

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

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

I. INTRODUCTION

TexCom Gulf Disposal, L.L.C. (TexCom) has applied for an Industrial Solid Waste (ISW) permit in conjunction with its applications for four Underground Injection Control (UIC) permits, which would authorize four underground injection wells to dispose of nonhazardous industrial wastewater at a facility located near the City of Conroe in Montgomery County, Texas. The ISW permit is needed for the surface facilities that would be used at the injection well site. The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ) approved the application and prepared a draft permit which, if approved, would authorize TexCom to operate the surface facility at the wastewater injection site in accordance with the terms, requirements, and conditions set forth in the permit. Montgomery County and the City of Conroe (Aligned Protestants), the Lone Star Groundwater Conservation District (Lone Star), and several aligned individual protestants (Individual Protestants) oppose TexCom’s application. They contend that the Commission has inadequate rules governing the surface facility, that the application is deficient, that TexCom did not meet its burden of proof, and that operation of the proposed facility would pose an unacceptable risk to the surface waters and the underground drinking water for the area. The TCEQ Office of Public Interest Counsel (PIC) also opposes the application or, alternatively, requests that a special condition be added to the permit to relocate the entrance to the facility.

TexCom requested a direct referral of this matter to the State Office of Administrative Hearings (SOAH) for a contested case hearing without limitation on the issues to be considered. In addition, TexCom requested a direct referral of TexCom’s separate application for its UIC permits. The UIC application was designated as TCEQ Docket No. 2007-0204-WDW and SOAH Docket No. 582-07-2673. TexCom’s application for the UIC permits and this application for the ISW permit

were consolidated for the hearing on the merits, but a separate proposal for decision (PFD) concerning the UIC permit application will be issued simultaneously with this PFD.

Based on the evidence presented, the Administrative Law Judges (ALJs) recommend that the Commission approve TexCom’s application and grant ISW Permit No. 87758.

II. PARTIES AND PROCEDURAL HISTORY

The following were designated as parties to this case:

Party	Representative
TexCom Gulf Disposal, L.L.C. (TexCom)	John Riley and Patrick Lee, Attorneys, Austin, Texas
Montgomery County and City of Conroe (Aligned Protestants)	David K. Walker, Montgomery County Attorney; Julie B Stewart, Assistant Montgomery County Attorney, Conroe, Texas
Lone Star Groundwater Conservation District (Lone Star)	Michael A. Gershon, Attorney, Austin, Texas
Aligned Individual Protestants ¹ (Individual Protestants)	Kevin A. Forsberg, Attorney, Montgomery, Texas
ED	J. Diane Goss and John E. Williams, Staff Attorneys, Environmental Law Division, TCEQ
PIC	Emily A. Collins, Attorney, Public Interest Counsel

¹ The individual protestants are: Nickey E. Dyer, Flora Harrell, Edgar Hoagland, Shirley Hoagland, Patty Mouton, James Langston, James A. Langston, III, Lois Nelson, James Nolan, George Phillips, Brian Rodel, Richard Ward, Edwin (Art) Wilson, Al Zaruba, and Jerry Zaruba.

The procedural history of this case is summarized as follows:

August 2, 2005	TexCom filed an application with TCEQ for an Industrial Solid Waste Permit.
August 29, 2005	ED declared TexCom's application administratively complete.
March 9, 2006	ED held public meeting in Conroe to receive public comment.
June 28, 2006	TCEQ Staff issued a Technical Summary and Executive Director's Preliminary Decision approving the application.
February 6, 2007	ED issued written responses to public comment.
April 13, 2007	TexCom requested direct referral of the proceeding to SOAH.
April 19, 2007	Case referred to SOAH for a contested case hearing.
May 9, 2007	TCEQ Chief Clerk issued a notice of hearing for July 18, 2007.
July 18, 2007	Preliminary hearing held by SOAH in Conroe.
July 24, 2007	SOAH Order No. 1 established a procedural schedule leading to a hearing on the merits on December 12, 2007.
December 12-18, 2007	Hearing on the Merits held in Conroe and Austin.
February 4, 2008	Parties filed Closing Arguments.
February 25, 2008	Parties filed Replies to Closing Arguments and the record closed.

