

STATE OF NEW MEXICO  
WATER QUALITY CONTROL COMMISSION



**IN THE MATTER OF:**  
**WASTE CONTROL SPECIALISTS LLC'S** )  
**PETITION FOR REVIEW AND NOTICE** )  
**OF APPEAL OF THE GROUND WATER** )  
**QUALITY BUREAU OF THE** )  
**NEW MEXICO ENVIRONMENT** )  
**DEPARTMENT'S REJECTION OF WASTE** )  
**CONTROL SPECIALISTS LLC'S** )  
**WITHDRAWAL OF ITS APPLICATION FOR** )  
**DISCHARGE PERMIT AND** )  
**DETERMINATION THAT A DISCHARGE** )  
**PERMIT IS REQUIRED** )  
  
**WASTE CONTROL SPECIALISTS LLC,** )  
  
**Petitioner.** )

**Docket No.**  
**WQCC 16-06 (A)**

**WASTE CONTROL SPECIALISTS LLC'S PETITION FOR REVIEW AND NOTICE OF APPEAL OF THE GROUND WATER QUALITY BUREAU OF THE NEW MEXICO ENVIRONMENT DEPARTMENT'S REJECTION OF WASTE CONTROL SPECIALISTS LLC'S WITHDRAWAL OF ITS APPLICATION FOR DISCHARGE PERMIT AND DETERMINATION THAT A DISCHARGE PERMIT IS REQUIRED**

Waste Control Specialists LLC ("WCS") hereby submits this Petition for Review and Notice of Appeal of the Ground Water Quality Bureau of the New Mexico Environment Department's ("NMED") rejection of WCS' withdrawal of its application for a discharge permit and NMED's determination that a discharge permit is required pursuant to NMSA 1978, Section 74-6-5 and 20.6.2.3112 NMAC.

**I. INTRODUCTION**

WCS submits this Petition for Review and Notice of Appeal to the Water Quality Control Commission ("Commission") appealing both NMED's February 9, 2017 rejection of WCS' withdrawal of its application for a discharge permit that was submitted to the agency on January 22, 2017 and NMED's determination set forth in its February 9, 2017 letter that a discharge

permit is required for discharges of stormwater from what is known as "Outfall 002" located at the WCS site. The WCS facilities are in State of Texas, although it owns adjacent lands on the New Mexico side of the border including lands that are in the pathway of any stormwater that crosses into New Mexico from Texas. The WCS Outfall 002 is physically located in the State of Texas and is currently regulated under a Texas Pollution Discharge Elimination System ("TPDES") Permit, Permit No. 4038. A copy of WCS' notice of withdrawal is attached hereto as **Exhibit A** and a copy of NMED's determination is attached hereto as **Exhibit B**. WCS requests the Commission consider and reverse the determination of NMED and find that WCS is authorized to withdraw its application for a discharge permit. Further, WCS requests the Commission find that WCS is not required to obtain a discharge permit, as further described below. WCS has standing under NMSA 1978 § 74-6-5(O) and 20.6.2.3112 NMAC to file this Petition for Review and Notice of Appeal.

## **II. STATEMENT OF ISSUES**

WCS raises two primary issues in this Petition for Review and Notice of Appeal. The first is whether NMED has the authority to deny WCS' notice of withdrawal of its discharge permit application and proceed to issuance of a permit based on the withdrawn application. The second issue is whether NMED has the authority and jurisdiction to require WCS to apply for and obtain a discharge permit. Each of these issues are briefly highlighted in this Statement of Issues section in sufficient detail to explicate what the Commission will need to decide in this appeal, and they will be more fully briefed and explained, with citations to the administrative record, in due course under the Commission's procedures.

