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January 5, 2009

Ms. LaDonna Castañuela
TCEQ
Office of the Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087

Re: Application by Waste Control Specialists, LLC for New Radioactive Material License No. R04100; TCEQ Docket No. 2005-1994-RAW.

Dear Ms. Castañuela:

Please find enclosed Sierra Club's Request for Extension of Time to Reply to Responses to Hearing Requests and Request for Extension of Public Meeting Date in the above-referenced matter.

Thank you for your consideration of this matter. If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

Marisa Perales

cc: Service List
General Counsel's Office

CHIEF CLERKS OFFICE

2009 JAN - 5 PM 3: 38

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

TCEQ Docket No. 2005-1994-RAW

2009 JAN -5 PM 3: 38

IN THE MATTER OF THE
APPLICATION OF WASTE
CONTROL SPECIALISTS, LLC
FOR LICENSE NO. R04100

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BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL QUALITY

CHIEF CLERKS OFFICE

**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 CHAIRMAN GARCIA AND COMMISSIONERS SOWARD
AND SHAW:

Sierra Club submits this Request for extension of time to submit replies to responses to hearing requests concerning the application of Waste Control Specialists, L.L.C. ("WCS"), for new radioactive license number R04100; TCEQ Docket No. 2005-1994-RAW. Sierra Club also requests a short postponement of the public meeting date during which the Commission will consider the hearing requests in this matter. For support, Sierra Club respectfully offers the following:

INTRODUCTION

Sierra Club seeks the requested extensions of time because it did not timely receive a copy of WCS's response to hearing requests. Moreover, the Chief Clerk's notice of the public meeting during which the Commission will consider the hearing requests did not comply with the notice requirements in TCEQ's rules. In addition, the deadlines for filing replies to responses to the hearing requests that were announced in the Chief Clerk's notice do not correspond to the deadlines for submitting replies set out in TCEQ's rules, resulting in some confusion about the proper deadline for filing replies.

In sum, the delayed receipt of WCS's response, coupled with the insufficient notice of the public meeting, the confusion surrounding the deadline for submitting replies to responses to hearing requests, and the intervening holiday season, render an extension of the deadlines for filing replies to the responses and an extension of the date for Commission consideration of the hearing requests both necessary and just.

BACKGROUND

On August 4, 2004, Waste Control Specialists, LLC submitted to TCEQ an application for a license to operate a facility for disposal of low-level radioactive waste. The application was declared administratively complete on February 18, 2005 and technically complete on August 11, 2008. A notice of public meeting and completion of technical review and draft license was mailed on August 13, 2008.

The comment and hearing request period ended on September 17, 2008. The Lone Star Chapter of the Sierra Club timely submitted its hearing request on September 16, 2008.

By letter dated and mailed December 12, 2008, the Chief Clerk of the TCEQ announced that WCS, the Executive Director of the TCEQ, and the Public Interest Council of the TCEQ may file written responses to the hearing requests on or before December 23, 2008. By that same letter, the Chief Clerk also stated that hearing requesters may file replies to the responses by January 8, 2009. And finally, the Chief Clerk announced that all hearing requests would be heard by the Commissioners at the public meeting scheduled for January 14, 2009.

DISCUSSION

A. **Insufficient notice provided of Commission public meeting to consider hearing requests.**

This application is governed by 30 Tex. Admin. Code Chapter 55, Subchapter G. Section 55.254(d) of that subchapter requires: “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.” 30 Tex. Admin. Code § 55.254. To comply with this requirement, the Chief Clerk’s notice should have been sent on December 10, 2008—35 days before January 14, 2009, the proposed date for the public meeting during which the Commission will consider all hearing requests.

As explained above, the Chief Clerk’s notice of public meeting was dated and mailed on December 12, 2008, two days later than required by the rules. While a two-day delay may seem inconsequential, it is worth noting that the holiday season falls within this notice period. Because the postal service is closed several days during the holiday season and because persons are more likely to travel during the holidays,¹ proper notice is especially important during this time period. It is worth noting that the Office Public Interest Counsel expressed a similar concern in its response to hearing requests filed on December 19. Thus, Sierra Club requests that the Commission extend the date for the public meeting during which hearing requests will be considered, to allow for

¹ Indeed, Sierra Club’s office is officially closed from December 24, 2008 through January 1, 2009.

proper notice of that meeting and an opportunity for all interested and affected persons to attend.

