

SOAH DOCKET NO. 582-07-2673
TCEQ DOCKET NO. 2007-0204-WDW

APPLICATION OF TEXCOM GULF DISPOSAL, LLC FOR TEXAS COMMISSION ON ENVIRONMENTAL QUALITY UNDERGROUND INJECTION CONTROL PERMIT NOS. WDW410, WDW411, WDW412 AND WDW 413 § § § § § § BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

APPLICANT TEXCOM GULF DISPOSAL, LLC'S RESPONSE TO DENBURY ONSHORE, LLC'S MOTION TO SUPPLEMENT THE ADMINISTRATIVE RECORD, OR IN THE ALTERNATIVE, TO TAKE JUDICIAL NOTICE OF FINAL ORDER

COMES NOW TexCom Gulf Disposal, LLC, ("*TexCom*" or "*Applicant*") and presents this, its response to Protestant Denbury Onshore, LLC's ("*Denbury's*") Motion to Supplement the Administrative Record, or in the Alternative, to Take Judicial Notice of Final Order ("*Motion*"). Without citing to any statutory or regulatory authority to move for anything at this point in the contested case hearing process, Denbury requests that the Texas Commission on Environmental Quality ("*TCEQ*" or the "*Commission*") reopen the record or take official notice of an irrelevant and *non-final* order of a distinct and separate agency, the Railroad Commission of Texas ("*RRC*"). For the reasons discussed more fully below, the Commission is neither authorized nor obligated to consider the RRC's order and Applicant respectfully requests that Denbury's Motion be denied.

I.
ARGUMENT

According to Denbury's Motion, the RRC issued an order on January 13, 2011 ("*RRC Order*"), purportedly rescinding the "no-harm" letter it originally issued in 2005, and requests, pursuant to 30 Tex. Admin. Code § 80.265, that the Commission supplement the evidentiary

record with the RRC Order or take “judicial” notice of it.¹ However, § 80.265 does not authorize the Commission to supplement the evidentiary record. By its plain language, § 80.265 authorizes the Commission to “order the *judge* to reopen the record for further proceedings on specific issues in dispute.”² Accordingly, the Commission may effectively order that the case be *remanded* to the State Office of Administrative Hearings (“*SOAH*”) for the Administrative Law Judge (“*ALJ*”) to take additional evidence, but it may not itself reopen the record as requested by Denbury. In this instance, the Commission is not authorized by its rules to unilaterally insert additional evidence into the record. Furthermore, there is no reason for the Commission to remand this matter to SOAH – again.

First, on its face, the RRC Order is not final and, accordingly, is not something that the Commission may presently consider in its deliberations regarding TexCom’s above-captioned permit application. The RRC’s rules provide that the effective date of an order issued by the RRC must be stated in the order.³ The RRC Order specifically provides that it “will not be final and effective until 20 days after a party is notified of the [RRC’s] order” and that a “party is presumed to have been notified of the [RRC’s] order three days after the date on which the

¹ See Denbury’s Motion To Supplement The Administrative Record, Or In The Alternative, To Take Judicial Notice Of Final Order at ¶¶ 7-8 [hereinafter Denbury’s Motion]. Given Denbury’s request, there does not seem to be any disagreement that the RRC Order is outside the closed administrative record.

² 30 TEX. ADMIN. CODE § 80.265 (emphasis added); see also TEX. GOV’T CODE § 2003.047(m) (requiring the Commission’s order to be “based solely on the record made before the administrative law judge” and requiring the Commission to “refer the matter back to the administrative law judge to . . . take additional evidence”).

³ See 16 TEX. ADMIN. CODE § 1.147 (“The effective date of a final decision or order, unless otherwise stated, is the date of the commission action, and the effective date shall be incorporated into the body of the decision.”).

notice is actually mailed.”⁴ Even assuming the RRC Order was mailed on the day it was issued, January 13, 2011, it cannot be “final and effective” until February 7, 2011, *at the earliest*.⁵ This matter is set for consideration by the Commission at the January 26, 2011 Agenda meeting, nearly two weeks before the RRC Order may become final and effective. Accordingly, even if the RRC Order were controlling – it is not – it has not become “a part of the body of law [the Commission] is required to apply in reasoning toward a decision.”⁶

Second, even if the RRC Order were ripe for consideration, it is irrelevant to the proceedings before the Commission at this time. Setting aside the fact that issues regarding mineral interests were not remanded to SOAH and, for that reason, any evidence related to mineral interests was specifically excluded from the evidentiary record,⁷ the time when the RRC “no-harm” letter was relevant passed *years* ago. Chapter 27 of the Texas Water Code requires that an applicant for underground injection control (“*UIC*”) wells provide to the Commission a

⁴ Denbury’s Motion, Ex. A at 1.

