

CAUSE NO. _____

Public Employees for Environmental Responsibility (“PEER”), Defenders of Wildlife (“Defenders”), Local Tribesman Juan Mancias, Forest Guardians, Dr. Nicole J. Rosmarino, Humane Society of the United States (“HSUS”), Llano Estacado Audubon Society, (“LEAS”), Anthony Allan Floyd, Great Plains Restoration Council (“GPCR”), and Animal Legal Defense Fund (ALDF)	§ IN THE DISTRICT COURT § § § § § § § § § § § § § § §
Plaintiffs	§
vs.	§ OF TRAVIS COUNTY, TEXAS, §
Texas Commission on Environmental Quality (“TCEQ”) and the City of Lubbock, Defendants	§ § § § § _____ JUDICIAL DISTRICT

ORIGINAL PETITION

TO THE HONORABLE JUDGE OF THE COURT:

COME NOW Public Employees for Environmental Responsibility (PEER), Defenders of Wildlife (Defenders), Local Tribesman Juan Mancias, Forest Guardians, Dr. Nicole J. Rosmarino, Humane Society of the United States (HSUS), Llano Estacado Audubon Society (LEAS), Anthony Allan Floyd, Great Plains Restoration Council (GPCR), and Animal Legal Defense Fund (ALDF). Plaintiffs in the above-styled cause, and file this Original Petition

complaining of the September 5, 2002, action of Defendant Texas Commission on Environmental Quality (TCEQ) in arbitrarily and unreasonably approving Defendant City of Lubbock's ("Lubbock's") August 20, 2002, compliance plan for Lubbock's Land Application Site (LLAS) and issuing a portion of the notice of violation to which the compliance plan was allegedly responsive. The LLAS is an approximately 6,000 acre prairie to which the City of Lubbock applies waste water. The prairie, the LLAS, can be open to and used by the public, including plaintiffs in this lawsuit. Plaintiffs seek a trial, declaratory judgment regarding the validity of the TCEQ compliance plan approval and suspension of the TCEQ compliance plan approval. In support of this Petition, Plaintiffs show as follows:

I. DISCOVERY CONTROL PLAN

1. This case is an appeal of an administrative agency's action. The case is not controlled by Subch. G (§§ 2001.171 - 2001.178), Tex. Gov't Code, in that the action of which complaint is made was not the result of a contested case proceeding. Discovery, therefore, should be conducted under a Level 3 discovery control plan.

II. PARTIES

2. Plaintiff PEER is a non-profit membership organization. Its members are local, state and federal resource professionals who, by virtue of the ever-changing tides of political leadership,

are the front-line defenders of the public interest within their agencies and are the first line of defense against the exploitation and pollution of the natural environment. PEER works nation-wide with government scientists, land managers, environmental law enforcement agents, field specialists and other resource professionals committed to responsible management of America's public resources. PEER has among its membership individuals who engage in scientific research about and observation of the prairie dogs at the LLAS; enjoy watching prairie dogs on this site, and enjoy the LLAS as a recreational and educational venue. One PEER member lives adjacent to the LLAS and is affected by groundwater contamination from the site.

3. Plaintiff Defenders is a membership organization dedicated to the protection of all native wild animals and plants in their natural communities. Defenders focuses its programs on what scientists consider two of the most serious environmental threats to the planet: the accelerating rate of extinction of species and the associated loss of biological diversity, and habitat alteration and destruction. Defenders also advocates new approaches to wildlife conservation that will help keep species from becoming endangered. Defenders has among its members individuals who have in the past and would again in the future observe, if the prairie dogs are not exterminated, the prairie dogs at the LLAS as a recreational and

educational activity.