**1. FIRST ISSUE ON APPEAL: NMED DOES NOT HAVE THE AUTHORITY TO DENY WCS' WITHDRAWAL OF ITS DISCHARGE PERMIT APPLICATION**

WCS originally submitted its application for a discharge permit to the NMED based on a good faith but mistaken understanding that a discharge permit was required. Moreover, WCS believes that the WCS' notice of intent, filed October 17, 2012, and WCS' original permit application, filed WCS July 12, 2013, contain incomplete information. WCS subsequently produced to NMED new and specific data that demonstrates that neither a notice of intent to discharge nor a discharge permit is required. WCS has provided NMED with all of its evidence that supports a finding that a discharge permit is not required. Accordingly, on February 1, 2017, WCS submitted a notice of withdrawal of its application for a discharge permit to NMED. In a letter dated February 9, 2017, NMED declined to accept WCS' withdrawal of its application for a groundwater discharge permit. According to NMED's letter, there purportedly is no law or regulation that compels the Department to accept the withdrawal of a discharge permit application. Despite this purported justification for its refusal to accept WCS' withdrawal, this Commission's regulation at 20.6.2.3114.B NMAC provides that "[f]acilities applying for discharge permits which are subsequently withdrawn or denied shall pay one-half of the permit fee at the time of denial or withdrawal." This provision clearly contemplates that an applicant may withdraw an application for a discharge permit. While there is not a regulatory mandate that NMED accept permit application withdrawals, NMED's search for such a mandate poses the wrong question. The question here is whether NMED has any legal basis for continuing to process a permit application after the applicant withdraws its application as allowed under 20.6.2.3114.B NMAC. In this instance, NMED's attempt to proceed with processing a permit against the wishes of the applicant, and after the applicant has withdrawn its application, is both contrary to law and is arbitrary and capricious action on the part of the agency. As WCS will



explain more fully in the briefing that will occur under the Commission's adjudicatory procedures, proceeding with permitting while WCS contests NMED's authority to do so is wholly inappropriate, places an undue burden and expense on WCS and is misleading to the public in advance of a determination by the Commission on the issues raised in this appeal.

**2. SECOND ISSUE ON APPEAL: WHETHER NMED HAS THE AUTHORITY OR JURISDICTION TO REQUIRE A DISCHARGE PERMIT**

This second issue constitutes the ultimate question NMED decided in its February 9, 2017 determination letter that is Exhibit B hereto. After a lengthy period of back and forth consisting of meetings, letters and exchanges of information between WCS and NMED in recent months, NMED's letter determination states that "[t]he Department disagrees with WCS' position that there is no reason or jurisdictional basis to require a discharge permit for the discharges of stormwater [covered under TPDES Permit No. 4038]." This determination is appealable under 20.6.2.3112.B NMAC, which provides in relevant part: "If the secretary determines that a discharger is not exempt from obtaining a discharge permit . . . then the discharger may appeal such determination by filing with the commission's secretary a notice of appeal to the commission within 30 days after receiving the secretary's written determination . . . ." Among the sub-issues this Commission will need to consider under this ultimate issue are the following three points.

**a) The stormwater discharges occur in the State of Texas, not New Mexico**

Outfall 002 is located in Andrews County, Texas. Discharges from Outfall 002 are all regulated stormwater discharges that are located in the State of Texas. Because Outfall 002 discharges occur in Texas near the border from New Mexico, during rare large storm events, permitted stormwater from this outfall has the potential to flow across the border into New Mexico at the surface, but when it does reach New Mexico, its legal status is as surface

stormwater that is in full compliance with the Clean Water Act; accordingly, there is no “discharge” within the State of New Mexico for purposes of triggering groundwater jurisdiction of NMED.

