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May 15, 2008

**Via Hand-Delivery**

Ms. LaDonna Castañuela  
Office of the Chief Clerk  
Texas Commission on Environmental Quality  
12100 Park 35 Circle  
Austin, Texas 78753

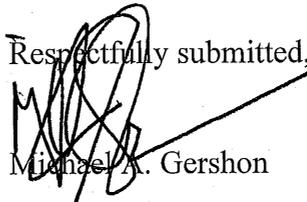
TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2008 MAY 15 PM 4:34  
CHIEF CLERKS OFFICE

RE: Applications of TexCom Gulf Disposal, LLC for TCEQ Underground Injection Control Permit Nos. WDW410, WDW411, WDW 412 and WDW413 and Industrial Solid Waste Permit No. 87758; SOAH Docket Nos. 582-07-2673 and 2674; TCEQ Docket No. 2007-0204-WDW and 2007-0362-WDW

Dear Ms. Castañuela:

Please find enclosed an original and eleven copies of the *Lone Star Groundwater Conservation District's Exceptions to the State Office of Administrative Hearings' Proposal for Decision and Findings of Fact and Conclusions of Law* in the above-captioned matters. By copy hereof, I certify that I have served the persons listed on the attached service list by hand delivery, first class mail, facsimile, or e-mail.

Respectfully submitted,

  
Michael A. Gershon

MAG:tkj  
1867/01/080204

Enclosure

cc: Parties of Record  
The Honorable Thomas H. Walston  
The Honorable Catherine C. Egan  
Ms. Kathy Turner Jones  
Mr. Jason T. Hill

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

2008 MAY 15 PM 4:34

APPLICATIONS OF TEXCOM GULF §  
DISPOSAL, L.L.C. FOR TEXAS § BEFORE THE STATE OFFICE  
COMMISSION ON ENVIRONMENTAL §  
QUALITY COMMISSION § OF  
UNDERGROUND INJECTION §  
CONTROL PERMIT NOS. WDW410, § ADMINISTRATIVE HEARINGS  
WDW411, WDW412, AND WDW413 §

CHIEF CLERKS OFFICE

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**LONE STAR GROUNDWATER CONSERVATION DISTRICT'S  
EXCEPTIONS TO THE STATE OFFICE OF ADMINISTRATIVE HEARINGS'  
PROPOSAL FOR DECISION AND FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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**SUBMITTED ON MAY 15, 2008**

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GROUNDWATER CONSERVATION DISTRICT**

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

2009 MAY 15 PM 4:34

APPLICATIONS OF TEXCOM GULF	§	CHIEF CLERKS OFFICE
DISPOSAL, L.L.C. FOR TEXAS	§	BEFORE THE STATE OFFICE
COMMISSION ON ENVIRONMENTAL	§	
QUALITY COMMISSION	§	OF
UNDERGROUND INJECTION	§	
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WDW411, WDW412, AND WDW413	§	

**LONE STAR GROUNDWATER CONSERVATION DISTRICT'S  
EXCEPTIONS TO THE STATE OFFICE OF ADMINISTRATIVE HEARINGS'  
PROPOSAL FOR DECISION AND FINDINGS OF FACT AND CONCLUSIONS OF LAW**

TO THE HONORABLE COMMISSIONERS:

The Lone Star Groundwater Conservation District, protestant in this case (the "District"), submits these exceptions and would respectfully show the following:

**I. INTRODUCTION**

There is insufficient evidence in the record to establish that TexCom's proposed UIC project will not endanger underground sources of drinking water ("USDWs") and freshwater. Thus, TexCom has not met its burden and its applications (the "UIC Permits Application" or "applications") should be denied. SOAH proposes a special condition ("Special Condition No. 2")<sup>1</sup> that would allow TexCom an opportunity to develop new evidence in an apparent attempt to fill the evidentiary voids in TexCom's case. Special Condition No. 2 contemplates an extensive process that would leave matters for the Commission open, unfinished, and inconclusive. To adopt SOAH's proposed order and Special Condition No. 2 would violate the doctrine of finality. The appropriate action would be to either (1) deny the UIC Permits Application outright or (2) remand with instructions that would ensure the ultimate decision to

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<sup>1</sup> PFD at 64.

consider evidence and make a final decision remains with the Commission, and not the Executive Director's ("ED's") staff.

## II. EXCEPTIONS

### A. LACK OF FINALITY: A DECISION TO GRANT THE UIC PERMITS APPLICATION SUBJECT TO SPECIAL CONDITION NO. 2 IS NOT FINAL

Material evidence is lacking from the record in this case to support TexCom's applications. Absent that material evidence, TexCom's applications fail. TexCom and Texas Commission on Environmental Quality ("TCEQ") must have that evidence in the record to meet the mandate in the Injection Well Act and TCEQ's rules that a UIC permit applicant prove nonendangerment of USDWs and fresh water. SOAH proposes to give TexCom and the ED's staff an opportunity to develop that material evidence post-permit issuance, and outside the record, pursuant to Special Condition No. 2. SOAH recommends that the Commission overlook the fact that the applicant did not meet its burden and grant the applications because it may be possible that the proof (which currently does not exist) might be developed.<sup>2</sup> To develop this evidence, the applicant would have to rework its existing well, then collect samples and conduct fall-off testing to generate new data, then analyze that data and run models with the hope that it might possibly be interpreted favorably by ED staff, and with the hope that after the ED staff's evaluation, that the ED's staff might decide whether or not TexCom can proceed with its project and, if so, whether additional conditions may need to be imposed on TexCom's authorized activities to protect the USDWs.

If TexCom does not conduct this work to generate additional, material evidence, then its applications remain unsubstantiated. And if and when TexCom might generate this additional

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<sup>2</sup> The District's foundation for its position that TexCom failed to meet its burden is briefed in Section II(C) of these Exceptions, and is briefed in greater detail in the District's Response to Closing Arguments.

information, the ED's staff must still evaluate TexCom's conclusions, run their own, independent models, and make substantive determinations regarding the operational parameters of the permits. The Commission cannot make a final decision absent this unfinished business. Thus, there are open issues, and any action by the Commission on the applications prior to completion of this work would be inconclusive. SOAH agrees. SOAH concludes that it cannot propose to grant the applications without the two proposed special conditions.

