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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
2010 NOV 29 PM 3:00
CHIEF CLERKS OFFICE

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November 29, 2010

Ms. LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Bldg. F, Room 4301
Austin, Texas 78753

VIA HAND DELIVERY

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

Dear Ms. Castañuela:

Enclosed with this correspondence, please find the Lone Star Groundwater Conservation District's exceptions to the Proposal for Decision issued in the above-referenced contested case. As indicated below, a copy of this transmittal and the enclosed filing is being provided to Judge Eagan and Judge Walston, as well as to the persons identified on the official SOAH service list for this particular application.

Please do not hesitate to let me know if you have any questions that I can address for you regarding this matter.

Respectfully submitted,

Jason T. Hill

JTH

ENCLOSURE

cc: The Honorable Catherine C. Egan
The Honorable Thomas H. Walston
Brian Sledge, *of the firm*
Michael A. Gershon, *of the firm*
Service List

TEXAS
COMMISSION
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QUALITY

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CHIEF CLERKS OFFICE

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

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

LONE STAR GROUNDWATER CONSERVATION DISTRICT'S
EXCEPTIONS TO PROPOSAL FOR DECISION AND TO
FINDINGS OF FACT AND CONCLUSIONS OF LAW

TO THE HONORABLE COMMISSIONERS:

The Lone Star Groundwater Conservation District, protestant in the above-styled and numbered contested case (the "District"), submits these exceptions to certain portions of the Proposal for Decision, and accompanying findings of fact and conclusions of law, issued by the Administrative Law Judges (the "ALJs") in this matter, and would respectfully show the Commissioners the following:

I.

The District agrees with the ALJs that the above-referenced applications (the "Applications") should be denied. In addition to the bases articulated by the ALJs for their ultimate conclusions, however, the District believes that the evidentiary record contains supplemental grounds for denial of the Applications, as well. In this context, the District submits these limited exceptions to the Proposal for Decision issued by the ALJs in the above-styled and numbered matter (the "PFD") and the proposed order issued therewith.

A. TexCom Has Again Failed To Accurately Describe And Appropriately Research The Area Of Review

In the PFD, the ALJs conclude that the pressure cone of influence ("COI") attributable to

TexCom's proposed injection disposal operation extends 2.7 miles to the north of WDW315 and 3.4 miles along the EW-4400-S fault. Their basis for this conclusion rests, *inter alia*, on their assessment that the permeability derived from the 1999 pressure fall-off test conducted on WDW315 (the "1999 PFOT")—80.9 mD—was an appropriate permeability factor to use for pressure modeling relevant to the Applications. The District excepts to this particular conclusion because, as discussed below, the record actually supports a finding that TexCom failed to accurately describe and research the applicable Area of Review ("AOR") based on the information derived from the 2009 pressure fall-off test conducted on WDW315 by TexCom during the abatement of this remand hearing (the "2009 PFOT").

1. Permeability

The District believes that the 2009 PFOT has generated reliable information indicating that the permeability of the Lower Cockfield formation in the area surrounding WDW315 is less than 80.9 mD. In fact, data harvested from the 2009 PFOT demonstrates that the permeability of this area is less than 50 mD. This conclusion was reached by the District's witness Phil Grant, P.G., as well as by EPA Region 6 staff persons.[1]

The ALJs correctly observed that other witnesses drew differing conclusions regarding the permeability obtained from the 2009 PFOT, and Mr. Grant did acknowledge that some of the differences could be attributable to the professional judgment of two qualified individuals. But because of the existence of these differing opinions among the Protestants regarding the permeability derived from the 2009 PFOT, the ALJs appear to have essentially discarded the results of this more recent test in favor of the data harvested from the 1999 PFOT. It is important, though, to remember that the 2009 PFOT was conducted after WDW315 had been

[1] District Ex. 22 at 14:4-5; District Ex. 25.

reconfigured by TexCom to inject into all 145 feet of available sands in the Lower Cockfield formation. While the 1999 PFOT produced the most reliable information available to the parties regarding the average permeability of the entire Lower Cockfield *at the time of the first hearing on the merits*, it is undisputed that the 2009 PFOT included pressure testing on portions of the Lower Cockfield that the 1999 PFOT did not reach.[2] The 2009 PFOT, therefore, provides us with a perspective on the average permeability of the Lower Cockfield formation as a whole in the vicinity of WDW315 that the 1999 PFOT does not.[3] For these reasons alone, it should not be so readily set aside.

