

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

<b>APPLICATION OF TEXCOM GULF</b>	<b>§</b>	<b>BEFORE THE STATE OFFICE</b>
<b>DISPOSAL, LLC FOR TEXAS</b>	<b>§</b>	
<b>COMMISSION ON</b>	<b>§</b>	
<b>ENVIRONMENTAL QUALITY</b>	<b>§</b>	<b>OF</b>
<b>UNDERGROUND INJECTION</b>	<b>§</b>	
<b>CONTROL PERMIT NOS. WDW 410,</b>	<b>§</b>	
<b>WDW 411, WDW 412 AND WDW 413</b>	<b>§</b>	<b>ADMINISTRATIVE HEARINGS</b>
	<b>§</b>	

**DENBURY ONSHORE, LLC'S REPLY TO EXCEPTIONS TO THE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS' PROPOSAL  
FOR DECISION AND FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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FOR DECISION AND FINDINGS OF FACT AND CONCLUSIONS OF LAW**

TO THE HONORABLE COMMISSIONERS:

Denbury Onshore, LLC, protestant in this case ("Denbury"), submits this its Reply to Exceptions, and would respectfully show the following:

**I. Introduction**

After nearly four years and three contested-case hearings, judges at both the State Office of Administrative Hearings ("SOAH")<sup>1</sup> and the Railroad Commission of Texas<sup>2</sup> have come to the same conclusion—TexCom's proposed injection activities should not be permitted. After reviewing weeks of live hearing testimony and thousands of pages of evidence, the Administrative Law Judges ("ALJs") at SOAH have concluded that TexCom cannot protect ground and surface fresh water from pollution with its waste.<sup>3</sup> The evidence is clear that TexCom's waste will migrate out of the injection interval and the injection zone, enter the

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<sup>1</sup> Amended Proposal for Decision After Remand ("Amended PFD") at 59.

<sup>2</sup> Examiners' Report and Proposal for Decision, Oil and Gas Docket No. 03-0266270 (Nov. 19, 2010) ("RRC Decision").

<sup>3</sup> Amended PFD, Conclusion of Law Nos. 44-45.

productive zone, and be produced at the surface. The ALJs properly found that ground and surface fresh water cannot be adequately protected from pollution.

To salvage its permit application, TexCom now makes a last-ditch effort to redefine the parameters of its project by changing its injection zone.<sup>4</sup> However, this requested revision is made without notice, and does not adequately address the conclusions of the ALJs and the relevant geology of the injection zone. The ALJs suggested no revision that would cure TexCom's problems because there is no cure other than permit denial. Even if TexCom could change the conditions of its permit, it cannot change the geology of the Cockfield formation. And the evidence amassed at two contested-case hearings has lead the SOAH ALJs to conclude that TexCom cannot contain its injected waste within the injection interval and consequently within the injection zone. Therefore, for the reasons discussed herein, the recommendation from the ALJs should be upheld, and TexCom's application for UIC Permit Nos. WDW410, WDW411, WDW412, and WDW413 should be denied.

## **II. TexCom is Required to Account for its Waste From Cradle to Grave, and Cannot Conscript an Unrelated Third-Party to Perform Permanent Disposal.**

### **A. The purpose of the UIC program is permanent waste disposal.**

While it may be stating the obvious, the purpose of the injection well permits at issue is to *dispose of waste*.<sup>5</sup> TexCom is not seeking a permit for waste storage—it is seeking a permit for permanent waste disposal. Yet in a move of desperation, TexCom astonishingly suggests that

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<sup>4</sup> Applicant TexCom Gulf Disposal, LLC's Exceptions to Amended PFD at 15-16 (filed Nov. 29, 2010).

<sup>5</sup> TEX. WATER CODE § 27.011 (“...no person may...begin drilling an injection well...to dispose of industrial and municipal waste...without first obtaining a permit...”) 30 TEX. ADMIN. CODE § 331.11(a)(1)(B) (Class I injection wells are “industrial and municipal disposal wells”); 30 TEX. ADMIN. CODE § 331.2(2)(A) (“injection well for disposal of waste”); TCEQ, APPLICATION FOR CLASS I INJECTION WELL PERMIT APPLICATION (2010), p. 1 (“Permit Application to Dispose of Waste in Class I Injection Well”)

“nothing...in the implementing rules indicates that the production of injected wastewater alone” is improper.<sup>6</sup> TexCom instead believes that it can satisfy its burden to protect ground and surface freshwater by conscripting someone else to take care of its waste.

In fact, the rules expressly provide the opposite; TexCom bears the burden to show that TexCom meets each and every requirement of the rules.<sup>7</sup> The position advocated by TexCom makes TexCom’s waste the proverbial hot potato—so long as somebody can perhaps be counted on to eventually dispose of it permanently, TexCom need not worry about what happens to it once it leaves TexCom’s wellhead. Nothing in the Underground Injection Control (“UIC”) program rules or regulations suggests that an applicant can meet its burden of showing non-endangerment by relying on an unrelated third-party to actually dispose of its waste.

TexCom’s entire concept—that it be permitted to inject waste that is simply being recirculated on a round-trip from the surface, into the formation, and back to the surface—is antithetical to the purposes of the UIC program. As TexCom’s own expert described at the hearing, the purpose of the UIC program is to ensure that wastes remain trapped in the formation until they degrade naturally.<sup>8</sup> Injection facilities like TexCom’s will take wastes that “are not fully identified at this time,” which require a substantial amount of time to degrade.<sup>9</sup> When analyzing projects for permitting purposes, the assumption is that the wastes must remain trapped in the formation for 10,000 years.<sup>10</sup> TexCom’s expert called this the “10,000 year perspective,”<sup>11</sup>

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<sup>6</sup> Applicant TexCom Gulf Disposal, LLC’s Exceptions to Amended PFD at 12 (filed Nov. 29, 2010).

<sup>7</sup> 30 TEX. ADMIN. CODE § 80.17(a).

<sup>8</sup> Remand Trial Tr. at 71:12-13 (Bost on cross).

<sup>9</sup> Remand Trial Tr. at 72:1-3 (Bost on cross).

<sup>10</sup> Remand Trial Tr. at 72:1-3 (Bost on cross).

