

Cause No. _____

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

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 or other acts by Defendant Texas Commission on Environmental Quality (“TCEQ” or the “Commission”), authorizing Waste Control Specialists, LLC, (“WCS”) to begin accepting waste and to commence waste disposal activity under Radioactive Material License R04100. For support, Sierra Club respectfully shows the following:

I. CASE SUMMARY

This lawsuit arises as a result of TCEQ’s failure to comply with its own statutes, rules, orders, and license provisions with regard to low-level radioactive waste disposal operations. In particular, by this lawsuit, Sierra Club seeks review of TCEQ’s decision authorizing WCS to commence low-level radioactive waste disposal activities despite the fact that WCS has not yet complied with all TCEQ regulations and license provisions.

This case is related to: *Sierra Club v. Texas Commission on Environmental Quality and Waste Control Specialists, LLC*, Cause No. D-1-GN-09-000894 (consolidated) (hereinafter referred to as the “first lawsuit”). Both cases involve the same parties, the same underlying low-level radioactive waste disposal license (License No. R04100), and the same disposal facilities.

The first lawsuit challenged TCEQ’s January 20, 2009 decision, granting WCS a license to operate two low-level radioactive waste disposal facilities in Andrews County, Texas, and denying Sierra Club’s request for a contested case hearing.

By Final Order dated May 14, 2012, in Cause No. D-1-GN-09-000894, Presiding Judge Lora Livingston found that TCEQ’s decision denying Sierra Club’s hearing request and granting WCS’s application for its low-level radioactive waste disposal license was erroneous. Accordingly, she reversed the decision and remanded the matter to TCEQ to allow Sierra Club to participate in a contested case hearing.

By this lawsuit, Sierra Club challenges the Commission’s April 25, 2012 decision or act, authorizing WCS to begin accepting waste under its amended License R04100. Sierra Club seeks review of that decision and seeks to set aside or suspend the decision.

Sierra Club contends that TCEQ’s decision, authorizing WCS to begin accepting waste—despite the fact that WCS had not yet complied with all of its license conditions—is arbitrary and capricious, an abuse of discretion, made through improper procedure, and affected by error of law.

II. 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.

III. 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, Zak Covar, at 12100 Park 35 Circle, Austin, Texas.
4. WCS, the 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. Terry Scarborough, Hance Scarborough, LLP, 111 Congress Ave., Suite 500, Austin, Texas, 78701.

IV. 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.
7. Plaintiff Sierra Club timely filed a Motion to Overturn the Executive Director's decision that is the subject of this petition. All other conditions precedent have been performed or have occurred.

V. 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 authorizes the eventual construction and operation of two disposal facilities at a site located near the Texas—New Mexico state line, but only after several conditions have been satisfied. The first facility will accept low-level radioactive waste for commercial disposal of waste subject to the Texas Low-Level Radioactive Waste Disposal Compact (the “compact-waste facility”). The second will accept low-level radioactive waste that is the responsibility of the federal government (the “federal waste facility”).
11. WCS’s 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. This is approximately 30 miles west of the city of Andrews, Texas, and five miles east of the city of Eunice, New Mexico.
12. Importantly, the license does not authorize WCS to commence waste disposal operations. Rather, the license includes a number of conditions that WCS must comply with before it is authorized to commence waste disposal operations.
13. Sierra Club timely submitted a request for a contested case hearing regarding WCS’s application.
14. By its hearing request, 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.

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 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.
17. Moreover, 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.
18. 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.

19. 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.
20. Ms. Williams and her family also use groundwater wells in the area.
21. 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.
22. 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 were not yet fully 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.*"
23. 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.

24. The Commission's decision was memorialized in an Order dated January 20, 2009.
25. The Order issued by the Commission on January 20, 2009, did not authorize WCS to commence waste disposal operations; it only conditionally granted WCS's license application.
26. On September 10, 2009, the TCEQ Executive Director signed radioactive material license R04100; this license did not authorize WCS to commence waste disposal operations. Rather, it required WCS to comply with a number of conditions, including additional investigation of the sub-surface hydrology, before operations may commence.
27. Among the provisions included in the license is the requirement that if saturated conditions are detected in the buffer zone of the facilities, WCS must cease all waste disposal operations and immediately notify the Executive Director.
28. In December 2011, TCEQ staff noted that water was detected in two of the wells (OAG-21 and OAG-22) along the eastern border of the compact-waste facility, in the Buffer Zone. By letter dated December 14, 2011, TCEQ staff informed WCS of its concerns. TCEQ staff noted that although WCS was not yet conducting disposal operations at the time the letter was drafted, "the detection of water in the buffer zone is an Area of Concern (AOC)." Further, TCEQ staff reminded WCS that, in accordance with the license conditions, "in the event saturated conditions in the buffer zone are detected, [WCS] shall cease disposal operations and notify

the executive director immediately.” Finally, TCEQ staff instructed WCS to immediately address the Area of Concern before it commences disposal operations.

