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Blas J. Coy, Jr., *Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

May 15, 2008

LaDonna Castañuela, Chief Clerk  
Texas Commission on Environmental Quality  
Office of the Chief Clerk (MC-105)  
P.O. Box 13087  
Austin, Texas 78711-3087

2008 MAY 15 PM 4:33  
CHIEF CLERKS OFFICE  
TEXAS COMMISSION  
ON ENVIRONMENTAL  
QUALITY

**RE: TEXCOM GULF DISPOSAL, LLC**  
**SOAH DOCKET NOS. 582-07-2673; 582-07-2674**  
**TCEQ DOCKET NOS. 2007-0204-WDW; 2007-0362-IHW**

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Exceptions in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Emily A. Collins".

Emily A. Collins, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

*REPLY TO:* PUBLIC INTEREST COUNSEL, MC 103 • P.O. Box 13087 • AUSTIN, TEXAS 78711-3087 • 512-239-6363

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

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APPLICATION OF TEXCOM GULF § BEFORE THE STATE OFFICE  
DISPOSAL, L.L.C. FOR TEXAS § CHIEF CLERKS OFFICE  
COMMISSION ON ENVIRONMENTAL § OF  
QUALITY UNDERGROUND INJECTION §  
CONTROL PERMIT NOS. WDW 410, §  
WDW 411, WDW 412, AND WDW 413 § ADMINISTRATIVE HEARINGS

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

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S EXCEPTIONS**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGES AND THE HONORABLE  
COMMISSIONERS:

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission  
on Environmental Quality (TCEQ or Commission), and submits the following Exceptions in the  
above-captioned matter and would respectfully show the following:

**I. INTRODUCTION**

**A. Background**

TexCom Gulf Disposal, LLC, (hereinafter "Applicant" or "TexCom") submitted a permit  
application to TCEQ on August 1, 2005, for a nonhazardous industrial solid waste permit  
(hereinafter "facility permit") to authorize the construction and operation of a container storage

area, eight waste storage and processing tanks, and seven miscellaneous units for the storage and processing of Class 1 and Class 2 non-hazardous industrial solid wastes.<sup>1</sup> TexCom's submission of an application for the facility permit coincided with submission of another set of applications for construction and operation of four proposed Class 1 underground injection wells (proposed permit Nos. WDW-410, WDW-411, WDW-412, WDW-413) that are also at issue here.<sup>2</sup>

WDW-410 was previously permitted to Crossroads Environmental, Inc. as WDW-315 and was drilled, but never utilized.<sup>3</sup> The proposed facility is at 16185 Creighton Road on a 26.93 acre tract of land near Conroe in Montgomery County, Texas.<sup>4</sup>

## **B. Procedural History**

The Applicant requested a direct referral of each of these applications to SOAH on April 13, 2007. A preliminary hearing was held on July 18, 2007, and the hearing on the merits was held on December 12, 2007 through December 18, 2007. The Administrative Law Judges ("ALJs") who heard the case issued a Proposal for Decision ("PFD") for the surface facility and a separate PFD for the proposed injection wells on April 25, 2008 recommending that the Commission grant the requested permits with modifications.

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<sup>1</sup> TexCom Ex. 59, page 8, lines 9-11.

<sup>2</sup> TexCom Ex. 49, page 10, lines 8-9.

<sup>3</sup> TexCom Ex. 1, page 3, lines 18-26, page 4, lines 1-8.

<sup>4</sup> *Id.* at page 3, lines 9-13.

## II. UIC PERMIT APPLICATIONS

### A. **TexCom has not presented alternatives with any measure of specificity to allow the Commission to determine whether there is a practical, economic, and feasible alternative to an injection well reasonably available.**

OPIC generally supports the ALJs' reasoning and conclusions in both PFDs with the distinct exception of the alternatives conclusion on pages 58 and 59 of the UIC PFD as well as proposed conclusion of law number 42. Notably, OPIC does not except to any specific findings of fact because the ALJs could not make any findings of fact supportive of proposed conclusion of law number 42 as it relates to the alternatives consideration in Texas Water Code ("TWC") section 27.051(d)(2) (2008). OPIC agrees with the ALJs that a UIC applicant must "present alternatives with 'a measure of specificity' to comply with the Water Code's requirement that the Commission consider whether there is a practical, economic, and feasible alternative to an UIC that is reasonably available."<sup>5</sup> However, OPIC does not agree that the discussion in the application (Attachment C) supports such a standard because the Applicant did not call the person responsible for drafting the alternatives section of the application to the stand,<sup>6</sup> and the Applicant's engineer who signed and sealed the application did not claim any knowledge of how the alternatives section of the application was derived.<sup>7</sup>

In addition, OPIC does not agree with the ALJs that TexCom's witnesses offered sufficiently detailed testimony on alternatives to allow the Commission to consider the practicality, economics, and feasibility of each of the "theoretical alternatives" that exist. While

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<sup>5</sup> UIC PFD at page 59.

