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July 28, 2014

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Texas Commission on Environmental Quality  
Office of the Chief Clerk (MC-105)  
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Re: Waste Control Specialists, LLC  
TCEQ Docket No. 2014-0851-RAW

Dear Ms. Bohac:

Enclosed for filing is Waste Control Specialists LLC's Response to Request for Contested Case Hearing in the above-referenced matter.

Sincerely,



Pamela M. Giblin

PMG:sm

Enclosure

**DOCKET NO. 2014-0851-RAW**

**APPLICATION OF** § **BEFORE THE TEXAS COMMISSION**  
**WASTE CONTROL SPECIALISTS LLC** §  
**RADIOACTIVE MATERIAL** § **ON**  
**LICENSE NO. R04100** §  
**AMENDMENT 26** § **ENVIRONMENTAL QUALITY**

**WASTE CONTROL SPECIALISTS LLC'S**  
**RESPONSE TO REQUEST FOR CONTESTED CASE HEARING**

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

WASTE CONTROL SPECIALISTS LLC (“WCS”), the applicant for the Major Amendment to Radioactive Materials License No. R04100, files this Response to Request for Contested Case Hearing, and would show the Commissioners of the Texas Commission on Environmental Quality (“TCEQ”) the following:

**I. Introduction**

State Representative Lon Burnam of Fort Worth (the “Requestor”) is not a “person affected” or an “affected person” as defined by law and, thus, the request for contested case hearing should be denied. Finding that the Requestor is affected by the license amendment would be contrary to the law and would set a precedent harmful to the TCEQ’s execution of its duties.

**II. Purpose of Standing in Administrative Hearings**

The requirement that a person granted a contested case hearing request be affected by an agency’s action (i.e., the standing requirement) is a fundamental condition for formally contesting a regulatory agency’s reasoned decision on the merits of a license amendment application. It ensures the applicant and regulatory agency are not forced to exhaust additional time, effort and resources defending the application and the decision of the agency unless there is a substantiated purpose for further scrutiny. Contested case hearings are strictly for purposes of developing necessary information and reasonable claims by individuals and entities that will be directly aggrieved by the proposed activity. The right to a contested case hearing does not exist to intervene in agency actions by those who do not like the permissions to conduct legal activities or the general concepts underlying the legal activities. Therefore, the standing requirement must be considered a mechanism for distinguishing an aggrieved person’s justified

right to a hearing from those hearing requests that are arbitrary, without merit, or that do not involve a legally protected interest.

### **III. “Person Affected” Standard Under Texas Law**

To be granted a contested hearing on the merits of WCS’ license amendment application, the Requestor must meet his burden of demonstrating to the Commissioners that he is affected. Arguably, two statutory definitions of who is “affected” are relevant to matters concerning the disposal of low-level radioactive waste (“LLRW”), which is defined as a form of regulated radioactive material under Section 401.004 of the Texas Radiation Control Act (“TRCA”).<sup>1</sup> One of the two definitions, the definition of “person affected” contained in the TRCA, should control because the TRCA is the specific statute applicable to LLRW disposal license amendment applications such as the one at issue here. Indeed, even the Requestor’s hearing request references the term “person affected” and cites the TRCA definition of that term (as opposed to the more general term “affected person”).<sup>2</sup> The other definition, that of “affected person” in Chapter 5 of the Texas Water Code, is generally applicable to air, water, and waste licensure matters under the TCEQ’s jurisdiction. The Commission does not have to decide which definition to apply here because, under either definition, the Requestor is not affected by the license amendment.

#### **a. The Requestor Is Not a “Person Affected”**

The Texas Legislature has narrowly defined the universe of persons who are entitled to a contested case hearing on LLRW disposal license amendment applications under the TRCA. A requestor seeking a contested case hearing on the Commission’s decision concerning a LLRW disposal license amendment has the burden of demonstrating that he or she is a “person affected,” as expressly defined in Section 401.003(15) of the TRCA.<sup>3</sup>

TRCA Section 401.003(15) states:

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

(A) *is a resident of a county, or a county adjacent to that county, in*

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<sup>1</sup> Tex. Health & Safety Code §§ 401.0005-.522

<sup>2</sup> Letter from Lon Burnam, State Representative, Texas House District 90, Fort Worth, to TCEQ Commissioners at 2, 4 n.12 (May 20, 2014).

