

Cause No. D-1-GN-09-004020

<b>SIERRA CLUB,</b>	§	<b>IN THE DISTRICT COURT OF</b>
<b>Plaintiff,</b>	§	
<b>v.</b>	§	
<b>TEXAS COMMISSION ON</b>	§	<b>TRAVIS COUNTY, TEXAS</b>
<b>ENVIRONMENTAL QUALITY,</b>	§	
<b>Defendant.</b>	§	<b>_____ JUDICIAL DISTRICT</b>

**SIERRA CLUB's ORIGINAL PETITION**

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff Sierra Club files this, its Original Petition, for judicial review of decisions by Defendant Texas Commission on Environmental Quality ("TCEQ" or "Defendant") denying Plaintiff Sierra Club's request for a contested case hearing, granting the application of Waste Control Specialists, LLC, ("WCS") for new radioactive material license R04100, and issuing WCS radioactive material license R04100. For support, Sierra Club respectfully shows the following:

**I. DISCOVERY**

1. This case is an appeal of an administrative agency's decision. If discovery is necessary, it should be conducted under Level 3, in accordance with Texas Rule of Civil Procedure 190.4.

## **II. PARTIES**

2. Plaintiff Lone Star Chapter of the Sierra Club (“Sierra Club”) is a membership association whose purposes include the preservation and protection of the environment and the use and enjoyment of the environment in the State of Texas.
3. Defendant TCEQ is an administrative agency created under the laws and Constitution of the State of Texas with the responsibility of implementing and administering the laws of Texas related to the management and disposal of radioactive material. *See* Tex. Health & Safety Code Ch. 401. Defendant TCEQ can be served with citation by serving its Executive Director, Mark Vickery, at 12100 Park 35 Circle, Austin, Texas.
4. WCS, the applicant (and now, licensee) will be served with a copy of this petition via certified mail addressed to: Ms. Pamela Giblin, Baker Botts, 1500 San Jacinto Center, 98 San Jacinto Boulevard, Austin, Texas, 78701-4078, and Mr. Michael L. Woodward, Hance Scarborough, LLP, 111 Congress Ave., Suite 500, Austin, Texas, 78701.

## **III. JURISDICTION AND VENUE**

5. This Court has jurisdiction over Defendant TCEQ as an agency of the government of the State of Texas.
6. This Court has jurisdiction over the controversy because this action is brought under section 5.351 of the Texas Water Code, section 2001.176(b)(1) of the Texas Government Code, and section 401.240 of the Texas Health and Safety Code.

7. Plaintiff Sierra Club filed a timely motion for rehearing of the Commission's decision, or in the alternative, motion to overturn the Executive Director's decision, on October 5, 2009, which is attached to this Petition. That Motion has been overruled by operation of law. All other conditions precedent have been performed or have occurred.
8. Plaintiff also filed a suit on March 2, 2009 after the Commission issued its January 20, 2009 order, and a second suit on March 19, 2009, after the Commission allowed Sierra Club's first motion for rehearing to be overruled by operation of law. Those petitions were filed to preserve Sierra Club's right to appeal, in the event this Court determines that the Commission's earlier January 20 decision is the final action for purposes of seeking judicial review. A third lawsuit was filed by Sierra Club on October 9, 2009, within 30 days after the Commission actually issued a license to WCS, but before the Commission ruled on Sierra Club's motion for rehearing/motion to overturn. This latest lawsuit also challenges the Commission's issuance of the license to WCS, as well as the Commission's decision on Sierra Club's motion for rehearing/motion to overturn. Plaintiff intends to seek consolidation of all of these lawsuits, as they involve identical facts.

#### IV. FACTUAL BACKGROUND

9. On August 4, 2004, Waste Control Specialists, LLC (“WCS”) applied to the Texas Commission on Environmental Quality (“TCEQ”) for a license authorizing the disposal of low-level radioactive waste.
10. Low-level radioactive waste is defined by what it is not. *See* Tex. Health & Safety Code § 401.004; 30 Tex. Admin. Code § 336.2(76). Low-level radioactive waste does not include high-level radioactive waste such as spent nuclear fuel, transuranic waste produced by the defense nuclear weapons program, tailings and other by-products from the production of source material and uranium mining, oil and gas naturally-occurring radioactive material (“NORM”), and non-oil and gas NORM waste. Low-level radioactive waste is a subset of a broad category of nuclear waste produced by nuclear utilities, industries, university research, and medical facilities. Generally, low-level radioactive waste is material that has been declared as waste that has been contaminated by or contains short-lived radionuclides or longer-lived radionuclides in relatively low concentrations.
11. The license would authorize the construction and operation of two disposal facilities at a site located near the Texas—New Mexico state line. The first will accept low-level radioactive waste for commercial disposal of waste subject to the Texas Low-Level Radioactive Waste Disposal Compact. The second will accept low-level radioactive waste that is the responsibility of the federal government.

12. WCS's proposed facilities are located in Andrews County, Texas, approximately one-and-one-half mile north of State Highway 176 on State Line Road, 250 feet east of the Texas and New Mexico state line. It is approximately 30 miles west of the city of Andrews, Texas, and five miles east of the city of Eunice, New Mexico.
13. At the time WCS submitted its application, it had not yet acquired title to and any interest in the land that is the subject of the license.
14. Section 401.232 allows the Commission to declare an application for a low-level radioactive waste disposal license "administratively complete" only after the Commission has received the portions of the application necessary to allow the Commission to review the technical merits of the application. Tex. Health & Safety Code § 401.232. Among those portions of the application that are necessary for the Commission to commence a technical review is: "a copy of the warranty deed or other conveyance showing required right, title, and interest in the land and buildings on which the facility or facilities are proposed to be located is owned in fee by the applicant [WCS] as required by Section 401.204." Tex. Health & Safety Code § 401.232(9).
15. By letter dated February 18, 2005, TCEQ's Executive Director declared WCS's application "administratively complete," even though WCS had not yet satisfied all of the statutory requirements in Chapter 401.
16. At the time that the Executive Director declared WCS's application administratively complete and commenced technical review, WCS had not

acquired the title to and any interest in the land that is the subject of its application.

