

Cause No. D-1-GN-09-000894

<p>SIERRA CLUB,</p> <p>Plaintiff</p> <p>v.</p> <p>TEXAS COMMISSION ON ENVIRONMENTAL QUALITY,</p> <p>Defendant</p>	<p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p>	<p>IN THE DISTRICT COURT OF</p> <p>TRAVIS COUNTY, TEXAS</p> <p>_____ JUDICIAL DISTRICT</p>
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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 and granting the application of Waste Control Specialists, LLC, ("WCS") for new 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. Discovery should therefore 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 2001.176(b)(1) of the Texas Government Code and section 401.341 of the Texas Health and Safety Code.

7. Plaintiff Sierra Club filed a timely motion for rehearing of TCEQ's decision, which was overruled by operation of law. All other conditions precedent have been performed or have occurred.

IV. FACTUAL BACKGROUND

8. 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.
9. 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.
10. 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.

11. WCS's proposed facilities are located in Andrews County, Texas, approximately one-and-one-half miles 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.
12. Sierra Club timely submitted a request for a contested case hearing regarding WCS's application.
13. 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.
14. 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.
15. 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.

16. 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.
17. 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.
18. 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: 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.
19. 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.

20. 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.
21. 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.
22. 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.
23. Ms. Williams and her family also use groundwater wells in the area.
24. 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.
25. 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.*"

26. 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.
27. 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.
28. 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.
29. 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, TCEQ denied Sierra Club's hearing request and approved WCS's application by Order dated January 20, 2009.
30. Moreover, WCS has not acquired the title to and any interest in the land that is the subject of the license.

31. 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.
32. Here, the Commission clearly *considered* WCS's application and conditionally granted the license. This action was beyond the Commission's statutory authority.

V. ERRORS OF DEFENDANT TCEQ

33. **Error No. 1:** TCEQ erred in determining that Sierra Club is not an affected person with justiciable interests entitled to a contested case hearing.
34. **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.
35. **Error No. 3:** TCEQ erred in determining that Sierra Club did not have a member who is an "affected person."
36. **Error No. 4:** TCEQ erred in failing to grant Sierra Club an opportunity to present evidence of its affected person status.
37. **Error No. 5:** TCEQ erred in denying Sierra Club's request for a contested case hearing.
38. **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.

39. **Error No. 7:** 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 this application.
40. **Error No. 8:** 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.
41. **Error No. 9:** 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.
42. **Error No. 10:** 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.
43. **Error No. 11:** 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.
44. **Error No. 12:** 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.

45. **Error No. 13:** 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.
46. **Error No. 14:** 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.
47. **Error No. 15:** 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 decision-making from the public participation process, in violation of the due process rights secured to the public by statutory and regulatory law.

48. **Error No. 16:** 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.
49. **Error No. 17:** TCEQ erred in approving WCS's application and conditionally issuing new radioactive material license R04100.
50. **Error No. 18:** 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 the application before WCS acquired all property interests;
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\
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