

**DOCKET NO. 2023-1590-WDW**

<b>IN RE THE APPLICATION OF</b>	<b>§</b>	<b>BEFORE THE</b>
	<b>§</b>	
<b>U.S. ECOLOGY TEXAS INC. FOR</b>	<b>§</b>	
	<b>§</b>	<b>TEXAS COMMISSION ON</b>
<b>INJECTION WELL PERMIT</b>	<b>§</b>	
	<b>§</b>	
<b>NOS. WDW-344 THROUGH WDW-350</b>	<b>§</b>	<b>ENVIRONMENTAL QUALITY</b>

**APPLICANT'S RESPONSE TO REQUEST FOR HEARING**

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

COMES NOW, U.S. Ecology Texas Inc. ("U.S. Ecology"), applicant for Injection Well Permit Nos. WDW-344, WDW-345, WDW-346, WDW-347, WDW-348, WDW-349, and WDW-350 to authorize the renewal and major amendment of seven nonhazardous commercial Class I Underground Injection Wells ("UIC") in Jefferson County, Texas, by and through its attorney, and submits this, its response to requests for a contested case hearing ("CCH"), pursuant to 30 TEX. ADMIN CODE § 55.209(d) of the rules of the Texas Commission on Environmental Quality ("TCEQ" or the "Commission"), and respectfully shows the following:

**I. FACILITY DESCRIPTION AND PROCEDURAL BACKGROUND**

U.S. Ecology Winnie operates existing deep waste disposal wells for the subsurface injection of industrial nonhazardous waste and municipal landfill leachate at 26400 Wilber Road,

Winnie, Texas 77665, Jefferson County (the “Facility”).<sup>1</sup> The amendments, if issued, will change the base of the injection zone from 1,765 feet to 4,000 feet below ground level (“BGL”) for all wells, lower the top of the injection zone for well WDW-346 from 952 feet BGL to 1,076 feet BGL, and change the Maximum Allowable Surface Injection Pressure for wells WDW-346 through WDW-350 to allow a range of maximum pressures based on the varying specific gravity of the injected fluid. U.S. Ecology filed its application on May 28, 2019, and the Executive Director (“ED”) declared it administratively complete on August 15, 2019. The Notice of Receipt of Application and Intent to Obtain Permit was published on September 7, 2019 in the *Beaumont Enterprise* in Jefferson County, Texas. The ED completed the technical review of the Application and issued the Final Draft Permit on March 9, 2023. The Notice of Application and Preliminary Decision was published on April 12, 2023, in the *Beaumont Enterprise* in Jefferson County, Texas.

The comment period ended on May 12, 2023, and the ED Filed her Response to Comments (“RTC”) with the Chief Clerk on July 11, 2023. Hearing requests were due by August 17, 2023.

Because the application was received after September 1, 2015, it is subject to the requirements adopted pursuant to House Bill 801, 76th Legislature (1999), and Senate Bill 709, 84th Legislature (2015).

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<sup>1</sup> Wells WDW-344 through WDW-346 are currently constructed and operating. WDW-347 through WDW-350 are currently permitted but not yet constructed. U.S. Ecology also currently owns and operates a commercial nonhazardous industrial solid waste and municipal solid waste storage and processing facility at the site pursuant to IHW Permit No. 39098. As stated in the ED’s RTC, IHW Permit No. 39098 is outside the scope of the ED’s consideration of this application.

## II. LEGAL BASIS

Chapter 55, Subchapter F of TCEQ's rules provides that a request for a CCH shall be granted if certain standards are met.

### **Affected Person**

First, the request must be filed by an "affected person." 30 TEX. ADMIN. CODE § 55.201(b). An affected person is "one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest." *Id.* at § 55.203(a). Determining whether a requestor is an affected person requires consideration of various factors, including:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person;
- (6) whether the requestor timely submitted comments on the application that were not withdrawn; and
- (7) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

*Id.* at § 55.203(c).

In determining whether a requestor is an affected person, the Commission may also consider:

- (1) the merits of the underlying application and supporting documentation in the commission's administrative record, including whether the application meets the requirements for permit issuance;
- (2) the analysis and opinions of the ED; and
- (3) any other expert reports, affidavits, opinions, or data submitted by the ED, the applicant, or hearing requestor.

*Id.* at § 55.203(d).

#### **Other Hearing Request Requirements**

Even if filed by an affected person, TCEQ rules require that, for an application filed on or after September 1, 2015, a request for a CCH shall be granted only if it:

- (1) raises disputed issues of fact or mixed questions of fact or law that were raised during the comment period by the affected person whose request is granted, that were not withdrawn, and that are relevant and material to the commission's decision on the application;
- (2) is timely filed with the chief clerk;
- (3) is pursuant to a right to hearing authorized by law; and
- (4) complies with the requirements of § 55.201.

*Id.* at § 55.211(c)(2)(A)(ii) and (B)-(D).

Section 55.201, in turn, requires that, for applications filed on or after September 1, 2015, the hearing request substantially comply with the following:

- (1) give the name, address, [and] daytime telephone number of the person who files the request;
- (2) identify the person's personal justiciable interest;
- (3) request a CCH;

- (4) list all relevant and material disputed issues of fact that were raised by the requestor during the public comment period and that are the basis of the hearing request; and
- (5) provide any other information specified in the public notice of the application.

*Id.* at § 55.201(d).