Additionally, while there were varying perspectives from the parties regarding what the 2009 PFOT indicated with respect to the average permeability of the Lower Cockfield, there is no evidence in the record that suggests Mr. Grant's calculation of 48.68 mD is an unreasonable conclusion based on the information derived from the 2009 PFOT. While Mr. Grant recognized that the average permeability calculation reached by EPA Region 6 staff persons was lower than his own calculation, the EPA calculation—42 mD—was well within what he previously described as a range of insubstantial deviation[4] when compared to his own calculation of 48.68 mD. And despite the ALJs' assessment that "there was no motive to slant the results" of the

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2 TexCom Ex. 20 at 151; TexCom Ex. 91 at 5 – 6; Transcript of Proceedings Before the State Office of Administrative Hearings, Jun 15-24, 2010, SOAH Docket No. 582-07-2673, TCEQ Docket No. 2007-02040WDW, Application of Texcom Gulf Disposal, LLC, for Texas Commission on Environmental Quality Underground Injection Control Permit Nos. WDW410, WDW411, WDW412, WDW413; SOAH Docket No. 582-07-2674, TCEQ Docket No. 2007-0362-IHW, Application of Texcom Gulf Disposal, LLC, for Texas Commission on Environmental Quality Industrial Solid Waste Permit No. 87758 ("2010 Tr.") at 202:10-14.

3 District Ex. 22 at 19:6-11.

4 Transcript of Proceedings Before the State Office of Administrative Hearings, December 12-18, 2007, SOAH Docket No. 582-07-2673, TCEQ Docket No. 2007-02040WDW, Application of Texcom Gulf Disposal, LLC, for Texas Commission on Environmental Quality Underground Injection Control Permit Nos. WDW410, WDW411, WDW412, WDW413; SOAH Docket No. 582-07-2674, TCEQ Docket No. 2007-0362-IHW, Application of Texcom Gulf Disposal, LLC, for Texas Commission on Environmental Quality Industrial Solid Waste Permit No. 87758 ("2007 Tr.") at 1150:14-16.

1999 PFOT analyses[5]—implying perhaps that some of the 2009 PFOT analyses were potentially tainted by a "motive to slant the results"—there simply is no evidence that suggests either Mr. Grant's or EPA Region 6 staff persons' independent permeability conclusions based on the 2009 PFOT were the product of any bias or improper motive.

Finally, it is important to keep in mind that the purpose of pressure modeling for applications like those at issue in this case is to determine a reasonable worst-case scenario for which applicants like TexCom must account to demonstrate non-endangerment.[6] The District maintains its position that the preponderance of evidence in this case now demonstrates that the average permeability of the Lower Cockfield formation in the area surrounding WDW315 is less than 50 mD. Based on the information derived from the 2009 PFOT, for TexCom to have demonstrated non-endangerment, it should have conducted formation pressure modeling using an average permeability of 48.68 mD or less for the Lower Cockfield formation. The record makes clear that TexCom failed to undertake this significant assessment.

2. Cone of Influence

The record clearly shows that TexCom conducted no formation pressure modeling that included a permeability value for the Lower Cockfield formation using an average permeability of 48.68 mD or less and that characterized the EW-4400-S fault as a pressure barrier.[7] If it had done so, the model would have generated a cone of influence that would have reached beyond 4.5 miles from WDW315.[8] The ALJs' assessment of Mr. Grant's testimony in this respect in the

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[5] Amended Proposal For Decision After Remand, In Re: Application of Texcom Gulf Disposal, LLC, for Texas Commission on Environmental Quality Underground Injection Control Permit Nos. WDW410, WDW411, WDW412, WDW413; SOAH Docket No. 582-07-2673, TCEQ Docket No. 2007-0204-WDW ("Remand UIC PFD") at 66.