<sup>6</sup> Tr. at 262 (testifying that Allen Blanchard prepared the alternatives section of the public interest demonstration).

<sup>7</sup> Tr. at 262-263 (Applicant's engineer for the UIC testifying that he does not recall if the Applicant identified potential alternate waste disposal methods in the application).

the ALJs appear to acknowledge that the Applicant has identified potential alternatives generally, OPIC cannot identify any evidence in the record on economics of those alternatives or the degree to which those alternatives are reasonably available. Indeed, the ALJs were also unable to identify any facts related to the economics, practicality, feasibility, or reasonable availability of TexCom's identified alternatives as seen by the utter lack of such findings of fact in the public interest section.<sup>8</sup> UIC applicants cannot meet their burden under TWC section 27.051(d)(2) by merely demonstrating that alternatives theoretically exist, which is the only finding the ALJs made with regard to alternatives. An UIC applicant must also provide the specific economics and practical feasibility of each of those alternatives related to their particular project to allow the Commission to determine where the public interest lies and how it should be furthered on a case by case basis. As no other state environmental statute in Texas specifically requires an affirmative public interest finding prior to permit issuance, OPIC cannot agree with the ALJs that TexCom's mere conclusion that injection is generally the best alternative in any wastewater disposal situation provides sufficient specificity to meet their burden of proof.

While not specifically part of the alternatives consideration as stated by the Texas Legislature, the Applicant's overarching point of its public interest demonstration generally involved the degree of environmental protection afforded by an injection well operation that includes proper assumptions with regard to geology and reservoir mechanics. The degree of environmental protection posed by the Applicant is complete removal: potentially harmful wastewater would theoretically be lost to the biosphere completely and would not come into contact with human, plant, or animal life ever again.<sup>9</sup>

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<sup>8</sup> See UIC proposed findings of fact numbers 195-220 on pages 24-26.

<sup>9</sup> Tr. at 264, lines 22-25; 265, lines 1-8, 19-25; 266-267, line 1.

OPIC does not dismiss the degree of environmental protection afforded by various disposal methods as irrelevant, but asserts that the ALJs and the Commissioners need to be able to consider alternatives with a measure of specificity to adequately carry out the Legislative mandate to look at alternative disposal methods. Indeed, the current Commission has declined to issue a permit following a SOAH hearing when an Applicant's case lacks specificity,<sup>10</sup> and denial of the application is warranted.<sup>11</sup>

Furthermore, the statute requires consideration of economics, practicality, and reasonableness. The Applicant's cross-examination may have shown that alternatives exist and they may be feasible, but no testimony was provided specifically based on the Applicant's particular proposal. If the Legislature meant for the Commission to make a general policy decision that injection wells are always a better alternative because the potentially harmful wastewater is lost to the biosphere, then the mandate to consider economics, practicality, reasonableness, and feasibility for each application would not have been put into law at all.<sup>12</sup> If the Legislature intended the Commission to derive a general policy approach to all injection well applications, the Legislature typically would make a statement to that effect,<sup>13</sup> such as a general policy statement included in the policy section of the Injection Well Act that it is state policy to

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<sup>10</sup> City of Weston, Interim Order issued January 24, 2008, TCEQ Docket No. 2006-0199-MWD; SOAH Docket No. 582-06-2770; *see also* City of Weston Proposal for Decision, pages 40-41, TCEQ Docket No. 2006-0199-MWD; SOAH Docket No. 582-06-2770 (finding that the Applicant provided insufficient information to demonstrate whether seeps are present on the site).

<sup>11</sup> *Id.*; *see also* City of Weston Agenda deliberations from the January 16, 2008 TCEQ Agenda meeting.

<sup>12</sup> *Hinkley v. Texas State Bd. Of Med. Examiners*, 140 S.W.3d 737, 743 (Tex.App. – Austin 2004, *pet. denied*) (holding that an “agency abuses its discretion in reaching a decision if it omits from its consideration factors that the legislature intended the agency to consider...”).

<sup>13</sup> *See, i.e.*, TWC § 26.081(a) (stating that the “legislature finds and declares that it is necessary to the health, safety, and welfare of the people of this state to implement the state policy to encourage and promote the development and use of regional and area-wide waste collection, treatment, and disposal systems...”).

encourage and promote the development and use of injection well disposal. Instead, the Legislature required a more discerning approach to injection well applications to ensure that the Commission considers whether a practical, economic, and feasible alternative to an injection well is reasonably available for each injection well application.