<sup>11</sup> Remand Trial Tr. at 71:20-22 (Bost on cross).

and agreed that in order to fulfill the goals of the UIC program, TexCom's waste must remain trapped in the formation for this natural decay to occur.<sup>12</sup>

Under the Injection Well Act, the Commission must find that ground and surface water is adequately protected from pollution resulting from the disposal activities of injection wells.<sup>13</sup> Inexplicably, TexCom attempts to shift the burden of the Injection Well Act's protections on ground and surface water to Denbury by asking the Commission to look at whether Denbury's *production* of TexCom's injected waste threatens surface and ground fresh water.<sup>14</sup> This is absurd. The proper focus is on whether the underground injection *disposal* activities of the applicant provide adequate protection for fresh water. TexCom cannot account for the final disposition of its waste and it cannot meet its burden to protect water.

The Injection Well Act was developed to ensure protection of groundwater from subsurface injection of wastes. The purpose of the Injection Well Act is set out in § 27.003 of the Water Code and states:

It is the policy of this state and the purpose of this chapter to maintain the quality of fresh water in the state to the extent consistent with the public health and welfare and the operation of existing industries, taking into consideration the economic development of the state, to prevent underground injection that may pollute fresh water, and to require the use of all reasonable methods to implement this policy.

Thus, injection wells must be located and constructed so that injected fluids do not migrate into ground and surface fresh water.

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<sup>12</sup> Remand Trial Tr. at 72:4-7 (Bost on cross).

<sup>13</sup> TEX. WATER CODE § 27.003, § 27.051(a)(3).

<sup>14</sup> Applicant TexCom Gulf Disposal, LLC's Exceptions to Amended PFD at 12-13 (filed Nov. 29, 2010).

Moreover, the focus of a UIC application is on demonstrating that proposed waste will be confined within the injection zone.<sup>15</sup> This is the purpose for the elaborate UIC rules, which require an applicant to identify a confining zone and to demonstrate that the confining zone is free of transecting, transmissive faults or fractures and artificial penetrations that would prevent permanent confinement of the waste.<sup>16</sup> When an applicant cannot show that these confining zones exist, their application should be denied.

Contrary to TexCom's suggestion that the implementing rules do not cover TexCom's activities, TCEQ rules expressly recognize that the purpose of the Injection Well Act is to ensure that underground injection well activity does not pollute fresh water.<sup>17</sup> Because the state's policy is "to prevent underground injection that may pollute fresh water," the proper analysis under Section 27.051(a)(3) is whether TexCom's injection wells' disposal activities have proper safeguards to protect ground and surface water<sup>18</sup>—not whether some other party beyond TexCom's control will take care of its waste.<sup>19</sup> The ALJs have correctly applied Section 27.015(c)(3) by analyzing the disposal activities of TexCom to determine that TexCom's disposal activities do not adequately safeguard fresh water.

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<sup>15</sup> 30 TEX. ADMIN. CODE § 331.121(c).

<sup>16</sup> *Id.*

<sup>17</sup> 30 TEX. ADMIN. CODE § 331.1(a) (implementation of Injection Well Act shall be consistent with policy of state to "prevent underground injection that may pollute fresh water.")

<sup>18</sup> TEX. WATER CODE § 27.003, § 27.051(a)(3).

<sup>19</sup> TexCom failed to develop a record that Denbury's equipment or operations are compatible in terms of equipment and materials to handle TexCom's industrial waste.

**B. TexCom cannot comply with the proposed permit which forbids waste from traveling outside the injection zone.**

In addition to violating the core purposes of the UIC program, any suggestion that it would be permissible for TexCom's waste to be removed from the injection zone ignores the UIC rules and the limiting conditions of the very permit TexCom seeks.

TexCom must demonstrate that it has a "confining zone" for its waste.<sup>20</sup> The rules are clear—the confining zone must act "as a barrier to movement of fluids out of the injection zone."<sup>21</sup> The production of its waste through and out of the confining zone flies in the face of the UIC rules. According to the terms of the draft permit, TexCom's waste is permitted to be emplaced directly into the injection interval, and may migrate only to the top of the injection zone.<sup>22</sup> The permit requires that TexCom's waste remain within the injection zone, and does not contemplate any scenario that would allow TexCom's waste to migrate outside that zone.<sup>23</sup>

It is astonishing that the Applicant and the Executive Director advocate for a permit to be granted that, by the very scenario they describe, calls for a violation of the permit. It is worth remembering that TexCom is seeking a permit to dispose of waste, not just a permit to temporarily store waste in a formation. It would be a clear violation of the UIC rules and TexCom's permits for TexCom's waste to end up outside the injection zone.

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<sup>20</sup> 30 TEX. ADMIN. CODE § 331.121(C)(3)(B).

<sup>21</sup> 30 TEX. ADMIN. CODE § 331.2(26).

<sup>22</sup> TexCom Exh. 27.

<sup>23</sup> TexCom Exh. 27.

**C. Neither TexCom nor the Executive Director can preclude Denbury from developing the mineral estate.**

As the owner of the interests in operations that include oil, gas, and mineral leases in the Conroe Oil Field, Denbury has a right to recover oil and gas.<sup>24</sup> A regulatory authority, such as the TCEQ or the Railroad Commission of Texas, has no authority to determine property rights.<sup>25</sup> Thus, the fact that a regulatory agency can issue a permit to TexCom does not give TexCom the right to control Denbury's mineral interest.

As a mineral lessee, Denbury has the right to extract oil and gas. If the only way TexCom can prevent waste from being produced at the surface is to prohibit Denbury from recovering oil and gas, either now or in the future, then the permit *per se* impairs Denbury's mineral rights, which would require the denial of TexCom's permit under section 27.051(a)(2) of the Water Code.

Mineral rights would be impaired by the production of waste at the surface. TexCom's suggestion that Denbury's wells could sufficiently monitor the production of injected waste: (1) is without any support in the record; and (2) misstates who bears the burden in this proceeding. TexCom presented no evidence that Denbury's monitoring obligations under its drilling permits require the monitoring of the type of wastes that TexCom injects. Further, TexCom has failed to make any evidentiary record that Denbury's operations are capable of handling TexCom's wastes or that the character of TexCom's waste would not damage Denbury's facilities.

