

# THE FORSBERG LAW FIRM, P.C.

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15949 HIGHWAY 105 W, STE. 59  
MONTGOMERY, TEXAS 77316  
(936) 588-6226  
FAX (936) 588-6229

KEVIN A. FORSBERG  
[Forsberglaw@earthlink.net](mailto:Forsberglaw@earthlink.net)

May 14, 2008

Docket Clerk  
Texas Commission on Environmental Quality  
Office of the Chief Clerk  
12100 Park 35 Circle  
Austin, Texas 78753

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2008 MAY 15 AM 9:52  
CHIEF CLERKS OFFICE  
Via FedEx

Re: *Application of Texcom Gulf Disposal LLC for Texas Commission on Environmental Quality Underground Injection Control Permit Nos. WDW410, WDW411, WDW412 and WDW413, SOAH Docket No. 582-07-2673, TCEQ Docket No. 2007-0204-WDW*

*Application of Texcom Gulf Disposal LLC for Texas Commission on Environmental Quality Industrial Solid Waste Permit No. 87758, SOAH Docket No. 582-07-2674, TCEQ Docket NO. 2007-0362-IHW*

Dear Docket Clerk:

Enclosed for filing please find:

- (1) Original and 11 copies of Individual Protestants Exceptions to ALJ Proposal for Decision (UIC Wells WDW 411, 412, 412, 413); AND
- (2) Original and 11 copies of Individual Protestants Exceptions to ALJ Proposal for Decision (Solid Waste Permit No. 87758).

Thank you.

Sincerely,

/s

Kevin A. Forsberg

cc:

The Honorable Catherine C. Egan and Thomas H. Walston  
Administrative Law Judges  
State Office of Administrative Hearings  
300 West 15<sup>th</sup> Street, Ste. 502  
Austin, Texas 78701

Via Fax

Master Service List

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
SOAH DOCKET NO. 582-07-2673  
TCEQ DOCKET NO. 2007-0204-WDW

APPLICATION OF TEXCOM GULF  
DISPOSAL, L.L.C. FOR TEXAS  
COMMISSION ENVIRONMENTAL  
QUALITY COMMISSION  
UNDERGROUND INJECTION  
CONTROL PERMIT NOS. WDW410,  
WDW411, WDW412, and WDW413

2008 MAY 15 AM 9:53  
§ BEFORE THE STATE OFFICE  
CHIEF § CLERKS OFFICE  
§  
§ OF  
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§  
§ ADMINISTRATIVE HEARINGS

**INDIVIDUAL PROTESTANTS' EXCEPTIONS TO THE ADMINISTRATIVE  
LAW JUDGES' PROPOSAL FOR DECISION  
(WDW 410, 411, 412 AND 413)**

TO THE HONORABLE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW, Individual Protestants (hereinafter "IP" or "Individual Protestants") and files these Exceptions to the Administrative Law Judges' Proposal for Decision in the above referenced matter and would show the Commission the following:

**I. Exceptions to PFD**

The IP files these exceptions to the PFD urging the Commission to deny Texcom Gulf Disposal LLC's ("Applicant") application for issuance of four underground injection well permits ("permits") or alternatively, to remand them to the State Office of Administrative Hearings ("SOAH") for further proceedings for the following reasons:

1. The physical location of the proposed wells, in the Conroe Oil Field, presents numerous potential contamination sources to the surface and underground sources of drinking water ("USDW");
2. The Administrative Law Judges ("ALJ") fail to address public

interest requirements required by statute and *Texas Citizens for a Safe Future and Clean Water v. Railroad Commission of Texas and Pioneer Exploration*, No. 03-07-00025-CV (December 2007) including but not limited to traffic and traffic safety;

3. The presence of significant faulting in the area makes the proposed location unsuitable for the proposed wells and Applicant should not be allowed to “re-do” its testing in support of its permit applications;
4. Uncertainty of ownership and control of Applicant and its lack of funding support a conclusion that it is an inappropriate company to operate such a facility.

#### **1. Physical Location of the Wells**

The IP incorporate the exceptions filed by Lonestar Water Conservation District (“Lonestar”) and the Aligned County of Montgomery and City of Conroe (“Aligned Protestants”) with regards to the issues of physical locations of the wells.

