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May 12, 2008

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

CHIEF CLERKS OFFICE

2008 MAY 12 PM 4:34

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

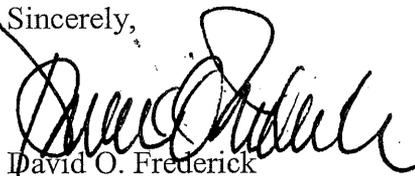
Re: Application by Waste Control Specialists, LLC for New Radioactive Material License No. R05807; TCEQ Docket No. 2008-0428-RAW

Dear Ms. Castañuela:

Please find enclosed Sierra Club's Reply to Response to Hearing Requests in the above-mentioned matter.

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

Sincerely,



David O. Frederick

XC: Service List

Certificate of Service

By my signature below I certify that on May 12, 2008 a true and correct copy of the foregoing **SIERRA CLUB'S REPLY TO RESPONSE TO HEARING REQUESTS** was served upon the parties identified below via First Class Mail.



David O. Frederick

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Application by Waste Control Specialists,
LLC, for New Radioactive Material License
No. R05807

Before the Texas
Texas Commission on
Environmental Quality

**SIERRA CLUB's REPLY IN SUPPORT OF ITS
REQUEST FOR A HEARING IN THIS DOCKET**

TO THE HONORABLE CHAIRMAN GARCIA AND COMMISSIONERS SOWARD
AND SHAW:

Sierra Club replies, here, to the responses served by your staff and the Applicant,
Waste Control Specialists, to the hearing request made by Sierra Club in this docket.

The Issue

The issue before you is whether Sierra Club has a member who, given the
allegations made, would be an "affected person" and, thus, entitle Sierra Club to a
hearing on the disposal of the Fernald radioactive wastes.¹ Sierra Club does not have to
have a member who definitely would be harmed in ways not shared by the general
public; it merely needs to have a member who *potentially* would be harmed in such ways.
The Austin Court of Appeals has explained the issue, thusly:

¹ Attached is a 3-pager from the DOE website on the Fernald wastes. Only the first page addresses the wastes' characteristics. From that page, in the event you did not already know this, you can learn that the wastes originated in the Belgian Congo as very-high-concentration (on the order of 40-50%) uranium and radium ores. The ores were processed near St. Louis and, mostly, outside Cincinnati for the nuclear weapons program, and the radioactive wastes from that processing were stored at the near-Cincinnati site, Fernald, Ohio. That site was closed in 1989 and declared a Superfund site. About 8,900 cubic yards (so, about 240,300 cubic feet – a cube 62 feet, 2 inches, on a side) of waste was slurried (i.e., semi-liquified) into a larger volume and stored in silos. This slurried waste has been stabilized, hopefully, with about 3 times as much (by weight) cement and fly ash from power plants and has been shipped in big steel drums to the Applicant's site in Andrews County, Texas, where the drums will be buried pursuant to the permit at issue. The volume the permit allows for disposal is 1.169×10^6 cubic yards (so, about 31.563×10^6 cubic feet – a cube 316 feet on a side).

An affected person is ‘one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application.’ An interest that is common to members of the general public does not qualify as a personal justiciable interest. This standard does not require parties to show that they will ultimately prevail on the merits; it simply requires them to show that they will *potentially* suffer harm or have a justiciable interest that will be affected.

United Copper Industries, Inc., and Texas Natural Resource Conservation Commission v.

Joe Grissom, 17 S.W.3d 797, 802-803 (Tex. App. -- Austin 2000, pet. dismissed)

(internal citations omitted and emphasis added). The Court went on, page 803, to explicitly reject the standard your staff (the ED’s staff, at least) would impose in this docket:

[The Applicant] confuses the preliminary question of whether an individual has standing as an affected person to *request* a contested-case hearing with the ultimate question of whether that person will *prevail* in a contested-case hearing on the merits. In essence, [the Applicant] suggests that [the would-be party] should be required to prove that he will *prevail* in a contested-case hearing just to show that he has the standing necessary to *request* such a hearing. We reject this argument here just as we did in *Heat Energy*. See 962 S.W.2d at 295.

Cf., Executive Director’s Response to Hearing Requests, pp. 14-16, reciting that the ED staff has reviewed the Applicant’s submissions regarding groundwater, surface water and air and finds concerns about these contamination pathways or perceptions of such contamination are not reasonable; the ED’s staff has tried the merits of the docket and determined Sierra Club loses and, thus, that Sierra Club may not have a hearing.

Relevant Law

A. Associational Standing

There seems to be no dispute among the parties on this standard. In determining whether an organization or association, such as Sierra Club, has standing to access the courts, the Texas Supreme Court has adopted the three-prong test articulated by the United States Supreme Court in *Hunt v. Washington State Apple Advertising Commission*. *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 447 (Tex. 1993). It is the first prong of this test (“one of its members would otherwise have standing to sue in his/her own right”) that is disputed, here. The Texas Supreme Court has instructed that this first requirement should not be interpreted to impose unreasonable obstacles to associational representation. *Id.* Rather, it is meant to weed out those parties who manufacture allegations that lack any real foundation. *Id.* A substantial risk of injury is sufficient to confer standing for access to courts. *Id.*

B. The standing standard

Texas appellate courts have historically and repeatedly recognized that the right to participate in administrative proceedings is construed quite liberally to encourage varying points of view – more liberally, for example, than has been the right to seek judicial review of administrative decision. *See, e.g., Texas Rivers Prot. Ass'n v. Texas Natural Res. Conservation Comm'n*, 910 S.W.2d 147, 151 (Tex. App.--Austin 1995, writ denied); *Fort Bend County v. Texas Parks & Wildlife Comm'n*, 818 S.W.2d 898, 899 (Tex. App.--Austin 1991, no writ); *Railroad Comm'n v. Ennis Transp. Co.*, 695 S.W.2d 706, 710 (Tex. App.---Austin 1985, writ ref'd n.r.e.); *Texas Ind. Traffic League v. Railroad Comm'n*, 628 S.W.2d 187, 197 (Tex. App.---Austin), *rev'd on other grounds*, 633

S.W.2d 821 (Tex. 1982), *but generally resurrected by Texas Ass'n of Bus.*, 852 S.W.2d 440; *see also* 1 RONALD L. BEAL, TEXAS ADMINISTRATIVE PRACTICE & PROCEDURE § 6.4 (2005) (“agencies have an overall statutory goal of encouraging public participation in agency proceedings;” “[a]ny strictures upon agency standing would be inconsistent with the overall goal of agencies acting for the public welfare”).

The Austin Court of Appeals explained that a more liberal construction of standing in administrative proceedings is necessary because of the difference in purpose and in nature between administrative proceedings and judicial proceedings. While judicial proceedings are intended to resolve genuine controversies, administrative tribunals were created to uphold the public interest:

Since administrative proceedings are different from judicial proceedings in purpose, nature, procedural rules, evidence rules, relief available and the availability of review, it is understandable that one’s right to appear in an agency proceeding should be liberally recognized. Moreover, administrative tribunals are created to ascertain and uphold the public interest through the exercise of their investigative, rulemaking and quasi-judicial powers. Any stricture upon standing in an administrative agency would thus be inconsistent with the proposition that the agency ought to entertain the advocacy of various interests and viewpoints in determining where the public interest lies and how it may be furthered. The doctrine of standing in the judicial branch serves, however, a different function: it avoids suits where there is no genuine controversy susceptible of judicial resolution and enforcement.

Texas Indus. Traffic League, 628 S.W.2d at 197.

As noted, earlier, the Austin Court of Appeals has also instructed on several occasions that parties seeking standing in an administrative proceeding are not required to show, simply to establish standing, that they will ultimately prevail on the merits of their

cases; this is not even the test in district court. Would-be parties in administrative cases are simply required to show that they have a greater potential to suffer harm than do members of the public at large, or, stated another way, that they have a “justiciable interest” related to the proceedings. *Collins v. Texas Natural Res. Conservation Comm’n*, 94 S.W.3d 876, 882 (Tex. App.---Austin 2002, no pet.); *United Copper Indus., Inc. v. Texas Natural Res. Conservation Comm’n*, 17 S.W.3d 797, 802-03 (Tex. App.---Austin 2000, pet. dismiss’d); *Heat Energy Advanced Tech., Inc. v. West Dallas Coal. for Envtl. Justice*, 962 S.W.2d 288 (Tex. App.---Austin 1998, pet. denied). Considering the expenses associated with participating in a hearing on the merits – expert witnesses, site inspections, legal fees, and the time devoted to preparing and participating in the hearing – it is only logical that an individual should not be required to prove the merits of his or her case just to have standing to participate in a hearing on the merits.

D. Legislative History

The ED’s response fuses a lot of toner arguing against the application of § 401.003(15)(“person affected”) of the Texas Radiation Control Act² to this proceeding – a proceeding that addresses the disposal of a radioactive substance, the by-product wastes of uranium enrichment. This is an unnecessary diversion of our energies, given that, in light of the residence and business activities of all the would-be protestant parties, there is no difference between the definitions of “person affected” in § 401.003(15), Health & Safety Code, “person affected” or “affected person” in § 5.115(a), Tex. Water Code.

² Chapter 401 of the Health & Safety Code is the Radiation Control Act.

The legislative history of the term “person affected” in the Radiation Control Act does not indicate that the Legislature intended to depart from the axiom that standing is to be construed more liberally in administrative proceedings. When the Legislature first considered the bill that added the term and the accompanying definition to the Act,³ the Senate Natural Resources Committee explained that one of the purposes of the bill was to “insure citizen participation in the regulation, licensing, and hearing processes.” Senate Comm. on Natural Res., Bill Analysis, Tex. S.B. 480, 67th Leg., R.S. (1981). Similarly, the House Committee on Environmental Affairs noted that the bill “includes stronger licensing requirements, public hearings, environmental impact assessments, enforcement powers, penalties, and financial security,” and that although some might argue that the bill is too strong, “[n]uclear waste needs strong regulation.” House Comm. on Envntl. Affairs, Bill Analyses, Tex. S.B. 480, 67th Leg., R.S. (1981). It was clearly the intent of the Legislature to ensure that citizens be allowed to participate in public hearings on the regulation and licensing of radioactive waste facilities, as this was an important element in the regulation of nuclear waste.

Furthermore, the legislative history reflects that the term “person affected” was ultimately defined by Representative Agnich so that the definition would be “exactly the same” in the Radiation Control Act as it is the Solid Waste Disposal Act; his intent was to

³ The definition of “person affected” was somewhat different, though not substantively different, than it is today. It defined a “person affected” as one “who shall demonstrate that he has suffered or will suffer actual injury or economic damage.” Act of March 23, 1981, 67th Leg., R.S., ch. 21, 1981 Tex. Gen. Laws 31. It was subsequently codified and reorganized in 1989, but again no substantive changes were made.

make the Radiation Control Act standing law consistent with the then-current and present standing law for participation in municipal waste landfill permitting, for example.