[6] District Ex. 8 at 23:6-9.

[7] 2010 Tr. at 622:16-25, 635:10-18.

[8] 2010 Tr. at 622:16-25.

PFD is incorrect.[9] While TexCom purported to conduct well research in the areas to the north of the EW-4400-S fault extending some distance beyond 2.9 miles from WDW315, the record clearly demonstrates that it conducted no such research beyond 4.5 miles from WDW315.[10] The record already demonstrates the presence of artificial penetrations within this area that may serve as potential pathways for migration into USDWs.[11] But the fact remains that TexCom has not conducted well research within the AOR that is based on the Lower Cockfield average permeability of 48.68 mD or less—an AOR that extends beyond 4.5 miles using these input values alone.[12]

But the record also now demonstrates that TCEQ has already authorized Class I injection into the Lower Cockfield formation less than two miles to the north of WDW315.[13] As TCEQ staff acknowledged, this existing Class I permit holder would be authorized to inject wastes into the Lower Cockfield at the same time as would TexCom if the Applications were granted.[14] This simultaneous injection into the same formation would itself influence formation pressuring within the Lower Cockfield.[15] Yet, none of TexCom's pressure modeling takes this additional potential pressuring source into account.[16]

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9 *See* Remand UIC PFD at 94 (incorrectly indicating that Mr. Grant calculated a cone of influence of 3.4 miles using a permeability value of less than 50 mD); *cf.* 2010 Tr. at 622:16-25, 635:10-18.

10 2010 Tr. at 622:16-25, 635:10-18.

11 Remand UIC PFD at 39.

12 2010 Tr. at 622:16-25, 635:10-18.

13 TexCom Ex. 106.

14 2010 Tr. at 1842:9-18.

15 2010 Tr. at 1844:3-11.

16 2010 Tr. at 1844:12-18.

B. The Record Reflects Additional Grounds For Concluding That The Applications Do Not Serve The Public Interest

The ALJs openly acknowledge that TexCom failed to comply with the terms of the Class V injection authorization issued to it by TCEQ staff as part of the prerequisite to the 2009 PFOT.[17] However, they discount TexCom's regulatory failure because, in their view, it "was not egregious and [the violation] appeared unintentional."[18] Given the circumstances—the acknowledged heightened scrutiny surrounding TexCom's work, the apparent importance of the reliability of the 2009 PFOT, the interest from all parties in the results of TexCom's interim work[19]—the District believes that the record shows TexCom's failure was in fact egregious.[20] And while no party appears to have suggested that TexCom's inability to comply with the terms of a simple Class V authorization was purposeful, nothing in the record supports the notion that only "intentional" infractions are worthy of consideration in this type of review.

But in addition to TexCom's demonstrated inability to comply with the terms of an injection authorization, the record also reflects how TexCom can be expected to function as a Class I injection well operator.[21] TexCom was wrong about the Lower Cockfield formation permeability during its first evidentiary hearing,[22] it used the wrong formation viscosity value in its 2009 PFOT analysis permeability calculations,[23] and it used the incorrect bottomhole temperature in the same analysis.[24] TexCom's own actions during this contested case

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17 Remand UIC PFD at 113-114.

18 Remand UIC PFD at 115.

19 2010 Tr. at 205:13 – 206:7.

20 2010 Tr. at 205:13 – 206:7.

21 District Ex. 27 at 5:23 – 6:5.

22 District Ex. 27 at 5:14-22.

23 District Ex. 22 at 14:14-17.

24 District Ex. 22 at 15:28-30.

demonstrate a lack of commitment to the rules and regulations employed by TCEQ in the agency's effort to protect USDWs from contamination.[25]

Given this history, the District believes that the record demonstrates a pattern by TexCom during this contested case that alone justifies denial of the Applications under Section 27.051 of the Texas Water Code.

II.

Based on the foregoing, the District excepts to the following findings of fact and conclusions of law articulated in the proposed order issued with the PFD.

