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IN THE MATTER OF §
RADIOACTIVE MATERIAL §
LICENSE NO. R05807 §

BEFORE THE TEXAS COMMISSION
ON ENVIRONMENTAL QUALITY CHIEF CLERKS OFFICE

**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 Materials License No. R 05807 authorizing the commercial disposal of byproduct material, 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 June 21, 2004, WCS applied to the Texas Department of Health (now the Department of State Health Services ("DSHS")) for a radioactive materials license authorizing the construction and operation of a byproduct material disposal facility in Andrews County, Texas ("license application"). The byproduct material disposal facility is to be located on a 1,338-acre tract of land ("site") located within the boundaries of the WCS property comprising nearly 15,000 acres. WCS currently conducts commercial hazardous waste, storage and disposal operations, and radioactive material treatment and storage operations at its site pursuant to multiple state authorizations, including DSHS-issued Radioactive Materials License No. L04971.

Effective June 2007, jurisdiction over the state's byproduct disposal regulatory program was transferred from DSHS to TCEQ under Senate Bill 1604 of the 80th Texas Legislature.¹ TCEQ was assigned the responsibility of continuing DSHS' technical review of WCS' license application. On November 9, 2007, public notice of the TCEQ Executive Director's completion of technical review and preliminary decision to approve WCS' license application, the draft license, and the draft environmental analysis was published in the *Texas Register*.² Public notice was also published in the *Andrews County News* on October 28, 2007. The deadline for submittal of public comment and hearing requests to the TCEQ was thirty days from the date of newspaper publication of the notice, or November 27, 2007.³ Due to the importance of this project to the U.S.

¹ Acts 2007, 80th Leg., ch. 1332, eff. June 15, 2007 ("Senate Bill 1604").

² 32 *Tex. Reg.* 8189 (November 9, 2007).

³ With the exception of a request filed by the applicant or TCEQ Executive Director, a request for contested hearing must be made by a person affected, must comply with the requirements of TCEQ Rule 55.251,

Department of Energy, the Texas Legislature has imposed a deadline of December 31, 2008 for the TCEQ to render its final decision on this license application.⁴

The City of Andrews, Texas, the City of Eunice, New Mexico, the Andrews Chamber of Commerce, the Andrews Economic Development Corporation, the Andrews Independent School District, and Southwest Realty submitted letters in support of WCS' license application. Requests for contested hearing on WCS' license application were submitted to the TCEQ by the Sierra Club – an association whose prior request for party status on a licensing action authorizing WCS' management of byproduct material was denied following an evidentiary hearing before the State Office of Administrative Hearings (“SOAH”) just two years ago – and the following individuals: Jerry Cherryhomes; Gilbert Cherryhomes; Bruce Cherryhomes; Anita Ireland; Emma Wooten; Vicki Longoria; Brigitte Gardner; Victor Orozco; Tommie Williams; Fred & Delphina Ortiz; and Jill A. Yarbrough.⁵ **Exhibit A** is a map identifying the location of the Requestors' purported residences.⁶ Exhibit A demonstrates that none of the Requestors reside in the State of Texas. Further, none of the Requestors own property adjacent to the WCS property.

On March 14, 2008, the TCEQ Executive Director filed with the Office of the TCEQ Chief Clerk his: (1) Response to Public Comment; (2) Revised draft Radioactive Material License No. R05807; and (3) Errata to the environmental analysis. On April 15, 2008, the TCEQ Chief Clerk notified WCS and all other interested persons that the Commissioners' meeting at which the Commissioners will determine whether any of the Requestors have standing to pursue a formal hearing on the merits of WCS' license application is scheduled for May 21, 2008. Pursuant to 30 Texas Administrative Code (“T.A.C.”) §55.254(e), WCS timely files this Response to Requests for Contested Hearing no later than 23 days before the date of the Commissioners' meeting.

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 the license application should not be granted.

must be timely filed with the chief clerk, and must be pursuant to a right to hearing authorized by law. *See* 30 T.A.C. §55.255(b).

⁴ Acts 2007, 80th Leg., ch. 1332, §33(k)(4), eff. June 15, 2007.

⁵ The association and individuals that filed requests for contested hearing in this matter are hereinafter collectively referred to as the “Requestors” where appropriate. The individual requestors submitted copies of a hearing request form letter, and listed their purported addresses and loosely estimated distances from those addresses to the WCS site.

