BEFORE THE TENNESSEE WATER QUALITY CONTROL BOARD

IN THE MATTER OF:	**)**	
DIVISION OF WATER POLLUTION	**)**	
CONTROL § 401 WATER QUALITY	**)**	
CERTIFICATION No. NRS 03-246	**)**	**CASE No. 05-0582**
(WASTE MANAGEMENT, INC.	**)**	
OF TENNESSEE)	**)**	**DOCKET No. 04.30-082242A**
	)	
BORDEAUX BEAUTIFUL, INC.,	**)**	
PEER, *et al.*	**)**	
	)	
PETITIONERS.	**)**	

PEER'S MOTION FOR RECONSIDERATION OF ORDER AND MOTION TO SET ASIDE PURSUANT TO RULE 60 : FORMAL REQUEST FOR ORAL ARGUMENT AND HEARING

Comes now Public Employees for Environmental Responsibility, (PEER) and files this motion for reconsideration of the order dated _____ and, to set aside the order under Tennessee Rule of Civil Procedure Rule 60 based on additional information.

PEER submits herewith an affidavit from Jeff Ruch, chief legal counsel for PEER, in Washington D.C, and an affidavit from Gregory Buppert.

I. INTRODUCTION

The order and the procedures that led to PEER's dismissal is based upon an erroneous set of arguments and conclusions and is inconsistent with well established law. The ruling is important and deserves reconsideration in light of additional facts and analysis.

The United States Supreme Court has stated with great clarity that the right to association is threatened when the identities of an association's membership are compelled to public disclosure and in such an occurrence, there ***must be a demonstration***

of a "compelling" interest that is sufficient to justify the negative effects of the constitutional infringement. (*National Association for the Advancement of Colored People v. State of Alabama*, 357 U.S. 449, [1958], and reaffirmed in *Buckley v. Valeo*, 424 U.S. [1976].

Discovery of membership lists rarely, if ever qualifies absent a detailed evidentiary finding. In Marrese v. American Academy of Orthopeadic Surgeons, 726 F. 2d 1150 (7th Cir 1984) the Court held that a **membership list cannot be divulged in discovery unless the information sought is "essential to their case and unobtainable by other means that would be less likely to discourage such advocacy**." (See also, Wilkinson v. FBI, 111 FRD 432, 436 (CD Cal 1986) – materials requested must go to the heart of the claim, and Local 814 v. Waterfront Comm'n 667 F 2d 272 (2d Cir. 1981) – court found chilling effect from disclosure of political contributors list.)

The arguments were never reduced to writing as to *how* the PEER list is relevant to the claim of "public notice". This has led to understandable confusion. PEER alleged that the *public* did not receive proper notice because the Corps prepared the notice and did not follow state regulations in doing so. (See Paragraph 6 of the Petition.) *The question is not whether PEER members received notice, but whether the notice went out in a local paper, was posted at the site and mailed to those on the state's official list*. The court would rightfully ask; IF several PEER members were aware of the permit notice by virtue of their government positions, would such individual awareness satisfy the agency's statutory obligations to post notice in a local paper or mail it to persons on the state's list of "interested parties"? The answer is obviously, no.

If notice to the public could be imputed to all through the knowledge of one, there

would be no need for a statute prescribing the method of publication.

In addition to confusion over the "notice" issue, Waste Management arguably misled the court by suggesting that the prevailing law in Tennessee is either vacant, or governed by Marshall v. Bramer, decided in the 6th Circuit. Marshall v. Bramer was an unusual case to say the least, and required the disclosure of the membership list for the Ku Klux Klan after specific and detailed factual findings that members of the local KKK had firebombed the home of African Americans who moved into a white neighborhood. The court made more than eight separate findings of fact establishing the connection between the Klan list and the firebombing, and there was no government entity receiving the list.

