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May 15, 2008

LaDonna Castañuela
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Office of the Chief Clerk
P. O. Box 13087
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TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2008 MAY 15 PM 4:30
CHIEF CLERKS OFFICE

RE: *Application of TexCom Gulf Disposal, L.L.C., 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:

Enclosed herewith please find an original and twelve copies of the following document to be filed in the above-captioned case:

1. Aligned Protestants Montgomery County and City of Conroe's Exceptions to the Proposal for Decision.

Please return a file-stamped copy of the document to the courier.

Thank you for your usual courtesies.

Sincerely yours,

Julie Stewart w/permission
Julie B. Stewart
Assistant County Attorney

Enclosures

cc: SOAH Service List
The Honorable Catherine Egan
The Honorable Thomas Walston

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 COMMISSION INDUSTRIAL §
SOLID WASTE PERMIT NO. 87758 § ADMINISTRATIVE HEARINGS

ALIGNED PROTESTANTS MONTGOMERY COUNTY AND CITY OF CONROE'S
EXCEPTIONS TO THE PROPOSAL FOR DECISION

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW Aligned Protestants Montgomery County and the City of Conroe ("Aligned Protestants") and submit their Exceptions to the Proposal for Decision issued to the Administrative Law Judges ("ALJs") on April 25, 2008, and in support thereof would show the following:

CHIEF CLERKS OFFICE
2008 MAY 15 PM 4:30
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

I. INTRODUCTION

Aligned Protestants except to the ALJs' ultimate recommendation that the Commission should approve TexCom's application for an Industrial Solid Waste permit for the surface facilities that would be used at the injection well site for four underground injection control wells. The ALJs have recommended the Commission grant ISW Permit No. 87758.

II. EXCEPTIONS

Conclusion of Law No. 6 states the following:

The evidence in the record is sufficient to meet the requirements of applicable law for issuance of such permit, including the Texas Health & Safety Code Ann. Chapter 361 (the Solid Waste Disposal Act) and 30 Tex. Admin. Code Chapter 335.

Conclusion of Law No. 7 states the following:

The Draft Permit No. 87758, as prepared by the TCEQ staff, includes all matters required by law.

While Conclusions of Law 6 and 7 state that the evidence and permit satisfy “the law”, in their Proposal for Decision, the ALJs admit that:

Intervenors are correct that no specific set of solid-waste rules expressly addresses a surface facility at an underground injection well site for nonhazardous industrial wastewater. Rather, most of the rules in 30 TAC Chapter 335 concern the handling of hazardous waste or nonhazardous waste landfill facilities, and 30 TAC Chapter 305 mainly contains general rules for permit applications and amendment.¹

However, the ALJs agreed with TexCom and the Executive Director that the intervenors’ arguments effectively requested a rulemaking proceeding, which according to them, is outside the scope of the contested case hearing.²

Lone Star Groundwater Conservation District (“Lone Star”) and the Aligned Protestants first raised the issue of there being no “specific set of solid-waste rules expressly address[ing] a surface facility at an underground injection well site for non-hazardous industrial wastewater” in their Motion to Certify Questions or, alternatively, for Summary Disposition, and for Continuance and Abatement of the Proceedings.³ The ALJs denied the motion and proceeded to the evidentiary hearing in December of 2007.

As noted above, however, the ALJs admitted Lone Star and the Aligned Protestants are correct, there are no specific rules. The ALJs get around this major issue by saying there are enough rules, presented by the Executive Director in a letter to the ALJs, to apply to the

¹ Proposal for Decision at 8.

² *Id.*

³ *See* Motion, attached.

application.⁴ The ALJs also rely on a seeming procedural glitch to get around making the tough decision that TexCom is asking for a permit that has no set rules and therefore should be denied.⁵

Aligned Protestants incorporate the arguments made by Lone Star and Aligned Protestants in their closing and reply briefs regarding the lack of rules.⁶ The simple fact of the matter is that – as the ALJs admit – the TCEQ has failed to properly promulgate rules governing the type of surface facility for which TexCom seeks a permit. TexCom brushes off the arguments of Lone Star and the Aligned Protestants by saying “[b]ecause non-hazardous wastewater is of lesser concern, the permitting of this type of facility is relatively straightforward.”⁷ How can it be straightforward without rules to tell you how to even move forward? Instead, the parties are left to wonder “which rules apply?” Even TexCom, the Executive Director and Michael Graeber, the TCEQ engineer who reviewed TexCom’s application, cannot agree on which rules apply.⁸ The TCEQ has previously recognized how important it is to specifically regulate commercial industrial non-hazardous waste because it promulgated 30 TAC 335, Subchapter T to set out the permitting standards for commercial industrial non-hazardous waste landfill facilities. The disposal of commercial industrial non-hazardous wastewater by underground injection should be accorded the same level of importance. It should not be afforded “lesser concern.”

⁴ Proposal for Decision at 8.

⁵ *Id.*

⁶ For convenience, these arguments are excerpted and attached to this brief as Attachment 2 (Aligned Protestants’ Closing Argument), Attachment 3 (Lone Star’s Closing Argument) and Attachment 4 (Lone Star’s Reply).

⁷ TexCom Closing Brief at 51.

⁸ See Lone Star Groundwater Conservation District’s Reply to Closing Arguments at 55.

III. CONCLUSION

The TCEQ has not properly promulgated rules for the type of surface facility for which TexCom seeks a permit. TexCom should therefore not be allowed to go forward with this surface facility.

WHEREFORE, PREMISES CONSIDERED, Aligned Protestants Montgomery County and the City of Conroe respectfully request that their Exceptions to the PFD be granted, that the Commission order TexCom's Industrial Solid Waste application be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2008, a true and correct copy of Aligned Protestants Montgomery County and City of Conroe Exceptions to the Proposal for Decision was served on all parties of record as indicated below by electronic mail, first class mail, or facsimile delivery:

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ATTACHMENT 1

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

APPLICATIONS OF TEXCOM GULF § BEFORE THE STATE OFFICE
DISPOSAL, L.L.C. FOR TEXAS §
COMMISSION ON ENVIRONMENTAL §
QUALITY COMMISSION § OF
UNDERGROUND INJECTION §
CONTROL PERMIT NOS. WDW410, §
WDW411, WDW412, AND WDW413 § 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 COMMISSION INDUSTRIAL §
SOLID WASTE PERMIT NO. 87758 § ADMINISTRATIVE HEARINGS

**JOINT MOTION TO CERTIFY QUESTIONS AND ABATE PROCEEDING AND
ALTERNATIVE MOTION FOR SUMMARY DISPOSITION**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGES:

Movants City of Conroe, Montgomery County and the Lone Star Groundwater Conservation District respectfully urge this joint motion to certify questions regarding the lack of substantive Commission regulations governing the Application by TexCom Gulf Disposal, L.L.C. for Texas Commission on Environmental Quality Industrial Solid Waste Permit No. 87758 (the "TexCom ISWP Application"), and for continuance and abatement and, in the alternative, summary disposition of the TexCom ISWP Application, and would respectfully show as follows:

I. SUMMARY OF THE ISSUE

Solid waste falls into three general regulatory classifications in Texas. Hazardous waste is defined by Texas Commission on Environmental Quality ("TCEQ") rule¹ and U.S.

¹ 30 TEX. ADMIN. CODE § 335.1 (West 2007).

Environmental Protection Agency ("EPA") rule² and is regulated under a delegation of federal authority. Municipal solid waste is defined by TCEQ rule³ and is regulated under a program established by the agency in Title 30, Chapter 330 of the Texas Administrative Code. The treatment, storage and processing of hazardous waste and municipal solid waste, as well as the substantive requirements for securing a permit that allows for such regulated activity to occur, are governed by rules that were promulgated in strict accordance with Chapter 2001 of the Texas Government Code (the "Texas APA"). That is, they were adopted after formal notice, public comment, and an articulation of the reasoned justification for the rules.

The same cannot be said for the development of standards governing the treatment, storage and processing of the third type of solid waste—nonhazardous industrial solid waste—for disposal by underground injection. In 2001, the Texas Legislature adopted amendments to section 5.103 of the Texas Water Code that clearly mandates that the agency is to carry out its powers and duties through properly promulgated rules.⁴ In response, the TCEQ adopted rules in 2004 regulating all aspects of commercial nonhazardous waste treatment, storage, processing and disposal activities associated with a Class I commercial nonhazardous waste *landfill*.⁵ In addition to governing facility site selection, permitting procedures, inspection requirements, and contingency planning, this particular set of rules also establish specific regulatory guidance for waste analysis, constituent reaction, personnel training, and facility operation and design.⁶ These rules, however, are applicable only to commercial nonhazardous waste *landfill* operations.

By contrast, the Applicant has applied for a permit that would allow for the treatment, storage and processing of Class I commercial nonhazardous wastes that will be disposed of by

² 40 C.F.R. Part 261 (2007).

³ 30 TEX. ADMIN. CODE § 330.3 (West 2007).

⁴ TEX. WATER CODE. ANN. § 5.103, *et seq.* (Vernon Supp. 2007).

⁵ 29 TEX. REG. 2888 (2004); *see* 30 TEX. ADMIN. CODE, Ch. 335, Subch. T (West 2007).

underground injection. Nowhere in Chapter 335 can there be found rules that govern the site selection, facility design standards, permit requirements, or operational requirements for the type of facility that is being proposed by the Applicant. In fact, such rules have never been promulgated in any chapter of TCEQ's rules. Instead, the guidelines for the TexCom ISWP Application are found in a mere pamphlet, created by TCEQ staff, never subjected to notice, public comment or the other implements of due process articulated in the Texas APA, in what is clearly a direct contravention of the mandates created by section 5.103 of the Texas Water Code. Because no true regulatory standard exists by which to evaluate the merits of the TexCom ISWP Application, the District believes that the Commissioners of the TCEQ should be given the opportunity to address this regulatory gap, and correct it, before the parties are expected to test the merits of the application in a contested case hearing.

II. RELEVANT PROCEDURAL HISTORY

This case consolidates TexCom's Applications for Underground Injection Control Permits Nos. WDW410, WDW411, WDW412, and WDW413 with TexCom's Industrial SWP application. Written discovery has been completed, although the parties have been serving supplemental discovery responses over the past few days and are under a continuing obligation to supplement their discovery responses. Several depositions are to be conducted over the next three weeks. Prefiled testimony of the TCEQ's Executive Director and the protestants was filed on November 13, and objections to all prefiled testimony is due by November 27. A prehearing conference is set for December 10, with the hearing scheduled to commence on December 12.

⁶ 30 TEX. ADMIN. CODE Ch. 335, Subch. T (West 2007).

III. A REVIEW OF APPLICABLE LAW

A. Overview of Rules Governing Solid Waste Permit Applications.

Chapter 305 of TCEQ's rules provide general procedural requirements for all types of permit applications, permits and other actions by TCEQ to carry out the responsibilities for management of waste disposal activities under Texas Water Code Chapters 26-28 and 32 and Texas Health & Safety Code Chapters 361 and 401.⁷ However, no properly noticed and adopted TCEQ rule exists that provides substantive guidance for Class I commercial nonhazardous waste treatment, storage and disposal facilities associated with underground injection disposal operations, or the permits that allow for such activity to take place. By contrast, Municipal Solid Waste treatment, storage, processing and disposal permitting and operational requirements are governed by extensive, detailed substantive—and most importantly, properly promulgated—rules located in Chapter 330 of TCEQ's Rules. Chapter 335 of TCEQ's rules provides extensive, detailed, substantive, properly promulgated rules that govern, *inter alia*, the treatment, processing, and storage of Class I commercial nonhazardous industrial solid waste that is necessarily associated with landfill disposal of those waste streams.⁸ There are no similar rules that apply to the treatment, storage and processing operation proposed in the TexCom ISWP Application.

Despite never adopting rules governing the treatment, storage and processing of Class I commercial industrial nonhazardous solid wastes destined for disposal by underground injection ("Class I CIN-UIC waste"), the Executive Director has nevertheless published a form permit

⁷ 30 TEX. ADMIN. CODE §§ 305.1(a), 305.45 (West 2007).

⁸ *Id.* Chapter 335, Subchapter T.

application for such activity.⁹ A true and correct copy of the version of Form INS-0024 used by the Applicant for the TexCom ISWP Application is attached hereto as Exhibit A.

Form INS-0024 is not the product of formal rulemaking. It does not articulate regulatory standards for the treatment, storage, and processing of Class I CIN-UIC waste that have themselves been promulgated through formal rulemaking. Yet, the Executive Director, through Form INS-0024, clearly prescribes law and policy and has describes the TCEQ's procedure and practice requirements for a Class I CIN-UIC waste treatment, processing, and storage operation permit. The regulations articulated through Form INS-0024 instead appear to have been developed *ad hoc* by agency staff under the mantle of section 305.45 of the Texas Administrative Code. For example, a Class I CIN-UIC waste treatment, processing and storage facility Surface Water Protection Plan, which is required by Form INS-0024, is governed not by a formally adopted rule, but rather by the dictates of the Executive Director through his general ability to seek information under section 305.45(a)(8)(C), which provides that a supplemental technical report must contain "such other information as reasonably may be required by the executive director for an adequate understanding of the project or operation, and which is necessary to provide the commission an adequate opportunity to make the considerations required by § 331.121 of this title."¹⁰ The Executive Director also relies on section 305.45(a)(8)(C) as the supposed regulatory guidepost for Class I CIN-UIC waste treatment, processing and storage facility and operational Security measures (Section II.A. of the Instruction Form), Inspection and Maintenance requirements (Section II.B. of the Instruction Form), Record Keeping (Section II.E. of the Instruction Form); and the description of Roads (Section II.F. of the Instruction Form).

⁹ TCEQ Form INS-0024, Texas Commission on Environmental Quality Permit Application to Store or Process Industrial Hazardous Waste.

Governing standards for the Waste Acceptance Plan (Section III. of the Instruction Form) and the Geology Report (Section V. of the Instruction Form) for Class I CIN-UIC waste treatment, storage and processing facilities are derived not from any properly adopted rule, but from nothing more than the whims of agency staff through the general power to seek information under section 305.45(a)(8)(C). The detail required for the Engineering Report, (Section IV of the Instruction Form), is derived from a one-sentence, general informational requirement in § 305.45(a)(7), which requests “a general description of the facilities and systems used for or in connection with the collection, transportation, treatment, and disposal of waste, or used in connection with an injection activity.” No clear standards have been promulgated so that the protestants, as well as the Administrative Law Judges, can ascertain whether, if at all, the Applicant has met its burden. Yet, section 5.013 of the Texas Water Code clearly requires the agency to develop these standards through formal rulemaking. Section 5.013 provides that:

(a) The commission *shall adopt any rules necessary to carry out its powers and duties under this code* and other laws of this state.

(b) The commission shall adopt reasonable procedural rules to be followed in a commission hearing. The executive director may recommend to the commission for its consideration any rules that he considers necessary.

(c) *Rules shall be adopted in the manner provided by Chapter 2001, Government Code.* As provided by that Act, *the commission must adopt rules when adopting, repealing, or amending any agency statement of general applicability that interprets or prescribes law or policy or describes the procedure or practice requirements of an agency.* The commission shall follow its own rules as adopted until it changes them in accordance with that Act.

(d) The commission shall include as a part of each rule the commission adopts, and each proposed rule for adoption after the effective date of this subsection, a citation to the statute that grants the specific regulatory authority under which the rule is justified and a citation of the specific regulatory authority that will be exercised. If no specific statutory authority exists and the agency is depending on

¹⁰ Cf. 30 TEX. ADMIN. CODE § 335.590, *et seq.* (West 2007) (providing rules, properly promulgated, that govern Class I commercial industrial nonhazardous waste treatment, processing, storage and landfill disposal facility operational and design standards).

this section, citation of this section, or Section 5.102 or 5.013, is sufficient. *A rule adopted in violation of this subsection is void.*

(emphasis added.)¹¹

The TCEQ's approach to regulating Class I CIN-UIC waste treatment, storage and processing facilities, and the permitting of the same, is found not in the Texas Administrative Code, but instead is found in the minds of agency staff, and articulated in an application form. Form INS-0024 is replete with agency statements of general applicability that prescribe law and policy and describe the procedure and practice requirements of the TCEQ for permitting, and operating, Class I CIN-UIC waste treatment, storage and processing facilities. This attempt to regulate without exercising due process falls far short of the agency's obligations established by the Texas APA, and as expressly required by sections 5.103(a) and (c) of the Texas Water Code, and by section 361.024 of the Texas Health & Safety Code. Absent properly noticed and adopted rules regulating the permitting and operation of Class I CIN-UIC waste treatment, storage and processing facilities, the merits of the TexCom ISWP Application cannot be judged against any objective standard.