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<sup>24</sup> *Tarrant County Water Control & Improvement Distr. v. Haupt, Inc.*, 854 S.W.2d 909 (Tex. 1993) (lessee holds the dominant estate with the right to enter and extract minerals, and other such incidents thereto as are necessary to be used for getting and enjoying them).

<sup>25</sup> *Magnolia Petroleum Co. v. R.R. Comm'n*, 170 S.W.2d 189, 191 (Tex. 1943) ("When it grants a permit to drill a well it does not undertake to adjudicate questions of title or rights of possession."); *Ryan Consol. Petroleum Corp. v. Pickens*, 285 S.W.2d 201, 207 (Tex. 1956).

TexCom's waste would also be corrosive to Denbury's equipment, which is not designed to monitor or pump the type of chemicals in TexCom's waste.<sup>26</sup> Moreover, by the time Denbury's production wells start producing TexCom's waste at the surface, mineral rights will have already been irreparably impaired.

### **III. The Evidence Established that Denbury's Ongoing and Future Operations Will Produce TexCom's Waste at the Surface.**

TexCom argues without any evidentiary support that "there is no evidence that Denbury's future plans are *possible* and *will be implemented*."<sup>27</sup> Nothing could be further from the truth. It is undisputed that Denbury is actively extracting oil and gas from the Conroe Field Unit ("CFU")<sup>28</sup> at present. Denbury also presented overwhelming, uncontroverted evidence to show that not only are its carbon dioxide enhanced oil recovery ("CO<sub>2</sub> EOR") plans more than possible, they are currently being executed. If TexCom begins injecting waste into the lower Cockfield, both *current* conventional recovery and future tertiary recovery will produce TexCom's waste at the surface.

#### **A. Denbury is currently producing oil and gas from the CFU through conventional recovery.**

TexCom's single-minded focus on CO<sub>2</sub> EOR ignores the fact that ordinary oil and gas production has occurred and is occurring continuously, without interruption, in the immediate area of TexCom's wells.<sup>29</sup> At present, Denbury produces nearly a quarter-million barrels of fluid

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<sup>26</sup> Remand Trial Tr. at 1561:25-1562:11 (Swadener on clarifying examination) (noting that production of waste would necessarily inhibit recovery of oil and gas).

<sup>27</sup> Applicant TexCom Gulf Disposal, LLC's Exceptions to Amended PFD at 5 (filed Nov. 29, 2010) (emphasis added).

<sup>28</sup> The Conroe Field Unit covers a large portion of land in Montgomery County, including where TexCom's proposed wells are located.

<sup>29</sup> Denbury Exh. 18 at 13:6-7 (Swadener on prefiled direct).

per day from the CFU, consisting of about 2,500 barrels of oil and 240,000 barrels of water.<sup>30</sup> This current oil and gas recovery alone will inadvertently extract TexCom's waste when it migrates from the lower Cockfield throughout TexCom's injection zone. There are currently ten active extraction wells within one mile of TexCom's proposed well, and one within 3,000 feet of WDW315.<sup>31</sup> Once TexCom begins waste injection, the pressure sinks created by Denbury's current, active, conventional production will force TexCom's proposed injectate to migrate into the upper Cockfield formation and into the production wells.<sup>32</sup> Therefore, TexCom cannot account for the final fate of its waste as required by the UIC rules.<sup>33</sup>

**B. Denbury presented extensive, uncontroverted evidence that its tertiary recovery through CO<sub>2</sub> EOR project is underway.**

Denbury is currently executing its plan to use CO<sub>2</sub> EOR in the CFU. Unlike TexCom, a single-asset company with no history in owning or operating a disposal well, Denbury has comprehensive experience and deep institutional knowledge of its core business of tertiary oil recovery. Denbury has a long history of acquiring properties for CO<sub>2</sub> EOR.<sup>34</sup> Denbury is a leading tertiary oil company with many years of experience conducting CO<sub>2</sub> EOR for fields in the Gulf Coast region.<sup>35</sup> Prior to the Conroe Field acquisition,<sup>35</sup> Denbury completed eight phases of prior CO<sub>2</sub> flood installations throughout Mississippi, Louisiana, and Texas.<sup>36</sup>

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<sup>30</sup> Denbury Exh. 18 at 6:4-5 (Swadener on prefiled direct).

<sup>31</sup> Denbury Exh. 18 at 19:10-19 (Swadener on prefiled direct).

<sup>32</sup> Denbury Exh. 18 at 19:10-19 (Swadener on prefiled direct).

<sup>33</sup> 30 TEX. ADMIN. CODE 331.121(C)(2)(C) ("...the limits of waste fate and transport can be accurately predicted....") In any event, TexCom failed to present any testimony to meet its burden on the fate of its waste once it is produced out of the injection zone.

<sup>34</sup> Denbury Exh. 18 at 10:11-14 (Swadener on prefiled direct).

<sup>35</sup> Denbury Exh. 18 at 10:11-14 (Swadener on prefiled direct).

<sup>36</sup> Denbury Exh. 18 at 10:17-19 (Swadener on prefiled direct).

The pipeline needed to bring CO<sub>2</sub> for EOR from the Jackson Dome in Mississippi to Conroe is well underway. The first phase, a 341 mile section from Donaldsonville, Louisiana to Alvin, Texas is complete, and Denbury is actively working on a branch from this pipeline to bring CO<sub>2</sub> to the Conroe Field.<sup>37</sup> As explained at the remand hearing, Denbury was at the time of the hearing on the verge of starting CO<sub>2</sub> EOR on a nearby field; the pipeline running from the Jackson Dome in Mississippi to the Oyster Bayou Field “was full and waiting for regulatory permits to start injection to Oyster Bayou.”<sup>38</sup> According to Denbury expert Jon Herber, the “basic process that has been applied to [Denbury’s most recent project in] Oyster Bayou is going to be the same process that will be applied to Conroe.”<sup>39</sup> A spur will be constructed from this pipeline to bring additional CO<sub>2</sub> to the Conroe Field and to Hastings, another planned CO<sub>2</sub> EOR project.<sup>40</sup>

Denbury expert Mark Swadener provided an extensive overview of Denbury’s CO<sub>2</sub> EOR plan for Conroe in his prefiled testimony, discussing Denbury’s well patterns for the different CFU sands.<sup>41</sup> Maps of these plans were introduced as Denbury Exhibits 20 and 21. Swadener described the mechanics of CO<sub>2</sub> EOR, and the methods Denbury uses to maximize tertiary recovery.<sup>42</sup>

TexCom offered no expert or witness qualified to criticize any technical aspect of Denbury’s proposed CO<sub>2</sub> EOR plan. Instead, TexCom brought to the hearing a superimposed

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<sup>37</sup> Denbury Exh. 18 at 13:18-21 (Swadener on prefiled direct).