The District supports SOAH's assessment in this regard, including SOAH's recognition of the problems underlying the need for the two proposed special conditions. But it is Special Condition No. 2 that would make any Commission action nonfinal. The District's expert, Phil Grant, did not propose that the applications be granted subject to Special Condition No. 2, as mentioned on page 36 of the Proposal for Decision. Rather, Mr. Grant testified that fall-off testing is reliable for determining permeability and transmissivity of faults. The District wants to make clear that its position, and the position of its expert, was that the applications should not be granted, with or without Special Condition No. 2. As reviewed in Section II(B), below, in the alternative, the District would be willing to support remand to allow fall-off testing and the related follow-up work by the ED's staff, with an opportunity for further discovery and hearing on those limited issues. Remand would ensure that the ultimate decision to consider evidence and make a final decision on TexCom's applications remains with the Commission, and not the ED's staff. Otherwise, Special Condition No. 2 leaves matters for the Commission open, unfinished, and inconclusive.

Texas case law is clear that a Commission order must not leave any material issue open for future disposition and, therefore, if a right is made contingent upon the occurrence of some

future event, the order is not final.<sup>3</sup> So long as matters remain open, unfinished or inconclusive, there is no final decision.<sup>4</sup> An Austin Court of Appeals decision reviewing Administrative Procedure Act § 2001.144 (“Decisions; When Final”) addresses this very problem.<sup>5</sup> The case involved an order of the Texas Water Commission that allowed the operator of a hazardous waste disposal well and related surface facilities the option of giving financial assurance other than the statutorily required bond. The Court concluded that the order was not final for purposes of judicial review under the APA because of the contingency related to financial assurance.<sup>6</sup>

Although there is no single rule dispositive of all questions of finality, the Texas Supreme Court has held that the statutory and constitutional context in which an agency operates should be considered, and that a decision should be treated as final “which is definitive, promulgated in a formal manner and one with which the agency expects compliance.”<sup>7</sup> In *Texas-New Mexico Power Co.*, the high court held generally that administrative orders are final and appealable if “they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process.”<sup>8</sup>

In reviewing the statutory context of this case, it is clear from the Injection Well Act that the purpose of TCEQ’s UIC program is to maintain the quality of fresh water and prevent

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<sup>3</sup> *P.A.C.E. v. Texas Air Control Bd.*, 725 S.W.2d 810, 811 (Tex.App.—Austin 1987, writ ref’d n.r.e.); *Browning-Ferris, Inc. v. Johnson*, 644 S.W.2d 123, 126-27 (Tex.App.—Austin 1982, writ ref’d n.r.e.); *Walker Creek Homeowners Ass’n v. Texas Dep’t of Health Resources*, 581 S.W.2d 196, 198 (Tex.App.—Austin 1979, no writ); *Mahon v. Vandygriff*, 578 S.W.2d 144, 147 (Tex.App.—Austin 1979, writ ref’d n.r.e.); *Albertson’s, Inc. v. Ellis*, 131 S.W.3d 245, 247-48 (Tex.App.—Fort Worth 2004, review denied); Ronald L. Beal, 2 Texas Administrative Practice and Procedure § 8.3.6, at 8-63 - 8-64 (2007).

<sup>4</sup> *Id.*; *State v. Public Utility Comm’n of Texas* 840 S.W.2d 650, 654-55 (Tex.App.—Austin 1992, affirmed in part, reversed in part on other grounds, 883 S.W.2d 190 (Tex. 1992)) (“Final administrative order is one that leaves nothing open for future disposition; therefore, so long as matters remain open, unfinished, or inconclusive, there is no final decision.”).

<sup>5</sup> TEX. GOV’T CODE § 2001.144.

<sup>6</sup> *Browning-Ferris, Inc. v. Brazoria County*, 742 S.W.2d 43, 48-54 (Tex.App.—Austin 1987, no writ).

<sup>7</sup> *Texas-New Mexico Power Co. v. Texas Indus. Energy Consumers*, 806 S.W.2d 230, 232 (Tex. 1991); *State v. Public Util. Comm’n*, 840 S.W.2d at 654.

<sup>8</sup> *Texas-New Mexico Power Co.*, 806 S.W.2d at 232.

underground injection that may pollute fresh water, including but not limited to ensuring compliance with the requirements of § 27.051 of the Texas Water Code and, naturally, TCEQ's implementing regulations.<sup>9</sup> As reviewed in more detail in Section II(C) below, not all of the requisite criteria have been met by TexCom. It is by the very nature of Special Condition No. 2 that the door is left open to allow TexCom to attempt to make its case post-permit issuance, with subsequent discretion left with the ED's staff to evaluate that evidence and make substantive decisions, which makes the proposed order nonfinal. SOAH is of the position that this special condition is appropriate because the activities contemplated by the condition occur in a traditional UIC case (one in which wells have not yet been drilled) post-permit issuance.<sup>10</sup> However, SOAH's position sidesteps the point that an applicant in a traditional UIC case must still meet its burden before the Commission, prior to getting authority to drill a well pursuant to a permit. The burden is *not* a relaxed standard, under which the Commission may allow any UIC applicant to have a permit, subject to post-permitting review by the ED's staff. Rather, an applicant must introduce the best available science justifying its technical assumptions, so that the Commission may confidently act on pending applications. SOAH's proposal in this case ignores its own conclusion that TexCom could not demonstrate with any persuasiveness that its assumptions were justified, and were protective of USDWs best available science shows that there are serious concerns about endangering USDWs and freshwater. SOAH's proposal deprives the Commission of the ability to confidently make a decision based on the best available science in the record. SOAH's proposal puts off to another day that decision, and leaves that decision not with the Commission but instead with the ED's staff. Most egregiously, that decision would be based on evidence that is not currently in the record, if it even exists, and

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<sup>9</sup> TEX. WATER CODE §§ 27.003, 27.051.

<sup>10</sup> PFD at 31-32.

that would not be subject to cross-examination or otherwise subject to any meaningful review by the protesting parties.

Special Condition No. 2's open-ended process, described above, clearly would make any Commission order inconclusive and, consequently, indefinite. Under the *Texas-New Mexico Power Co.* holding, the Commission's order must be definitive, which it would not be if it included Special Condition No. 2. Consequently, the ALJ's proposed order violates the finality doctrine on this ground.

With respect to promulgation in a formal manner, certainly it is recognized that the Commission would issue its order through the appropriate procedure for conducting Commission agenda and decisionmaking. However, the ordering provision contemplated by Special Condition No. 2 provides for an *informal* post-permit issuance process of testing, evaluation, review, and decisionmaking that avoids the type of formal review required by the APA through the contested case hearing process at SOAH and deliberation by the Commission in a public meeting. Even SOAH recognizes the "sensitive nature" of the *informal* process contemplated by Special Condition No. 2.<sup>11</sup> SOAH's solution to this sensitive issue is that the other parties be allowed to be present during testing, but with no opportunity for meaningful review, with no remedy for questioning or challenging the data or the opinions of the applicant and ED's staff, and with no remedy for challenging the ultimate, discretionary decisionmaking to be vested with the ED's staff.<sup>12</sup> Clearly this process for informal decisionmaking by the ED's staff on core issues, applying evidence outside the record, post-permit issuance, conflicts with the doctrine of finality contemplated by the Texas Supreme Court in *Texas-New Mexico Power Co.*<sup>13</sup>

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<sup>11</sup> PFD at 23.