B. Ad Hoc Rulemaking Impermissible in this hearing.

It is well settled Texas law that state agencies such as TCEQ and SOAH are prohibited from regulating on an *ad hoc* basis where there has been a clear statutory mandate for multiple years that the agency must promulgate rules that govern a regulated activity.¹² In 2001, the Texas Legislature enacted a direct mandate that the TCEQ use formally adopted rules to carry out its powers and duties under the Texas Water Code and other laws of this state.

¹¹ See also TEX. HEALTH & SAFETY CODE § 361.024(e) ("Rules shall be adopted as provided by Chapter 2001, Government Code. As provided by that Act, the commission must adopt rules when adopting, repealing, or amending any agency statement of general applicability that interprets or prescribes law or policy or describes the procedure or practice requirements of the agency. The commission shall follow its own rules as adopted until it changes them in accordance with that Act.").

¹² See, e.g., R. Beal, TEX. ADMIN. PRAC. & PROCEDURE, § 10.2.1 (citations omitted).

Clearly section 5.103 commands the TCEQ to formally promulgate rules governing Class I CIN-UIC waste treatment, storage and processing, instead of regulating through a form based on nothing more than staff contributions.

The Executive Director's failure to adopt rules has put the Administrative Law Judges and the protestants in the untenable position of having to guess about the most appropriate requirements by which the TexCom ISWP Application should be judged. Because the agency has not provided the Administrative Law Judges nor the protestants with any statement of applicable agency rules,¹³ the Judges and protestants will be forced to pick and choose what standards apply to the TexCom ISWP Application. This *ad hoc* approach to regulation is prohibited by section 5.103 of the Texas Water Code and section 361.058 of the Texas Health & Safety Code. Moreover, it constitutes an impermissible delegation of power.¹⁴

C. Procedural Due Process Requires Notice of Applicable Rules and Policies.

Before issuance of a permit, the TCEQ must provide an opportunity for a hearing to protestants.¹⁵ The APA requires SOAH to conduct the contested case hearing and provide protestants an opportunity to present evidence and argument on each issue raised by the Application.¹⁶ In the absence of rules adopted in accordance with the requirements of the APA, none of the parties can make proper cases in the contested case hearing regarding the TexCom ISWP Application. Section 2001.058(c) of the Texas Government Code underscores this substantive requirement, which provides in pertinent part that "[a] state agency shall provide the administrative law judge with a written statement of applicable rules or policies." This has not

¹³ As required by TEX. GOV'T CODE § 361.058(c).

¹⁴ *Moody v. Texas Water Commission*, 373 S.W.2d 793, 797 (Tex. Civ. App.—Austin 1963, writ ref'd n.r.e.).

¹⁵ TEX. HEALTH & SAFETY CODE § 361.088(c).

¹⁶ TEX. GOV'T CODE § 2001.051.

occurred in any reasonable manner. Due to the direct referral of the case, the only statement of applicable rules or policies in the Notice of Hearing was:

[T]he chief clerk has referred this application directly to SOAH for a hearing on whether the application complies with all applicable statutory and regulatory requirements.

This statement provides no substantive guidance as required by the Texas APA as to what the applicable rules or policies are for the TexCom ISWP Application. In the further absence of any rules directly applicable to permits for Class I CIN-UIC waste treatment, storage, and processing facilities, the District and other parties are left only to guess about what are the requirements that the Applicant will be bound by. This is an affront to due process, as it effectively denies Movants any true opportunity to properly ascertain the merits of the application, and to ultimately make their case against it.

It is untenable to proceed with this contested case hearing in the absence of any statement of the rules and policies applicable to the TexCom ISWP Application. If Form INS-0024 is accepted as the standard against which the application is to be judged, then the form has literally become the rules. Form INS-0024 is nothing more than an informally adopted agency statement of general applicability interpreting and prescribing law and policy and describing the procedure and practice requirements of the TCEQ for Class I CIN-UIC waste treatment, storage, and processing facilities operations and permitting. Without any properly adopted rules against which the TexCom ISWP Application can be judged, it is necessary to seek the guidance of the TCEQ through certified questions.

IV. CERTIFIED QUESTIONS

Movants accordingly respectfully request that the Administrative Law Judges submit the following certified questions to the Commissioners of the Texas Commission on Environmental Quality:

1. Should the Application by TexCom Gulf Disposal, L.L.C. for Texas Commission on Environmental Quality Industrial Solid Waste Permit No. 87758 be dismissed for want of formally adopted Commission rules regarding the treatment, storage, and processing of Class I commercial industrial nonhazardous solid wastes destined for disposal by underground injection?
2. If Question No. 1 is responded to in the negative, should the contested case hearing regarding the Application by TexCom Gulf Disposal, L.L.C. for Texas Commission on Environmental Quality Industrial Solid Waste Permit No. 87758 be abated due to the absence of rules adopted by the TCEQ which are specifically applicable to treatment, storage, and processing of Class I commercial industrial nonhazardous solid wastes destined for disposal by underground injection, until such time as TCEQ can promulgate necessary rules?
3. If the answer to Question No. 2 is negative, what are the applicable rules or policies that the Administrative Law Judges should apply in their consideration of the merits of the Application by TexCom Gulf Disposal, L.L.C. for Texas Commission on Environmental Quality Industrial Solid Waste Permit No. 87758?

The foregoing questions are appropriate for submission to the TCEQ Commissioners under section 155.35(b) of SOAH's rules, section 80.131 of TCEQ's rules, and under the circumstances of this case. The foregoing questions cannot be answered under prior policy statements made by the TCEQ.

V. REGULATORY BASIS FOR CERTIFYING QUESTION

The rules providing the basis for submission of a certified question to the Commissioners of the TCEQ, SOAH Rule 155.35(b) and TCEQ Rule 80.131(b), both provide essentially the following requirements:

On a motion by a party or on the judge's own motion, the judge may certify a question to the commission. Certified questions may be made at any time during a proceeding, regarding commission policy, jurisdiction, or the imposition of any

sanction by the judge which would substantially impair a party's ability to present its case. Policy questions for certification purposes include, but are not limited to:

- (1) the commission's interpretation of its rules and applicable statutes;
- (2) which rules or statutes are applicable to the proceeding; or
- (3) whether commission policy should be established or clarified as to a substantive or procedural issue of significance to the proceeding.¹⁷

As reviewed below, the District establishes that its questions proposed for certification meet each of these regulatory criteria.

A. The Questions Concern a Matter or Commission Policy.

The two rules providing the basis for submission of a certified question provide three non-exclusive categories of policy questions that are appropriate for certification. The proposed questions set forth above are appropriate under each of those categories.

1. The question concerns the commission's interpretation of its rules and applicable statutes.

The questions posed above present issues which can only be resolved by TCEQ guidance as to how it interprets its rules and applicable statutes. The Movants contend that section 5.103 of the Texas Water Code and section 361.024 of the Texas Health and Safety Code each require statements of general applicability to be adopted as rules, and that no such rules have been adopted. Sections 2001.058(b) and (c) of the Texas Government Code require the Commission to provide the Administrative Law Judges with a written statement of applicable rules or policies. Because that statement has not been provided, and the Form ISN-0024 has not been adopted as a rule, this proceeding can proceed if at all, only with the Commission's guidance.

¹⁷ 1 TEX. ADMIN. CODE § 155.35(b); 30 TEX. ADMIN. CODE § 80.131(b)(emphasis added).

2. **The question seeks determination of which rules or statutes are applicable to the proceeding.**

This is the essence of the questions posed. It is the Movants' position that essential requirements, which now exist only in a guidance form and which have not been adopted as a rule, are being applied in violation of section 5.103 of the Texas Water Code and section 361.024 of the Texas Health and Safety Code. Are those statutes applicable to this proceeding? If so, what is the impact? Should this proceeding be terminated for failure of the Commission to adopt the statements of general applicability as rules? If not, what are the rules and policies to be applied? Movants' proposed certified questions directly seek a determination of which rules or statutes are applicable to the TexCom ISWP Application.

3. **The question seeks clarification of commission policy as to a substantive and procedural issues of significance to the proceeding.**

The questions posed above seek clarification of both substantive and procedural issues of significance to the proceeding. Substantively, the questions seek guidance as to the regulatory requirements to be considered in assessing whether the Applicant is entitled to a permit for its Class I CIN-UIC waste surface facilities. What does the Commission require for the substance of the TexCom ISWP Application? Procedurally, the questions seek guidance as to how to proceed, if at all, in the absence of a statement of what requirements apply. These issues are of paramount significance to this proceeding.

B. **The Questions Concern ALJ Rulings which Substantially Impair the Protestant's Ability to Present Their Cases.**

Because of the accelerated schedule and the absence of any requirement that the parties agree to or brief their positions on which rules are applicable in this proceeding, there is an absence of any ruling on what rules and policies apply. This void makes it impossible for the protestants to present their cases as they are unable to put up any yardstick against which to

judge the application. Answers to the posed questions will provide the guidance necessary to allow the parties to present their cases, if necessary.

VI. REQUEST FOR CONTINUANCE AND ABATEMENT

To allow for proper briefing and a hearing at SOAH on the critically important legal issue raised by this motion, the Movants respectfully request a continuance of the December 12 hearing date and an abatement of all associated activities in this case until this issue can be resolved. SOAH has the authority to grant this relief pursuant to SOAH Rules 155.15(a)(1) and (b)(8) and (9), and 155.30(b) and (e), and TCEQ Rules 80.4(c) and 80.119.

This request for continuance is timely filed, well in advance of the deadline set in SOAH Rule 155(e). Movants have not previously sought continuance of the hearing or abatement. Continuance or abatement is appropriate under the circumstances. The Movants do not seek this relief solely for purposes of delay, but rather to raise a critically important substantive and procedural issue and to urge that SOAH provide an opportunity for briefing and hearing. The Movants have undertaken significant efforts to abide by the deadlines set under the expedited procedural schedule in this case. Twenty-one (21) days remain before the December 12 evidentiary hearing. Between now and the hearing date, several depositions have yet to be conducted, objections to prefiled testimony and discovery supplementation are due, and preparation for the hearing will be necessary. This work is unrelated to the critically important issue presented in this motion, and will result in substantial harm by the unnecessary and significant expenditure of time and tens of thousands of dollars by multiple governmental entities and individual protestants.

This directly referred contested case has been on an unusually accelerated schedule. While a direct referral allows consideration of "all applicable statutory and regulatory

requirements", the hearing has been only 21 weeks from preliminary hearing to evidentiary hearing. This would be an unusually expedited proceeding even with limited issues pursuant to House Bill 801 procedures. As the applicant requested direct referral, the Commission has not given any deadline for the ALJs to provide a proposal for decision. As such, the ALJs will not violate any such deadline of an interim order of the TCEQ as to returning a proposal for decision.

The accelerated schedule of the hearing did not provide an opportunity for the parties to negotiate an agreed list of applicable authorities, or to brief which authorities are applicable as often occurs in contested case proceedings before SOAH. It would be a significant waste of resources of SOAH, the Commission, protestants, and even the Applicant if the proceeding were to continue without resolution of the issue raised by this motion. In summary, the Movants seek continuance of the December 12 hearing date and an abatement of all associated activities in this case until this issue can be resolved.

VII. ALTERNATIVE MOTION FOR SUMMARY DISPOSITION

Summary disposition is an alternative procedural approach and remedy available to SOAH to resolve the issue presented in this motion. Summary disposition is appropriate in this case because the issue involves solely questions of law, and because summary disposition provides the most efficient, cost effective procedure for resolving all issues related to the Industrial SWP Application. Because there are no genuine issues of material fact that bear in any way on the issue presented, it is unnecessary to consider any facts to resolve the issue presented.

Accordingly, pursuant to TCEQ Rule 80.137, SOAH Rule 155.57, and Texas Rule of Civil Procedure 166a, Movants respectfully request alternative relief in the nature of summary disposition. In support of this motion, Movants incorporate Sections I through VI above. On the

basis that no TCEQ rules exist to govern Class I CIN-UIC waste treatment, storage, and processing facilities operation and permitting, the District seeks SOAH's dismissal of the TexCom ISWP Application.

The agency's and the Applicant's respective prefiled testimony underscore the Movants' assertion that there are no substantive TCEQ rules that apply to Class I CIN-UIC waste treatment, storage, and processing facilities operation and permitting. For convenience of review, the District would point to the arguments and evidence offered by TCEQ, the Applicant, and the Lone Star Groundwater Conservation District, as follows:

- (1) Deposition on Written Questions by Michael D. Graeber, P.E.
- (2) Prefiled Testimony of Carl Brassow, P.E., J.D. *p. 7, l 20 – p. 11, l. 9.*
- (3) TexCom Exhibit 61.
- (4) Prefiled Testimony of Ray Lee Shull, P.E., *p. 25, l. 12 – p. 27, l 24.*
- (5) District Exhibit 7.

For purposes of complying with Texas Rule of Civil Procedure 166a(d), SOAH Rule 155.57(d), and TCEQ Rule 80.137(e), this pleading also serves as the Movants' statement of intent to use discovery responses of the Applicant and TCEQ.

VIII. CONCLUSION

This proceeding came to SOAH on a direct referral requested by the Applicant. The only guidance SOAH has received as to the applicable authorities is as contained in the notice of hearing which commands consideration of "all applicable statutory and regulatory requirements." Otherwise, it is clear that the only applicable regulatory requirements are those procedural rules in Chapter 305 of TCEQ rules and *ad hoc* procedural and substantive regulations in the form of TCEQ Form INS-0024 for Class I CIN-UIC waste treatment, storage, and processing facilities

operation and permitting. This form constitutes an agency statement of general applicability that and prescribes law and policy and describes the procedure and practice requirements of the TCEQ. As such, the Form INS-0024, and the informally adopted considerations that serves as its basis, must be adopted as rules pursuant to rulemaking under the Texas APA. This has not occurred. Absent any properly adopted substantive rule governing Class I CIN-UIC waste treatment, storage, and processing facilities operation and permitting, there are no objective standards by which the Movants can make their case, or by which the Administrative Law Judges may conduct a hearing and prepare a Proposal for Decision. Consequently, it would be a deprivation of all parties' constitutional right to procedural due process to proceed to hearing on the TexCom ISWP Application.

IX. CERTIFICATE OF CONFERENCE

The District's undersigned counsel certifies that they have conferred with legal counsel for TexCom, TCEQ's Executive Director, and the individual protestants, but that they were unable to reach legal counsel for the Office of Public Interest Counsel. The individual protestants do not object to summary disposition. TCEQ's Executive Director neither objects nor agrees to this motion, but reserves his right to respond. TexCom objects to the motions to certify and for summary disposition, but did not take a position and reserved its right to respond on the separate and independent requests for continuance and abatement.

PRAYER

WHEREFORE, Montgomery County, the City of Conroe and the District respectfully request that SOAH grant their joint motion to certify questions or, in the alternative, grant their joint motion for summary disposition, and that the hearing set for December 12th be continued and all associated activities and deadlines be abated until these motions are addressed and acted

upon by SOAH and/or the Commission. Furthermore, the joint movants request that SOAH set a hearing on the motion for continuance and abatement within three days of the filing of this motion, and a subsequent hearing or hearings on the motion to certify questions and motion for summary disposition.

Respectfully submitted,

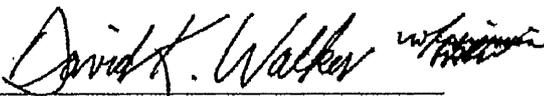
**LLOYD GOSSELINK BLEVINS
ROCHELLE & TOWNSEND, P.C.**
816 Congress Avenue, Suite 1900
Austin, Texas 78701
(512) 322-5800 (phone)
(512) 472-0532 (facsimile)



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State Bar No. 24046075

**ATTORNEYS FOR PROTESTANT
LONE STAR GROUNDWATER
CONSERVATION DISTRICT**

**OFFICE OF THE COUNTY ATTORNEY
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(936) 539-7997 (facsimile)



DAVID K. WALKER
State Bar No. 20696200
JULIE B. STEWART
State Bar No. 24013924

**ATTORNEYS FOR ALIGNED
PROTESTANTS MONTGOMERY
COUNTY AND CITY OF CONROE**

CERTIFICATE OF SERVICE

SOAH Docket Nos. 582-07-2673 and 582-07-2674;
TCEQ Docket Nos. 2007-0204-WDW and 2007-0362-IHW

I hereby certify that on this the 21st day of November, 2007, 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:

Mr. John E. Williams
Ms. J. Diane Goss
Environmental Law Division (MC-173)
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087
johwilli@tceq.state.tx.us
dgoss@tceq.state.tx.us
(512) 239-0606 (fax)

Representing the Executive Director

Ms. LaDonna Castañuela
Office of Chief Clerk (MC-105)
Attention: Docket Clerk
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087
(512) 239-3311 (fax)

Office of the Chief Clerk

Ms. Emily Collins
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Counsel

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Representing Applicant TexCom Gulf
Disposal, L.L.C.