4. Plaintiff Juan Mancias resides at 5319 E. 6th in Lubbock, Texas, 79403. His family residence is adjacent to and one cotton field over from the LLAS. His well water/drinking water has been contaminated by the ground water pollution from the LLAS. The City of Lubbock is supplying his neighbors with drinking water, but has failed to supply him with drinking water at this time. Mr. Mancias is a member of PEER and a member of the Carrizo/Comecrudo Tribe of Texas. Long before 1845 when Texas joined the Union, the Carrizo/Comecrudo Tribe was forced off native lands by the U.S. Cavalry and Texas Rangers, the Carrizo/Comecrudo People inhabited a large region of Texas from Northeastern Mexico (Monterrey) to hunting grounds in the Llano Estacado (Lubbock) region of Northwest Texas. The Carrizo/Comecrudo community, culture and spirituality is founded, then as now, on a healthy and intact native ecosystem for food, water, and shelter. The black tailed prairie dog, like the bison and the wolf, is an important link in the Carrizo/Comecrudo sacred life cycle and Culture. The prairie dog, as a keystone species, represents community and family values and emphasizes the direct importance of the connection between Spirit to Earth. Lubbock and TCEQ's plans to exterminate the prairie dog town for no apparent reason on public lands displays the same cultural insensitivity and lack of historical

knowledge about the Carrizo/Comecrudo community that was shown when the bison and wolf were exterminated in the mid 1800s. The black tailed prairie dog continues to be a resource for education for many Texas tribes as well as a spiritual entity in their almost tribal form of behavior. If this prairie dog community is destroyed, the Carrizo/Comecrudo People will lose this opportunity to educate tribal children about the story of community and sacred life connections and the tribe will once again, loose an important pier of the tribal cultural foundation and another chance to show how important it is to protect and restore native communities.

5. Plaintiff LEAS is a membership organization and a chapter of the National Audubon Society. The mission of LEAS is to conserve and restore natural ecosystems - focusing on birds, other wildlife and habitat - for the benefit of human heritage and the earth's biological diversity. Members of the LEAS have been visiting the LLAS and surrounding area at least since the mid 1970's. This site has a well-known history of being an excellent place to view birds of prey and water birds. These birds can be easily viewed from the road side and the club had permission to go onto the property for the annual Christmas count. Without the prairie dogs and species associated with the burrows, this area will become a vacant wasteland, no longer valuable to our members for wildlife viewing.

6. Plaintiff Forest Guardians is a non-profit membership organization committed to protecting flora, fauna, natural processes, and native habitats in the southwestern United States. Forest Guardians has a grasslands protection campaign, with a particular focus on short-grass prairie in the southern plains and southwestern desert grasslands. The organization is interested in the conservation of highly imperiled species, especially those that play important umbrella and keystone functions within their ranges. Forest Guardians strives to restore and preserve all naturally occurring components and processes within native ecosystems. The organization's grasslands protection campaign includes participating in the effort to protect black-tailed prairie dogs located on the LLAS. The campaign also includes participation in state and federal black-tailed prairie dog management planning processes throughout the species' range. Forest Guardians' members and staff recreate and view black-tailed prairie dogs and associated wildlife in Texas and other areas in the southern Great Plains. Consequently, studying, protecting, and recovering this species is a high priority for Forest Guardians and its members. The above described educational, scientific, aesthetic, spiritual, and conservation interests of Forest Guardians and its members have been, are being, and will continue to be adversely affected

and irreparably injured by the Defendants unless this Court grants the requested relief.

7. Plaintiff Nicole J. Rosmarino, Ph.D. is a biodiversity advocate who has been involved in the protection of imperiled species in the Great Plains for six years and is also a member of Forest Guardians. Dr. Rosmarino enjoys viewing black-tailed prairie dogs, enjoys recreating (unobtrusively) in black-tailed prairie dog habitat, and has a spiritual interest in the recovery of black-tailed prairie dogs throughout their range. Dr. Rosmarino has participated in efforts to protect prairie dog habitat from land conversion and poisoning and to stop the shooting of prairie dogs. Dr. Rosmarino received her Ph.D. in political science in May 2002 and her doctoral dissertation included a case study on the prairie dog ecosystem. Dr. Rosmarino therefore has an academic and scientific interest in ensuring the protection and recovery of the prairie dog throughout its range. The above described educational, scientific, aesthetic, spiritual, and conservation interests of Dr. Rosmarino have been, are being, and will continue to be adversely affected and irreparably injured by the Defendants unless this Court grants the requested relief.