Debate on Tex. S.B. 480 on the Floor of the House, 67th Leg., R.S. (Mar. 11, 1981) (statement of Rep. Agnich, example added). Representative Agnich's comments and the legislative history certainly do not indicate that the Legislature intended to raise the burden for persons seeking to participate in public hearings on radioactive waste; to the contrary, imposing an elevated burden on citizens who wish to participate in public hearings on nuclear waste would be antithetical to the Legislature's intent.

E. Interpretation and Application of Standing Principles

Heat Energy Advanced Technology, Inc. v. West Dallas Coalition for Environmental Justice, 962 S.W.2d 288 (Tex. App.---Austin 1998, pet. denied), is the only appellate case addressing standing to participate under either law. In that case, the Third Court of Appeals considered whether an individual had standing as an associational representative to participate in a hearing on a permit to operate a hazardous and industrial waste storage and processing facility under the Solid Waste Disposal Act. In determining that the individual, Mr. Acosta, did have standing, the Court emphasized that parties are not required to prove the merits of their cases just to have standing to prove them again in a hearing on the merits. *Id.* at 295. In that case, the administrative law judge heard evidence that the facility had the *potential* to emit odors, thus giving credence to Mr. Acosta's assertions of the potential to suffer harm. *Id.*

TCEQ, likewise, has rejected the opportunity to apply a stringent standard to individuals seeking party status in litigation brought under the Radiation Control Act. Specifically, in the case concerning the application of the Texas Low-Level Radioactive Waste Disposal Authority for the proposed Sierra Blanca site, the TCEQ (the TNRCC, at that time) determined that “the *perception* of adverse environmental or health consequences” can have an impact on a justiciable interest. The issue in that case, presented to the Commission in a certified question, was whether interests in a socio-economic area that may be affected by the *perception* of adverse environmental or health consequences gave rise to a justiciable interest within agency’s jurisdiction. The Commissioners responded:

Yes, where the perception of adverse environmental or health consequences can be demonstrated to have [an] impact on an interest related to a legal right, duty, privilege, power or economic interest that may be affected by the application or an interest that is protected by the law under which the application will be considered, that interest is a justiciable interest within the Commission’s jurisdiction. Perceptions can have real impacts in some circumstances, and it is a fact question whether a sufficient showing has been made that the perception is real, the interest claimed to be impacted is genuine and a reasonable nexus exists between the perception and the interest sought to be protected.

Tex. Natural Res. Conservation Comm’n, *Application of Texas Low-Level Radioactive Waste Disposal Authority for License No. RW-3100*, Docket No. 96-1206-RAW (Jan. 23, 1997) (order responding to certified question, Attachment B to this reply). Subsequently, under this standard, individuals from as far away as Mexico and Alpine (132 miles) and El Paso (83.6 miles) were granted party status.

F. Why the Two Health Department Decisions are not Binding or Instructive

I suppose it is obvious that a decision of the Department of State Health Services or of its predecessor, the Department of Health, is not binding on you. Such a decision, however, would perhaps be entitled to some deference, were the facts on which it was based sufficiently similar to the facts before the Commission. Here, however, the facts are not similar; they are, in fact, overtly dissimilar, so the earlier standing decisions related to Sierra Club by the Department are not, even, instructive for your decision.

The PFDs for both dockets are attached to this reply for your convenience. The 1997 docket PFD is Attachment C. The 2005 docket PFD is Attachment D. The Department Commissioner adopted both without change as his decision.

Both dockets dealt with the interim storage of radioactive waste on the ground surface, so neither docket dealt with either the long-term migration of hazards from the WCS site by groundwater or other subsurface transport.⁴

The 1997 docket did not involve either Sierra Club or either of the standing members Sierra Club has identified, here. The individuals who sought standing in the 1997 docket lived in the city of Andrews, 31 miles from the WCS site.⁵ None of the individuals seeking party status in 1997 even claimed to use well water from anywhere near the WCS site; they relied (FF #22) on a municipal water supply. The individuals who sought party status in 1997 alleged declines in property values, but, as the ALJs

⁴ The 1997 docket also dealt with surface treatment of radioactive wastes.

⁵ See, 1997 PFD, p. 4, and the EA for this docket, p. 12.

noted (FF ##14 & 15), property value declines drop to nominal after about 5 miles from the site. The individuals who sought party status in 1997 did not allege any connection between the highways they used for business or personal travel and the WCS site (FF #30). The 1997 individuals were not represented by counsel, so they likely did not know much standing law, and, of course, both *Heat Energy* and *United Copper* post-date the 1997 decision, anyway.

The 2005 docket, again, involved only temporary surface storage of radioactive waste, and, thus, no party alleged any groundwater or subsurface transport mechanism as giving rise to a potential risk. Sierra Club sought party status in that docket, and Rose Gardner was one of its standing members, but Mrs. Fletcher Williams, its other and more-nearby identified standing member in this docket, was not identified in the earlier docket. The PFD from the 2005 docket reflects no allegations by would-be protesters of harm caused by perceptions that would adversely affect economic interests.

As to the argument that Sierra Club's decision not to appeal that earlier adverse decision reflects some validation of the decision, one should bear in mind that the license amendment allowed only temporary storage on the surface of radioactive wastes and that the TSDHS rules made amendments immediately effective when issued (i.e., unlike the more-balanced TCEQ practice, TSDHS waste license amendments became effective before the hearings on them were held). So, in the year or so it would have taken Sierra Club to get the earlier decision overturned in court, the wastes in question would already

have arrived at the WCS site. On balance, one can perhaps understand that the Club decided an appeal, even a successful appeal, would be a poor use of resources.

Sierra Club's Members' Standing Credentials

Rose Gardner lives in Eunice, New Mexico, just under 6 miles, per the WCS Response Exh. A, from the WCS site. Her home is just off of Route 207, approximately a half mile south of Highway 176, the highway that runs by the WCS site. In addition, Mrs. Gardner and her husband own a Feed Store located right next to the house. She also owns a flower shop about a half mile north of Highway 176. Mrs. Gardner's livelihood will potentially be affected in several ways by the WCS byproduct material disposal site: 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 just down Highway 176 from those businesses will negatively impact them; Mrs. Gardner's wholesalers for the flower shop are located in Odessa, Texas, and the flowers and other shop supplies arrive to the shop from Odessa via Highway 176, passing by the WCS disposal site in transit.

Rose Gardner and her husband own approximately 15 acres of land off of 16th Street (in Eunice), which has a direct connection to Highway 176. This land is used to raise alfalfa. Mrs. Gardner and her husband own horses, cattle, goats, chickens and a pig, which are housed on this land and frequently graze parts of the fields. The alfalfa itself is cut and dried and used both for their own animals and to provide some hay for the feed store. This alfalfa relies on a 200-foot water well owned by Mrs. Gardner and her

husband, which well is potentially hydrologically connected to groundwater resources found in the vicinity of the WCS site.⁶ The ED, in his response to comments, acknowledged that numerous potentially-significant aspects of the subsurface hydrogeology regime have yet to be characterized: size of red-bed clay fractures (pp. 79-80), causes of Antlers formation deformities (pp. 80-81), consistent data on the 125-foot and 185-foot sand layers (p. 81), consistent borehold data (pp. 81-82), the causes of gypsum in the Dockum clay fractures (p. 82), and so forth. Given the uncertainties the ED acknowledges, there is no basis on which to discount to “zero” the Mrs. Gardner’s (and her customers’) apprehensions about subsurface migration, over time, of wastes to her well. These people, after all, actually live in the area and, therefore, may be expected to know some details about the area.

Finally, in addition to trips to the landfill on the SW corner of the WCS site, Mrs. Gardner, unlike her 1997 counterparts, travels frequently on Highway 176 into Texas as a matter of necessity; it is the highway that takes her east to Odessa.

The other identified Sierra Club standing member, Mrs. Fletcher Williams, lives even closer to the proposed WCS site than does Mrs. Gardner. Mrs. Williams lives approximately three-and-a-half miles from the site, if WCS Exh. A is accurate, on Highway 176. (Her mailing address is in Eunice, but, as one can see from Exh. A, she actually lives out in the country on the way to the WCS site.) Her home is located near

⁶ Mrs. Gardner lives in the same hydrological basin as the WCS site, with lands in both areas being part of the Pecos River Basin, as well as the Pecos River Basin alluvial aquifer. Formations associated with the Pecos Valley, Ogallala aquifer formations and the Dockum (subcrop) underlie both the proposed site and the businesses and home owned by Mrs. Gardner.

the railroad line – including a rail spur that is directly behind her house – that serves the WCS site. Mrs. Williams is a caregiver and takes care of both her elderly mother and two young children under the age of six. Because her mother and other members of her family rely on medical care in Andrews, she frequently travels east along Highway 176 to Andrews, passing directly by the WCS site. She also travels with her family along Highway 176 on the way to Odessa on trips there for shopping or to the airport. She and her family use groundwater wells in the area.

Conclusion

The law is awfully clear: a person seeking party status need not prove his or her harm on the merits to seek and be granted a contested-case hearing on the merits. As the Court of Appeals put it:

This standard does not require parties to show that they will ultimately prevail on the merits; it simply requires them to show that they will *potentially* suffer harm or have a justiciable interest that will be affected.

We reject the argument [i.e., that the would-be party should be required to prove that he will *prevail* in a contested-case hearing just to show that he has the standing necessary to *request* such a hearing], here, just as we did in *Heat Energy*.

United Copper, quoted on the first page, *supra*.

The public at large does not live 3.5 or 5.5 miles from the proposed radioactive waste disposal site. The public at large does not rely for any purpose on groundwater from wells in the same basin as the one in which the WCS site is located – a basin that even the ED acknowledges has not been thoroughly characterized in the vicinity of the WCS site. The public at large does not have to, as a practical matter, drive right

alongside the WCS site for personal and business reasons, and the public at large does not have customers who, whether rightly or wrongly, perceive a threat associated with goods that pass by that site or are simply housed within 5 or 6 miles of the site.

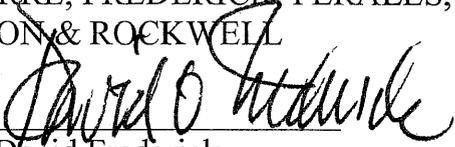
You should reject the rushed conclusions of the ED's staff and the self-interested arguments of WCS regarding Sierra Club's lack of "party" credentials. The Legislature has mandated a "rocket" schedule for the hearing in this docket, in any event, so there is precious little delay that will be associated with the hearing; and, of course, we are talking, here, about a decision that will burden Texans, West Texans, in particular, for thousands of years.