<sup>3</sup> See TRCA § 401.116(d) (“The agency shall give notice and hold a hearing to consider the license amendment if a *person affected* files a written complaint with the agency before the 31st day after the date on which notice is published under Subsection (b).”) (emphasis added).

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.*<sup>4</sup>

The Requestor in this case fails to meet any of the criteria for “person affected” status. On its face, Representative Burnam’s request shows that he is not a “person affected.” Representative Burnam states, “I freely admit that I do not reside near the disposal site in Andrews County[.]”<sup>5</sup> Additionally, the request contains zero indication that the Requestor “is doing business or has a legal interest in land in the county or adjacent county.” Thus, the Requestor cannot meet the statute’s requirement for standing to obtain a contested case hearing.

While the fact alone that the Requestor is not a resident of Andrews County (where the licensed facilities are located) or any adjacent county and the Requestor does no business and has no legal interest in land in those counties means that the Requestor cannot be a “person affected,” the Requestor also fails to “demonstrate that [he] has suffered or will suffer actual injury or economic damage[.]” which is required to be a “person affected.” The standard of actual injury or economic damage requires a demonstration of an injury in fact or an actual threat thereof. This requirement is at least as stringent as the “injury in fact” element of the three-part test applied by the U.S. Supreme Court in determining whether a party has met the “irreducible constitutional minimum of standing.”<sup>6</sup> According to the U.S. Supreme Court, an “injury in fact” is an “invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.”<sup>7</sup> The injury has to be traceable to the challenged action and not the result of the independent action of some third party.<sup>8</sup> Further, “to have standing an individual must demonstrate a particularized interest in a conflict distinct from that sustained by the public at large.”<sup>9</sup> The Requestor’s request offers nothing but hypothetical injury that, even if ever realized, would not affect any interest of the Requestor distinct from the

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<sup>4</sup> TRCA § 401.003(15) (emphasis added).

<sup>5</sup> Letter from Lon Burnam, State Representative, Texas House District 90, Fort Worth, to TCEQ Commissioners at 4 n.11 (May 20, 2014).

<sup>6</sup> *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136 (1992).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* (Standing requires a causal connection between the injury and the conduct complained of— the injury has to be fairly traceable to the challenged action, and not the result of the independent action of some third party).

<sup>9</sup> *S. Tex. Water Auth. v. Lomas*, 223 S.W.3d 304, 307-08 (Tex. 2007) (holding that a plaintiff affected like others in the community lacked standing).

public at large. The Requestor claims “fiscal risks” to “taxpayers.”<sup>10</sup> But the claim of “fiscal risks” is speculative and, equally damaging to the Requestor’s attempted assertion of person-affected status, courts (including the Texas Supreme Court) reject the notion that merely being a taxpayer confers standing.<sup>11</sup>

Federal decisions involving the federal counterpart agency to the TCEQ in commercial radioactive materials disposal matters, the U.S. Nuclear Regulatory Commission (“NRC”), provide persuasive authority regarding the requirements for meeting the “person affected” standard in administrative hearings.<sup>12</sup> Several federal decisions involving NRC licensing actions provide examples of what does not constitute “injury in fact.” Of particular importance here, a mere interest in or concern about a geographic area or environmental matters does not suffice to establish standing.<sup>13</sup>

Finally, under Texas law, simply being a legislator with the power to vote on, and an interest in, legislation regarding a particular subject does not confer standing.<sup>14</sup> The Requestor’s status as a state legislator (representing an area of Fort Worth) is irrelevant in determining whether he is a “person affected” by the license amendment. Without any legally protected

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<sup>10</sup> Letter from Lon Burnam, State Representative, Texas House District 90, Fort Worth, to TCEQ Commissioners at 4 (May 20, 2014).