III. BACKGROUND

TexCom has applied for an ISW permit for the surface facility and equipment of its proposed nonhazardous wastewater UIC site. TexCom seeks a permit to construct and operate the surface facility for up to four Class I UIC wells on approximately 27 acres of land located at 16185 Creighton Road in Montgomery County. The proposed Class I UIC wells would inject nonhazardous industrial wastewater into a geological formation more than 5,000 feet below the surface. Mr. Carl Brassow, P.E., J.D., prepared the engineering design work for the surface facility.

The proposed surface facility would be a secured area with equipment used to offload, process, and temporarily store the nonhazardous wastewater prior to injection. It would occupy a 143-foot by 100-foot rectangular area, comprising 0.33 acre of TexCom's 27-acre site. The surface facility would include two separate parts, the Waste Unloading and Solids Area (WUSA) and the Main Containment Area (MCA). All waste handling activities, besides injection, would take place within either the MCA or the WUSA.²

The WUSA is the contained area where trucks would unload client wastewater and where solids that have been removed from the wastewater would be temporarily stored until disposal at an off-site landfill. It is designed to accommodate vehicle traffic, support tanker-truck and solids bin weight, and collect any accumulated stormwater and leaks/spills. Within the WUSA, wastewater would be offloaded from tanker trucks by a flexible hose attached to the truck and an unloading pump. During offloading, the wastewater would be pumped directly to one of four Waste Storage/Mixing tanks or to one of two shaker screen units used for coarse particle removal, all of which would be located in the MCA.³

The MCA is the contained area where all processing and storage activities would take place. It includes eight tanks for storage and processing the wastewater. Within the MCA, wastewater would be treated to remove particles, separate oil or grease, or adjust pH, as needed. Wastewater mixing would be performed in one of the four Waste Storage/Mixing Tanks, or in one of the two Reaction Tanks. Once mixing has met its chemical concentration objective, the wastewater would be considered injectate and transferred to one of two Injection tanks for down-hole injection.⁴

² TexCom Ex. 59, Brassow direct at 12-14.

³ TexCom Ex. 59, Brassow direct at 13-14.

⁴ TexCom Ex. 59, Brassow direct at 13-15.

The design of the surface facility currently calls for a truck entrance at an existing driveway off Creighton Road, which is a two-lane black-top road, that intersects with Albert Morehead Road approximately 700 feet east. Albert Morehead Road, in turn, intersects with FM 3083 about 100 feet to the North. However, the opposite end of TexCom's 27-acre tract connects directly to FM 3083, a significant roadway in the area. If allowed by the Texas Department of Transportation, TexCom has stated that it would relocate the entrance to its surface facility to FM 3083.

IV. APPLICABLE LAW

TEX. HEALTH & SAFETY CODE § 361.061⁵ allows the Commission to issue permits authorizing and governing the construction, operation, and maintenance of solid waste facilities used to store, process, or dispose of industrial solid waste. Further, § 361.064 requires the Commission to prescribe the form and reasonable requirements for the permit application and the procedures for processing the application. In addition, TEX. WATER CODE §§ 5.551 and 5.557 provide that, for an application for a permit under TEX. HEALTH & SAFETY CODE Chapter 361, the Commission can make a direct referral to SOAH for a contested case hearing on whether the application complies with "all applicable statutory and regulatory requirements."

A major disputed issue in this case is what statutes and regulations, if any, are applicable to this ISW permit application. Before the hearing on the merits, Lone Star and Aligned Protestants filed a Joint Motion to Certify Questions and Abate Proceeding and an Alternative Motion for Summary Disposition, in which they argued that TexCom's application should be denied because the TCEQ has no rules or inadequate rules governing the treatment, storage, and processing of nonhazardous industrial solid waste at TexCom's proposed surface facility. The Individual Protestants and the PIC also supported the motion for summary disposition. TexCom and the ED

⁵ Section 361.061 of the Water Code is entitled "PERMITS; SOLID WASTE FACILITY" and states that "except as provided by Section 361.090 with respect to certain industrial solid waste, the commission may require and issue permits authorizing and governing the construction, operation, and maintenance of the solid waste facilities used to store, process, or dispose of solid waste under this chapter."

opposed the motion, arguing that the Commission has adopted adequate applicable rules and that Intervenor's⁶ motion was, in effect, an improper request for rule-making. On November 29, 2007, the ALJs denied the motions filed by Lone Star and Aligned Protestants, but those parties continue to re-urge those arguments in their post-hearing briefs.

