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May 27, 2008

Via Hand Delivery

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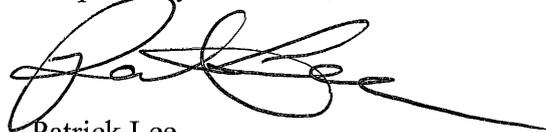
RE: *Application of TexCom Gulf Disposal, LLC for Texas Commission on Environmental Quality Underground Injection Control Permit Nos. WDW410, WDW411, WDW412 and WDW413, SOAH Docket No. 582-07-2673, TCEQ Docket No. 2007-0204-WDW; and*

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 Ms. Castañuela:

Please find one original and twelve copies of Applicant TexCom Gulf Disposal, LLC's Responses to Exceptions to the Administrative Law Judges' Proposals for Decision in each of the above-referenced dockets. Please return one file-stamped copy of each to the courier. Thank you.

Respectfully submitted,



Patrick Lee

cc: Service List (Via Electronic Mail)

ORIGINAL

**SOAH DOCKET NO. 582-07-2674
TCEQ DOCKET NO. 2007-0362-IHW**

APPLICATION OF TEXCOM GULF	§	BEFORE THE STATE OFFICE
DISPOSAL, L.L.C. FOR TEXAS	§	
COMMISSION ON ENVIRONMENTAL	§	OF
QUALITY INDUSTRIAL SOLID	§	
WASTE PERMIT NO. 87758	§	ADMINISTRATIVE HEARINGS

**APPLICANT TEXCOM GULF DISPOSAL, LLC'S RESPONSE TO EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGES' PROPOSAL FOR DECISION**

**TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY**

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I. INTRODUCTION

Very few exceptions have been filed with respect to this PFD. OPIC has filed no exceptions. The Executive Director has proposed purely clerical revisions to just one Finding of Fact, No. 37, with which TexCom agrees. The Executive Director has also proposed adding a Conclusion of Law No. 14A, which would require TexCom to apply for and receive a permit modification or amendment before relocating the site entrance to FM 3083. The Aligned Protestants and the Lone Star Groundwater Conservation District have only filed exceptions regarding the alleged lack of regulatory standards applicable to this facility. Finally, the Individual Protestants have filed exceptions to several specific Findings and Conclusions, most of which are based on arguments previously considered by the ALJs. Below, we will respond to (a) arguments concerning the alleged lack of rules, (b) the Executive Director's proposed addition of Conclusion of Law No. 14A, and (c) the various exceptions to specific Findings and Conclusions, in that order.

II. THE ALLEGED LACK OF RULES

The Protestant Parties' arguments concerning the alleged lack of rules governing the surface facility have been previously briefed both in pre-hearing motions and responses, and in closing arguments and replies. Because these have been specifically considered and addressed by the ALJs, we will only make a few brief points here.

First, the argument that there are no applicable rules cannot be reconciled with Conclusions of Law Nos. 2, 4, 9, 11, 12, 14, 16, 17 & 18, each of which concludes that TexCom's Application complied with a specific, applicable rule provision. For example, 30 TEX. ADMIN. CODE § 335.4(1) prohibits the discharge or imminent threat of discharge of industrial solid waste into or adjacent to waters in the state. Conclusion of Law No. 16 states that operation of the surface facility, in accordance with the representations in the Application and the Terms and Conditions of the Draft Permit, will not result in a violation of this prohibition. Thus, contrary to the Protestant Parties' arguments, there obviously are regulatory standards that apply to this type of facility. Incidentally, neither Lone Star nor the Aligned Protestants filed exceptions to Conclusion of Law No. 16, or any of the other Conclusions of Law cited above.

Second, contrary to the Protestant Parties' argument, the absence of a more pervasive and detailed regulatory scheme for this kind of facility is not a mysterious "gap" in TCEQ's permitting program. This facility will only temporarily handle *non-hazardous* wastewater prior to injection,¹ and the mechanisms for disposing of that wastewater, the injection wells, are heavily regulated.