⁶ Sierra Club claims standing through its members, Rose Gardner and Fletcher Williams. Rose Gardner resides over 5 ½ miles from the WCS site. Her claimed flower shop is also over 5 ½ miles from the WCS site. Fletcher Williams resides 3.69 miles from the WCS site.

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 "person affected" are relevant to matters concerning the disposal of "byproduct material," which is defined as a form of regulated radioactive material under the Texas Radiation Control Act of the Health & Safety Code ("Act"). "Person affected" 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 byproduct material disposal licensure matters.⁷ As discussed below, none of the Requestors have standing under the definition of "person affected" in either Chapter 5 of the Water Code or Chapter 401 of the Act.

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.⁸ The subchapter in which the provision construing "person affected" is found, Subchapter D, establishes the "general powers and duties of the [TCEQ]."⁹ 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, providing that the TCEQ "has other specific powers and duties as prescribed in other sections of the code

⁷ 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.

⁸ In Chapter 5 of the Water Code, "person affected" and "affected person" are used interchangeably. *See* TEX. WATER CODE §5.115(a) (using the terms interchangeably and applying the same meaning to both phrasings). *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").

⁹ TEX. WATER CODE §5.101.

and other laws of this state.”¹⁰ This 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 defines “person affected” as follows:

“For the purpose of an administrative hearing held by or for the commission involving a contested case, “affected persons,” or “person affected,” or “person who may be affected” means a person who has a justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing. An interest common to the 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.”¹¹

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. A person’s affected status must be demonstrated by more than unfounded predictions and unsupported assumptions.¹²

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.

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:

- (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;

¹⁰ *Id.*

¹¹ TEX. WATER CODE §5.115(a) (Emphasis added).

¹² 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).

- (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.¹³

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. Therefore, a person's ability to be granted party status for a contested hearing on the merits of WCS' license application is 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.¹⁴

B. Chapter 401 of the Act

The Texas Legislature has narrowly defined the universe of persons who are entitled to a contested hearing on license applications for the disposal of byproduct material under Chapter 401 of the Act. A requestor seeking to contest a state agency's decision concerning a byproduct material 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:

"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:

- (1) 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
- (2) Is doing business or has a legal interest in land in the county or adjacent county.¹⁵

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

¹³ 30 T.A.C. §55.256(c)

¹⁴ 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 byproduct material. *See* TEX. HEALTH & SAFETY CODE §401.264.

¹⁵ TEX. HEALTH & SAFETY CODE §401.003(15) (Emphasis added).

whether a party has met the “irreducible constitutional minimum of standing.”¹⁶ 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.”¹⁷

The injury has to be traceable to the challenged action and not the result of the independent action of some third party.¹⁸ 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. L04971.¹⁹ The 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.²⁰ 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.²¹ Given the applicability of the same “person affected” standard in the Act and the fact that the 1997 contested case and this matter both concern the same WCS radioactive materials management site in Andrews County, the 1997 contested case established a direct precedent that should be strongly considered in determining whether the Requestors are “person(s) affected” in this matter.

An even stronger precedent was established just two years ago. As specifically detailed in Section IV.B of this Response, the Sierra Club through its new member, Rose Gardner, sought standing to contest WCS’ radioactive materials license amendment application concerning the storage of byproduct material, which is the same material subject to this matter. After a two-day preliminary hearing to determine party status, the ALJs in that matter issued a Proposal for Decision wherein associational standing was 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 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.²²

¹⁶ *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136 (1992).

¹⁷ *Id.*

¹⁸ *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).

¹⁹ 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).

²⁰ 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.

²¹ 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).

²² 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.

Federal decisions involving the federal counterpart agency to the TCEQ in commercial byproduct material disposal matters, the U.S. Nuclear Regulatory Commission (“NRC”), provide persuasive authority regarding the requirements for meeting the “person affected” standard in administrative hearings.²³ 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.²⁴ The NRC also held that general assertions by persons merely living close to transportation routes upon which low-level radioactive materials and components would be transported is insufficient to establish “injury in fact.”²⁵

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 Commissioners 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 byproduct material, 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 materials 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.

However, if the Commissioners choose to originate their standing analysis under Chapter 5 of the Water Code, it would ultimately result in the application of the same underlying “person affected” standard. Section 5.115(a) of the Water Code mandates consideration of the factors specified in TCEQ Rule 55.256 for determining standing. 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.”²⁶ By law, the Commissioners are 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 Commissioners may choose to begin their standing analysis with Chapter 5 of the Water Code.

²³ 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).

²⁴ 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).

²⁵ See *Yankee Atomic Electric Co.*, CLI-94-3, 39 NRC 95-98 (1994).