B. Deadline for submitting replies does not correspond with TCEQ rules.

According to Section 55.254(f), all hearing requesters' replies to responses to hearing requests should be filed nine days before the scheduled commission meeting at which the Commissioners will evaluate the hearing requests. Tex. Admin. Code § 55.254(f). In this case, nine days before the scheduled public meeting would be January 5, 2009. The Chief Clerk's notice letter, however, states that replies are due January 8, 2009. Thus, it is unclear whether the TCEQ's rules or the Chief Clerk's notice letter governs the deadlines for this matter.

Sierra Club is concerned that without an Order by the Commission extending the deadlines for submitting replies to responses to hearing requests, its reply will be considered untimely if filed on January 8, 2009, instead of January 5. Accordingly, Sierra Club respectfully requests that the Commission issue an order or some other appropriate directive, extending the deadline for submitting replies to responses to hearing requests. *See* 30 Tex. Admin. Code § 1.11(g) (allowing *Commission* to extend time for taking action required of a party).

C. WCS's response to hearing requests not timely received.

The Chief Clerk's notice required all responses to hearing requests to be served by December 23, 2008 (just before the Christmas holiday). Sierra Club did not receive WCS's response to the hearing requests until December 29, 2008—six days after the

deadline for submitting the responses and eleven days after the date reflected in the certificate of service attached to WCS's response.

As reflected in the attached affidavit by Dr. Ken Kramer (marked as Exhibit A), Director of the Lone Star Chapter of the Sierra Club, Dr. Kramer first received notice that a certified letter was awaiting pick-up on December 29, 2008. Upon receipt of the notice, Dr. Kramer retrieved from the post office WCS's response to hearing requests. The certificate of service attached to the response to hearing requests states that the response was served on December 18, 2009—eleven days before Dr. Kramer received any notice of a certified letter.

According to Section 55.254(e) of the TCEQ rules, responses to hearing requests “shall be filed with the chief clerk, and *served on the same day* to . . . any persons filing hearing requests.” 30 Tex. Admin. Code § 55.254(e). Section 1.11(a) repeats this instruction: “For responses and replies to responses concerning hearing requests filed under Chapter 55 of this title . . . , copies of all documents filed with the chief clerk shall be served on . . . any persons filing hearing requests, *no later than the day of filing.*” 30 Tex. Admin. Code § 1.11(a).

The above-quoted rule allows for service to be accomplished by delivering a copy of the document to the party to be served by mail to the party's last known address. *Id.* § 1.11(c). It further states that service by mail is complete three days after deposit of the document in a USPS depository. *Id.* § 1.11(d). And finally, the rule requires the party or

the party's attorney to certify compliance with the rule in writing over signature on the filed instrument. *Id.* § 1.11(f).

Notwithstanding a party's certification of compliance with the rules regarding service, TCEQ's rules also allow an opposing party to offer proof that the served document was not timely received. Section 1.11(g) of the TCEQ rules provides that nothing in the rules "shall preclude any party from offering proof that the notice or instrument was not received, or, if service was by mail, that it was not received within three days from the date of deposit in a post office or [USPS] official depository." *Id.* § 1.11(g).

Dr. Kramer's affidavit, attached to this Request, is an offer of proof that WCS's response to hearing requests was not received within three days from the date of deposit in a post office or official USPS depository. According to this affidavit, Dr. Kramer personally checked the Sierra Club's post office box everyday from December 24 through December 29, 2008 (except Christmas Day and Sunday, December 28). The notice of certified letter did not appear in the post office box until December 29, 2008.

Based on this offer of proof, the Commission may extend the time for the hearing requesters to reply to responses to the hearing requests or grant such other relief as the Commission deems just. *Id.* § 1.11(g) (Commission may extend the time for taking the action required of a party). Even taking into account the lack of postal service on certain days during the holiday season, an eleven-day delay in delivery of WCS's response to hearing requests is an unreasonable delay, warranting an extension of the deadline to

reply to the response and a corresponding postponement of the date of the public meeting during which the hearing requests will be considered.

D. Requested Relief

The next Commission public meeting date after January 14, 2009 is scheduled for January 28, 2009. Therefore, Sierra Club respectfully requests that the Commission's consideration of hearing requests be postponed from January 14 until January 28, 2009.

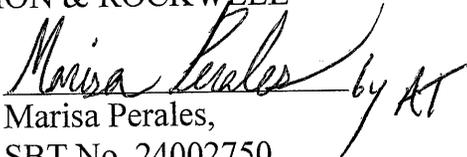
Sierra Club further requests that the deadline for submitting replies to responses to hearing requests be extended. TCEQ rule 55.254(f) requires all replies to responses to hearing requests be submitted nine days before the public meeting at which the Commission will act on the hearing requests. Nine days before January 28 is January 19. Thus, Sierra Club respectfully requests that the deadline for filing replies to responses to hearing requests be extended until January 19, 2009.