17. Section 401.204 of the Texas Health and Safety Code clearly and expressly states that an application for a disposal facility license, such as the one that was granted here, may not be *considered* unless the applicant has acquired the title to and any interest in land and buildings. Tex. Health & Safety Code § 401.204.
18. TCEQ staff clearly *considered* WCS's application, commenced a technical review, prepared an environmental analysis, and prepared a draft license.
19. Sierra Club timely submitted a request for a contested case hearing regarding WCS's application.
20. TCEQ rules require a hearing requestor to identify his justiciable interest affected by the application, specifically noting how and why the requestor believes he will be affected by the activity in a manner not common to members of the general public. *See* 30 Tex. Admin. Code § 55.251.
21. A request by a group or association, such as Sierra Club, must demonstrate that (1) a member of the group or association would otherwise have standing to request a hearing in his own right; (2) the interests the group seeks to protect are germane to the organization's purpose; and (3) the claim or relief requested does not require participation of individual members in the case. *See* 30 Tex. Admin. Code § 55.252.

22. By its hearing request, Sierra Club addressed each of the requirements for requesting a contested case hearing as a group or association. *See* 30 Tex. Admin. Code § 55.205.
23. Sierra Club explained that it has at least two members who are “affected persons” who would potentially be harmed in ways not shared by the general public by the approval of WCS’s application.
24. Rose Gardner, a Sierra Club member, lives in Eunice, New Mexico, just under 6 miles from the WCS site. In addition, Ms. Gardner owns a Feed Store located right next to the house and a flower shop about a half-mile north of Highway 176.
25. Sierra Club explained in its hearing request that Ms. Gardner’s livelihood will potentially be affected in several ways by the WCS low-level radioactive waste disposal facilities. For instance, Ms. Gardner raises alfalfa on her land. She 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 Ms. Gardner and her husband, which well is potentially hydrologically connected to groundwater resources found in the vicinity of the WCS site.
26. In addition, Ms. 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 Ms. Gardner.

27. Finally, in addition to trips to the landfill that already exists on the WCS site, Ms. Gardner travels frequently on Highway 176 into Texas as a matter of necessity; it is the highway that takes her east to Odessa, Texas, where she purchases supplies for her floral business.
28. The other identified Sierra Club member, Ms. Fletcher Williams, lives even closer to the proposed WCS site than does Ms. Gardner. Ms. Williams lives approximately three-and-a-half miles from the site on Highway 176. Her home is located near the railroad line – including a rail spur that is directly behind her house – that serves the WCS site.
29. Because her mother and other members of her family rely on medical care in Andrews, Texas, Ms. Williams 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.
30. Ms. Williams and her family also use groundwater wells in the area.
31. Ms. Williams and Ms. Gardner expressed concerns about the adverse effects of any off-site migration of radioactive material on groundwater resources, and about potential exposure to radioactive material due to accidents and high winds.
32. The TCEQ Executive Director, in the environmental analysis and in his response to comments received, acknowledged that numerous potentially-significant aspects

of the subsurface hydrogeology regime have yet to be characterized. Indeed, the Executive Director recommended additional license conditions for additional characterization of the subsurface area before construction commences. This additional site information is necessary, according to the Executive Director's Environmental Analysis, to "verify the characterization provided in the application to *address data gaps and areas of uncertainty.*"

33. Given the uncertainties the Executive Director acknowledged, there is no basis on which to discount to "zero" Ms. Gardner's and Ms. Williams' apprehensions about subsurface migration, over time, of wastes to the groundwater and to the wells.
34. Sierra Club further explained how its concerns about the effects of the above-referenced application on groundwater resources and the public health in general fall squarely within the purposes of Sierra Club.
35. Finally, neither Sierra Club's asserted claims nor the requested relief (participation in a contested case hearing and denial of the requested permit) require the participation of individual members.
36. In spite of Sierra Club's stated facts in support of its hearing request, demonstrating how at least two of its members are persons affected by WCS's application in ways not shared by the general public, a majority of the TCEQ Commissioners denied Sierra Club's hearing request during a public meeting on January 14, 2009, and by Order dated January 20, 2009.

37. Moreover, on January 14, 2009, the TCEQ Commissioners *considered*, during a public Commission meeting, WCS's application for radioactive material license R04100 and conditionally granted the license. In fact, the Agenda for the Commission's January 14 public meeting lists as Item 3: "*Consideration of the application* by Waste Control Specialists, LLL for new radioactive material license, proposed TCEQ License No. R04100, to authorize receipt and disposal of low-level radioactive waste." (Emphasis added.) At the time of this public meeting, WCS still had not acquired title to and all interest in the land that is the subject of the license.
38. During the January 14 public meeting, a majority of the Commissioners voted to conditionally grant WCS's application for radioactive material license R04100 "upon a demonstration by [WCS] that the Applicant has acquired free and clear title to and all interests in land and buildings, including the surface and mineral estates, of the proposed disposal sites." (One Commissioner, Commissioner Soward, did not vote on this item.)
39. The Commission's decision was memorialized in an Order dated January 20, 2009. That Order states that the license "may not be issued, signed, or granted until the demonstration required above has been provided to the Executive Director."