The Club prays you grant it a hearing.

Respectfully submitted,

LOWERRE, FREDERICK PERALES,
ALLMON & ROCKWELL

By:


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COUNSEL FOR SIERRA CLUB

ATTACHMENT A



U.S. Department of Energy
Ohio Field Office
Fernald Closure Project

Transporting DOE Silos 1 & 2 Material from Fernald, Ohio

BACKGROUND

The Fernald site is a former Department of Energy (DOE) uranium processing facility located approximately 18 miles northwest of Cincinnati, Ohio. Formerly known as the Feed Materials Production Center (FMPC), the facility began operations in 1952 producing high purity uranium metal for the nations defense programs. Production operations ended in 1989 and Fernald was included on the National Priorities List established under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Following CERCLA requirements, the Fernald site, now known as the Fernald Closure Project (FCP), developed plans to clean up the facility. These plans included demolition of buildings and structures, and the proper disposition of all wastes remaining in storage. This includes the removal, treatment, transport, and disposal of the waste products located in the Fernald Silos. In accordance with the cleanup plan established under the CERCLA process, the waste from Silos 1 & 2 is to be treated, packaged, and transported to the Waste Control Specialists, LLC (WCS) facility in Andrews, Texas for temporary storage pending final disposal. This fact sheet provides information related to the plans for transportation of the waste in Silos 1 & 2 to WCS. Plans for final disposal, including any necessary transportation, will be communicated in future documents and fact sheets once the plans are finalized and approved.

HISTORY

Silos 1 & 2 stored residues generated from the processing of high assay uranium ores at the FMPC and Mallinckrodt Chemical Works (MCW) in St. Louis, MO. The ores processed at MCW and the FMPC came primarily from one mine located in the former Belgian Congo. Those ores contained relatively high concentrations of uranium in the range of 40 to 50 percent as well as high concentrations of radium.

The term "K-65" was used at Fernald to describe the processing of the Belgian Congo ores, these materials are currently known as "K-65 Residues."

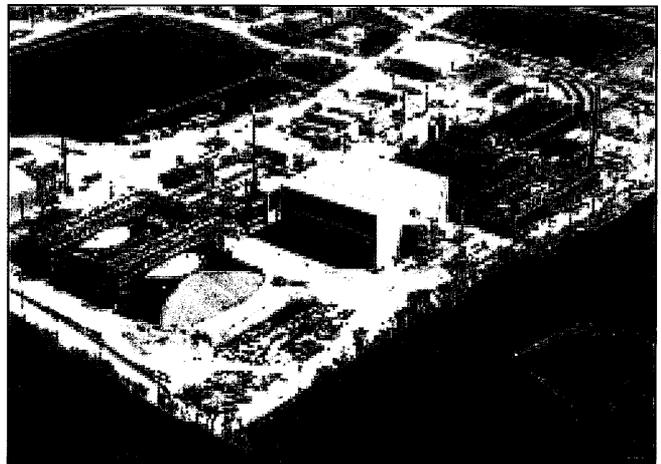
Uranium-bearing ores contain not only uranium, but also radionuclides that are a part of the natural-uranium decay chains. These radionuclides, including radium, are separated from uranium in the refining process. The refinery wastes, known as raffinates, contained a high concentration of the radioactive decay-chain products. Approximately 8,900 cubic yards of raffinates from the K-65 process were slurried into Silos 1 & 2.

CHARACTERISTICS OF SHIPPED MATERIALS

The Silos 1 & 2 material consists of uranium residue remaining after the extraction of uranium from uranium ore. Waste will be stabilized with a formulation of flyash, and Portland cement. The waste loading in the stabilized waste is expected to average from 17 to 30 weight-percent K-65 material; therefore, 70 to 83 weight-percent of the final stabilized waste form will be inert, non-waste material additives. Maximum expected radionuclide concentrations per waste package (pCi/g):

Radium	226	-	100,000
Thorium	230	-	15,000
Lead	210	-	100,000
Polonium	210	-	100,000
Actinium	227	-	2,000

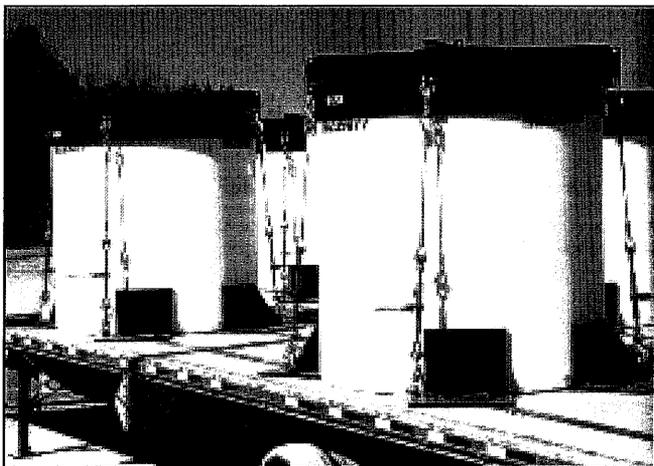
The final physical form of the treated waste will be a concrete monolith inside a sealed steel shipping container.



PHYSICAL DESCRIPTION OF SHIPPING CONTAINERS

The waste will be shipped in 76" diameter, 80" high, 1/2-inch thick cylindrical carbon steel containers with external volume of 208 cubic feet. Container design meets the Department of Transportation's (DOT) Industrial Package Type 2 (IP-2) requirements. Containers have successfully passed all required DOT tests (i.e., free drop test and stacking test). Filled containers will have a maximum weight of 21,950 pounds. The containers will be filled with the stabilized Silos 1 & 2 materials, weighed, labeled, and surveyed before being placed onto the flatbed trailer for shipping. There will be two containers on each trailer. The treated waste form will be a low compressive strength cement monolith with no free liquid present. Up to 7,000 filled containers (3,500 truck shipments) are to be generated over an 11-month period. Anticipated direct radiation dose rates on the outside of the shipping container:

- 75 millirem/hour on contact (DOT standard specifies on contact dose rate shall not exceed 200 millirem/hour)
- 9 millirem/hour at 2 meters from the package (DOT standard specifies dose at 2 meters shall not exceed 10 millirem/hour)



WASTE CLASSIFICATION

DOE has classified the K-65 material as uranium byproduct. Section 11e.(2) of the Atomic Energy Act defines uranium byproduct material as "tailings or wastes produced as a result of the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content." Recent congressional language confirms DOE designation of the Silos 1 & 2 waste as 11e.(2) uranium byproduct material.

IDENTIFYING SHIPMENT CONTENTS

"Radioactive, Class 7" placards will be placed on the front, back, and both sides of the tractor trailer in

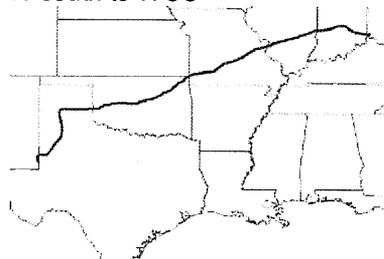
accordance with DOT placarding requirements. In addition, all DOT required emergency response information will be contained in the shipping papers and readily available for all law enforcement and emergency response personnel. These are located in a pocket located on the driver's door or within arm's length of the driver. The FCP maintains a 24-hour emergency response telephone number (513-648-4444) through its Communications Center. Communication Center personnel are trained in the communication and notification procedures in the unlikely event of a transportation incident.



SHIPMENT ROUTING

The route for transportation of Silo 1 & 2 materials to WCS was selected with consideration of travel time, distance, and population along the route in order to minimize radiological risk. The planned primary route is:

From Fernald, OH SR-128 to I-275 to I-74
I-74 West to I-465 (Indianapolis, IN) to I-70 West
I-70 West to I-255/I-270 (St. Louis, MO) to I-44 West
I-44 West (Oklahoma City, OK) to I-40 West
I-40 West to I-27 South (Amarillo, TX)
I-27 to US-62/82 (Lubbock, TX)
US-62/82 to Seminole, TX
US-62/180 to Hobbs, NM
SR-18 south to WCS



Interstate loops will be utilized around the following cities: Indianapolis, Indiana, St. Louis, Missouri / East St. Louis, Illinois, and Oklahoma City, Oklahoma. Bypass loops around other cities will be utilized where they exist. The total travel distance for the planned route is approximately 1,340 miles.

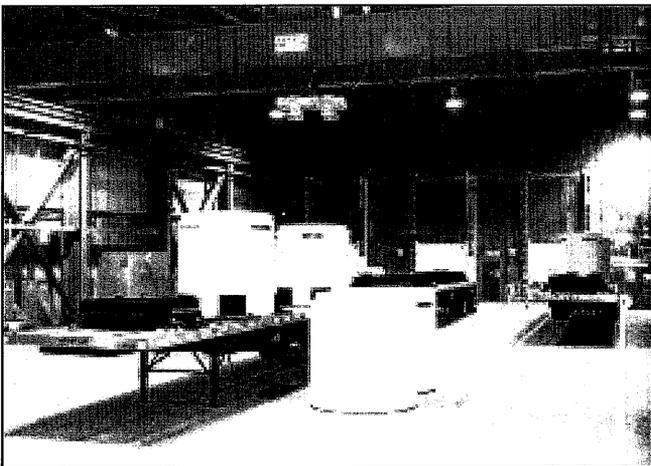
INSPECTIONS

The loading will be done inside the Silos 1 & 2 Remediation Facility. The DOT Type IP-2 packaging will be inspected by Quality Control (QC) personnel prior to filling. The flatbed trailer will be pulled into the facility and an overhead bridge crane will be utilized to load the filled containers. Once the packages are surveyed and approved for disposal, they will be loaded onto trailers.

After the loaded trailer is released from the Silos area for shipment, the remaining paperwork is prepared. Individual containers of Silos 1 & 2 materials are tracked using the existing on-site waste tracking databases.

A contract has been awarded to Visionary Solutions, LLC to provide transportation of Silos 1 and 2 materials from the FCP to WCS. Visionary Solutions is responsible for providing motor carriers with satisfactory ratings under the Department of Energy (DOE) Motor Carrier Evaluation Program (MCEP).

Prior to departure from the site, the power units are inspected for roadworthiness, and documentation is verified for DOT compliance.



After being unloaded at WCS, trailers will be surveyed and released for the return trip to then FCP. Visionary Solutions will maintain an ongoing, documented inspection program to ensure the operability and safety of the trailers. Upon arrival at the FCP, inbound trailers will be moved to the trailer staging area for staging and any necessary maintenance or repairs.