<sup>12</sup> *Id.*

<sup>13</sup> *Texas-New Mexico Power Co.*, 806 S.W.2d at 232.

In conclusion, but for SOAH's proposal to give TexCom another chance to develop *new* information that *may possibly* support TexCom's applications, the *existing* evidence in TexCom's applications and the record demonstrate that TexCom's project does not comport with the mandate in the Injection Well Act and TCEQ's rules that a UIC permit applicant prove nonendangerment of USDWs.<sup>14</sup> TexCom did not make its case, and SOAH's Special Condition No. 2 gives TexCom another bite at the apple. Special Condition No. 2 provides TexCom an opportunity to develop evidence that might fill critically important holes in its case, without which its applications fail. If adopted, this special condition makes the permits nonfinal. Absent this special condition, the applications fail.

Because Special Condition No. 2 is not legally justifiable, the Commission is left with no option other than to deny the applications, unless the Commission is interested in remanding this case. The District will review these two remedies in the following two sections.

## **B. REMAND**

If the Commission is of the position that the applicant ought to be given an opportunity to rework its well and develop new, material evidence as contemplated by Special Condition No. 2, then the appropriate remedies are (1) outright denial, recognizing that TexCom could refile new applications, or (2) remand with instructions. If the Commission's preference is remand, the Commission has discretion to reopen the record.<sup>15</sup> Section 80.265 of TCEQ's rules provides:

The commission, on the motion of any party or on its own motion, may order the judge to reopen the record for further proceedings on specific issues in dispute. The commission's order shall include instructions as to the subject matter of further proceedings and the judge's duties in preparing supplemental materials or revised orders based upon those proceedings for the commission's adoption.<sup>16</sup>

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<sup>14</sup> See Section II(C) of these Exceptions; *see also* District's Response to Closing Arguments.

<sup>15</sup> *Reliant Energy, Inc. v. PUC*, 153 S.W.3d 174, 196-97 (Tex.App.—Austin 2004, writ denied); *Pretzer v. Motor Vehicle Bd.*, 125 S.W.3d 23, 37-38 (Tex.App.—Austin 2003, *rev'd on other grounds*, 138 S.W.3d 908 (Tex. 2004)); 30 TEX. ADMIN. CODE § 80.265 ("Reopening the Record").

<sup>16</sup> 30 TEX. ADMIN. CODE § 80.265.

It is possible that the Commission could fashion instructions to SOAH and the Executive Director consistent with § 80.265 and the cited Texas case law that would provide the opportunity proposed by SOAH's Special Condition No. 2, and then provide for discovery and hearing on the limited issues involved directly with activities conducted and opinions developed by the ED, TexCom, and all other parties in this case. Remand would ensure that the ultimate decision on these applications is made by the Commission, and not the ED's staff. Remand would ensure finality in decisionmaking.

The applicant would not be prejudiced by remand. In fact, remand is an opportunity for the applicant to attempt to supplement the administrative record in its favor. Any burden of added time and expense is also borne by the protestants and other parties. The cause for remand is ultimately the applicant's own doing, due to the applicant's failure to adequately develop the record. It is apparent from the record that the applicant hedged its bets by choosing not to develop additional evidence, most likely to conserve funds. TexCom's CEO testified that his company did not conduct due diligence on the well because they assumed that if the applications at this site had been granted before, they should be granted again.<sup>17</sup> Of course it is the District's position that TexCom's CEO should have known that the completion report and fall-off test run by the former permit holder showed significant problems and were never approved by TCEQ. TexCom could have reworked its existing well and generated the data, modeling, and other evidence sought under Special Condition No. 2 prior to filing its applications, but chose not to do so. The time spent by TexCom on remand to develop this information could have been spent on the front-end. For these reasons, it would be disingenuous for TexCom to argue that remand for that purpose now is an unfair delay.

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<sup>17</sup> Tr., at 54-55.

### C. DENIAL

To understand exactly why the Commission is left with no choice but to deny the UIC Permits Application first requires an understanding of the significant role that the cone of influence calculation plays in a Class I injection well permit application like the one at issue in this contested case. TCEQ rules and policy require Class I UIC permit applicants like TexCom to assess the pressure increases in the planned injection reservoir that will be caused by the proposed injection activity and make a calculation of how far from the wellbore these endangering pressure influences will extend over the life of the well.<sup>18</sup> The formation pressuring increases that TCEQ considers to be “endangering influences” are those increases that are equal to or greater than what is needed to push reservoir fluid—either injectate or displaced native brines—into an abandoned but structurally sound wellbore that is plugged with nothing but a column of 9.0 lbs. per gallon drilling mud.<sup>19</sup> The area extending from the wellbore that is calculated to be subjected to these endangering pressure influences is what is referred to as the cone of influence of an injection disposal well (the “COI”).<sup>20</sup> This calculation can be made by making long-hand calculations based on the mathematical equation provided by TCEQ in its rules,<sup>21</sup> or it can be done by using computer modeling software designed to produce such a determination. Both the District and TexCom relied on computer models to calculate the COI of the proposed injection wells.

An applicant’s COI assessment is important not just in determining where potential pressuring problems could be expected to occur in an injection reservoir, but it also potentially

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<sup>18</sup> *Id.* § 331.42(b – c); District Exh. 11, p. 28 of 32 (TCEQ-0623 UIC Class I Injection Well Application, Rev. Sept. 20, 2005).

<sup>19</sup> District Exh. 11, p. 28 of 32 (TCEQ-0623 UIC Class I Injection Well Application, Rev. Sept. 20, 2005).

<sup>20</sup> 30 TEX. ADMIN. CODE § 331.42(c) (noting in the Theis equation, “r” equals the vertical radius of endangering pressure influence caused by underground injection).