Furthermore, it is undisputed that the proposed injection zone lies within the Conroe Oil Fields, an area of Montgomery County that has played host to oil drilling operations for nearly a century. It is further undisputed that said drilling operations were often haphazard and would not comply with modern regulations in regards to the operation and plugging of oil and gas wells. Edwin Stephan, a witness for the IP, provided undisputed testimony as a former worker in the Conroe Oil Fields, that wells were often just capped and covered up without any proper plugging, including wells in the immediate area of the subject wells.

In the minds of the IP, who know that oil wells exist all around them in various states of

plugging, many of which are not even identified, it makes no sense to begin pumping Class I materials below their feet. It does not take an expert to realize that you cannot hold down water with a strainer, when the water is being pushed up; the water will pass through the holes of the strainer. The IP, without dispute, live on a strainer; a strata of land filled with so many holes of various depths that the likelihood of water being pushed up into the aquifers, groundwater and even surface level, is simply too high to justify the risks.

## **2. Public Interest Requirements**

It is clear that the law is in a state of flux with regards to what public interest requirements must be considered in regards to facilities such as the one proposed by the Applicant. See generally *Texas Citizens for a Safe Future and Clean Water v. Railroad Commission of Texas and Pioneer Exploration*, No. 03-07-00025-CV (December 2007).

Evidence was presented as to each of the following:

1. No studies with regards to traffic safety had been performed based upon the hundreds of trucks that Applicant proposes to open its facility to for waste disposal;
2. There were no plans to deal with traffic that arrives at the facility before and/or after the facility is open for business on any given day (and the potential for having trucks parking on the side of FM 3083 is a distinct possibility);
3. Potential noise from ongoing operations and construction were a concern for residents to which Applicant failed to address with any competent contravening evidence;
4. Applicant's entire case with regards to affects on traffic flow came from

one last minute “expert” witness that viewed the proposed facility for an hour or two on a Saturday.

Furthermore, the IP attempted to offer evidence of potential damages related to property values, but the ALJ excluded such evidence on the basis that it was not related to a public interest requirement.

As the Applicant has failed to meet its burden with regards to these public interest requirements, the IP urge that the permit be denied. Alternatively, this matter should be remanded to SOAH for a more complete and detailed analysis of the public interest requirements, including traffic, traffic safety, and property values.

### **3. Applicant Should Not Be Allowed a “Re-Do”**

The IP incorporate the exceptions filed by Lonestar Water Conservation District (“Lonestar”) and the Aligned County of Montgomery and City of Conroe (“Aligned Protestants”) with regards to the issues of faulting and fault transmissivity.

Furthermore, despite agreeing that the Applicant utilized incorrect numbers and assumptions in its modeling, the ALJ recommend approval of the permits as long as another test is performed by Applicant. See PFD at 44-45. The IP urge that if the Applicant’s numbers and assumptions were incorrect, the proper result is the denial of the permits. Further, the retesting procedure set forth by the ALJ would only allow for the various protesting parties to observe the testing that will be presumably be done by a testing firm chosen and retained by Applicant. Even if the testing came back and confirmed the “weekend modeling” of staff-witness Kathryn Hoffman<sup>1</sup> (which the ALJ openly casts aside as insignificant), the ALJ presumably still would

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<sup>1</sup>Testimony confirmed that Staff-witness Kathryn Hoffman had redone some modeling the weekend prior to her testimony which resulted in a much larger cone of influence of 5-10,000 ft.

recommend issuance of the permits. The IP argue that the application procedure is rendered moot if an Applicant can simply perform some type of follow up test following a contested case hearing to satisfy the ALJ (even though the record is closed, and the permits would seemingly issue no matter what the test results would show).

