

Velva L. Price  
District Clerk  
Travis County  
D-1-GN-16-003243  
Ruben Tamez

D-1-GN-16-003243  
Cause No. \_\_\_\_\_

<p><b>CONCERNED ABOUT POLLUTION,</b></p> <p style="text-align: center;"><b>Plaintiff</b></p> <p style="text-align: center;">v.</p> <p><b>RAILROAD COMMISSION OF TEXAS,</b></p> <p style="text-align: center;"><b>Defendant</b></p>	<p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</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;">200TH</p> <p style="text-align: center;">_____ <b>JUDICIAL DISTRICT</b></p>
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**PLAINTIFF'S ORIGINAL PETITION**

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff Concerned About Pollution ("CAP" or "Plaintiff") files this its Original Petition seeking judicial review of decisions by Defendant Railroad Commission of Texas ("Defendant" or "Railroad Commission") in issuing its "Final Order," which resulted in the approval of the application by Pyote Reclamation Systems, LLC ("Pyote") to operate a 204-acre commercial oil and gas waste disposal and land treatment facility in the rural community of Nordheim, Texas.

**I. CASE SUMMARY**

1. This lawsuit arises out of a decision by the Railroad Commission granting the permit application of Pyote. This permit allows Pyote to construct and operate a 204-acre commercial oil and gas waste disposal and land treatment facility in a rural community in DeWitt County, Texas, to dispose of oil and gas exploration and production waste on its property.

2. The Railroad Commission initially denied the application after determining that the proposed facility may cause or allow pollution to surface or subsurface waters. The Commission advised that an amended application would be considered by staff if a number of issues were addressed and outlined at least 40 issues to be addressed.
3. Pyote subsequently submitted an amended application, but its amended application failed to address all of the outlined issues.
4. Pyote then proceeded to supplement or revise its application four more times before the Commission's staff declared the application administratively complete.
5. CAP, an organization consisting of residents from DeWitt County, including residents who own property adjacent to the proposed facility, opposed Pyote's requested permit and sought an administrative hearing.
6. After the application had been declared complete by staff, but before an administrative hearing was convened, Pyote again revised its application, to replace the deficient storm water management plan included in its application. As a result of this new storm water management plan, the facility was also re-designed.
7. An administrative hearing was convened in September 2014, resulting in a proposal for decision that recommended granting the requested permit to Pyote.
8. On September 15, 2015, the Commission considered the hearing examiners' proposal for decision during a public meeting. The Commissioners voted to

- remand the matter to the hearing examiners for further consideration of the storm water management design for the proposed facility.
9. Pyote attempted to prevent the hearing examiners from convening a second administrative hearing, but it failed in its attempt, and a second administrative hearing was convened in December 2015 to consider further revisions to Pyote's storm water management design.
  10. Following the second administrative hearing, the hearing examiners recommended issuance of the permit with revisions to the storm water management design and to the proposed financial security.
  11. The proposal for decision was considered by the Commission during a public meeting on May 3, 2016, and the Commission voted to grant Pyote's permit application.
  12. On May 27, 2016, CAP timely filed its motion for rehearing regarding the Commission's decision, and on June 1, CAP timely filed its Amended Motion for Rehearing. The motions were overruled by order of the Commission dated June 21, 2016.

## **II. DISCOVERY**

13. 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.

### III. PARTIES

14. Plaintiff. CAP is a membership organization, consisting of individuals owning land in DeWitt County, Texas. Most of CAP's members reside or own property near the proposed facility, and several own property adjacent to the proposed facility.
15. The organization's purpose is to protect public health, air quality, the natural resources and environment, and the quality of life in the DeWitt County area.
16. CAP and its members participated in the Railroad Commission administrative hearing that culminated in the Commission's Final Order.
17. CAP's members are aggrieved by the Commission's Final Order, inasmuch as their properties, surface and ground water will be negatively impacted and will be placed at greater risk of contamination by the operation of the proposed waste facility. They will also suffer elevated risks of harm from the increased industrial truck traffic associated with the waste disposal on roads that are ill-equipped to handle such traffic.
18. Defendant. The Railroad Commission of Texas is the state agency that issued the Final Order that is the subject of this Original Petition. Defendant may be served with process by service on its Secretary, Ms. Kathy Way, at 1701 North Congress Avenue, 12<sup>th</sup> Floor, Austin, Texas, 78701.
19. The Applicant (and now, Permittee) Pyote Reclamation Systems, LLC will be served with a copy of this petition via certified mail addressed to John Soule, Scott

Douglass & McConnico, LLP, 303 Colorado Street, Suite 2400, Austin, Texas, 78701.