<sup>21</sup> *Id.*

impacts the amount of information the applicant must review, and provide, in its Class I UIC permit application.<sup>22</sup> Under TCEQ rules, the “area of review is the area surrounding an injection well for which the applicant must detail the information required in Subchapter G ... (relating to Consideration Prior to Permit Issuance)” (the “AOR”).<sup>23</sup> The rules make clear that for Class I well applications, the AOR is the area extending 2.5 in radius from the wellbore, or the area within the COI, whichever is greater.<sup>24</sup>

As with any mathematical formula, the quality of the COI calculation depends on the reliability of the values used in the equation. Throughout the evidentiary hearing, the District presented substantial evidence that established that TexCom used insupportable, unrealistically optimistic values in the COI modeling that it conducted as part of its UIC Permits Application. The obvious conclusion was that because TexCom used poor inputs in its formation pressure modeling, the COI calculation it used in its UIC Permits Application was not a reliable indicator of the pressuring impacts of its proposed injection operations. The ALJs agreed with the District's assessment that TexCom used improper permeability assumptions in its model and that in its modeling it characterized the EW-4400-S fault in a way that was not sufficiently protective of underground sources of drinking water.

The practical differences between modeling based on TexCom's inaccurate assumptions and based on those that the ALJs concluded should have been used in the UIC Permits Application could not be more significant. When using what the ALJs concluded were TexCom's unrealistically optimistic inputs, the COI from the proposed injection well was no more than 750 feet. When using the inputs that the District advocated should have been used,

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<sup>22</sup> 30 TEX. ADMIN. CODE § 331.42(b).

<sup>23</sup> *Id.* § 331.42(a).

<sup>24</sup> *Id.* § 331.42(b).

and that the ALJs said TexCom indeed should have used in the modeling it presented in its UIC Permits Application, the COI of TexCom's proposed operation jumps from 750 feet to 14,300 feet from the wellbore—a radius of 2.7 miles.<sup>25</sup> The ALJs' conclusions make clear that TexCom failed to demonstrate with any amount of reliability that its modeling assumptions were appropriately protective of USDWs. Consequentially, a failure like TexCom's to develop an appropriately conservative COI can lead to endangerment of USDWs and fresh water aquifers.<sup>26</sup>

Beyond the important practical differences between TexCom's flawed model and one using the inputs the ALJs said TexCom should have used, however, there are significant legal realities that doom TexCom's UIC Permits Application, barring a remand. Chapter 331, Subchapter G, of TCEQ rules contains certain matters that the Commission *must* consider before it can issue a Class I injection well permit like the ones sought by TexCom in this proceeding.<sup>27</sup> Specifically, section 331.121(a) in clear terms provides that the Commission cannot issue a Class I injection well permit unless it has first considered, among other things, a map showing the “applicable area of review” along with the location and number or name of “all producing wells, injection wells, abandoned wells, dry holes, surface bodies of water, springs, mines, quarries, water wells, and other pertinent features...” within the applicable area of review.<sup>28</sup> The Commission is similarly precluded from issuing such a permit if it first does not consider “a tabulation of all wells within the area of review that penetrate the injection zone or confining zone,” which is to include a disclosure of the type of each well, a description of each well's

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<sup>25</sup> District Exh. 13.

<sup>26</sup> District Exh. 8, pp. 6, 21-23.

<sup>27</sup> 30 TEX. ADMIN. CODE Chapter 331, Subchapter G (Consideration Prior to Permit Issuance).

<sup>28</sup> *Id.* § 331.121(a)(2)(A).

construction, the date each was drilled, its location, depth, and record of plugging and / or completion.<sup>29</sup>

In the context of the UIC Permits Application filed by TexCom, the COI calculation becomes critical here. Because the correct COI—that is, the one calculated by using the input parameters that the ALJs concluded TexCom should have used in its UIC Permits Application modeling—is larger than 2.5 miles, under TCEQ rules the AOR becomes as expansive as the COI.<sup>30</sup> In other words, for TexCom’s UIC Permits Application, the “applicable area or review” is 2.7 miles from the well bore, not the lesser 2.5 mile area of review submitted by TexCom. The result, of course, is that because TexCom incorrectly calculated the COI in its UIC Permits Application, the Commission today does not have for its consideration all of the information that it is required under its own rules to consider before it can issue the requested injection well permits.<sup>31</sup>

The ALJs believe that *Citizens Against Landfill Location v. Texas Commission on Environmental Quality*<sup>32</sup> direct them to sidestep this question, categorizing this as a merely a matter of technical or administrative completeness. As an initial matter, the limits articulated in that particular decision that precluded the court from revisiting the staff’s determination of an application’s administrative and technical completeness were solely and exclusively borne from an express statutory directive from the Legislature proscribing the Commission from revoking the determination that a solid waste landfill application was administratively or technically

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<sup>29</sup> *Id.* § 331.121(a)(2)(B).

<sup>30</sup> *Id.* § 331.42(b)(1).

<sup>31</sup> *Id.* § 331.121(a)(2).

<sup>32</sup> 169 S.W.3d 258 (Tex. App.—Austin 2005, pet. denied).

complete.<sup>33</sup> As the ALJs recognized in their PFD, the prohibitions of section 361.068, Health and Safety Code, do not apply to this application. To conclude, then, that the prohibitions reviewed in *Citizens* should be also implied with respect to section 331.121(a) of the TCEQ rules, would of course be the type of judicial legislation that courts are typically loathe to condone.<sup>34</sup> It is a fundamental rule of statutory construction that when the Legislature has employed a standard in one statute, but refrained from doing so in another, the standard should not be implied where it has been excluded.<sup>35</sup>

But the ALJs miss the mark here by characterizing the shortcomings in TexCom's modeling, and its resulting incorrect description of the applicable AOR in its UIC Permits Application, as a mere technicality. The AOR calculation is a critical component in assessing whether the proposed injection activities might endanger USDWs or freshwater aquifers.<sup>36</sup> Section 331.121(a)(2)(A) requires TexCom to identify the location of each of the four proposed injection wells in its technical report and to delineate "the applicable area of review." To have satisfied this requirement, TexCom must have demonstrated by a preponderance of the evidence that the AOR it delineated in the technical report was, in fact, the applicable AOR.<sup>37</sup> Whether TexCom satisfied this requirement depends on whether it has proven that it correctly calculated the COI of the proposed injection activities.<sup>38</sup> And the ALJs have made clear in their findings of

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<sup>33</sup> *Id.* at 271-72; *cf.* TEX. HEALTH & SAFETY CODE ANN. § 361.068(b)(1) (Vernon 2001) (providing, *inter alia*, that once a determination that an application is administratively and technically complete has been made and the permit application has become the subject of a contested case under Section 2001.003, Government Code, the Commission may not revoke the determination that an application is administratively or technically complete).