#### **4. Ownership and Financial Ability**

There is no doubt that Applicant is attempting to hide behind corporate formalities in effort to thwart any argument that the entities that own and/or control TexCom are immaterial to the subject permits. Apparently, the ALJ agreed and disregarded the evidence regarding how controls and/or is going to control the Applicant, even when TCEQ staff witness Kathryn Hoffman admitted that it was an important piece of information. The following facts were established during the hearing:

- a. An investment company named Foxborough has and/or is in the process of purchasing a membership interest in TexCom.
- b. Foxborough will have a say in the operations of TexCom Gulf Disposal in the position of management and as part of the Board.
- c. Foxborough will have a majority membership in TexCom of sixty percent.
- d. TexCom is unaware of the environmental history of Foxborough.
- e. Despite testimony denying the future sale of the subject facility, TexCom has a history of selling facilities to equity partners.
- f. It is important for TCEQ to consider the ownership and environmental history of ownership of a proposed facility.

The IP believe that who owns and controls TexCom is more than a subtle corporate nuance. As noted above, TCEQ seems to agree. Foxborough will be the majority partner in

TexCom Gulf Disposal, as testified to by Lou Ross, PhD. However, no evidence has been provided that said entity is qualified or capable of operating such a facility. The IP believe that permits should not be issued to a company and its ownership (that provided testimony) when in fact there is a majority owner/partner/member waiting in the wings to which we have virtually no information. Why have all of these proceedings in which TexCom bears the burden of proving various elements of its operations when in fact a completely different entity (operating under the same name) will be the majority partner?

It is simply not in the public interest to issue permits to an entity that is undergoing a vast change in ownership/partnership/membership. If permits are going to be issued in the face of the opposition of so many parties, it seems as though the public interest is only served if the proper parties in interest are present to face scrutiny. The IP, based upon the evidence presented, have no knowledge of the makeup and history of the company that will be majority partner in the subject facility.

The IP urge that the permits should be denied based upon these uncertainties. Alternatively, this matter should be remanded to the ALJ for consideration of Foxborough, and its ability to operate and fund such a facility to ensure compliance with applicable laws and regulations.

## **II. Specific Exceptions to Findings of Fact and Conclusions of Law**

The IP specifically excepts to the following Findings of Fact and Conclusions of Law:

### Finding of Fact 22

The IP except to this finding in that it is not supported by the evidence; required information for the applications was absent, including calculations utilizing correct assumptions and other details.

#### Finding of Fact 28

The IP except to this finding in that it is not supported by the evidence. The technical report that was included with applications for WDW410, 411, 412 and 413 lacked essential and material details.

#### Finding of Fact 52

The IP except to this finding in that it is not supported by the evidence. Applicant failed to provide any specific details as to the types of materials to be injected, and admits it has not tested any of these materials in relation to the materials used to construct the well. As such, the finding that the materials are compatible with the proposed waste stream is simply an unsupported assumption.

#### Finding of Fact 68

The IP except to this finding in that it is not supported by the evidence. There were several differing opinions presented regarding the local geology. Further, the inconsistency in the modeling performed by various experts and the Staff-witness Kathryn Hoffman show that there can be little if any agreement regarding the accuracy of modeling, and that said inconsistency certainly does not suggest that there can be any confidence in any of the modeling provided.

#### Finding of Fact 76

The IP except to this finding in that it is not supported by the evidence. Several witnesses offered conflicting testimony regarding the stability and suitability of the Lower Cockfield. Testimony was presented that drilling operations had penetrations through the shale levels separating the Cockfield levels.

Finding of Fact 77

See Exception to 76, above.

Finding of Fact 78

See Exception to 76, above.

Finding of Fact 80

See Exception to 76, above.

Finding of Fact 82

The evidence presented suggests that the drilling in the Conroe Oil Field was not nearly as cohesive and documented as this finding suggests. In fact, the evidence suggested numerous wells drilled by unknown entities and which lack any records of any kind.

Finding of Fact 83

The IP except to this finding in that it is not a finding of fact; it is an assumption that an unknown operator from decades ago “would likely have plugged that well back to the Upper Cockfield.” Absent a clear finding that such wells were plugged, the IP would argue that such a finding and the ultimate approval of the permits is done at a very high level of risk.

Finding of Fact 84

The IP except this finding in that evidence was presented that the number of artificial penetrations exceeds the 505 known penetrations. The 505 penetrations is a minimum number but by no means should it exclude the possibility that numerous others exist.