²⁶ See 30 T.A.C. 55.256(c)(1), (2).

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.²⁷ 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 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.²⁸

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 suffered or will suffer actual injury or economic damage, as required by the “person affected” standard in Chapter 401 of the Act.²⁹ 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.³⁰

By letter dated November 27, 2007, 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 R05807 on their behalf...These two individual members will be adversely affected by the

²⁷ *Nobles v. Marcus*, 533 S.W.2d 923 (Tex. 1976).

²⁸ 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).

²⁹ 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).

³⁰ *Id.*

issuance of the license.”³¹ 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.³²

Sierra Club fails to satisfy the first prong of the three-prong test for associational standing.³³ Sierra Club has not made a showing that either of its identified members has suffered or will suffer actual injury or economic damage resulting from WCS’ proposed byproduct material disposal activities. Given the information presented in Sierra Club’s submittal, Rose Gardner and Fletcher Williams’ accusations rest on unfounded scenarios and hypotheticals.³⁴ Neither Rose Gardner nor Fletcher Williams is an adjacent landowner to WCS’ 15,000-acre property on which the WCS 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.³⁵ There is no adequate demonstration of at least a substantial risk of injury to the individuals resulting from WCS’ proposed activities.³⁶ Rose Gardner and Fletcher Williams merely express positions that are common to members of the general public.³⁷ 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;³⁸ 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.³⁹ Sierra Club’s discussion of Rose Gardner’s activities only proves that Rose

³¹ Sierra Club Request Letter, p. 16.

³² Sierra Club Request Letter, p. 16-18.

³³ 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.

³⁴ See *Collins*, 94 S.W.3d at 883 (Tex. App.—Austin 2002, no writ).

³⁵ 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).

³⁶ See *Tex. Ass’n of Business*, 852 S.W.2d at 447 (Tex. 1993).

³⁷ 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).

³⁸ Rose Gardner resides over 5 ½ miles from the WCS site. Her flower shop is also located over 5 ½ miles from the WCS site. See **Exhibit A**.

³⁹ Sierra Club Request Letter, p. 16-18.

Gardner is not anymore impacted than other members of the general public by the proposed activities at the WCS site.⁴⁰

Sierra Club has not demonstrated that Rose Gardner will suffer an “injury in fact” resulting from WCS’ proposed activities.⁴¹ There is absolutely no invasion of a legally protected interest afforded to her that is concrete and particularized, and actual or imminent.⁴² There is no demonstration that Rose Gardner would be exposed to a substantial risk of injury resulting from WCS’ proposed activities.⁴³ Sierra Club does not establish standing by generally asserting Rose Gardner’s proximity to, and use of, potential transportation routes upon which radioactive materials and components would be transported to the WCS site.⁴⁴ 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 not 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.

B. The doctrine of *res judicata* bars Sierra Club, through its member, Rose Gardner, from obtaining party status in this matter.

This is not the first time that Sierra Club has attempted to obtain associational standing through its member, Rose Gardner, in a licensure matter concerning WCS’ radioactive materials management operations at its 1,338-acre site in Andrews County. In fact, only two years ago did Sierra Club fail 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.⁴⁵

WCS sought a license amendment from the DSHS for the storage of byproduct material at its site. In 2005, 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.⁴⁶ During the preliminary hearing, the ALJs considered

⁴⁰ See 30 T.A.C. §55.256(a).

⁴¹ See TEX. HEALTH & SAFETY CODE §401.003(15).

⁴² See *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136 (1992).

⁴³ See *Tex. Ass’n of Business*, 852 S.W.2d at 447 (Tex. 1993).

⁴⁴ See *Yankee Atomic Electric Co.*, CLI-94-3, 39 NRC 95-98 (1994).

⁴⁵ 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.

⁴⁶ 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.

evidence presented by Sierra Club, including the testimony of Rose Gardner.⁴⁷ Based on the evidence presented, the ALJs made the following Findings of Fact:⁴⁸

27. The WCS facility comprises 1,338 acres on a 15,000-acre ranch owned by WCS.

28. The town nearest to the facility is Eunice, in Lea County, New Mexico, located approximately five to six miles to the west.

29. The Texas community closest to the facility site is the City of Andrews, which is about 35 miles east of the site.

36. Ms. Gardner is a resident of Eunice, New Mexico.⁴⁹

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.⁵⁰

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.⁵¹

⁴⁷ *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.

⁴⁸ *Id.* at p. 11-12.