40. The Order issued by the Commission on January 20, 2009, neither completely disposes of WCS's application nor includes a remand to the Executive Director for final action on the application.
41. The Executive Director signed radioactive material license R04100 on September 10, 2009, and the license states that the "effective date" of the license is September 10, 2009.
42. Notice of the signed license was mailed to Sierra Club on September 17, 2009.
43. It is unclear whether WCS satisfied all of the requirements found in Chapter 401 of the Health and Safety Code at the time the Executive Director issued WCS a license on September 10, 2009. Any amendments or supplements to the application before issuance of the license were not noticed for public comment nor made available for public inspection.
44. Sierra Club filed its motion for rehearing, or in the alternative, motion to overturn the Executive Director's decision on October 5, 2009.
45. The Commission did not rule on Sierra Club's motion, and so, it is now deemed overruled by operation of law.

#### **V. ERRORS OF DEFENDANT TCEQ**

46. **Error No. 1:** TCEQ erred in determining that Sierra Club is not an affected person with justiciable interests entitled to a contested case hearing.
47. **Error No. 2:** TCEQ erred in determining that Sierra Club did not satisfy the requirements for requesting a contested case hearing as a group or association.

48. **Error No. 3:** TCEQ erred in determining that Sierra Club did not have a member who is an “affected person.”
49. **Error No. 4:** TCEQ erred in failing to grant Sierra Club an opportunity to present evidence of its affected person status.
50. **Error No. 5:** TCEQ erred in denying Sierra Club’s request for a contested case hearing.
51. **Error No. 6:** TCEQ’s decision denying Sierra Club’s request for a contested case hearing was made through unlawful procedure, is not reasonably supported by substantial evidence in the record, and is arbitrary and capricious and an abuse of discretion.
52. **Error No. 7:** TCEQ erred and exceeded its statutory authority when it declared WCS’s application administratively complete, commenced technical review, and issued a draft permit before WCS had complied with all applicable statutory requirements. *See* Tex. Health & Safety Code § 401.238.
53. **Error No. 8:** TCEQ erred and exceeded its statutory authority in considering WCS’s application before WCS had acquired the title to and any interest in the land that is the subject of its application.
54. **Error No. 9:** The TCEQ Executive Director, in his environmental analysis and in the response to comments received, acknowledged that further site characterization is necessary to address data gaps and areas of uncertainty. This

further supports the assertion that WCS's application was deficient, and TCEQ erred in approving it.

55. **Error No. 10:** TCEQ erred in determining that WCS satisfied all the requirements in Texas Health and Safety Code Chapter 401 pertaining to its application for new radioactive material license R04100. *See* Tex. Health & Safety Code § 401.202.
56. **Error No. 11:** TCEQ erred in determining that WCS satisfied all the regulatory requirements, found in 30 Tex. Admin. Code Chapter 336, pertaining to its application for new radioactive material license R04100. *See* 30 Tex. Admin. Code § 336.209.
57. **Error No. 12:** The Commission exceeded its statutory authority by conditionally granting WCS's application and conditionally issuing WCS a license in its January 20 Order. Chapter 401 does not authorize the "conditional" granting of an application. *See* Tex. Health & Safety Code § 401.202.
58. **Error No. 13:** TCEQ's Order lacks finality, in that it only conditionally grants WCS a license, upon a demonstration that all property interests have been acquired. It thus fails to fix a legal relationship as a consummation of the administrative process.
59. **Error No. 14:** The Commission's Order lacks finality because it includes a number of conditions—many addressing inadequacies of site characterization—that require resolution before construction of the facilities.

60. **Error No. 15:** The Commission's decision violates Section 401.112 of the Texas Health and Safety Code. That section requires the Commission, in making a licensing decision on a specific license application to dispose of radioactive waste, to consider, among other factors, site suitability, geological, hydrological, and meteorological factors and natural hazards. The Commission lacked sufficient information to adequately consider these factors, as the Executive Director's environmental analysis indicates.
61. **Error No. 16:** The design evaluated for the proposed site was, basically, conceptual. The failure of the TCEQ to require a more detailed development of the site design rendered adequate risk and performance evaluations of the operation of the site impossible, and the issuance of the license by TCEQ, based on analyses that were, themselves, based on the inadequately-specified site design, therefore, was legal error and in violation of Chapter 401 of the Health and Safety Code.
62. **Error No. 17:** The TCEQ has attempted in several instances to nullify this error by adding to the license certain post-license-issuance data-development responsibilities, but imposition of these post-license-issuance responsibilities remove aspects of decisionmaking from the public participation process, in violation of the due process rights secured to the public by statutory and regulatory law.

63. **Error No. 18:** Sierra Club's rights have been affected as a result of this unlawful procedure, in that it was unable to review a complete application before having to submit comments and request a hearing. Sierra Club was prevented from reviewing and commenting on an application that included all of the information required by law. And the Commission ultimately issued a license presumably based on information that was required by statute, but that was never made available to the public for review.
64. **Error No. 19:** The issuance of radioactive material license R04100 to WCS was made through improper procedure and in violation of Commission rules and governing statutes, in that the Commission never remanded the application to the Executive Director for action. Yet, the Executive Director acted on the application in issuing WCS's license on September 10, 2009.
65. **Error No. 20:** TCEQ's decision approving WCS's application violated Chapter 401 of the Health and Safety Code, was made through unlawful procedure, is not reasonably supported by substantial evidence in the record, and is arbitrary and capricious and characterized by an abuse of discretion.
66. **Error No. 21:** TCEQ's actions violated Sierra Club's due process rights.
67. **Error No. 22:** TCEQ erred in approving WCS's application and conditionally issuing new radioactive material license R04100.
68. **Error No. 23:** TCEQ erred in overruling Sierra Club's Motion for Rehearing.