### III. JURISDICTION AND VENUE

20. This Court has jurisdiction under Texas Government Code Section 2001.176(b)(1). Plaintiff timely filed a motion for rehearing of the Railroad Commission's decision, which was overruled by operation of law.

21. Venue is proper in Travis County, Texas, per the foregoing statutory provision.

### IV. ERRORS OF DEFENDANT RAILROAD COMMISSION

**22. Error No. 1: Failure to adhere to rules prohibiting multiple supplements or revisions to application.**

23. Allowing Pyote to supplement and revise its application multiple times was a violation of Commission rules.

24. Railroad Commission Rule 1.201 provides specific and strict limitations on how many submissions a permit applicant may submit to staff to complete its application:

An applicant may make no more than two supplemental filings to complete an application. The Initial Review Period shall start again each time the division or section receives a supplemental filing relating to an incomplete application. After the second supplemental submission, if the application is complete, the division or section shall administratively rule on the application; if the application is still incomplete, the division or section shall administratively deny the application. *The division or section specifically does not have the authority to accept or review any other additional supplemental submissions.*

16 Tex. Admin. Code § 1.201 (emphasis added).

25. In this case, Pyote initially submitted an application, which staff ultimately denied because the application remained incomplete after two supplemental submissions. Pyote then submitted a revised application, which staff determined to be complete, after several (at least four more) supplemental submissions. But it later became evident that the information in the application was still inaccurate—in particular, with regard to the surface water management plan. And so, the application had to be revised yet again. Pyote submitted a revised surface water management plan to replace its original one, just before the administrative hearing commenced.

26. Allowing Pyote to continue to revise and supplement its application, on multiple occasions, violated the Commission's rules, and the decision to issue the permit was thus arbitrary and capricious, made through unlawful procedure, an abuse of discretion, and exceeded the Commission's authority.

**27. Error No. 2: Failure to identify the proper entity, responsible for operations, on the permit.**

28. Pyote is not the entity that intends to own and operate the facility and should not have been granted a permit.

29. During the administrative hearing, Pyote produced Mr. Sammy Cooper as its witness to sponsor the application materials submitted to the Commission and that were the subject of the administrative hearing. But Mr. Cooper is not even associated with Pyote. He was hired by Petro Waste Environmental almost a year after Pyote first submitted its application to the Railroad Commission.

30. Mr. Cooper was unable to authenticate the application and was unfamiliar with many of its contents; nor could Mr. Cooper offer reliable testimony regarding Pyote and its proposed operations.

31. This resulted in at least two additional errors: (1) admission of the application materials via Mr. Cooper was an abuse of discretion and made through unlawful procedure; and (2) granting the permit to Pyote, who admittedly does not intend to own or operate the facility, was arbitrary and capricious, not reasonably supported by substantial evidence, and made through unlawful procedure.

**32. Error No. 3: Findings of Fact 6a and b (regarding suitability of soils) are in error.** These findings are not reasonably supported by substantial evidence.<sup>1</sup>

33. CAP presented substantial, compelling evidence demonstrating that highly erodible soils, such as caliche, are present at shallow levels at the site, and these soils are not suitable for the proposed facility operations.

34. The Railroad Commission's guidance document recommends, for a facility such as the one proposed by Pyote, a site that is conducive to protection against erosion. The Pyote site does not satisfy this requirement. Indeed, the evidence presented demonstrates that the Pyote site consists of historically highly erodible soils. Even the hearing examiners, in their PFD, acknowledged that the available on-site soils have not been demonstrated to be suitable material for berm construction

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<sup>1</sup> FOF 6.a. states: "The land treatment areas have 20 inches of tillable soil." FOF 6.b. states: "Laboratory analysis of soil samples from the top 24 inches indicate the surficial soils are suitable for land treatment of oil and gas wastes."

(meaning, adequate to prevent erosion). The evidence presented simply does not support these findings.

35. Further, there was no legally sufficient evidence presented to support finding 6.b.

The laboratory analysis for the soil samples, which forms the basis for finding 6.b., was completely unreliable, inadmissible, and any testimony based on the lab analyses was also unreliable and inadmissible. The evidence was so unreliable as to constitute no evidence.

36. **Error No. 4: Findings of Fact 6c and e (regarding the subsurface stratigraphy and characterization) are erroneous and are not reasonably supported by substantial evidence.** In fact, one would have to disregard some of Pyote's *own* evidence to accept these findings, because Pyote's own evidence contradicted these findings.