⁴⁹ 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**.

⁵⁰ 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.

⁵¹ 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

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.⁵² The ALJs recommended that the DSHS issue the radioactive materials authorization to WCS without a contested hearing.⁵³ Although Sierra Club filed a post-Proposal for Decision Exceptions Brief further claiming that it had standing to pursue a contested hearing,⁵⁴ the Commissioner of the DSHS adopted the ALJs Proposal for Decision, Findings of Fact and Conclusions of Law on February 24, 2006.⁵⁵ The DSHS Commissioner’s Order served as a final agency decision in the matter.⁵⁶

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 2005 matter before SOAH.⁵⁷ Both matters involve the *same* requestor for associational standing, the *same* member through whom standing is sought, the *same* personal and business activities of the member through whom standing is sought, the *same* WCS site in Andrews County, the *same* regional characteristics, the *same* local geology, the *same* local weather climate, and the *same* type of material.⁵⁸ Sierra Club is merely repeating itself in its attempt to meet the “person affected” standard, which it failed to satisfy just two years ago. Sierra Club’s request for contested hearing based on the circumstances of its member, Rose Gardner, should be barred under the legal doctrine of *res judicata*.

Docket No. 537-05-5206, Transcript, pg. 47, lines 5-25, p. 48, lines 1-7, Sierra Club Exhibit No. 4 (Emphasis added).

⁵² 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).

⁵³ *Id.* at p. 1, 14.

⁵⁴ 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).

⁵⁵ 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).

⁵⁶ No parties appealed the DSHS Commissioners’ Order dated February 24, 2006.

⁵⁷ 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.

⁵⁸ In 2005, WCS sought authorization to store byproduct material at its site in Andrews County. The byproduct material was received from the U.S. Department of Energy’s cleanup site in Fernald, Ohio. This same byproduct material is proposed to be disposed of by WCS in the current matter.

In a case involving the Texas Natural Resources 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.”⁵⁹

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 privity with them; and (3) a second action based on the same claims as were raised or could have been raised in the first action.⁶⁰ 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.⁶¹

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.⁶² 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.”⁶³ 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.⁶⁴

⁵⁹ See *McMillan v. Tex. Nat. Resources. Conserv. Comm.*, 983 S.W.2d 359 (Tex.Civ.App. –Austin, 1998, pet. den.).

⁶⁰ *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).

⁶¹ *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”).

⁶² *Igal*, No. 04-0931 (Tex. 2007), citing *Westheimer ISD v. Brockett*, 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).

⁶³ *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.).

⁶⁴ *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).

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.”⁶⁵

In accordance with case law, the issue of whether Sierra Club, through its member, Rose Gardner, has associational standing to contest WCS’ authorization to manage radioactive materials in Andrews County should be barred from further consideration. The DSHS Commissioner’s Order dated February 24, 2006 serves as a prior final judgment of a state agency on the merits of whether Sierra Club, through its member, Rose Gardner, has standing. The same parties subject to that prior final judgment are directly involved in the current matter. The current matter is a second action based on the same claims as were raised or could have been raised in the first action. In essence, the current matter concerns the same question of law distinctly put in issue (i.e., whether Sierra Club, through its member, Rose Gardner, has standing to contest WCS’ authorization to conduct radioactive materials management 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.⁶⁶

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 attempt 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 member, Rose Gardner, are barred under the facts, the law, and the doctrine of *res judicata*.

C. 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 radioactive materials transportation routes; use of groundwater from “wells in the area”; exposure to high

⁶⁵ *Igal*, No. 04-0931 (Tex. 2007) (Emphasis added).

⁶⁶ *Id.*

winds common in the area; and use of public roadways.⁶⁷ 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.⁶⁸ 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 site, as compared to the distance between Rose Gardner’s residence and the WCS site, does not establish an “injury in fact.”⁶⁹ Sierra Club’s discussion does not demonstrate a substantial risk of injury to Fletcher Williams resulting from the proposed activities.⁷⁰ Fletcher Williams’ mere interest in or concern about the geographic area and environmental matters concerning the proposed activities at the WCS site does not suffice to establish standing.⁷¹

Fletcher Williams is not 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.

For the reasons above, Sierra Club lacks standing and has no right to a contested hearing in this matter under Texas law.⁷²

V. Individual Requestors Do Not Have Standing

In addition to Sierra Club, individuals filed requests for contested hearing on WCS’ license application. Like the Sierra Club, the individual requestors do not satisfy the requirements for standing under either Chapter 5 of the Water Code or Chapter 401 of the Act.