SHIPMENT TRACKING

The Fernald Closure Project (FCP) provides a detailed briefing to every driver of radioactive material before the shipment departs the FCP. That briefing stresses response actions to take in the event of an accident or severe weather, instructions for maintenance of exclusive use shipment controls, and the requirements for remaining on the designated route. The FCP also requires motor carriers to utilize a satellite tracking system (e.g., Qualcomm) for each shipment and has made arrangements with the motor carriers to access that data as necessary to randomly verify the motor carrier is adhering to the assigned routes. Motor carrier drivers that fail to adhere to the assigned routes are prohibited from hauling future shipments of material for the FCP.

EMERGENCY RESPONSE

In the unlikely event of an incident involving one of these shipments, State and local government agencies and the carrier would have the primary responsibility for response.

Every driver is provided a copy of the applicable Emergency Response Guidebook (ERG) page upon departure from the FCP. ERG No. 162 is applicable to the Silos 1 & 2 material. No other emergency response actions over and beyond the standards listed in ERG No. 162 are required. (Note: the waste is a solid cement form inside a sealed steel container.)

Highway carriers have established Emergency Response Plans and have contingency plans for cleanup and recovery, if needed. DOE and its contractor, Fluor Fernald, Inc., have developed a Transportation Plan and will maintain a 24-hour emergency response telephone number (513-648-4444) through its Communications Center. In addition, all drivers are provided with a 24-hour toll-free contact number (513-738-2073) to provide responders on-scene with comprehensive emergency response and incident mitigation information regarding the material in the shipment. In addition, DOE Radiological Assistance Program (RAP) teams are available in the event of an incident. RAP teams will be deployed as quickly as possible and no later than four hours after notification.

ATTACHMENT B

TEXAS NATURAL RESOURCE CONSERVATION COMMISSION



AN ORDER concerning questions certified to the Commission concerning the application of the Texas Low-Level Radioactive Waste Disposal Authority for License No. RW-3100; TNRCC Docket No. 96-1206-RAW.

On January 22, 1997, the Texas Natural Resource Conservation Commission ("Commission") considered two questions certified to the Commission by the State Office of Administrative Hearings concerning the application of the Texas Low-Level Radioactive Waste Disposal Authority for License No. RW-3100.

After considering the questions, the written filings and oral argument, the Commission answered these questions as follows:

Question No. 1

Do interests in (connections to) a socio-economic area that may be affected by the perception of adverse environmental or health consequences give rise to a justiciable interest within TNRCC's jurisdiction?

Answer to Question No. 1

Yes, where the perception of adverse environmental or health consequences can be demonstrated to have a impact on an interest related to a legal right, duty, privilege, power or economic interest that may be affected by the application or an interest that is protected by the law under which the application will be considered, that interest is a justiciable interest within the Commission's jurisdiction. Perceptions can have real impacts in some circumstances, and it is a fact question whether a sufficient showing has been made that the perception is real, the interest claimed to be impacted is genuine and a reasonable nexus exists between the perception and the interest sought to be protected.

Question No. 2

As a matter of law and policy, are the interests of the applicant, as owner and operator of the facility, with the burden of proof in the proceeding, sufficiently distinct from other intervenors that it should be aligned independently from other intervenors supporting the application?

Answer to Question No. 2

Yes, as a matter of interpretation of Commission Rule 80.109(c), where the applicant is a state agency whose statutory authority is limited to the development and operation of one licensed facility and that authority is not shared with any other person, the interests of the applicant are sufficiently distinct from intervenors supporting the application such that the applicant should be aligned independently from all other parties.

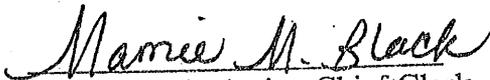
Having answered the questions, the Commission determined to return the questions, together with the respective answers, to the State Office of Administrative Hearings for application in the proceedings below.

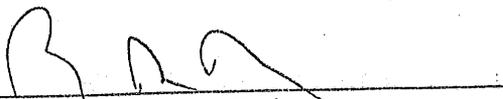
NOW, THEREFORE, BE IT ORDERED BY THE TEXAS NATURAL RESOURCE CONSERVATION COMMISSION that the certified questions are answered as described above. IT IS FURTHER ORDERED that the certified questions and their respective answers be returned to the State Office of Administrative Hearings for application in the proceedings below.

Issue date: January 23, 1997

TEXAS NATURAL RESOURCE
CONSERVATION COMMISSION

ATTEST:


Mamie Black, Acting Chief Clerk


Barry R. McBee, Chairman

ATTACHMENT C

SOAH DOCKET NO. 501-97-1364
TDH DOCKET NO. D-841-1997-0001

APPLICATION OF WASTE § BEFORE THE STATE OFFICE
CONTROL SPECIALISTS, L.L.C. §
FOR TEXAS DEPARTMENT OF §
HEALTH LICENSE NO. L04971 § OF ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

I. Introduction

In March 1996, Waste Control Specialists, L.L.P. (WCS or applicant) filed an application with the Texas Department of Health (TDH or Department) for a license to authorize the receipt, temporary storage, and processing of radioactive materials. WCS would build the radioactive materials facility on a 1338 acre tract of land, located on 16,000 acres of land it owns in Andrews County, one mile north of State Highway 176, 250 feet east of the Texas/New Mexico state line, and thirty miles west of Andrews, Texas. At this location, WCS presently operates a facility that is fully permitted by both the Texas Natural Resource Conservation Commission (TNRCC) and the United States Environmental Protection Agency (EPA) for the treatment, storage, and disposal of hazardous and toxic wastes.

The TDH has jurisdiction over this application pursuant to Chapter 401 of the TEXAS HEALTH & SAFETY CODE ANN. (Vernon Supp. 1997) (TH&SC). The staff of the Department's Bureau of Radiation Control (BRC) reviewed the application and supporting materials and determined the proposed license provides reasonable assurance that the radioactive waste facility will be sited, designed, operated, decommissioned, and closed in accordance with the requirements of the Texas Regulations for Control of Radiation (TRCR);¹ the issuance of this license will not be adverse to the health and safety of the public or environment; and the proposed activity will not have a significant effect on the human environment. The BRC then issued a *Notice of Proposed Issuance* for Radioactive License No. L04971 on June 10, 1997. 22 Tex. Reg. 5862-5863 (June 17, 1997)

Following receipt of several requests for hearing, the Department referred this matter to the State Office of Administrative Hearings (SOAH) on July 17, 1997. SOAH has jurisdiction over all matters relating to the conduct of a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to Chapter 2003 of the Texas Government Code.

II. Recommendation

The recommendation in this PFD and proposed Order is presented to the Department solely on

¹ Adopted by reference in 25 TEX. ADMIN. CODE (TAC) Chapter 289)

the threshold issue of whether certain persons who seek a hearing on the merits of WCS's application are "affected persons" with standing to challenge the application. Whether this application will be considered in a hearing on the merits is contingent upon the Department's decision on this standing issue.

Upon consideration of the evidence and argument presented, and for the reasons set forth below, the ALJs recommend the Department find the requestors have not demonstrated they are "affected persons" pursuant to the standards set forth in Section 401.003(15) of the TH&SC and Section 13.2 of the TRCR and deny all requests for party status. They further recommend that the Department take further action on the application without a hearing as provided for in its rules.

III. Procedural History

Pursuant to applicable notice requirements,² Leslie Craven, an Administrative Law Judge (ALJ) with SOAH, conducted the preliminary public hearing in the above referenced matter on August 7, 1997, in Andrews County, Texas. As stated in the notice, the purpose of this hearing was "to convene the hearing, establish jurisdiction, take public comment, determine party status, and take up such other preliminary matters as determined by the administrative law judge." The TDH separately noticed a public-comment-only session for that same evening.

After jurisdiction was established and public comment concluded, two statutory parties were named: the Department and the applicant. Party status was then requested by individuals Peggy Pryor, Melodye Pryor, Avis Ficks, and the organization known as Atomic Waste and Radiation Education (A.W.A.R.E.), collectively designated "requestors."³ A.W.A.R.E. represents approximately seventy people from the local area around Andrews. WSC, which had earlier filed, on July 28, 1997, a timely motion⁴ to contest the standing of the requestors, reasserted its objections at the evidentiary hearing. Thereafter, evidence and argument on the issue of party status was presented by both the applicant and requestors at the August 7 hearing. In the interests of fairness, since the requestors were participating *pro se*, and over the applicant's objections, the ALJ gave the requestors an opportunity to file additional support for their requests, subject to applicable evidentiary objections and the applicant's opportunity to respond.

Pursuant to Order No. 1, on August 15, 1997, the requestors filed additional material to be

² Section 13.5 of the TRCR

³ Section 13.2 of the TRCR.

⁴ Section 13.3(c) of the TRCR.

considered in determining whether they are "affected persons."⁵ On August 22, 1997, WCS filed its response to the requestors' supplemental information and a brief on the question of how the transportation of radioactive materials may factor into consideration of party status in this TDH proceeding.

IV. Applicable Standards of Review

The Department's formal hearing procedures describe a "party" to the hearing "as being a *person affected* in the matter being considered . . ." (emphasis added) 25 TAC § 1.22. All parties must be "persons affected" as defined by the appropriate enabling statute. 25 TAC § 1.25 Pertinent statutory provisions pertaining to this application are found in the Texas Radiation Control Act, TH&SC, Subtitle D, Chapter 401.

Section 401.003(15) of the TH&SC provides:

"Person affected" means a person who demonstrates that the *person has suffered or will suffer actual injury or economic damage* and, if the person is not a local government:

- (A) is a resident of a county, or a county adjacent to that county, in which nuclear or radioactive material is or will be located; or
- (B) is doing business or has a legal interest in land in the county or adjacent county. (emphasis added)

Similarly, Section 13.2 of the TRCR defines a "person affected" as one:

- (1) who is a resident of a county, or county adjacent to the county, in which radioactive materials subject to the Act are or will be located, including any person who is doing business or who has a legal interest in land in the county or adjacent county, and any local government in the county; and
- (2) who shall demonstrate that *he/she has suffered or will suffer actual injury or economic damage*. (emphasis added)

No specific definition is given for "actual" injury or economic damage. However, in the absence of a specific definition of a word or term, courts will look to the common ordinary meaning of the word. As defined in Black's Law Dictionary 33 (rev. 5th ed. 1979), "actual" means "real;

⁵ Ken and Mary Henderson, respectively president and secretary of A.W.A.R.E., provided the additional filing on behalf of A.W.A.R.E.

substantial; existing presently in fact; having a valid objective existence as opposed to that which is merely theoretical or possible. Opposed to potential, possible, virtual, theoretical, hypothetical, or nominal.”