**b) The discharges are non-contact stormwater that are already permitted by the appropriate regulatory authority with jurisdiction—the Texas Commission on Environmental Quality—pursuant to the federal Clean Water Act**

Outfall 002 is already subject to TPDES Permit No. 4038, which authorizes discharge of stormwater subject to certain effluent limitations. Pursuant to New Mexico’s groundwater discharge permit regulations, discharges which are subject to effective and enforceable effluent limitations in an NPDES permit are exempt from the requirement to obtain a New Mexico groundwater discharge permit unless the secretary determines that a hazard to public health may result. *See* 20.6.2.3105.F NMAC. NMED has made no determination that a hazard to public health may result, nor could it reasonably do so. Any stormwater crossing the border from Texas into New Mexico onto WCS property is non-contact stormwater, meaning the stormwater does not come into contact with materials disposed of at WCS’ facilities. The non-contact stormwater is properly regulated by TCEQ, which, unlike New Mexico, has delegated authority to issue stormwater discharge permits under Section 402 of the Clean Water Act. Because discharges from Outfall 002 are subject to TPDES Permit No. 4038, a valid exemption exists from the requirement to obtain a groundwater permit from NMED in New Mexico. Groundwater quality-based effluent limitations are not required.

**c) There is no evidence that groundwater will be infiltrated**

The administrative record available when NMED considered and made its February 9, 2017 decision that WCS was not exempt from discharge permitting contains ample and unrefuted evidence that stormwater discharged from Outfall 002 that might travel into New Mexico in large storm events is incapable of reaching groundwater. Groundwater is defined as “interstitial

water which occurs in saturated earth material and which is capable of entering a well in sufficient amounts to be utilized as a water supply.” 20.6.2.7.Z NMAC. WCS has confirmed, and NMED has not credibly refuted, that there is no groundwater meeting this definition in the path of the stormwater discharges from Outfall 002. During its back and forth with NMED leading to NMED’s February 9 determination letter, WCS even went so far as to drill a well in the projected path of stormwater discharges from Outfall 002 on private lands it owns on the New Mexico side of the border. The drilling log from that well, which extended part way into the upper layer of a highly impermeable clay feature that has been determined to be thick and widespread in the area, confirms the absence of groundwater capable of entering a well in sufficient amounts to be utilized as a water supply. In fact the well was dry, despite recent heavy rain events at the site. WCS has also provided NMED with ample technical studies to demonstrate the absence of groundwater in the trajectory of any stormwater flows from Outfall 002, while NMED has produced no credible evidence suggesting any ability of surface stormwater flows to reach anything meeting New Mexico’s regulatory definition of groundwater.

### **III. REQUEST FOR STAY OF FURTHER PERMITTING PROCEEDINGS BY NMED**

In NMED’s February 9, 2017 letter determination, NMED appears intent upon continuing proceedings on WCS’ withdrawn permit application. Accordingly, WCS respectfully requests the Commission order a stay of further permit proceedings pending the determination of this Petition for Review and Notice of Appeal. The Commission has the discretion to order a stay pursuant to 20.6.2.3112.A NMAC. In this instance, as stated in NMED’s February 9 letter, NMED intends to move forward in processing WCS’ withdrawn permit application by publishing a second public notice before the end of February. To conserve administrative resources and costs, and an orderly manner of proceeding that will not hold WCS hostage to a



potentially avoidable public process on a permit that has been withdrawn, WCS requests the Commission to order a stay of NMED's processing of the application until this appeal is decided.

**IV. THE COMMISSION SHOULD REVERSE NMED'S DETERMINATION AND (1) REQUIRE NMED TO ACCEPT WCS' WITHDRAWAL OF ITS DISCHARGE PERMIT APPLICATION AND (2) FIND THAT A DISCHARGE PERMIT IS NOT REQUIRED**

For the reasons briefly set forth in Sections II and III, *supra*, a discharge permit is not required for the non-contact stormwater discharges from Outfall 002, located in the State of Texas, and NMED has no basis to reject WCS' notice of withdrawal of its application for a discharge permit. WCS has submitted sufficient factual and legal reasons to NMED supporting a determination that there is no jurisdiction for a New Mexico groundwater permit for stormwater discharges from Outfall 002, which is covered by an existing TPDES permit. Accordingly, WCS will respectfully request in this appeal that NMED's February 9, 2017 determination letter be reversed as contrary to law, as arbitrary and capricious, and as against the weight of substantial evidence. WCS respectfully requests that the Commission stay further permitting proceedings by NMED, mandate that NMED is required to accept WCS' lawful withdrawal of its discharge permit application, and order that no discharge permit is required.