Section 55.209 requires that responses to hearing requests address:

- (1) whether the requestor is an affected person;
- (2) which issues raised in the hearing request are disputed;
- (3) whether the dispute involves questions of fact or of law;
- (4) whether the issues were raised during the public comment period;
- (5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing;
- (6) whether the issues are relevant and material to the decision on the application; and
- (7) a maximum expected duration for the CCH.

*Id.* at § 55.209(e).

### **III. DETERMINATION OF AFFECTED PERSONS (§ 55.209(e)(1))**

Grayson E. Pipkin, Bruce F. Pipkin, and Pipkin Ranch Holdings, LP (collectively the “Requestors” or “Pipkins”) were the only people to request a CCH. As the Pipkins do not meet the requirements of “affected persons,” their requests should be denied.

The Pipkins identified their residence as 237779 Big Hill Road, Beaumont, Texas 77705 which sits on 18,000 acres abutting the Facility. Though their property may abut the Facility, they do not meet other requirements to be found an affected party. While more than ten requests from the Pipkins appear on the TCEQ Commissioners’ Integrated Database, many of the requests

were repeat submissions. Ultimately, the Pipkins submitted only two distinct hearing requests. The first distinct hearing request was submitted on April 16, 2023 and then resubmitted on April 20, 2023 (hereafter, the “Sparks Letter”). The second distinct hearing request was submitted on August 17, 2023, after the close of the comment period but during the hearing request period (hereafter, the “Tuckfield Letter”). Under neither hearing request can the Pipkins be found to be affected persons because none of the interests claimed are protected by the law under which the application is considered and there is no reasonable relationship between the interest claimed and the activity regulated. *See* 30 TEX. ADMIN. CODE § 55.203(c)(1) and (3).

### **Sparks Letter**

The Sparks Letter, (the only timely filed comment letter), only alleges (i) a loss of use and enjoyment due to “the value of the injections by Chevron [being] reduced due to the space being occupied by the Applicant’s injected waste,” and (ii) tort claims such as negligence, trespass, and other similar claims, seeking compensation under the legal doctrine of *quantum meruit*. Neither of these comments raise issues within the jurisdiction of TCEQ. Such claims must be tried in a court setting, not in a TCEQ administrative hearing.

Furthermore, even if the Commission takes a broader reading of the Sparks Letter, the interests claimed have already been decided as a matter of law. Fluids injected pursuant to the technical limits of state rules and permits are authorized to migrate beyond the boundaries of the surface estate of the permittee. *See* TNRCC Docket No. 2000-0166-UIC. In that Docket, the protestants argued similar claims in a matter involving amendments to non-hazardous Class I injection well permits in Liberty County. The amended permits were issued, and the Commission included in its Order Conclusions of Law establishing that the protestant “does not

have an absolute right to exclude others from the deep subsurface below its property” and “does not have an absolute and exclusive property interest in the deep surface below its property.” *See* Conclusions of Law Nos. 10 and 11 on Page 11 of Exhibit A. The Commission’s decision in that case was upheld by the 3d Court of Appeals in *FPL Farming, Ltd. v. Texas Natural Resource Conservation Com’n*, No. 03-02-00477-CV, 2003 WL247183 (Tex. App. – Austin Feb 6, 2003, pet. denied).

### **Tuckfield Letter**

Because the Tuckfield Letter was filed during the hearing request period, and not the comment period, the Pipkins are limited to the issues raised in the Sparks Letter. 30 TEX. ADMIN. CODE § 55.201(d)(4). No additional issues raised in the Tuckfield Letter can be used to cure the lack of issues raised in the Sparks Letter.

After reviewing both the Sparks Letter and Tuckfield Letter, the affected person analysis must result in a finding that the Pipkins are not affected persons as their claimed interests are not protected by the law under which the application will be considered and there is no reasonable relationship between the interests claimed and the activity regulated as required by *Id.* at § 55.203(c)(1) and (3).

## **IV. ISSUES PRESENTED**

To be granted a CCH, a party who is found by the Commission to be an affected party must also raise issues based on timely comments. *Id.* at § 55.211(c)(2)(A)(ii)(I).

Although U.S. Ecology does not find that the Pipkins are affected persons, should the Commissioners find that the Pipkins are affected persons, U.S. Ecology submits the following

regarding issues raised by the Pipkins. The following further demonstrates why the Pipkins should not be granted a CCH.

### **Sparks Letter**

The Sparks Letter delineates the maximum breadth of the issues that could be referred for a CCH. The TCEQ ED's RTC addresses those issues in Section IV, beginning on page 3. The Tuckfield Letter attempts to bootstrap a dozen additional new issues not reasonably based on the comments raised in the Sparks Letter.

Focusing on the Sparks Letter and the ED's RTC, we address each of those issues according to the ED's RTC, as follows:

**Comment 1** states "Pipkin Ranch Holdings, LP, Bruce Fletcher Pipkin, and Grayson Eden Pipkin (the Pipkins) commented that the application seeks to "increase the pore space" for injection by 4000 feet."

The ED correctly responds "[t]he Application does not seek to increase the pore space; the Application does request to increase the vertical extent of the injection zone for each permitted injection well. Identifying 'pore space' is neither an application requirement nor a consideration when determining whether to grant an application for a Class I injection well. 'Pore space' means 'the open space in a rock or soil, considered collectively.'"