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

CHIEF CLERKS OFFICE

2008 MAY 15 PM 4: 31

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(936) 756-8102

Representing Flora Harrell, James Langston,
James A. Langston III, Lois Nelson, Edgar and
Shirley Hoagland, Patty Mouton, Edwin A.
(Art) Wilson, Al and Jerry Zaruba, Nicky E.
Dyer, Brian Rodel, and Richard Ward

Designated Representative of former Pro Se
Parties (courtesy copy)



MICHAEL A. GERSHON

1867/01/PLEADINGS/071121



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
PERMIT APPLICATION
TO STORE OR PROCESS INDUSTRIAL NONHAZARDOUS WASTE

FORM AVAILABILITY:

This form, as well as other Industrial and Hazardous Waste documents and pertinent rules, is available on the Internet. The TCEQ Home Page is located at the following address: <http://www.TCEQ.state.tx.us>. This application will be in the Forms category, after selecting Forms, you may enter the number of the form (0024) and submit. Questions may be e-mailed to ihwper@TCEQ.state.tx.us.

PART I
GENERAL INSTRUCTIONS

1. A person (individual, corporation or other legal entity) who stores or processes industrial solid waste (except for on-site storage, or processing of nonhazardous waste) must obtain a permit pursuant to the Texas Water Code and the Texas Health and Safety Code, Texas Solid Waste Disposal Act. In applying to the Texas Commission on Environmental Quality, hereafter referred to as the Commission, the applicant shall follow the procedures outlined below, on the attached application form and consistent with the Rules of the Commission.
2. The original application plus all copies for New, Renewal, Major Amendments and Class 3 Modification should be submitted to:

Texas Commission on Environmental Quality
Attention: Permits Administrative Review Section, MC- 161
Registration, Review & Reporting (RRGR) Division
P. O. Box 13087
Austin, Texas 78711-3087

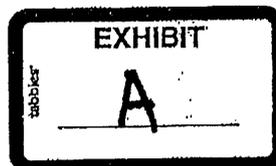
The original application plus all copies for Class 1, 1', Class 2 Modifications and Minor Amendments should be submitted to:

Texas Commission on Environmental Quality
Attention: Industrial and Hazardous Waste Permits Section, MC 130
Waste Permits Division
P. O. Box 13087
Austin, Texas 78711-3087

and should be submitted a minimum of 180 days prior to the construction of a new or the alteration of an existing industrial solid waste management facility. A permit holder requesting modification of permit terms and/or conditions, which will not involve construction or alteration of a facility, is encouraged to submit an application 180 days prior to the proposed implementation of the desired change(s).

Telephone Inquiries: (512) 239-2334 Technical - Industrial and Hazardous Waste Permits Section, Waste Permits Division
(512) 239-6832 Waste Identification - Registration, Review and Reporting Division
(512) 239-0357 Fees - Financial Administration Division

3. Signature on Application (30 TAC Section 305.44): The person who signs the application form will often be the applicant himself; when another person signs on behalf of the applicant, his title or relationship to the applicant will be shown. In all cases, the person signing the form must be authorized to do so by the applicant. An application submitted by a corporation must be



signed by a principal executive officer or at least the level of vice president or by his duly authorized representative, if such representative is responsible for the overall operation of the facility. In the case of a partnership or a sole proprietorship, the application must be signed by a general partner or the proprietor, respectively. In the case of a municipal, state, federal or other public facility, the application must be signed by a principal executive officer or a ranking elected official. A person signing an application on behalf of an applicant must provide notarized proof of authorization.

4. An application cannot be processed until all information required to properly consider the application has been submitted. If an application is severely lacking in detail, or if the applicant fails to submit additionally requested information in a timely manner, the application will be returned in accordance with 30 TAC Section 281.18.
5. Fees and Costs.
 - a. The fee for filing an application is \$100 plus \$50 for the cost of required notice. Therefore, a person filing an application for an original permit or an amended permit, must submit a fee of \$150. A renewal of a permit must include an additional \$15 for a total fee of \$165. (30 TAC Section 305.53).
 - b. The applicant for a permit is required to bear the cost of publication of notice in a newspaper as prescribed by 30 TAC Section 39.5 and 39.103.
6. A person is encouraged not to commence construction of an industrial solid waste management facility until the Commission has issued a permit to authorize the management of industrial solid waste at the facility.
7. Designation of Material as confidential.
 - a. The designation of material as confidential is frequently carried to excess. The Commission has a responsibility to provide a copy of each application to other review agencies and to interested persons upon request and to safeguard confidential material from becoming public knowledge. The Commission suggests that the applicant NOT submit confidential information as part of the permit application. However if this cannot be avoided, the Commission requests that an applicant (1) be prudent in the designation of material as confidential and (2) submit such material only when it might be essential to the staff in their development of a recommendation.
 - b. Reasons of confidentiality include the concept of trade secrecy and other related legal concepts which gave a business the right to preserve confidentiality of business information to obtain or retain advantages for its right in the information. This includes authorization under 5 U.S.C. 5552(b)(4), 18 U.S.C. 1905, and special rules cited in 40 CFR 552.301-2.309.
 - c. Section 381.037 of the Texas Solid Waste Disposal Act does not allow an applicant for an industrial solid waste permit to claim as confidential any record pertaining to the characteristics of the industrial solid waste.
 - d. The applicant may elect to withdraw any confidential material submitted with the application. However, the permit cannot be issued, amended, or modified if the application is incomplete.

PART II PROCEDURAL INFORMATION

The Executive Director's staff will review the application for completeness of information submitted. An applicant may be requested to submit additional information in accordance with 30 Texas Administrative Code Section 305.50(a)(3), to complete or clarify questions concerning the applicant's submittal. The failure of an applicant to complete an application shall result in the return of the application. The Commission will provide a copy of the application or a summary of its contents to other state agencies and local governmental entities for their review. Following review of the application and any comments received in response to the application, the Executive Director will forward the application and recommendation, as required by 30 Texas Administrative Code Section 281.21-22, to the Texas Commission on Environmental Quality for their consideration.

Action Following Filing of an Application with the Texas Commission on Environmental Quality

Notice Requirements:

TCEQ Application - Industrial Solid Waste
INS-0024 (Rev. 09/27/04)

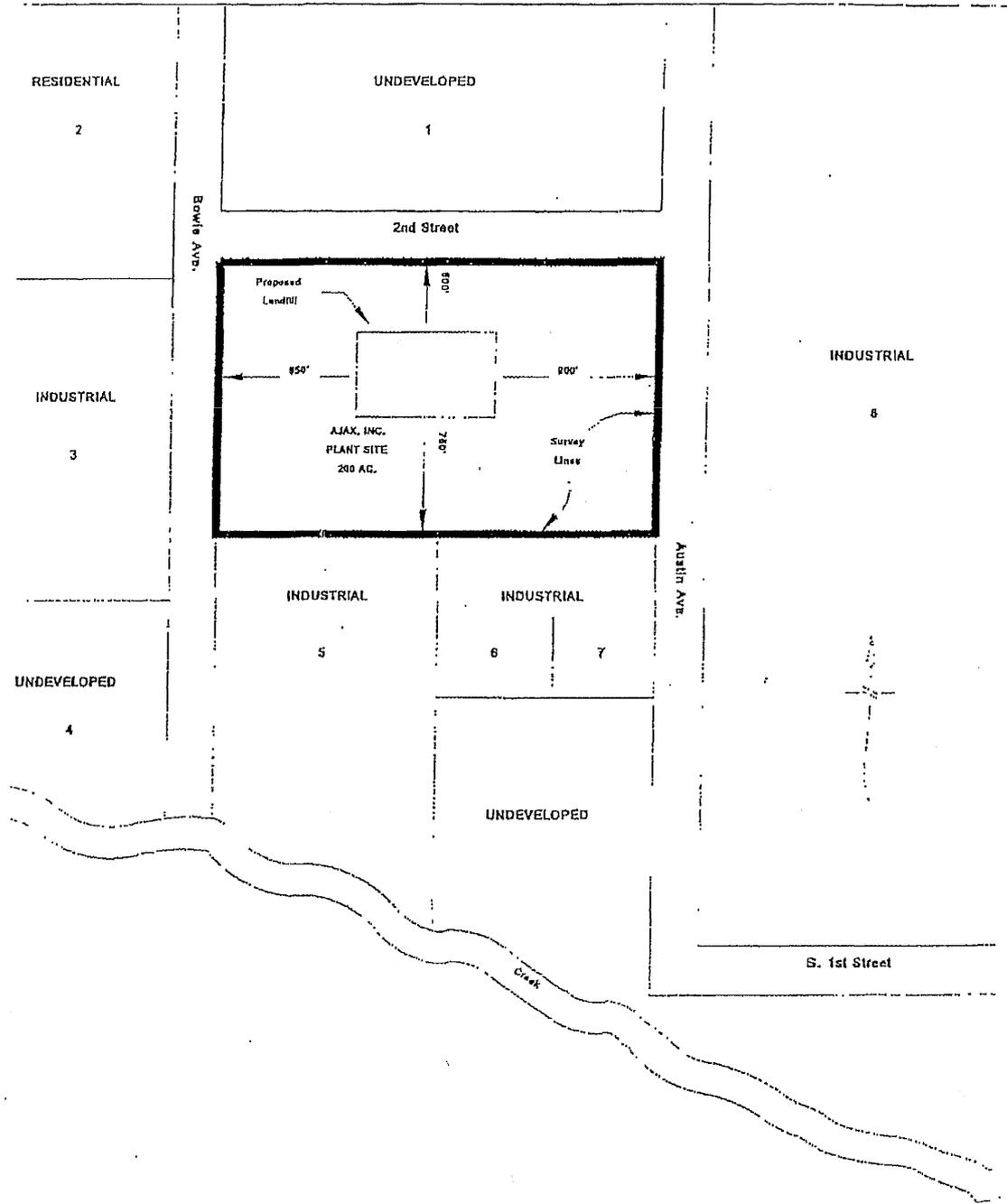
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1. **Applicant:** Every applicant for a permit or major amendment shall be responsible for causing notice of the application to be published in a newspaper regularly published or circulated in the county where the disposal activities will occur and in each county and area which is adjacent or contiguous to each county in which the facility is located (30 TAC Section 39.503(d)). Except in the case of a notice of a permit modification request, the Commission will mail the appropriate notice and instructions for publication to the applicant.
2. **Texas Commission on Environmental Quality:** The same general notice of the application (except for permit modifications) as is required to be published will be mailed to persons who might possibly be affected by the application and to other governmental entities. This notice is mailed concurrently with the notice to the applicant to publish in a newspaper.

Following Publication of Notice: The Texas Commission on Environmental Quality may act upon an application for a permit or major permit amendment without the necessity of holding a public hearing when (1) notice of the application has been mailed to persons possibly affected by the application; (2) notice of the application has been published in a newspaper in accordance with instruction from the Commission and (3) following the prescribed time from the date of newspaper publication of the Commission's notice, a Commissioner, the Executive Director or an affected person has not requested a public hearing.

Final Consideration of the Application: The applicant will be notified of the date when the Commission will consider the application.

Note: If a public hearing is requested, the applicant will be responsible for bearing the cost of additional notice and publication. The applicant should be prepared to participate in the public hearing process in addition to representation by technical and/or legal counsel on his behalf.



LANDOWNERS CROSS-REFERENCED TO
APPLICATION MAP

The persons identified below would be considered as affected persons.

- | | | | |
|----|---------------------------------------------------------------------------|----|----------------------------------------------------------------|
| 1. | Mr. & Mrs. Samuel L. Davis
11901 Knights Bridge
Austin, Texas 78759 | 5. | Jaxson Brewing Co.
4240 Line Road
Dallas, Texas 77640 |
| 2. | Mr. & Mrs. Edward Sanchez
1405 Craigmont Lane
Waco, Texas 76710 | 6. | Plainview Company
6647 Star Blvd.
Houston, Texas 77590 |
| 3. | Tex-Link Corp.
8411 Zip Street
Houston, Texas 77590 | 7. | ABC Chemicals, Inc.
1212 Austin Ave.
Dallas, Texas 77640 |
| 4. | Mr. & Mrs. Ted Goldsby
3210 20th Street
Waco, Texas 76724 | 8. | Big-C Bottle Co.
10024 N.W. Hwy.
Bovina, Texas 79402 |

Except for Class 1 or Class 1' modifications, please also submit this mailing list on a 3 1/2-inch computer disc using software compatible with WordPerfect, as allowed by 30 TAC 39.5(b). If more convenient, four sets of printed labels of the list may be provided in lieu of a computer disc.

If the adjacent landowners list is submitted on computer disc, please label the disk with the applicant's name and permit number. Within the file stored on the disk, type the permit number and applicant's name on the top line before typing the addresses. Names and addresses must be typed in the format indicated below. This format is required by the U.S. Postal Service for machine readability. Each letter in the name and address must be capitalized, contain no punctuation, and the appropriate two-character abbreviation must be used for the state. Each entity listed must be blocked and spaced consecutively as shown below.

Example:

Permit No. HW-50000, Texas Chemical Plant

TERRY M JENKINS
RR 1 BOX 34
WACO TX 76710

MS AND MRS EDWARD PEABODY
1405 MONTAGUE LN
WACO TX 76710-1234

A list submitted on computer disc should be the only item on that disc. Please do not submit a list on a disc that includes maps or other materials submitted with your application.

If you wish to provide the list on printed labels, please use sheets of labels that have 30 labels to a page. Please provide four complete sets of labels of the adjacent landowners list.

2000-01-01

2000-01-01

APPLICATION FOR PERMIT TO STORE OR PROCESS
INDUSTRIAL NONHAZARDOUS SOLID WASTE

I. GENERAL INFORMATION

A. Applicant Information

Name of Applicant:

(Individual, Corporation or Other Legal Entity)

Address:

(Permanent Mailing Address)

City: _____ State: _____ Zip: _____

Telephone Number:

Street Address (if available):

County:

If the application is submitted on behalf of a corporation, please identify the Charter Number as recorded with the Office of Secretary of State for Texas.

Charter Number

B. Facility Contact Information

1. List those persons or firms, to include a complete mailing address and telephone number, authorized to act for the applicant during the processing of the permit application.

2. If the application is submitted by a corporation or by a person residing out of state, the applicant must designate an Agent in Service or Agent of Service and provide a complete mailing address for the agent. The agent must be a Texas resident.

3. List the individual who will be responsible for causing notice to be published in the newspaper and his/her mailing address, telephone number and fax number. If e-mail is available, please provide an e-mail address.

- C. For applications for new permits, renewals, major amendments and class 3 modifications, a copy of the application must be made available at a public place in the county where the facility is, or will be located for review and copying by the public (30 TAC Section 39.405(g)). Identify the public place in the county (e.g., public library, county court house, city hall), including the address, where the application will be made available to the public for review and copying.

D. Type of Permit for Which Application is Submitted:

- a. Original _____ Permit Number (Will be Assigned by the Commission)
- b. Amendment _____ of Permit Number _____ Page Number
- c. Modification: Class 1 _____ Class 2 _____ Class 3

E. List any other permits, existing or pending, which pertain to pollution control activities conducted by this plant or at this location.

F. Facility Information:

1. Name and address of operator or person in charge of facility (if different from the applicant):

Name:

Address:

City: _____ Zip Code _____ Phone _____

2. Name and address of Owner of facility (if different from applicant):

Name:

Address:

City: _____ Zip Code _____ Phone _____

3. If facility is not owned by the applicant, a copy of the lease for use of said facility must accompany this application. (Note: The lease must address the duration and the land usage.)

4. Provide a brief description of the facility (i.e., the nature of the business) and the activities to be permitted. 30 TAC Sections 305.45(a)(4) and (a)(5)

5. Ownership Status

Federal _____ State _____ Private _____ Public _____ Other _____

If "Other", please specify _____

6. Are your waste management operations within the incorporated limits or extraterritorial jurisdiction of a municipality?