The decision herein needs to be reconsidered in light of the additional factual showing attached in the affidavit of Mr. Ruch, the Executive Director of PEER, and pursuant to Rule 60 which establishes the substantial likelihood of threats, harm and retaliation for the members who have already suffered, and that confidentiality is critical to the lives and livelihood of members.

II. PROCEDURAL ERROR

The decision to order the dismissal of PEER as a party was not based on a written motion with opportunity for written opposition. The sanction of dismissal is extreme and was based upon an earlier order granting a motion to compel that was heard by the Administrative Law Judge only 5 days after it was filed, in violation of Rule 1360.-4-1.09. (Uniform Rules of Procedure for Hearing Contested Cases before State Administrative Agencies, hereafter Rules of Procedure). This rule requires the passage of seven (7) days before an Administrative Law Judge (ALJ) may consider any matter

submitted for hearing.

The motion to compel was filed June 14th and the matter heard on June 19th. Exhibit 1 attached here is the initial order granting the Motion to Compel as filed by Tennessee Department of Environment and Conservation, (TDEC).

The affidavit of Mr. Buppert states he was not even on notice of the motion before June 19th and had not had an opportunity to respond.

The Rules of Procedure also require that the party making the motion must "state the reasons supporting the motion", (Rule 1360.-4-1.09 (3) (b)) *and* the motion must be accompanied by " *a statement certifying that the moving party or his or her counsel has made a good faith effort to resolve by agreement the issues raised… Such effort shall be set forth with particularity in the statement*." (Rule 1360.-4-1.09 (3) (c)). TDEC's motion contains no such a statement. PEER submits that had TDEC been required to do so, it would have been revealed that TDEC had requested membership information initially for the purpose of establishing "standing" and had been satisfied. No articulable need for the member list relevant to "public notice" was known when the TDEC motion was filed. (Affidavit of Greg Buppert)

The state's argument regarding the relevancy of the membership list for defending the "lack of notice" to the public is found nowhere in their pleadings.

To the extent TDEC *later* argued that "notice" is an issue, it was arguably pretext. The real purpose is to identify PEER members within TDEC, which is not related to a claim or defense. There was no case law provided by TDEC for the creative argument that notice to a PEER member /government employee at TDEC constitutes notice to the public pursuant to the regulations. If such were the case, there would be no need for any

notice at all, - as soon as anyone at TDEC knew about a permit, any group that person was affiliated with, including their church choir would be considered on notice as well. There is no legal support for such a tortured analysis of public notice.

Waste Management did state a reason for wanting the membership list which is admirably free of pretext; - they wanted to depose members under oath and identify "double agents" and determine why anyone would disagree with TDEC. While refreshingly honest, it does not relate to any material issue in the permit appeal or a defense. The "credibility" of the organization is not determined by the deposition of less than 1 % of its members in one of fifty states.

The procedural error of taking up the motion without the prerequisite allowance of time and the lack of an articulable connection between the claims presented and discovery sought profoundly affects the outcome here and short-circuited a critical analysis.

III. THE U.S. SUPREME COURT REQUIRES A FINDING OF COMPELLING STATE INTEREST TO INFRINGE ON FIRST AND FOURTEENTH AMENDMENT RIGHTS; THERE IS NONE.

The critical question is what need the government (TDEC) has for the membership list. Standing is admittedly satisfied. The issue of "Notice" became confused: notice to the public is the contention made in the Petition, but notice to PEER is the argument made by TDEC. TDEC cannot frame the petition for the petitioner.

TDEC has orally argued that if PEER cannot identify who within PEER membership did not get notice, then PEER cannot prove their claim. TDEC has framed up a claim that does not exist – and demanded discovery for it. Therein lays the difficulty. Public notice is not particularized to an individual person; - it is a question of

fact as to whether or not the procedure used complies with the law/regulations. PEER alleged that the notice was provided by the Army Corps, instead of by TDEC, and does not comply with the state notice regulation. To defend the claim, the state must look at whether it mailed the required notice to those on their *own list*, not the PEER list.