## VI. RELIEF REQUESTED

WHEREFORE PREMISES CONSIDERED, Plaintiff Sierra Club respectfully prays that this Court:

1. Reverse TCEQ's decision granting WCS's application for new radioactive material license R04100 and render a decision that TCEQ exceeded its statutory authority in considering and granting the application.
2. Reverse TCEQ's decision denying Sierra Club's hearing request and remand for reconsideration of that decision or for an evidentiary hearing regarding the hearing request;
3. Reverse TCEQ's decision granting WCS's application for new radioactive material license R04100 and remand for denial of the application or for a full contested case hearing regarding the application;
4. Dismiss this matter so that the TCEQ may issue a final order, resolving all issues, in accordance with the due process protections afforded by the APA; and/or
5. Grant such further relief at law or in equity as to which Sierra Club may show itself entitled.

Respectfully submitted,

LOWERRE, FREDERICK, PERALES,  
ALLMON & ROCKWELL

By: \_\_\_\_\_/s/  
Marisa Perales,  
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**COUNSEL FOR SIERRA CLUB**

# Attachment

Application by Waste Control Specialists,  
LLC, for New Radioactive Material License  
No. R04100

Before the Texas  
Texas Commission on  
Environmental Quality

**SIERRA CLUB'S MOTION FOR REHEARING,  
OR IN THE ALTERNATIVE,  
MOTION TO OVERTURN THE EXECUTIVE DIRECTOR'S DECISION**

TO THE HONORABLE CHAIRMAN SHAW AND COMMISSIONERS GARCIA  
AND RUBENSTEIN:

Sierra Club submits this Motion for Rehearing of the Commission's decision, or in the alternative, Motion to Overturn the Executive Director's decision, in issuing radioactive material license R04100 to Waste Control Specialists, L.L.C. ("WCS"). For support, Sierra Club respectfully offers the following:

**INTRODUCTION**

This Motion is being filed in abundance of caution and to preserve error. The Commission's Order, dated January 20, regarding the above-referenced license may not have resulted in a final decision regarding WCS's application. Indeed, the January 20 Order states the license "may not be issued" until certain conditions have been satisfied. The Commission, however, did not remand the matter to the Executive Director either.

The Executive Director nevertheless issued the license, with an effective date of September 10, 2009. Notice was provided to Sierra Club by letter dated September 17, 2009.

The actions taken by the Commission and the Executive Director in this case are somewhat atypical. They do not correspond to procedures described in the TCEQ rules

or its governing statutes. Thus, it is not clear what type of motion is warranted at this stage of the proceedings. Because the issuance of the license appears to be the final decision regarding WCS's application, Sierra Club is filing this Motion (for rehearing or to overturn the Executive Director's decision) to exhaust its remedies and preserve error for appeal.

### **BACKGROUND**

1. On August 4, 2004, WCS applied to the TCEQ for a license authorizing the disposal of low-level radioactive waste, under Chapter 401 of the Texas Health and Safety Code.
2. Section 401.204 of the Texas Health and Safety Code expressly states that an application for a disposal facility license, such as the one that WCS applied for, may not be considered unless the applicant has acquired title to and any interest in land and buildings. Tex. Health & Safety Code § 401.204.
3. At the time that WCS submitted its application, it had not yet acquired title to and any interest in the land that is the subject of the license.
4. Sierra Club timely submitted comments and a request for a contested case hearing regarding WCS's license application.
5. Sierra Club complied with all hearing request requirements, including those applicable to a group or association.

6. On January 14, 2009, the TCEQ Commissioners considered, during a public Commission “agenda” meeting, WCS’s application for radioactive material license R04100 and Sierra Club’s hearing request regarding the application.
7. At the time of the public meeting, WCS still had not acquired title to and all interest in the land that is the subject of the license.
8. During the January 14 public meeting, a majority of the Commissioners denied Sierra Club’s hearing request. (Commissioner Soward did not vote on this item.)
9. During the January 14 public meeting, a majority of the Commissioners voted to grant WCS’s application for radioactive material license R04100 “upon a demonstration by [WCS] that the Applicant has acquired free and clear title to and all interests in land and buildings, including the surface and mineral estates, of the proposed disposal sites.” (Commissioner Soward did not vote on this item.)
10. The Commission’s decision was memorialized in an Order dated January 20, 2009.
11. That Order further states that the license “may not be issued, signed, or granted until the demonstration required above has been provided to the Executive Director.”
12. The Order issued by the Commission on January 20, 2009, does not include a remand to the Executive Director to act on the application.

13. The Executive Director signed radioactive material license R04100 on September 10, 2009, and the license states that the “effective date” of the license is September 10, 2009.
14. Notice of the signed license was mailed to Sierra Club on September 17, 2009.