<sup>34</sup> *Franklin v. Pietzsch*, 334 S.W.2d 214, 219 (Tex. Civ. App.—Dallas 1960, writ ref'd n.r.e.) (noting that "[a] court is not authorized, under any pretext, to modify, repeal or rewrite a statute, nor even to 'construe' an unambiguous act to conform to its own notions of justice, policy, propriety, or wisdom").

<sup>35</sup> *Smith v. Baldwin*, 611 S.W.2d 611, 616 (Tex. 1980).

<sup>36</sup> District Exh. 8, p. 55; 30 TEX. ADMIN. CODE § 331.42.

<sup>37</sup> 30 TEX. ADMIN. CODE § 331.121(a)(2)(A).

<sup>38</sup> 30 TEX. ADMIN. CODE §§ 80.17, 80.117, 331.42(a), (b)(1).

the piezometric surface of the lowermost USDW, (C) no USDW or freshwater aquifer was present, or (D) because of geology, nature of the waste to be injected, or other considerations, that abandoned boreholes or other conduits would not cause endangerment of USDWs or fresh or surface water sources.<sup>45</sup> TexCom was unable to produce any credible evidence that suggested A, B, or C was in its favor. Thus, it was left with the task of demonstrating, by a preponderance of the evidence,<sup>46</sup> that abandoned boreholes or other conduits would not cause endangerment of USDWs and fresh and surface water.<sup>47</sup>

As reiterated and reinforced throughout the District's closing arguments and reply—and as illustrated by the ALJs' apparent need to draft its Special Condition No. 2<sup>48</sup>—the great weight of evidence produced in this case demonstrates that TexCom did not adequately address the endangerment issues left unaccounted for by its UIC Permits Application, and has thus failed to demonstrate that artificial penetrations will not serve as pathways for migration of injectate or displaced native brines into USDWs and fresh water aquifers. This was, without question, its single most important evidentiary obligation in this entire permitting process.<sup>49</sup>

But we know that TexCom failed to demonstrate that it correctly calculated the COI of its proposed injection activities.<sup>50</sup> In fact, we know that TexCom *incorrectly* calculated the COI.<sup>51</sup> Based on the use of what the ALJs determined to be the appropriate permeability values and a realistic assessment of the nontransmissive nature of fault EW-4400-S, we know that the COI of

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<sup>45</sup> *Id.* § 331.121(c)(4).

<sup>46</sup> *Id.* §§ 80.17, .117.

<sup>47</sup> 30 TEX. ADMIN. CODE § 331.121(c)(4)(D).

<sup>48</sup> Conclusion of Law. No. 51.

<sup>49</sup> District Exh. 8, pp. 62-63.

<sup>50</sup> Finding of Fact Nos. 146, 154.

<sup>51</sup> *Id.*

fact that TexCom did not correctly calculate the COI.<sup>39</sup> But they also went a step further. They concluded that TexCom should have used a permeability value of 81 millidarcies in their model, and it should have assumed the EW-4400-S fault was nontransmissive.<sup>40</sup> When the COI of TexCom's proposed injection wells is calculated using those inputs in accordance section 331.42(c) of the TCEQ rules, then it is clear that TexCom's UIC Permits Application was based on a substantively deficient AOR description.<sup>41</sup> Because of TexCom's failures in this regard, the Commission does not have before it the applicable area of review—calculated based on the ALJs findings—that it is required to consider under section 331.121(a)(2) of its rules.

This is more than a ministerial box-checking issue for the Commission. This is a substantive defect in TexCom's UIC Permits Application that, if allowed to go unaddressed with a permit issuance, would be inconsistent with the most important component to the purpose and scope of Chapter 331—preventing underground injection that may pollute fresh water.<sup>42</sup>

Finally, without the ALJs' legally specious proposed Special Condition No. 2,<sup>43</sup> TexCom's UIC Permits Application fails because of its failure to demonstrate, by a preponderance of the evidence, that it has satisfied yet another critical provision in the TCEQ's UIC permitting rules. Specifically, under section 331.121(c)(4), TexCom was saddled with the burden of ultimately proving that its proposed injection operations would not cause endangerment of USDWs and fresh or surface water sources.<sup>44</sup> Under the rules, it could have done this by proving that (A) a protective layer exists between the confining zone and the lowermost USDW, (B) the piezometric surface of the natural fluids in the injection zone is below

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<sup>39</sup> Findings of Fact Nos. 146, 154.

<sup>40</sup> *Id.*

<sup>41</sup> District Exh. 8, p. 57: 13 – 15.

<sup>42</sup> 30 TEX. ADMIN. CODE § 331.1.

<sup>43</sup> Conclusion of Law No. 51.

<sup>44</sup> 30 TEX. ADMIN. CODE § 331.121(c)(4)(D).

TexCom's proposed operation is 14,300 feet,<sup>52</sup> not the implausible, effectively *de minimis*, value that TexCom proposed, but failed to justify with evidence, in its UIC Permits Application.<sup>53</sup>

Section 331.121(c)(4)(D), therefore, requires TexCom to have demonstrated by a preponderance of the evidence that none of the artificial penetrations within the 14,300-foot COI would cause endangerment of USDWs and fresh water aquifers. Because it did not even investigate all of this 2.7 mile AOR, it has made no such showing. Without the ALJs' special condition giving TexCom this inappropriate opportunity to supplement its UIC Permits Application, and without a much more appropriate remand of this case, then the Commission, by its own rules, and based on the substantial evidence in this case, is left with no choice than to deny TexCom's UIC Permits Application.

### **III. EXCEPTIONS TO FOF/COL**

The District excepts to the following findings of fact and conclusions of law proposed by the ALJs.

#### **A. EXCEPTIONS TO FINDINGS OF FACT**

##### **1. ALJs' Findings of Fact regarding Location**

###### Findings of Fact Nos. 96 and 98

The District excepts to these Findings to the extent they are to be somehow used as justification for alleviating TexCom from the requirement that it describe the well type, construction, date drilled, location, depth, record of plugging and / or completion for each well within its COI. For each well that TexCom is unable to produce total depth or plugging information on, the well must be assumed to penetrate the injection reservoir, be filled with a

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<sup>52</sup> District Exh. 8, p. 56; District Exh. 13.

<sup>53</sup> District's Closing Arguments, p. 28.

mud plug under the parameters discussed throughout this case, and otherwise be capable of serving as a pathway for migration of injectate or displaced native brines, therefore endangering USDWs.

Finding of Fact No. 117

The District excepts to this Finding to the extent that it does not recognize artificial penetrations as potential pathways for migration of injectate or displaced native brines into USDWs. TexCom has not demonstrated that such pathways will not cause endangerment.