In general terms, the TDH has established standards for party status which place the burden of proof on the one seeking party status to demonstrate through evidence in the hearing that there is a causal relationship between the injury claimed and the licensing action.⁶ The injury or economic damage must affect the particular requestor, not merely be a general public concern, and such injury or economic damage cannot be based on conjecture or supposition.

In the case of establishing party status for an organization or association, the requestor organization must show (1) at least one of its members would otherwise have standing to sue in his or her own right; *i.e.*, he or she is an “affected person” who has suffered or will suffer actual injury or economic damage; (2) the interests which the group seeks to protect are germane to the organization’s purpose; and (3) neither the claim asserted nor relief requested requires the participation of individual members of the group. *Texas Association of Business v. Air Control Board*, 852 S.W.2d 440, 447 (Tex. 1993)

V. Issue Presented

1. Whether the requestors are affected persons, with the ensuing right to participate as parties in a hearing on the merits of WCS’s pending application.

The ALJs recommends the Department find that the requestors have not shown they are affected persons, pursuant to applicable statutory and regulatory standards, and deny their requests for party status.

A. Requestors

Evidence presented shows the requestors are homeowners in the town of Andrews, within the county where the WCS facility would operate. They drink city water, breath the air, and travel on the highways around the town. The Pryors’ home is located on Northwest 12th Street, near NW Mustang Drive. Mustang Drive is a main travel route around the outer perimeter of the city. The wind sometimes blows from the direction of the site towards Andrews. Ms. Fick lives on Crescent Drive in the northeast area of Andrews. Requestors all expressed generally the same concerns, which they contend make them affected persons. For this reason, discussion of their case will refer to them collectively. In addition, Peggy and Melodye Pryor (Pryors) testified they have been diagnosed with a condition called “fibromyalgia.” Fibromylagia is a term used to describe a chronic pain condition in the muscles and fibers of the body and is considered by some medical authorities to be related to immune deficiencies in the body. The Pryors contend

⁶ Section 13.3(c) of the TRCR.

radiation from the site will worsen the effects of this disease. The following generally describes concerns expressed by the requestors:

1. Winds will blow radioactive particles from the uncovered open pit dump site to Andrews.
2. Property values in Andrews will go down.
3. Home owner's insurance will not cover losses from radiation contamination.
4. Accidents involving carriers of radioactive materials on their way to and from the facility on the highways around Andrews will leak radioactive particles.
5. Even without the occurrence of accidents, chronic exposure to radiation will occur from the general leakage that will occur as trucks pass through town.
6. Increased traffic and fumes from trucks transporting materials to the site will pollute the air.
7. Workers will carry radioactive particle contamination into town on their shoes, clothes, and vehicles.
8. Impaired workers will make mistakes in their work that will cause radiation to escape.
9. Natural events, such as tornados, lightening strikes, and thunderstorms, will transmit contamination from the site to Andrews.
10. Drinking water will be contaminated since the Ogallala Aquifer is located beneath the site. Earthquakes will cause underground radiation leakage into the water system. Wells will be contaminated.
11. No independent study was conducted of area geology and hydrology to be sure the Ogallala Aquifer would not be contaminated.
12. "Temporary" storage at the site will become permanent because there is nowhere else to send this waste.
13. Hazardous fluids will leak from injection wells.
14. Underground storage will leak into the environment.
15. This permit is merely the first step to WCS securing a Department of Energy (DOE) permit for disposal of nuclear waste.
16. Employees' health is not adequately safeguarded at the site.
17. Bio-accumulation will occur, beginning with radiation leaking from the site.
18. WCS has no proven track-record to operate a radiation facility.

Evidence was presented in the form of sworn testimony by the Pryors and Ms. Fick. Peggy Pryor, a member of A.W.A.R.E., also spoke on behalf of A.W.A.R.E. since its President Ken Henderson was sick and could not attend. In their testimony, these individuals identified the above noted concerns and stated their belief that the proposed facility would adversely impact them. The requestors stated their concerns are based, for the most part, on various written materials they've read and a personal awareness of such things occurring as traffic accidents and the wind blowing toward town from the site. No additional evidence regarding how these people are "affected" was provided either in the hearing or in the requestors' August 15 supplemental

filings.

B. WCS

The applicant presented the following evidence at the hearing in response to concerns expressed by the requestors.

Economic Impacts and Property Values

Dr. Robert F. Hodgin testified as an expert⁷ in the evaluation of expected economic impacts from placing industrial facilities near communities. Findings in his study on the anticipated economic effects of the WCS facility indicate an annual business volume impact on Andrews County of approximately 7.4 million dollars. These increased dollars will be spent locally, raising the overall level of economic activity. Dr. Hodgin concluded the proposed facility will have a positive economic impact on the community, describing it as a "relatively small but significant addition to the economic base" of the county. Addressing the claim that property values will decrease, Dr. Hodgin explained the difficulties of trying to tie negative impacts on property values to any one area industry. He noted the general weight of the evidence in this area of study shows negative impacts on property values tended to occur when the facility in question was "in the immediate area." Beyond five miles from a site, Dr. Hodgin found the resulting effect "tends to be nominal and that effect tends to diminish through time." Dr. Hodgin's study of the Andrews area found no evidence consistent with the diminution of property values attributable to the proposed WCS facility. On the contrary, there has been an increase in real estate sales, particularly of higher priced homes.

Impacts on Surface and Ground Water

Allen Messenger, President of A.M. Environmental and a registered professional engineer in Texas, testified concerning the engineering safety and geology of the site area⁸. Mr. Messenger is the expert in charge of the development, siting, and design of the WCS facility. Mr. Messenger personally participated in the extensive boring program and groundwater characterization work required to receive hazardous and toxic waste disposal permits from the TNRCC and EPA. He testified that this work and his review of an independent study by Dr. Tom Lehman of Texas Tech University, show the Ogallala Aquifer does not exist beneath the WCS site. Mr. Messenger explained that some of the confusion concerning the location of the Ogallala Aquifer may stem from descriptions of where the formation is, as opposed to the aquifer itself, and noted that "formation" refers to the type of soil present at a certain elevation. The Ogallala Aquifer and the Ogallala Formation both exist in Andrews County, but the aquifer does not lie under the site.

⁷ Credentials listed in Exhibit No. 7 in the record.

⁸ Credential listed in Exhibit No. 8 in the record.

Mr. Messenger noted there is basically no surface water on site and no surface runoff when storms occur. He explained the facility is designed to direct storm water away from storage and processing activities. Storm water is carefully saved for reuse since it is the highest quality water at the facility.

Facility Safety, Design, and Operations

Mr. Messenger testified that waste will arrive in DOE prescribed containers and, in general terms, processing will only occur in a containment structure that is, itself, contained within another building. Containers will not be opened outside these buildings or otherwise handled in a manner which could allow particles to escape and be blown elsewhere. Regarding the characterization of waste, Mr. Messenger explained the materials are carefully tracked from the point of departure to the site. Upon arrival, the contents are re-verified to ensure they are the same as claimed to be when shipped. The facility uses a bar code system to keep track of each container and its contents while stored on site. Mr. Messenger added that procedures for extensive characterization of the waste are also required pursuant to the facility's TNRCC hazardous waste permit. Finally, Mr. Messenger reiterated that the application at issue is for authority to receive, possess, store, and process radioactive materials. Storage is temporary and is only above ground in concrete sealed curbed containment buildings. There are no "open pits" associated with the radioactive waste operations at this site.

Wind Direction

Mr. Messenger testified that part of the information required to obtain the TNRCC hazardous waste permit involved analyzing the prevailing wind directions in Andrews County. This analysis is done using the Texas Climatic Atlas, which provides weather station data from the Midland-Odessa area. Although Mr. Messenger acknowledged winter northers come through and blow from north to south, the results of the study show the prevailing wind direction in Andrews County is south to north. The weather data shows the wind blows from the west to the east, towards the city of Andrews, approximately four percent of the time. This equates to approximately fourteen days per year.

Employee and Public Safety

Carl Kee, a health physicist and radiation protection officer, testified about the likelihood of possible impacts from radiation coming from the site and passing through town in trucks. Mr. Kee is an expert in the study of protecting humans and the environment from the harmful effects of radiation with special expertise in developing the standards and procedures used to protect workers at a site, the general public, and the environment.⁹ Mr. Kee testified that under normal

⁹ Credentials listed in Exhibit No. 11 in the record.

operations, no airborne exposure will take place measured at the fence line of the facility. Part of his work for the WCS facility involved an analysis of a worst case scenario occurring, which included airborne materials. Mr. Kee found, even assuming multiple negative contingencies all occurring at one time, radiation exposure at the fence line of the facility would be well within regulatory guidelines, no detrimental exposure would occur within a few miles of the facility, and no exposure, whatsoever, would occur thirty miles away in the city of Andrews. Mr. Kee further noted the analysis of data from a worst case scenario involving a tornado showed no resulting significant public health risk.

Mr. Kee testified regarding his preparation of the workers' protection plan for this facility and described the procedures and controls developed therein for the safety and health of workers at the site. Besides the workers being required to wear protective clothing, all personal vehicles are restricted from waste management areas. If procedures are followed, Mr. Kee believes there is no possibility workers will carry radioactive materials from the site. Mr. Messenger added that, besides safety procedures and design required for the TDH permit, the facility is subject to additional safety oversight by the TNRCC and EPA by virtue of having been issued hazardous and toxic waste permits. Messrs. Kee and Messenger both testified that, besides the on site workers' training, WCS trains emergency response personnel in Andrews and Eunice counties, and at Permian General Hospital.

Transportation

Regarding transportation concerns, Messrs. Kee and Messenger noted there are already many radioactive materials transported on the highways of this country, and United States Department of Transportation data shows there has never been an injury related to the release of radiological material during transportation of those materials. Alvin Collins, an independent oil and gas operator and long time resident of Andrews County, testified concerning the existing shipments of radioactive materials around Andrews as result of the oil business. He stated that no adverse impacts have been experienced in the community from transporting these radioactive materials, and the roads are already designed to handle the types of trucks which carry such materials. In addition, there is no one prescribed route through Andrews, which would concentrate trucks in one location as they pass through on their way to the site.

WCS further argues that radiological impacts associated with the transportation of radioactive materials is not an appropriate basis for determining actual injury or economic damage because the field of safety in the transportation of hazardous materials, including radioactive materials, is generally preempted by federal law and states cannot prohibit the transport of such materials on a basis of safety hazards.¹⁰ Citing Section 401.112 of the TH&SC, WCS argues the language is clearly drafted to exclude consideration of radiological impacts from transportation, and submits

¹⁰The two exceptions to federal pre-emption, federal waiver and a state's designation of specific routes, do not apply to this case.

that appropriate considerations are clearly the "socioeconomic" impacts of transportation such as truck traffic, noise, dirt, and accident rates. WCS contends the requestors have submitted no proof that the incremental number of radioactive materials shipments resulting from the operation of the WCS facility will cause them actual harm.