The ED goes on to discuss, in detail, some of the factors relevant to an UIC permit application. However, the ED's discussion does not negate the irrelevance of the "increase [in] pore space" issue – the actual issue raised in the Sparks Letter. Because the "pore space" issue is not relevant to this application, this issue cannot be referred as a disputed issue in a CCH; § 55.201(d)(4)(B) requires that only "...relevant and material..." issues be referred.

**Comment 2** states “[t]he Pipkins commented that they own approximately 1800<sup>2</sup> acres adjacent to the US Ecology Winnie facility and that they have entered a cont(r)act (sic) with Chevron USA, Inc to sell the right for Chevron to inject carbon dioxide into the sub-surface pore space of their property for agreed consideration and that they have not entered a contract with the Applicant.”

Though the ED’s response discusses various application requirements regarding property ownership and notice, the ED rightfully never states that there is any rule requirement that U.S. Ecology must contract with adjacent landowners or “pay consideration for use of [pore] space” as alleged in the Sparks Letter. That is because no such requirement exists in TCEQ’s rules, making the issue non-referable for a CCH. In fact, as previously mentioned in Section III of this response, TNRCC Docket No. 2000-0166-UIC states at Conclusion of Law No. 10 “Protestant FPL does not have an absolute right to exclude others from the deep subsurface below its property.” TNRCC Docket No. 2000-0166-UIC. Conclusion of Law No. 11 further concludes that “Protestant FPL does not have an absolute and exclusive property interest in the deep subsurface below its property.” *Id.* Not only is this issue based on an irrelevant factor, it also is an incorrect statement of Texas law and therefore is not referable.

**Comment 3** states “[t]he Pipkins commented that they have concluded that the waste plume injected by US Ecology has migrated through the subsurface onto their property because the US Ecology facility is located on fewer than 200 acres of property, because the Applicant has disposed of waste via injection, and because the Applicant plans to dispose additional waste by injection in the future. The Pipkins also commented that they may engage a geologist to verify that the waste plume is located on their property.”

Though the ED’s paraphrasing of the discussion in the Sparks Letter admirably attempts to extract some relevant meaning from the letter’s content, it goes beyond the actual comment raised in the Sparks Letter. Rather, the Sparks Letter only discusses the current and possible future “subsurface trespass and desecration of the Pipkin’s property” and goes on to allege a

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<sup>2</sup> Note that the RTC includes a typo; this should be 18,000 acres.

“taking without just compensation and/or tortious interference with a contract and/or existing business relationship, as well as other violations.” The Sparks Letter concludes by requesting a “...contested case hearing to establish the impact of the Permits on their subsurface pore space and to determine the extent of trespass of the Applicants (sic) waste on their property, as well as to address other matters related to Applicant’s conduct.” Nowhere in the Sparks Letter has there been any identification of an applicable regulation addressing “subsurface trespass” or “desecration of property.” This is because no such rule exists. These matters cannot be addressed by a CCH and the Pipkins’ rights to pursue such matters in a civil proceeding will not be affected in any way. A CCH is thus not an appropriate venue for such claims.

**Comment 4** states “[t]he Pipkins allege that US Ecology is committing negligence, gross negligence, trespass, subsurface trespass, public nuisance, private nuisance, tortious interference with a contract, and unjust enrichment ‘through’ UIC permits Nos. WDW344 -WDW350. The Pipkins further allege that the Commission granting the renewals and major amendment would constitute the Commission and the state of Texas endorsing or formally approving of the private act of trespass and would not be equitable.”

The ED correctly states in her response that the “causes of action raised by the commenters, negligence, gross negligence, trespass, subsurface trespass, public nuisance, private nuisance, tortious interference with a contract, and unjust enrichment, are civil causes of action. The Commission does not have jurisdiction to adjudicate these civil causes of action. Additionally, the Injection Well Act expressly states that a permit issued under the Act does not relieve a person of any civil liability. (Tex. Water Code § 27.104).” This issue is therefore not a referable issue.

**Comments 5 and 6** are requests for a public meeting and a CCH. These items are not referable as they raise no contested issue of fact or law.

### **Tuckfield Letter**

Finally, the twelve numbered issues listed in the Tuckfield Letter are not properly referable as they are not reasonably related to timely filed comments. A hearing request cannot bootstrap its way to expand a few timely-filed comments into a laundry list of a dozen issues. That is precisely the reason the statute and rules were crafted as they were. Hearing request issues must be raised by the requestor during the public comment period...” *See* 30 TEX. ADMIN. CODE § 55.201(d)(4). The Tuckfield Letter goes far beyond any issue raised during the comment period.

However, out of an abundance of caution, we address the twelve issues separately, as follows:

1. Whether any existing rights will be impaired by use or installation of the injection wells in accordance with Tex. Water Code § 27.051(a)(2) as a result of the issuance of these permits.
  - a. This is not a referable issue as it is not reasonably related to a timely filed comment.
  - b. The issues raised in the Sparks Letter are tort and trespass claims rather than claims under the Texas Water Code (“TWC”).
  - c. TCEQ has previously ruled that any rights a protestant may have to the deep subsurface of their property are not exclusive. U.S. Ecology’s potential use of the deep subsurface beneath the Pipkins’ property will not adversely impact any rights of the Pipkins.
2. Whether the Applicant correctly identified the proposed injection interval in accordance with 30 TAC §§ 331.62, 331.63, and 331.121.