Finding of Fact No. 84.

The District excepts to this finding. The ALJs indicate that the geology of the area relevant to the Applications was "described confidently." But the overwhelming weight of evidence in this case demonstrates that the Applicant was not able to project a consistent, supportable understanding of the geology of the area surrounding WDW315. To the contrary, record reflects little basis for any confidence in TexCom's understanding of the geology of the area.

Finding of Fact No. 150.

The District excepts to this finding. Information derived from the 2009 PFOT demonstrates that the average permeability of the Lower Cockfield formation in the area surrounding WDW315 is less than 50 mD. TexCom did not calculate a cone of influence based on a Lower Cockfield average permeability of 50 mD or less. If it had done so, the record reflects that the cone of influence would extend north of the EW-4400-S fault to beyond 4.5

[25] District Ex. 27 at 7:4-6.

miles from the WDW315 well.

In addition, the record reflects that if the Applications are granted, both TexCom and Huntsman Petroleum would be authorized to inject wastewater into the Lower Cockfield formation from wells located less than two miles apart. The record clearly demonstrates that the additional injection from Huntsman Petroleum could take place simultaneous to injection undertaken by TexCom at WDW315. However, none of TexCom's formation pressure modeling takes this additional pressuring source into account.

Finding of Fact No. 151.

The District excepts to this finding. Based on information derived from the 2009 PFOT, the Area of Review is greater than 4.5 miles from WDW315. The records demonstrates that TexCom did not conduct an investigation of the entire AOR. As a consequence, TexCom did not account for all artificial penetrations within the AOR.

Finding of Fact No. 159.

The District excepts to this finding. The record clearly reflects that the information derived from the 2009 PFOT demonstrates that the Lower Cockfield formation has an average permeability of less than 50 mD in the area surrounding WDW315.

Finding of Fact No. 161.

The District excepts to this finding. The record unambiguously demonstrates that TexCom failed to comply with its Class V injection authorization.

Finding of Fact No. 166.

The District excepts to this finding. The record demonstrates that the AOR extends north

of the EW-4400-S fault to 4.5 miles beyond WDW315.

Finding of Fact No. 233.

The District excepts to this finding. TexCom admitted that it failed to comply with the terms of its Class V injection authorization. The compliance score identified in this finding is not reflective of TexCom's violation of the terms and conditions of its Class V authorization.

Finding of Fact No. 234.

The District excepts to this finding. TexCom admitted that it failed to comply with the terms of its Class V injection authorization. The compliance history referenced in this finding excludes TexCom's failure to comply with the terms and conditions of its Class V authorization.

Conclusion of Law No. 6.

The District excepts to this conclusion. To the contrary, the evidence in the record demonstrates overwhelmingly that TexCom has not met the requirements of applicable law for the issuance of the permits requested in the Applications.

Conclusion of Law No. 13.

The District excepts to this conclusion. A two-examiner panel within the Railroad Commission of Texas recently issued a proposal for decision that recommends withdrawal of the letter referenced by the ALJs in this conclusion. The Railroad Commission of Texas hearings examiners based their recommendation on the finding that TexCom's proposed injection operation would likely endanger known oil and gas reservoirs.

Conclusion of Law No. 43.

The District excepts to this conclusion. The record reflects that the AOR extends north of

the EW-4400-S fault to beyond 4.5 miles of WDW315. Within this AOR there exists artificial penetrations for which TexCom has provided no well records. This shortcoming demonstrates that some corrective action may be required with respect to known artificial penetrations to prevent or correct pollution of USDWs.

III.

The overwhelming evidence submitted in this case demonstrates that TexCom has again failed to carry its evidentiary burden. Accordingly, for all the reasons set forth above and as otherwise set forth in the PFD and proposed order, the District respectfully requests that the Commissioners adopt the PFD, as modified by these exceptions, and otherwise finally deny the Applications.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

I hereby certify that on this the 29th day of November, 2010, a true and correct copy of the foregoing document was provided by hand delivery, first class mail, facsimile, or email to the persons listed below.

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