_____ If so, what municipality?

7. Are your industrial solid waste processing or storage operations in an area in which the governing body of the county or municipality has prohibited the processing, storage or disposal of municipal hazardous waste or industrial solid waste.

Yes

No

If "Yes", provide a copy of the ordinance or order.

8. Is the facility located on Indian lands? Yes _____ No
9. Is the facility within the Coastal Management Program boundary? _____ Yes _____ No.
10. Give a description of the facility location with respect to known or easily identifiable landmarks.
11. Coordinates of the Facility
- _____ ° _____ ' _____ " North Latitude
- _____ ° _____ ' _____ " West Longitude

G. Provide a list of sites owned, operated, or controlled by the applicant in the State of Texas. 30 TAC Section 305.50(a)(2)

H. If there will be a discharge of either process water or storm water, describe the effluent route to the nearest identifiable watercourse.

I. Waste Management Units - Please complete Table I.I. (Waste Management Unit List) for each waste management unit to be permitted.

J. What estimated date will waste management operations begin; or if operations have begun, what date did waste management operations begin at the site described by this application?

K. Submit an application map which extends at least one mile beyond the facility boundaries. The map shall be on a scale of not less than one inch equals one mile and shall include the following information: 30 TAC Section 305.45(a)(6)

1. The approximate boundaries of the tract of land on which the waste management activity is or will be conducted;
2. The location of the areas of storage or processing;
3. The general character of the areas adjacent to the waste facility including public roads, towns and the nature of development of adjacent lands such as residential, commercial, agricultural, recreational, undeveloped, etc.;
4. The boundaries of all affected tracts of land within a reasonable distance from the area of storage, processing, or disposal; and
5. Each well, spring, and surface water body or other water in the state within the map area.

L. Show on the application map or on a separate list properly cross-referenced to item K.4. above, the names and mailing addresses of all landowners which you have identified as being affected by the activities described by this application. (Minimum requirements are shown on the sample application map).

M. The names and mailing addresses of persons identified as affected parties, item L. above, were obtained from:

(Source, City, County, School or Water District Records or Abstract Co.)

- N. The TCEQ requires that a Core Data Form (Form 10400) be submitted on all incoming applications unless a Regulated Entity and Customer Reference Number has been issued by the TCEQ and no core data information has changed. For more information regarding the Core Data Form, call (512) 239-5175 or go to the TCEQ Web site at www.TNRCC.state.tx.us/permitting/projects/cr.

PLEASE LABEL ANY ATTACHMENTS WITH NAME OF APPLICANT.

Signature Page

I, _____
(Print or Type Name of Person Signing for Applicant) (Title)

I, _____
(Print or Type Name of Owner if different from Applicant)

certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Signature: _____ Date: _____
(Applicant)

Signature: _____ Date: _____
(Owner)

TO BE COMPLETED BY THE APPLICANT WHEN THE ABOVE STATEMENT IS SIGNED BY AN AGENT FOR THE APPLICANT.

I, _____ hereby designate _____ as my agent
(Print or Type Name) (Print or Type Name)

and hereby authorize said agent to sign any application, submit additional information as may be requested by the Commission, and/or appear for me at any hearing or before the Texas Commission on Environmental Quality in conjunction with this request for a Texas Solid Waste Disposal Act permit. I further understand I am responsible for the contents of this application, for oral statement given by my agent in support of the application and for compliance with the terms and conditions of any permit which might be issued based upon this application.

Printed or Typed Name of Applicant
or Chief Executive Officer

Signature

(Note: Application Must Bear Signature & Seal of Notary Public)

SUBSCRIBE AND SWORN to before me by the said

_____ on this _____ day of _____, 19____.

My commission expires on the _____ day of _____, 19____.

(Seal)

Notary Public in and for

_____ County, Texas

II. FACILITY MANAGEMENT

- A. Security: Describe site access control, screening traffic control, and safety. 30 TAC Section 305.45(a)(8)(C)
- B. Inspection and Maintenance:
1. Complete Table II.B. for all of the waste management units to be permitted. Please note that inspection criteria should be provided for each component of each permitted unit (e.g., tank system, tank, secondary containment area, ancillary equipment). 30 TAC Section 305.45(a)(8)(C)
 2. Describe the maintenance procedures for the units listed in Table II.B. 30 TAC Section 305.45(a)(8)(C)
- C. Personnel: Describe the staffing pattern and qualifications of all key operating personnel. 30 TAC Section 305.50(a)(2)

D. **Equipment:** Describe the types of equipment and minimum number of each type to be provided by the site operator in order to conduct the operation in conformance with the design and operational standards. 30 TAC Section 305.45(a)(8)(A)

E. **Record keeping:** Describe the record keeping practices. 30 TAC Section 305.45(a)(8)(C)

F. **Roads:** Describe roads used for entry, exit and operations within the facility. 30 TAC Section 305.45(a)(8)(C)

III. WASTE ANALYSIS PLAN

- A. Complete Table III.A. (Waste Management Information) for each waste, source, and volume of waste to be stored or processed in the facility units to be permitted. 30 TAC Section 305.45(a)(8)(C)
- B. For inclusion into a permit, complete Table III.B. (Wastes Managed in Permitted Units) for each waste to be managed in a permitted unit. Guidelines for the Classification & Coding of Industrial Wastes and Hazardous Wastes, TNRCC publication RG-22, contains guidance for how to properly classify and code industrial waste in accordance with 30 TAC 335, Subchapter R. 30 TAC Section 305.45(a)(8)(C)

Applicants need not specify the complete 8-digit waste code formulas for their wastes but only the 3-digit form codes and 1-digit classification codes. This allows the applicant to specify major categories of wastes in an overall manner without having to list all the specific waste streams.

- C. For inclusion into a permit, complete Table III.C. for each waste listed in Table III.B. For each waste listed in the table, please include the sampling location, the sampling method, the sample frequency, the analytical parameters (e.g., pH, density, viscosity), and the analytical method for each parameter. Please note that process knowledge may be used for difficult to sample and/or measure wastes or parameters. 30 TAC Section 305.45(a)(8)(C)
- D. Submit a waste analysis plan which specifies procedures which will be used to inspect and if necessary, analyze each industrial solid waste received at the facility. The plan must describe methods which will be used to determine the identity of each waste managed at the facility. In addition, please specify methods for managing flammable and incompatible wastes. 30 TAC Section 305.45(a)(8)(C)

IV. ENGINEERING REPORT

The engineering report represents the conceptual basis for the storage or processing units at the industrial nonhazardous waste management facility. It should include calculations and other such engineering information as may be necessary to follow the logical development of the facility design. Plans and specifications are an integral part of the report. They should include construction procedures, materials specifications, dimensions, design capacities relative to the volume of wastes (as appropriate). Since these reports may be incorporated into any issued permit, the report should not include trade names, manufacturers, or vendors of specific materials, equipment, or services unless such information is critical to the technical adequacy of the material. Technical specifications and required performance standards are sufficient to conduct a technical review.

Submit a detailed engineering design report prepared and sealed by a professional engineer, with current registration as specified in the Texas Engineering Practice Act. Include in the report the following information shown below. 30 TAC Section 305.45(a)(8)

(Please note that in accordance with 30 TAC §305.50(a)(7), any engineering plans and specifications (e.g., engineering drawings, engineering calculations) submitted as part of the permit application shall be sealed by a licensed professional engineer who is currently registered in the state of Texas).

A. Complete Table IV.A. for each waste management unit to be permitted at the facility.

B. Flow Diagram/Description

Submit a process flow diagram and step-by-step word descriptions of the process flow, depicting the handling, collection, storage, processing, and/or disposal of each waste listed in Table III.A.

The flow diagrams and/or descriptions should include the following information:

1. Originating point of each waste and waste classification code;
2. Means of conveyance utilized in every step of the process flow;
3. Name and function of each facility component through which the waste passes; and
4. The ultimate disposition of all wastes (if off-site, specify "off-site") and waste residues.

C. Submit a United States Geological Survey, 7½-minute quadrangle map which shows the location of the facility and it uses a scale of not less than 1:24,000.

D. Submit a "site map" prepared by a registered surveyor. The map must show the approximate boundaries of the facility, denoting the areas where waste management activity is or will be conducted. The map shall also show (1) contours, using a contour interval of 5 feet if the slope is >5% and a contour interval of 2 feet if the slope is <5%, (2) plant facilities and other improvements such as fences, roads, pits, ponds, ditches, dikes, location of boreholes if applicable etc. The scale of this map should not be less than 1 inch = 200 feet.

E. For land-based storage or treatment units (such as surface impoundments and land treatment units) submit an aerial photograph approximately 9" x 9" with a scale within a range of 1" = 1667' to 1" = 3334' and showing the area within at least a one-mile radius of the site boundaries. The site boundaries and actual fill areas should be marked.

Waste Management Units (30 TAC 305.45(a)(8)(A))

F. Container Storage Areas

1. Submit engineering plans and specifications which fully depict each container storage area (CSA) (e.g., CSA, secondary containment system, ancillary equipment).

2. Provide an engineering description of each CSA. Please note that the engineering description should include a description of the materials of construction, run-on prevention, overflow prevention, and the container management practices for each CSA.

G. Tank Systems

1. Submit engineering plans and specifications which fully depict each tank system (e.g., tank, secondary containment system, ancillary equipment).
2. Submit piping and instrumentation drawings (P&IDs) of each tank system.
3. Provide an engineering description of each tank system. Please note that the engineering description should include a description of the materials of construction, external corrosion protection, spill prevention controls, and overfill prevention controls for each tank system.

H. Containment Buildings

1. Submit engineering plans and specifications which fully depict each containment building.
2. Provide an engineering description of each containment building. Please note that the engineering description should include a description of the materials of construction and the waste management practices of each unit.

L. Drip Pads

1. Submit engineering plans and specifications which fully depict each drip pad. If there is a liner(s) (soil and/or artificial), leachate collection system, and/or leak detection monitoring system associated with a drip pad, include engineering drawings of these components as well.
2. Provide an engineering description of each drip pad including a description of any liner, leak detection system, leachate collection system, run-off prevention controls, and/or run-on control system that may be in place. Please note that the description should also describe the materials of construction for each component of each drip pad and the operating practices for each drip pad.

J. Waste Piles

1. Submit engineering plans and specifications which fully depict any liner(s) (soil and/or artificial), leachate collection, and/or leak detection monitoring system associated with each waste pile.
2. Provide an engineering description of any liner, leak detection system, leachate collection system, run-off prevention controls, and/or run-on control system that may be in place for each waste pile. Please note that the description should describe the materials of construction for each component of a waste pile and the operating practices for each waste pile.

K. Incinerators

1. Submit engineering plans and specifications which fully depict each incinerator and any associated air pollution control equipment.
2. Submit Piping & Instrumentation Drawings (P&ID) for each incinerator and any associated air pollution control equipment (APCE).
3. Provide an engineering description of each incineration system. Each description should include the name and model number of the unit, the type of unit, a description of any APCE associated with the unit, the materials of

construction for each component of the system, the types of auxiliary fuels used, the operating ranges of key parameters (e.g., combustion chamber temperature, waste feed rates, air pollution control equipment parameters), and the types of stack gas monitoring equipment used (if any).

L. Miscellaneous Units

1. Submit engineering plans and specifications which fully depict each miscellaneous unit. If there is a liner(s) (soil and/or artificial), leachate collection system, and/or leak detection monitoring system associated with a drip pad, please include engineering drawings of these components. If there is any APCE associated with a unit, please submit engineering drawings of that equipment as well.
2. Submit P&IDs for each miscellaneous unit, if applicable.
3. Provide an engineering description of each miscellaneous unit including a description of any APCE, liners, leak detection system, leachate collection system, run-off prevention controls, and/or run-on control system that may be associated with the unit. Please note that the description should also describe the materials of construction for each component of each miscellaneous unit and the operating practices for each unit.

M. Surface Impoundments

1. Submit engineering plans and specifications which fully depict each surface impoundment. The plans should include all significant features of the surface impoundment(s) and should indicate the 100-year flood zone. Cross-sectional drawing(s) detailing significant design features should be shown.
2. Describe liner specifications including type and thickness.
3. For in-place liners describe site preparation planned including scarification and compaction, and any other chemical or physical treatment to be effected.
4. For imported reworked soils, describe liner installation methodology including lift size, moisture content during compaction, compaction method, design density, and determination of hydraulic conductivity.
5. For artificial liner materials provide pertinent specifications and a description of how liner/waste compatibility has been determined. Also describe installation method.
6. For all liners describe quality control measures to be followed during liner installation.
7. Provide an engineering description of any leak detection system, leachate collection, run-off prevention controls, and/or run-on control system that may be in place for each surface impoundment.

N. Land Treatment Units

1. Submit engineering plans and specifications which fully depict each land treatment unit. The plan should include all significant features of the land treatment unit and should indicate the 100-year flood zone.
2. Submit a performance evaluation plan describing how the degradation of waste constituents will be monitored. The plan should include the depth below ground surface of the treatment zone and management methods to be utilized within the treatment zone.
3. Describe necessary site preparation including soil importation, preparation, chemical amendments, etc.
4. Describe waste application method(s), including depth of incorporation and frequency of cultivation, equipment to be used, etc.
5. Submit an application rate table indicating the application rate of waste constituents to be applied to the treatment zone.

6. Provide an engineering description of any leachate collection, run-off prevention controls, and/or run-off control system that may be in place for each land treatment unit.

V. GEOLOGY REPORT (30 TAC 305.45(a)(8)(C))

(This section is applicable only to those facilities utilizing land-based storage or treatment facilities such as surface impoundments, land treatment units and waste piles.)

- A. Submit a Geology Report (prepared by a Texas licensed professional geoscientist) which describes the regional geology and hydrogeology in the vicinity of the solid waste management facility. The report should provide a discussion of stratigraphy, structural setting, topography, faulting, and land surface subsidence and any other active geologic processes in the vicinity of the facility. Include both geologic maps and cross-sections as necessary. The report should also identify regional aquifers and discuss the groundwater bearing and transmitting properties of subsurface units, and contain a water table contour or potentiometric surface map for the facility.
 1. Indicate the location of all water-producing wells within one mile of the facility. A United States Geological Survey map may be used to show the wells. Provide uses of the water in these wells (for example: domestic, livestock watering, industrial, agricultural, etc.)
 2. Provide an analysis of ground water at the waste management site.
- B. Submit a Subsurface Soils Investigative Report which is sufficiently detailed to establish the soil conditions in the vicinity of the waste management facility. The applicant should consult TCEQ technical guidelines to determine the recommended number of borings, location and depth of borings, and frequency of engineering classification tests. Such investigation should be conducted in accordance with recognized subsurface soils investigation practices. The report should at a minimum contain the following information:
 1. The logs of borings performed at the waste management area. All borings must be conducted in accordance with established field exploration methods. Investigation procedures should be discussed in the report. A sufficient number of borings should be performed to establish subsurface stratigraphy and to identify and allow assessment of potential pathways for pollution migration. Borings must be sufficiently deep to allow identification of the uppermost aquifer and underlying hydraulically interconnected aquifers. Boring logs should include a detailed description of materials encountered including any discontinuities such as fractures, fissures, slickensides, lenses or seams. The hollow stem auger boring method is recommended in those instances where an accurate determination of initial water levels is important. A key explaining both the symbols used on the boring logs and the classification terminology for soil type, consistency, and structure should be provided.
 2. Complete Table V.B.2. and provide in the report data which describes the geotechnical properties of the subsurface soil materials. All laboratory and field tests must be performed in accordance with recognized procedures. A brief discussion of test procedures should be included. All major strata encountered during the field investigation phase should be characterized with regard to: Unified Soil Classification, moisture content, percent less than number 200 sieve, Atterberg limits (liquid limit, plastic limit, and plasticity index), and coefficient of permeability. Field permeability tests should be used to determine the coefficient of permeability of sand or silt units and should also be used to supplement laboratory tests for more clay-rich soils. In addition, particle size distribution and relative density based upon penetration resistance should be determined for coarse-grained soils. For fine-grained soils the following parameters should also be determined: cohesive shear strength based upon either penetrometer or unconfined compression tests, dry unit weight, and degree of saturation(s). For the major soil strata encountered, the maximum, minimum, and average for each of these variables should be compiled.
 3. Coefficient of permeability in units of cm/sec should be determined for any in-place or constructed soil liners to be used to control waste migration. Separate values shall be determined with ground water from the site and waste or leachate from waste as test fluids. A description of testing methods is required.
 4. For land treatment units, provide a description of the surficial soils at the site which includes:

- (a) The name and description of the soil series at the site;
- (b) Important physical properties of the series such as depth, permeability, available water capacity, soil pH, and erosion factors;
- (c) Engineering properties and classifications such as USDA texture, Unified Soil Classification, size gradation, and Atterberg limits (liquid limit, plastic limit, and plasticity index); and
- (d) The cation exchange capacity (CEC) of the soil(s) expressed in units of meq/100g.