Each individual requested a contested hearing by signing his or her name, disclosing his or her residential address in the City of Eunice, and approximating the distance between his or her residence and the WCS site, on a form letter.⁷³ The form letter, which predominantly consists of public comment, lists the following far-fetched scenarios in an attempt to demonstrate party status for the undersigned:

⁶⁷ See Sierra Club Request Letter, pg. 18. 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.

⁶⁸ See 30 T.A.C. 55.256(a).

⁶⁹ Fletcher Williams resides 3.69 miles from the WCS site. See **Exhibit A**.

⁷⁰ See *Tex. Ass’n of Business*, 852 S.W.2d at 447 (Tex. 1993).

⁷¹ See *Yankee Atomic Electric Co.*, CLI-94-3, 39 NRC 95-98 (1994).

⁷² 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.

⁷³ See **Exhibit A**.

“The issuance of the license will impact those *residents living and working in Eunice* because of its [WCS site] proximity and the failure to assure that radioactive materials will not migrate and contaminate the groundwater we [the undersigned] use for our livestock, crops and domestic needs, the *possibility* and potential for traffic accidents off of Highway 176 and HW 18, the nearby railway that *could* also release radioactive materials, and the *possibility* for other migration of byproduct material off-site due to high wind events and high rain flood-like events.”⁷⁴

The form letter does not demonstrate that the undersigned has suffered or will suffer actual injury or economic damage resulting from WCS’ proposed activities. Further, the form letter does not demonstrate that the undersigned has suffered or will suffer an invasion of a legally protected interest that is concrete and particularized, and actual or imminent.⁷⁵ The undersigned individuals merely adopt unfounded predictions and unsupported assumptions.⁷⁶ The concerns expressed in the form letter are indistinguishable from those of the general public (i.e., residents living and working in Eunice).⁷⁷

For the reasons above, the individual requestors lack standing and have no right to a contested hearing in this matter under Texas law.

VI. Conclusion

Sierra Club and the individual 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) are “persons affected” under either Chapter 5 of the Water Code and TCEQ Rule 55.256, or Chapter 401 of the Act. There is no demonstration of an actual injury, economic damage or substantial risk of injury resulting from WCS’ proposed activities. 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 Commissioners consider this Response to Requests for Contested Hearing and deny party status to each and every Requestor because they have not met their burden

⁷⁴ See Individual Form Request Letters, pg. 2 (Emphasis added).

⁷⁵ *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136 (1992).

⁷⁶ See *Collins*, 94 S.W.3d at 883 (Tex. App.—Austin 2002, no writ).

⁷⁷ Sierra Club and the individual requestors reference repeatedly the transport of radioactive material on the public roadways and railway to the WCS site as a basis for establishing party status. However, the transportation of radioactive materials is beyond the purview of this matter because the U.S. Department of Transportation has *exclusive jurisdiction* over the regulation of packaging and transportation of radioactive materials. The U.S. Hazardous Materials Transportation Authorization Act of 1994, codified as 49 U.S.C. §§5101-5127.

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,



Michael L. Woodward
Clayton D. Nance
Hance Scarborough, L.L.P.
111 Congress Ave., Suite 500
Austin, Texas 78701
(512) 479-8888
(512) 482-6891 (fax)

Pamela M. Giblin
Derek R. McDonald
Baker Botts, L.L.P.
1500 San Jacinto Center
98 San Jacinto Blvd.
Austin, Texas 78701
(512) 322-2667
(512) 322-8342 (fax)

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

CERTIFICATE OF SERVICE

In accordance with 30 T.A.C. §55.254(e), I hereby certify that a true and correct copy of the above and foregoing has been duly served by hand delivery or certified mail, return receipt requested, on this 28th day of April 2008 on the following:

FOR THE EXECUTIVE DIRECTOR:

Mr. Glenn Shankle
Executive Director
Texas Commission on Environmental Quality
MC 109
P.O. Box 13087
Austin, Texas 78711-3087

Mr. Don Redmond
Environmental Law Division
Texas Commission on Environmental Quality
MC 173
P.O. Box 13087
Austin, Texas 78711-3087

Ms. Amie Richardson
Environmental Law Division
Texas Commission on Environmental Quality
MC 173
P.O. Box 13087
Austin, Texas 78711-3087

Ms. Susan Jablonski
Director, Radioactive Materials Division
Texas Commission on Environmental Quality
MC 233
P.O. Box 13087
Austin, Texas 78711-3087