- a. This is not a referable issue as it is not reasonably related to a timely filed comment. Identification of the proposed injection interval was not raised in the Sparks Letter.
3. Whether the Applicant correctly identified the facility as defined by 30 TAC § 335.1(69).
  - a. This is not a referable issue as it is not reasonably related to a timely filed comment.
  - b. The “facility” referenced in this request is already permitted under IHW Permit No. 39098, which was renewed by U.S. Ecology Winnie, LLC on July 2, 2020. As stated in the ED’s RTC, and footnote 1 of this response, this IHW permit is outside the scope of the ED’s consideration of this application.
4. Whether the Applicant has a legal right to inject liquids that will occupy pore space that they do not own.
  - a. This is not a referable issue as it is not reasonably related to a timely filed comment.
  - b. As previously discussed in response to Comment 1 above herein, this is not an issue relevant to the issuance of the permit.
5. Whether the Applicant has a legal right to use the facility.
  - a. This is not a referable issue as it is not reasonably related to a timely filed comment.
  - b. This issue was conclusively adjudicated when U.S. Ecology was granted its original UIC permits for all seven injection wells and IHW Permit No. 39098. IHW Permit No. 39098 is not due for renewal until July 2, 2030.

6. Whether the application contains an adequate review of all current and potential future artificial penetrations within the area of review that could provide a conduit for upward fluid migration. (30 TAC §§ 331.62, 331.63 and 331.121(c)(4)).
  - a. This is not a referable issue as it is not reasonably related to a timely filed comment.
7. Whether the applicant demonstrated that the injection zone and interval are isolated from the base of the USDW by impermeable strata in accordance with 30 TAC § 331.121(a)(4)(A)-(C).
  - a. This is not a referable issue as it is not reasonably related to a timely filed comment.
8. Whether Applicant properly identified the owner(s) of the real property where the UIC facility is located or is proposed to be located in accordance with 30 TAC § 305.45.
  - a. This is not a referable issue as it is not reasonably related to a timely filed comment.
  - b. This issue was conclusively adjudicated when U.S. Ecology was granted its original UIC permits for all seven injection wells and IHW Permit No. 39098.  
IHW Permit No. 39098 is not due for renewal until July 2, 2030.
9. Whether Applicant adequately depicted the boundary(s) of the tract(s) of land upon which the facility is located (30 TAC §§ 305.45 and 331.121).
  - a. This is not a referable issue as it is not reasonably related to a timely filed comment.

- b. This issue was conclusively adjudicated when U.S. Ecology was granted its original UIC permits for all seven injection wells and IHW Permit No. 39098.

IHW Permit No. 39098 is not due for renewal until July 2, 2030.

10. Whether the Applicant owns or has made a good faith claim to, or has the consent of the owner to utilize, or has an option to acquire, or has the authority to acquire through eminent domain, the property or portions of the property where the waste injection well will be constructed in accordance with Tex. Water Code § 27.051(a)(7).

- a. This is not a referable issue as it is not reasonably related to a timely filed comment.
- b. This issue was conclusively adjudicated in the original Environmental Processing Systems' applications for its existing permits, as cited in Section III of this response.

11. Whether Applicant adequately provided a legal description of the tract or tracts of land upon which the facility is or will be located. (30 TAC § 305.45 and Tex. Health & Safety Code § 361.087).

- a. This is not a referable issue as it is not reasonably related to a timely filed comment.
- b. This issue was conclusively adjudicated by the initial granting of the U.S. Ecology UIC and IHW permits.

12. Whether Applicant included a complete and accurate mailing list of the facility owner(s), facility mineral interest owner(s), adjacent landowners, and adjacent mineral interest owners cross-referenced to map depicts the parcels of land that constitute the facility and

that are adjacent to the facility. (30 TAC §§ 39.413(1), 39.651(c) and (d), 281.5(6), and 305.45(a)(6)).

- a. This is not a referable issue as it is not reasonably related to a timely filed comment.

In summary, none of the dozen issues raised in the Tuckfield Letter were “raised by the requestor during the public comment period” as required by 30 TEX. ADMIN. CODE §§ 55.211(c)(2)(A)(ii) and 55.201(d)(4)(B), and as paraphrased in 55.209(e)(1) and (4). If that requirement, as stated in *three* different places in TCEQ regulations, is to be applied as written and intended, none of the issues raised in the Tuckfield Letter are properly referable.

## V. CONCLUSION

The Sparks Letter fails to raise any issues that are relevant and material to the issuance of the permit, thereby negating the Pipkins’ standing as an affected party, and providing no issues for the Commission to review for a CCH.

The Tuckfield Letter first discusses the issues raised in the Sparks Letter in terms of a Request for Reconsideration, but then goes far beyond those irrelevant and immaterial issues in an attempt to broaden and twist the issues into issues that might have been referable, had they been actually based on timely-filed comments. The Tuckfield Letter seeks to expand the concerns raised in the Sparks Letter from tort claims to claims under the TWC. However, the TWC specifically states that “[t]he fact that a person has a permit issued under this chapter does not relieve him from civil liability.” TEX. WATER CODE § 27.104. The Pipkin’s ultimate concerns are matters under civil law, not administrative law. The remedy to such concerns would thus be in civil court, not an administrative proceeding. Therefore, denying this hearing

request does not deprive the Pipkins of seeking damages and arguing their ultimate concern. However, a CCH is not the proper avenue to raise tort claims such as trespass.