Much of this information may be obtained by consulting the county soil survey published by the United States Department of Agriculture, Soil Conservation Service. If available, a copy of an aerial photograph showing soil series units on the land treatment area should be provided.

If an aerial photograph is not available, include a soil series map as an attachment to this subsurface soils investigation report.

VI. GROUND AND SURFACE WATER PROTECTION (30 TAC 305.45(a)(8)(C))

- A. Submit a ground and surface water protection plan drawn to scale consisting of a sheet reflecting locations and typical sections of levees, dikes, liners, drainage channels, culverts, curbs, holding ponds, storm sewers, leachate collections systems and all other units relating to protection of the site from contact with ground and surface water. Adequacy of provisions for safe passage of any internal or adjacent external floodwaters should be reflected here. Cross-sections of levees should be shown tied into contours.
- B. Submit a subsurface monitoring plan including descriptions of the location, operation, construction and installation of each monitoring device, subsurface zone to be monitored, constituents to be analyzed, analytical method to be employed, frequency of sampling and how a release from the waste management unit will be determined. Include logs of borings performed.
 - 1. Groundwater Monitoring (This section may apply only to those facilities utilizing land-based storage or treatment facilities such as surface impoundments, land treatment units and waste piles.)
 - (a) For inclusion into a permit, complete Table VI.B.1 for each unit to be monitored, to specify any proposed monitoring well system.
 - (b) For inclusion into a permit, for each unit to be monitored, complete Table VI.B.2. to specify the following:
 - (1). the suite of waste specific parameters (indicator parameters, waste constituents, or reaction products) which will be analyzed at each sampling event for each well or group of wells. These parameters must provide a reliable indication of the presence of hazardous constituents in the ground water;
 - (2). the sampling frequencies and calendar intervals (e.g., monthly; quarterly within the second 30 days of each quarter; semiannually within the first 30 days of the 2nd and 4th quarters, etc.);
 - (3). the analytical method and the achievable detection limit of the sample preparation and analysis methods for the selected parameters. This detection limit will represent the capability of the sampling and analysis to reliably and accurately determine the presence of the selected parameters in the sample; and
 - (4). the concentration limit which will be the basis for determining whether a release has occurred from the waste management unit/area.

2. Unsaturated Zone Monitoring (This section may apply to facilities which contain land treatment units):

- (a). List all hazardous constituents that have been or will be monitored.
 - (i). Current parameters
 - (ii). Proposed parameters
- (b). Number of soil-pore liquid sampling points
 - (i). Depth of sampling points
 - (ii). Equipment used for soil pore liquid monitoring
- (c). Number of soil core sampling points
 - (i). Depth of soil core sampling points
 - (ii). Indicate on a facility map locations of all sampling points.

C. Climate

- 1. Describe regional climatic conditions
- 2. Indicate the magnitudes, in inches, of the following storm events.
 - (a) 100-yr./24-hr.
 - (b) 50-yr./24-hr.
 - (c) 25-yr./24-hr.
- 3. Indicate the average monthly and annual rainfall for the area.
- 4. Is the facility located within a 100-year flood zone ?
- 5. Is the facility located within a coastal surge zone ?
- 6. Indicate the average monthly and annual evaporation rate for the area.
- D. Explain how rainfall runoff and any other wastewaters within the boundary of the facility are controlled to prevent pollution of ground and surface waters in the area during construction and operation of the units.
- E. Is it possible for surface waters originating outside the facility to enter said facility? Give explanation of answer.
- F. If an accidental discharge did occur, trace the route which the water would follow (for example: into an unnamed creek adjacent to the facility; thence into Red Creek; thence into the Trinity River).

VII. CLOSURE AND POST-CLOSURE PLANS

The applicant must close the facility in a manner that minimizes need for further maintenance and controls, or eliminates, to the extent necessary to protect human health and the environment, the post-closure escape of hazardous waste, hazardous constituents, leachate, contaminated rainfall, or waste decomposition products to the ground water, or surface waters, or to the atmosphere.

A. Closure

1. Complete Table VII.A for each waste management unit to be permitted and list the possible methods of decontamination, and possible methods of disposal of wastes and waste residues, generated during unit closure. 30 TAC Section 335.8
 2. Submit a closure plan for the facility which includes each permitted waste management unit. The closure plan should describe in detail the procedures (e.g., disposition of wastes, decontamination procedures, procedures for soil sampling and analysis) to be followed and the materials and manpower to be used in accomplishing final closure of the waste management facility. If the facility contains land based units (e.g., land treatment units), please ensure the closure plan includes information on such items as: type, volume and source of cover material; dismantling/demolition of structures and other improvements; ultimate disposition of liquid wastes; final grading/contouring of the facility; topsoil, seed, fertilizer and irrigation necessary to establish cover, where applicable; equipment and manpower (man hours) to accomplish closure. Please include a schedule or timetable for closure of the facility. 30 TAC Section 335.8
 3. Complete Table VII.C. by providing an itemized closure cost estimate (e.g., cost for any decontamination, costs for soil and/or rinsate sampling, cost for analyses) for each permitted waste management unit at the facility. 30 TAC Section 335.8
 4. Complete Table VII.D. by providing a closure cost estimate for final closure of the entire facility. This cost estimate will be used in determining the amount of a closing bond to be procured by the management facility operator. Closing cost estimates should be prepared on a "worst case" basis (cost of closure by a third party in the event of sudden or total abandonment of the management facility by the operator). 30 TAC Section 335.8
 5. Submit a contingent closure plan for each permitted unit in the case where a release from the unit to the environment has occurred. (30 TAC Chapter 350)
- B. Post-closure (This section may apply to land-based units such as surface impoundments and land treatment units). Provide a post-closure care plan that includes:
1. any maintenance or monitoring of waste containment systems;
 2. any monitoring or reporting of groundwater monitoring systems;
 3. any monitoring or reporting of unsaturated zone monitoring systems;
 4. any security measures; and/or
 5. a discussion of the future use of the land.

TABLE VII.C. - Unit Closure Cost Estimate

Task	Cost
(Name of permitted unit, e.g., Tank TK-1)	
Description of task (waste amount generated x disposal cost/unit amount)	\$\$, \$\$\$
Description of task (waste amount generated x disposal cost/unit amount)	\$\$, \$\$\$
Description of task (waste amount generated x disposal cost/unit amount)	\$\$, \$\$\$
Description of task (waste amount generated x disposal cost/unit amount)	\$\$, \$\$\$
Description of task (waste amount generated x disposal cost/unit amount)	\$\$, \$\$\$
Other tasks (such as labor, lab analysis, transportation, certifications, etc.)	
Other tasks	
subtotal	\$\$\$, \$\$\$
Contingency (10% minimum)	\$\$, \$\$\$
Total Unit Closure Cost	\$\$\$, \$\$\$ (200)
(Name of permitted unit, e.g., Surface Impoundment West)	
Description of task (waste amount generated x disposal cost/unit amount)	\$\$, \$\$\$
Description of task (waste amount generated x disposal cost/unit amount)	\$\$, \$\$\$
Description of task (waste amount generated x disposal cost/unit amount)	\$\$, \$\$\$
Description of task (waste amount generated x disposal cost/unit amount)	\$\$, \$\$\$
Description of task (waste amount generated x disposal cost/unit amount)	\$\$, \$\$\$
Other tasks (such as labor, lab analysis, transportation, certifications, etc.)	
Other tasks	

subtotal	\$\$\$\$,\$\$\$
Contingency (10% minimum)	\$\$,\$\$\$
Total Unit Closure Cost	\$\$\$\$,\$\$\$ (200_)

TOTAL PERMITTED FACILITY CLOSURE COST (all unit costs combined)	\$\$\$\$,\$\$\$ (200_)
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TABLE VII.D. - PERMITTED UNIT CLOSURE COST SUMMARY

<i>Existing Unit Closure Cost Estimate</i>	
Unit	Cost
TOTAL EXISTING UNIT CLOSURE COST ESTIMATE	(200_)¹

<i>Proposed Unit Closure Cost Estimate</i>	
Unit	Cost

¹As units are added or deleted from these tables through future permit amendments or modifications, the remaining itemized unit costs should be updated for inflation when re-calculating the revised total cost in current dollars.

ATTACHMENT 2

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

APPLICATION OF TEXCOM GULF § BEFORE THE STATE OFFICE
DISPOSAL, L.L.C. FOR TEXAS §
COMMISSION ON ENVIRONMENTAL § OF
QUALITY UNDERGROUND §
INJECTION CONTROL PERMIT NOS. §
WDW410, WDW412, and WDW413 § 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

CLOSING ARGUMENTS OF ALIGNED PROTESTANTS

MONTGOMERY COUNTY AND CITY OF CONROE

Respectfully submitted,

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MONTGOMERY COUNTY ATTORNEY

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flawless operation that is protective of Montgomery County, its citizens, and the environment and that it will comply with all of the statutory and regulatory requirements placed on it.

Not only does TexCom have some enormous burdens – lack of experience, lack of personnel, and apparently a lack of money – their operations would seriously burden the County. There would be additional monitoring requirements in maintaining the roadways,³⁰⁴ ensuring drainage/stormwater runoff around the facility,³⁰⁵ and responding to potential spills of unidentified wastes.³⁰⁶ Judge Sadler also anticipated additional burdens that would befall the County's Environmental Health Department in overseeing environmental compliance at the facility and addressing public inquiries that would undoubtedly be generated by the facility operations.³⁰⁷ As Judge Sadler pointed out, there is no means available to surcharge or assess any commercial enterprise such as that proposed by TexCom for the additional expenditures that will be occasioned by the additional burdens.³⁰⁸ Those additional burdens and increased expenditures will ultimately be borne by the citizens of Montgomery County who sustain their local government.

III. Surface Facility Application

A. Adequacy of Application

TexCom has applied to the TCEQ for a permit for the construction and operation of one (1) container storage area (a main containment area for the storage, processing, and unloading of waste/waste materials), eight (8) waste storage and/or processing tanks, and seven (7) miscellaneous units for the storage and processing of Class 1 nonhazardous industrial solid

³⁰⁴ AP Exh. 3, p. 20, ln. 14-16.

³⁰⁵ Sec. III.C.

³⁰⁶ AP Exh. 4, p. 13, ln. 22 – p. 15, ln. 1-7.

³⁰⁷ AP Exh. 5, p. 15, ln. 5-15.

³⁰⁸ Id. p. 15, ln. 21-22 – p. 16, ln. 1-5.

waste.³⁰⁹ The permit application has been declared both administratively and technically complete by the TCEQ, and a draft permit has been issued.³¹⁰

It is difficult to assess whether or not the application for the surface facility is “adequate” because the TCEQ has failed to properly promulgate rules for surface facilities that will treat, store and process nonhazardous industrial solid waste which will be disposed by underground injection. Hazardous waste is regulated under a delegation of federal authority.³¹¹ Municipal solid waste has its own set of rules which were properly promulgated in strict accordance with the Administrative Procedure Act contained in Chapter 2001 of the Texas Government Code (“APA”).³¹² A *landfill* that disposes of Class 1 commercial nonhazardous waste has its own set of regulations properly promulgated by the TCEQ.³¹³ These rules – which are only applicable to commercial nonhazardous waste landfill operations – govern operation aspects such as facility site selection, permitting procedures, contingency planning, waste analysis, constituent reaction, and facility operation and design.³¹⁴ These same operation aspects are in dispute in this case, but the parties are left with no guidance that was properly adopted. Aligned Protestants and the District brought this to the attention of the ALJs in their Joint Motion to Certify Questions and Abate Proceeding, which was denied on November 29, 2007.³¹⁵ Apparently in response to that motion, TCEQ-ED submitted a letter on December 7, 2007, to the ALJs to “provide the judges and the parties a list of the regulations that the Executive Director *believes* are applicable to Executive Director’s review of an application for a nonhazardous industrial solid waste

³⁰⁹ TexCom Ex. 43.

³¹⁰ ED Exh. 17 and 18.

³¹¹ 40 C.F.R. Part 261 (2007).

³¹² See 30 TEX. ADMIN. CODE, Chapter 30.

³¹³ 30 TEX. ADMIN. CODE, Ch. 335 Subch. T.

³¹⁴ Id.

³¹⁵ Order No. 8.

permit.”³¹⁶ So, the parties are left with the following to rely on as guidance: (1) TCEQ’s form INS-2004, and (2) the TCEQ-ED’s December 7, 2007 letter, but no properly promulgated rules.

The Texas Legislature set out the following mandate in the Solid Waste Disposal Act:

It is the state’s policy and the purpose of this chapter to safeguard the health, welfare, and physical property of the people and to protect the environment by controlling the management of solid waste, including accounting for hazardous waste generated.³¹⁷

Further, the TCEQ itself has set out this important prohibition:

In addition to the requirements of §335.2 of this title (relating to Permit Required), no person may cause, suffer, allow, or permit the collection, handling, storage, processing, or disposal of industrial solid waste or municipal hazardous waste in such a manner so as to cause:

- (1) the discharge or imminent threat of discharge of industrial solid waste or municipal hazardous waste into or adjacent to the waters in the state without obtaining specific authorization for such a discharge from the Texas Natural Resource Conservation Commission;
- (2) the creation and maintenance of a nuisance; or
- (3) the endangerment of the public health and welfare.³¹⁸

TexCom’s application meets neither the requirements of the Legislature’s mandate, nor Section 335.4 of the Texas Administrative Code set out above.

TexCom also did not have the benefit of guidance from properly promulgated rules when preparing its surface facility application. However, even using the *ad hoc* rules it had to work with, TexCom’s application is inadequate and does not demonstrate the health, welfare, physical property of the people and the environment would be protected by its surface facility operations. The application is deficient in very specific ways discussed below. TexCom has not made many important decisions or compatibility demonstrations. At this late date, TexCom is even moving

³¹⁶ See Letter from J. Diane Goss dated December 7, 2007 (emphasis added).

³¹⁷ TEX. HEALTH & SAFETY CODE ANN. § 361.002(Vernon 2001).

³¹⁸ 30 TEXAS ADMIN. CODE § 335.4.

the access point for the facility, but there is no evidence this actually feasible. Finally, and perhaps most importantly, TexCom's Waste Acceptance Plan is inadequate in its information and requirements.

B. Proposed Design and Operation of Surface Facility

The surface facility is comprised of two main areas, the main containment area (MCA) and the waste unloading storage area (WUSA).³¹⁹ The MCA is the "primary container storage area and secondary containment, containing all liquid storage tanks and processing equipment."³²⁰ "Secondary containment" means that the MCA is designed to prevent any liquids from contaminating the soil in the event of an unexpected failure of a tank or other processing equipment.³²¹ The WUSA is the area where trucks pull up to unload wastewater, and where solids which have been removed from the wastewater will be temporarily stored before disposal in an off-site landfill.³²² In the WUSA, there are four (4) unloading bays.³²³ The wastewater is pumped directly to one of four waste water storage/mixing tanks or one of two shaker screen units used for coarse particle removal.³²⁴

The evidence presented through the prefiled testimony and at the hearing shows that TexCom has yet to make a number of important decisions:

1. The surface facility will be open 8-10 hours per day.³²⁵ With four unloading bays³²⁶ in operation and 90³²⁷ large, 5,000 gallon³²⁸ trucks per day (although Mr. Brassow

³¹⁹ TexCom Exh. 59, p. 13, ln. 1-3.

³²⁰ TexCom Exh. 59, p. 13, ln. 6-8.

³²¹ TexCom Exh. 59, p. 13, ln. 10-12.

³²² TexCom Exh. 59, p. 13, ln. 16-20.

³²³ TexCom Exh. 59, p. 14, ln. 19-20.

³²⁴ TexCom Exh. 59, p. 14, ln. 23-25.

³²⁵ Tr. p. 499, ln. 21-25.

³²⁶ Tr. p. 501, ln. 4-6.

³²⁷ Tr. p. 499, ln. 18-20.

³²⁸ Tr. p. 532, ln. 11-15.