Findings of Fact Nos. 123 and 124

The District excepts to this Finding to the extent that it does not recognize artificial penetrations as potential pathways for migration of injectate or displaced native brines into USDWs. TexCom has not demonstrated that such pathways will not cause endangerment.

**2. ALJs' Findings of Fact regarding Reservoir Modeling**

Findings of Fact Nos. 130 and 131

The District excepts to these Findings to the extent that they are proposed to serve as substitutes to TexCom's burden of proof in this case, or otherwise intended to serve as a mechanism for allowing TexCom to supplement its UIC Permits Application in a manner that is inconsistent with its evidentiary obligations under applicable rules.

Finding of Fact No. 132

The District excepts to this Finding on the ground that it is inconsistent with, and contrary to, the ALJs' Findings of Fact Nos. 146 and 154, wherein the ALJs concluded that TexCom

should have used different assumptions in its pressure modeling in order for it to have been "conservative and protective of USDWs."

### **3. ALJs' Findings of Fact regarding Permeability Used in Reservoir Modeling**

#### Finding of Fact No. 139

The District excepts to this Finding on the ground that mischaracterizes evidence and is not supported by the preponderance of the evidence in this case. As the completion report submitted on WDW315 in 1999 clearly indicates, the core samples that were taken from WDW315 had actual permeability values of 485 mD, 836 mD, 511 mD, 117 mD, and 6 (six) mD, with a collective permeability average of 391 mD.<sup>54</sup> These five samples were each two-inch segments selected from a 14-foot core of material, providing a permeability assessment on ten noncontiguous inches of a 14-foot segment of the 345 foot Lower Cockfield.

#### Finding of Fact No. 140

The District excepts to this Finding on the ground that it is without any evidentiary support. As an initial matter, the District addressed in its closing argument and in its reply to closing arguments the limited utility that literature, or regional, values like the one purportedly referred to in this finding actually provide professional geoscientists when they are working to understand the characteristics of specific strata below specific points, like the permeability of the Lower Cockfield formation at WDW315, as a pertinent example.<sup>55</sup> Mr. Grant testified without any serious contradiction that while these literature values can be useful to ascertain regional

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<sup>54</sup> TexCom Ex. 11, p. 146; *see* District's Closing Arguments, pp. 18-19 for discussion regarding Klingenberg correction factor.

<sup>55</sup> District's Closing Arguments, pp. 12-14.

geologic trends,<sup>56</sup> the most useful information regarding the subsurface conditions below a given point like a well is information garnered from the location itself—actual site-specific data.<sup>57</sup> Even this point is really not in contention between the parties, as Mr. Casey testified in the hearing that, between regional data and site-specific information, he indicated that “actual well data” was more accurate.<sup>58</sup> So, even if we had at our disposal literature that told us to expect an average permeability of 1,400 mD in the area of the proposed injection operations, the information we learned at, and from, WDW315 itself would be more accurate and thus more appropriate to rely upon when attempting to ensure nonendangerment.<sup>59</sup>

But despite what TexCom says in its brief, not once did it reveal the source of this permeability theory for the Lower Cockfield.<sup>60</sup> TexCom neither cites in its brief,<sup>61</sup> nor references in its UIC Permits Application,<sup>62</sup> any literature that says the Lower Cockfield should be expected to have a permeability of 1,400 mD. Indeed, as the ALJs concluded in Findings of Fact No. 146, the most appropriate and reasonably conservative permeability assumption for purposes of calculating the COI was 80.9 mD.

#### Finding of Fact No. 142

The District excepts to this Finding on the ground that it mischaracterizes evidence and is not supported by the preponderance of the evidence in this case. The completion report conducted on WDW315 in 1999 indicate that perforations were made into 100 feet of total sand (not 90 feet) within the Lower Cockfield.

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<sup>56</sup> District Exh. 8, pp. 11-13.

<sup>57</sup> District Exh. 8, pp. 10-11, 13.

<sup>58</sup> Tr. 325-26.

<sup>59</sup> District Exh. 8, pp. 22-23.

<sup>60</sup> TexCom Ex. 21, p. 32.

<sup>61</sup> TexCom Brief, p. 34, n. 306.

<sup>62</sup> TexCom Ex. 21, p. 47 (References).

Finding of Fact No. 144

The District excepts to this Finding on the ground that it mischaracterizes evidence and is not supported by the preponderance of evidence in this case. Evidence presented in this case, including information presented in TexCom's own UIC Permits Application, make abundantly clear that the Lower Cockfield is known to possess very little of the type of "clean, non-shaley sand intervals," if any at all, that are referenced in this Finding.

Instead, the overwhelming evidence in this case makes clear that the sands in the Lower Cockfield are "mostly thin bedded with shale interbeds," and "uniformly lower quality than" sands in the Middle and Upper Cockfield.<sup>63</sup> In fact, TexCom describes the entire Lower Cockfield in its UIC Permits Application as having the "least sand and the lowest quality sands in the [entire] Cockfield,"<sup>64</sup> and that it is made up of "shales and shaley sands," with "the thickest sand [appearing] to be seven feet thick while most are much thinner."<sup>65</sup> Even one of TexCom's own witnesses has generally characterized the Lower Cockfield as "shaley."<sup>66</sup>

As Mr. Grant helped clarify, that means that the sands contain a higher percentage of clay particles, which lower its permeability.<sup>67</sup> Even the shallower sands of the Lower Cockfield, as Mr. Grant has explained, maintain this shaley characteristic, which means they are expected to have a reduced permeability compared to the sands in the Upper and Middle Cockfield.<sup>68</sup> The great weight of the evidence in this case, much of it found directly in TexCom's UIC Permits Application, tells us that it is unlikely it will experience a significantly greater permeability

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<sup>63</sup> TexCom Ex. 21, p. 29; TexCom Ex. 49, p. 32; TexCom Ex. 23, p. 29.

<sup>64</sup> TexCom Ex. 23, p. 38.

<sup>65</sup> TexCom Ex. 21, p. 29; TexCom Ex. 49, p. 32; TexCom Ex. 57, p. 15; TexCom Ex. 23, p. 29.

<sup>66</sup> TexCom Ex. 57, p. 18.

<sup>67</sup> District Exh. 8, p. 17.

<sup>68</sup> District Exh. 8, p. 17; *see also*, TexCom Ex. 23, p. 28 (describing the top of the Lower Cockfield formation as "series of finely bedded sands and shales").

average from the 45 feet of remaining sands available for it to perforated into in the Lower Cockfield.

