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April 21, 2003

Mr. Paul H. Lohaus
Director
Office of State and Tribal Programs
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

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Dear Mr. Lohaus:

I am writing to you on behalf of Waste Control Specialists, LLC ("WCS"). WCS operates a facility in Andrews County, Texas for the disposal of hazardous materials under a RCRA subtitle C permit and the disposal of limited kinds of radioactive materials in accordance with Texas agreement state regulatory requirements. Recently, WCS filed a petition for rule making with the Texas Department of Health ("TDH") requesting a generic approval for the disposal of certain low-activity radioactive materials at RCRA subtitle C disposal facilities located within the State of Texas. The proposed rule was based on the safety characteristics of RCRA subtitle C licensed disposal facilities, prior NRC precedent, an evaluation of the potential hazards, and a proposed criterion that the risk from transportation and disposal from any specific licensee may not exceed one mrem (0.01 mSv) per year to the average member of the critical group.

WCS withdrew its petition when the TDH indicated it would initiate rule making to address the same subject. However, the TDH rule making has been delayed because of concerns expressed by the NRC Staff in a letter to Ms. Ruth E. McBurney of the TDH, dated November 8, 2002, and in a conference call among NRC, EPA, and TDH personnel on January 10, 2003. WCS believes strongly that the concerns expressed by NRC Staff are misplaced, that NRC should encourage rather than discourage agreement state initiatives like this one, and that NRC Staff should reconsider its position.

The NRC Staff's letter does not express any safety concern about WCS's proposal. Indeed, the TDH has a similar rule for short-lived radionuclides that has been reviewed and found acceptable by NRC, and the letter recognizes that NRC has approved proposals similar to WCS's on a case-by-case basis. Nevertheless, the letter suggests that that adoption of WCS's proposed rule may result in an incompatibility between Texas' agreement state program and NRC's regulatory program. This cannot be the case. Since NRC does not object to case-by-case consideration of the use of RCRA subtitle C permitted facilities for the disposal of licensed radioactive materials, the only incompatibility that could arise from Texas's consideration of WCS's proposal must be associated with Texas's legislative decision to address matters such as

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this by generic rule as opposed to case-by-case. This legislative choice to follow a rule making decision process has long been a prominent part of Texas's agreement state program, and NRC has not suggested that this choice put Texas' (or any other state's) status as an agreement state in jeopardy.

Moreover, NRC's own regulatory program incorporates the well-established administrative law principle that generic safety questions are best resolved in rule making proceedings, as opposed to case-by-case. *See e.g., Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council Inc., et al.*, 435 U.S. 519 (1978) (consideration by rule making of the environmental impacts of the nuclear fuel cycle); 10 C.F.R. §§ 52.41-52.63 (consideration of standard reactor designs in rule making). Thus, Texas's choice of rule making to address this issue is actually compatible, rather than incompatible, with NRC's program, and NRC's guidance on the content of agreement state programs confirms this. *See Handbook 5.9 "Adequacy and Compatibility of Agreement State Programs"* at pg. 15 ("The use of generic requirements will help to avoid inconsistency and confusion that may result from the imposition of individual requirements on a case-by-case basis.") NRC's concern here is especially ironic given NRC's own choice of rule making to address the related subject of releasing solid materials containing small amounts of radioactivity. *See Staff Requirements Memorandum on SECY-02-0133*, dated October 25, 2002.

NRC also expressed concerns that Texas's initiation of rule making on this subject at this time may be "premature," "imprudent," and disruptive of NRC's and EPA's consideration of the generic issue at a national level. But agreement states, especially Texas, have long been at the national forefront in developing safe, environmentally sound, and innovative solutions to problems associated with disposal of small amounts of radioactivity. WCS respectfully suggests that NRC (and EPA) might well have more to learn from Texas's experience in acting on and implementing WCS's proposal than Texas (or other states) would learn from NRC's (or EPA's) much delayed and still very tentative efforts in this same field. Moreover, sharing of experience between NRC and the states will be it is far easier if a limited number of rule making proceedings are involved, as opposed to a multiplicity of case-by-case applications.

It is, of course, true that NRC might in the future issue a rule that is inconsistent with Texas's decision on WCS's petition and require a revision in Texas's agreement state program in order for that program to maintain its compatibility. But for now such an outcome is entirely speculative. The outcome and timing of NRC's rule making decisions are unknown. For example, one possible outcome might be that NRC (and EPA) would allow disposals of low-activity radioactive materials in RCRA subtitle C facilities under criteria that are less stringent than the extremely stringent one mrem criterion proposed by WCS, in which case the delay in acting on WCS's proposed rule would have resulted in no benefit to anyone, but would have harmed WCS and generators desiring additional disposal options. In any event, NRC has expressed no similar concern about case-by-case state decisions on the disposal of small amounts of radioactivity, even though these decisions could also be called into question in the face of an inconsistent future NRC rule.

We would like to discuss this issue with you (and cognizant representatives of NMSS and OGC) at your earliest convenience. Were NRC Staff to reconsider its position, Texas could proceed to consider WCS's proposal on the basis of its safety merits. Adoption of WCS's proposal would add to the capacity and diversity of radioactive waste disposal facilities in the United States. As you know, it has been many decades since any new licensed low-level radioactive waste disposal have been developed in the United States, contrary to Congress's expectations when it enacted the Low-Level Radioactive Waste Policy Amendments Act of 1985. That Act contemplated that a diverse group of regional low-level radioactive waste disposal facilities should be developed, but this expectation has not been realized. In practice, it has only been through innovative proposals such as WCS's that any new disposal capacity has been developed. Adoption of WCS's proposal would also facilitate decommissioning and cleanup of contaminated sites, including sites on NRC's SDMP list, much like the NRC policies on interpretation of the definition of section 11e.(2) by-product material (see SECY-02-0095) and disposal of unimportant quantities of source material have done.

Sincerely,



Martin G. Malsch
Counsel for WCS

- c: Richard A. Ratliff, P.E. (Chief, Bureau of Radiation Control, TDH)
- Ms. Ruth E. McBurney, CHP (Bureau of Radiation Control, TDH)
- Dr. John T. Greeves (Director, Division of Waste Management, NRC)
- Joseph R. Gray, Esq. (Associate General Counsel, NRC)
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- Mr. William P. Dornsife (WCS)