CONCLUSION

Based on the foregoing, Sierra Club respectfully requests that the Commission officially extend the deadline for filing replies to responses to hearing requests until January 19, 2009. Furthermore, Sierra Club respectfully requests that the Commission also postpone the public meeting date during which the Commission will evaluate the hearing requests from January 14 until January 28, 2009. The extension is just and warranted to allow all parties sufficient time to prepare replies to all responses to the hearing requests and to provide sufficient notice of the public meeting during which those hearing requests will be evaluated.

Respectfully submitted,

LOWERRE, FREDERICK, PERALES,
ALLMON & ROCKWELL

By:  by AT
Marisa Perales,
SBT No. 24002750

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Austin, Texas 78701
(512) 469-6000 / 482-9346 (facsimile)

COUNSEL FOR SIERRA CLUB

Exhibit A

AFFIDAVIT OF DR. KEN KRAMER

STATE OF TEXAS

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COUNTY OF TRAVIS

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BEFORE ME, the undersigned notary public, on this day personally appeared Dr. Ken Kramer who being by me duly sworn on his oath stated that he has read the following statements in this Affidavit, that the statements are true and correct, and that every statement contained herein is within his personal knowledge.

“1. My name is Ken Kramer. I am over the age of 21 and competent to testify to the following based on my own personal knowledge.

“2. I am the current Director of the Lone Star Chapter of the Sierra Club.

“3. By hand-delivered letter dated September 16, 2008, I submitted a hearing request on behalf of the Lone Star Chapter of the Sierra Club regarding the application by Waste Control Specialists for a low-level radioactive materials license (R04100).

“4. By letter dated and mailed December 12, 2008, the Chief Clerk of the TCEQ announced that the Applicant (Waste Control Specialists), the Executive Director of the TCEQ, and the Public Interest Counsel of the TCEQ may file responses to the hearing requests on or before December 23, 2008.

“5. By that same letter, the Chief Clerk of the TCEQ announced that hearing requesters may file a written reply to the responses on or before January 8, 2009.

“6. By that same letter, the Chief Clerk of the TCEQ announced that all hearing requests will be heard by the Commissioners at the public meeting scheduled for January 14, 2008.

“7. Because of the tight deadlines and the holiday season, which included the official closing of our office from December 24, 2008 through January 1, 2009, I made a concerted effort to personally check the Sierra Club’s post office box every day (except Christmas Day and Sunday, December 28) following the December 23, 2008 response deadline, to make sure that the Sierra Club had adequate time to prepare a reply to any filed responses to the Sierra Club’s hearing request.

"8. On December 22, 2008, I received a copy of the Executive Director's response to the hearing requests in this matter.

"9. On December 24, 2008, I received a copy of the Public Interest Counsel's response to the hearing requests in this matter.

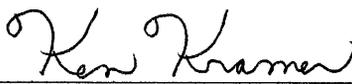
"10. Finally, on December 29, 2008, I received a notice in the Sierra Club's post office box that a certified letter was awaiting pick-up. On that same day, I retrieved from the post office Waste Control Specialist's response to hearing requests in this matter.

"11. The certificate of service attached to Waste Control Specialists' response to hearing requests states that it was served by hand delivery or certified mail on December 18, 2008.

"12. The meter strip on the envelope from Waste Control Specialists was dated December 18, 2008 but there was no postmark on the envelope itself.

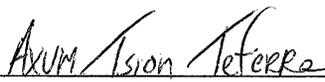
"13. Having personally checked Sierra Club's post office box everyday (except Christmas Day and Sunday, December 28) from December 24, 2008 through December 29, 2008, including Saturday, December 27, 2008, I can attest that notice of Waste Control Specialists' response to hearing requests did not arrive in the Sierra Club's post office box until December 29, 2008—eleven days after the date reflected in the certificate of service."

Further affiant sayeth not.

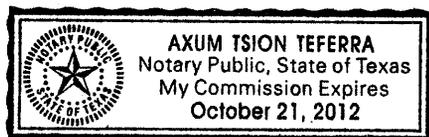


Ken Kramer, Ph.D.

SWORN TO and SUBSCRIBED before the undersigned on this the 5th ~~nd~~ day of January 2009.



Notary Public, State of Texas
My Commission expires: 10/21/2012



Certificate of Service

By my signature below, I hereby certify that on January 5, 2009, copies of Sierra Club's Request for Extension of Time to Reply to Responses to Hearing Requests and Request for Extension of Public Meeting Date was served via hand delivery and/or U.S. Mail:



Marisa Perales

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