29. By letter dated December 22, 2011, WCS responded to TCEQ’s letter, explaining that the saturated conditions found in wells OAG-21 and OAG-22 were expected, and WCS has begun pumping and evacuating the groundwater from the “buffer zone.” WCS nevertheless proposed to continue to move forward with its plans to commence disposal operations in the northwest corner of the compact-waste facility. It also proposed to install two additional, temporary observation wells between the eastern buffer zone and the waste disposal area to ensure saturated conditions do not exist within one-hundred feet of the disposal unit. Finally, WCS explained that it expects that the pumping of groundwater in the eastern buffer zone will remove the saturated conditions there or as waste disposal operations continue to move east toward the buffer zone, *WCS may request relocation of the buffer zone to the east in an unsaturated area.* In other words, WCS informed TCEQ that if it (WCS) determined that the waste disposal units were getting too close to the saturated buffer zone, it might seek to move the buffer zone farther east to an area that is not saturated.
30. By letter dated February 6, WCS confirmed to TCEQ staff that the two proposed temporary observation wells were drilled and installed, and that pumping of the water detected in OAG-21 in the eastern “buffer zone” is ongoing.

31. By letter dated March 2, WCS informed TCEQ staff that pumping of groundwater in the area of OAG-21 in the eastern “buffer zone” remains ongoing. WCS also noted that the two temporary observation wells were dry.
32. Then, on March 28, WCS informed TCEQ that one of the temporary observation wells—the wells located between the waste disposal unit and the eastern buffer zone—detected a bit of water. WCS attributed the presence of this water in the temporary observation well to condensation.
33. By that same March 28 letter, WCS also indicated that pumping of the groundwater along the eastern boundary buffer zone remains ongoing, and predicted that “it will take 18 months [of pumping] to reduce the water level to the elevation of the OAG/Dockum contact,” so that the OAG aquifer unit will no longer be saturated in the area of the OAG-21 well. WCS further predicted that “to fully evacuate the groundwater from the previous playa, an additional 18 months . . . will be required.”
34. It is worth noting that as late as March 2012, WCS continued to admit that saturated conditions were detected in the Buffer Zone of the facility. And WCS informed TCEQ that it would take 18 months to evacuate the water. Yet, WCS never intended to cease waste disposal operations, in spite of the fact that the license prohibits waste disposal if saturated conditions are detected.
35. Instead, WCS informed TCEQ that it expected that the pumping of groundwater in the eastern buffer zone would eventually remove the saturated conditions there;

meanwhile, WCS indicated that it would proceed with waste disposal operations while it attempted to remove the saturated conditions in the buffer zone. If the saturated conditions were not removed as quickly as anticipated, WCS informed TCEQ that as waste disposal operations continue to move east toward the buffer zone, WCS *may request relocation of the buffer zone* to the east in an unsaturated area. In other words, WCS had no intention of ceasing waste disposal operations even though it admitted that saturated conditions were detected in the buffer zone.

36. The above-described letters reveal the presence of groundwater beneath the WCS site, and the extent of that water is not fully known. Not only does the groundwater exist in the eastern buffer zone, but some water was detected in the temporary observation well that is located between the buffer zone and the waste disposal unit—that is, water has been detected within the facility footprint.
37. Nevertheless, TCEQ authorized WCS to begin accepting waste. The justification for this decision is less than clear. Written communications by the Executive Director, however, reveal an inconsistent interpretation of the license provisions—one that had not been previously expressed by TCEQ staff nor by WCS.
38. By letter dated April 25, 2012, addressed to the Honorable Lon Burnam, the Executive Director stated that there has been no detection of saturated conditions within 100 feet from the “constructed Compact Waste Disposal Facility cell.” It is not clear what the intent of this statement is. It appears, however, that the Executive Director has implicitly revised the requirements imposed by License

No. R04100. Rather than requiring WCS to demonstrate that there are no saturated conditions within 100 feet of the facility, WCS now must demonstrate only that there are no saturated conditions within 100 feet of the “constructed Compact Waste Disposal Facility cell.” It appears that the Executive Director has revised the definition of the buffer zone.