On December 7, 2008, Staff provided the parties and ALJs a list of regulations that apply to the ED's review of an application for a nonhazardous industrial solid waste permit. The rules cited by the ED are contained in 30 TAC Chapter 37 (Financial Assurance), Chapter 305 (Consolidated Permits), Chapter 335 (Industrial Solid Waste and Municipal Hazardous Waste), and Chapter 350 (Texas Risk Reduction Plan). The ED's list included the applicable portions of the following:

- Financial assurance: 30 TAC Chapter 37, Subchapter P (§§ 37.6001, 37.6011, and 37.6021);
- General and specific permit requirements and standards: 30 TAC Chapter 305, Subchapters A and C (§§ 305.1, 305.2, 305.3, 305.41, 305.42, 305.43, 305.44, and 305.47), and 30 TAC Chapter 335, Subchapters A and F (§§ 335.1, 335.2, 335.4, 335.30, 335.153, and 335.155);
- The applicant, the proposed activity, and the proposed site: 30 TAC Chapter 305, Subchapter C (§ 305.45(a)(1) through (a)(7));
- Minimum engineering requirements, waste management, and operational standards: 30 TAC Chapter 305, Subchapter C (§§ 305.45(a)(8) and 305.50), and Chapter 335, Subchapter A (§ 335.3);
- Processing changes to permits after they are issued: 30 TAC Chapter 305, Subchapter D (§§ 305.61 through 305.69);

⁶ The term "Intervenor" includes PIC, LoneStar, the Aligned Protestants and the Individual Protestants. The term "Protestants" includes only Lone Star, the Aligned Protestants and the Individual Protestants.

- Standard provisions to assure compliance with the permit and applicable laws and regulations: 30 TAC Chapter 305, Subchapters F and G (§§ 305.121 through 305.125; 305.127 through 305.129; 305.141 through 305.145);
- Compliance with standards for closure of the facility: 30 TAC Chapter 335, Subchapter A (§ 335.8) and Chapter 350.

The rules cited by the ED relate to TexCom's application, but most address non-substantive issue such as definitions, contents of applications, and similar matters. However, 30 TAC § 335.4 is a substantive rule that states that following prohibitions:

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 . . . in such a manner 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 Texas [Commission on Environmental Quality];
- (2) the creation and maintenance of a nuisance; or
- (3) the endangerment of the public health and welfare.

In response to the Lone Star and Aligned Protestants' pre-hearing motions, TexCom cited some of the same rules as the ED, and it also cited 30 TAC § 281.5⁷ (listing required items to be included in permit applications); 30 TAC §§ 331.63 (requiring quarterly calibration and testing of gauges, pressure sensing, and recording devices) and 331.66 (requiring signs, an all-weather road, painting, and maintenance).

⁷ 30 TAC § 281.5 states that "except as provided by § 305.48 of this title (relating to Additional Contents of Applications for Wastewater Discharge Permits), applications for wastewater discharge including subsurface area drip dispersal systems, underground injection, municipal solid waste, radioactive material, hazardous waste and industrial solid waste management permits must include: (1) complete application form(s), signed and notarized, and appropriate copies provided; (2) the payment of fees, if applicable; (3) the verified legal status of the applicant; (4) the signature of the applicant, checked against agency requirements; (5) the attachment of technical reports and supporting data required by the application; (6) a list of adjacent and potentially affected landowners and their addresses along with a map locating the property owned by these persons; and (7) any other information as the executive director or the commission may reasonably require.

The ALJs decline to recommend denial of TexCom's application based on Intervenors' arguments that the rules are inadequate. 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 amendments. Nevertheless, as shown in the ED's list of rules described above, the Commission's rules do contain various provisions that apply to TexCom's application. Further, the ALJs agree with TexCom and the ED that Intervenors' arguments effectively request a rulemaking proceeding, which is beyond the scope of this contested case hearing.

V. DISCUSSION

The issues contested by the parties at the hearing include: the adequacy of TexCom's application, the proposed design and operation of the facility, stormwater runoff, and other issues. These are discussed below.

A. Adequacy of Application

The Intervenors contend that TexCom's application is incomplete in numerous respects. TexCom disputes these contentions. The ALJs find that whether TexCom's application is administratively or technically complete is not a decisive issue for this case. Instead, the substance of the information provided in the application and other evidence admitted at the hearing must be evaluated to determine whether the proposed surface facility will satisfy the requirements of the applicable statutes and rules for an industrial solid waste permit. Those substantive issues are discussed in later sections of this PFD.