<sup>38</sup> Remand Trial Tr. at 989:18-19 (Herber on redirect). Since the conclusion of the remand hearing, Denbury has started injecting CO<sub>2</sub> at Oyster Bayou.

<sup>39</sup> Remand Trial Tr. at 865:11-16 (Herber on cross).

<sup>40</sup> Remand Trial Tr. at 989:12-15 (Herber on redirect).

<sup>41</sup> Denbury Exh. 18 at 11:11-14 (Swadener on prefiled direct).

<sup>42</sup> Denbury Exh. 18 at 12:18-21 (Swadener on prefiled direct).

image of Denbury's planned CO<sub>2</sub> injectors (as depicted in Denbury Exhibits 20 and 21) atop a purported aerial map of the Conroe field<sup>43</sup> with the intent to show that Denbury had mistakenly planned injection wells on top of "daycares, lakes, elementary schools, and cemeteries."<sup>44</sup> TexCom only successfully demonstrated its ignorance of the fact that well locations depicted on Denbury Exhibits 20 and 21 are bottom-hole locations, which will not correlate precisely with the surface.<sup>45</sup>

The ALJs also heard extensive confidential evidence regarding detailed business plans and projections that are proprietary trade secrets belonging to Denbury.<sup>46</sup> Counsel for TexCom examined Denbury witness Robert Sutherland extensively regarding an acquisition document that detailed Denbury's immediate and long-term plans for the Conroe Field, which TexCom then admitted into evidence as TexCom Exhibit 108.<sup>47</sup> These included detailed questions about the purchase of the Conroe Field,<sup>48</sup> the precise figures regarding daily production in the Conroe Field,<sup>49</sup> the modeling for Denbury's plans to initiate CO<sub>2</sub> EOR in the Conroe Field,<sup>50</sup> including the flood's anticipated operating pressure,<sup>51</sup> CO<sub>2</sub> displacement,<sup>52</sup> predicted performance,<sup>53</sup> and the long-term development plan for CO<sub>2</sub> EOR over the life the project.<sup>54</sup>

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<sup>43</sup> TexCom Exh. 107.

<sup>44</sup> *Id.*

<sup>45</sup> Remand Trial Tr. at 1552:23-24 (Swadener on redirect).

<sup>46</sup> Remand Trial Tr. Vol. 7 Confidential.

<sup>47</sup> CONROE FIELD UNIT Montgomery County, Texas, Wapiti Energy & XTO Interests (December 2009) (Confidential).

<sup>48</sup> Remand Trial Tr. at 1583:3-5 (Sutherland on cross) (Confidential).

<sup>49</sup> Remand Trial Tr. at 1606-1608 (Sutherland on cross) (Confidential).

<sup>50</sup> Remand Trial Tr. at 1630 (Sutherland on cross) (Confidential).

<sup>51</sup> Remand Trial Tr. at 1632:1-2 (Sutherland on cross) (Confidential).

<sup>52</sup> Remand Trial Tr. at 1632:15-17 (Sutherland on cross) (Confidential).

<sup>53</sup> Remand Trial Tr. at 1633:12-15 (Sutherland on cross) (Confidential).

<sup>54</sup> Remand Trial Tr. at 1636:4-8 (Sutherland on cross) (Confidential).

TexCom suggests that because CO<sub>2</sub> EOR is not happening right now, it is never going to happen. TexCom's arguments are unfounded speculation based on its own misconceptions about tertiary oil recovery. As discussed by Denbury expert Mark Swadener, full implementation of CO<sub>2</sub> EOR will involve the construction and drilling of numerous additional wellbores, as well as the repurposing of existing wells within the field.<sup>55</sup> A CO<sub>2</sub> flood like that planned for the CFU does not happen overnight, and completing this process will take up to five years.<sup>56</sup> However, the record is clear that it will be done.

The ALJs considered extensive public and confidential evidence and testimony regarding Denbury's current conventional recovery and future CO<sub>2</sub> EOR in the Conroe Field. Denbury has established by more than a preponderance of the evidence that it currently produces from the Conroe Field and that it can and will initiate its standard CO<sub>2</sub> EOR in the Conroe Field. TexCom presented no credible evidence to suggest otherwise.<sup>57</sup> TexCom's self-serving speculation about Denbury's plans was appropriately given no weight by the ALJs, and should be given no weight by the Commission.

**C. Denbury's current and future operations will inevitably extract TexCom's waste.**

Denbury presented four expert witnesses to testify about the fundamental incompatibility of TexCom's injection with existing and future activities in the Conroe Field. TexCom did not challenge the expert qualifications of any of Denbury's witnesses. As discussed in extensive

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<sup>55</sup> Denbury Exh. 18 at 14:6-9 (Swadener on prefiled direct).

<sup>56</sup> Denbury Exh. 18 at 13:10-12 (Swadener on prefiled direct).

<sup>57</sup> TexCom presented no evidence modeling or analyzing the impact of oil and gas recovery or of CO<sub>2</sub> EOR on its injection.

detail in Denbury's Closing Arguments<sup>58</sup> and Denbury's Reply to Closing Arguments,<sup>59</sup> experts agreed that TexCom's injected waste will migrate to Denbury's wells and be produced at the surface.