Findings of Fact 86

The IP except to this finding in that it is not supported by the evidence.

Finding of Fact 88 -90

See exception to 84, above.

Finding of Fact 94

The IP except to this finding of fact as it is not supported by the evidence, and fails to consider differing testimony offered by competent witnesses.

Finding of Fact 95

The except to this finding in that evidence was presented that the Jackson Shale was punctured by drilling operations, and that the existence of faults in the area suggest potential fracturing (and thus a potential path of travel for injected materials).

Finding of Fact 96

The IP except to this finding in that it is not a finding of fact; it is an assumption that something may have occurred without direct evidence suggesting that it indeed did occur. The IP would urge that assuming that the Jackson Shale “would likely have collapsed into and sealed any improperly cased, abandoned boreholes” is a risky assumption at best. Without a finding that these events did occur (as opposed to “would likely have” occurred), the permits should be denied.

Finding of Fact 117

See exception to 95, above.

Finding of Fact 123

See exception to 95, above.

Finding of Fact 124

See exception to 95, above.

Finding of Fact 131

The IP except to this finding in that the general statement that “TexCom will be required to conduct further investigation and make operational adjustments, as needed” is not a finding of

fact based upon any evidence presented at the hearing of this matter. There is no basis for allowing permits to issue if TexCom's calculations show that the site is not suitable. Further investigation and operational adjustments do not satisfy the IP in that the permits would still issue, and apparently the decision with what investigation and operational adjustments are adequate will be solely up to the Applicant.

The IP request that this particular matter be remanded to the ALJ for further consideration of the steps that would follow for TexCom should the results of fall off testing show the site unsuitable for operations as they are currently proposed.

#### Finding of Fact 134

This finding is not supported by the evidence, and the IP except as it excludes clear evidence that other modeling calculations resulted in varying degrees of travel for injected materials.

#### Finding of Fact 137

The IP except in that this finding is not a finding of fact, but a merely a statement that further fracturing "should" not occur. Absent a finding that such fractures will not occur, the IP argue that these permits be denied.

#### Finding of Fact 149

As noted above, the IP except to this proposed addition to the WDW410 permit requiring additional fall-off testing. The ALJ concur that the Applicant used the improper permeability assumptions in its modeling, which should be sufficient to deny the applications. Allowing the applicant to simply re-do the testing nullifies the entire purpose of the contested case hearing process.

#### Finding of Fact 169

See exception to 149, above. Furthermore, the providing of results of the new fall-off testing to the protestant parties provides no mechanism for said protestants to seek protection if the testing indicates potentially negative consequences. Simply receiving a copy of test results provides no protection to public. Absent denial of the permits, the IP urge that no operations should begin until the testing results are provided, and that an additional period of time be provided the protestant parties to evaluate the testing results, and file objections with TCEQ to potentially stop operations and/or seek judicial remedy to stop operations, whichever is deemed appropriate.

#### Finding of Fact 204

The IP except in that no evidence was provided by TexCom that their services were needed in Montgomery County, Texas, and failed to counter arguments that other feasible means of disposal were available (including wells in nearby counties and incineration).

#### Finding of Fact 206

The IP except to this finding of fact and would argue that it should be struck. The finding suggests that Huntsman Chemical, a nationally known and large corporation, would be a customer of Applicant. No evidence was presented that Huntsman would be a customer of Applicant. As such, the presence of such a finding is somewhat confusing and without bearing on the outcome of the applications.

#### Finding of Fact 210

Evidence was presented that there are other more suitable means of disposal of the subject waste, including other wells within 100 miles of the proposed site (see Finding 207). The IP except to this finding as there is clearly alternatives that are currently being utilized by

nonhazardous wastewater producers.

Finding of Fact 211

See exception to 210, above.

Conclusion of Law 4

The IP except to this finding in that ample evidence was presented that the applications submitted by the Applicant were incomplete and did not comply with statutory guidelines. Further, as agreed to by the ALJ, the applications contained incomplete and/or inaccurate information (i.e., the permeability assumptions used in the modeling).