### **PROCEDURAL REQUIREMENTS**

15. As discussed above, because of the unorthodox procedure followed in the processing of WCS’s application and the issuance of its license, none of the Commission’s rules clearly addresses the proper administrative remedy available at this stage of the process. Thus, Sierra Club has filed this motion for rehearing, or in the alternative motion to overturn the Executive Director’s decision, in order to exhaust its administrative remedies and preserve its contentions of error.
16. Commission Rule 50.135 states that a permit or other approval by the Executive Director is effective when signed by the Executive Director; the Executive Director signed WCS’s license on September 10. 30 Tex. Admin. Code § 50.135.
17. Once the Executive Director acts on an application, the chief clerk must transmit notice of the action *and* an explanation of the opportunity to file a motion to overturn the Executive Director’s decision. 30 Tex. Admin. Code § 50.133(b).
18. A person may file a motion to overturn the executive director’s action on an application within 23 days after the date the agency mails notice of the signed license. 30 Tex. Admin. Code § 50.139.

19. Upon the Executive Director's issuance of the license to WCS in this case, Sierra Club was notified by letter dated September 17, but that notice did not explain the motion to overturn procedure, as required by Commission rules. Nor did the notice explain the procedure for seeking judicial review of the Executive Director's decision or the significance of the effective date on the license.
20. The Commission's rules also state that motions for rehearing may be filed on the Commission's decision on an application. 30 Tex. Admin. Code § 50.131(c)(3).
21. If the Commission acts on an application, the deadline for the motion for rehearing is 20 days after the date the person is notified in writing of the Commission's "*final* decision or order on the *application*." 30 Tex. Admin. Code § 55.119(b) (emphasis added).
22. If all hearing requests are denied, then a different rule is triggered; but the deadline to file a motion for rehearing is essentially the same as that described above: it must be filed no earlier than, and no later than 20 days after, the date the person is notified of the Commission's "*final* decision or order on the *application*." 30 Tex. Admin. Code § 50.255(e).<sup>1</sup>
23. Under either of the rules cited above, it appears that a final decision on WCS's application was rendered when the Executive Director signed and issued WCS its license.

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<sup>1</sup> One difference between the motion for rehearing deadline in section 50.131 and the deadline in section 55.119 is that under Rule 55.119, a person is expressly *prohibited* from filing a motion for rehearing before he or she is notified in writing of the Commission's final decision or order on the application.

24. Sierra Club therefore submits this motion, asking for reconsideration of that decision.

## ARGUMENT

### **A. The Executive Director failed to follow proper procedures in reviewing WCS's application and providing public notice.**

25. Section 401.232 allows the Commission to declare an application for a low-level radioactive waste disposal license “administratively complete” only after the Commission has received the portions of the application necessary to allow the Commission to review the technical merits of the application. Tex. Health & Safety Code § 401.232.
26. Among those portions of the application that are necessary for the Commission to commence a technical review is: “a copy of the warranty deed or other conveyance showing required right, title, and interest in the land and buildings on which the facility or facilities are proposed to be located is owned in fee by the applicant [WCS] as required by Section 401.204.” Tex. Health & Safety Code § 401.232(9).
27. It is undisputed that WCS had not acquired the title to and any interest in the land that is the subject of its application at the time that the Executive Director declared WCS's application administratively complete and commenced technical review. *See* Attachment 5, wherein the Executive Director recommends that WCS's

application be “conditionally granted” upon a clear demonstration that it has acquired title to all property interests.

28. Thus, the Executive Director should not have declared WCS’s application administratively complete until WCS could demonstrate that all property interests had been acquired.
29. Because WCS’s application was not administratively complete, the Executive Director should not have commenced a technical review of the application and should not have prepared a draft permit.
30. Because the Executive Director completed his technical review and prepared a draft permit before WCS’s application was even administratively complete, the notice and the deadlines for providing comments and requesting a hearing were premature. *See* Tex. Health & Safety Code § 401.238.
31. Moreover, the application materials that were made available for inspection were incomplete, as WCS had not yet satisfied all of the application requirements mandated by Chapter 401 of the Health and Safety Code.
32. In sum, the Executive Director exceeded its statutory authority in declaring WCS’s application administratively complete, in conducting a technical review of WCS’s application, and in issuing a draft permit before WCS had complied with all applicable statutory requirements.
33. Sierra Club’s due process rights were violated, as a result of this unlawful procedure, in that it was unable to review a complete application before having to

submit comments and request a hearing. Sierra Club was prevented from reviewing and commenting on an application that included all of the information required by law. And the Executive Director ultimately issued a license based on information that was required by statute, but was never made available to the public for review.

**B. The Commission erred in denying Sierra Club’s request for a contested case hearing.**

34. Sierra Club satisfied the requirements to show it is an affected person entitled to a contested case hearing. *See* 30 Tex. Admin. Code § 55.203.
35. Sierra Club satisfied the requirements for requesting a contested case hearing as a group or association. *See* 30 Tex. Admin. Code § 55.205.
36. Sierra Club established that it has at least one member who is an “affected person” and thus, entitles Sierra Club to a hearing on the disposal of the low-level radioactive wastes, as proposed in the above-referenced application and permit. *See* 30 Tex. Admin. Code § 55.205(a)(1).
37. Sierra Club does not need to have a member who is actually harmed or 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. *See United Copper Indus., Inc. v. Grissom*, 17 S.W.3d 797, 802-803 (Tex. App. -- Austin 2000, pet. dismissed). Sierra Club’s members, Ms. Rose Gardner and Ms. Fletcher Williams satisfied this requirement.

38. There is no difference between the definitions of “person affected” in section 401.003(15) of the Health and Safety Code and “person affected” or “affected person” in section 5.115(a) of the Water Code.
39. 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.
40. *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 in a contested case hearing under either the Water Code or the Health and Safety Code. In that case, 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.
41. 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. 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.