FOR OFFICE OF PUBLIC ASSISTANCE:

Ms. Bridget C. Bohac
Director, Office of Public Assistance
Texas Commission on Environmental Quality
MC 108
P.O. Box 13087
Austin, Texas 78711-3087

FOR PUBLIC INTEREST COUNSEL:

Mr. Blas J. Coy, Jr.
Public Interest Counsel
Texas Commission on Environmental Quality
MC 103
P.O. Box 13087
Austin, Texas 78711-3087

FOR ALTERNATIVE DISPUTE
RESOLUTION:

Mr. Kyle Lucas
Alternative Dispute Resolution
Texas Commission on Environmental Quality
MC 122
P.O. Box 13087
Austin, Texas 78711-3087

FOR THE CHIEF CLERK:

Ms. LaDonna Castanuela
Office of Chief Clerk
Texas Commission on Environmental Quality
MC 105
P.O. Box 13087
Austin, Texas 78711-3087

Waste Control Specialists LLC
Response to Requests for Contested Hearing
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REQUESTORS:

Bruce Cherryhomes
1102 Avenue G
Eunice, New Mexico 88231

Gilbert A. Cherryhomes
1102 Avenue G
Eunice, New Mexico 88231

Jerry H. Cherryhomes
1102 Avenue G
Eunice, New Mexico 88231

Brigitte Gardner
1402 Avenue A
Eunice, New Mexico 88231

Emma Wooten
1307 Avenue G
Eunice, New Mexico 88231

Anita Ireland
1304 Avenue A
Eunice, New Mexico 88231

Ken Kramer
Sierra Club – Lone Star Chapter
P.O. Box 1931
Austin, Texas 78767-1931

Vicki Longoria
1307 Avenue G
Eunice, New Mexico 88231

Victor Orozco
613 Texas Avenue
Eunice, New Mexico 88231

Delphina & Fred Ortiz
1602 Avenue S
Eunice, New Mexico 88231

Tommie Williams
1800 East Texas Ave.
Eunice, New Mexico 88231

Jill A. Yarbrough
31 Drinkard Road
Eunice, New Mexico 88231

PUBLIC OFFICIALS COMMENTS:

The Honorable Robert Zap
Mayor
City of Andrews
111 Logsdon Street
Andrews, Texas 79714-6515

The Honorable Johnnie M. White
1106 Avenue J
Eunice, New Mexico 88231

INTERESTED PERSONS:

Wesley R. Burnett
Andrews Economic Development Corporation
111 Logsdon Street
Andrews, Texas 79714-6515

Diane D'Arrigo
NIRS
6930 Carroll Ave., Suite 340
Takoma Park, Maryland 20912-4423

Lloyd Eisenrich
P.O. Box 1228
Andrews, Texas 79714-6121

Waste Control Specialists LLC
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Pete Francis
212 NW Avenue A
Andrews, Texas 79714-6310

Barbara & John M. Hogan
1221 N. Park Street
Uvalde, Texas 78801-3944

David S. Mitchell
Andrews ISD
405 NW 3rd Street
Andrews, Texas 79714-5014

Rosa Rodriguez
Andrews Chamber of Commerce
700 W. Broadway Street
Andrews, Texas 79714-6121

Edward Selig
Advocates for Responsible Disposal in Texas
P.O. Box 26586
Austin, Texas 78755-0586

Glen E. Hackler
City Manager
City of Andrews
111 Logsdon Street
Andrews, Texas 79714-6515

Wendy Inlow
Southwest Realty
801 N. Main Street, Suite D
Andrews, Texas 79714-4026

Mark S. Pelizza
URI, Inc.
405 Highway
121 BYP, Bldg. A, Suite 110
Lewisville, Texas 75067-8193