Denbury expert Jon Herber testified about the geology of the Cockfield formation, concluding that the lower Cockfield (TexCom's injection interval) was in communication with each of the zones above, and that it was impossible for TexCom's proposed wastes to remain trapped in the injection interval.<sup>60</sup> Herber's testimony further establishes that TexCom's waste will not remain in either the injection zone or the injection interval because: (1) the injection interval is in communication with the remainder of the injection zone; and (2) TexCom's waste will be under enough pressure to cause it to move up to the areas where fluids are being pumped out of the injection zone.<sup>61</sup> Modeling also showed TexCom's proposed operations would cause the EW-4400-S fault to see a pressure increase of more than 1,400 lbs. above current pressure.<sup>62</sup> This is a direct path to Denbury's production wells.<sup>63</sup>

The methodologies and bases for each of these expert's testimony can be found in their prefiled testimony as well as in Denbury's prior briefing. Denbury conclusively established that TexCom's waste will be produced at the surface, and TexCom's arguments to the contrary should be disregarded by the Commission.

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<sup>58</sup> Denbury's Closing Arguments (filed August 10, 2010).

<sup>59</sup> Denbury's Reply to Closing Arguments at 31-34 (filed September 8, 2010).

<sup>60</sup> Denbury Exh. 13 at 6:11-12 (Herber on prefiled direct).

<sup>61</sup> Denbury Exh. 13 at 12:3-7 (Herber on prefiled direct); Denbury Exh. 18 at 17:16-18 (Swadener on prefiled direct).

<sup>62</sup> Denbury Exh. 4 at 16 (Fairchild on prefiled direct).

<sup>63</sup> Denbury Exh. 1 at 9:15-17 (Sutherland on prefiled direct); Denbury Exh. 1 at 8:22-23 (Sutherland on prefiled direct).

**D. TexCom's injection interval is in communication with the remainder of the Cockfield formation.**

The overwhelming evidence establishes that the various strata in the Cockfield formation are in communication. This evidence was sufficient to convince the ALJs, as well as the examiners from the Railroad Commission of Texas, that the strata are in communication. But, the Commission need not take just the Protestants' evidence on this. Even TexCom has said that the Cockfield strata are in communication. At the first hearing, Langhus, TexCom's geologist, testified about the communication between the Cockfield layers and stated under oath that the EW-4400-S fault is transmissive through the lower, middle, and upper Cockfield.<sup>64</sup> In his initial prefiled testimony, TexCom witness Greg Casey also testified that "the pressures in the middle and lower Cockfield are lower than normal due to communication between the zones at the various faults across the area where the oil was produced."<sup>65</sup>

TexCom's application discussed the Cockfield geology and came to the conclusion that there is no strata that confines its waste in the Lower Cockfield.<sup>66</sup>

At some point after submitting its sworn application and sworn testimony, TexCom apparently had a change of heart, and now desperately needs to argue that no communication is occurring between the strata within the Cockfield formation. Because these issues were discussed at length in Denbury's Reply to Closing Arguments,<sup>67</sup> Denbury will not reproduce them here. TexCom appears to be the only entity that remains skeptical about communication between the Cockfield strata, a skepticism it only acquired once it became critical to prove that

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<sup>64</sup> Original Hearing Tr. at 1366:4-10 (Langhus on clarifying examination).

<sup>65</sup> TexCom Exh. 49 at 32 (Casey on prefiled direct).

<sup>66</sup> See detailed discussion below in IV.C.

<sup>67</sup> Denbury's Reply to Closing Arguments at 25-28 (filed September 8, 2010).

the lower zone was completely sealed. TexCom's recent epiphany was not convincing to the ALJs, and should also be disregarded by the Commission.

**IV. TexCom's Attempt to Revise its Permit at the 11<sup>th</sup> Hour Must be Rejected.**

Realizing that it has failed to carry its burden of proof for the second time, TexCom now suggests multiple revisions to the proposed permit it seeks. However, as the ALJs acknowledged, "TexCom offered no evidence of additional conditions to arrest the potential for Denbury's operation to cause injected wastewater to migrate and ultimately return to the surface where it could contaminate ground and surface fresh water."<sup>68</sup> For this reason, and each of the reasons discussed below, TexCom's suggested revisions should be rejected. TexCom's revision is not supported by the evidentiary record and is procedurally improper.

**A. TexCom's proposed amendments are not supported by the administrative record.**

TexCom proposes that the Commission revise the permit to redefine the injection zone as the injection interval to resolve the migration concerns.<sup>69</sup> The suggested amendment to the application is made multiple years after the application was declared technically complete on July 3, 2006 and well after the hearing on the merits in December of 2007 and the remand hearing on the merits in June of 2010. The suggested amendment is also inconsistent with the theory that has been advanced by TexCom for the last five years, and must be rejected.

TexCom requests that the Commission pay no attention to the ALJs' findings of fact that the injected wastewater will migrate outside of the injection interval. The ALJs did not reach

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<sup>68</sup> Amended PFD at 97.

<sup>69</sup> Applicant TexCom Gulf Disposal, LLC's Exceptions to Amended Proposal for Decision at 15 (filed Nov. 29, 2010).

their decision to reverse their initial PFD lightly, and did so only after examining thousands of pages of evidence and considering nearly two weeks of live testimony.

**B. Geology mandates that TexCom cannot contain waste in the lower Cockfield.**

Both the ALJs and the examiners from the Railroad Commission of Texas are convinced that TexCom's waste cannot remain trapped in the lower Cockfield. The ALJs found that "TexCom did not establish by a preponderance of the evidence that the sand, silt, and shale layers between the Upper, Middle, and Lower Cockfield strata are sufficient to prevent fluid migration between those strata."<sup>70</sup>

TexCom held this same opinion. When TexCom prepared its application, it recognized the problem of waste migrating to the top of the Upper Cockfield. TexCom chose to seek a permit for the entire Cockfield because, as TexCom's geologist Bruce Langhus wrote:

I don't know if there is a competent confining zone anywhere within the Cockfield.

TexCom repeatedly told the TCEQ the same story in TexCom's sworn application. In its original application, TexCom states that:

these three thick sand packages are separated by persistent shales, but the shales appear not to be thick enough to isolate the individual sand members either stratigraphically or across faults in the AOR.<sup>71</sup>

TexCom filed two more sworn revisions to the geologic sections of the application, and in each revision, TexCom's sworn statement is:

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<sup>70</sup> Amended PFD at 53.