39. This new interpretation of the license is not supported by the language in the license.¹
40. The written communications between the Executive Director’s staff and WCS during the period of December 2011 through March 2012 also do not support this interpretation. These letters clearly reveal that both TCEQ staff and WCS understood the buffer zone to be the area within 100 feet of the compact-waste facility and that WCS was required to monitor for saturated conditions within this area. Sierra Club was not provided any notice of any revision to this license requirement.
41. Even if the Executive Director’s new interpretation of the license provisions were a proper and accurate interpretation, and WCS were required to monitor for saturated conditions only within 100 feet of the disposed waste (versus within 100

¹ License Requirement 67 of the license states that WCS shall maintain a buffer zone 100 feet around all “disposed waste.” And Requirement 68 mandates a buffer zone for the “compact waste disposal facility,” not simply the “unit” in which waste has already been disposed.

Read together, both requirements 67 and 68 contemplate monitoring for saturated conditions within the buffer zone, which includes the area around the disposal facility, as the communications between WCS and TCEQ staff recognize.

- feet of the compact-waste facility), WCS has still failed to comply with the license provisions. WCS has no monitoring wells within 100 feet of the disposed waste.
42. The existing OAG wells that had been identified by WCS as monitoring wells in the buffer zone (OAG-21 and OAG-22) are not within 100 feet of the disposed waste.
 43. In addition, the two new temporary observations wells (OW-1 and OW-2) are also not within 100 feet of the disposed waste.
 44. Moreover, the temporary observation wells do not support WCS's hypothesis that there are no saturated conditions within this area.
 45. Mr. George Rice, a hydrologist with over 20 years of experience in groundwater contamination investigations, reviewed the WCS groundwater data and prepared an expert report, which Sierra Club submitted to TCEQ along with its Motion to Overturn. As explained by Mr. Rice in his expert report, groundwater exists in the buffer zone surrounding the compact-waste facility, and it occurs in both the more shallow OAG aquifer unit and the upper portion of the Dockum Group, which lies just below the OAG unit.
 46. Mr. Rice further opined that groundwater exists within the facility itself, not only in the buffer zone. At least some of the water in the temporary observation well is from the upper portion of the Dockum Group, and not the result of condensation, as WCS hypothesized.

47. The groundwater levels in the facility fluctuate, according to Mr. Rice. Thus, some portions of the OAG unit and the upper Dockum Group are alternately saturated and unsaturated.
48. And finally, near the northwest portion of the facility, a lobe of groundwater in the OAG unit appears to have moved toward the facility and then retreated from the facility. Mr. Rice opined that there is nothing to prevent this groundwater from entering the facility in the future.
49. Mr. Rice's report provides further evidence of the existence of saturated conditions at the compact-waste facility. Yet, TCEQ has, to date, refused to rescind or overturn its decision authorizing WCS to commence waste disposal activities.
50. Moreover, on May 14, 2012, a Travis County District Court reversed TCEQ's decision to issue WCS License No. 04100. The Court determined that TCEQ should have granted Sierra Club a hearing before issuing the license.
51. In light of the Court's decision, WCS does not presently possess an effective license and should not be accepting waste.

VI. ERRORS OF DEFENDANT TCEQ

52. **Error No. 1:** The Commission's April 25 waste-acceptance-authorization decision was arbitrary and capricious, an abuse of discretion, made through improper procedure, and affected by error of law because WCS failed to comply with the license conditions imposed by the TCEQ; WCS failed to satisfy the

prerequisites necessary for waste acceptance and disposal activities. The license prohibits waste disposal operations when saturated conditions are detected. Saturated conditions have been detected in the buffer zone. Accordingly, the Commission's decision authorizing waste acceptance and disposal activities was erroneous.