Lone Star points to Chapter 335, Subchapter T of TCEQ's rules, and argues that there is no analogous set of rules for TexCom's facility. That is incorrect. Chapter 335, Subchapter T sets forth the standards governing the siting, design, and operation of commercial landfills. A landfill, like an injection well, is designed to accept and permanently store waste. The analogous set of rules, therefore, is Chapter 331, which sets the standards governing the siting, design, and operation of injection wells. There is no reason to expect an *additional* set of regulations with the same level of detail governing the small, concrete-lined area where wastes will be temporarily stored and processed *prior to disposal*. In fact, most facilities of this type are not even required to have any permit at all, as the Legislature has *prohibited* TCEQ from requiring permits for facilities that collect, handle, store, process, and dispose of non-hazardous industrial waste that is disposed of within the boundaries of a tract of land that is within 50 miles of the source.²

TexCom would also point out that Lone Star's suggestion on page 3 of its exceptions, that SOAH identified a "defect in TCEQ's regulatory program" that it is helpless to correct, is a misrepresentation. While Lone Star certainly did its best to convince the ALJs that the absence of more pervasive regulations was a problem, the ALJs have expressed no agreement with that position. To the contrary, the PFD concluded that "the Commission's rules do contain various provisions that apply to TexCom's application,"³ and proceeded to conclude that TexCom's Application complied with those rules.

Third, even the Protestant Parties would presumably agree that had they not been allowed to participate in a hearing on the Surface Facility Application, they could have only complained about the sufficiency of the rules in a petition for rulemaking. The hearing was held only to

¹ TexCom Ex. 6 (Vol. I of UIC Application), 169 of 314; TexCom Ex. 49 (Casey pre-filed), 16:24-17:10; TexCom Ex. 27 (Draft UIC Permits), 3 of 24 (Permit Condition VI.A., referencing 40 C.F.R. § 261.3(a) through (d)).

² TEX. HEALTH & SAFETY CODE § 361.090(a)(2).

³ PFD at page 8.

allow parties to contest the Application's compliance with existing laws.⁴ It did not bestow upon the Protestant Parties any additional legal right. If the Protestant Parties are not satisfied with the existing laws, their only legal right remains the right to file a petition for rulemaking, which, if granted, could only affect future applications.

Fourth, Lone Star's argument that it has never understood which regulations apply is neither credible nor of any consequence. Lone Star, just as both of the other Protestant Parties were, was represented by counsel in this case. Additionally, prior to the hearing, the Executive Director voluntarily provided to all parties a list of applicable rule provisions. As the PFD states, most of these rule provisions addressed non-substantive issues such as definitions, but some were substantive requirements. The ALJs were certainly able to determine which regulations applied as evidenced by a corresponding Conclusion of Law in their PFD. Lone Star's stated inability to do the same is no basis for excepting to the PFD.

Finally, Lone Star's argument that TCEQ Engineer Michael Graeber relied solely on Chapter 305 of TCEQ's rules when he performed his review of the application is inconsequential. Each of the PFD's Conclusions of Law finding compliance with specific regulatory provisions is supported by competent evidence in the record. If Lone Star thought otherwise, surely it would have excepted to one or more of them, but it did not.

III. THE EXECUTIVE DIRECTOR'S PROPOSED CONCLUSION OF LAW NO. 14A

The Executive Director proposes that the following Conclusion of Law No. 14A be added:

A special provision should be added to Permit No. 87758 requiring the permittee to apply for and receive a permit modification or amendment prior to relocating the truck entrance of the facility from Creighton Road to FM 3083.

While TexCom agrees that the permit should clearly indicate that the driveway will be on FM 3083, we disagree that a modification or amendment will be needed. Modifications and amendments are mechanisms for changing permits that have already been issued. Permit No. 87758 is still in draft form, and can be amended by the Commission prior to issuance. All parties agree that the driveway should be located on FM 3083 as opposed to Creighton Road. Given

⁴ TEX. WATER CODE § 5.557.

these considerations, there is no reason to require a separate administrative action after the permit is issued. Instead, TexCom proposes that the addition of the following Conclusion of Law, which mirrors Conclusion of Law No. 52 from the PFD on the UIC Application:

A special condition should be added to Permit No. 87758 requiring relocation of the truck entrance of the Facility from Creighton Road to FM 3083.