<sup>71</sup> TexCom Exh. 6 at 85.

these three thick sand packages are separated by persistent shales, but the shales appear not to be thick enough to isolate the individual sand members either stratigraphically or across faults in the AOR.<sup>72</sup>

Langhus concluded that “I think we’d have [to] permit the entire package from 5,134’ to 6,390’.”<sup>73</sup> This is precisely what TexCom did, creating an injection zone from 5,134’ to 6,390’.<sup>74</sup>

The knowledge that fluids will radiate throughout the Cockfield formation is also consistent with TexCom’s packer setting. Though TexCom’s own expert recommended that the proper setting be “just above the injection interval,”<sup>75</sup> or the top of the lower Cockfield at 6,045 feet,<sup>76</sup> TexCom’s packer is set at a depth of approximately 5,108 feet.<sup>77</sup> Because TexCom’s only concern was keeping fluids below the Jackson Shale, it saw no reason to move its packer to prevent waste from exiting the well prior to reaching the injection interval. Since the injection interval cannot contain the injected waste in the first instance, TexCom apparently assumes it need have no concern that injected waste enters the formation above the injection interval, and instead leaks from casing below the packer and directly into the injection zone.

The Executive Director speculated that if TexCom’s waste had not reached Denbury’s wells before CO<sub>2</sub> EOR began, it never would.<sup>78</sup> This speculation is unsupported by the record.

First, the Executive Director misreads the ALJs findings, when the Executive Director identifies only “faults and fractures as potential pathways.”<sup>79</sup> In fact, the ALJs considered not

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<sup>72</sup> TexCom Exh. 20 at 92; TexCom Exh. 23 at 38.

<sup>73</sup> Denbury Exh. 27.

<sup>74</sup> TexCom Exh. 27.

<sup>75</sup> TexCom Exh. 49 at 23:23-27 (Casey on prefiled direct).

<sup>76</sup> Remand Trial Tr. at 305:24 - 306:1-4 (Casey on cross).

<sup>77</sup> Remand Trial Tr. at 478:25 - 479:1-3.

<sup>78</sup> Executive Director’s Exceptions to Amended Proposal for Decision at 6 (filed Nov. 29, 2010).

only these pathways, but also the quality and extent of the “shale layer” separating the lower Cockfield from the rest of the injection zone. The ALJs specifically found that “TexCom did not establish by a preponderance of the evidence that the sand, silt, and shale layers between the Upper, Middle, and Lower Cockfield strata are sufficient to prevent fluid migration between those strata.”<sup>80</sup> This finding was not limited to any particular portion of the “shale layer” in question, and consequently includes the entire radius of the 2,770 foot calculation.<sup>81</sup>

Second, the presence of one well within 3,000 feet of TexCom’s well does not foreclose the possibility that additional wells will be drilled even closer to TexCom’s proposed well. The CO<sub>2</sub> EOR project will involve many additional wells, introducing numerous additional pressure sinks into the formation, that will draw fluids up from where TexCom plans to inject waste.<sup>82</sup> Denbury can and will drill additional wells to carry out tertiary recovery in the CFU. Any attempt to narrow the focus to a single existing well is misplaced, as (contrary to its claims in the application) TexCom does not own the minerals underlying its proposed facility. Therefore, TexCom cannot block Denbury from carrying out its plans.

Finally, the Executive Director misstates precisely what the 2,770 figure indicates. That number is in no way a “model” of TexCom’s waste plume. As Denbury discussed at length in its Exceptions,<sup>83</sup> the formula TexCom used to calculate a waste plume is nothing more than a crude calculation for the volume of a cylinder,<sup>84</sup> and is not indicative of any modeling done by TexCom. TexCom admits that it assumed a purely “radial flow pattern” as well as a perfectly

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<sup>79</sup> Executive Director’s Exceptions to Amended Proposal for Decision at 5 (filed Nov. 29, 2010).

<sup>80</sup> Amended PFD at 53.

<sup>81</sup> The area of this circle is equal to 24,105,126 square feet or .864 square miles.

<sup>82</sup> Denbury Exh. 18 at 14:6-9 (Swadener on prefiled direct).

<sup>83</sup> Denbury Onshore, LLC’s Exceptions to Amended Proposal For Decision at 30-31 (filed Nov. 29, 2010).

<sup>84</sup> TexCom Exh. 20 at 7-9.

“homogeneous reservoir” to calculate the plume,<sup>85</sup> conditions that are not reflective of the actual reservoir.<sup>86</sup> And the results of this calculation have remained unchanged, despite the extensive changes to reservoir modeling performed by TexCom from the original hearing to the remand hearing. It is highly disingenuous to claim this calculation represents a real-world approximation for the final fate of TexCom’s waste, or to suggest that the only fractures relevant to migration must occur within 2,770 feet of the wellbore.<sup>87</sup>

**C. TexCom cannot be relied upon to conduct the requested testing.**

TexCom also suggests that it be required to conduct a fall-off test on its wells after permit issuance to “verify that there are no preferential pathways that could allow migration of the injected wastewater out of the Lower Cockfield.”<sup>88</sup> TexCom suggestion is ironic, since its inability to design, conduct, and interpret a fall-off test is one of the key missteps in TexCom’s failure to meet its evidentiary burden.

During the recess between the original and remand hearing, TexCom obtained a Class V permit from the TCEQ to conduct a second fall-off test on the WDW315 well. TexCom designed the 2009 fall-off test to investigate the transmissivity of the EW-4400-S fault.<sup>89</sup> TexCom witness Greg Casey testified that he intended that the fall-off test reach out beyond 5,400 feet from the wellbore to investigate the EW-4400-S fault,<sup>90</sup> and that a fall-off test time of 75.5 hours would yield a radius of investigation of 5,400 feet from WDW315.<sup>91</sup> But the 2009

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<sup>85</sup> TexCom Exh. 20 at 7-9.

<sup>86</sup> Denbury Exh. 18 at 20:1-11 (Swadener on prefiled direct).

<sup>87</sup> Interestingly, TexCom made the same assertion to the Railroad Commission examiners who found this assertion was “entirely inconsistent with the known geologic features of the Cockfield.” RRC Decision at. 9.

<sup>88</sup> Applicant TexCom Gulf Disposal, LLC’s Exceptions to Amended PFD at 16 (filed Nov. 29, 2010).

<sup>89</sup> TexCom Exh. 84 at 16:12-21 (Casey on prefiled direct).