<sup>11</sup> See, e.g., *Lomas*, 223 S.W.3d at 307-08 (holding that Lomas, as a taxpayer or ratepayer, suffered an injury common to the general public and, thus, had no standing to sue). The only “taxpayer standing” that exists under Texas law is a limited exception to the general rule that no standing exists merely because a person is a taxpayer. The limited exception requires a claim of an illegal expenditure of public funds (not simply an unwise expenditure) and there must be a logical nexus between being a taxpayer and the type of action challenged. *Williams v. Lara*, 52 S.W.3d 171, 180-81 (Tex. 2001). Further, merely paying sales taxes cannot confer taxpayer standing. *Id.* at 180. Representative Burnam’s request does not explain what particular taxes he pays that go to state coffers, but, given that Texas has no income tax and no state property tax, it is highly unlikely that, even if all other conditions for taxpayer status were met (which they clearly are not), Representative Burnam could successfully establish taxpayer status for an expenditure of state funds. Nor does Representative Burnam state that he pays state taxes in the form of the state business franchise tax, but, even if he did, there is no nexus between payment of the franchise tax and the hypothetical costs the State of Texas may incur because of reductions in the financial assurances required by WCS’ disposal license. Other than sales tax and the franchise tax, the State of Texas collects a variety of specific levies such as the fireworks sales tax and the cigarette tax, which have no nexus to the LLRW disposal facilities in Andrews County.

<sup>12</sup> As charged under 189(a)(1) of the Atomic Energy Act, the NRC grants a contested hearing only to those who meet the standard of a “person affected.” See 42 U.S.C. §2239(a)(1).

<sup>13</sup> See *In the Matter of Cleveland Electric Illuminating Co.*, CLI-93-21, 38 NRC 87, 92 (1993); *In the Matter of Umetco Minerals Corp.*, LBP-94-18, 39 NRC 369, 370 (1994).

<sup>14</sup> See *Brown v. Todd*, 53 S.W.3d 297, 304-06 (Tex. 2001) (Texas Supreme Court case dismissing a Houston city council member’s suit against the mayor on the grounds that the council member lacked standing); *Raines v. Byrd*, 521 U.S. 811, 818-19 (1997) (United States Supreme Court case dismissing a suit brought by Members of Congress because the Congresspersons lacked standing because they did not have “personal injury” and there was no “‘personal stake’ in the alleged dispute, and that the alleged injury suffered [was not] particularized as to [the Congresspersons]”).

interest that is concrete and particularized and actual or imminent, the Requestor cannot demonstrate that he “has suffered or will suffer actual injury or economic damage[.]”

The Commissioners should rely solely on the “person affected” standard in the TRCA for determining whether the Requestor has standing in this matter. Because the TRCA specifically governs radioactive materials licensure matters, which expressly includes the disposal of LLRW, the exclusive application of the TRCA standard is appropriate. Equally important, the “person affected” standard in the TRCA has been the standard applied by the State of Texas in past licensure matters involving WCS’ radioactive materials authorizations. Thus, a strong precedent exists for determination of party status in this matter based on the “person affected” standard in the TRCA.

Nonetheless, if the Commissioners choose to originate their standing analysis under Chapter 5 of the Water Code, it would ultimately lead to the same conclusion: Representative Burnam is not affected by the license amendment.

**b. The Requestor Is Not an “Affected Person”**

Chapter 5 of the Water Code governs the general structure and duties of the TCEQ.<sup>15</sup> Section 5.115(a) of the Water Code states:

For the purpose of an administrative hearing held by or for the commission involving a contested case, “affected persons,” or “person affected,” or “person who may be affected” means a person who has a justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing. An interest common to members of the general public does not qualify as a personal justiciable interest. The commission shall adopt rules specifying factors which must be considered in determining whether a person is an affected person in any contested case arising under the air, waste, or water programs within the commission’s jurisdiction and whether an affected association is entitled to standing in contested case hearings.<sup>16</sup>

Section 5.115(a) requires a person seeking a hearing to demonstrate that his or her interest is personal and is not common to the general public. A person’s affected status must be

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<sup>15</sup> In Chapter 5 of the Water Code, “person affected” and “affected person” are used interchangeably. *See* Tex. Water Code §5.115(a) (using the terms interchangeably and applying the same meaning to both phrasings). *See* Tex. Water Code §5.011 (stating that the purpose of Chapter 5 is to provide an organizational structure for the TCEQ and to define “the duties, responsibilities, authority, and functions of the commission and the executive director”).