In addition to the Applicant's failure to provide specific information on the alternatives consideration during the hearing, OPIC has concerns that an insufficient review is being conducted at the program level to allow a UIC application to pass muster without such specificity. For example, the loss of potentially treatable wastewater in a State desperately in need of water<sup>14</sup> poses a significant public policy issue that the Commission should weigh carefully under the powers granted to them by the Legislature in TWC section 27.051(a)(1). The Commission has a mandate to consider the economics, a quantitative methodology by its nature, of injection well projects to compare the value of potentially treatable wastewater completely lost to the biosphere with the economic value and need for commercial injection well disposal. Yet, staff currently conducts a general qualitative analysis of disposal alternatives and the public interest requirement due to a lack of resources to quantitatively analyze what the Applicant has stated in the application.<sup>15</sup> Likewise, the Applicant did not provide any evidence on the economic component of the alternatives consideration. A meaningful review of the public interest implications of injection well proposals is simply not being done, and the mere fact that no expert provided an opinion on which alternative is better than another based on the specific economics, practicality, and reasonableness of TexCom's particular project and particular alternative disposal possibilities in the area does not fulfill the Applicant's burden of proof.

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<sup>14</sup> Tr. at 162, lines 2-12; 267, lines 2-9.

<sup>15</sup> Tr. at 1257-1266.

**B. OPIC is a statutory party to this proceeding, which is distinct from an “intervenor.”**

In addition, OPIC disagrees with the ALJs' characterization of OPIC as an “intervenor” on page 8 and in footnote 13 of the UIC PFD. The Texas Legislature created the Office of Public Interest Counsel to “ensure that the commission promotes the public’s interest and is responsive to environmental and citizens’ concerns including environmental quality and consumer protection.”<sup>16</sup> In creating OPIC, the Legislature *mandated* that the Counsel “represent the public interest and *be a party to all proceedings before the commission.*”<sup>17</sup> As a statutory party to all proceedings before the Commission, OPIC’s role in this hearing differs from that of intervenors in other SOAH cases. An intervenor, or “[o]ne who voluntarily enters a pending lawsuit because of a personal stake in it,”<sup>18</sup> seeks to enter a legal controversy as a third party to protect their rights.<sup>19</sup> Unlike intervenors, OPIC does not need to prove its justiciable interest in this controversy to become a party to this litigation. OPIC seeks to protect and promote the *public interest* rather than any particular personal interest. OPIC does not have a personal stake in this controversy. As the Texas Legislature has already named OPIC as a party to every proceeding that comes before the Commission, OPIC does not need to present allegations of fact on which a right to intervene depends, and does not need to show that it is entitled to some

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<sup>16</sup> Texas Water Code § 5.271 (2006).

<sup>17</sup> TWC § 5.273 (2006) (emphasis added). Notably, the Legislature also prohibited OPIC from appealing any ruling, decision, or other act of the Commission. TWC § 5.275 (2006). Therefore, the scope of OPIC’s duties do not extend outside of proceedings pending before the Commission.

<sup>18</sup> Black’s Law Dictionary, Seventh Edition, Bryan A. Garner, Editor in Chief (1999); TRCP 60-61.

<sup>19</sup> *Id.* (defining “intervention” as “[t]he entry into a lawsuit by a third party who, despite not being named a party to the action, has a personal stake in the outcome.” *See also* TRCP 60-61.

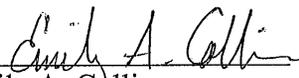
recovery.<sup>20</sup> Therefore, the ALJs' classification of OPIC as an "intervenor" is unsupported by the law and misinterprets OPIC's role in TCEQ proceedings. OPIC requests that the ALJs clarify their statements on page 8 of the UIC PFD to appropriately reflect OPIC's status in this proceeding.<sup>21</sup>

### III. CONCLUSION

Based on the Applicant's failure to meet its burden of proof on alternatives as stated above, OPIC requests that the Commissioners deny the UIC permits. If, however, the Commissioners approve the UIC permits, OPIC agrees with the ALJs that language should be included in the Special Conditions of the permits to require a full completion report that does the following: includes a new fall-off test that is run long enough to have a radius of investigation of 5,400 feet (1,000 feet past the fault to the south); demonstrates that the modeling as currently presented is conservative or the modeling was redone to show a new cone of influence; addresses wells within that revised cone of influence; and determines whether the fault at 4,400 feet is a lateral pressure boundary. OPIC also agrees with the ALJs that a Special Condition should be required that locates the site entrance to the facility at FM-3083.

Respectfully submitted,

Blas J. Coy, Jr.  
Public Interest Counsel

By   
Emily A. Collins

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<sup>20</sup> TWC §§ 5.271, 5.273 (2006); *see also Serna v. Webster*, 908 S.W.2d 487, 492 (Tex.App.—San Antonio 1995, no writ); *H. Tebbs, Inc. v. Silver Eagle Distribs., Inc.*, 797 S.W.2d 80, 84 (Tex.App.—Austin 1990, no writ).

<sup>21</sup> OPIC favors language indicating our distinct role, such as the following: "[t]he Intervenor and OPIC contend that TexCom's application was incomplete in various respects."

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 15, 2008, the original of the Office of Public Interest Counsel's Exceptions and eleven copies were filed with the Chief Clerk of the TCEQ and a true and correct copy was served on all parties of record or their legal representatives listed on the attached mailing list via hand delivery, electronic mail, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.

  
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Emily A. Collins

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