<sup>90</sup> Remand Trial Tr. at 192:17-22 (Casey on cross)

<sup>91</sup> Remand Trial Tr. at 193:3-22 (Casey on cross).

fall-off test did not reach the EW-4400-S fault.<sup>92</sup> Casey attributed his failure to “lower-than-expected” permeability of the reservoir, but this is a false explanation.<sup>93</sup> As evidence at the hearing showed, Casey’s designed fall-off test could not have reached this distance unless he assumed a permeability figure of at least 833.2 millidarcies, a figure with no empirical support in the record.<sup>94</sup> As stated by District expert Phil Grant, “[n]o reasonably objective observer should have anticipated permeability in that portion of the Lower Cockfield that grossly deviated from the known 80.9 millidarcy permeability.”<sup>95</sup> If TexCom used a reasonable permeability figure of approximately 81 millidarcies, it would have required 517 hours of injection to reach a radius of investigation of 5,400 feet.<sup>96</sup> Instead, TexCom only ran the injection component of the fall-off test for 35.1 hours.<sup>97</sup> Therefore, TexCom failed to design and implement a fall-off test to determine the transmissivity of the EW-4400-S fault, and the Commission has no fall-off test evidence that would demonstrate whether the fault is transmissive.

In addition to these technical failures, TexCom violated the Class V permit it was issued. TexCom’s Class V permit for its 2009 fall-off test limited specific gravity to no more than 1.05 as measured at 68 degrees Fahrenheit.<sup>98</sup> TexCom disregarded this limitation, and injected a fluid with a specific gravity of 1.18, violating the limitations of its Class V permit.<sup>99</sup> TexCom offered no justification for exceeding the specific gravity of the permit, other than its own

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<sup>92</sup> TexCom Exh. 84 at 24:9-15 (Casey on prefiled direct).

<sup>93</sup> TexCom Exh. 84 at 24:9-10 (Casey on prefiled direct).

<sup>94</sup> Remand Trial Tr. at 271:2-4, 222:23-24 (Casey on cross); Lone Star expert Phil Grant stated that TexCom’s parameters must have assumed a permeability greater than 1,195 millidarcies if they intended to reach out to 5,400 feet.

<sup>95</sup> District Exh. 22 at 10:10-12 (Grant on prefiled direct).

<sup>96</sup> District Exh. 22 at 10:27-29 (Grant on prefiled direct).

<sup>97</sup> District Exh. 22 at 10:24-26 (Grant on prefiled direct).

<sup>98</sup> Remand Trial Tr. at 202:1-3.

<sup>99</sup> Remand Trial Tr. at 203:5 (Casey on cross).

carelessness.<sup>100</sup> No employee of TexCom took the stand to talk about the lessons learned from this mistake or safeguards they would implement to prevent a repeat of a permit violation. Therefore, the Commission has no reason to believe that TexCom will exercise greater care in the future, should it receive the permits it seeks.

**D. TexCom's proposed change is procedurally improper.**

Without explaining what authority the Commission has as this late stage to unilaterally revise a permit that has pending for five years, TexCom casually suggests that the migration issues can be resolved by allowing TexCom to redefine the injection zone as the Lower Cockfield Formation. Even if the permit could be revised in the manner suggested by TexCom, which it can not, modification of the permit is improper and outside permitted practice.

**(i) No amendment can be made without notice.**

The proposed change to the injection interval is a major amendment that requires TexCom to refile the application and to provide additional notice under the provisions of 30 TEXAS ADMIN. CODE § 281.23(a). According to Section 281.23(a):

No amendment to an application which would constitute a major amendment under the terms of § 305.62 of this title (relating to Amendment) can be made by the applicant after the chief clerk has issued notice of the application and draft permit, unless new notice is issued which includes a description of the proposed amendments to the application.

A major amendment “changes a substantive term, provision, requirement, or limiting parameter of a permit.”<sup>101</sup> There is no dispute that the change in the injection zone is a major amendment. Therefore, refiling of the permit along with additional public notice of the

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<sup>100</sup> Remand Trial Tr. at 205:4-16 (Casey on cross) (“I--you know, I missed it”).

<sup>101</sup> 30 TEXAS ADMIN CODE § 305.62.

application with the revised injection zone (presumably with correct notice to the mineral right owners and current production information) would be required.

**(ii) The record does not support modification of the permit.**

The record in this matter is closed. When the record closes in a contested case hearing, the Commission may not consider evidence outside the record.<sup>102</sup> Because the Commission is limited to the record, the migration determination must be based on wells constructed in accordance with the specifications in the applications and the requirements in the draft permits.

As a practical matter, the evidentiary record was not developed based on evaluating a mythical shale layer on top of the injection interval as the required “confining zone.” To point out just one example of how the record did not address TexCom’s newest theory, TexCom’s testimony on artificial penetrations was exclusively about penetrations through the Jackson Shale. Testimony focused on the wells being plugged below the Jackson Shale or that the Jackson Shale would collapse unplugged wells. TexCom presented no evidence that this mythical shale layer above the injection interval would have the same impact on unplugged wells or that plugs were set to isolate the Lower Cockfield from the remainder of the Cockfield. Therefore, TexCom has not proven that the Lower Cockfield could be an adequate confining layer, and the evidence introduced at the remand hearing proves that it is not a confining layer. TexCom did not present any evidence on how plugs would or would not isolate the Lower Cockfield or whether the mythical 35 foot shale would collapse unplugged boreholes. Introducing new issues at this late point in the process does not protect the Protestants’ due process rights to develop a record and question witnesses on these new issues. Thus, the

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<sup>102</sup> TEX. GOV’T CODE § 2003.047(m) (amendment to proposal for decision “shall be based solely on the record made before the administrative law judge”).

Commission should not consider an injection zone other than that contained in the permit application.<sup>103</sup>

**(iii) The finding of fact by the ALJs should not be disregarded.**

Reversing the ALJs' fundamental findings of fact regarding migration in the cavalier manner suggested by TexCom would be hostile to the delegated role the ALJs play in contested-case proceedings. SOAH has established a natural resource conservation division with the expertise and technical knowledge necessary to perform contested case hearings for the TCEQ. The very purpose of the contested case hearing is to separate the adjudicative function that the ALJs perform from the investigative, prosecutorial, and policy making functions executed by the TCEQ.<sup>104</sup> The determination that the waste migrates up and out of the formation is a technical, factual determination that does not implicate the policy making functions.