<sup>16</sup> Tex. Water Code §5.115(a) (emphasis added).

demonstrated by more than unfounded predictions and unsupported assumptions.<sup>17</sup> As explained above, the Requestor here fails to demonstrate the existence of any personal interest not common to the general public.

Section 5.115(a) also requires the TCEQ to adopt rules specifying factors to be applied in determining whether or not a hearing requestor is an “affected person.” These rules are contained in Chapter 55 of Title 30 of the Texas Administrative Code, governing requests for contested case hearings generally. Like Section 5.115(a) in the Water Code, the rule construing “affected person” is of general applicability within the confines of the TCEQ’s jurisdiction. TCEQ Rule 55.256(c) sets out the factors to be applied by the TCEQ in determining whether or not an individual is an “affected person.”

WCS agrees with the Executive Director’s analysis regarding Representative Burnam’s request and the Rule 55.256(c) factors.<sup>18</sup> The Requestor’s honest and active interest in the licensed facilities notwithstanding, he simply is not affected by the license amendment according to any of the relevant statutes and rules.

#### **IV. Conclusion**

Representative Burnam does not have standing in this matter. He did not meet his burden of demonstrating that he is a “person affected” under either Chapter 5 of the Water Code and TCEQ Rule 55.256 or the TRCA. There is no demonstration of an actual injury, economic damage or substantial risk of injury resulting from the proposed license amendment. Indeed, the Requestor essential concedes that he is not a person affected when he “freely admit[s] that [he] do[es] not reside near the disposal site in Andrews County[.]”<sup>19</sup> The Third Court of Appeals in Austin recently affirmed this Commission’s determination that individuals owning property in Lea County, New Mexico (adjacent to Andrews County) were not affected by the initial issuance of license R04100.<sup>20</sup> The Commission properly denied the hearing request in that case. Assuming the Requestor at issue here has a property interest in the district he represents in the Legislature (within Fort Worth), the Requestor’s interest is approximately 70 times as distant as

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<sup>17</sup> See *Collins v. Texas Natural Res. Conservation Comm’n*, 94 S.W.3d 876, 883 (Tex. App.—Austin 2002, no writ) (holding that TCEQ properly denied hearing request of person whose affected person status was premised on the prediction that liners will fail and unsupported assumption that the failure will be of such magnitude as to contaminate his groundwater).

<sup>18</sup> See Executive Director’s Response to Hearing Request at 6-9, Application by Waste Control Specialists LLC, Radioactive Material License R04100, Amendment 26 (TCEQ Docket No. 2014-0851-RAW) (July 25, 2014).

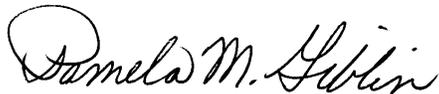
<sup>19</sup> See *supra*, note 5.

<sup>20</sup> *TCEQ v. Sierra Club*, No. 03-12-00335-CV, 2014 WL 1584511 (Tex. App.—Austin, Apr. 18, 2014).

the property of the previous hearing requestors that have already been determined to lack standing. Additionally, granting the contested case hearing request on the basis of the Requestor's contentions concerning his status as a taxpayer and a legislator would be contrary to law and set an unworkable precedent, potentially broadening the set of persons that could obtain contested case hearings on TCEQ matters far beyond what is authorized by statutes and rules. For these reasons, the Commission should deny the contested case hearing request.

WHEREFORE PREMISES CONSIDERED, Waste Control Specialists LLC respectfully requests the Commissioners consider this Response to Request for Contested Case Hearing and deny party status to the Requestor because he has not met his burden of demonstrating that he is a "person affected" under either Chapter 5 of the Texas Water Code and TCEQ Rule 55.256 or the TRCA.

Respectfully submitted,



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

**CERTIFICATE OF SERVICE**

I hereby certify that on July 28, 2014, the original and seven true and correct copies of Waste Control Specialists LLC's Response to Request for Contested Case Hearing were filed with the Chief Clerk of the TCEQ. In accordance with 30 T.A.C. §55.254(e), I hereby certify that on July 28, 2014, a true and correct copy of the above and foregoing was duly served by hand delivery or certified mail, return receipt requested, on all persons on the attached mailing list.



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Pamela M. Giblin

MAILING LIST  
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REQUESTER:

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