42. Rose Gardner lives in Eunice, New Mexico, just under 6 miles from the WCS site. In addition, Ms. 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. Ms. Gardner's livelihood will potentially be affected in several ways by the WCS low-level 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; Ms. 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.
43. Rose Gardner and her husband own approximately 15 acres of land off of 16<sup>th</sup> Street (in Eunice), which has a direct connection to Highway 176. This land is used to raise alfalfa. Ms. 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 Ms. Gardner and her husband, which well is potentially hydrologically connected to groundwater resources found in the vicinity of the WCS site.<sup>2</sup>

44. The Executive Director, in the environmental analysis and response to comments acknowledged that numerous potentially significant aspects of the subsurface hydrogeology regime have yet to be characterized.
45. Given the uncertainties the Executive Director acknowledged, there is no basis on which to discount to “zero” Ms. 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. *See also* Attachment 3 for additional support regarding the uncertainties of subsurface migration of pollutants.
46. Finally, in addition to trips to the landfill on the southwest corner of the WCS site, Ms. 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.
47. The other identified Sierra Club standing member, Ms. Fletcher Williams, lives even closer to the proposed WCS site than does Ms. Gardner. Ms. Williams lives approximately three-and-a-half miles from the site on Highway 176. Her home is located near the railroad line – including a rail spur that is directly behind her house – that serves the WCS site.

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<sup>2</sup> Ms. 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 Ms. Gardner.

48. Because her mother and other members of her family rely on medical care in Andrews, Ms. Williams 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.
49. The public at large does not live 3.5 or 5.5 miles from the proposed radioactive waste disposal site.
50. 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 Executive Director acknowledged has not been thoroughly characterized in the vicinity of the WCS site.
51. 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.
52. Both Ms. Gardner and Ms. Williams are affected persons in their own right, and thus, Sierra Club satisfies the first requirement for associational standing under 30 Tex. Admin. Code § 55.205.
53. Moreover, the interests that Sierra Club seeks to protect are germane to the organization's purpose. *See* 30 Tex. Admin. Code § 55.205.

54. Sierra Club is the oldest, largest, and most influential grassroots environmental organization in the United States, and has been working since 1892 to protect communities, wild places, and the planet itself.
55. Sierra Club's concerns about the effects of the above-referenced application and permit on groundwater resources and the public health in general fall squarely within the purposes of Sierra Club.
56. Finally, neither Sierra Club's asserted claims nor their requested relief (participation in a contested case hearing and denial of the requested permit) require the participation of individual members. *See* 30 Tex. Admin. Code § 55.205.
57. A decision of the Department of State Health Services or of its predecessor, the Department of Health, is not binding on this Commission. The facts in this case are not similar to the facts in the Department of Health cases. They are, in fact, overtly dissimilar; so the earlier standing decisions related to Sierra Club by the Department are not even instructive for the Commission's decision.
58. For one, the Department of Health case involved an application to *store* radioactive waste; this application involves permanent disposal of radioactive waste.
59. More obviously, the Department of Health is a different agency from this Commission on Environmental Quality. The Commission is not bound by fact-

findings of the Department. The only precedent that limits the Commission's authority in this case is judicial precedent.

60. Having satisfied the requirements for affected person status and for associational standing, Sierra Club's hearing request should have been granted. The Commission's denial of Sierra Club's hearing request was erroneous.

**C. The Commission's January 20 Order and its conditional issuance of the license to WCS exceeded its statutory authority.**

61. It is well-established that agencies may exercise only those powers the law, in clear and express statutory language, confers upon them. *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 220 (Tex. 2002).
62. In this case, the law clearly and expressly states that an application for a disposal facility license, such as the one that was conditionally granted here, *may not be considered* unless the applicant has acquired the title to and any interest in land and buildings. Tex. Health & Safety Code § 401.204.
63. In fact, WCS's application should not even have been declared administratively complete, and a technical review should not have commenced, until WCS provided "a copy of the warranty deed or other conveyance showing required right, title, and interest in the land and buildings on which the facility or facilities are proposed to be located is owned in fee by [WCS] as required by Section 401.204." Tex. Health & Safety Code § 401.232(9).

64. It is undisputed that WCS had not acquired the title to and any interest in the land that is the subject of its application at the time that the Commission considered WCS's application. *See* Attachment 5, wherein the Executive Director recommends that WCS's application be "conditionally granted" upon a clear demonstration that it has acquired title to all property interests.
65. Nevertheless, the Commission *considered* WCS's application and conditionally granted the license.
66. In fact, the Agenda for the Commission's January 14 public meeting lists as Item 3: "*Consideration of the application* by Waste Control Specialists, LLL for new radioactive material license, proposed TCEQ License No. R04100, to authorize receipt and disposal of low-level radioactive waste." (Emphasis added.)
67. Thus, in issuing the Order that conditionally granted WCS a license, the Commission exceeded its statutory authority.
68. Moreover, there is no statutory provision allowing the Commission to "conditionally" grant WCS a license.
69. Section 401.202 of the Health and Safety Code provides that the Commission may "grant, deny, renew, revoke, suspend, or withdraw" licenses for disposal of low-level radioactive waste.
70. The Commission's January 20 Order, conditionally issuing WCS a license, is not one of the types of decisions authorized by Section 401.202 of the Health and Safety Code.