IV. TEXCOM'S RESPONSES TO SPECIFIC EXCEPTIONS

TexCom believes that all of the Protestant Parties' exceptions should be denied for reasons set forth below. But first, we note that the Individual Protestants have, in addition to making specific exceptions (which we address below), re-urged some general arguments for denial of the Application.⁵ The arguments made under the heading, "Lack of Regulatory Rules," are addressed above in Section II. of this Response. The arguments made under the heading, "Public Interest Requirements," are inappropriate because the "public interest" requirement found in TEX. WATER CODE § 27.051 only applies to TexCom's UIC Application. The Surface Facility Application is not subject to any "public interest" requirement. Additionally, TexCom has already responded to these arguments in its Closing Brief at pages 39-42 (traffic), and its Response Brief at pages 19-21 (traffic) and 28 (odor and noise). TexCom has also previously responded to the arguments made under the heading "Stormwater Runoff" in its Closing Brief at pages 56-57 (stormwater) and its Response Brief at page 6 (compatibility testing), 31-33 (piping), and 34-37 (stormwater). The Individual Protestants' argument that TexCom failed to take into consideration tanks that are 2-3 stories tall is not based on any testimony, and is incorrect. TexCom does not currently intend to use any tanks 2-3 stories tall, but if it did, the height of the tanks would not affect the size of containment needed to accommodate a storm. The Individual Protestants' argument that "empty tanks will be more susceptible to wind damage and subsequent contamination" is likewise not based on any testimony or evidence at all. TexCom's responses to the specific exceptions filed by each party are as follows:

⁵ Individual Protestants' Exceptions to the Administrative Law Judges' Proposal for Decision, pages 1-6.

Finding of Fact No. 37

Exception filed by the Executive Director

TexCom does not object to the clerical revisions to this Finding proposed by the Executive Director.

Finding of Fact No. 44

Exception filed by Individual Protestants

This exception is based on arguments that have been previously made to the ALJs, and to which TexCom has previously responded in its Response Brief at page 28.

Finding of Fact No. 57

Exception filed by Individual Protestants

This exception is based on arguments that have been previously made to the ALJs, and to which TexCom has previously responded in its Closing Brief at page 53 and its Response Brief at pages 31-32. *See also* the above response to arguments concerning the alleged lack of rules.

Finding of Fact No. 74

Exception filed by Individual Protestants

TexCom's Waste Acceptance Plan was generally described at pages 54-56 of TexCom's Closing Brief. The Individual Protestants' argument that the Waste Acceptance Plan will be time consuming and could render the process non-profitable is neither based on any testimony or evidence, nor of any consequence to any regulatory demonstration..

Finding of Fact No. 75

Exception filed by Individual Protestants

TexCom's Waste Acceptance Plan was generally described at pages 54-56 of TexCom's Closing Brief. The Individual Protestants' argument that the Waste Acceptance Plan will be time consuming and could render the process non-profitable is neither based on any testimony or evidence, nor of any consequence to any regulatory demonstration.

Finding of Fact No. 76

Exception filed by Individual Protestants

TexCom's Waste Acceptance Plan was generally described at pages 54-56 of TexCom's Closing Brief. The Individual Protestants' argument that the Waste Acceptance Plan will be time consuming and could render the process non-profitable is neither based on any testimony or evidence, nor of any consequence to any regulatory demonstration.

Finding of Fact No. 77

Exception filed by Individual Protestants

TexCom's Waste Acceptance Plan was generally described at pages 54-56 of TexCom's Closing Brief. The Individual Protestants' argument that the Waste Acceptance Plan will be time consuming and could render the process non-profitable is neither based on any testimony or evidence, nor of any consequence to any regulatory demonstration.

Finding of Fact No. 78

Exception filed by Individual Protestants

TexCom's Waste Acceptance Plan was generally described at pages 54-56 of TexCom's Closing Brief. The Individual Protestants' argument that the Waste Acceptance Plan will be time consuming and could render the process non-profitable is neither based on any testimony or evidence, nor of any consequence to any regulatory demonstration.

Finding of Fact No. 79

Exception filed by Individual Protestants

TexCom's Waste Acceptance Plan was generally described at pages 54-56 of TexCom's Closing Brief. The Individual Protestants' argument that the Waste Acceptance Plan will be time consuming and could render the process non-profitable is neither based on any testimony or evidence, nor of any consequence to any regulatory demonstration.

Finding of Fact No. 80

Exception filed by Individual Protestants

TexCom's Waste Acceptance Plan was generally described at pages 54-56 of TexCom's Closing Brief. The Individual Protestants' argument that the Waste Acceptance Plan will be time consuming and could render the process non-profitable is neither based on any testimony or evidence, nor of any consequence to any regulatory demonstration.

Finding of Fact No. 81

Exception filed by Individual Protestants

TexCom's Waste Acceptance Plan was generally described at pages 54-56 of TexCom's Closing Brief. The Individual Protestants' argument that the Waste Acceptance Plan will be time consuming and could render the process non-profitable is neither based on any testimony or evidence, nor of any consequence to any regulatory demonstration.

Finding of Fact No. 82

Exception filed by Individual Protestants

TexCom's Waste Acceptance Plan was generally described at pages 54-56 of TexCom's Closing Brief. The Individual Protestants' argument that the Waste Acceptance Plan will be time consuming and could render the process non-profitable is neither based on any testimony or evidence, nor of any consequence to any regulatory demonstration.