C. ALJs' Analysis

Pursuant to the applicable standards for determining party status as set forth in Part IV of the PFD, it is the requestors' burden to show they are "affected" persons. Regarding the need for persons challenging an action to show concrete harm, the United States Supreme Court, Justice Kennedy, observed in *Luzan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2147 (1992) that:

This requirement is not just an empty formality. It preserves the vitality of the adversarial process by assuring that the parties before the court have an actual, as opposed to professed, stake in the outcome . . .

The ALJs find the requestors have not shown they are persons that have "suffered or will suffer actual or economic damage" if the application is approved. Nor have they shown even a reasonable likelihood that they will suffer such damage.

Evidence presented by the requestors shows they are concerned about essentially hypothetical events (*i.e.*, what could happen, what is possible, or what they "feel" will happen), all of which lack a causal showing of actual injury or economic damage to these persons.¹¹ While the requestors' evidence does establish they have a sincere belief they will suffer harm if this facility is permitted, their evidence does not establish facts upon which a finding can be made that they will actually be affected by the proposed facility. For example, requestors' transportation-related concerns reference such things as increased accidents and leaking of radiation from passing trucks. However, they do not show how or why it is reasonable to conclude that some unknown number of trucks, going to the site using commonly traveled roads, over which radioactive materials unrelated to this site already travel by truck, will present an actual threat to their personal or economic safety. In addition, while Requestor Avis Fick fears lost property values, she also stated she has no present or future intention of selling her home. Ms. Fick further testified she has not seen or heard anything which supports this concern. It is based solely on her opinion that she wouldn't buy in this area again if she knew about the "dump."

Moreover, several of the requestors' concerns have little or nothing to do with the subject of this

¹¹*E.g.*, Requestors live in the town of Andrews, generally thirty miles east of the site, in an area where prevailing winds blow south to north over ninety percent of the year. Requestors do not take their water from private wells, they drink city water. The facility is located on 16,000 acres of private land and the facility lies more than a mile from the boundary. Requestors are not employed at the facility and have no occasion to drive near the facility as any part of their daily activities.

hearing and are not issues that can be addressed in this proceeding.¹² Finally, as is detailed in V(B), WCS presented evidence which addressed the reasonableness of the requestors' concerns regarding such things as: (1) escaping radiation, (2) winds carrying radiation to Andrews, (3) public and employee safety, (4) surface and ground water characterization, and (5) the safe design and operations of the facility itself. This evidence reinforces the ALJs' finding that requestors have not shown even a reasonable likelihood that this facility, if permitted, will cause them actual injury or economic damage.

VI. Conclusion

For the reasons stated above, based on the following Findings of Fact and Conclusions of Law, the ALJs find the evidence does not show the requestors are "affected" persons and recommend that the Department deny their requests for party status. Moreover, they recommend that the Department take further action without a hearing as provided for in its rules.

FINDINGS OF FACT

1. In March 1996, Waste Control Specialists (WCS) filed an application with the Texas Department of Health (TDH or Department) for a license to authorize the receipt, temporary storage, and processing of radioactive materials.
2. Upon completion of its review of the application and supporting materials, the staff of the Department's Bureau of Radiation Control issued a *Notice of Proposed Issuance* for Radioactive License No. L04971 on June 10, 1997, published in 22 Tex. Reg. 5862-5863 (June 17, 1997).
3. The Department and applicant provided notice of the August 7, 1997 hearing on WCS's application as follows:
 - (a) Notice was issued by the Department on June 10, 1997, and published in 22 Tex. Reg. 5862-5863 (June 17, 1997).
 - (b) Notice was mailed by WCS on June 27, 1997, by direct certified mail to those persons listed on Exhibit No. 2 in the record, being owners of real property contiguous to the land upon which the facility is located, owned by WCS in Texas and New Mexico.
 - (c) Notice was published on June 29, 1997, by WCS in the *Andrews County*

¹² *I.e.*, whether WCS ever seeks a DOE permit, home owners' insurance, hazardous waste leaking from injection wells and "open pit" holes in the ground at the site which are the result of operations conducted pursuant to the TNRCC and EPA permitted hazardous and toxic waste landfill.

News, a newspaper regularly published in Andrews County, Texas.

4. Notice of the hearing included a statement of the time, place, and nature of the hearing; a statement identifying the location of the proposed facility and describing the activities for which authorization is requested; a statement of the legal authority and jurisdiction under which the hearing was to be held; a statement of the opportunity for a hearing of a person affected; and a recitation of the standard defining an "affected" person, who may intervene.
5. As stated in the notice, the purpose of the August 7, 1997 hearing was to convene the hearing, establish jurisdiction, take public comment, determine party status, and take up such other preliminary matters as determined by the Administrative Law Judge.
6. Following receipt of hearing requests by Peggy Pryor, Avis Fick, George and Virginia Young, Kenneth and Mary Henderson, and the organization named Atomic Waste and Radiation Education (A.W.A.R.E.), the TDH referred this case to the State Office of Administrative Hearings (SOAH) on July 17, 1997, for a hearing on the application.
7. On July 28, 1997, ten days prior to the hearing, the applicant filed a Motion to Contest Standing of those persons and entities requesting party status, contending they are not "affected" persons as defined by Section 401.003(15) of the Texas Health and Safety Code (TH&SC) and Section 13.2 of the TRCR, and requesting those persons and entities show proof, by admissible evidence at hearing, that they met the requirements for standing. This motion was also timely served, on July 28, 1997, to the requestors identified in Finding of Fact No. 6.
8. At 10:00 a.m. on August 7, 1997, the evidentiary public hearing was held in Andrews, Texas regarding the application.
9. At the August 7, 1997 hearing, party status was requested by Peggy Pryor, Melodye Pryor, Avis Fick, and the organization known as Atomic Waste And Radiation Education (A.W.A.R.E.), collectively designated "requestors."
10. At the August 7, 1997 hearing and by supplemental filing on August 18, 1997, the requestors, WCS, and the TDH staff were given the opportunity to submit evidence regarding the issue of requestors' standing.
11. Requestors have not and will not suffer actual injury or economic damage related to the subject of and activities proposed in this application, nor is there a reasonable likelihood they will suffer such actual harm.
12. There will be a positive economic effect on the Andrews area community from the WCS

facility.

13. Housing and general property values have remained the same or risen slightly in the Andrews area despite general public awareness and knowledge of the pending WCS application.
14. Negative impacts on property values tend to occur when a facility is planned for the immediate area.
15. Beyond five miles, effects on property values are nominal and diminish further with time.
16. Requestors' homes are located in Andrews, Texas, thirty miles from the proposed facility.
17. Requestors have no present or future plans to sell their homes.
18. The prevailing wind in this area runs generally south to north over ninety percent of the year and the proposed facility is located thirty miles east of Andrews, Texas.
19. The WCS facility will not adversely affect area surface and groundwater.
20. Extensive studies to characterize the surface and groundwater at this site were performed by WCS as a prerequisite to receiving permits for the present operation of a hazardous and toxic waste landfill at this site.
21. WCS's studies, plus an independent study by Texas Tech University, confirm the Ogallala Aquifer is not located beneath the facility.
22. Requestors receive city water service and do not have wells on their property.
23. Waste received at the WCS facility will be characterized, and safely handled and stored in a manner which minimizes or eliminates leakage of any radiation from the waste.
 - (a) The WCS facility will receive waste in Department of Energy prescribed containers.
 - (b) Containers will only be opened in sealed buildings.
 - (c) Waste will be categorized upon departure from the supplier and again upon receipt at the WCS facility.
 - (d) Tracking and monitoring of each waste container and its specific contents will continue throughout the time the container is in storage.

- (e) Storage of waste will be temporary and only take place above ground in sealed curbed containment buildings.
- 24. WCS personnel will wear protective clothing, to prevent contamination of skin and personal clothing, and all personal vehicles are restricted from waste management areas.
- 25. WCS personnel will receive detailed and comprehensive training on safety and operational procedures associated with their jobs at the site.
- 26. WCS will train emergency response personnel in Andrews and Eunice counties and at the Permian General Hospital.
- 27. Assuming a worse-case scenario of multiple negative contingencies occurring at one time, no airborne radiation exposure would occur thirty miles away in the town of Andrews, Texas.
- 28. Under normal operations, no airborne radiation exposure will occur as measured at the fence line of the WCS facility, within the 16,000 acres of land surrounding the facility site.
- 29. The 1338 acre facility site is located over a mile inside the boundary of the 16,000 acres of land privately owned by WCS.
- 30. The WCS site is not located along public highways along which members of the general public must travel near it to conduct their ordinary daily business and personal activities.
- 31. Radioactive materials, not associated with the WCS facility, have been transported by truck on the streets and highways in and around the town of Andrews for many years with no known detrimental health or safety impacts.
- 32. There is no one designated route for trucks to follow through Andrews on their way to the WCS site, which would concentrate trucks in one location and precipitate an increased risk of accidents.

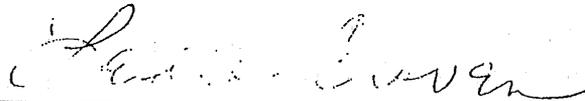
CONCLUSIONS OF LAW

- 1. The State Office of Administrative Hearings has jurisdiction over all matters relating to the conduct of a hearing in this proceeding, including the preparation of a Proposal for Decision with Findings of Fact and Conclusions of Law, pursuant to Chapter 2003 of the Texas Government Code.

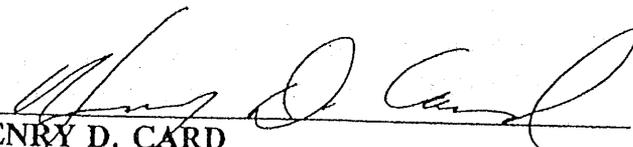
2. Notice of the application and opportunity for hearing was provided as required by Section 13.5 of the TRCR, 25 TAC § 289.112, Section 401.114 of the TH&SC, and Chapter 2001 of the Administrative Procedure Act.
3. The public hearing in this matter was held under the authority and in accordance with Chapter 401 of the TH&SC and 25 TAC Chapter 289.
4. The Department has authority to consider this application and the issue of standing in accordance with Chapter 401 of the TH&SC, 25 TAC Chapter 289, and the TRCR.
5. Requestors have the burden of proof to demonstrate they are "affected" persons.
6. Requestors failed to demonstrate or otherwise prove they are "persons affected" within the meaning of Section 401.003(15) of the TH&SC and Section 13.2 of the TRCR.