71. That statute, 401.202, also provides that the Commission may issue the license only for a facility that meets requirements for licensing provided by Chapter 401, Subchapter F of the Health and Safety Code, including section 401.204 (requiring acquisition of all property interests).
72. Finally, the Commission's own rules, specifically Rule 336.209, provide that the Commission may issue a license authorizing the disposal of low-level radioactive waste only after the Commission determines that the application meets the requirements of Chapter 401 of the Health and Safety Code. Tex. Health & Safety Code § 336.209.
73. At the time that the Commission considered WCS's application, WCS had not satisfied all the requirements of Chapter 401, Subchapter F, and therefore, the Commission could not issue the license at that time.
74. In sum, in attempting to conditionally issue WCS a license at its January 14 public meeting, the Commission erred by (1) considering the application before WCS had acquired all property interests and (2) rendering a decision not authorized by Chapter 401, *i.e.*, conditionally issuing WCS a license. Moreover, if the Commission's decision is not a conditional issuance of the license, then, the Commission erred in granting an application that did not satisfy all of the applicable statutory and regulatory requirements.

**D. The Commission's Order lacks finality.**

75. The Commission's January 20 Order lacks finality.

76. The Austin Court of Appeals has, on numerous occasions, outlined the factors necessary to render an agency action “final.” According to the Court, a final agency action is one that is: (1) definitive, (2) promulgated in a formal manner, (3) with which the agency expects compliance, (4) that fixes some legal relationship as a consummation of the administrative process. *Star Houston, Inc. v. Texas Dep’t of Transp.*, 957 S.W.2d 102, 105 (Tex. App.—Austin 1997, pet. denied).
77. In its Order, the Commission states that the Radioactive Material License “may not be issued, signed, or granted until the demonstration required above [demonstration that all property interests have been acquired] has been provided to the Executive Director.”
78. The above-quoted provision lacks the fourth factor required for finality: it fails to fix a legal relationship as a consummation of the administrative process.
79. The language of the Order does not expressly name WCS as a licensee or permittee, at least not until WCS acquires all property interests.
80. In sum, WCS has no mandatory, legal obligations resulting from the Order.

**E. The Commission’s decision and the Executive Director’s issuance of the license violate Section 401.112 of the Health & Safety Code.**

81. Section 401.112 of the Texas Health and Safety Code requires the Commission, in making a licensing decision on a specific license application to dispose of

radioactive waste, to consider, among other factors, site suitability, geological, hydrological, and meteorological factors and natural hazards.

82. The Commission failed to sufficiently consider the aforementioned factors, as the Executive Director's summary of the environmental analysis indicates. The Executive Director, and the Commission, lacked sufficient information to adequately consider these factors; hence, the need for further studies and analyses that are required by the license.

**F. The Commission's Order and the Executive Director's issuance of the license are erroneous, as described in Sierra Club's comments.**

83. Moreover, the Commission's conditional approval of the application for radioactive license No. R04100 and the Executive Director's issuance of the license were also erroneous, for the reasons stated in Sierra Club's comment letter.
84. Sierra Club's comments, dated September 16, 2008, describing the various deficiencies in the application are attached to this Motion and incorporated herein.

**H. The Preconstruction Requirements in the License lack finality and violate Sierra Club's due process rights.**

85. Both the APA and the principles of due process require that affected persons be accorded a full and fair hearing on disputed fact issues. Tex. Gov't Code § 2001.051; *City of Corpus Christi v. Public Util. Comm'n*, 51 S.W.3d 231, 262 (Tex. 2001) (explaining that due process does not require the full procedural framework of a civil trial).

86. By issuing a license that requires the development of relevant, substantive data *after* the license has been issued, the Commission has effectively precluded any affected person from having an opportunity to fully explore those issues in an administrative hearing. No person will have an opportunity to challenge, for instance, the veracity of the tracer studies or the interpretation of the data from the borings.
87. Moreover, the license also lacks finality, because it includes a number of conditions that require resolution before construction of the facility.
88. To be sure, the Commission can place conditions on permits or licenses without impairing finality *if the conditions do not require additional approval by the Commission. North Alamo Water Supply Corp. v. Texas Dep't of Health*, 839 S.W.2d 448, 450-51 (Tex. App.—Austin 1992, writ denied); *Walker Creek Homeowners Ass'n v. Texas Dep't of Health Res.*, 581 S.W.2d 196, 198 (Tex. Civ. App.—Austin 1979, no writ).
89. In other words, if a permit or license provision requires action by the permittee/licensee and approval by the Commission *before* a site becomes operational, the Court of Appeals has held that the agency's order is not final. *Walker Creek*, 581 S.W.2d at 198.
90. The license at issue here includes a number of *pre-construction* requirements that render the license not final.

91. For instance, Special Condition 51 requires the installation and sampling of additional borings to verify unsaturated conditions immediately outside the disposal unit before construction commences. If the measurements indicate saturated conditions, then additional sampling, verification, and testing are required.
92. In addition, tracer studies are required to determine the proper location and installation of monitor wells in the Ogallala-Antlers-Gatuna (OAG) formation. According to the license, “groundwater pathways to springs and playas should be determined using tracers in order to protect and monitor these features from spills and releases.” The license requires WCS to submit to the executive director both the work plans and the subsequent results for the tracer studies.
93. Another example is found in Preconstruction Requirement No. 52. This provision requires WCS to “measure matric potential of the subsurface Dockum formation at the land disposal facility to locate the top of the zone of saturation. WCS must allow the executive director to observe any verification measurements or testing and must provide data and interpretation of the results in a report to the executive director.
94. In addition, WCS must “reconcile the differences in the descriptions of site drainage and site soils between the surficial geology report and the floodplain report provided in the license application.” This too must be submitted for review by the executive director.