Lone Star championed the majority of the objections to TexCom's application for the Protestants. Lone Star contends that TexCom's application is deficient in the following respects:

- Failing to comply with standards set out in 30 TAC § 335.4, by (1) posing an imminent threat of discharging industrial waste into, or adjacent to, state waters; (2) creating a nuisance, and (3) endangering the environment and public health, welfare, and physical property
- Failing to provide information about a required air permit under 30 TAC § 305.45(a)(5).⁸
- Failing to adequately address air emission and stormwater controls in its technical report as required by 30 TAC §§ 305.45(a)(8)(A) and 305.50(a)(2).⁹

⁸ 30 TAC § 305.45(a)(5) and (8)(A) provide:

(a) Forms for permit applications will be made available by the executive director. Each application for permit must include the following:

...

(5) the activities conducted by the applicant which require a permit;

...

(8) a supplementary technical report submitted in connection with an application. The report shall be prepared either by a Texas licensed professional engineer, a licensed professional geoscientist, or by a qualified person who is competent and experienced in the field to which the application relates and thoroughly familiar with the operation or project for which the application is made. The report must include the following:

(A) 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;

⁹ 30 TAC § 305.50(a)(2) and (7) provide:

(a) Unless otherwise stated, an application for a permit to store, process, or dispose of solid waste must meet the following requirements.

...

(2) 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. For purposes of this section, the terms "permit holder" and "applicant" include each member of a partnership or association and, with

- Failing to have certain application documents sealed by a licensed engineer as required in 30 TAC § 305.50(a)(7).
- Failing to provide a sufficient outline and checklist for its closure and post-closure plans as contemplated by 30 TAC § 335.8
- Failing to provide all the information required in the Form INS-0024 Instructions.

The Aligned Protestants also argues that TexCom's application does not meet the legislative mandate in the Solid Waste Disposal Act.¹⁰ The mandate states:

It is the state's policy and 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.

Based on *Citizens Against Landfill Location v. Texas Commission on Environmental Quality*,¹¹ PIC contends that whether TexCom's application is administratively or technically complete is not a decisive issue. Rather, PIC states, the purpose of the hearing is to determine whether the substance of the information provided in TexCom's application and other evidence received at the hearing fulfill the statutory purposes of the Solid Waste Disposal Act.¹²

respect to a corporation, each officer and the owner or owners of a majority of the corporate stock, provided such partner or owner controls at least 20% of the permit holder or applicant and at least 20% of another business which operates a solid waste management facility.

...

(7) Engineering 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.

¹⁰ TEX HEALTH & SAFETY CODE ANN. § 361.002.

¹¹ 169 S.W.3d 258, 272 (Tex. App. – Austin 2005, pet. denied).

¹² PIC's Closing Argument at 3-4.

The ED declared TexCom's application administratively complete on August 29, 2005.¹³ The TCEQ engineer charged with conducting the technical review of TexCom's application, Mr. Michael Graeber, P.E., explained that during his review of permit applications, if he discovers an omission or error in an application he issues a "Notice of Deficiency" to the applicant so the problem can be corrected. Mr. Graeber issued two "Notice of Deficiency" to TexCom. According to Mr. Graeber, TexCom provided satisfactory responses.¹⁴ Mr. Graeber also explained that he did not require TexCom to provide information for a subsurface monitoring plan or a post-closure plan because these plans do not apply to TexCom's facility. These type of plans apply to facilities that use "land-based storage or treatment facilities such as surface impoundment, land treatment unit, and waste piles." TexCom's facility will not engage in any of these types of disposal.¹⁵

In reviewing the application, Mr. Graeber applied the state regulations under 30 TAC Chapter 305.¹⁶ During his deposition, Mr. Graeber clarified that TexCom's application includes all the information required by 30 TAC §§ 281.5, 305.45, and 305.50. At the hearing, Mr. Graeber adopted his Technical Summary and Preliminary Decision without change. Therefore, the ED concludes that the administrative completeness of the surface facility application is not at issue.¹⁷

In response to the Protestant's complaints, TexCom maintains that its surface facility application is complete and provided the ED with the necessary information required by the applicable rules, 30 TAC §§ 281.5, 305.45, and 305.50. The engineer who designed the surface facility, Mr. Brassow, represented that the Application contained all the information required by

¹³ ED's Closing Argument at 4.