ISSUED IN AUSTIN, TEXAS, the 24th day of September 1997.

STATE OFFICE OF ADMINISTRATIVE HEARINGS



LESLIE CRAVEN
ADMINISTRATIVE LAW JUDGE



HENRY D. CARD
ADMINISTRATIVE LAW JUDGE

ATTACHMENT D

SOAH DOCKET NO. 537-05-5206

IN THE MATTER OF § BEFORE THE STATE OFFICE
WASTE CONTROL SPECIALISTS, LLC, § OF
LICENSE AMENDMENT NO. 32 § ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Waste Control Specialists, LLC, (WCS) owns and operates a radioactive waste storage facility in Andrews County, Texas. WCS presently holds Radioactive Materials License No. LO4971 issued by the Texas Department of State Health Services (the Department or DSHS). On May 19, 2004, WCS filed an application for an amendment to its license. On February 23, 2005, the Department granted WCS's application and issued Amendment No. 32, which authorized construction of two new storage units for interim storage of radioactive waste. Pursuant to written requests for hearing, the Department referred this matter to the State Office of Administrative Hearings (SOAH). Following a preliminary hearing in which prospective parties offered evidence concerning their requests to be parties, the Administrative Law Judges (ALJs) determined that no requestor met the applicable requirements for party status. Accordingly, the ALJs recommend that the Department's issuance of Amendment No. 32 be affirmed without hearing.

I. THE WCS FACILITY AND AMENDMENT NO. 32

Located on the Texas-New Mexico state line in western Andrews County, the WCS facility comprises 1,338 acres on a 15,000-acre ranch owned by WCS. The town nearest to the facility site is Eunice in Lea County, New Mexico, located approximately five to six miles to the west. The closest Texas community is the City of Andrews, which is about 35 miles east of the site.

Under Amendment No. 32,¹ WCS is authorized to construct two open-air storage pads (respectively called the "LSA storage area" and the "container storage area") and to store an

¹ The WCS license, as amended by Amendment No. 32, is DSHS Exhibit 9.

additional 1,500,000 cubic feet of radioactive material there.² Each of these storage pads has a water catchment system, a concrete holding pond, and an overflow ditch.³

Pursuant to the provisions of its amended permit, WCS has begun to store waste from the Department of Energy's Fernald, Ohio, facility that is currently being decommissioned.⁴ The Fernald waste is diluted and solidified by being mixed with cement and fly ash, and the dry solidified mixture is contained in steel canisters. The Fernald waste material can only be stored until October 31, 2007.

As WCS points out, Amendment No. 32 does not authorize an increase of curie levels of the radioactive waste stored at the facility, nor does it authorize the disposal or transportation by WCS of radioactive materials.

II. PROCEDURAL HISTORY

Following the Department's approval of Amendment No. 32 on February 23, 2005, notice of the amendment was published in a local newspaper and in the *Texas Register*.⁵ The Sierra Club and Public Citizen filed written requests for hearing,⁶ and the Department referred the matter to SOAH in April 2005. On June 30, 2005, WCS filed a written Motion to Contest Standing that challenged the attempts by the Sierra Club and Public Citizen to be named parties to the SOAH case.

² Tr. at 201-208.

³ Tr. at 207-208.

⁴ The Texas Radiation Control Act (the Act) allows license amendments to take effect immediately, prior to the contested case hearing process. TEX. HEALTH & SAFETY CODE § 401.116.

⁵ DSHS Exhibits 1 and 2. The applicable notice requirements are found at TEX. HEALTH & SAFETY CODE §§ 401.114, 401.116 and 25 TEX. ADMIN. CODE § 289.205(f).

⁶ DSHS Exhibit 4.

An initial preliminary hearing was convened on July 11, 2005, but the ALJs continued the matter at the request of WCS and the Sierra Club to allow additional time to ensure proper advance written notice to adjacent landowners. The preliminary hearing was reconvened on September 1 and continued on September 16, 2005.⁷

At the preliminary hearing, the ALJs heard evidence from the Sierra Club concerning its request to be designated a party. WCS and the staff of the Department's Radiation Safety Licensing Branch (Staff) participated in the hearing, also offering evidence on party status issues. Public Citizen withdrew its request for hearing. Three other requestors – Michele Weston, Nuclear Free Texas (represented by Ms. Weston), and Tristan Mendoza – appeared and made oral requests for party status. The ALJs denied those three requests but took the Sierra Club's request under advisement. The record closed on October 27, 2005, with the submission by the parties of their briefing on issues related to the Sierra Club's request. In its brief, Staff recommended denial of the Sierra Club's request.

III. APPLICABLE LAW

The Act provides for a hearing on a license amendment where there has been a request for hearing by a "person affected" by the amendment.⁸ "Person affected" is defined as:

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.⁹

⁷ Notices of hearing were published in local newspapers and the *Texas Register* in accordance with the requirements of TEX. HEALTH & SAFETY CODE § 401.116 and 25 TEX. ADMIN. CODE § 289.205(f). See Department Exhibits 5-8. Notice is not contested in this case.

⁸ TEX. HEALTH & SAFETY CODE § 401.116.

⁹ TEX. HEALTH & SAFETY CODE § 401.003(15); 25 TEX. ADMIN. CODE § 289.205(b)(16).

The requestor has the burden to show he or she is a person affected.¹⁰ Where an organization like the Sierra Club or Nuclear Free Texas seeks party status, the organization must show that (1) at least one of its members would otherwise have standing to sue in his or her own right; *i.e.*, he or she is an “affected person” who has suffered or will suffer actual injury or economic damage; (2) the interests which the group seeks to protect are germane to the organization’s purpose; and (3) neither the claim asserted nor relief requested requires the participation of individual members of the group.¹¹ These requirements are known as the test for “associational standing.”

The parties disagree about how strong a connection a requestor must show to the subject of a licensing proceeding in order to establish that the requestor is a “person affected” under the Act and the Department’s rules. WCS cites to an earlier decision by the Commissioner of Health to deny party status to requestors who had sought a hearing on WCS’s initial license application for the Andrews County facility.¹² The Commissioner adopted the proposal for decision of the SOAH ALJs in that case, who discussed the “actual injury or economic damage” requirement in the Act and determined that this language means a requestor’s assertions of injury must be based on more than conjecture or supposition.¹³ The ALJs concluded that no requestor had met this requirement of proof. WCS argues that this case demonstrates the stringency of the standing requirements for cases brought under the Act – a greater stringency than that of the more liberal “personal justiciable interest” standard applicable to some permitting matters heard by the Texas Commission on Environmental Quality.¹⁴

¹⁰ 25 TEX. ADMIN. CODE § 289.205(c)(3).

¹¹ *Texas Association of Business v. Air Control Board*, 852 S.W.2d 440, 447 (Tex. 1993).

¹² Staff also cites to this earlier decision, and the ALJs’ reasoning on which it was based, as providing guidance for the instant case. *DSHS Brief Relating to Party Status* at 1-2.

¹³ *Application of Waste Control Specialists, LLC, for Texas Department of Health License No. L04971*, SOAH Docket No. 501-97-1364 (Sept. 24, 1997).

¹⁴ See TEX. WATER CODE § 5.115(a); 30 TEX. ADMIN. CODE §§ 55.3, 55.103.

Citing to the legislative history of the Act and to Texas case law discussing public participation in administrative hearings,¹⁵ the Sierra Club disagrees that the Act's definition of "person affected" is intended to be more restrictive than that of the standard traditionally applied in TCEQ cases.¹⁶ According to the Sierra Club, the legislative history of the Act clearly shows an intent to establish robust hearing requirements and not to impose an especially heavy burden on citizens seeking to participate in hearings on radioactive waste.

IV. DISCUSSION

The ALJs need not reach the issue whether the definition of "person affected" applicable to hearings on radioactive waste licensing differs significantly from any other standard or standards applicable to environmental permitting in Texas. 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.

Sierra Club. The Sierra Club offered the testimony of Rose Gardner, a resident of Eunice, New Mexico.¹⁷ Ms. Gardner testified that she is a member of the Sierra Club. She stated that she goes to the Lea County landfill, which is immediately southwest of the WCS site, about four or five times a year to discard waste from her flower shop. She drives close to the WCS site on errands,¹⁸ and she sometimes visits a family member who lives two to three miles from the site.¹⁹

¹⁵ *Closing Argument of Sierra Club* at 4-10.

¹⁶ The Sierra Club also does not read the ALJs' proposal for decision in the 1997 contested case to say that the burden under the Act is higher than under other Texas laws.

¹⁷ Tr. at 82-113.

¹⁸ She travels on Highway 176 several times a month on errands. Tr. at 89-90. The WCS facility is adjacent to and bisected by State Highway 176. Tr. at 198. Highway 176 comes within approximately a mile from one of the new storage areas authorized by Amendment No. 32. Tr. at 212.

¹⁹ Ms. Gardner's sister-in-law lives on Highway 176. Ms. Gardner visits her "periodically." Tr. at 88.

The Sierra Club's assertion that it meets the first prong of the associational standing test rests entirely on Ms. Gardner. The Sierra Club relies primarily on two aspects of Ms. Gardner's activities: first, her visits to the landfill and, second, her use of the roads near the site and on which the wastes destined to be stored pursuant to the provisions of Amendment No. 32 are transported.

As pointed out by the Sierra Club, the emergency response plan prepared for the WCS facility (but not in connection with Amendment No. 32) contemplated the possibility of a fire occurring in an enclosed waste storage building.²⁰ Such a fire could result in the transport of particulate materials into the air.²¹ If particulate matter were to settle on canisters stored at one of the new storage areas authorized by Amendment No. 32, and if it rained following the fire, water containing the particulate matter could travel into a catchment system constructed pursuant to Amendment No. 32.²² According to the Sierra Club, the particulate matter could be carried by water that would or could ultimately drain to the southwest of the site. This is where the Lea County landfill, visited by Ms. Gardner up to five times a year, is located. There she might, according to the Sierra Club's argument, face exposure to toxic runoff or windblown toxic particles. The Sierra Club asserts that these possible events pose a risk to Ms. Gardner that sufficiently distinguishes her concerns from those of the general public such that she – and by extension, the Sierra Club – is a “person affected” by this proceeding.

The Sierra Club also points to Ms. Gardner's unavoidable need to use Highway 176 several times a month for business-related errands, and her use of the highway to visit her sister-in-law. According to Ms. Gardner, Highway 176 is a two-lane highway with minimal shoulders²³ over which radioactive waste is transported to the WCS site. The Sierra Club asserts that Ms. Gardner therefore

²⁰ Sierra Club Exhibit 1 at 6.