37. Pyote failed to provide sufficient, reliable evidence to support these findings. The evidence that was offered by Pyote was conflicting, and its witnesses never attempted to reconcile the conflicting evidence.

38. The boring logs that were prepared and sponsored by Pyote's geologist (and which formed the basis for the findings) were cryptic, overly simplistic, and unreliable, as is the cross-section that was developed by its experts based on these boring logs. The logs provided no useful, reliable information about the subsurface soils. They were not sealed by a professional geologist, and do not represent the type of information relied upon in the industry.



39. Further, the laboratory sampling analysis provided by Pyote is also unreliable for the purposes of providing meaningful information about whether movement of contaminants in the subsurface will be impeded. The sampling analysis conducted for the soil samples from the borings was compromised when the samples were mixed together, intermingling geologic materials from different depths.
40. Even if CAP had not provided any expert testimony, Pyote's evidence, alone, was inadequate to support the overly simplistic subsurface characterization it presented and that was adopted by the Commission.
41. Thus, the findings are not reasonably supported by substantial evidence, are arbitrary and capricious, constitute an abuse of discretion, and were made through unlawful procedure.
- 42. Error No. 5: Finding of Fact 6.d (regarding the presence of groundwater) is in error and is not supported by substantial evidence.**
43. The evidence presented by Pyote was legally insufficient to support a finding regarding groundwater elevations.
44. Pyote's expert witnesses failed to provide any field observations or recorded data regarding any change in water table elevations—from their field investigation of groundwater conditions. Further, their monitoring wells were installed during the most significant drought in Texas and demolished immediately after construction. This evidence was, thus, so unreliable as to amount to no evidence, and any testimony based on this evidence was also unreliable and legally insufficient.

45. This finding also fails to account for evidence, presented by CAP, supporting the presence of groundwater at shallower intervals—evidence that was disregarded and remained unexplained by Pyote.
46. In sum, Finding of Fact 6.d. does not present a complete picture of the presence of groundwater at or near the site, and thus, this finding is not reasonably supported by substantial evidence.
- 47. Error No. 6: Findings of Fact 7 and 7a (regarding the presence of groundwater resources) are in error and are not reasonably supported by substantial evidence.**
48. These findings ignore evidence demonstrating that shallow groundwater exists at the boundary of the Pyote site. See the discussion above, which is fully incorporated herein, related to the unreliability of the evidence offered by Pyote regarding groundwater conditions.
49. The only expert presented by Pyote regarding groundwater conditions had limited, if any, first-hand knowledge of the conditions at the site. His testimony is thus so unreliable as to be legally insufficient.
50. The finding also ignores reliable evidence presented by CAP, based on personal knowledge, which demonstrated that shallow groundwater does exist in the area.
51. In sum, Pyote did not conduct an adequate investigation of groundwater conditions at the site, its evidence was unreliable and legally insufficient, and thus, these findings are not supported by the evidence presented.

**52. Error No. 7: Findings of Fact 14, 14.a., 14.b., 14.c., & 14.d. (i. & ii.)**

**(regarding management of storm water) are erroneous.** These findings related to stormwater management are not reasonably supported by substantial evidence, are arbitrary and capricious, were made through unlawful procedure, and constitute an abuse of discretion.

53. According to Pyote's own expert, Pyote's application "underestimated significantly the amount of runoff from the facility," and "the location of the pond on the facility didn't take into consideration, the general topography of the site." So, Pyote revised its application yet again, just before the first administrative hearing commenced.

54. Allowing Pyote to correct this deficiency by submitting yet another supplemental revision to its application was a violation of the Commission's own rules, and findings related to the surface water management plan were thus made through unlawful procedure and an abuse of discretion.

55. Similarly, allowing a third revision to the stormwater management plan (which was presented during the second administrative hearing), to re-design the ponds to hold runoff from a 50-year/24-hour storm event was also erroneous, as it violated the Commission's own rules, and thus the findings were made through unlawful procedure and an abuse of discretion.

56. Even after being allowed so many revisions and supplements to its application, Pyote still failed to present evidence demonstrating that its storm water

management plan will be adequately protective and comply with Commission rules.

57. Pyote failed to demonstrate that its proposed berms are adequate and comply with Commission rules, and it failed to demonstrate that it possesses adequate soils for the construction of those berms. Because Pyote's consultants have not adequately investigated the actual soil conditions, and because of the history of erodible soils at the site, the findings related to earthen berms are not reasonably supported by substantial evidence.