In addition, any amendment to the proposal for decision, including any finding of fact, shall be based solely on the record made before the administrative judge.<sup>105</sup> Any such amendment must also be accompanied by an explanation of the basis for the amendment.<sup>106</sup> The record does not establish that TexCom has met its burden to prove that there is a confining layer

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<sup>103</sup> To the extent that the Commission determines to reopen the record to accept evidence on whether the revised injection zone is a suitable confining layer, Denbury objects to the admission of any additional evidence without remand to SOAH for the opportunity to conduct discovery, present additional evidence and argument, and participate in an additional evidentiary hearing, as required under the Administrative Procedure Act. TEX. GOV'T CODE §§ 2001.051, 2001.081, and 2001.087

<sup>104</sup> TEX. GOV'T CODE § 2003.021(a).

<sup>105</sup> TEX. GOV'T CODE § 2003.047(m).

<sup>106</sup> *Id.*

above the lower Cockfield. As such, disregarding the ALJs determination regarding migration would be impermissible<sup>107</sup> and an abuse of discretion.

**E. TexCom's suggestion that Denbury create a water fence would directly impair mineral rights.**

Finally, TexCom argues that Denbury—not TexCom—could remedy the production of TexCom's waste by creating a “water fence” between the two projects.<sup>108</sup> Denbury expert Robert Sutherland was asked at trial about techniques that could isolate TexCom's project from the oil and gas production in the Conroe Field.<sup>109</sup> Sutherland answered that a “water fence” could be used to isolate TexCom's project.<sup>110</sup> But what TexCom does not explain is what a water fence means. A water fence would involve injecting water in a manner to cut-off the area of TexCom's injection—minerals and all—from the remainder of the Conroe Field. TexCom's supposed solution is to impair mineral rights. As Sutherland testified, creation of a water fence would directly impair the minerals on the “down side” of the fence, wasting the mineral resources.<sup>111</sup> In other words, the “technical solution” to preventing TexCom's waste from migrating into the productive interval would be to isolate and impair all mineral rights within the fence.<sup>112</sup> Since TexCom cannot prove that its project will not impair mineral rights, instead it suggests that the unit operator impair the mineral rights of third-parties—who have been given no notice of TexCom's proposed injection activities—so that TexCom's project may go forward. Setting aside the fact that TexCom cannot compel a third party to install a water fence, if

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<sup>107</sup> *Heat Energy Advanced Tech. v. W. Dallas Coalition for Env'tl Justice*, 962 S.W.2d 288 (Tex. App.—Austin 1998, pet. denied) (Commission exceeded statutory authority in substituting its finding and conclusions for those of the ALJ).

<sup>108</sup> Applicant TexCom Gulf Disposal, LLC's Exceptions to Amended PFD at 15 (filed Nov. 29, 2010).

<sup>109</sup> Remand Trial Tr. at 1699:5-7 (Sutherland on redirect).

<sup>110</sup> Remand Trial Tr. at 1699:9-17 (Sutherland on redirect).

<sup>111</sup> Remand Trial Tr. at 1699:9-17 (Sutherland on redirect).

<sup>112</sup> Remand Trial Tr. at 1699:9-17 (Sutherland on redirect).

TexCom's solution to the issues raised in hearing and found by the judges is a water fence, then TexCom's proposed permits *per se* impair mineral rights, and the permit must be denied under Section 27.051(a)(2) of the Texas Water Code.<sup>113</sup>

**V. Conclusion.**

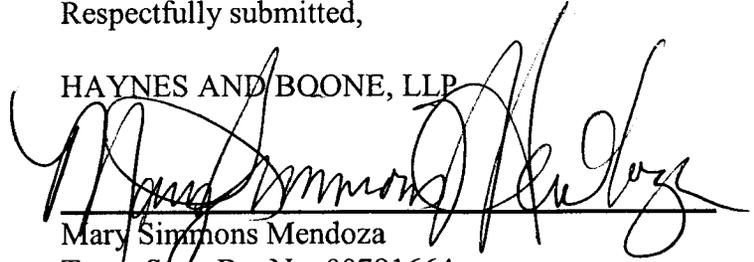
After two contested-case hearings at SOAH, TexCom has been unable to prove that it could dispose of wastes in accordance with the statute and rules. Now that the ALJs have concluded that TexCom's waste will migrate out of the injection interval and be produced at the surface, TexCom seeks eleventh-hour changes in a last-ditch effort to get a permit. Even if TexCom could change the conditions of its permit, it cannot change the geology of the Cockfield formation. Nor can TexCom prevent the extraction of oil and gas from the CFU, because TexCom owns no mineral rights underlying or adjacent to its tract. The evidence has shown that TexCom's proposed project endangers the state's freshwater resources, and therefore, TexCom's applications for UIC Permits Nos. WDW410, WDW411, WDW412, and WDW413 should be denied.

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<sup>113</sup> Denbury notes that given this suggestion, TexCom's failure to notify the owner of the mineral rights is even more egregious.

Respectfully submitted,

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**SERVICE LIST**

I hereby certify that, on this of 8th day of December, 2010, a true and correct copy of the foregoing has been served upon the following via the methods indicated below:

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**Denbury Onshore, LLC's Reply to Exceptions**

TCEQ Docket No. 2007-0204-WDW  
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**Denbury Onshore, LLC's Reply to Exceptions**

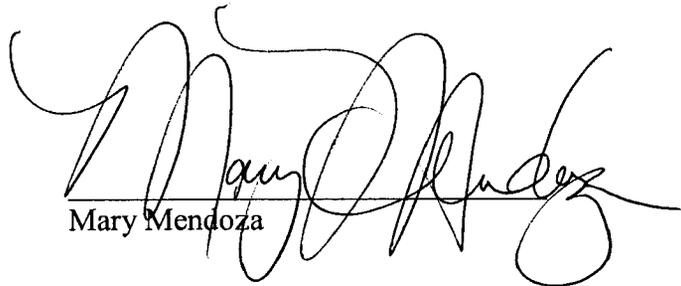
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