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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

April 28, 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 APR 28 PM 1:40
CHIEF CLERKS OFFICE

**RE: WASTE CONTROL SPECIALISTS, LLC
TCEQ DOCKET NO. 2008-0428-RAW**

Dear Ms. Castañuela:

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

Sincerely,

Emily A. Collins
Emily A. Collins, Attorney *by jlc*
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

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TCEQ DOCKET NO. 2008-0428-RAW

2008 APR 28 PM 1:40

IN THE MATTER OF THE
APPLICATION OF WASTE
CONTROL SPECIALISTS, LLC FOR
RADIOACTIVE LICENSE NO. R05807

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BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

CHIEF CLERKS OFFICE

**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

Waste Control Specialists, LLC, ("Applicant" or "WCS") applied to the Texas Department of State Health Services ("DHS") on June 24, 2004, for a license to authorize the construction of a below-grade disposal facility to dispose of tailings or wastes produced by or resulting from the extraction or concentration of uranium or thorium from ore processed primarily for its source material content, including discrete surface wastes resulting from uranium solution extraction processes. The proposed facility is located approximately one and one half mile north of State Highway 176 on State Line Road, 250 feet east of the Texas and New Mexico state line in Andrews County, Texas.

The Applicant published a Notice of Completion of Technical Review of Proposed Radioactive Material License Number R05807 in the *Andrews County News* on October 28, 2007. The comment period ended on November 27, 2007, and the last date on which to request a

hearing fell on the same date. The Executive Director (“ED”) issued a Response to Public Comment on March 14, 2008. TCEQ received eleven hearing requests from individuals in Eunice, New Mexico, and one hearing request from the Lone Star Chapter of the Sierra Club on November 27, 2007, each stating concern about the Applicant’s characterization of geology, hydrology, and other site characteristics, potential air deposition of radioactive material, transportation accidents, financial assurance, the consideration of alternatives, and groundwater contamination. Pursuant to the analysis provided below, OPIC recommends granting each of the timely hearing requests, and referring this matter to SOAH to determine if Waste Control Specialists’ application meets the requirements of applicable law and whether the Commission should issue Waste Control Specialists a license to dispose of by-product materials.

II. APPLICABLE LAW

While TCEQ has regulated the disposal of radioactive substances aside from by-product material and oil and gas “naturally occurring radioactive material” waste since September 1, 2003, the Texas Legislature consolidated regulation of the storage, processing and disposal activities associated with uranium mining and radioactive waste under TCEQ as of June 15, 2007, to include by-product material regulation.¹ As part of the Act transferring such authority to TCEQ, the Legislature directed the Commission to “continue any applications review or processing and any hearings that concern a matter subject to transfer...being conducted by the Health and Human Services Commission or the [DHS]....”² The Act further directs the Commission to process applications for a new license to dispose of by-product material filed

¹ S.B. 1604; Acts 2007, 80th Leg., ch. 1332, eff. June 15, 2007; Tex. Health & Safety Code (“THSC”) § 401.2625 (2008).

² Acts 2007, 80th Leg., ch. 1332, § 33(j), eff. June 15, 2007.

with DHS prior to January 1, 2007, according to the *technical* rules and regulations of DHS that were effective on June 15, 2007.³ The Legislature mandated completion of the technical review by October 1, 2007, and a final Commission decision on a license by December 31, 2008, for applications filed with DHS prior to January 1, 2007.⁴ The Commission may provide an opportunity for a public hearing on its own motion, and must provide such an opportunity upon the written request of a "person affected."⁵ Any contested case hearing on an application filed prior to January 1, 2007, may not exceed one year in duration as measured from the date of referral to SOAH to the Commission's final decision on the application.⁶

A. Requirements for Contested Case Hearing Requests

This application was submitted to DHS on June 24, 2004. As the application was filed 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") to the extent that those provisions do not conflict with provisions of the Texas Health and Safety Code ("THSC") applicable to this application. A contested case hearing may be requested by the Commission, the Executive Director, the Applicant, and affected persons. 30 TAC § 55.251(a).

A hearing requestor must make their request in writing 30 days after the publication of the notice of the completion of technical review. 30 TAC § 39.703(a) (2007). A hearing requestor must also identify their personal justiciable interest affected by the application, specifically noting the "requestor's location and distance relative to the activity" and "how and

³ *Id.* at § 33(k)(1). TCEQ's procedural rules, therefore, apply to this application, but DHS' technical rules and regulations that were effective on June 15, 2007, apply to the substantive review of this application.

⁴ *Id.* at § 33(k)(2), (3).

⁵ THSC § 401.264(a) (2008).

⁶ Acts 2007, 80th Leg., ch. 1332, § 33(k)(4), eff. June 15, 2007.

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.

"Persons affected" may become parties to a contested case hearing upon a "determination that the person possesses a justiciable interest in the result of the proceeding." THSC § 401.264 (2008). A person affected is defined as the following:

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. THSC § 401.003(15) (2008).