Respectfully Submitted,


**MODRALL, SPERLING, ROEHL, HARRIS  
& SISK, P.A.**

By: 


Stuart R. Butzier  
Christina C. Sheehan  
Attorneys for Waste Control Specialists LLC  
Post Office Box 2168  
Albuquerque, New Mexico 87103-2168  
Telephone: 505.848.1800

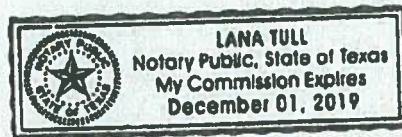
STATE OF TEXAS                    )  
  ) ss.  
COUNTY OF ANDREWS            )

I swear or affirm under oath that I have read this Petition for Review and Notice of Appeal, that all the information contained therein is true, correct and complete to the best of my knowledge and belief, and that I am authorized by Waste Control Specialists LLC to make this declaration.

  
\_\_\_\_\_  
Elicia Sanchez  
Senior Vice President and General Manager  
Waste Control Specialists LLC

Subscribed and sworn before me this 22 day of February, 2017.

  
\_\_\_\_\_  
Notary Public



My commission expires: 12-01-2019



**CERTIFICATE OF SERVICE**

I hereby certify that Waste Control Specialists LLC's Petition for Review and Notice of Appeal of The Ground Water Quality Bureau of the New Mexico Environment Department's Determination that a Discharge Permit is Required and Rejection of Waste Control Specialists LLC's Withdrawal of Application for Discharge Permit was hand-delivered and emailed to:

Pam Castaneda  
Commission Administrator  
Water Quality Control Commission  
New Mexico Environment Department  
1190 Saint Francis Drive  
Santa Fe, NM 87502  
Pam.Castaneda@state.nm.us

And emailed and mailed to all those listed below on February 22, 2017.

Bruce Yurdin, Director  
Water Protection Division  
New Mexico Environment Department  
1190 Saint Francis Drive  
Santa Fe, NM 87502  
Bruce.Yurdin@state.nm.us

Michelle Hunter, Chief  
Ground Water Quality Bureau  
New Mexico Environment Department  
1190 Saint Francis Drive  
Santa Fe, NM 87502  
Michelle.Hunter@state.nm.us

Lara Katz  
Assistant General Counsel  
New Mexico Environment Department  
1190 Saint Francis Drive  
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Lara.Katz@state.nm.us

**MODRALL, SPERLING, ROEHL, HARRIS  
& SISK, P.A.**

By: 

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Christina C. Sheehan  
Attorneys for Attorneys for Waste Control Specialists LLC  
Post Office Box 2168  
Albuquerque, New Mexico 87103-2168  
Telephone: 505.848.1800



February 1, 2017

Michelle Hunter, Bureau Chief  
Ground Water Quality Bureau  
New Mexico Environment Department  
1190 Saint Francis Drive  
Santa Fe, NM 87502

Re: Withdrawal of Waste Control Specialists' Groundwater Discharge Permit 1817  
Application for its Facility in Andrews County, Texas

Dear Ms. Hunter:

As we have discussed extensively in recent months, supported by voluminous materials we have asked NMED to consider, and multiple meetings both at NMED and at the WCS site, WCS believes that NMED has no reason or jurisdictional basis to continue with New Mexico's groundwater discharge permitting process for stormwater discharges at WCS' facility in Andrews County that are already permitted by Texas under the Section 402 Clean Water Act program. Accordingly, WCS hereby withdraws its groundwater discharge permit application.

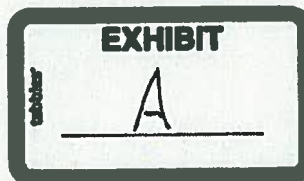
Thank you.