ATTACHMENT 3

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

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 §

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 COMMISSION INDUSTRIAL §
SOLID WASTE PERMIT NO. 87758 § ADMINISTRATIVE HEARINGS
§

**CLOSING ARGUMENT OF
LONE STAR GROUNDWATER CONSERVATION DISTRICT**

SUBMITTED ON FEBRUARY 4, 2008

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conformed copy /s/

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ATTORNEYS FOR LONE STAR
GROUNDWATER CONSERVATION DISTRICT

several years, the groundwater supply will remain an important source of supply.²⁷⁸ TexCom admits that there are options for disposing of nonhazardous industrial solid wastes.²⁷⁹

Finally, TexCom urges Your Honors to factor in the credibility of the Applicant to competently and responsibly operate its proposed facility, based upon the evidence reviewed below in Section III(A)(1)(b).

III. SURFACE FACILITY APPLICATION

What standards apply to this application has been an open question and moving target throughout this case. Underlying the uncertainty as to what standards apply is the reality that there is a significant gap in TCEQ's rules that should govern this regulatory program. This problem with a regulatory gap came to light in the TSP case, another TCEQ case involving commercial, nonhazardous industrial solid wastes ("CNIS wastes").²⁸⁰ In the TSP case, litigation, legislative action, and TCEQ rulemaking ensued to correct the problem, but only for CNIS wastes proposed *for landfill disposal*.²⁸¹ Unfortunately, CNIS wastes proposed *for deep-well injection*, such as TexCom's, were not addressed in that legislative-regulatory fix. Consequently, there continues to be uncertainty as to how TCEQ evaluates an application like TexCom's. More importantly, there is uncertainty as to how TCEQ meets its statutory mandate "to safeguard the health, welfare, and physical property of the people and to protect the environment" as the regulator of projects like TexCom's, when the rules do not address important aspects of a project like TexCom's.²⁸² Procedurally, the parties face a major challenge to develop a case and present closing arguments in the absence of clear-cut standards. As briefed

²⁷⁸ *Id.* (citing District Exh. 2 [District's Management Plan approved by the Texas Water Development Board]).

²⁷⁹ *See, e.g.*, TexCom Ex. 39.

²⁸⁰ TNRCC Docket No. 2001-0657-MLM.

²⁸¹ *See* 30 TEX. ADMIN. CODE Ch. 335, Subch. T ("Permitting Standards for Owners and Operators of Commercial Industrial Nonhazardous Waste Landfill Facilities").

in Section III(D) below, (i) the gap in the rules, (ii) the evidentiary rulings that excluded related testimony, (iii) the reliance on application instructions that did not undergo rulemaking under the Administrative Procedure Act, and (iv) the moving target as to what standards apply in the hearing on this application all add up to a deprivation of due process to the District and the other stakeholders protesting TexCom's application.

As TexCom would have it, they solely need to meet the minimal requirements that TexCom believes to be applicable.²⁸³ As the ED argued on the eve of the hearing, there are regulations in place, as well as a form application and instructions that in his opinion adequately lay out the standard.²⁸⁴ But the ED's own expert was not on the same page with this position taken on the eve of the hearing, and undertook a more limited review of the application. Suffice it to say that there has been no consensus among the applicant, ED, and the other parties at any point in this case, and the ED's own expert and legal staff are not working from the same set of criteria. For convenience of review, Attachment "A" is provided to summarize the various positions taken in this case as to what rules may apply, and to provide an outline of the rules believed to apply by the parties.

It is important to point out that in the ED's direct case, his senior engineer responsible for the application testified that he only applied Chapter 305 of TCEQ's rules. How, then, can the ED's proposed draft permit be supportable if his own staff did not evaluate the application against all of the applicable rules cited on December 7, 2007? And how can TexCom meet its burden of proof when it did not address all of the criteria outlined by the ED on December 7,

²⁸² TEX. HEALTH & SAFETY CODE § 361.002.

²⁸³ TexCom has consistently asserted that only 30 TEX. ADMIN. CODE §§ 281.5, 305.45, 305.50, 331.63(f), 336.66, and 335.4(3) govern TCEQ Docket No. 2007-0362-IHW, coupled with Instructions to TCEQ Form INS-0024. See TexCom's response to Joint Motion to Certify Questions and Abate Proceeding and Alternative Motion for Summary Disposition.

²⁸⁴ TCEQ Form INS-0024.

2007? The District believes that summary disposition or certification of questions OR DENIAL is the appropriate way to deal with the ISWP application. Such a motion was filed prior to the hearing by the District, along with the City of Conroe and Montgomery County, and is reurged.²⁸⁵

Beyond the complaint about the gap in TCEQ's rules, reviewed in more detail in Section III(D) below and Attachment "A," the District has concerns about aspects of TexCom's application which fall under the rules cited by the ED. These concerns are addressed, in turn, in the following Subsections III(A), (B), and (C).

A. Adequacy of application

1. ADEQUACY OF APPLICATION UNDER TCEQ'S RULES

Adequacy of an application under the rules cited by the ED on December 7, 2007, depends upon TexCom's demonstration of the following five requirements:

a. PROOF OF FINANCIAL ASSURANCE²⁸⁶

The District does not challenge TexCom's evidence that, at the time of the hearing, it had adequate bonds in place to cover closure costs.

b. ASSURED COMPLIANCE WITH "GENERAL AND SPECIFIC PERMIT REQUIREMENTS/STANDARDS" IN "APPLICABLE PORTIONS" OF THE FOLLOWING TCEQ RULES:

- (i) §§ 305.1 (scope and applicability), 305.2 (definitions), and 305.3 (abbreviations);
- (ii) §§ 305.41 (applicability), 305.42 (application required), 305.43 (who applies), 305.44 (signatories), and 305.47 (retention of

²⁸⁵ It should be noted that the landowners supported summary disposition as requested in the joint motion, and that the Office of Public Interest Counsel joined in raising the issue of the regulatory gap during the hearing on the joint motion.

²⁸⁶ Attachment "B," p. 1 ("*applicable portions of*" 30 Tex. Admin. Code §§ 37.11, 37.6011, 37.6021, 335.1, and 335.7). Note that Tex. Gov't Code § 2001.058(c) provides in that "[a] state agency shall provide the administrative law judge with a written statement of applicable rules or policies." The ED complied with this requirement on December 7th, the Friday afternoon before the hearing. Due to the direct referral of the case, the only statement of applicable rules or policies in the Notice of Hearing was that "the chief clerk has referred this application directly to SOAH for a hearing on whether the application complies with all applicable statutory and regulatory requirements."

- application data);
- (iii) §§ 335.1 (definitions), 335.2 (permit required), 335.4 (general prohibitions), and 335.30 (Appendix I); and
 - (iv) §§ 335.153 – 335.155 (standards for hazardous waste treatment, storage, or disposal facilities).²⁸⁷

The only rule of substance listed among these rules is § 335.4. Sections 335.153-335.155 do not apply to TexCom's application under the express terms of § 335.151.²⁸⁸ The other rules merely scope out the applicability, definitions, ministerial acts, and abbreviations of Chapters 305 and 335, which are in significant part inapplicable to TexCom's application. Section 335.4, however, sets forth a critically important standard in this case:

[N]o person may cause, suffer, allow, or permit the collection, handling, storage, processing, or disposal of industrial solid waste...in such a manner so as to cause:

- (1) the discharge or imminent threat of discharge of industrial solid waste...into or adjacent to the waters in the state without obtaining specific authorization for such a discharge from the [TCEQ];
- (2) the creation and maintenance of a nuisance; or
- (3) the endangerment of the public health and welfare.

Addressing subsection (1), the evidence shows that TexCom's proposed project poses an imminent threat of discharge of industrial solid wastes into or adjacent to state waters. By TexCom's own admission, it is possible, and factored into TexCom's design plans, that stormwater could overflow from its stormwater retention pond into a drainage ditch that runs off TexCom's property and along Creighton Road.²⁸⁹ The evidence reflects that the stormwater retention pond collects stormwaters that could accumulate from areas around TexCom's site used for collection, handling, storage, processing, and/or disposal activities.²⁹⁰ Based upon TexCom's

²⁸⁷ *Id.*

²⁸⁸ 30 TEX. ADMIN. CODE § 335.151 ("The purpose of this subchapter is to establish minimum standards to define the acceptable management of *hazardous* waste.") (emphasis added).

²⁸⁹ TexCom Exh. 39, p. 103; District Exh. 6, pp. 15-19.

²⁹⁰ TexCom Ex. 39, Attachment. "C."

own description of the drainage ditch, it cannot be disputed that the drainage ditch and ultimate receiving waters to which the drainage ditch flows are state waters or waters adjacent to state waters, under the definition of state water and interpretive case law.²⁹¹ The U.S. Geological survey map and Area Land Use, Facility and Application Map attached to TexCom's application depict elevation levels and the drainage basin within which TexCom's site is located, and clearly show drainage into a watercourse located less than one mile from and to the southeast of TexCom's site.²⁹²

Second, as developed by Montgomery County, the City of Conroe, and the individual protestants in their direct cases and cross-examination of TexCom's and the ED's witnesses, TexCom's project will create and perpetuate a nuisance, as prohibited by § 335.4(2). The District is sympathetic to the harm that could be caused to these parties, and agrees that this evidence provides another basis for denial of the application. Interestingly, TexCom omits reference to this subsection in its list of applicable rules.²⁹³

Third, TexCom's project endangers the environment and public health, welfare, and physical property. It does so under its plan for disposal by deep-well injection, and it does so under its protocols for collection, handling, storage, and processing industrial solid wastes. As shown in Section II, above, TexCom's proposed deep-well injection poses an unacceptable risk of endangering the public health and environment in addition to creating and maintaining nuisance, and that proof and argument is incorporated herein. Furthermore, off-site discharge of inadequately controlled stormwaters will endanger the public health and the environment, not only because those waters will flow to state waters or waters adjacent to state waters, but because

²⁹¹ TEX. WATER CODE § 11.021(a); *see also Domel v. City of Georgetown*, 6 S.W.3d 349 (Tex. App.—Austin 1999, writ denied).

²⁹² TexCom Ex. 39, Attachments 21 and 29 (TexCom's ISWP application); Aligned Protestants Ex. 3, pp. 7-12.

²⁹³ See TexCom's response to Joint Motion to Certify Questions and Abate Proceedings and Alternative Motion for

the waters will flow in a drainage ditch located near several residential properties. The public health and environment will also be affected by TexCom's failure to design its collection, handling, storage, processing, and disposal facilities to account for and protect against air emissions.²⁹⁴ Both TexCom and the ED agree that § 305.45(a)(7) applies to this case. That section requires that TexCom list all permits and construction approvals necessary under the Prevention of Significant Deterioration program under the Federal Clean Air Act and the Nonattainment Program under the Federal Clean Air Act, among other environmental programs.²⁹⁵ TexCom's application reports "None" – that it does not have any such compliance obligations. The details of the important air emissions requirements that should have been included in TexCom's application are recited below in Section III(D). The bottom line is that TexCom has not complied with § 305.45, a rule that is directly applicable in this case. Consequently, TexCom fails to comply with § 335.4(3).

Also relevant to the application review under § 335.4(3) is TexCom's own credibility to competently administer its proposed project. TexCom has no experience with Class I wells and no employees to operate the proposed project. Its application was prepared by a contract employee, Allen Blanchard, who no longer works for the company, whom TexCom did not include among its testifying experts, and whose competency was not evidenced in this case.²⁹⁶ Mr. Blanchard was beyond the subpoena power of SOAH and the Commission, and refused to respond to inquiries from the District during discovery. TexCom testifies that it has hired a replacement for Mr. Blanchard, but does not produce any meaningful evidence demonstrating

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²⁹⁴ Chapter 305 of TCEQ's rules ("Consolidated Permits") specifically requires a demonstration that activities affecting the environment are addressed by the applicant in its ISW permit application. 30 TEX. ADMIN. CODE § 305.45(a)(7).

²⁹⁵ *Id.*

²⁹⁶ Tr. 32-34.

that employee's experience. TexCom's CEO touts TexCom and its experts for their operational and technical expertise: "among the most respected names in the field."²⁹⁷ As mentioned above, the company has not yet hired any employees to operate the project and work at the site. This application was supported by an engineer, Mr. Carl Brassow, who has no experience with this type of project. While Dr. Ross believes that Mr. Brassow is highly regarded, that recognition and notoriety calls into question Dr. Ross's reliance on Mr. Brassow, and the ultimate competence and diligence applied in support of TexCom's application.²⁹⁸

Additionally, the evidence reflects TexCom's and its parent company's strained financial condition, and Dr. Ross testifies that TexCom is seeking additional financial support from Foxborough Energy Company.²⁹⁹ To be more precise, Dr. Ross testifies that TexCom's current investors are negotiating to relinquish a controlling interest to Foxborough in order to attract a much-needed infusion of cash from that company.³⁰⁰ Dr. Ross makes clear that its project centers around the existing well (WDW 315) purchased for \$400,000, at a significant discount from the cost of a new well (\$1.5 - \$2.5 million per well); he emphasizes that TexCom's project will not proceed if the company cannot put to use the existing well and, in that event, that the company would not drill a second well.³⁰¹ In conclusion, TexCom has not met its burden of demonstrating it will safeguard the health, welfare, and physical property of the people and to protect the environment.

²⁹⁷ TexCom Ex. 1, pp. 26-27.

²⁹⁸ Dr. Ross was unaware that Mr. Brassow was the engineer for a company penalized with a \$3 million fine in a court of law after being proven to have polluted a groundwater formation at its solid waste injection disposal site, and that Mr. Brassow had testified in that case that he had personal knowledge of the wilful and knowing conduct associated with the contamination several years before it came to the attention of TCEQ. See transcript at pp. 55-62; *State v. Malone Service Company*, 853 S.W.2d 82 (Tex.-App. Hous. [14 Dist.] 1993, writ denied). Nor was Dr. Ross aware that Mr. Brassow's engineering license had been suspended and that he was penalized by the Texas Board of Professional Engineers for practicing engineering at TCEQ during the period of suspension. See transcript at pp. 55-62; Dist. Exh. 17.

²⁹⁹ Tr. at 46.

³⁰⁰ Tr. p. 46; District Exh. 1, pp. 10-12; District Exh. 4.

c. **NECESSARY GENERAL INFORMATION RELATED TO APPLICANT, PROPOSED ACTIVITY, AND PROPOSED SITE UNDER THE FOLLOWING TCEQ RULES:**

- (i) § 305.45(a)(1)(name, mailing address, and physical address of facility);
- (ii) § 305.45(a)(2)(ownership status of site);
- (iii) § 305.45(a)(3)(name, mailing address, and telephone number of applicant);
- (iv) § 305.45(a)(4)(brief description of nature of business);
- (v) § 305.45(a)(5)(activities conducted by applicant which require a permit);
- (vi) § 305.45(a)(6)(map showing on-site intake and discharge structures and other enumerated off-site features located within at least a one-mile radius from the site); and
- (vii) § 305.45(a)(7)(list of all environmental permits and construction approvals required).

These requirements are quite general and seek mostly administrative, nontechnical information. Sections 305.45(a)(1)-(4) and (6) are not in dispute. TexCom's description of activities actually demonstrates that it requires an air permit under § 305.45(a)(5), as explained below. TexCom's response that there are no permits or approvals required under § 305.45(a)(7) is incorrect. For the reasons set forth below in Section III(B), TexCom is obligated to comply with the Clean Air Act (the "CAA") requirements cited in § 305.45(a)(5) and (7). TexCom's obligation to secure the appropriate CAA approvals is not subsumed within the requirements of the pending ISWP Application. However, TexCom's failure to design its facilities to account for air emissions and regulatory requirements governing air emissions is a defect in the facilities designs and plans that are part of TexCom's application. Operation of the facility in violation of the air permitting requirements should also be considered to create a nuisance in violation of § 335.4(2). The District understands and agrees with the BD's position that air permitting is a separate and independent regulatory process. However, TexCom's designs and plans for its surface facilities do not presently account for air emissions. Nor has TexCom complied with the

³⁰¹ Tr. 49-50.

specific requirement in § 305.45(a)(7) that it bring to the ED's attention what permits and other approvals are required. Consequently, TexCom's ISWP application is incomplete.³⁰²

d. ASSURED COMPLIANCE WITH MINIMUM ENGINEERING REQUIREMENTS, WASTE MANAGEMENT AND OPERATIONAL STANDARDS OF PROPOSED FACILITY AND ITS UNITS [§§ 305.45(a)(8)(A) and (C) AND 305.50(a)(1), (2), (3) and (7)]

The District addresses each of these rules, in turn, as follows:

Section 305.45(a)(8) requires that a technical report be submitted with the application. This technical report must be prepared by a licensed engineer or geoscientist, or a qualified person competent and experienced in the field to which the application relates and thoroughly familiar with the operation or project. This report must include the following:

- (1) a general description of the facilities and systems used for or in connection with the collection, transportation, treatment, and disposal of waste, or used in connection with an injection activity;³⁰³ and
- (2) such other information as reasonably may be required by the ED for an adequate understanding of the project or operation, and which is necessary to provide the Commission an adequate opportunity to make the considerations required by § 331.121 and § 305.50.³⁰⁴

While TexCom has provided the "general description" in Mr. Carl Brassow's technical report attached to the application, as contemplated by § 305.45(a)(8)(A). That technical report is deficient on at least two major substantive points: (1) it does not adequately address air emissions and (2) it fails to provide for stormwater controls. The second requirement requires an examination of §§ 331.121 and 305.50. The District addresses § 331.121 in Section II, above, and will focus on § 305.50(a)(1), (2), (3), and (7) at this point. Section 305.50(a)(1) is a ministerial requirement concerning the number of copies that must be filed with TCEQ, and the

³⁰² The ED's reliance on § 281.22(b) in its evidentiary objection is misplaced because that rule does not apply to a "completeness determination" in ISWP applications.