Should the Commission disagree with our findings and refer the matter to a CCH, the maximum time it should be referred for is no more than 180 days.

## **VI. PRAYER**

WHEREFORE, PREMISES CONSIDERED, U.S. Ecology respectfully requests that the Commission deny the hearing requests of the Pipkins and authorize the renewal and major amendment of Underground Injection Well Permit Nos. WDW-344, WDW-345, WDW-346, WDW-347, WDW-348, WDW-349, and WDW-350 by the ED.

Respectfully submitted,

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**ATTORNEYS FOR U.S. ECOLOGY**

**DOCKET NO. 2023-1590-WDW**  
**CERTIFICATE OF SERVICE**

I hereby certify that on the 29<sup>th</sup> day of January, 2024, a true and correct copy of the foregoing Applicant's Response to Request for Hearing was served on the following entities and individuals by electronic mail and/or USPS mail, return receipt requested, as further described herein.

  
DUNCAN C. NORTON

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# **EXHIBIT “A”**

# TEXAS NATURAL RESOURCE CONSERVATION COMMISSION



**AN ORDER** issuing modifications for Permit Nos. WDW-316 and WDW-317 to Environmental Processing Systems, L.C.; TNRCC Docket No. 2000-0116-UIC; SOAH Docket No. 582-00-0405

On February 7, 2001, the Texas Natural Resource Conservation Commission ("Commission" or "TNRCC") considered the application of Environmental Processing Systems, L.C. ("EPS" or "Applicant") for modifications to Permit Nos. WDW-316 and WDW-317 to expand the injection rates and capacities of EPS's waste injection facilities in Liberty County. The application was presented to the Commission with a Proposal for Decision by Kerry D. Sullivan and Craig R. Bennett, Administrative Law Judges (ALJs) with the State Office of Administrative Hearings.

After considering the ALJs' Proposal for Decision and the evidence and arguments presented, the Commission makes the following Findings of Fact and Conclusions of Law:

## FINDINGS OF FACT

### **GENERAL FINDINGS**

1. The Applicant is Environmental Processing Systems, L.C., which seeks permit amendments for its commercial non-hazardous Class I injection well permits, WDW-316 and WDW-317.
2. The EPS Injection Well Facility is located in Liberty County at 600 Hatcherville Road, Dayton, Texas, 77535, and its mailing address is P.O. Box 1350, Mont Bellvieu, Texas, 77580. Both injection wells under the permit amendments are, or will be, located at the EPS Hickory Island Farms Facility (the "Facility").

3. The original permits for the subject wells were issued by the Texas Natural Resource Conservation Commission ("TNRCC") on September 27, 1996. Under these permits, each well is currently permitted to inject at a maximum injection rate of 96 gallons per minute (gpm) and at an average injection rate of 68 gpm. The permitted monthly injection volume for each well is 3,035,520 gallons and the permitted annual injection volume for each well is 35,740,800 gallons.
4. EPS requests amendment to the permits in order to authorize an increase in injection rate and volumes for the wells to a maximum and average injection rate of 660 gpm per well (1,320 gpm cumulative) and injection volume to 29,462,400 gallons per month for each well (58,924,800 gallons cumulative) and 346,896,000 gallons per year for each well (693,792,000 gallons cumulative).
5. Injection well WDW-316 was constructed and completed on or about February 16, 1997, and is currently operational. WDW-317 was not constructed at the time of the contested case hearing in this proceeding, and EPS does not have specific plans for building WDW-317 in the immediate future.

#### **PROCEDURAL FINDINGS**

6. The Application for Permit Amendments was declared administratively complete on August 2, 1999, and notice of the Application was issued on August 5, 1999.
7. The Executive Director's Staff conducted a technical review of the Application, prepared draft permits, and notice of the draft permits was mailed and published.
8. Copies of the initial draft permits were forwarded to the Environmental Protection Agency (EPA).
9. Following the receipt of a hearing request, the Application was referred to the State Office of Administrative Hearings ("SOAH") for a contested case hearing.

10. A preliminary hearing was held on March 29, 2000, in Liberty, Texas. The only party named other than the statutory parties at the Preliminary Hearing was FPL Farming Ltd. ("FPL" or "Protestant").
11. A hearing on the merits was held at the SOAH offices on September 6, 2000, in Austin, Texas.

#### **APPLICATION FINDINGS**

12. The Application for the two permit amendments contain sufficient information for the technical review of the project.
13. The draft amended permits adequately explain operation and injection procedures to be implemented under the amendments.
14. The applicable TNRCC filing and review requirements for injection well amendment applications WDW-316 and WDW-317 have been satisfied.

#### **SITING AND LOCATION INFORMATION**

15. Injection well WDW-316 is located approximately 875 feet from the east line of the GC & SFRR Survey, A-458 and approximately 1,625 feet from the north line of the T.F. Pickney Survey, A-610.
16. Injection well WDW-317 will be located approximately 875 feet from the east line of the GC & SFRR Survey, A-458 and approximately 1,725 feet from the north line of the T.F. Pickney Survey, A-610.
17. EPS leases the property where the Facility is located.
18. A description of the ownership of the surface estate and mineral interests of tracts adjacent to the Facility was submitted with EPS's application for permit amendments.