Best Regards,

A handwritten signature in cursive script that reads "Elicia Sanchez".

Elicia Sanchez  
Senior Vice President and General Manager  
Waste Control Specialists LLC

Corporate  
5430 LBJ Freeway, Ste. 1700  
Three Lincoln Centre  
Dallas, TX 75240  
972-715-9800  
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Fax 432-525-8902





SUSANA MARTINEZ  
Governor

JOHN A. SANCHEZ  
Lieutenant Governor

NEW MEXICO  
ENVIRONMENT DEPARTMENT

*Harold Runnels Building*  
1190 South St. Francis Drive (87505)  
P.O. Box 5469, Santa Fe, New Mexico 87502-5469  
Phone (505) 827-2900 Fax (505) 827-2965  
[www.env.nm.gov](http://www.env.nm.gov)



BUTCH TONGATE  
Cabinet Secretary - Designate

J.C. BORREGO  
Deputy Secretary

**CERTIFIED MAIL – RETURN RECEIPT REQUESTED**

February 9, 2017

Elicia Sanchez, Senior Vice President and General Manager  
Waste Control Specialists, LLC  
P.O. Box 1129  
Andrews, TX 79714

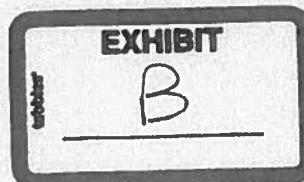
**Re: Withdrawal of Waste Control Specialists' Groundwater Discharge Permit  
1817 Application for its Facility in Andrews County, Texas**

Dear Ms. Sanchez:

The Ground Water Quality Bureau of the New Mexico Environment Department ("Department") has received your letter dated February 1, 2017, purporting to withdraw Waste Control Specialists, LLC's ("WCS") application for Groundwater Discharge Permit 1817 ("Application") for its facility in Andrews County, Texas ("Facility"). The Application seeks a permit for discharges of stormwater from what is known as "Outfall 001" under TPDES Permit No. 4038 (this was formerly "Outfall 002" under TPDES Permit No. 4857). Outfall 001 is located approximately 100 yards from the New Mexico state line, and stormwater discharges from that outfall can and do flow across the border into New Mexico.

This letter is to inform you that the Department declines to accept withdrawal of the Application. The Department disagrees with WCS's position that there is no reason or jurisdictional basis to require a discharge permit for the discharge from Outfall 001, particularly given WCS's actions in securing the removal of New Mexico effluent standards from the applicable Texas surface water permit based on representations to the Texas Commission on Environmental Quality that WCS would obtain a groundwater discharge permit from New Mexico.

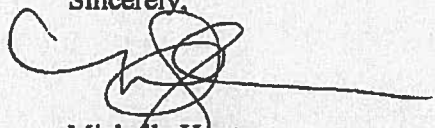
There is no law or regulation that compels the Department to accept the withdrawal of a discharge permit application where there has been no change in process resulting in elimination of the discharge for which the application was originally submitted, and where the Department believes a permit is required pursuant to the New Mexico Water Quality Act, NMSA 1978, §§ 74-6-1 through -17, and the New Mexico Water Quality Control Commission's regulations at 20.6.2 NMAC.



Elicia Sanchez  
February 9, 2017  
Page 2 of 2

Accordingly, the Department intends to move forward with the additional public notice process we have discussed with WCS in our previous meetings and correspondence. We expect that the amended draft of DP-1817 will be released for public comment before the end of February.

Sincerely,

A handwritten signature in black ink, appearing to be "Michelle Hunter", with a long horizontal line extending to the right.

Michelle Hunter  
Chief, Ground Water Quality Bureau

Cc: Stuart Butzier, Counsel for WCS  
Bruce Yurdin, Director, NMED Water Protection Division  
Lara Katz, Assistant General Counsel, NMED