8. Plaintiff HSUS is a non-profit organization that promotes the protection of all animals. The HSUS maintains its headquarters in Washington, DC, and has ten regional offices, four

affiliates, and an international arm. The organization has more than 7 million members and constituents nationwide, of which 305,021 reside in Texas. The HSUS promotes the humane treatment and protection of animals, including wildlife, through several program initiatives. The HSUS actively advocates against practices that injure, harass, or abuse wild animals or that result in threats to the continued existence of populations or species in their natural habitats. The organization promotes non-lethal and humane means of preventing and reducing human-wildlife conflicts. The HSUS provides information regarding the inhumane treatment of wildlife through practices such as trapping, trophy hunting, or lethal control programs such as those directed against prairie dogs. The HSUS offers information on the impact of captivity on wildlife and threats to populations and ecosystems via habitat loss or alteration. The HSUS also organizes political initiatives to achieve their aims of increasing respect for the intrinsic value of animals and increasing the strength of the human-animal bond. HSUS has been involved with the requests by many members, organizations and agencies to resolve the problem of elevated nitrates on the LLAS by determining scientifically the cause of the contamination and by addressing the factor(s) responsible in a manner that does not jeopardize the prairie dogs, burrowing owls, or the prairie ecosystem in Texas as a whole. HSUS

members enjoy, study, photograph, and watch prairie dogs and participate in efforts to preserve the species and their habitat. HSUS has among its membership individuals who have benefited and would continue to benefit from an opportunity to observe prairie dogs, burrowing owls, and other wildlife residing on the LLAS for recreational and/or educational purposes. HSUS members would be adversely affected by the destruction of the prairie dog habitat and the senseless killings of the prairie dogs in question.

9. Plaintiff Anthony Allan Floyd works with LEAS as a Field Trip Leader and Field Notes Coordinator and is also a member of PEER. Mr. Floyd holds a bachelor and master degree in Zoology and has ten years of experience as a field biologist. Mr. Floyd has observed wildlife at the LLAS for roughly five years, during which time he has made informal inventories of all terrestrial vertebrates on the property including the Federally Listed Endangered Texas Horned Lizard. The area has also provided invaluable data for the annual Christmas Bird Counts every year he has been with Audubon; particularly as it supports a steady population of wintering burrowing owls. Mr. Floyd has guided numerous visitors to observe the prairie dogs and the birds (in particular, the owls) that flourish in the ecosystem provided by the prairie dogs. Along with the owls, the site is unique to the region in regards to the number of Ferruginous Hawks, Rough-

legged Hawk, Swainson's Hawks, and Golden Eagles that use the area to forage. Lubbock's plan will tremendously hamper the city's ability to provide a quality wildlife viewing experience for both locals and visitors, who spend money to visit the state's largest burrowing owl colony.

10. Plaintiff GPRC is a multiracial, multicultural 501 (c) 3 non-profit organization building the Buffalo Commons step-by-step by bringing the wild buffalo back and restoring healthy, sustainable communities in the Great Plains. From the Indian Reservation to the prairie outback to the inner city and beyond, GPRC organizes specifically where the areas of environment, human rights and human health, and animal protection interact in social change. The black-tailed prairie dogs on the LLAS are central to GPRC's work and goals. The LLAS prairie dog colony represents perhaps the best chance for public land protection of the prairie dog ecosystem on the Llano Estacado. The LLAS, properly restored from its human-caused degradation, and connected to a nearby canyon state wildlife area, could serve as a critical "ecotone". Ecotones are essential for whole ecosystems and migrating wildlife. These protected and connected wildlife areas will make up significant areas for GPRC's Buffalo Commons. GPRC is further affected by the LLAS prairie dogs in that their Executive Director frequents the site to study, watch and learn from the prairie dogs. Also, GPRC's

mentored youth of color have been planning a trip next Spring to observe and learn from the prairie dogs, and receive first-hand direct education as to the nature and necessity of the prairie dog ecosystem on the Southern Plains. Lastly, many people within GPRC, especially the Executive Director, have an intensely personal, spiritual interest in prairie dogs, and are deeply concerned about their survival, which is ultimately responsible for survival and return-to-health of the entire Great Plains.