A request by a group or association must demonstrate that (1) a member of the group or association would otherwise have standing to request a hearing in their own right; (2) the interests the group seeks to protect are germane to the organization's purpose; and (3) the claim or relief requested does not require participation of individual members in the case. 30 TAC § 55.252(a) (2007).

III. The Hearing Requests of the Individual Hearing Requestors and the Sierra Club Demonstrate that They Are Persons Affected and are, Therefore, Entitled to a Hearing.

TCEQ received timely hearing requests contesting Waste Control Specialists' application from the following individuals: Gilbert A. Cherryhomes, Jerry H. Cherryhomes, Bruce Cherryhomes, Brigitte Giles,⁷ E. Westia,⁸ Anita Ireland, Victoria Longoria, Fred and Delphina

⁷ The hearing requestor residing at 1402 Avenue A, Eunice, New Mexico 88231 has written her name partially illegibly.

⁸ Again, the name of the requestor is partially illegible, but the requestor has an address at 1307 Avenue G, Eunice, New Mexico 88231.

Ortiz, Victor Orozco, Tommie Williams, and Jill A. Yarbrough. TCEQ also received a timely hearing request from the Lone Star Chapter of the Sierra Club.

Each individual hearing requestor states that he or she resides in Eunice, New Mexico, which is located in Lea County along the Texas and New Mexico state lines. Andrews County, Texas, the county in which the proposed facility will be located, is directly adjacent to Lea County, New Mexico. Therefore, each of the individuals are residents of a county adjacent to the county in which the Applicant has proposed to accept, or locate, radioactive material.⁹

Hearing requestors also must demonstrate either actual harm or that they will suffer actual harm or economic injury. The individual hearing requestors state that the Applicant's inadequate characterization of geology, hydrology and other site characteristics may result in migration of radioactive materials to their groundwater. The requestors also state concern that traffic accidents, high winds, and floods may occur and result in the release and off-site migration of radioactive materials in close proximity to the requestors' residences and workplaces. The hearing requestors also contend that the financial assurance provisions and post-closure plan do not ensure necessary cleanup and oversight of the proposed facility. Based on these concerns and the potential for actual harm related to those concerns, OPIC recommends that the Commission find the individual hearing requestors have satisfied the final prong of the "person affected" definition provided in statute¹⁰ and are, therefore, entitled to a hearing.¹¹

The Lone Star Chapter of the Sierra Club identifies two members, Ms. Rose Gardener and Ms. Fletcher Williams, who reside in Lea County, New Mexico, and have specific concerns regarding the proposed byproduct facility. Ms. Gardener, who owns a flower shop close to

⁹ THSC § 401.003(15) (2008).

¹⁰ *Id.*

¹¹ THSC § 401.264(a), (b) (2008).

downtown Eunice, may suffer economic damage “[b]ecause she relies on travelers from outside Eunice to purchase goods at the feed store and flower shop, [and] the negative publicity surrounding the opening of a radioactive waste site...will impact her business.” In addition, Ms Gardener claims that any off-site migration of radioactive material will adversely affect groundwater resources used by Ms. Gardener and may harm her residential “property, livelihood, and health.” Ms. Williams states similar concerns related to her use of groundwater wells in the area and potential exposure to radioactive material due to accidents and high winds. Therefore, OPIC recommends that the Commission find that the Sierra Club has identified one or more members of their group who would otherwise have standing to request a hearing in their own right due to their allegations of actual injury and location.¹²

The Sierra Club states that its purpose is to “protect communities, wild places, and the planet itself.” The Sierra Club identifies many specific interests it seeks to protect according to that purpose, including the interests of its Lea County members in adequate site characterization, potential alternatives to the design and location of the proposed site, and adequate financial assurance. OPIC recommends that the Commission find that the interests the Sierra Club seeks to protect are germane to its purpose in protecting communities, wild places, and the planet.¹³ Furthermore, OPIC recommends that the Commission find that the claims asserted by the Sierra Club and the relief requested do not require participation of the organization’s individual members.¹⁴ Therefore, OPIC recommends that the Commission find that the Sierra Club is a person affected and entitled to a hearing on this application.¹⁵

¹² 30 TAC § 55.252(a)(1) (2007); THSC § 401.003(15) (2008).

¹³ 30 TAC § 55.252(a)(2) (2007).

¹⁴ 30 TAC § 55.252(a)(3) (2007).

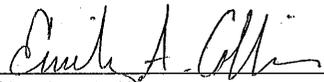
¹⁵ THSC § 401.264(a), (b) (2008).

IV. CONCLUSION

For the reasons set forth above, the Office of Public Interest Counsel respectfully recommends that the Commission grant each of the hearings requests, and refer this matter to SOAH for a contested case hearing to determine whether Waste Control Specialists' application meets the requirements of applicable law and whether the Commission should issue Waste Control Specialists a license to dispose of by-product materials.

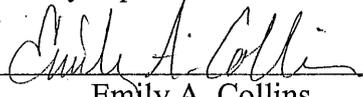
Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2008, the original and eleven true and correct copies of the Office of Public Interest Counsel's Response to Requests 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.



Emily A. Collins

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