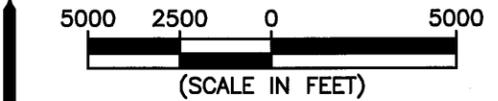
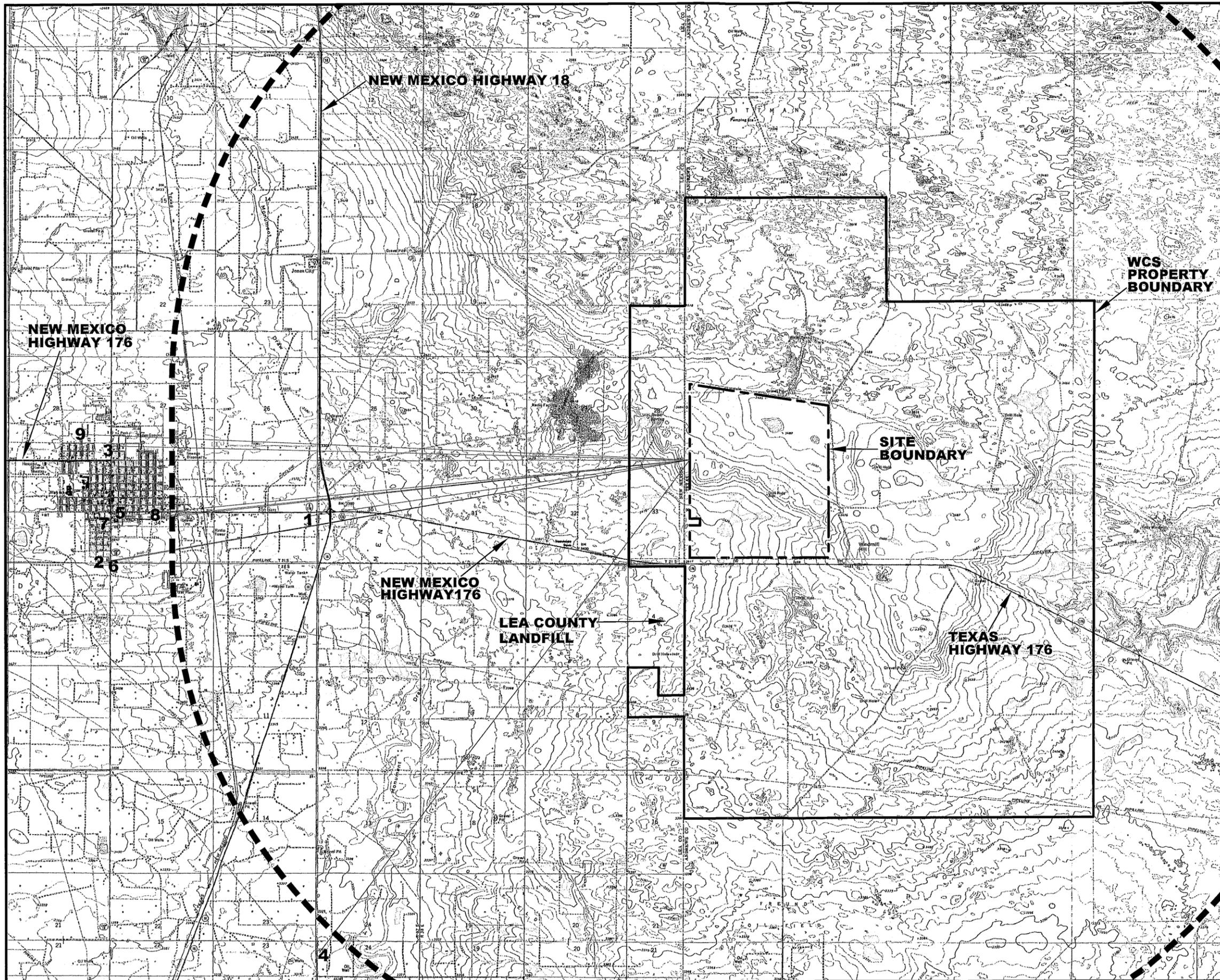
Stephen F. Smith
ED, TMRA
816 Congress Ave., Suite 1900
Austin, Texas 78701-2442


Michael L. Woodward

EXHIBIT A

**MAP IDENTIFYING
LOCATIONS & DISTANCES TO RESIDENCES
FROM WCS SITE**

**WASTE CONTROL SPECIALISTS LLC
RESPONSE TO REQUESTS FOR CONTESTED HEARING
TCEQ DOCKET NO. 2008-0428-RAW**



- LEGEND**
- SITE BOUNDARY
 - WCS PROPERTY BOUNDARY
 - 5 MILE RADIUS

- | | |
|------------------------|------------|
| 1 WILLIAMS | 3.69 MILES |
| 2 GLENN GARDNER | 5.75 MILES |
| 3 GARDNER FLOWER STORE | 5.56 MILES |
| 4 YARBROUGH | 5.96 MILES |
| 5 CHERRYHOLMES | 5.48 MILES |
| 6 IRELAND | 5.70 MILES |
| 7 LONGORIA WOOTEN | 5.65 MILES |
| 8 OROGRO | 5.14 MILES |
| 9 ORTIZ | 5.83 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	SDB	SCALE: SEE BAR SCALE
DR BY	SLC	PROJECT NO. 03089.04
CHK BY	SLC	CJI NO. 03089227
APP BY	SLC	SHEET 1 OF 1 SHEETS
DATE ISSUED: 12-10-2007		FIGURE NO. 1

