

Cause No. \_\_\_\_\_

<p><b>SIERRA CLUB,</b></p> <p style="text-align: center;"><b>Plaintiff</b></p> <p style="text-align: center;">v.</p> <p><b>TEXAS COMMISSION ON ENVIRONMENTAL QUALITY,</b></p> <p style="text-align: center;"><b>Defendant</b></p>	§ § § § § § § § § §	<p><b>IN THE DISTRICT COURT OF</b></p> <p style="text-align: center;"><b>TRAVIS COUNTY, TEXAS</b></p> <p style="text-align: center;">_____ <b>JUDICIAL DISTRICT</b></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 its motion for rehearing and granting the application of Waste Control Specialists, L.L.C., for new radioactive material license R05807. 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, permittee) 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.

## **III. JURISDICTION AND VENUE**

5. This Court has jurisdiction under Texas Government Code Section 2001.176(b)(1). Plaintiff timely filed a motion for rehearing of TCEQ’s decision, which was overruled by operation of law. All other conditions precedent required by Chapter 2001 of the Texas Government Code have been performed or have occurred.

6. Plaintiff also filed a suit on June 30, 2008, under Section 5.351 of the Texas Water Code and Section 401.341 of the Texas Health and Safety Code, to preserve its right to appeal, in the event this Court determines that its petition for judicial review is proper under those provisions of Texas law. Plaintiff intends to seek consolidation of that suit with the present one, as they involve identical facts.

#### **IV. FACTUAL BACKGROUND**

7. On June 21, 2004, Waste Control Specialists, L.L.C. (“WCS”) applied to the Texas Department of State Health Services (“DHS”) for a license to authorize the construction of a below-grade disposal facility to commercially dispose of by-product material. By-product material consists of tailings or wastes produced by or resulting from the extraction or concentration of uranium or thorium from ore processed primarily for its source material content, including discrete surface wastes resulting from uranium solution extraction processes. The application was transferred to and processed by TCEQ, in accordance with legislation enacted in 2007, which transferred responsibility for the regulatory program and review of the license application from DHS to TCEQ.<sup>1</sup>

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<sup>1</sup> While TCEQ has regulated the disposal of radioactive substances aside from by-product material and oil and gas “naturally occurring radioactive material” waste since September 1, 2003, the Texas Legislature consolidated regulation of the storage, processing and disposal activities associated with uranium mining and radioactive waste under TCEQ as of June 15, 2007, to include by-product material regulation. *See* S.B. 1604; Acts 2007, 80<sup>th</sup> Leg., ch. 1332, eff. June 15, 2007; Tex. Health & Safety Code § 401.2625.

As part of the Act transferring such authority to TCEQ, the Legislature directed the TCEQ to “continue any applications review or processing and any hearings that concern a matter subject to transfer

8. WCS's proposed facility is 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.
9. The approved license authorizes a landfill that covers approximately 16 acres and consists of up to six disposal units. It authorizes disposal of up to 1,169,000 cubic yards and a total radioactivity of 24,530 Curies of by-product material.
10. Sierra Club timely submitted a request for a contested case hearing regarding WCS's application.
11. 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.
12. 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

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. . . being conducted by the Health and Human Services Commission or the [DHS].” Acts 2007, 80<sup>th</sup> Leg., ch. 1332, § 33(j), eff. June 15, 2007.

The Act further directs the TCEQ to process applications for a new license to dispose of by-product material filed with DHS before January 1, 2007, according to the technical rules and regulations of DHS that were effective on June 15, 2007. Therefore, TCEQ's procedural rules apply to the application that is the subject of this Original Petition, but DHS's technical rules and regulations that were in effect on June 15, 2007, apply to the substantive review of the application.

participation of individual members in the case. *See* 30 Tex. Admin. Code § 55.252.

13. 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.
14. 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 if WCS’s application were approved.
15. 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.
16. Sierra Club explained in its hearing request that Ms. Gardner’s livelihood will potentially be affected in several ways by the WCS byproduct material disposal site: 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.

17. 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.
18. 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.
19. 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.
20. 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.
21. Ms. Williams and her family also use groundwater wells in the area.