#### **4. ALJs' Findings of Fact regarding Transmissivity of Fault Located 4,400 Feet South of Facility**

##### Finding of Fact No. 151

The District excepts to this Finding on the ground that, to the extent it is meant to support the theory that the EW-4400-S fault is transmissive to formation pressuring at the Lower Cockfield. The overwhelming weight of evidence in this case—much of it coming from TexCom's UIC Permits Application—tells us that the Lower Cockfield will act as a barrier to the formation pressures generated by TexCom's proposed injection activities.

The only evidence offered by TexCom to support its now discredited decision to model EW-4400-S as transmissive to Lower Cockfield pressuring is testimony by Dr. Langhus regarding oil production in the Upper Cockfield. According to Dr. Langhus, because the oil-water contact on both sides of EW-4400-S in the Upper Cockfield is at the same approximate elevation below sea level, this suggests to him that the fault could be transmissive.<sup>69</sup> But Dr. Langhus does not even fully commit to this theory, calling it a “strong indication” of transmissivity, but in the same breath letting us know that his theory is “not 100 percent; it’s not bullet proof”<sup>70</sup>—hardly a statement of confidence. And in fact, as Mr. Grant testified, the oil “trap” formed at EW-4400-S provides an indication that the trapped minerals were blocked from migrating across the fault because of the fault’s nontransmissive nature.<sup>71</sup>

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<sup>69</sup> Tr. 1360-62.

<sup>70</sup> Tr. 1361-62.

<sup>71</sup> Tr. 1085-86, 1090-91.

More significantly, Dr. Langhus<sup>72</sup> clearly and expressly limited the scope of his opinion regarding the nontransmissive nature of EW-4400-S to only the portion of the fault that transects the *Upper Cockfield* formation.<sup>73</sup> In fact, nowhere in the referenced testimony does Dr. Langhus even mention the nontransmissive nature of EW-4400-S where it transects the Lower Cockfield.<sup>74</sup> Furthermore, the ALJs' Finding is directly contrary to Dr. Langhus' later admission to Judge Walston that he (Dr. Langhus) has no evidence to support the idea that EW-4400-S is transmissive to formation pressures where it transects the Lower Cockfield.<sup>75</sup>

The best evidence offered by TexCom on the subject, then, is that EW-4400-S is potentially transmissive in the *Upper Cockfield*,<sup>76</sup> and that its key faulting witness has no evidence to support the Applicant's position that the EW-4400-S fault is transmissive at the *Lower Cockfield*—the only relevant member of the Cockfield formation for the purposes of COI modeling.<sup>77</sup>

#### Finding of Fact No. 153

The District excepts to this Finding on the ground that it is not consistent with the great weight of evidence produced in this case. Indeed, TexCom's own evidence supports the conclusion that EW-4400-S is a barrier to pressure transmission. Dr. Langhus testified that “in order for a fault to be open, transmissive, there has to be a lot of sand on both sides of the faulted horizon,” and “if there's too much shale – and by ‘too much,’ I mean 25 percent – then it tends to

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<sup>72</sup> TexCom Brief, p. 37, notes 330-33 (citing to Tr. 1360-62).

<sup>73</sup> Tr. 1360-62.

<sup>74</sup> Tr. 1360-62.

<sup>75</sup> Tr. 1366.

<sup>76</sup> Tr. 1360-62.

<sup>77</sup> Tr. 1366.

smear across the fault.”<sup>78</sup> He later went on to expand on the effect of the “smear” phenomenon he was speaking of when he told us that “if there’s sufficient shale on both sides – or on either side of the fault, the clay material within the shale will smear across the fault plane, and that smearing will, of course, retard any kind of transmission of fluids through the fault plane.”<sup>79</sup>

In Dr. Langhus' own words, the Lower Cockfield is a “shaley” formation.<sup>80</sup> It is made up of more than 50 percent shale, well beyond the 25 percent threshold he spoke of that would be necessary to create a pressure seal at the EW-4400-S fault.<sup>81</sup> In fact, based on information disclosed by TexCom itself, the Lower Cockfield formation has the least amount of sand of all Cockfield members.<sup>82</sup>

Thus, the overwhelming evidence in this case demonstrates clearly that EW-4400-S will act as a barrier to pressures created by TexCom’s commercial disposal operations, and as a consequence will have a dramatic effect on the its COI.<sup>83</sup> Indeed the preponderance of evidence admitted in the case makes abundantly clear that TexCom should have calculated a COI based on EW-4400-S being a pressure barrier. The ALJs' Finding No. 154 recognizes this. But because TexCom failed to do this, it has failed to accurately calculate the COI of its proposed injection operations,<sup>84</sup> and as a result, it has failed to base its UIC Permits Application on the applicable AOR.<sup>85</sup>

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<sup>78</sup> Tr. 407; *see also* Tr. 1093 (Mr. Grant testifying about his general knowledge that in the Gulf Coast tertiary, faults transecting a formation like the Lower Cockfield with 30 percent to 40 percent shale content will create smearing sufficient to form a pressure seal).

<sup>79</sup> Tr. 419 (emphasis added).

<sup>80</sup> TexCom Ex. 57, p. 18.

<sup>81</sup> Tr. 1078-79, 1091-93.

<sup>82</sup> TexCom Ex. 23, p. 38.

<sup>83</sup> District Exh. 13.

<sup>84</sup> District Exh. 8, p. 56.

<sup>85</sup> District Exh. 8, p. 57.

Findings of Fact Nos. 161 and 162

The District excepts to these Findings to the extent that they suggests that TexCom took the initiative to make any modeling assumptions that were more conservative, and thus protective of USDWs, than what it was required to do by the TCEQ, and to the extent they suggest TexCom was not required to integrate these assumptions into its modeling. Indeed, TexCom was required by TCEQ to conduct its modeling using continuous injection as a baseline. The TCEQ's Class I UIC guidance document makes clear that TexCom must have, in its UIC Permits Application, justified "the anticipated distribution pattern of pressure increase [within the AOR] considering patterns of fluid flow in response to any preferential permeability and to any faults or other possible reservoir boundaries."<sup>86</sup> Additionally, it must have included "predictions for one and ten years from present and for the remainder of the operational lifetime of the well (30 years for new wells)," and it must have assumed "continuous injection during those periods. The rate of injection used in the model should be the requested maximum permitted rate sustainable over those period of time."<sup>87</sup>

Finding of Fact No. 165

The District excepts to this finding of fact on the ground that it is wholly without evidentiary support, and indeed is contrary to the ALJs' assessment that more information must be developed by TexCom before it can be allowed to operate WDW410. Because TexCom used modeling inputs that it could not prove were protective of USDWs—as the ALJs noted in Finding No. 146 and Finding No. 154—it was not able to demonstrate that it correctly calculated the COI of its injection operations (and, as the evidence in this case demonstrated

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<sup>86</sup> District Exh. 11, p. 27 of 32 (TCEQ-0623 UIC Class I Injection Well Application, Rev. Sept. 20, 2005).