³⁰³ 30 TEX. ADMIN. CODE § 305.45(a)(8)(A).

³⁰⁴ 30 TEX. ADMIN. CODE § 305.45(a)(8)(C).

District is unaware whether that requirement has been met. Section 305.50(a)(2) requires:

Plans and specifications for the construction and operation of the facility and the staffing pattern for the facility shall be submitted, including the qualifications of all key operating personnel. Also to be submitted is the closing plan for the solid waste storage, processing, or disposal facility. The information provided must be sufficiently detailed and complete to allow the executive director to ascertain whether the facility will be constructed and operated in compliance with all pertinent state and local air, water, public health, and solid waste statutes. Also to be submitted are listings of sites owned, operated, or controlled by the applicant in the State of Texas.

TexCom's own facilities plan and designs, on their face, show that TexCom has not complied with statutory law governing air emissions, as expressly required by § 305.50(a)(2).

As a matter of law, TexCom cannot rely on permitting by rule, as TexCom has attempted to do.³⁰⁵ TexCom must comply with air permitting regulations. How this affects the ISWP Application is that TexCom needs to redesign its facilities plans to incorporate protections to account for its air emissions. Its current plans are incomplete.

Section 305.50(a)(3) requires:

Any other information as the executive director may deem necessary to determine whether the facility and the operation thereof will comply with the requirements of the TSWDA and Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste), shall be included, including, but not limited to, the information set forth in the TSWDA, § 4(e)(13).

Section 305.50(a)(3)'s cite to TSWDA, § 4(e)(13), now Texas Health and Safety Code § 36.109, applies only to *hazardous* solid waste facilities.

Otherwise, the requirements of §§ 305.45(a)(8) and 305.50(a)(2) leave it to the applicant and ED's staff to sort out, informally, outside any regulations, what other reports and what other information may be necessary for the ED and Commission's review. What is left is a requirement that the following information be provided:

such other information as reasonably may be required by the ED for an adequate understanding of the project or operation, and which is necessary to provide the Commission an adequate opportunity to make the considerations required

and

information provided must be sufficiently detailed and complete to allow the ED to ascertain whether the facility will be constructed and operated in compliance with all pertinent state and local air, water, public health, and solid waste statutes

These rules are open-ended. These rules do not comport with § 5.103 (“Rules”) of the Texas Water Code and § 361.024 (“Rules and Standards”) of the Texas Health and Safety Code, nor do they provide sufficient guidance to the Applicant or protestants as to the information required or the standard to be applied.

Section 305.50(a)(7) establishes the duty to have certain application documents sealed by a licensed engineer. This section provides that “[e]ngineering plans and specifications submitted as part of the permit application shall be prepared and sealed by a registered professional engineer who is currently registered as required by the Texas Engineering Practice Act.” The District identified the following documents that should have been but that were not sealed by a licensed engineer:

- (1) the Engineering Report at TexCom Ex. 39, page 33;
- (2) the waste management unit list and design capacities, at TexCom Ex. 41, page 3;
- (3) the surface equipment schedule located at TexCom Ex. 41, page 4; and
- (4) the schedule depicting waste management unit information at TexCom Exh. 41, page 5.

TexCom’s expert attempted but failed to comply with sealing requirements by his submission of what he terms an “Engineering Report Certification Statement.”³⁰⁶ This statement provides:

I Carl Brassow, Principal Engineer, certify under penalty of law that the

³⁰⁵ TexCom Ex. 33, p. 8 of 186.

³⁰⁶ TexCom Ex. 41, p. 6.

engineering report and all the accompanying drawings, figures and related attachments were prepared under my direction and supervision, in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the information submitted...

But Mr. Brassow's Engineering Report Certification Statement does not bring the four documents listed above into compliance with the Texas Engineering Practices Act. The Texas Engineering Practice Act and Rules, Subchapter I, Section 1001.401, paragraph B provide that "a plan, specification, plat, or report issued by a licensed holder for a project to be constructed or used in this state must include the license holder's seal *placed on the document.*" Consequently, the engineering seal must be placed on each of the documents identified above. Mr. Brassow's failure to comply with the Texas Engineering Practices Act is reflective of other failings in his work brought to light during the hearing. Certainly he had ample opportunity to seal the reports to come into compliance with statutory and regulatory requirements. However, at the end of the day, the documents listed above are not properly sealed. Accordingly, TexCom fails to satisfy § 305.50(a)(7).

In conclusion, very little substance is demanded by § 305.4(a)(8)(A) and (C) and 305.50(a)(1), (2), (3) and (7). Despite the rules setting the bar so low, TexCom did not meet the substantive requirements.

e. ASSURED COMPLIANCE WITH CLOSURE AND REMEDIATION REQUIREMENTS [§ 335.8 and Chapter 350]

TexCom's three-page closure and post-closure plans appear, on their face, to provide a sufficient outline and checklist that conforms to § 335.8 and Chapter 350, TCEQ's Texas Risk Reduction Program. However, these plans do not address contingencies for post-closure monitoring and remediation contemplated by § 335.8(b) when land use changes from nonresidential to residential, as expressly required by § 335.8(b)(5)(B). It is undisputed that land

use in the vicinity of the site has changed from nonresidential to more residential since TCEQ last considered this site in the late 1990s.³⁰⁷ There has been explosive population growth in Montgomery County, and within the Conroe area in particular.³⁰⁸ The U.S. Census Bureau released a report that showed that Montgomery had added over 104,000 people between 2000 and 2006.³⁰⁹ That is a growth rate of 35.6%, which makes Montgomery County the 28th-fastest growing county in the U.S., and the fifth-fastest in Texas.³¹⁰

Taking into consideration existing residential properties in the area and the trend in population growth, TexCom's plans do not address contingencies for post-closure monitoring and remediation contemplated by § 335.8(b) when land use changes from nonresidential to residential, as expressly provided for in § 335.8(b)(5)(B).

In its submission of applicable rules dated December 7, 2007, the ED also cites to rules that apply after a permit is issued and to permit terms, but that do not affect application requirements. For purposes of the analysis of application requirements, those rules are not addressed in this section. As reviewed above, multiple reasons support denial of TexCom's application.

2. ADEQUACY OF APPLICATION UNDER FORM INS-0024 INSTRUCTIONS

In its December 7th submission, the ED did not include the Form INS-0024 Instructions (the "Instructions") on the list of standards governing this case. Nor has the ED's witness, Michael Graeber, taken the position, when asked, that the Instructions serve as any benchmark for his review of the application. See Mr. Graeber's sworn prefiled testimony:

Q. What state regulations did you review the permit application under?

A. I reviewed the application under 30 Texas Administrative Code,

³⁰⁷ See, e.g., Tr. 49.

³⁰⁸ District Exh. 1, 2, and 3.

³⁰⁹ *Id.*

³¹⁰ *Id.*

Chapter 305.

- Q. Did you rely on any other law, publication, guidance, or materials while conducting your review of the permit application?
- A. No.³¹¹

Yet the standards for presenting and evaluating a significant amount of the information critically important to the proposed surface facilities are contained only in the Instructions, and not in any rule. For convenient reference, those requirements include:

- (1) waste treatment, processing and storage facility and operational Security measures (Section II.A. of the Instruction Form);
- (2) inspection and maintenance requirements (Section II.B. of the Instruction Form);
- (3) recordkeeping (Section II.E. of the Instruction Form);
- (4) description of roads (Section II.F. of the Instruction Form);
- (5) standards for the waste acceptance plan (Section III. of the Instruction Form);
- (6) geology report (Section V. of the Instruction Form);
- (7) surface water protection plan (Section IV of the Instruction Form);
- (8) engineering report, (Section IV of the Instruction Form);

The basis for these requirements in the rules is solely the ED's discretion through his general ability to seek information under §§ 305.45(a)(8)(A) and (C) and 305.50(a)(1), (2), (3) and (7), the rules reviewed in detail in the previous section. These rules do not provide any specificity or guidance with respect to the information listed above or how that information is to be evaluated. It is the Instructions and the Instructions alone that constitute the legal standard. If the Instructions are accepted as the standard against which the application is to be judged, then this form has literally become the rule.

This situation creates a predicament. It is an error of law to apply legal standards that

³¹¹ ED Exh. 14, at p. 4.

have no legal basis. Statutory law is clear that when TCEQ adopts a statement of general applicability that interprets or prescribes law or policy or describes its procedure or practice requirements, it must do so by rule. Sections 5.013 (“General Jurisdiction of the Commission”) and 5.103 (“Rules”) of the Texas Water Code and § 361.024 of the Texas Health and Safety Code clearly require TCEQ to develop these standards for its nonhazardous industrial solid waste program through formal rulemaking.³¹²

It is evident on the face of the Instructions that they are a statement of general applicability interpreting and prescribing law and policy and describing the procedure and practice requirements for TCEQ’s processing of TexCom’s ISWP Application. Accordingly, absent properly noticed and adopted rules governing the permitting and operation of nonhazardous industrial solid waste treatment, storage and processing facilities, the merits of TexCom’s ISWP application cannot be judged against any objective standard. It is also a fundamental premise of administrative law that agencies cannot regulate through *ad hoc* rulemaking. Application of standards in the Instructions would be *ad hoc* rulemaking, because the Instructions were not adopted in accordance with the APA, but are being implemented as though they were rules, in violation of the Texas Water Code and Health and Safety Code.

Such is the predicament. The District believes that due process has been violated because (1) TCEQ’s rules are insufficient to adequately protect human health and the environment and

³¹² TEX. WATER CODE § 5.013 (TCEQ responsible for administration of Chapter 361 of TEX. HEALTH & SAFETY CODE Ch. 361); TEX. WATER CODE § 5.103 (a) and (c) (“The commission shall adopt any rules necessary to carry out its powers and duties under this code and other laws of this state...Rules shall be adopted in the manner provided by Chapter 2001, Government Code. As provided by that Act, the commission must adopt rules when adopting, repealing, or amending any agency statement of general applicability that interprets or prescribes law or policy or describes the procedure or practice requirements of an agency. The commission shall follow its own rules as adopted until it changes them in accordance with that Act.”); see also § 361.024(e) (“Rules shall be adopted as provided by Chapter 2001, Government Code. As provided by that Act, the commission must adopt rules when adopting, repealing, or amending any agency statement of general applicability that interprets or prescribes law or policy or describes the procedure or practice requirements of the agency. The commission shall follow its own rules as adopted until it changes them in accordance with that Act.”).

(2) the hearing was held in the absence of these rules. The District, joined by Montgomery County, the City of Conroe, and the aligned landowners, and with the support of the Office of Public Interest Counsel, presented a solution by requesting that SOAH dispose of the application by summary disposition or, in the alternative, by certifying questions to the Commission.³¹³ At this juncture in the case, either remedy is still procedurally appropriate, and the District reurges that motion.

The issue of the applicability of the Instructions as rules or otherwise is not a legalistic exercise without real world meaning. But for the Instructions, TexCom would never have provided any surface water protection plan in its Application because, but for the Instructions, Mr. Graeber would never have identified the absence of a Surface Water Protection Plan as a technical deficiency. But does the plan provided in the ISWP Application meet the criteria of the Instructions? The Instructions require an applicant to describe the stormwater discharge route to the nearest identifiable water course. TexCom did not do so. The Instructions require an applicant to describe the types of waste and the suitability of the facilities to handle the wastes. TexCom failed to design the facility to ensure wastes are only handled in facilities suited to the task. The Instructions require an applicant to demonstrate the manner in which the facility will handle a storm event. The design and operational requirements contained in the Application are not capable of handling the design storm event absent extraordinary human intervention.

In concert, these deficiencies spell catastrophe. The following scenario is entirely plausible: During regular operations at the TexCom facility, a solvent stored in a fiberglass storage tank breaks down the adhesives of the PVC piping on its way to disposal. The ensuing

³¹³ The individual landowners supported the motion for summary disposition, but opposed delay sought under the motion to certify questions. OPIC did not have the opportunity to respond to the motion in writing, given that the hearing was set less than five days from filing and the joint movants were unable to reach OPIC to confer prior to filing the motion; however, OPIC attorney Blas Coy advised the District's legal counsel that he concurred with the

leak also breaks down the asphalt upon which it spills and enters the groundwater. While the solvent-contaminated surface water is still spreading, a storm event occurs. The contaminated water is transported to the storm water tank, and also to the salt water tank and the injection tank because the capacity of those tanks is required to handle the storm event. But those tanks are already full and there was not sufficient time to pump their contents down the well.

So an overflow occurs where the water, which is now contaminated with solvents, salt water, and whatever was in the disposal tank (presumably Class 1 Industrial Solid Waste) overflows in the waste handling area, traveling an undefined route to the on-site storage pond. It flows from that pond to a drainage ditch and then to...where? Because TexCom does not identify the water body into which the site drains, who is to be warned? What children playing in what stream should be evacuated?

If the Instructions were not applied to set formal requirements for TexCom's application for surface facilities at its UIC well site, TexCom can be excused from providing the information that would force an avoidance of the grim scenario described above. If the Instruction Form INS-0024 is applied to set informational, design and operational standards for permitting of surface facilities at a UIC well site, then those Instructions are rules, in violation of Texas Water Code § 5.103 and Texas Health and Safety Code § 361.024(e).

The District evaluates in further detail the design and operation of the surface facility, stormwater runoff and TexCom's surface water protection plan, in the following Subsections III(B) and (C).

B. Proposed design and operation of surface facility

TexCom fails to adequately design its facility to account for all of the possible types of chemicals that might be delivered to the site. Because TexCom does not know the identity of its

joint movants' position.

ATTACHMENT 4

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

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 §

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 COMMISSION INDUSTRIAL §
SOLID WASTE PERMIT NO. 87758 § ADMINISTRATIVE HEARINGS
§

LONE STAR GROUNDWATER CONSERVATION DISTRICT'S
REPLY TO CLOSING ARGUMENTS OF
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY'S EXECUTIVE DIRECTOR
AND TEXCOM GULF DISPOSAL, LLC

SUBMITTED ON FEBRUARY 25, 2008

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approved for disposal.

Second, with respect to TexCom's financial commitment, Dr. Ross concedes that TexCom has financial challenges, which confirms the concerns the District noted in TexCom, Inc.'s SEC filing.²⁹⁴ In his live testimony on this point, Dr. Ross relates that TexCom is trying to close the deal with a new investor to infuse capital needed to complete the process of obtaining the permit and to build up the operating facility.²⁹⁵ Third, TexCom has not yet staffed up, though it commits to doing so. Given concerns about TexCom senior management's lack of knowledge and experience and cash-flow concerns, how can TexCom be trusted to follow through to hire well-qualified staff? In summary, TexCom is not in a position to undertake the proposed project absent more experienced senior management, more reliable, sufficient funding, and less speculative intentions of its investors and corporate officers.

III. SURFACE FACILITY APPLICATION

Neither the ED nor TexCom has evaluated all of the applicable criteria submitted by the ED on December 7, 2007.²⁹⁶ How, then, can the ED's proposed draft permit be supportable if his own staff did not evaluate the application against all of these applicable rules? And how, then, can TexCom meet its burden of proof when it did not address all of the criteria outlined by the ED?