95. WCS must also verify the adequacy of the leachate collection system. The license contemplates allowing a design modification of the leachate collection system if necessitated by the verification process. This revised analysis and design must be submitted for review by the executive director.
96. It is also worth noting that Special Requirement No. 63 states that “construction may not commence without the prior written approval of the executive director.”
97. Although many of the special requirements state only that additional information must be “reviewed” by the executive director, it is clear that the executive director must do more than only review the submittals. The executive director must approve them, and in some cases, additional information may be required.
98. Indeed, the additional requirements are necessary because, as the Executive Director explained, additional site information is needed to verify the characterization in the application and to “address data gaps and areas of uncertainty.” *See* Attachment 4.
99. Because WCS is required to fulfill a number of significant and substantive conditions before it may commence construction—conditions that must be reviewed and analyzed by the executive director—the license is not “final.”
100. By issuing such a license that lacks finality, the Commission and the Executive Director have deprived *any* affected person from the opportunity to review all of the information relevant to the issuance of the license and to fully explore these

issues in an administrative hearing. This constitutes a violation of Sierra Club's due process rights.

**I. The Commission and the Executive Director failed to follow proper procedures when the Executive Director issued WCS its license.**

101. Chapter 50, Subchapter G of the Commission's rules addresses delegation of the Commission's authority to the Executive Director and specifies applications on which the Executive Director may take action on behalf of the Commission. It specifically applies to radioactive waste licenses. 30 Tex. Admin. Code § 50.131(a), (b)(11).
102. Under that subchapter, the Executive Director may act on an application if, among other requirements: the application meets all relevant statutory and administrative criteria and the application is uncontested (such as, when the Commission has denied all hearing requests). 30 Tex. Admin. Code § 50.133(a)(2), (5).
103. If an application does not meet the requirements above (those found in Rule 50.133(a)), the Executive Director must refer the application to the chief clerk, so that the chief clerk can schedule the application for consideration and action by the Commission. 30 Tex. Admin § 50.133(c).
104. The above-described procedure is the procedure that was followed up until the January 14, 2009 Commission public meeting; that is, because all hearing requests had not been withdrawn or denied, the Executive Director referred the application

to the chief clerk, and the chief clerk scheduled the application for consideration and action by the Commission.

105. In fact, as mentioned above, the Agenda for the Commission's January 14 public meeting lists as Item 3: "Consideration of the application by Waste Control Specialists, LLC for new radioactive material license, proposed TCEQ License No. R04100, to authorize receipt and disposal of low-level radioactive waste."
106. Commission Rule 50.137 provides that at any time during the processing of an application, if all timely hearing requests are denied, the Commission may remand the application to the Executive Director, and the chief clerk shall remove the application from the Commission's public meeting agenda. 30 Tex. Admin. Code § 50.137.
107. Even though the Commission denied Sierra Club's hearing request, at no time during the processing of WCS's application did the Commission remand the application to the Executive Director, in accordance with the above-cited rule. Nevertheless, the Executive Director appears to have taken action on behalf of the Commission in issuing WCS's license on September 10, 2009.
108. A comparison of the Commission's January 20 Order, the license signed on September 10, and the Commission rules outlined above reveals that proper procedures were not followed in the Commission's consideration of WCS's application or in the issuance of the permit.

109. First, it is clear that during the Commission's January 14 public meeting, the Commission did not only deny Sierra Club's hearing request; it also "considered" WCS's application (even though WCS had not yet obtained all necessary property interests).
110. Second, upon considering WCS's application, the Commission neither issued a final decision on WCS's application nor remanded it to the Executive Director for final action on the application.
111. Indeed, the Commission could not issue WCS a license because the Commission did not determine that the application met all the requirements of Chapter 401 of the Health and Safety Code; WCS had not satisfied the requirement found in Section 401.204, relating to acquisition of all property interests.<sup>3</sup>
112. It is unclear whether WCS satisfied all of the requirements found in Chapter 401 of the Health and Safety Code at the time the Executive Director issued WCS a license on September 10, 2009. Any amendments or supplements to the application before issuance of the license were not noticed for public comment nor made available for public inspection.
113. Nor is it clear whether the issuance of the license to WCS was properly delegated to the Executive Director by the Commission.

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<sup>3</sup> Rule 336.209 provides that the Commission may issue a license authorizing the disposal of low-level radioactive waste only after the Commission determines that the application meets the requirements of Chapter 401 of the Health and Safety Code. Tex. Health & Safety Code § 336.209.

114. In sum, the issuance of License No. R04100 resulted from improper procedure and failure to follow Commission rules and governing statutes.
115. By failing to follow its own procedures, the Commission's and the Executive Director's decisions resulted in a denial of due process to Sierra Club.

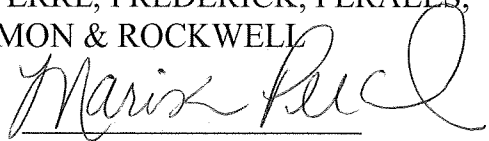
### CONCLUSION

For the reasons described above, Sierra Club respectfully requests that the Commission grant this Motion, reverse the granting of WCS's application and issuance of its license, and grant Sierra Club's request for a contested case hearing.

Respectfully submitted,

LOWERRE, FREDERICK, PERALES,  
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By:



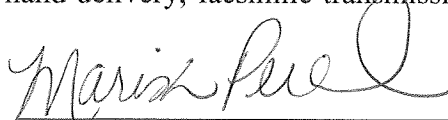
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## CERTIFICATE OF SERVICE

By my signature below, I hereby certify that on this day, October 5, 2009, copies of **Sierra Club's Motion for Rehearing, or the Alternative, Motion to Overturn the Executive Director's Decision** were served upon the following via hand-delivery, facsimile transmission, and/or U.S. Mail:



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