<sup>87</sup> *Id.*

overwhelmingly, TexCom did not, in fact, correctly calculate its COI, resulting in a material defect in the AOR it reviewed and identified in its UIC Permits Application). Because TexCom has not demonstrated that all artificial penetrations within the correct COI are appropriately plugged or are completed to depths shallower than the injection reservoir, and because it has supplied no corrective action plan for the countless wells within the correct COI that it did not specifically address in its UIC Permits Application, it has made no showing that even remotely supports this Finding.

If, in fact, this Finding were true, then the ALJs' special condition regarding TexCom's post-permit supplementation would be a waste of resources that neither TexCom, the protesting parties, nor the State of Texas, should be required to participate in.

#### Finding of Fact No. 169

The District excepts to this Finding on the ground that it is without any support in the law. Because TexCom did not demonstrate by a preponderance of the evidence that its proposed injection operations would not endanger USDWs and fresh and surface water sources, it did not meet the evidentiary threshold required to support permit issuance. With no legally justifiable permit, there should be no vehicle for special conditions—particularly conditions that serve no purpose other than to provide TexCom the opportunity remedy this evidentiary void in its UIC Permits Application.

#### **B. EXCEPTIONS TO THE ALJS' PROPOSED CONCLUSIONS OF LAW**

The District excepts to the following conclusions of law proposed by the ALJs.

#### Conclusion of Law No. 8

The District excepts to this legal Conclusion on the ground that TexCom failed to demonstrate by a preponderance of the evidence that its proposed injection operations will not endanger USDWs or fresh and surface water sources. Accordingly, there is no support in the record to justify this legal conclusion.

#### Conclusion of Law No. 9

The District excepts to this legal Conclusion on the ground that applicable law, if followed, does not support the Commission's issuance of TexCom's requested UIC permits. TexCom has failed to demonstrate nonendangerment.

#### Conclusion of Law No. 29

The District excepts to this finding of fact on the ground that it is wholly without evidentiary support, and indeed is contrary to the ALJs' assessment that more information must be developed by TexCom before it can be allowed to operate WDW410.

#### Conclusion of Law No. 42

The District excepts to this legal Conclusion on the ground that TexCom offered no evidence to support contention that the use of WDW315 for commercial injection disposal of nonhazardous wastes was in the public interests.

#### Conclusions of Law Nos. 43 and 45

The District excepts to these legal Conclusions on the ground that neither are supported by any evidence—credible or otherwise—in the record, and on the ground that they are wholly inconsistent with the ALJs' proposed special condition allowing TexCom the opportunity to

develop, post-permitting, evidence that will be used to account for the evidentiary voids in its UIC Permits Application. Because TexCom used modeling inputs that it could not prove were protective of USDWs—as the ALJs noted in Finding No. 146 and Finding No. 154—it was not able to demonstrate that it correctly calculated the COI of its injection operations (and, as the evidence in this case demonstrated overwhelmingly, TexCom did not, in fact, correctly calculate its COI, resulting in a material defect in the AOR it reviewed and identified in its UIC Permits Application). Because TexCom has not demonstrated that all artificial penetrations within the correct COI are appropriately plugged or are completed to depths shallower than the injection reservoir, and because it has supplied no corrective action plan for the countless wells within the correct COI that it did not specifically address in its UIC Permits Application, the record is devoid of any evidence that would give support to this legal Conclusion.

Based on these legal Conclusions, there is no need to allow TexCom to develop its UIC Permits Application with the proposed post-permitting testing—the ALJs have determined *sua sponte* that no threat to USDWs can possibly exist. The ALJs' special condition would be a waste of resources that neither TexCom, the protesting parties, nor the State of Texas, should be required to participate in.

#### Conclusions of Law Nos. 44, 46 and 47

The District excepts to these legal Conclusions on the ground that the ALJs have inappropriately, and without any legal support, allowed their proposed special condition allowing TexCom to conduct post-permitting application supplementation to circumvent TexCom's evidentiary obligations that they otherwise would have been required to meet *before* permit issuance. Without the special condition, the ALJs would have no grounds for support of their ultimate conclusions here. Typically, UIC Permits Applicants must make these demonstrations

before permit issuance. There has been no justification shown to explain why TexCom has been excused from the evidentiary obligations imposed on, presumably, all other applicants seeking a Class I UIC permit.

#### Conclusion of Law No. 50

The District excepts to this legal Conclusion on the ground that it is without any evidentiary support in the record, and on the ground that it is inconsistent with the ALJs' determination that TexCom should produce additional evidence, post-permitting, to justify issuance of its requested UIC permits.

#### Conclusion of Law No. 51

As discussed in detail in Section 2(C) above, the District excepts to this legal Conclusion on the ground that it is without legal justification.

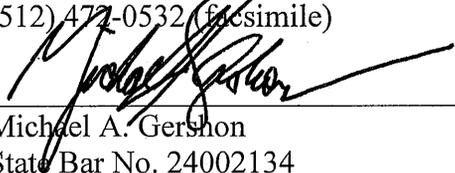
### **IV. CONCLUSION**

The District has been tasked by the Texas Legislature with managing, preserving, and protecting the near-sole source of drinking water for one of the fastest growing counties in the United States. It takes seriously its responsibility to carry out the duties set forth in its enabling act, Chapter 36 of the Texas Water Code, and its rules. It expects that the TCEQ rules will be applied with equal rigor to the applications submitted by TexCom.

As the overwhelming evidence submitted in this case demonstrates, TexCom has failed to carry its evidentiary burden. Accordingly, the District respectfully requests, for all the reasons set forth above, that this honorable tribunal propose to the TCEQ that the Applicant's requested permits be denied. Alternatively, if SOAH is of the opinion that TCEQ's ISW rules are insufficient to provide adequate standards and due process, as the District contents, the District would respectfully certify questions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

SOAH Docket No. 582-07-2673;  
TCEQ Docket No. 2007-0204-WDW

I hereby certify that on this the 15<sup>th</sup> day of May, 2008, a true and correct copy of the foregoing document was provided by hand delivery, first class mail, facsimile, or e-mail to the persons listed below:

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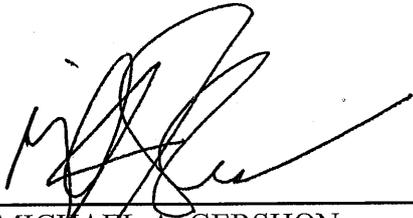
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