¹⁴ TexCom Ex. 63, Graeber's deposition at 3-4; ED Ex. 14, Graeber's prefiled at 8.

¹⁵ Ex. Ex. 14, Graeber's direct at 11.

¹⁶ ED Ex. 14, Graeber's direct at 4.

¹⁷ ED's Closing Arguments at 5-6.

applicable rules.¹⁸ This was confirmed by Mr. Graeber, who conducted a 10-month technical review of the Application for the ED.¹⁹ Mr. Graeber testified that the application included all information required by the Commission's rules and all the information he needed to prepare his technical review. He further stated that all sections of the proposed surface facility application that were required to be sealed by an engineer were properly sealed by Mr. Brassow.

As for the Surface Water Protection Plan, TexCom points out that Lone Star and the Aligned Protestants are arguing that TexCom failed to comply with Staff's instructions. TexCom denies that it failed to follow instructions, noting instead that the Surface Water Protection Plan was issued in response to a Notice of Deficiency requesting more information. TexCom prepared and submitted a map²⁰ to Mr. Graeber detailing the Surface Water Protection Plan. While Lone Star's expert, Mr. Ray Shull, P.E., questioned whether the map was sufficient enough, TexCom argued that Mr. Graeber, who asked for the information, confirmed that all TexCom's responses to Notices of Deficiency were satisfactory and that TexCom provided all the technical information required by TCEQ practice and procedures.²¹

In response to Lone Star's argument that Mr. Brassow failed to stamp pages within the Application with his engineering seal as required, TexCom asserted that Mr. Brassow sealed the documents required to be sealed by TCEQ. Mr. Graeber testified that TexCom met the requirements. Lone Star contends that Mr. Brassow should have placed his engineering seal on the engineering report, the waste management unit list and design capacities, surface equipment schedule, and the

¹⁸ TexCom Ex. 59, Brassow direct at 9; TexCom's Closing Arguments at 52.

¹⁹ TexCom's Closing Arguments at 52.

²⁰ TexCom Ex. 39 at 103.

²¹ TexCom Ex. 63, Graeber Deposition at 4 and 5.

schedule depicting waste management unit information. Mr. Brassow filed a Engineer Report Certification to address Lone Star's concerns, but Lone Star argues that this is insufficient because it does not comply with the Texas Engineering Practices Act.

The ALJs find that the purpose of this proceeding is to determine whether the substance of TexCom's application and other evidence fulfill the statutory requirements of the Solid Waste Disposal Act. The ED has already determined that the application was administratively and technically complete prior to the hearing. As PIC referenced, *Citizens Against Landfill Location v. Texas Commission on Environmental Quality*,²² involved a solid waste facility and the court, relying on TEX. HEALTH & SAFETY CODE § 361.068, held that an applicant is not required to establish at a contested case hearing that its application is technically and administratively complete, because the applicant will have already done so prior to the hearing.²³

Therefore, the decisive issue for this case is whether the substance of the information TexCom provided in its application and the evidence received at the hearing satisfy the requirements of the applicable statutes and rules. Protestants' complaints about the completeness of TexCom's application relate to disputes about the substantive issues discussed later in this Proposal for Decision (Proposed Design and Operation of Surface, V.B.; Stormwater Runoff, V.C.; and Other Issues Raised Concerning Surface Facility Application, V.D.). Because the ED has already found that TexCom's application is administratively and technically complete and that the information within the application that required an engineer's seal was properly sealed by an engineer, the ALJs conclude that the issues raised by Protestants are properly addressed as substantive issues on whether TexCom's proposed surface facility complies with the relevant legal and regulatory requirements. These substantive issues raised by the Protestant are considered in the appropriate section of this Proposal for Decision.

²² 169 S.W.3d 258, 272 (Tex. App. – Austin 2005, pet. denied).