19. There are no industrial, municipal waste injection wells, or waterflood wells completed in the EPS Area of Review ("AOR").
20. One salt water disposal well (SWD 3) is present to the southeast of the Facility. The well injects at an average injection rate of 46 gpm. The reservoir pressure modeling included in the Application considered the effects due to the presence of this well within the Area of Review ("AOR"). Given the thickness and permeability of the Frio Formation injection interval, the presence of SWD 3 has little to no effect on the EPS injection well operations.
21. EPS has examined and accurately described the structural and stratigraphic geology and the hydrogeology of the area and region of the injection wells.
22. Evaluation of the structural and stratigraphic geology reflects that the EPS Facility is located in a geologically suitable location for injection well operations. Further, the geology in the area will support the permit amendments requested.
23. The Catahoula/Oakville Formations are the lowermost USDW in the vicinity of the wells. The base of such occurs at depths of approximately 2,160 feet below ground surface in this area.

#### **INJECTION AND CONFINEMENT**

24. The injection zone for injection wells WDW-316 and WDW-317 is within the Frio Formation from approximately 6,000 feet to 8,200 feet below ground level. The average net sand thickness within the Frio injection zone in the AOR is 842 feet.
25. Across the AOR, the Anahuac Shale serves as the confining zone for the EPS injectate and is approximately 330 feet thick. The top of the Anahuac Shale is at a depth of 5,670 feet in the injection wells. The Anahuac Shale Interval represents a significant barrier to vertical and horizontal fluid movement. The Anahuac Shale is predominantly shale with some wells in the AOR having a carbonate interval within the upper Anahuac. In the AOR, the average thickness of the Anahuac Shale is interpreted to be 416 feet. The thickness of the confining

zone is approximately 330 feet thick in the Hickory Islands Farm WDW-316 injection well. The Anahuac Shale in the AOR has porosities averaging 13% and permeability that averaged 1 md (porosity and permeability taken from sidewall and whole core analysis of the WDW-316 injection well).

26. The confining zone is laterally continuous and free of transecting, transmissive faults or fractures to prevent migration of fluids into an underground source of drinking water ("USDW").
27. Known artificial penetrations of the injection and confining zones within a 2½ mile radius from the disposal well are properly plugged or constructed to prevent endangerment to a USDW. Ambient monitoring and mechanical integrity tests ("MIT") of the disposal well was performed in April 1999.
28. The containment interval for EPS's injection wells is the upper part of Oligocene Frio Formation between 6,000 feet to about 7,350 feet. This interval is composed of alternating layers of sand and shale. Shale layers range between 10 feet to 50 feet thick and sand layers range from about 10 feet to 70 feet thick. The containment interval provides additional layers of confinement to ensure that no injected wastes move upward out of the injection interval to a point of contact with a USDW.
29. The injection interval for EPS's injection wells is the middle and lower part of the Oligocene Frio Formation. The injection interval depths for WDW-316 and WDW-317 are from approximately 7,350 feet to 8,200 feet below ground level. The top of the injection interval is present at a depth of 7,360 feet in WDW-316. The base of the Frio Formation injection interval is at a depth of approximately 8,200 feet.
30. The EPS injection interval has sufficient permeability, porosity, thickness and lateral extent to prevent movement of constituents from the injection zone into a USDW or freshwater aquifer.
31. The total injection interval thickness is approximately 840 feet thick. The total net sand thickness in the WDW-316 injection well is approximately 510 feet.

32. For the WDW-316 injection well, the well is perforated in the lower part of the injection interval between 7,908 and 8,080 feet. This is only about 110 feet of the total net sand thickness, leaving about 400 feet of net sand in the permitted injection interval available for injection.

#### **POROSITY AND PERMEABILITY**

33. The average porosity of the EPS injection interval is 26.5%.
34. Core-derived values of permeability were developed for a 40-foot cored section (7,820 feet - 7,859 feet) within the middle portion of the EPS injection interval. The permeability ranged from 5.5 md to 6,510 md with an arithmetic average permeability of 886 md.
35. The representative permeability of the injection interval is 1,120 md.

#### **BOTTOM HOLE TEMPERATURE**

36. The bottom hole temperature ("BHT") is 170 degrees Fahrenheit at 7,360 feet KB at the top of the injection interval. The temperature at 600 feet KB was 80 degrees Fahrenheit and the temperature at 8,100 feet KB was 179 degrees Fahrenheit.

#### **INJECTION RESERVOIR FLUID**

37. The injection interval reservoir fluid in the Frio Formation brine has a total dissolved solid ("TDS") value of 146,000 milligrams per liter (mg/l). The dissolved solids are composed of approximately 81% NaCl. The specific gravity of the formation fluid is 1.09 at 68 degrees Fahrenheit and the viscosity is 1.188 at 73 degrees Fahrenheit.

#### **FRACTURE GRADIENT**

38. The fracture pressure at a depth of 7,360 feet KB (top of injection interval) is 5,755 psig. The Maximum Allowable Surface Injection Pressure (MASIP) is 1,830 psig. The currently permitted MASIP for WDW-316 and WDW-317 is 1,500 psig.

### **CONE OF INFLUENCE**

39. The calculated cone of influence of the injection wells extends a distance of approximately 400 feet from the injection wells.