For example, the regulation requires notice be mailed to all persons on the TDEC official mailing list, comprised of individuals across the state. The state's obligation is to mail to everyone on the *state list*, not the PEER membership. PEER membership is irrelevant to the question of whether TDEC followed the statute in providing notice.

Whether or not the Corps mailed notice to the people on the *state list* as required is the only legitimate inquiry, - not whether individual PEER members are on it (A critical distinction). The notice allegations in the Petition also encompass the question of "content". The content is prepared by TDEC and also must conform to the state regulations. There is no conceivable nexus between PEER membership and the arguably inadequate content of a public notice.

PEER submits that the court did not conduct the constitutionally necessary analysis of finding a compelling governmental interest to justify the disclosure of a private organization's membership list. Had the analysis been done with an eyeon the allegations as framed in the Petition, not by TDEC, the outcome here would be different. NAACP v. Alabama, 357 U.S. 449, is controlling law, reaffirmed repeatedly. Disclosing membership lists for a legally formed organization requires a constitutional rights analysis and a "***compelling state interest***" that overrides the infringement of well established rights. Discovery in general has never been good enough in any case.

In the Seventh Circuit, the federal court ruled that membership lists **cannot be**

divulged in discovery unless the information sought is "essential to their case and unobtainable by other means,". (Marrese v. American Academy of Orthopeadic Surgeons 726 F. 2d 1150, (7th Cir. 1984)) The membership list of PEER is not at issue but rather the state's own list of citizens requesting notice in the state database. Whether PEER itself or its members got "notice" is irrelevant and is not remotely central to any claim posed by Petitioner. The standard is not met.

In the NAACP case, the membership list was demanded while the state of Alabama was attempting to exclude the organization from doing any business there. This occurred in the context of civil rights battles. The state of Alabama claimed they needed the list for discovery along with an exhausting request for financial and documentary information. The Supreme Court set out the standard that the burden of showing the need for the list was *very high*, higher than "relevancy" and beyond "discovery". It had to be compelling. The reason had to be so compelling and vital to the state's interest that it outweighed the constitutional rights that were at risk. The Court has never faltered on this issue, - the freedom to associate and do so privately is a protected right. It cannot be infringed for the stated purpose of "outing" the members for public scrutiny which obviates the very basis for the protection.

Under the light of clarification, it is clear that TDEC need only look at their own records and their official mailing list to evaluate whether anyone on it (as the regulations require) got notice. They do not need the PEER list and never did.

As to Waste Management, their stated reasons are the equivalent of an old fashioned "outing" of their critics in high places. They openly are looking for "double-agents" to subpoena and depose as to their reasons for questioning TDEC. This bold

statement alerts the Court that the very constitutional rights to free speech that the Supreme Court protects are the ones under attack and for no legitimate purpose. Ordering disclosure of the membership list not only withdraws from the well established laws of the country, but seemingly aids the defendants in their ignoble task.

The attached affidavit of Jeff Ruch, National Director of PEER in Washington D.C. submits information that was not previously put before the court due to excusable neglect and mistake and which makes the showing that PEER has extensive experience in public advocacy issues regarding the environment, and the retribution for members is significant. The entire point to the organization is that current and retired government employees can disseminate information about unethical, illegal or even fraudulent government conduct without putting their jobs and families at risk.

CONCLUSION

In order for this case to proceed in an orderly fashion with all parties, on all issues, PEER respectfully requests that the court vacate the order dismissing PEER and the order compelling disclosure of the membership list.

Respectfully Submitted,

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Certificate of Service

I hereby certify that the forgoing motion was mailed on this the ___ day of August, 2006 by U.S. Mail postage prepaid to Mr. Patrick Parker, TDEC 20th Floor, L & C Tower, 401 Church St. Nashville, TN 37243-1548; and John Williams, Tune, Entrekin 315 Deaderick Street, Nashville, TN 37238-1700.

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