²¹ Sierra Club Exhibit 1 at 6.

²² The Sierra Club's explanation of this asserted basis for party status, accompanied by citations to the record, is set out at *Closing Argument of Sierra Club* at 15-16.

²³ Tr. at 93, 95.

runs some risk of collision or contact with canisters containing radioactive waste and feels fear and apprehension concerning these possibilities.

The ALJs conclude that Ms. Gardner is not a “person affected” by Amendment No. 32. The multi-step scenario laid out by the Sierra Club involving a catastrophic fire, deposition of toxic particulate matter on waste canisters, a subsequent rain, and the transportation of toxic water or particles to the Lea County landfill involves too much conjecture and too little connection with Ms. Gardner, an infrequent and probably brief visitor to an unspecified part of the landfill. In addition, Ms. Gardner’s use of Highway 176 for errands a few times a month and family visits of an unknown frequency fails to establish the kind of close connection to this proceeding necessary to distinguish her concerns from those of the general public.²⁴

Michele Weston and Nuclear Free Texas. Ms. Weston attempted to demonstrate that she would suffer both economic damage and “personal” injury. She and her husband own and live on a farm in Bastrop, Texas. They also have a business collecting native plants that they sell to buyers from El Paso to Oklahoma. Ms. Weston testified that she and her husband both collect and sell native plants in Lea County, New Mexico, and in Andrews County, Texas, and they would be unable to sell plants that “may have contamination on them.”²⁵ She noted, however, that she had collected native plants in Lea County only once and her husband had done so only about ten times. She did not state where in Lea County they had collected plants. Additionally, Ms. Weston related that she would suffer “personal” injury because, for family reasons, she and her husband hope to live in this area in the future.

The ALJs concluded that Ms. Weston was not a “person affected” by this application. She currently is neither a resident of Andrews County nor Lea County, and her infrequent visits to both

²⁴ WCS also challenges Ms. Gardner’s connection with the Sierra Club as well as the Sierra Club’s representation of its members in its decision to seek party status in this case. *Waste Control Specialists, LLC’s Closing Argument* at 10-13. The ALJs do not reach these matters.

²⁵ Tr. at 161.

counties to either collect or sell native plants is insufficient to show that she would suffer actual injury or economic damage by this license amendment.

As its representative, Ms. Weston also requested party status for Nuclear Free Texas, an organization with members living in New Mexico, Oklahoma, Iowa, and Texas. Although no members currently are residents of Andrews County or Lea County, she expects that residents of those counties would become members of Nuclear Free Texas in the future. Because no member of the organization is a resident of either Andrews County or Lea County, the ALJs determined Nuclear Free Texas does not meet the applicable requirements for party status.

Tristan Mendoza. Mr. Mendoza lives in Austin, Texas. He expressed concern that radioactive waste will reach the Colorado River, located "just north" of the WCS facility, and flow down through Austin. The ALJs concluded that Mr. Mendoza, who is neither a resident of Lea County nor Andrews County and is not doing business in those counties, failed to demonstrate that he is a "person affected" by Amendment No. 32.

V. RECOMMENDATION

No person or organization has shown that it is a "person affected" within the meaning of the Act and entitled to a hearing on Amendment No. 32. Therefore, the ALJs recommend that the Department's issuance of Amendment No. 32 be affirmed without hearing.

VI. FINDINGS OF FACT

1. Waste Control Specialists, LLC, (WCS) owns and operates a radioactive waste storage facility in Andrews County, Texas.

2. WCS presently holds Radioactive Materials License No. LO4971 issued by the Texas Department of State Health Services (the Department or DSHS).
3. On May 19, 2004, WCS filed an application for Amendment No. 32 to its license.
4. On January 6, 2005, a public meeting was held in Andrews, Texas, to receive public comment on the amendment application.
5. On February 23, 2005, the Department granted WCS's application and issued Amendment No. 32.
6. Notice of Amendment No. 32 was published in the *Andrews County News* on February 27, 2005, and in the *Texas Register* on March 11, 2005.
7. On April 11, 2005, the Sierra Club and Public Citizen filed written requests for hearing with the Department.
8. The Department referred this matter to the State Office of Administrative Hearings (SOAH) on April 14, 2005.
9. A preliminary hearing was scheduled for July 11, 2005.
10. The Department published notice of hearing in the *Texas Register* on June 3, 2005, in the *Andrews County News* on June 5, 2005, and in the *Eunice News* on June 9, 2005.
11. On June 14, 2005, notice of hearing was mailed to landowners adjacent to the WCS property.
12. On June 30, 2005, WCS filed a written Motion to Contest Standing that challenged the attempts by the Sierra Club and Public Citizen to be named parties to the SOAH case.
13. An initial preliminary hearing was convened on July 11, 2005, with Administrative Law Judges (ALJs) Carol Wood and Shannon Kilgore presiding.

14. At the request of WCS and the Sierra Club, the ALJs continued the matter to September 1, 2005, to allow additional time to ensure proper advance written notice to adjacent landowners.
15. The Department issued a notice of hearing for the September 1, 2005, preliminary hearing.
16. On July 21, 2005, WCS published the notice of hearing for the September 1, 2005, preliminary hearing in the *Andrews County News* and the *Eunice News* and mailed the notice to adjacent landowners.
17. On July 22, 2005, the Department published the notice of hearing for the September 1, 2005, preliminary hearing in the *Texas Register*.
18. The notice of hearing included a statement of the time, place, and nature of the hearing; a statement identifying the location of the proposed facility and describing the activities for which authorization is requested; a statement of the legal authority and jurisdiction under which the hearing was to be held; a statement of the opportunity of a person affected to seek party status; and a recitation of the standard defining an "affected" person, who may intervene.
19. WCS re-filed its Motion to Contest Standing on August 19, 2005.
20. The preliminary hearing was reconvened on September 1 and continued on September 16, 2005.
21. At the preliminary hearing, the ALJs heard evidence from the Sierra Club concerning its request to be designated a party.
22. Public Citizen withdrew its request for hearing.
23. Three other requestors -- Michele Weston, Nuclear Free Texas, and Tristan Mendoza -- appeared and made oral requests for party status. The ALJs denied those three requests on the record at the preliminary hearing.

24. WCS and the staff of the Department's Radiation Safety Licensing Branch (Staff) participated in the preliminary hearing, also offering evidence on party status issues.
25. The record closed on October 27, 2005, with the submission by the parties of their briefing on issues related to the Sierra Club's request.
26. In its brief, Staff recommended denial of the Sierra Club's request.
27. The WCS facility comprises 1,338 acres on a 15,000-acre ranch owned by WCS.
28. The town nearest to the facility site 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.
30. Under Amendment No. 32, WCS is authorized to construct two open-air storage pads (respectively called the "LSA storage area" and the "container storage area") and to store an additional 1,500,000 cubic feet of radioactive material there.
31. Each storage area authorized by Amendment No. 32 has a water catchment system, a concrete holding pond, and an overflow ditch.
32. Pursuant to the provisions of its amended permit, WCS has begun to store waste from the Department of Energy's Fernald, Ohio, facility that is currently being decommissioned.
33. The Fernald waste is diluted and solidified by being mixed with cement and fly ash, and the dry solidified mixture is contained in steel canisters.
34. Amendment No. 32 does not authorize an increase of curie levels of the radioactive waste stored at the facility, nor does it authorize the disposal or transportation by WCS of radioactive materials.
35. Rose Gardner is a member of the Sierra Club.

36. Ms. Gardner is a resident of Eunice, New Mexico.
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.
38. Ms. Gardner drives close to the WCS site on errands.
39. The WCS facility is adjacent to and bisected by State Highway 176.
40. Ms. Gardner uses Highway 176 for errands a few times a month and for family visits of an unknown frequency.
41. Highway 176 is used, or may be used, for the transportation of waste destined for storage at the WCS site under the terms of Amendment No. 32.
42. Ms. Gardner's occasional use of the Lea County landfill and her travels 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.
43. The Sierra Club is not a person affected by this proceeding.
44. Michele Weston and her husband own and live on a farm in Bastrop, Texas.
45. Ms. Weston and her husband both collect and sell native plants in Lea County, New Mexico, and in Andrews County, Texas.
46. Ms. Weston has collected native plants in Lea County only once and her husband has done so only about ten times.
47. Ms. Weston currently is neither a resident of Andrews County nor Lea County, and her infrequent visits to both counties to either collect or sell native plants is insufficient to make her a person affected by this proceeding.
48. Nuclear Free Texas is an organization with members living in New Mexico, Oklahoma, Iowa, and Texas.

49. No member of Nuclear Free Texas is a resident of Andrews County, Lea County, or any other county adjacent to Andrews County.
50. Nuclear Free Texas is not a person affected by this proceeding.

VII. CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject of this proceeding. TEX. HEALTH & SAFETY CODE ch. 401.
2. SOAH has jurisdiction over all matters relating to the conduct of a hearing in this proceeding, including the preparation of a Proposal for Decision with Findings of Fact and Conclusions of Law. TEX. GOV'T CODE ch. 2003.
3. Proper and timely notice of the amendment and opportunity for hearing was provided. TEX. GOV'T CODE ch. 2001; TEX. HEALTH & SAFETY CODE §§ 401.114, 401.116; 25 TEX. ADMIN. CODE § 289.205(f).
4. The Department must provide for a hearing on a license amendment where there has been a request for hearing by a "person affected" by the amendment. TEX. HEALTH & SAFETY CODE § 401.116.
5. "Person affected" is defined as: 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. TEX. HEALTH & SAFETY CODE § 401.003(15); 25 TEX. ADMIN. CODE § 289.205(b)(16).
6. Persons requesting party status have the burden of proof to demonstrate they are "affected" persons. 25 TEX. ADMIN. CODE § 289.205(c)(3).
7. Where an organization or association seeks party status, the organization must show that (1) at least one of its members would otherwise have standing to sue in his or her own right; *i.e.*, he or she is an "affected person" who has suffered or will suffer actual injury or economic damage; (2) the interests which the group seeks to protect are germane to the

organization's purpose; and (3) neither the claim asserted nor relief requested requires the participation of individual members of the group. *Texas Association of Business v. Air Control Board*, 852 S.W.2d 440, 447 (Tex. 1993).

8. The requestors in this case failed to prove they are "persons affected" within the meaning of § 401.003(15) of the Texas Health and Safety Code and § 289.205(b)(15) of the Department's rules.
9. The Department's issuance of Amendment No. 32 should be affirmed without hearing.

Signed December 16, 2005

Carol Wood *per*

SHANNON KILGORE
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

Carol Wood

CAROL WOOD
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS