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**Lon Burnam**  
DISTRICT 90 • FORT WORTH

CHIEF CLERKS OFFICE

May 20, 2014

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*RW*  
*90253*

**REVIEWED**

MAY 27 2014

By *[Signature]*

*H*

Re: Request for Contested Case Hearing on Major Amendments to Radioactive Material License R04100, possessed by licensee Waste Control Specialists.

Dear Commissioners,

I make this request solely due to the extraordinary nature of the major license amendments proposed by Waste Control Specialists (WCS), the sole licensee for near-surface land disposal of low-level radioactive waste in our state and one of the only such licensees in the entire country. At stake are, quite literally, millions of cubic feet of radioactive waste and tens of millions of dollars that constitute a huge fiscal liability for the State of Texas. As a Texas taxpayer and a legislator who has 1) dedicated a major portion of his career in public service to issues regarding radioactive waste; 2) who serves on the House Energy Resources Committee; and 3) who considered and voted on the original authorizing legislation for this facility, which

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*MW*

was not presented as covering this level of waste capacity (and thus potential liability) or allowing this low a level of financial assurance, I will thus be exposed to the long-term financial consequences of two of these major amendments to WCS's license. Because of the pressing importance of this matter, I feel compelled to claim status as a "person affected" and now exercise the right to seek an evidentiary proceeding before the State Office of Administrative Hearings (SOAH).<sup>1</sup>

I request a contested case hearing on the two major amendments that 1) will expand the Compact Disposal Facility and change the disposal volume from 2.31 million to 9.0 million cubic feet, and that 2) will reduce the total financial assurance from over \$136 million to only \$85 million. To be clear, the proposed amendments would do much more than this and I emphasize that they also pose significant ecological, public health, and safety risks.<sup>2</sup> Yet, for the purposes of this contested case hearing request, I focus on only the following consequences of these two proposed amendments.

Specifically, I base my request for a contested case hearing on three consequences. These are 1) the physical expansion of this facility's size, 2) the increase in the allowable volume of radioactive waste, and 3) the drastic reduction in financial assurances.

The first two will magnify the costs of activities that the State of Texas will be liable for undertaking in certain instances. The third will shrink the private funds available to cover those costs, as is their purpose under the law. The cumulative effect of these changes is to vastly increase the fiscal burdens of Texas taxpayers in a way that does not comport with applicable Texas law.

#### A. Shrinking Financial Assurances Magnifies Costs for Taxpayers.

Financial assurances are more than insurance. They are more comparable to collateral for undertaking certain activities. The State of Texas is essentially a guarantor, as it is liable for undertaking (and thus paying for) those activities if the financial assurances do not suffice to meet their purpose.

The TCEQ's rules obligate WCS to "provide sufficient financial assurance to enable . . . a *governmental custodian* [i.e. the TCEQ] of a site, *to assume and carry out responsibilities* for any necessary control and maintenance of the site."<sup>3</sup> More specifically, WCS must provide financial assurances that "sufficient funds will be available to carry out . . . (1) *decontamination* or *dismantlement* of land disposal facility structures; (2) *disposal* of any radioactive material remaining at the site at closure; and (3) *closure* and *stabilization* of the disposal site so that,

<sup>1</sup> See TEX. HEALTH & SAFETY CODE § 401.264(b) ("A person affected may become a party to a proceeding on a determination that the person possesses a justiciable interest in the result of the proceeding.").

<sup>2</sup> In fact, I have elaborated on their other detrimental effects in rulemaking petitions and comments that I have previously submitted, and I urge the Commissioners to weigh the valid concerns that I express in them.

<sup>3</sup> 30 TEX. ADMIN. CODE § 336.623(a)(emphasis added).

following transfer of the disposal site to the custodial agency[ i.e. the TCEQ], . . . only minor custodial care, surveillance, and monitoring are required.”<sup>4</sup>

Currently, the financial assurances needed to cover the estimated cost of these various activities is over \$136 million.<sup>5</sup> Reducing the required financial assurances by over \$50 million, including \$46 million for the inevitable and crucial decommissioning and closure expenses, bodes poorly for taxpayers.

It will increase the likelihood that the new amount of financial assurances will not suffice to cover these expenses, thus requiring taxpayers to fill this gap in funding when the TCEQ undertakes its responsibilities as the future governmental custodian of the disposal site. It will also increase by millions of dollars the amount covered by taxpayers. This is because the State of Texas takes title to all radioactive waste accepted for disposal at the Compact Disposal Facility.<sup>6</sup> The TCEQ is responsible for taking actions on behalf of the State of Texas regarding the waste and facilities over which it has assumed custody.<sup>7</sup>

I purport to show in a contested case hearing that the drastically reduced financial assurances would simply not suffice to cover all the costs that they are legally required to cover.<sup>8</sup> They are inadequate.<sup>9</sup> Because this is only the initial request for a hearing and I intend to use the discovery process to collect more precise data, I find myself unable to present more detailed evidence at this early time.

<sup>4</sup> TEX. ADMIN. CODE § 336.736(a)(emphasis added). The TCEQ’s own rules make evident that the Commission envisioned the possibility that that WCS might not be able to pay these costs itself, which is why financial assurances are essential. See § 336.736(b)(The “cost estimates [on which financial assurances are based] shall take into account *total costs* that would be *incurred if an independent contractor were hired to perform*” work done pursuant to a TCEQ-approved plan for closure and stabilization)(emphasis added). If WCS could not pay for these costs, then the TCEQ would have to hire such a contractor and hope that financial assurances suffice. If they do not, then taxpayer money must necessarily be used.

<sup>5</sup> The amount currently includes \$79.9 million for decommissioning and closure, \$10.2 million for post-operation surveillance, \$21 million for institutional control, and \$25.3 million for corrective action in 2008 dollars. Now these amounts are, respectively, only \$33.3 million, \$9.2 million, nearly \$22.8 million, and \$20 million in 2012 dollars.

<sup>6</sup> TEX. HEALTH & SAFETY CODE § 401.2051(a) (“The compact waste disposal facility license holder *shall convey to the state at no cost to the state title to the compact waste* delivered to the disposal facility for disposal *at the time the waste is accepted at the site.*”)(emphasis added).

<sup>7</sup> TEX. HEALTH & SAFETY CODE §§ 401.209(d)(“The right, title, and interest in low-level *radioactive waste* accepted for disposal at property and facilities acquired under this section . . . are the property of the commission, acting on behalf of the state, and *shall be administered and controlled by the commission* in the name of the state.”); 401.212 (“The commission may undertake *monitoring, maintenance, and emergency measures* that are necessary to protect the public health and safety and the environment in connection with low-level radioactive waste and property *for which it has assumed custody*”).

<sup>8</sup> As this is only the initial request for a hearing and I intend to use the discovery process pursuant to SOAH and TCEQ rules, I find myself unable to present more detailed evidence at this early time.

<sup>9</sup> The criteria used for evaluating financial assurances includes their adequacy for conducting licensed activities such as decontamination, decommissioning, reclamation, or disposal, and control and maintenance of the site or facilities *after active operations cease, and unanticipated extraordinary events that may occur after decommissioning and closure.* TEX. HEALTH & SAFETY CODE § 401.233(d). The TCEQ “shall conduct a review of the adequacy of the financial assurance mechanisms . . . The review shall consider: . . . 4) the adequacy of the financial instruments to cover the state’s liabilities.” TEX. HEALTH & SAFETY CODE § 401.2085(a).

B. Expanding the Size of the Compact Disposal Facility and Increasing the Volume of Radioactive Waste Accepted by this Facility has Tangible Financial Consequences.

As explained above, TCEQ's obligation to respond to public health, safety, and environmental risks at the disposal site entails *fiscal risks to taxpayers*. This is because taxpayers must pay when financial assurances do not suffice.<sup>10</sup>

Those increased costs are multiplied by tripling the allowable volume of waste from 2.31 million to 9.0 million and by expanding the Compact Disposal Facility's size. The expansion of the facility will occur horizontally by expanding the surface area in which waste containers are located. It will also expand vertically, by digging downward to allow *five layers* of containers (instead of the current three) to be buried on top of each other. Naturally, a greater number of layers means a greater depth of the waste.

The deeper the waste is, the more expensive it is to respond to any problems with the containers (including structural damage posing a risk of radiation leaks) or changes to the surrounding environment (including the, still ongoing, presence of subsurface water that I purport to show will make this site unsuitable for the disposal of radioactive waste).

C. I am Unlike a Generic Taxpayer.

As a legislator on the House Energy Resources Committee, I have direct oversight responsibilities of the development of the legal regime that now governs WCS's operations. Furthermore, I have, either personally or through my staff, engaged repeatedly with officials at the TCEQ and employees of WCS during both the legislative session and the interim. I am one of only 181 Texans serving in the state legislature, one of only 11 who serve on the House Energy Resources Committee, and one of the only elected officials who have consistently participated in the rulemakings, license changes, and permit applications of WCS, not to mention the original authorizing legislation. I can think of no one else who can say he or she has done the same.<sup>11</sup>

My policymaking activities directly dealing with radioactive waste disposal, not merely my status as a legislator, differentiate me from a generic taxpayer. The undertakings that occur at the disposal site in Andrews County have important physical and legal consequences that I will be responsible for given my unique circumstances. The combination of that legitimate, legislative interest in the disposal site and the fiscal impacts that these extraordinary amendments will have on me as a taxpayer make me "a person who . . . will suffer . . . economic damage and, . . . [have] a legal interest in land in the county[.]"<sup>12</sup>

<sup>10</sup> This is because taxpayers necessarily fund the operations of the TCEQ.

<sup>11</sup> I freely admit that I do not reside near the disposal site in Andrews County, but note that physical proximity is not the only basis for obtaining standing as a "person affected."

<sup>12</sup> TEX. HEALTH & SAFETY CODE § 401.003(13). A "person affected" is defined by statute 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." *Id.*

This combination of legislative and economic interests that will be affected by the two proposed major amendments I discuss above elevate me to the status of a "person affected" who may request a contested case hearing.

As Commissioners of the TCEQ, you have the ability, and indeed the duty, to make the factual determination as to whether I possess the requisite legal standing. If you decide against me, I intend to accept that determination as final and will not seek judicial review. Please know that I will nonetheless appreciate the consideration you will have given to this matter.

D. Please exercise caution regarding the proposed major amendments.

I conclude by urging you, as the final agency decision-makers of one of our state's most important agencies, to take time to consider the very significant ramifications of tripling the allowable volume of radioactive waste and reducing financial assurances by tens of millions of dollars. I urge caution given how these changes will increase likelihood that the TCEQ will have to undertake crucial radioactive waste control and maintenance activities without sufficient funding.

Thank you for your consideration of this matter.

Best regards,



Lon Burnam

P.S. As required for requests for contested case hearings, I provide the following contact information.

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Phone: (512) 463-0740.

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May 16, 2014

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*RW*  
*90253*  
**REVIEWED**  
MAY 21 2014  
By *[Signature]*  
CHIEF CLERKS OFFICE  
2014 MAY 19 PM 3:01  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Re: Proposed Major Amendments to Radioactive Material License R04100, Amendment 26

Dear Commissioners,

I strongly oppose increasing the financial risks to Texas taxpayers and the health risks to Texas and nearby New Mexico residents who work or live near the low-level radioactive waste disposal site managed by Waste Control Specialists (WCS). For these reasons, I respectfully, but adamantly, oppose the three proposed major amendments to WCS's operating license.

None of the three amendments offer benefits to the public that outweigh their risks. They will magnify the monetary burdens that the State of Texas will potential endure (by tens of millions of dollars), allow the acceptance of more (and more dangerous) radioactive waste, and create less transparency.

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*[Handwritten signature]*

Rather, these proposed changes directly benefit WCS. In sum, they will enable WCS to triple the volume of radioactive materials it can dispose of, greatly reduce its financial liability if an accident occurs, make it easier to accept more dangerous types of waste, and operate with less public scrutiny.

A. Texas Taxpayers are Already on Liable for Future Costs, and Decreasing WCS's Financial Assurances Magnifies those Potential Costs by over \$50 Million Dollars.

These changes will reduce WCS's financial liability by over \$50 million, including a reduction of \$46 million in financial assurances for any decommissioning and closure costs. They will also vastly expand both the volume and types of radioactive waste that may be disposed, including depleted uranium. WCS gets paid for disposing of waste and thus expands its potential revenues by increasing and diversifying the radioactive waste it may accept.

WCS's financial assurances defray the State's costs in the event of an accident or a post-closure situation requiring the State to incur costs in managing or containing the waste. The Texas Department of Health and Safety (Department) and Texas Commission on Environmental Quality (Commission) "shall use the security provided by the license holder to pay the costs of actions that are taken" *when the licensee holder is unable to remove a threat to public health, safety, and the environment.*<sup>1</sup>

Without financial assurances, Texas taxpayers will bear those costs since the State of Texas automatically takes title to all radioactive waste disposed in the Compact Waste Disposal Facility.<sup>2</sup> This makes taxpayers liable for the costs that the Commission may incur in undertaking "monitoring, maintenance, or emergency measures that are necessary to protect the public health and safety and the environment in connection with low-level radioactive waste and property for which it has assumed custody."<sup>3</sup>

I must highlight the undeniable irony that WCS seeks to vastly expand its potential revenues while also reducing its financial liabilities. By tripling the allowable volume of waste that may be disposed in the Compact Disposal Facility while simultaneously reducing its financial assurances by over \$50 million, WCS shows it does not have the interests of Texas taxpayers at heart. Taxpayers will be on the hook in the event of a catastrophe or unforeseen event requiring action by the State of Texas.<sup>4</sup>

Admittedly, WCS is not expected to act in the public's best interests. It is a for-profit business. The Commission *is* expected to act in the public's interests, however. I am aware of the

<sup>1</sup> TEX. HEALTH & SAFETY CODE § 401.152(b)-(c).

<sup>2</sup> TEX. HEALTH & SAFETY CODE § 401.2051(a) ("The compact waste disposal facility license holder *shall convey to the state . . . title to the compact waste delivered to the disposal facility for disposal at the time the waste is accepted at the site.*")(emphasis added).

<sup>3</sup> TEX. HEALTH & SAFETY CODE § 401.212; *see also* §§401.205(a), 401.209.

<sup>4</sup>The Legislature's concern with the costs of responding to unforeseen events is evidenced by how, in 2011, it required the Commission to conduct a review of the adequacy of the financial assurance mechanisms "against projected post-closure costs, including a review of the *adequacy of funds for unplanned events.*" TEX. HEALTH & SAFETY CODE § 401.2085(a).

stated reasons for this drastic reduction in WCS's financial responsibilities.<sup>5</sup> Supposedly, fewer financial assurances are justified since WCS has constructed fewer facilities at its disposal sites than were anticipated at the time its license was issued. In other words, WCS spent less than initially expected and now it wants to spend less in the event of an accident.

The financial assurances required by the Legislature were not meant for the good of WCS. They were meant for the good of Texas taxpayers, nearby residents (both present and future), and the environment, all of which would be impacted by an inadequately funded response to a radiation leak from a container, aquifer contamination, or other unexpected hazard. So too would they be impacted by any deficiencies in the expected site closure and stabilization process that will be undertaken by the Commission, as required by statute.<sup>6</sup>

#### B. More Waste and Different Waste Creates More Hazards.

The proposed amendments would also create worrisome loopholes and directly contravene the initial purpose of the Compact Disposal Facility: disposing of Class A, B, or C low-level radioactive waste from Texas and Vermont generators. This was the idea originally pitched to the Legislature and the general public back in the 1990s. Yet, this idea does not reflect reality today, much less the future.

In a perverse 180-degree turn, the proposed amendments would explicitly allow for disposal of those "waste streams *not* classified as Class A, B, or C low level radioactive waste" so long as the Executive Director of the TCEQ authorizes it.<sup>7</sup> This loophole is outrageous.

Moreover, the proposed amendments would remove the following from the current list of explicitly "prohibited waste:" greater than Class C waste, "[w]aste streams not specifically authorized by the license," and even depleted uranium.<sup>8</sup> In fact, these amendments would explicitly allow for the *disposal* (not just storage) of "[w]aste streams containing *depleted uranium* in concentrations *greater* than ten (10) nanocuries per gram[.]"<sup>9</sup>

<sup>5</sup> I have been given to understand that this new amount (adjusted down from over \$135 million to approximately \$85 million) reflects a new estimate of the total line item costs of decontaminating property, treating leachate, safety destroying contaminated buildings, and other on-site actions that could be needed.

<sup>6</sup> An applicant for a license for near-surface land disposal of low-level radioactive waste must provide assurance "that sufficient funds will be available to carry out disposal site closure and stabilization, including: (1) decontamination or dismantlement of land disposal facility structures; (2) disposal of any radioactive material remaining at the site at closure; and (3) closure and stabilization of the disposal site so that, *following transfer of the disposal site to the custodial agency*, only minor custodial care, surveillance, and monitoring are required." 30 TEX. ADMIN. CODE § 336.736(a).

<sup>7</sup> See page #46 on page 12 of both the current and proposed licenses. *Compare* TCEQ, RADIOACTIVE MATERIAL LICENSE (last accessed May 8, 2014), <<http://www.tceq.texas.gov/assets/public/permitting/rad/wcs/R04100%20Amend%2025%20License%20FINAL%2003-5-2014.pdf>> (after Amendment 25) *with* TCEQ, DRAFT RADIOACTIVE MATERIAL LICENSE (last accessed May 8, 2014), <<http://www.tceq.texas.gov/assets/public/permitting/rad/wcs/DRAFT%20R04100%20License%20Amend%2026.pdf>> (with proposed Amendment 26) (emphasis added).