What is troubling about the ED's closing argument and case in general is that the ED has not evaluated or even acknowledged any of the concerns about and defects in TexCom's application raised in the hearing. There is not one reference in his closing arguments to any of

²⁹³ Tr. 54.

²⁹⁴ Tr. 46; District Exh. 1, pp. 10-12; District Exh. 4; *see also* fn 287, *supra* (quoting SEC filing).

²⁹⁵ Tr. 46-48.

²⁹⁶ TEX. GOV'T CODE § 2001.058(c) provides that "[a] state agency shall provide the administrative law judge with a written statement of applicable rules or policies." The ED complied with this requirement on December 7th, the Friday afternoon before the hearing.

the TCEQ Office of Public Interest Counsel's and protestants' challenges or concerns. Aside from failing to address evidence underscoring the other parties' concerns, the ED has sidestepped any meaningful evaluation of the evidence in the hearing, instead leaning on staff witness Michael Graeber's *prehearing* conclusory opinion offered back in October 2007 and November 2007 that "the application meets the applicable statutory and regulatory requirements."²⁹⁷

A. Adequacy of Application

1. Reply to ED's Closing Arguments

Does the application meet the applicable statutory and regulatory requirements, as Mr. Graeber asserts? First and foremost, the ED did not even examine his own List of Applicable Rules submitted on December 7, 2007. Nor did the ED explain any basis for applying the instructions and guidance provided in TCEQ Form INS-0024 ("Form INS-0024"), which appear to be what the ED intended to serve as the guideposts of this case. Mr. Graeber and the ED are not even on the same page as to what standards apply in this case.²⁹⁸ And TexCom has its own list of standards that does not match the ED's list.²⁹⁹

Most of the information submitted in the application responds to the guidance in Form INS-0024, which has no specific reference whatsoever in TCEQ's rules.³⁰⁰ And the ED has not cited to Form INS-0024 in his list of applicable standards governing this case. Nor has Mr. Graeber taken the position, when asked, that Form INS-0024 serves as any benchmark for his review of the application. See Mr. Graeber's sworn prefiled testimony:

Q. What state regulations did you review the permit application under?

A. I reviewed the application under 30 Texas Administrative Code, Chapter 305.

²⁹⁷ See ED's Closing Argument, fn 88-100; 106, 110, 112, 115 (citing to Deposition on Written Questions of Michael Graeber dated October 25, 2007, and Mr. Graeber's prefiled testimony dated November 13, 2007).

²⁹⁸ Cf. ED Exh. 14, p. 4, ED's list of applicable standards filed December 7, 2007.

²⁹⁹ TexCom Brief, p. 52.

³⁰⁰ Cf. TCEQ Form INS-0024 (the "Instructions"), ED's list of applicable standards filed December 7, 2007.

Q. Did you rely on any other law, publication, guidance, or materials while conducting your review of the permit application?

A. No.³⁰¹

Consequently, how is the District, let alone SOAH or the Commission, supposed to evaluate the adequacy of the application? The District is in the position of having to guess at what the standards are, and to attempt to cover all the bases, and hope that it guessed right.

As reviewed in extensive detail in the District's closing arguments, it is uncertain what information is required and what the standards are. What is clear is that the rules are bare-boned and inspecific,³⁰² and that Form INS-0024 *outlines* a significant amount of the information that must be included in the ISW permit application. Without question the rules applicable in this case come nowhere close to the specificity of TCEQ's rules governing commercial industrial nonhazardous waste *landfill* facilities.³⁰³ For convenient reference, the requirements in Form INS-0024 include:

- (1) waste treatment, processing and storage facility and operational Security measures (Section II.A. of Form INS-0024);
- (2) inspection and maintenance requirements (Section II.B. of Form INS-0024);
- (3) recordkeeping (Section II.E. of Form INS-0024);
- (4) description of roads (Section II.F. of Form INS-0024);
- (5) standards for the waste acceptance plan (Section III. of Form INS-0024);
- (6) geology report (Section V. of Form INS-0024);
- (7) surface water protection plan (Section IV of Form INS-0024); and
- (8) engineering report, (Section IV of Form INS-0024).³⁰⁴

These requirements are not addressed with any specificity in the rules. The only basis for these requirements in the rules is the ED's *discretion* through his general ability to seek information under sections 305.45(a)(8)(A) and (C) and 305.50(a)(1), (2), (3) and (7). As briefed at pp. 47-62 of the District's closing arguments (Section III (introduction) and III.A),

³⁰¹ ED Exh. 14, p. 4.

³⁰² See 30 TEX. ADMIN. CODE §§ 305.45(a)(8)(A) and (C) and 305.50(a)(1), (2), (3) and (7), which serve as the basis for the information required in the Instructions.

³⁰³ Cf. 30 TEX. ADMIN. CODE Ch. 335, Subch. T; ED's December 7th List of Applicable Rules.

these instructions are clearly a statement of general applicability interpreting and prescribing law and policy and describing the procedure and practice requirements for TCEQ's processing of TexCom's ISW permit application. As such, this guidance must be adopted through rulemaking.³⁰⁵

Whether or not Mr. Graeber has relied upon Chapter 305 or the Form INS-0024, his opinion is wholly conclusory and is not based upon any meaningful evaluation of the evidence by any standard. He admits that he only "reviews" the ISW permit application to determine whether it contains sufficient information, but that he does not "evaluate" that information.³⁰⁶ Over and over in its closing arguments the ED and Mr. Graeber emphasize that information included in the ISW permit application "is consistent with and complies with TCEQ regulations," but nowhere is there a meaningful evaluation of that information against the applicable standards.³⁰⁷ If ever there were a legitimate basis for accusing the ED's staff of a superficial review, this case is one.

Perhaps the superficial review is a result of Mr. Graeber's limited experience with ISW permit applications like TexCom's. Mr. Graeber testifies that he has been involved in only two others, and that they were distinctly different because they sought authority for waste transfer

³⁰⁴ District Exh. 7.

³⁰⁵ TEX. WATER CODE § 5.013 (TCEQ responsible for administration of Chapter 361 of TEX. HEALTH & SAFETY CODE Ch. 361); TEX. WATER CODE § 5.103 (a) and (c) ("The commission shall adopt any rules necessary to carry out its powers and duties under this code and other laws of this state...Rules shall be adopted in the manner provided by Chapter 2001, Government Code. As provided by that Act, the commission must adopt rules when adopting, repealing, or amending any agency statement of general applicability that interprets or prescribes law or policy or describes the procedure or practice requirements of an agency. The commission shall follow its own rules as adopted until it changes them in accordance with that Act."); see also § 361.024(e) ("Rules shall be adopted as provided by Chapter 2001, Government Code. As provided by that Act, the commission must adopt rules when adopting, repealing, or amending any agency statement of general applicability that interprets or prescribes law or policy or describes the procedure or practice requirements of the agency. The commission shall follow its own rules as adopted until it changes them in accordance with that Act.").

³⁰⁶ TexCom Ex. 63, pp. 9-11, 14.

³⁰⁷ ED's Closing Argument, pp. 20-22 of 27, 24-25 of 27.

stations, and not destination sites for disposal by deep-well injection.³⁰⁸ Mr. Graeber is also the sole staffer who worked on the application, so he did not benefit from any support or guidance.³⁰⁹

Furthermore, the ED does not support his assertion that “[t]he evidence supports a finding that all sections of the proposed surface facility application required to be sealed by an engineer are properly sealed by an engineer.”³¹⁰ The ED only cites to Mr. Graeber’s conclusory assessment that “the information included in the application for Permit No. 87758, is consistent with and complies with TCEQ regulations...” and “...that the surface facility application satisfies all applicable statutory and regulatory requirements.”³¹¹ But the ED does not refer at all to the documents that ought to be sealed:

- (1) the Engineering Report at TexCom Ex. 39, page 33;
- (2) the waste management unit list and design capacities, at TexCom Ex. 41, page 3;
- (3) the surface equipment schedule located at TexCom Ex. 41, page 4; and
- (4) the schedule depicting waste management unit information at TexCom Exh. 41, page 5.³¹²

As briefed at pages 57-58 and 67 of the District’s closing arguments, the Texas Engineering Practices Act and TCEQ’s rules make clear that a seal is required on each engineering document to ensure that a licensed engineer prepared and signed off on important documents requiring an engineer’s professional attention.³¹³ Mr. Brassow’s failure to comply with the Texas Engineering Practices Act is reflective of other failings in his work brought to light during the hearing. Certainly he had ample opportunity to seal the reports to come into compliance with statutory and regulatory requirements. However, at the end of the day, the documents listed

³⁰⁸ Tr. 1306-08.

³⁰⁹ ED’s Exh. 14, p. 4.

³¹⁰ ED’s Closing Argument, pp. 20-21.

³¹¹ *Id.*

³¹² District Exh. 5, p. 24.

above are not properly sealed. Accordingly, TexCom fails to satisfy section 305.50(a)(7) of TCEQ's rules.

2. Reply to TexCom's Closing Brief

TexCom's arguments under this Section III.A consist of two paragraphs, the first seeking to bolster its sole expert involved with the application, Carl Brassow, and the second outlining what TexCom believes to be the governing TCEQ rules: sections 281.5, 305.45, and 305.50.³¹⁴ The District will address each of these two paragraphs, in turn.

First, TexCom touts Mr. Brassow's 34 years of engineering experience, coupled with his 14 years of legal experience.³¹⁵ TexCom also notes his experience preparing applications for injection facilities and other types of disposal projects, and includes testimony about his qualification as an expert in SOAH hearings on "non-hazardous industrial waste applications such as this one."³¹⁶ But on cross-examination, Mr. Brassow qualifies his experience by noting that he has never actually worked on a commercial, nonhazardous industrial solid waste application involving deep-well injection.³¹⁷ His experience is based on one hazardous waste landfill permit application, and one hazardous waste salt-dome injection project, which was denied.³¹⁸ Although TexCom does not mention it in its closing brief, Mr. Brassow's only on-point experience is limited to review of other, third parties' industrial solid waste permit conditions, on behalf of clients who ultimately chose not to file ISW permit applications.³¹⁹

The salt-dome deep-well injection project referenced by Mr. Brassow and that was denied is worth further examination, given the similarity in that case due to a lack of rules

³¹³ TEX. OCC. CODE § 1001.401(b); 30 TEX. ADMIN. CODE § 305.50(a)(7).

³¹⁴ TexCom Brief, p. 52.

³¹⁵ *Id.*

³¹⁶ *Id.*; see also TexCom Ex. 59, pp. 6-7.

³¹⁷ Tr. 44 ("I have not developed any other—this is the first non-hazardous industrial well that I've worked on.")

³¹⁸ Tr. 477-81.

³¹⁹ Tr. 481-85.

governing salt-dome injection.³²⁰ As Mr. Brassow testified, that project—initially developed by United Resources Recovery, and then redeveloped by Secured Environmental Management—faced procedural challenges due to a lack of rules governing the program (deep-well injection into a salt dome).³²¹ According to Mr. Brassow, that project faced several legal challenges, in part due to a lack of regulatory guidance, which resulted in the Texas Natural Resource Conservation Commission’s development of new rules governing salt-dome disposal in Chapter 331 of TCEQ’s rules.³²² Then, subsequently, the Texas legislature passed legislation prohibiting hazardous waste disposal in salt domes.³²³ Similarly, in the instant case, there is a need for rules to provide guidance and certainty as to the information required of an applicant and standards to be applied in evaluating that information. Underscoring this requirement is the statutory mandate to promulgate rules to implement a regulatory program set forth by the Texas Health & Safety Code and Texas Water Code.³²⁴

It is also worth calling out the District’s very significant concerns about TexCom’s reliance on Mr. Brassow, and TexCom CEO Dr. Lou Ross’s belief that they had hired one of the best consultants in the field.³²⁵ While Dr. Ross may have initially believed that Mr. Brassow was highly regarded, that recognition and notoriety calls into question Dr. Ross’s reliance on Mr. Brassow, and the ultimate competence and diligence applied in support of TexCom’s application.³²⁶

³²⁰ Tr. 479-81.

³²¹ *Id.*

³²² *Id.* Note that the Texas Natural Resource Conservation Commission is TCEQ’s predecessor agency with jurisdiction over industrial solid waste.

³²³ *Id.*

³²⁴ TEX. HEALTH & SAFETY CODE § 361.024; TEX. WATER CODE § 5.103. See the District’s briefing of this issue in its Closing Arguments, at pp. 60-62.

³²⁵ TexCom Ex. 1, pp. 26-27.

³²⁶ See District’s Closing Arguments, at p. 53, including footnote 298 (referring to Mr. Brassow’s involvement as the engineer for a company penalized with a \$3 million fine in a court of law after being proven to have polluted a groundwater formation at its solid waste injection disposal site, and Mr. Brassow’s testimony in that

Along the same line of concern, the District believes it to be telling of TexCom's lack of experience and weak management team that its lead employee responsible for preparing and filing the application, Allen Blanchard, is now completely out of the picture—in fact, out of the state and entirely disengaged from TexCom, TexCom's application, and this proceeding.³²⁷ Mr. Blanchard was a contract employee who no longer works for TexCom, who was not included among TexCom's testifying experts, and whose experience and competency are not evidenced whatsoever in this case.³²⁸ TexCom testifies that it has hired a replacement for Mr. Blanchard, but does not produce any meaningful evidence demonstrating that employee's experience.³²⁹ Nor has that employee been designated as an expert in this case, which is also telling. In short, Dr. Ross testifies that he has no background with Class I wells, that TexCom has no experience with Class I wells, and that TexCom has no employees to manage and operate its proposed project.³³⁰ Dr. Ross also testifies that Mr. Brassow's engagement ends with the conclusion of this hearing, so there is actually no one with even the slightest degree of background with surface facilities to support TexCom.³³¹ In summary, neither Mr. Brassow nor Dr. Ross demonstrates a command of the regulatory program or provides any degree of confidence that TexCom will be capable of responsibly managing its operations.

Turning to the second paragraph and point made by TexCom in this section of its closing brief, TexCom merely recites sections 281.5, 305.45, and 305.50 as TCEQ's rules governing the

case that he had personal knowledge of the wilful and knowing conduct associated with the contamination several years before it came to the attention of TCEQ, and the suspension of his engineering license and penalty by the Texas Board of Professional Engineers for practicing engineering at TCEQ during the period of suspension).

³²⁷ Tr. 33-34. In TexCom's disclosures, it is noted that Mr. Blanchard now resides in Louisiana. As such, Mr. Blanchard was beyond the subpoena power of SOAH and the Commission. Mr. Blanchard refused to respond to inquiries from the District during discovery.

³²⁸ Tr. 32-34.

³²⁹ Tr.

³³⁰ Tr. 35.

³³¹ Tr. 57.

ISW permit application, and notes Mr. Brassow's and Mr. Graeber's belief that the ISW permit application contains all information required by these three rules. Talk about a moving target, although this list of rules is consistent with Mr. Brassow's prefiled testimony,³³² it differs from TexCom's list that also includes sections 331.63(f), 331.66, and 335.4(3),³³³ from the ED's December 7th submission, and from Mr. Graeber's assessment, which excludes any evaluation of any standards beyond Chapter 305 of TCEQ's rules. The bottom line is that neither the applicant nor ED's sole witness involved with the ISW permit application has addressed all of the criteria set out in the ED's December 7th list of applicable authorities.

B. Proposed Design and Operation of Surface Facility

TexCom focuses on a proposed *conceptual* design and operational plan—conceptual because it does not know (i) who its customers will be, and (ii) what types of chemicals it might receive, and (iii) in what volumes and (iv) on what schedule.³³⁴ Having a conceptual design in and of itself is not a problem under Form INS-0024 (there are no rules on the subject) as long as the applicant covers all its bases by providing a design that demonstrates that it can safely receive, store, and process each and every chemical waste stream intended to be received at the applicant's proposed facility. Most ISW facility owners are generators of their own wastes and, consequently, have a limited number of chemicals to be disposed of, and know when and in what volumes the wastes will be generated. Obviously there is more focus and certainty with facilities design for generators of the wastes, compared with a commercial operator who may know nothing of the waste streams, such as a speculator like TexCom. Commercial facilities situated like TexCom's face this challenge because they do not always know (i) who its customers will

³³² TexCom Ex. 59, p. 7.

³³³ See transcript of hearing held November 27, 2007; see also TexCom's response to Joint Motion to Certify Questions and for Summary Judgment.

³³⁴ Tr. 68-69, 71.