53. **Error No. 2:** The Commission's April 25 waste-acceptance-authorization decision was arbitrary and capricious, an abuse of discretion, made through improper procedure, and affected by error of law because the decision has resulted in an improper and illegal modification of the license provisions. More specifically, rather than requiring WCS to monitor the buffer zone, as mandated by the license, the Executive Director instead warns WCS that "[i]t is important to ensure that saturated conditions do not exist within 100 feet of the disposed waste." In other words, although WCS and the Executive Director had previously understood the license to require monitoring for saturated conditions within 100 feet of the disposal facility (as reflected in their written communications), the Executive Director appears to have modified this requirement. Now, WCS must ensure that saturated conditions do not exist within 100 feet of the disposed waste (even though there was no disposed waste at the time the April 25 letter was issued, and thus, presumably, no buffer zone). This implicit license revision was made without any notice to the public.

54. **Error No. 3:** Even if the Executive Director's new interpretation of the license requirements were valid, WCS has failed to demonstrate that no saturated conditions exist within 100 feet of the disposed waste. This is, in part, because there are no monitoring wells within 100 feet of the disposed waste. And the temporary observation wells do not demonstrate a lack of saturated conditions. To the contrary, at least one of these temporary observation wells has detected water. By authorizing waste acceptance in violation of the license provisions that require monitoring for saturated conditions within the buffer zone, TCEQ's decision is arbitrary, capricious, an abuse of discretion, made through improper procedure, and affected by error of law.
55. **Error No. 4:** The Commission's decision is arbitrary, capricious, an abuse of discretion, made through improper procedure, and affected by error of law because the authorization of disposal activities, when saturated conditions clearly exist, violates the Legislature's mandate to protect the public's health, safety, and the environment.
56. **Error No. 5:** The Commission's decision is arbitrary, capricious, an abuse of discretion, made through improper procedure, and affected by error of law because the authorization of disposal activities, when saturated conditions clearly exist, violates Chapter 401 of the Health and Safety Code and the Commission's own rules.

57. **Error No. 6:** The Commission's decision is arbitrary, capricious, an abuse of discretion, made through improper procedure, and affected by error of law because the authorization of disposal activities, when saturated conditions clearly exist, 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 failed to sufficiently consider the aforementioned factors, because it lacks sufficient information to adequately consider the presence of saturated conditions at the site.
58. **Error No. 7:** The Commission's decision is arbitrary, capricious, an abuse of discretion, made through improper procedure, and affected by error of law because Sierra Club was not provided notice of this decision, and this decision has resulted in a denial of Sierra Club's procedural due process rights.
59. **Error No. 8:** Because a district court has now determined that License No. R04100 should not have been issued without providing Sierra Club a contested case hearing, the Commission's decision authorizing WCS to begin accepting waste under that license is similarly erroneous.
60. **Error No. 9:** The Commission exceeded its statutory authority by authorizing WCS to begin accepting waste despite WCS's failure to comply with TCEQ's rules and license provisions.

61. **Error No. 10:** The Commission's decision determining that WCS has sufficiently complied with TCEQ rules and license provisions to allow waste disposal activities to commence, without providing public notice or an opportunity for Sierra Club to participate in a contested case hearing, effectively removes aspects of decisionmaking from the public participation process, in violation of the due process rights secured to the public by statutory and regulatory law. The Commission ultimately authorized waste disposal activities based on information that was required by statute, rules, and the license itself, but that was never made available to the public for review.

VII. RELIEF REQUESTED

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

1. Reverse TCEQ's decision authorizing WCS to accept for disposal low-level radioactive waste and to begin waste disposal activity, and render a decision that TCEQ's decision is arbitrary and capricious, an abuse of discretion, made through improper procedure or affected by error of law;
2. Reverse TCEQ's decision authorizing WCS to accept for disposal low-level radioactive waste and to begin waste disposal activity and remand for reconsideration of that decision;
3. Set aside the Commission's decision authorizing WCS to accept for disposal low-level radioactive waste and to begin waste disposal activity because the decision is

arbitrary and capricious, an abuse of discretion, made through improper procedure or affected by error of law;

4. Suspend the Commission's decision authorizing WCS to accept for disposal low-level radioactive waste and to begin waste disposal activity until after a contested case hearing is held, in accordance with the district court's Order in Cause No. D-1-GN-09-000894; and/or
5. Grant such further relief at law or in equity, including injunctive relief, as to which Sierra Club may show itself entitled.

Respectfully submitted,

LOWERRE, FREDERICK, PERALES,
ALLMON & ROCKWELL

By: _____\s_____
Marisa Perales,
SBT No. 24002750

707 Rio Grande., Ste. 200
Austin, Texas 78701
(512) 469-6000 / 482-9346 (facsimile)

COUNSEL FOR SIERRA CLUB