⁵ Twenty-three days from the date of issuance is Saturday, February 5, 2011. Pursuant to the RRC’s rules, the last day in a period being computed shall be included unless it is a Saturday, Sunday, or an official state holiday, in which case the period runs through the next day that is not a Saturday, Sunday, or state holiday. *See* 16 TEX. ADMIN. CODE § 1.8(a). This calculation also assumes that no party files a motion for rehearing, which if filed, would further extend the period until the RRC Order becomes final and effective. *See id.* § 1.149(a), (b); *see also* Denbury’s Motion Ex. A at 1-2 (extending the time allotted in this case for RRC action on a motion for rehearing prior to it being overruled by operation of law to 90 days from the date the order is served on the parties, or April 13, 2011).

⁶ *Eckmann v. Des Rosiers*, 940 S.W.2d 394, 399 (Tex. App.—Austin 1997, no writ).

⁷ *See* Remand Tr. at 83:1-4 (Walston) (“I’ll sustain the objection to the extent your question said ‘Did you consider damage to Denbury’s mineral interests’ because that is beyond the scope.”), 1824:1-20 (Walston) (excluding additional RRC “no-harm” letters offered by TexCom); Pre-Hr’g Conference Tr. at 21:13 to 22:9 (Walston) (granting Denbury party status, but finding that “any impact on oil or mineral interests was previously considered” and recognizing that, although “a great deal of [Denbury’s] motion addresses the potential impact [TexCom’s plans] might have on Denbury’s mineral interest [t]hat would not be a part of this proceeding”) (Apr. 12, 2010); Order No. 24 (“Other issues, such as whether TexCom’s injection activities would negatively affect or impair Denbury’s mineral rights . . . are beyond the scope of this remand proceeding.”).

“no-harm” letter from the RRC at two times: when the application is submitted to TCEQ and at the start of the hearing on the merits.⁸ As acknowledged by the ALJs, TexCom provided a valid RRC “no-harm” letter in its application,⁹ which was declared technically complete in July 2006.¹⁰ The hearing on the merits was held from December 12-18, 2007, and at that time, the ALJs admitted into the evidentiary record a valid RRC “no-harm” letter, i.e., when the Commission, through SOAH, proceeded to hearing issues other than preliminary matters.¹¹ Therefore, both threshold requirements for the Commission to consider TexCom’s UIC application were satisfied over three years ago and a non-final order issued by another agency has no impact on the Commission’s decision in this matter.

II. CONCLUSION

For the foregoing reasons, TexCom respectfully requests that the Commission deny Denbury’s Motion.

⁸ See TEX. WATER CODE § 27.015(a), (b).

⁹ See Amended Proposal for Decision After Remand Proposed Order at 5 (Finding of Fact (“*FOF*”) 37) (“By letter dated September 16, 2005, the RRC indicated that it had conducted a review of the UIC Application, specifically studied aspects relating to injection operation, geology, and artificial penetrations within 1/4 mile of the Facility, and concluded that operation of the Facility would not injure or endanger any known oil or gas reservoir.”), 34 (Conclusion of Law (“*COL*”) 13) (same) [hereinafter PFD Proposed Order]; see also TexCom Ex. 1 at 12:18 to 13:6 (Ross) (testifying that the RRC “no-harm” letter was added to the application after it was received from the RRC).

¹⁰ See PFD Proposed Order at 5 (FOF 32).

¹¹ See PFD Proposed Order at 38 (COL 47); see also First Trial Tr. at 29:20-23 (ALJ Walston) (admitting TexCom Ex. 18, the RRC “no-harm” letter, into the evidentiary record without objection).

Respectfully submitted,



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CERTIFICATE OF SERVICE

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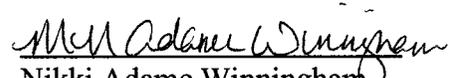
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