11. Plaintiff ALDF is a national nonprofit public interest law organization of over 100,000 persons, including lawyers, law professors, law students, paralegals and members of the general public, including residents of the state of Texas. ALDF's mission is to protect the lives and advance the interests of animals through the legal system. To that end, and as a regular course of its business, ALDF files and participates in lawsuits against federal and state governmental agencies, where it believes that violations of federal or state wildlife, animal protection or environmental laws are occurring. Recent litigation includes, but is not limited to, legal challenges to deer "management" programs and wild horse removals, litigation aimed at forcing the Bureau of Land Management (BLM) to prepare a programmatic federal environmental impact statement on its national wild horse and burro program and a challenge to the

U.S. Fish and Wildlife Service's issuance of permits to import the heads of endangered argali sheep as trophies. Since 2000, ALDF has been funding and supporting a lawsuit in Colorado which seeks protection for black-tailed prairie dogs and associated species. ALDF has among its members individuals who live within the black tailed prairie dog historic range and who have been involved in the public process for protection of black tailed prairie dogs through various state and federal agencies. They have in the past and would in the future observe, photograph and enjoy black- tailed prairie dogs and prairie dog habitats and communities.

12. Defendant TCEQ is an agency of this State responsible for, inter alia, implementation and administration of the laws of Texas regarding discharge of waste or pollutants into or adjacent to any water of the State. Defendant TCEQ may be served with citation through its Executive Director, Ms. Margaret Hoffman; Texas Commission on Environmental Quality; 12100 Park 35 Circle; Austin, Texas 78753.

13. Defendant Lubbock is a Texas municipal corporation. It operates the LLAS, at which waste water effluent is disposed pursuant to TPDES ("Texas Pollution Discharge Elimination System") permit no. 10353-002. This permit was issued by Defendant TCEQ and is the permit for which Defendant TCEQ served Defendant Lubbock the notice of violation that led to the

instant controversy. Defendant Lubbock, pursuant to §37.006(a), Tex. Civ. Prac. & Remedies Code, is a necessary party to this cause. Its presence may also be necessary to protect the full remedy authority of the Court.

III. JURISDICTION AND VENUE

14. The Court has jurisdiction over Defendant TCEQ because it is an agency of the State and over Defendant Lubbock because it is a Texas municipal corporation.

15. The Court has jurisdiction over the controversy, because this action is brought under TEX. WATER CODE § 5.351.

16. Venue is proper in Travis County pursuant to TEX. WATER CODE § 5.354 and to Tex. Civ. Prac. & Rem. Code §§15.004, .005.

IV. LEGAL AND FACTUAL BACKGROUND

17. Sec. 5.351(a), Tex. Water Code, provides a cause of action for "a person affected by a ... decision or other act of the Commission" to seek "to review, set aside, modify or suspend the act of the Commission."

18. On September 5, 2002, Defendant TCEQ approved a "compliance plan" submitted by Defendant Lubbock. Plaintiffs allege this approval was an arbitrary and unreasonable Commission decision or act and, thus, should be set aside or suspended.

19. The dispute among the parties has its roots in Defendant Lubbock's long-standing failure to take the steps necessary to

minimize the likelihood its waste water disposal practices will adversely affect human health or the environment. These waste water disposal practices relevant to the instant dispute have occurred since the 1930s at contiguous tracts (initially, the "Grey" tract) of land in or near Lubbock. On these tracts, Defendant Lubbock discharges, via irrigation spray, effluent from its waste water treatment plant. It is currently permitted by Defendant TCEQ to discharge 16.5 million gallons of effluent per day in this manner at this site. The site has long been leased for cattle grazing and has recently become the home of a large colony of **black-tailed** prairie dogs (**Cynomys ludovicianus**) and a flock of burrowing owls.