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 November 27, 2007, Sierra Club, through its members, Rose Gardner and Fletcher Williams, and twelve individuals (all hereinafter called the “Requestors”) filed requests for contested hearing on WCS’ byproduct disposal license application that is currently pending before the Texas Commission on Environmental Quality (“Commission”). The hearing requests disclosed the Requestors’ names and residential addresses. According to the hearing requests, all Requestors reside in or near the City of Eunice, Lea County, New Mexico.

2. On December 7, 2007, I traveled to the street address identified by each Requestor as their respective residential addresses in the hearing requests filed with the Commission. Once I located a Requestor’s address, 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 Requestor’s residence. The GPS unit was showing an average accuracy of +/- 20 feet.

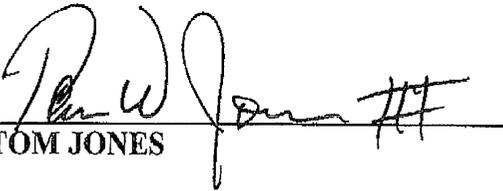
3. After obtaining and recording the coordinates identifying the location of the public street in front of the Requestors’ residences, I compared the addresses to the known coordinates of the western boundary of the WCS site in Andrews County, Texas. With this information, I calculated the approximate distances between the western boundary of the WCS site and each of the Requestors’ residences.

4. I then delivered the information above to Cook-Joyce, Inc. so that a map could be produced to portray the locations of the Requestors’ residences, location of the

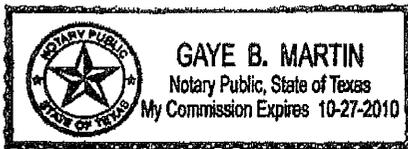
western boundary of the WCS site, and the distances between the Requestors' residences and the western boundary of the WCS site."

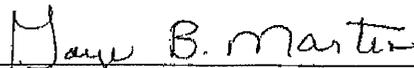
"I have read this Affidavit, and it is true and correct."

FURTHER AFFIANT SAYETH NOT.


TOM JONES

SUBSCRIBED AND SWORN TO BEFORE ME on this 25th day of April 2008.




NOTARY PUBLIC, STATE OF TEXAS

AFFIDAVIT

THE STATE OF TEXAS

§

COUNTY OF TRAVIS

§

§

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

“My name is **STEVE COOK**. 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.

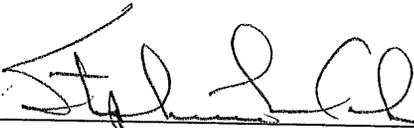
1. I am the owner of Cook-Joyce, Inc. located in Austin, Texas. On November 27, 2007, Sierra Club, through its members, Rose Gardner and Fletcher Williams, and twelve individuals (all hereinafter called the “Requestors”) filed requests for contested hearing on WCS’ byproduct disposal license application that is currently pending before the Texas Commission on Environmental Quality (“Commission”). The hearing requests disclosed the Requestors’ names and residential addresses. According to the hearing requests, all Requestors reside in or near the City of Eunice, Lea County, New Mexico.

2. On December 8, 2007, I received information from Tom Jones of WCS concerning the location of the Requestors’ residences (including longitude and latitude coordinates), the location of the western boundary of the WCS site in Andrews County, Texas (including longitude and latitude coordinates), and the distances between the Requestors’ residences and the western boundary of the WCS site.

3. With this information, I caused to have plotted the location of the WCS site, including the western boundary of the WCS site, and the locations of all the Requestors’ residences on a map. The distances between the western boundary of the WCS site and all the Requestors’ residences are also included on the map.

4. The above-described map is registered to Cook-Joyce, Inc. and is dated December 10, 2007. A true and correct copy of the map is attached as Exhibit A to WCS’ Brief in Response to Requests for Contested Hearing.”

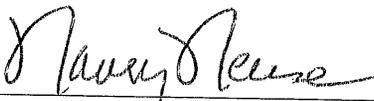
"I have read this Affidavit, and it is true and correct."
FURTHER AFFIANT SAYETH NOT.



STEVE COOK

SUBSCRIBED AND SWORN TO BEFORE ME on this 25th day of April 2008.





NOTARY PUBLIC, STATE OF TEXAS