Conclusion of Law 6

The IP excepts to this finding in that the record does not support a finding that the Applicant met its burdens prescribed by law, as more fully detailed above (See Section I).

Conclusion of Law 8

The IP except to this conclusion as evidence was presented as to potential hazards to the public health and the environment, including but not limited to contamination (resulting from lack of containment) of the ground and USDW, and the potential for traffic safety concerns.

Conclusion of Law 9

See exception to 8, above.

Conclusion of Law 22

The IP except in that the evidence established that the Conroe Oil Field is not a suitable location for such facilities, and at the very least, the Applicant failed to meet its burden that the Conroe Oil Field is suitable.

Conclusion of Law 23

See exception to 22, above.

Conclusion of Law 24

The IP except to this finding as evidence was introduced that fracturing does exist and could increase with the added pressure of the facility. Further, evidence was produced that showed potential paths of travel for effluent waste to travel into the USDW directly above the confining zone.

Conclusion of Law 25

See exception to 24, above.

Conclusion of Law 27

This conclusion is not supported by evidence in the record and ample evidence was offered showing the potential dangers to the USDW as a result of effluent travel.

Conclusion of Law 34

Evidence was presented that TexCom needs to obtain a capital partner in order to secure the project (Foxborough). The Applicant has a history of selling things off for quick infusions of cash and abandoning projects (i.e., biodiesel plants). The IP except that adequate financial assurances have been provided.

Conclusion of Law 36

See exception to 34, above.

Conclusion of Law 42

The IP except to this finding as Applicant has failed to demonstrate how the proposed permits is in the interest of the public, whether that public be local or statewide.

Conclusion of Law 44

The IP except to this finding as it is not supported by the evidence in the record; evidence identified abandoned boreholes and faulting as potential conduits for effluent.

Conclusion of Law 45

See exception to 44, above.

Conclusion of Law 46

See exception to 44, above.

Conclusion of Law 47

See exception to 44, above.

Conclusion of Law 51

The IP except that this conclusion allows Applicant to make up for deficiencies in its application and supporting materials that should ultimately be cause for the denial of the permits. As noted above, (see Section I above) the Applicant filed incomplete applications utilizing incorrect assumptions. To allow for subsequent testing to in effect repair their applications, the entire contested case hearing has been nothing more than exercise to show Applicant the weaknesses of its position in order for it to correct them. The IP urge that the applications should be denied based upon these inadequacies rather than allowing TexCom a "re-do".

**III. Conclusion**

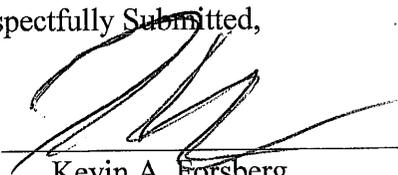
The ALJ have recommended that the Commission completely disregard extensive evidence presented with regards to the potential dangers associated with the operations of a underground injection wells as proposed by Applicant. Within this suggestion to disregard, the ALJ admit that the Applicant failed to use appropriate calculations and assumptions in its modeling but still find that the operation of the facility complies with rules and regulations. Absent complete and accurate applications, utilizing proper data, the permits must be denied.

Further, the developing law clearly illustrates that a much greater burden is placed upon Applicant with regards to public interest issues than has previously been suggested or enforced.

Applicant has clearly failed to meet its burden in this regard as no competent evidence was presented to counter concerns regarding traffic, traffic safety, noise, odors and damages to property values.

WHEREFORE, PREMISES CONSIDERED, the Individual Protestants respectfully request that their Exceptions to the PFD be granted, that the Commission order that UIC permits for WDW 410, 411, 412 and 413 be denied, and further request such other relief at law or equity to which the Individual Protestants may be entitled.

Respectfully Submitted,

By: 

Kevin A. Forsberg  
SBN:24009204  
15949 Hwy. 105 W., Ste. 59  
Montgomery, Texas 77316  
Tel: 936-588-6229  
Fax:936-588-6229

**Certificate of Service**

I certify that a copy of this pleading has been forwarded to persons of record in the master service list, in addition to the Honorable Administrative Law Judges, on this 15<sup>th</sup> day of May 2008.

  
Kevin A. Forsberg

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