnation proceedings can be completed. In theory, this approach appears logical, however, the plain language of the statute states: An application for a compact waste disposal facility license *may not be considered* unless the applicant has acquired the title to and any interest in land and buildings as required by commission rule. See Texas Health and Safety Code § 401.204 (a). *emphasis added*.

Therefore, it is not clear that the Commission can even consider the application before condemnation proceedings have been completed and ownership established. The Agenda at which hearing requests are considered is part of the Commission's consideration of the application. OPIC recommends continuing the consideration of the hearing requests to the time at which condemnation proceeding have been completed.

Nevertheless, OPIC provides this analysis on the hearing requests received should the Commission decide to hear the requests on January 14, 2008.

III. APPLICABLE LAW: STANDING

A. Requirements for Affected Person

This application was received on August 4, 2004 and was declared administratively complete on February 18, 2005. As the application was declared administratively complete after September 1, 1999, it is subject to the requirements of Title 30, Chapter 55, Subchapter G, sections 55.250-55.256 of the Texas Administrative Code ("TAC"). Under those provisions, a hearing requestor must make their request in writing 30 days after the publication of the notice of the application and identify the requestor's personal justiciable interest affected by the

application, specifically noting the "requestor's location and distance relative to the activity" and "how and why the requestor believes he or she will be affected by the activity in a manner not common to members of the general public." 30 TAC § 55.251(b), (c); 30 TAC § 295.171.

An affected person is "one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application." 30 TAC § 55.256(a).

A group or association may request a contested case hearing only if the group or association meets all of the following requirements: (1) one or more members of the group or association would otherwise have standing to request a hearing in their own right; (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 TAC § 55.252. In addition, the executive director, the public interest counsel, or the applicant may request that a group or association provide an explanation of how the group or association meets the requirements.

The Commission shall grant a request for a contested case hearing if (1) the request is made by an affected person, (2) the request is timely filed with the chief clerk, and (3) the request is made pursuant to a right to hearing authorized by law. 30 TAC § 55.255(b).

B. Requirements for "Person Affected" Status

The requirements for this application are found in Texas Health and Safety Code Chapter 401, which provides a definition for "person affected" rather than "affected person." "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: (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.

Texas Health and Safety Code § 401.003 (15).

IV. ANALYSIS OF THE HEARING REQUESTS

A. Hearing Requests Received

Rose Gardner

Rose Gardener submitted hearing requests on this application and draft permit on September 17, 2008 and September 8, 2008. In her September 8, 2008 request, Ms. Gardner expresses concerns related to protecting the water table and air from accidental releases of radionuclide materials. In addition, Ms. Gardener notes that former TCEQ geologists have indicated that there is water close to the site. Ms. Gardner states that she is a resident of Eunice, New Mexico, approximately five miles west of the proposed site location. In the September 17, 2008 request, Ms. Gardener expresses concerns about moving forward on the application without a hearing to address unanswered questions.

Nuclear Information and Resource Service (NIRS)

NIRS submitted a hearing request on September 17, 2008. NIRS states that it has over 300 members in Texas and 200 in New Mexico, including members Andrews, Texas and Eunice, New Mexico. In addition, NIRS notes that it also has members along the transportation corridors between the waste generators and the proposed waste storage facility but does not identify any specific members. NIRS raises concerns related to proper identification of the nature and location of the underlying water table and whether or not alternatives have been considered. NIRS also raises concerns related to unknown impacts from wind and severe weather events, protection of water, wastewater management, security, monitoring, impact on traffic and economic conditions, and effects on human health and the environment.

Cruz Montanez

Cruz Montanez submitted a hearing request May 2, 2005. He states that he is a property owner and resident in Ector County, adjacent to Andrews County. Mr. Montanez raises concerns related to potential damage to the aquifers, and accountability for the site in the future in the event of accidents. Mr. Montanez states the Sierra Club is representing him on the issue of allowing radioactive waste in Andrews County. Therefore, OPIC assumes he is not requesting standing in his individual capacity, but offers himself as a qualifying member for Sierra Club. If OPIC misinterpreted the correspondence from Mr. Montanez, he has the opportunity to file a reply, and OPIC may offer an amended recommendation at the scheduled Commissioners' Agenda.