22. 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.
23. The TCEQ Executive Director, in his response to comments received, acknowledged that numerous potentially significant aspects of the subsurface hydrogeology regime have yet to be characterized.
24. Given the uncertainties the Executive Director acknowledged, there is no basis on which to discount to “zero” Mrs. Gardner’s and Ms. Williams’ apprehensions about subsurface migration, over time, of wastes to the groundwater and to the wells.
25. 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.
26. Finally, neither Sierra Club’s asserted claims nor the requested relief (participation in a contested case hearing and denial of the requested permit) requires the participation of individual members.
27. 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 May 29, 2008.

28. Following TCEQ's decision, Sierra Club timely filed its Motion for Rehearing, on June 25, again pointing out the agency's error in denying Sierra Club's hearing request and granting WCS's application.
29. TCEQ took no action on Sierra Club's Motion, and it was therefore overruled by operation of law.

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

30. **Error No. 1:** TCEQ erred in determining that Sierra Club is not an affected person with justiciable interests entitled to a contested case hearing.
31. **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.
32. **Error No. 3:** TCEQ erred in determining that Sierra Club did not have a member who is an "affected person."
33. **Error No. 4:** TCEQ erred in failing to grant Sierra Club an opportunity to present evidence of its affected person status.
34. **Error No. 5:** TCEQ erred in denying Sierra Club's request for a contested case hearing.
35. **Error No. 6:** 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 R05807.

36. **Error No. 7:** TCEQ erred in determining that WCS satisfied all the regulatory requirements, found in 25 Tex. Admin. Code Chapter 289, pertaining to its application for new radioactive material license R05807.
37. **Error No. 8:** The TCEQ Executive Director, in his response to comments received, acknowledged that numerous potentially significant aspects of the subsurface hydrogeology regime have yet to be characterized: size of red-bed clay fractures, causes of Antlers formation deformities, consistent data on the 125-foot and 185-foot sand layers, consistent borehole data, the causes of gypsum in the Dockum clay fractures, and so forth. This further supports the assertion that WCS's application was deficient, and TCEQ erred in approving it.
38. **Error No. 9:** 25 Tex. Admin. Code § 289.260(o)(2) requires that the site's hydrogeologic characteristics achieve isolation of tailings and contaminants associated with tailings without ongoing human intervention. *See also* 25 Tex. Admin. Code § 289.260(f)(1)(A), which requires that the license application materials include descriptions of the area and the proposed site sufficient to allow this demonstration. Plaintiff alleges the license application materials so poorly characterized the site geology and hydrology as not, as a matter of law, to have provided the information necessary to allow the TCEQ to make this demonstration and that issuance of the license by the TCEQ, therefore, was legal error.
39. **Error No. 10:** The TCEQ's regulations establish various radiological limits for public exposure to radiation from mill tailings disposal. Plaintiff alleges the

license application materials so poorly demonstrated the impacts of off-site contamination by the windborne contamination pathway as not, as a matter of law, to have made the regulatorily-required demonstration and that the issuance of the license by TCEQ therefore was legal error.

40. **Error No. 11:** There is adjoining this proposed site a RCRA hazardous waste disposal site. Plaintiff alleges the license application materials so poorly demonstrated the impacts of this site and its contaminants on the operation of the proposed disposal site, particularly, the operational and post-operational monitoring required at that site, as not, as a matter of law, to have made the regulatorily-required demonstration of the impacts on the site of area features and that, therefore, the issuance of the license by TCEQ was legal error.
41. **Error No. 12:** 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. 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 procedural process rights secured to the public by statutory and regulatory law.

42. **Error No. 13:** Plaintiff alleges the license application materials did not adequately analyze alternatives to the essentially Subtitle C (RCRA) landfill design proposed for the site, and that the issuance of the license by TCEQ, therefore, was legal error.
43. **Error No. 14:** TCEQ erred in approving WCS's application and issuing new radioactive material license R05807.
44. **Error No. 15:** 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 denying Sierra Club's hearing request and remand for reconsideration of that decision or for an evidentiary hearing regarding the hearing request;
2. Reverse TCEQ's decision granting WCS's application for new radioactive material license R05807 and remand for denial of the application or for a full contested case hearing regarding the application; and

3. 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

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