Finding of Fact No. 83

Exception filed by Individual Protestants

TexCom's Waste Acceptance Plan was generally described at pages 54-56 of TexCom's Closing Brief. The Individual Protestants' argument that the Waste Acceptance Plan will be time consuming and could render the process non-profitable is neither based on any testimony or evidence, nor of any consequence to any regulatory demonstration.

Finding of Fact No. 87

Exception filed by Individual Protestants

This Finding is based on testimony given by Carl Brassow⁶ that was not objected to, discredited during cross-examination, or refuted by contrary testimony. Arguments concerning yet-to-be made operational decisions have been previously made to the ALJs, and responded to by TexCom in its Response Brief at pages 32-33.

Finding of Fact No. 96

Exception filed by Individual Protestants

This exception is based on arguments that have been previously made to the ALJs, and to which TexCom has previously responded in its Closing Brief at pages 52-56 and its Response Brief at pages 31-34.

Conclusion of Law No. 14A

Exception filed by the Executive Director

As explained above, TexCom disagrees that an amendment or modification will be needed. TexCom proposes the following alternative Conclusion of Law No. 14A: "A special condition should be added to Permit No. 87758 requiring relocation of the truck entrance of the Facility from Creighton Road to FM 3083."

⁶ TexCom Ex. 59 (Brassow pre-filed), 32:4-5; TexCom Ex. 39 (Oct. 15, 2005 Update to Surface Facility Application), 7-9 of 103.

Conclusion of Law No. 5

Exception filed by Individual Protestants

See the above response to arguments concerning the alleged lack of rules.

Conclusion of Law No. 6

Exception filed by Aligned Protestants, Individual Protestants and Lone Star

These exceptions are based on arguments that have been previously made to the ALJs, and to which TexCom has previously responded in its Closing Brief at pages 51-57 and in its Response Brief at pages 29-41. *See also* the above response to arguments concerning the alleged lack of rules.

Conclusion of Law No. 7

Exception filed by Aligned Protestants and Lone Star

See the above response to arguments concerning the alleged lack of rules.

Conclusion of Law No. 8

Exception filed by Individual Protestants

This exception is based on arguments that have been previously made to the ALJs, and to which TexCom has previously responded in its Closing Brief at pages 52-57 and in its Response Brief at pages 31-37.

Conclusion of Law No. 15

Exception filed by Individual Protestants

See the above response to arguments concerning the alleged lack of rules.

Conclusion of Law No. 16

Exception filed by Individual Protestants

This exception is based on arguments that have been previously made to the ALJs, and to which TexCom has previously responded in its Closing Brief at pages 52-57 and in its Response Brief at pages 31-37.

Conclusion of Law No. 17

Exception filed by Individual Protestants

This exception is based on arguments that have been previously made to the ALJs, and to which TexCom has previously responded in its Closing Brief at pages 39-42 (traffic) and its Response Brief at pages 19-21 (traffic) and 28 (odor).

Conclusion of Law No. 18

Exception filed by Individual Protestants

This exception is based on arguments that have been previously made to the ALJs, and to which TexCom has previously responded in its Closing Brief at pages 39-42 (traffic) & 52-57 (safeguards to prevent contamination) and its Response Brief at pages 19-21 (traffic), 28 (odor) & 31-37 (safeguards to prevent contamination).

Conclusion of Law No. 19

Exception filed by Individual Protestants and Lone Star

This exception is based on arguments that have been previously made to the ALJs, and to which TexCom has previously responded in its Closing Brief at pages 52-57 and in its Response Brief at pages 31-37. *See also* the above response to arguments concerning the alleged lack of rules.

Conclusion of Law No. 20

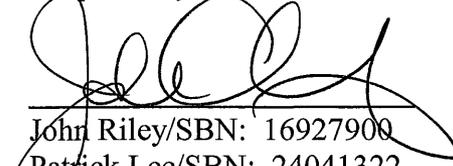
Exception filed by Individual Protestants

This exception is based on arguments that have been previously made to the ALJs, and to which TexCom has previously responded in its Closing Brief at pages 52-57 and in its Response Brief at pages 31-37.

V. CONCLUSION

Based on the above, TexCom respectfully requests that Finding of Fact No. 37 be revised as recommended by the Executive Director, that Conclusion of Law 14A as described above be added, and that the few exceptions filed by the Protestant Parties be denied.

Respectfully submitted,



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