### **STATIC FLUID LEVEL AND REGIONAL GRADIENT**

40. The native brine specific gravity (at bottom hole temperatures) is 1.0614. The hydrostatic pressure of the injection interval would elevate the native brine head 7,050 feet [3,240 psi/(1.0614)(0.433 psi/ft)], or 293 feet below ground level ("BGL").
41. The direction of both shallow and deep groundwater is controlled primarily by the topographic gradient of the Gulf Coast Plain. Thus, water recharging the aquifers on the Gulf Coasts Plain penetrates to several thousand feet in a direction from northwest to southeast below the EPS Facility. Circulation is most rapid in the fresh water aquifers, and movement is relatively slow in the deep saline zone.

### **RATE OF GROUNDWATER MOVEMENT**

42. The hydraulic gradient for the Catahoula/Oakville formations is 2.5 feet per mile.
43. The maximum flow rate is 1.6 feet/year.

### **WASTE PLUME GEOMETRY**

44. Subsurface mapping of the Frio Formation injection interval indicates that the injection interval sands are laterally continuous across the area of review and maintain relatively constant thickness. In addition, the Frio Formation sands of interest in this Amendment Application are unlithified. However there is a no flow boundary about 5,500 feet from the injection well. This is associated with Fault A located to the west of the Facility.

### **EXTENT OF THE WASTE PLUME**

45. Assuming that 100 percent of the yearly cumulative injection volume (660 gpm) will be injected, the 10-year waste plume radii will be 3,021 feet from the wells, and the 30-year waste plume radii will be 5,145 feet from the wells.

## **COMPARISON TO OTHER INJECTION WELL OPERATIONS**

46. The actual perforated section of injection well WDW-316 is 7,908 to 8,080 feet, making this the deepest Class I injection well for the area. Between the top of the permitted injection zone at 6,000 feet and the nearest USDW at 2,160 feet are numerous permeable sands to act like bleed-off zones to receive injected waste if it escapes out of the injection zone. The well is permitted for a maximum injection pressure of 1,500 psig and is under 1,982 psi, which is considered the maximum safe injection pressure. A review of ten permitted Class I injection facilities in the area showed that the injection rate ranged from 300 to 800 gpm, the injection pressure from 1,000 to 1,500 psi, and the injection intervals from 4,800 to 7,650 feet.

## **PERMIT CONDITIONS**

47. The proposed permits limit the type of waste streams that may be injected (hazardous wastes are prohibited), the injection pressure cannot exceed 1,500 psig, the injection rate cannot exceed 660 gpm, and the injection of wastes is limited within the injection zone between 6,000 to 8,200 feet. An approved mechanical integrity test must be performed at least on a yearly basis, and the wells must pass this test for continued operations. The proposed permits also contain monitoring, waste analysis, and other operational requirements.

## **WASTEWATER COMPATIBILITY**

48. The wells will dispose of nonhazardous wastes generated by the EPS Facility and from other sources. Industrial nonhazardous waste authorized to be injected by the amended permits include wastes generated during closure of the well and associated facilities that are compatible with permitted wastes, the injection zone, and the well.

## **INJECTION WELL OPERATION**

49. If operated as designed, EPS's injection wells will adequately protect surface fresh water and groundwater and will prevent the movement of fluid that could result in pollution of a USDW.

## **CONTINGENCY PLANNING**

50. EPS prepared a contingency plan, included in the permit application submittals dated August 31, 1993, September 29, 1994, January 23, 1995, March 21 1995, and June 16, 1995, and which should be incorporated into the amended permits by reference.

## **MARKET**

51. The injection rate limitations in the current permits are inadequate to properly provide service to the market area.
52. The operation of the injection wells will allow EPS to better serve the market it is in, and is protective of the safety and health of the environment.

## **COMPLIANCE HISTORY**

53. Except as noted in Finding of Fact No. 54, the Facility has maintained compliance with its permits.
54. A Compliance Evaluation Inspection ("CEI") was conducted and minor issues were noted and subsequently resolved without the need for a formal enforcement action. The minor compliance issues resolved were recorded as being that "The contingency plan did not have the coordinators listed; the electrode for the measurement of PH levels had not been calibrated; hazardous waste information for the SOCK filters was requested; and the Notice of Receipt (NOR) needed updating."
55. There have been no citizen complaints regarding the Facility in the last five years.
56. There are no pending enforcement actions, nor have there been prior enforcement actions at the Facility in the last five years.
57. The Facility is current on its fees.

## **FINANCIAL ASSURANCE**

58. The Applicant has satisfied applicable financial assurance requirements imposed by the TNRCC, including a showing that the wells will be properly plugged and abandoned.

## **OTHER FINDINGS RELATED TO CONTESTED ISSUES**

59. Protestant FPL does not own the oil and gas mineral interests associated with its properties in the area, and has not identified a specific reasonable or foreseeable intended use of the deep surface where EPS's injectate may migrate.

60. Oil and gas interests in the area of the Facility will not be impaired by the proposed permit amendments.
61. There is no expected adverse impact on the environment from the proposed permit amendments.
62. In 1996, EPS paid the sum of \$185,000 to FPL's predecessor-in-title to resolve all disputes related to the original permit applications for injection wells WDW-316 and WDW-317.
63. The settlement agreement between EPS and FPL's predecessor-in-title does not specifically state that challenges to amendments to the original permits have been waived.