20. In about 1968, Defendant Lubbock determined that a "ground-water mound" had developed beneath LLAS. Water in this mound was found to be contaminated with high levels of nitrates. Defendant in the late 1970s undertook to deplete the ground water mound by pumping the contaminated water from it for re-disposal elsewhere. The methods for this "pumping for re-disposal" were formalized in 1989, when a predecessor of Defendant TCEQ and Defendant entered into an agreed enforcement order, which order included a remediation plan. The remediation plan sought to reduce nitrate concentrations in the ground water mound, which mound, itself, also would be reduced. Unfortunately, Defendant Lubbock completely disregarded important provisions of the

remediation plan; for example, it failed to meter its ground water withdrawal wells, it failed to operate them on the correct (really, on any) schedule and it created inaccurate subsurface contour maps of both the ground water elevations and of the nitrate concentrations. As a result of its failures to follow the agreed order and the remediation plan, nitrate concentrations in the mound did not decline and have not declined to acceptable levels. The foregoing history is recounted in more detail in a 1999 TCEQ memorandum of the agency's investigations to that time. This memo is Exhibit A to this Petition.

21. Defendants TCEQ and Lubbock have since the 1999 investigation negotiated an agreement under which Defendant Lubbock is to return to approximately the terms of the 1989 remediation plan. This return to the plan notwithstanding, an April 2002 LLAS inspection by staff of Defendant TCEQ determined, among other things, that nitrate levels in the ground water mound remained unacceptably high and that the sodium adsorption ratios at the site were on the order to 100% greater than allowed by the permit. These findings resulted in a June 3, 2002, "notice of violation" from Defendant TCEQ to Defendant Lubbock. That notice of violation is Exhibit B to this Petition.

22. A "notice of violation" is a letter the agency sends to a

permittee describing the permit terms or other legal requirements alleged to have been violated. It is not provided for by statute or regulation, but it is a widely used instrument within the agency.

23. The notice identified two alleged violations: (1) a violation of permit condition 2(d), "the permittee shall take all reasonable steps to minimize or prevent any discharge of sludge use or disposal or other permit violation which has a reasonable likelihood of adversely affecting human health or the environment," and (2) a violation of operational requirement 15(b), which provides, of relevance, here, that the sodium **adsorption** ratio at the site not exceed **10 mg/L**. As to the first alleged violation, the notice elaborated with an opinion that the proliferation of prairie dogs had created conditions that would allow flow of effluent through prairie dog burrows to lower soil regions and had could lead to crop failure from overgrazing by prairie dogs of the surface grasses.

24. This notice of violation and Defendants' initial ruminations about a response (i.e., prairie dog extermination) created quite an up-roar among wildlife-protection agencies and citizen advocates of wildlife protection. Basically, these agencies and advocates protested that there was no evidence to support the opinion expressed by Defendant TCEQ in the notice of violation and that the prairie dogs were at all connected with the nitrate

violations. Agency pronouncements in the absence of supporting evidence were decried in this situation, particularly, since the U.S. Fish and Wildlife Service has determined that prairie dogs warrant listing as an endangered species but would not be listed at the time due to higher priorities. Extermination of a healthy colony of these creatures would tend to justify such a listing. Concerns were also expressed about the impacts of prairie dog extermination on the burrowing owl, a migratory bird that is already protected under federal law and that nests in prairie dog burrows. (Prairie dogs are also the favored food of the black-footed ferret, (Mustela nigripes), the single most endangered mammal in North America.

See, www.ngpc.state.ne.us/wildlife/ferret.html.) Over 90% of the ferret's diets are prairie dogs, and ferrets cannot survive in the wild outside of prairie dog colonies. Thus, ferrets are a prairie dog obligate species (See Miller, Brian, Reading, Richard P. and Steve Forrest. 1996. Prairie Night: Black-footed Ferrets and the Recovery of Endangered Species. Washington: Smithsonian Institution Press).