58. Moreover, Pyote's witness testified that if all the berms at the facility failed, and the contact water were retained in the retention ponds, well over 1000 trucks would be required to haul the contact water out of the retention ponds. Yet, Hohn Road, the road that leads to the entrance to the proposed facility, cannot accommodate this type of truck traffic. This is simply not a feasible plan, and no other plan has been presented.

59. Thus, the evidence does not support the finding that contact storm water can be removed from the site for disposal at an authorized facility. The roads are simply not adequate to support this plan. The Commission erred in failing to consider the adequacy of the roadways, because the roadway capacity is, in essence, a factor that must be examined in determining whether contact storm water can be removed from the site.

**60. Error No. 8: Finding of Fact 15.a. (regarding the appropriate amount of financial security to cover the cost of closure) is erroneous and is not reasonably supported by substantial evidence.**

61. During the second administrative hearing, Pyote presented only one expert witness, and he testified that he failed to consider whether the revisions to the storm water management plan required re-examination of and revisions to the closure/post-closure cost estimates. Because there is no evidence in the record regarding whether those cost estimates remain adequate, this finding is arbitrary and capricious, an abuse of discretion and not supported by substantial evidence.

**62. Error No. 9: Finding of Fact 18 and Conclusion of Law 3 (regarding whether the proposed facility will result in the pollution of surface and subsurface waters) are in error.** This finding and conclusion are not reasonably supported by substantial evidence, are arbitrary and capricious, were made through unlawful procedure, and constitute an abuse of discretion.

63. The finding and conclusion are erroneous because they fail to account for additional evidence in the record demonstrating threats to fresh surface and groundwater, including evidence related to an existing pipeline that traverses the site and evidence related to the adequacy of existing soils for berms.

64. Pyote failed to account for increased risks to subsurface water associated with the existing pipeline that traverses the site.

65. Pyote's own witnesses testified that Pyote's operators intended to drive over the pipeline during operations and had no real protocol for how to deal with the pipeline during operations. This evidence, alone, demonstrates that surface and subsurface waters will not be adequately protected from pollution by the operation of the proposed facility.

**66. Error No. 10: CAP's evidence was erroneously excluded during the second administrative hearing.**

67. In addition to the fact that the evidence presented does not support finding of fact 18 and conclusion of law 3, there was additional testimony presented by CAP, relevant to this finding and conclusion, that was erroneously excluded from evidence. This testimony demonstrated that the soils, the facility design, and the presence of the pipeline would render the proposed facility a significant risk to surface and groundwater. Yet, the hearing examiners refused to allow CAP's witnesses to present this testimony and evidence.

68. The exclusion of this evidence resulted in an erroneous finding and conclusion, because the excluded evidence was the only evidence offered regarding the consequences of constructing the proposed facility with a pipeline running through it, including consequences related to management of storm water and groundwater. Thus, the finding and conclusion to the contrary was made through unlawful procedure.

**69. Error No. 11: The Final Order resulted from a failure of due process and unlawful procedure.**

70. CAP also alleges an overall failure of procedural due process in the hearings that led to the Final Order.

71. When Pyote failed to present an adequate permit application, the Commission allowed Pyote to try again and again and again, and still, Pyote continued to revise significant portions of its application up until just before the administrative hearing commenced. Nevertheless, Pyote failed to meet its burden of proof, and the Railroad Commission simply allowed Pyote to try again and present additional evidence during a second hearing.

72. The re-convened hearing was nothing more than a second bite at the apple for Pyote, with limited opportunity for CAP to conduct adequate discovery in preparation for the hearing. Further, CAP's evidence during the second hearing was erroneously excluded. In sum, CAP was deprived of the process it was due.

**VI. RELIEF REQUESTED**

WHEREFORE PREMISES CONSIDERED, CAP respectfully prays that Defendant be cited to appear and answer herein, and that upon trial of this matter, this Court reverse the Railroad Commission's Final Order granting the Application of Pyote Reclamation Systems, LLC for a permit to operate a treatment and disposal facility in

DeWitt County, Texas. CAP further prays for such temporary and other relief for which it may show itself entitled.

Respectfully submitted,

By: /s/ Marisa Perales  
Marisa Perales,  
SBT No. 24002750

FREDERICK, PERALES, ALLMON &  
ROCKWELL, P.C.  
707 Rio Grande, Suite 200  
Austin, Texas 78701  
Phone: (512) 469-6000  
Facsimile: (512) 482-9346

COUNSEL FOR CONCERNED  
ABOUT POLLUTION