Sierra Club

Sierra Club filed a hearing request on September 16, 2008. Sierra Club recommends the Commission not grant the proposed license and requests a contested case hearing on behalf of about 12 members who reside in Lea County, New Mexico, and one member in Andrews County. Sierra Club is concerned that the application and draft license do not meet applicable statutory requirements. Specifically, Sierra Club notes disputes about the site's surface geology and hydrology, the weaknesses of the future climate model, limited information about the proposed waste streams, potential dangers associated with high winds and tornadoes, lack of detail in the wastewater and water management plans, compliance history, lack of a required detailed one year monitoring study, impacts of traffic, negative economic impacts, water supply impact, seismic activity, surface water drainage, erosion, protection of aquifers, and a lack of analysis related to alternatives.

In establishing Sierra Club's standing, Sierra Club identifies two members living in Lea County, New Mexico, adjacent to and west of Andrews County, Texas. Rose Gardener lives approximately four miles west of the proposed facility. Sierra Club describes how her livelihood will be affected by the proposed facility, and notes that one of the criteria for 'affected' status is economic damage. Ms. Gardener relies on travelers from outside her home of Eunice to purchase goods at her feed store and flower shop. She travels to Odessa for business regularly via Highway 234/176. According to Sierra Club, her ability to attract customers will be negatively impacted by the proposed activities and she will suffer economic damage. In addition, her ability to safely travel for business will be impacted. Rose Gardener also owns acreage aside from her home for livestock and alfalfa production. On this property, Ms. Gardener uses a 200 foot-deep water well, which is may be hydrologically connected to the groundwater beneath the proposed site, approximately four miles west of the proposed facility. According to Sierra Club, the applicant's failure to characterize adequately the nature of the groundwater will prevent Ms. Gardener from relying on her water well. Sierra Club and member Ms. Gardener are also concerned about the impact of the transport of the waste via rail and from a uranium enrichment plant to the proposed facility on Ms. Gardener's ability to travel safely into Texas on Highway 18 and Highway 234/176.

Sierra Club member Fletcher Williams lives in Lea County, approximately two and a half to three miles from the proposed site. She lives near the rail line and the Highway 18/Highway 234 interchange likely to be utilized by trucks bringing waste to the proposed facility. Ms. Williams would be subject to direct exposure via high winds and potential transportation accidents. Ms. Williams frequently travels to Andrews for medical care needs of her elderly mother and directly passes by the proposed site

B. Sierra Club and Rose Gardener are "Persons Affected"

In addition to the information submitted through the Sierra Club, Rose Gardener submitted two individual hearing requests, clearly seeking standing in her individual capacity. OPIC evaluated her hearing requests and the information provided through the Sierra Club's request and determined that Ms. Gardener meets the requirements to be a "person affected" as defined in Texas Health and Safety Code § 401.003 (15). Ms. Gardener has stated that she will suffer economic damages related to her feed store, flower shop, and alfalfa fields due the proximity of those interests to the proposed site. She has stated multiple concerns related to how she will be affected by the activity in manner not common to the general public and those concerns are related to legal rights affected by the application. She is a resident and conducts business in the land in a county adjacent to Andrews County. Therefore, OPIC recommends that the Commission find Rose Gardener to be a "person affected" as defined Texas Health and Safety Code § 401.003 (15).

Likewise, OPIC recommends Sierra Club be granted associational standing. Sierra Club identified at least one member. As described above, Ms. Gardener is a member who would otherwise have standing to request a hearing in her own right. Sierra Club's interests in this application and draft license are germane to the Sierra Club's purpose. Finally, neither the claim asserted nor the relief requested requires the participation of Rose Gardener.²

C. Nuclear Information and Resource Service (NIRS) has not demonstrated that it is a "Person Affected"

NIRS has not identified one or more members that would otherwise have standing to request a hearing in their own right. At this time, OPIC cannot recommend finding NIRS to be a "person

² This provision does not prohibit Rose Gardener from being granted individual standing or participating in her individual capacity.

affected.” However, NIRS raises issues which are relevant and material to a decision on the application. As allowed by 30 TAC § 55.252, OPIC is requesting that NIRS provide an explanation in a reply to this response showing how the group or association meets the requirements through the identification of a member who would otherwise have standing.

V. CONCLUSION

For the reasons set forth above, OPIC respectfully recommends that the Commission continue this matter until proper notice of the agenda date and briefing schedule can be achieved, and until a time at which condemnation proceedings have been completed. In the alternative, OPIC recommends granting the contested case hearing request of Sierra Club and Rose Gardener and referring this matter to SOAH.

Respectfully submitted,

Blas J. Coy, Jr.
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CERTIFICATE OF SERVICE

CHIEF CLERKS OFFICE

I hereby certify that on December 19, 2008, the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Request for Hearing were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.



Christina Mann

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