25. A meeting was held June 26, 2002, among representatives of Defendant TCEQ and Texas Parks and Wildlife Department and U.S. Fish and Wildlife Service at which representatives of Defendant TCEQ acknowledged the lack of evidence supporting its opinion

regarding ties between the prairie dogs and the nitrate violations. Exhibit C to this petition are copies of Texas Parks and Wildlife Department letters (2) to Defendant TCEQ memorializing this meeting, the issues discussed at the meeting and the admissions of Defendant TCEQ.

26. Notwithstanding the public and professional outcry following the notice of violation, Defendant Lubbock on August 20, 2002, submitted, in response to the notice of violation, to Defendant TCEQ a proposed compliance plan. That plan is Exhibit D to this petition. The plan proposed to address the alleged prairie dog problem by, first, the relocation of some of the dogs, and, then, by the extermination of the remaining ones. That plan did not address remedying the sodium adsorption ratio problem but, rather, argued that the ratio specified in the current TPDES permit was unnecessarily conservative and pointed out the city had submitted an application to Defendant TCEQ that, if approved, would established a relaxed ratio (one with which Defendant Lubbock presumably would comply).

27. Despite (1) its own admission that no evidence existed to support a causal relationship between the prairie dog proliferation, on the one hand, and Defendant Lubbock's violation of its permit's nitrate requirements, on the other hand and (2) the compliance

plan's failure to propose a remedy for the sodium adsorption ratio violation that was actually described by Defendant TCEQ in its notice of violation, Defendant TCEQ September 5, 2002, approved Defendant Lubbock's compliance plan. Defendant TCEQ also approved the plan, despite the fact that approval purported to sanction Defendant Lubbock's violation of the terms (e.g., condition 2(d) and operational requirement 15(b)) of its TPDES permit, no. 1-353-02. Exhibit E is a copy of Defendant TCEQ's action approving the compliance plan.

V. CLAIMS

28. Defendant TCEQ unreasonably and arbitrarily approved Defendant Lubbock's compliance plan. This unreasonable and arbitrary approval violated Plaintiffs' substantive due process rights, as codified at § 5.351 of the Water Code and as established by the state's case law on administrative procedure, to administrative decision-making based on reason. The compliance plan failed to address the ground water nitrate violation in a manner Defendant TCEQ could reasonably have determined to be rational, and the plan failed to propose any action at all to address the sodium adsorption ratio violation noted by Defendant TCEQ.

29. Defendant TCEQ violated Plaintiffs' procedural due

process rights, as codified at Chs. 39, 55 and 80 of Title 30 of the Texas Administrative Code, by its de facto amendment of Defendant Lubbock's TPDES permit without adhering to the procedural safeguards for permit amendment set out in those chapters and on the basis of which, in part, Defendant TCEQ was empowered by the Environmental Protection Agency to implement the TPDES program. (See, 63 Fed. Reg. 51164, et seq. (September 24, 1998), the terms of the delegation by EPA to TCEQ of authorization to implement the NPDES program.)

30. Defendant TCEQ's June 3, 2002, notice of violation to Defendant Lubbock was an unreasonable and arbitrary agency decision or action, in so far as it opined of a causal connection between the prairie dogs and Defendant Lubbock's violation of permit condition 2(d), that ripened for judicial set-aside or suspension with Defendant TCEQ's September 5, 2002, approval of the compliance plan.

VI. PRAYER

31. In light of the foregoing, Plaintiffs pray:

a. Defendant TCEQ's approval of Defendant Lubbock's compliance plan be declared unreasonable and arbitrary; b. there be declared no causal relationship of a significance to support agency action between the prairie dogs at the LLAS and excessive

nitrites or other contaminants in the ground water mound at that site;

c. Defendant TCEQ's notice of violation to Defendant Lubbock be declared unreasonable and arbitrary, to the extent it opined as to the reasons for Defendant Lubbock's violation of permit condition 2(d);

d. Defendant TCEQ's approval of the compliance plan be set aside and suspended;

e. Defendant Lubbock be enjoined from implementing its compliance plan, in so far as that plan calls for the extermination of prairie dogs; and

f. The Court award Plaintiffs their reasonable attorneys' fees, costs, and costs of litigation, as well as such other relief as to which they may show themselves entitled.