#### CONCLUSIONS OF LAW

1. The Texas Natural Resource Conservation Commission (Commission) has jurisdiction under TEX. WATER CODE ANN., Chs 26 and 27, and TEX. HEALTH & SAFETY CODE ANN. Ch. 361 to consider applications for amendment to injection well permits WDW-316 and WDW-317, and is thereby authorized to grant the requested permit amendments.
2. Notice was provided in accordance with 30 TEX. ADMIN. CODE §§ 39.5 and 39.251, and TEX. GOV'T CODE §§ 2001.051 and 2001.052.
3. Administrative Law Judges (ALJs) from the State Office of Administrative Hearings (SOAH) have jurisdiction to conduct a hearing and to prepare a proposal for decision in this matter under TEX. GOV'T CODE § 2003.047. The permit amendment applications were processed and the proceedings herein described were conducted in accordance with applicable law and regulations of the Commission, specifically 30 TEX. ADMIN. CODE § 80.1 *et seq.*, and SOAH, specifically 1 TEX. ADMIN. CODE § 155.1 *et seq.*, and all other applicable procedural requirements relative to notice, hearing, and due process of law were met.

4. EPS submitted complete permit amendment applications, as required by TEX. HEALTH & SAFETY CODE ANN. §§ 361.066 and 361.068, which demonstrate that EPS will comply with all aspects of the applications and design requirements of the relevant rules and statutes including TEX. WATER CODE ANN. Chs 26 and 27 as well as 30 TEX. ADMIN. CODE Chs 281, 305, 331 and 335.
5. The operation of injection wells WDW-316 and WDW-317 pursuant to the requested permit amendments, will not adversely affect the public health or the environment as required by TEX. WATER CODE ANN. Chs 26 and 27 as well as 30 TEX. ADMIN. CODE Chs 281, 305, 331 and 335.
6. The use or installation of injection wells WDW-316 and WDW-317, under the requested permit amendments, is in the public interest pursuant to TEX. WATER CODE ANN. §§ 27.003 and 27.051.
7. Injection wells WDW-316 and WDW-317, under the requested permit amendments, meet all siting criteria and are located, or will be built, on property leased by EPS pursuant generally to TEX. WATER CODE ANN. Ch 27, and 30 TEX. ADMIN. CODE Chs. 281, 305, 331 and 335.
8. EPS has made a satisfactory showing of financial responsibility to insure that the injection wells will be properly plugged and abandoned as required by 30 TEX. ADMIN. CODE §§ 331.141-331.147.
9. Protestant FPL's right to challenge the proposed permit amendments has not been waived by virtue of the 1996 settlement agreement between EPS and FPL's predecessor-in-title, regarding injection wells WDW-316 and WDW-317.
10. Protestant FPL does not have an absolute right to exclude others from the deep subsurface below its property.
11. Protestant FPL does not have an absolute and exclusive property interest in the deep subsurface below its property.

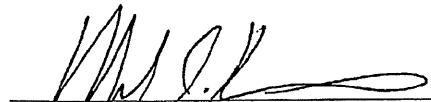
12. No existing rights, including, but not limited to, mineral rights, will be impaired by the construction of and/or operation of injection wells WDW-316 and WDW-317 under the requested permit amendments as required by TEX. WATER CODE ANN. § 27.051(a)(2).
13. Protestant FPL has not shown that its intended use of the deep subsurface below its property will be impaired by the migration of injected waste from wells WDW-316 and WDW-317.
14. No property will be taken for public use, within the meaning of the Fifth Amendment to the United States Constitution, by virtue of the operation of the injection wells WDW-316 and WDW-317 under the requested permit amendments.
15. Proper safeguards have been included in the design, construction and operation specifications of injection wells WDW-316 and WDW-317, under the requested permit amendments, to adequately protect both ground and surface fresh water from pollution as required by TEX. WATER CODE ANN. § 27.051(a)(3).
16. The Application for the two permit amendments meets the technical requirements of the rules of the TNRCC.
17. EPS has satisfied all statutory and regulatory requirements for the Commission to issue the requested amendments to injection well permits WDW-316 and WDW-317 including TEX. WATER CODE ANN. Chs 26 and 27 as well as 30 TEX. ADMIN. CODE Chs 281, 305, 331 and 335.
18. In order to effectuate the policies of the state in maintaining the quality of fresh water to the extent consistent with the public health and welfare, the operation of existing industries, the economic development of the state, and to prevent underground injection that may pollute fresh water, the requested amendments to permits WDW-316 and WDW-317 should be granted and the amended permits for injection wells WDW-316 and WDW-317 should be issued pursuant to TEX. WATER CODE ANN. § 27.003.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS NATURAL RESOURCE  
CONSERVATION COMMISSION THAT:

1. Amendments to Permit Nos. WDW-316 and WDW-317 for the commercial non-hazardous Class I injection well Facility in Liberty County, Texas, are hereby issued to Environmental Processing Systems, L.C.
2. All other motions, requests for entry of specific findings of fact or conclusions of law submitted by any party, and any other request for general or specific relief not expressly granted or adopted herein are denied for want of merit.
3. The Chief Clerk of the Texas Natural Resource Conservation Commission shall forward a copy of this Order and attached permit to all parties and, subject to the filing of motions for rehearing, issue the attached permit.
4. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of such shall not affect the validity of the remaining portions of the Order.
5. The effective date of this Order is the date the Order is final. The Order is final and appealable as provided by 30 TEX. ADMIN. CODE § 80.273 and TEX. GOV'T CODE § 2001.144.

Issued: FEB 12 2001

TEXAS NATURAL RESOURCE  
CONSERVATION COMMISSION

  
Robert J. Huston, Chairman