<sup>8</sup> Compare also #3.2 on pages 77-78 of the current license with #3.2 on pages 76-77 of the proposed license with amendments. *Id.*

<sup>9</sup> See page #46 on page 12 of the proposed license. *Id.* (emphasis added).

It is worth mentioning that, despite the original intent of the Legislature, the volume of compact waste from Texas and Vermont constitutes *less than one-third* of the total volume currently disposed at the Compact Disposal Facility.<sup>10</sup> These states' share of radioactivity is *less than 1%* of the total curies too.<sup>11</sup>

I object to changes in the license that would increase dangers to the public and the environment by allowing the acceptance of waste streams that are even more dangerous and have longer half-lives than the low-level waste customarily disposed at the facility.

C. Less Transparency Disadvantages the Public and There is No Need to Triple the Volume of Waste at the Compact Disposal Facility.

In addition to tripling the volume of radioactive waste that may be disposed in the Compact Disposal Facility (from about 2.3 million to 9.0 million cubic feet), the major amendments would allow existing curie limits to be increased through the minor amendment process. I see no justification for using the short, almost cursory, minor amendment process.

If used, the public would have only 10 days to comment and would have no opportunity for a contested case hearing anytime WCS seeks to increase the total allowable radioactivity at that facility. Limitations on total allowable radioactivity (expressed in units of decay-corrected curies) indirectly affect both the amount and types of waste that WCS may accept for disposal.<sup>12</sup> In this way, they also affect the costs that Texas taxpayers would incur, especially in the event that financial assurances are insufficient to pay for the steps taken by the Commission to remove an unexpected threat or other actions regarding the waste and property over which it has assumed custody.<sup>13</sup>

Raising the total allowable radioactivity is not inconsequential, yet WCS seeks to make this process routine and less transparent. Curie limits help ensure the safety of the facilities in Andrews County, the availability of space for waste from Texas and Vermont generators, and the protection of the local environment and its residents. The Legislature recognized the importance of abiding by numerical curie limits when it chose to set specific curie, volume, and percentage limits on nonparty compact waste.<sup>14</sup> Public input is thus appropriate.

The 10-day minor amendment process is too short to provide a fair opportunity to comment on increases in the total allowable radioactivity at the Compact Disposal Facility. I strongly oppose limiting the duration or extent of Texans' right to voice their concerns on this important matter.

D. Please Reject the Three Proposed Major Amendments.

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<sup>10</sup> TEXAS LOW LEVEL RADIOACTIVE WASTE COMPACT COMMISSION, REPORTS AND MORE (last visited May 9, 2014), <<http://www.tllrwdeco.org/reports-more/>>.

<sup>11</sup> *Id.*

<sup>12</sup> Certain wastes are more radioactive than others and so the ability to dispose of such wastes decreases as this total radioactivity limit is reached.

<sup>13</sup> See TEX. HEALTH & SAFETY CODE §§ 401.152(b)-(c), 401.212.

<sup>14</sup> TEX. HEALTH & SAFETY CODE §404.207(e)-(f).

This is a time when WCS has been increasing its revenues by expanding its universe of customers, namely out-of-state generators or brokers who send their waste for disposal or processing.<sup>15</sup> This is a time when restraint, not expansion, is warranted by the continuing presence of water in wells surrounding *and directly adjacent* to the disposal cells at the facility.<sup>16</sup> In light of the current situation, I feel obliged to oppose the three major amendments I have discussed.

First, I see no justification for reducing by \$50 million the financial assurances meant to pay for the costs of unforeseen occurrences, corrective measures to protect the public or environment, and other expenses that Texas taxpayers will otherwise have to bear.

This reduction is even less justified given the additional request to triple the volume of waste that may be disposed in the Compact Disposal Facility. Furthermore, it adds insult to injury to discreetly silence the public by using the too short minor amendment process to increase the total allowable radioactivity at this facility.

Lastly, expanding the types of radioactive waste that WCS may accept to include highly dangerous waste streams that the Legislature did not intend to allow in large quantities when it originally created the statutes governing the construction of a low-level radioactive waste disposal facility and the selection of licensees intending to operate such a facility.

I respectfully urge the Commission to reject these proposed amendments to WCS's license.

Best regards,



Lon Burnam

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<sup>15</sup> This is also thanks to the vertical integration strategies that I opine has been WCS's goal since its inception.

<sup>16</sup> See TEX. HEALTH & SAFETY CODE §§401.205(a), 401.209.