²³ *Id.*

B. Proposed Design and Operation of the Surface Facility

As discussed previously, TexCom's surface facility would be a secured area with equipment used to offload, process, and temporarily store the nonhazardous waste prior to injection. It would occupy 0.33 acre of TexCom's 27-acre site and would include the WUSA and the MCA. All waste handling activities other than injection would take place within either the MCA or the WUSA.²⁴

The WUSA would be an asphalt-paved contained area where trucks would unload wastewater and removed solids would be temporarily stored. It is designed to accommodate vehicle traffic, support tanker-truck and solids bin weight, and collect accumulated stormwater and leaks/spills. Wastewater would be offloaded from trucks and pumped directly to one of four Waste Storage/Mixing tanks or to one of two shaker screen units for coarse particle removal, all of which would be located in the MCA.²⁵

The MCA is the concrete-paved contained area where wastewater would be treated to remove particles, separate oil or grease, or adjust pH. Wastewater mixing would be performed in one of the four Waste Storage/Mixing Tanks, or one of the two Reaction Tanks. Once mixing has met its chemical concentration objective, the wastewater would be transferred to one of two Injection tanks for down-hole injection.²⁶

TexCom states that the proposed design and operational parameters would adequately protect against corrosion, leaks, and spills.²⁷ It would use non-corrosive materials such as carbon steel, fiberglass reinforced with epoxy resins, PVC, and other polymers in order to mitigate against

²⁴ TexCom Ex. 59, Brassow direct at 12-14.

²⁵ TexCom Ex. 59, Brassow direct at 13-14.

²⁶ TexCom Ex. 59, Brassow direct at 13-15.

²⁷ TexCom Ex. 59, Brassow direct at 17-21.

corrosion and degradation potential.²⁸ TexCom's application, which would be incorporated into its permit, also requires TexCom to perform daily inspections of all processing equipment and tanks for leaks, deposits, cracks, bulges, and discoloration, and daily inspections of all piping for illegible labels, loose supports, leaks, and deposits, all for early signs of failure; and annual inspections of pump internals for corrosion.²⁹

TexCom maintains that if a leak or spill ever occurred, it would be contained within the MCA or WUSA. The concrete MCA is designed with concrete walls two feet high and eight inches thick with a capacity to retain a simultaneous rupture of the largest tank (30,000 gallons) and a 100-year, 24-hour storm event (a 12-inch rain).³⁰ The WUSA, constructed of asphalt, is designed to retain the liquid from the largest potential tank rupture (one 5,000 gallon tanker truck).³¹ TexCom did not design the WUSA to include stormwater accumulations because operations would cease during storms, and the sump pump capacity would accommodate the flow rate from a major storm.³²

According to its Waste Acceptance Plan, TexCom would analyze each client's proposed waste stream before agreeing to accept it for disposal. This would include:

- gathering client waste information;
- obtaining and analyzing waste samples;
- comparing client waste information with analysis results;
- evaluating waste analysis results with permit conditions and reservoir formation protection;

²⁸ TexCom Ex. 59, Brassow direct at 18.

²⁹ TexCom Ex. 59, Brassow direct at 18.

³⁰ TexCom Ex. 59, Brassow direct at 23.

³¹ TexCom Ex. 59, Brassow direct at 24.

³² TexCom Ex. 59, Brassow direct at 24.

- determining the need for additional chemical analysis; evaluating waste for incompatibility potential; and
- specifying operational requirements (processing, monitoring, etc.) as appropriate.³³

In addition, TexCom's clients would be required to provide a “Waste Stream Statement” to notify TexCom if any changes occurred to the characteristics of a previously accepted waste stream, and a “Constituent Certification” to verify that the waste stream was not hazardous waste or otherwise inappropriate for disposal at the TexCom site.³⁴

TexCom's Waste Acceptance Plan also includes procedures for accepting clients' individual wastewater shipments, in addition to the procedures outlined above for evaluating client waste streams. When a tanker truck arrives at the facility, TexCom's proposed procedures call for it to verify that the waste manifest and other documentation are complete and that TexCom has on file at the facility a Client Waste Report for that waste stream. If documentation is complete, TexCom would inspect the load for consistency with waste description, volume, odors, debris or foreign material, and container integrity. If the inspection is satisfactory, TexCom would review the Client Waste Report for waste compatibility, waste handling requirements, and sampling and analytical requirements, and obtain a representative sample of the wastewater and forward it to the TexCom on-site laboratory for analysis and verification.³⁵ The laboratory would test for “fingerprint” parameters, such as pH, temperature, chlorides, total dissolved solids, total suspended solids, odor, appearance, color, specific gravity, and other parameters. TexCom would then compare the results to the waste acceptance criteria, re-sample and retest if necessary, and reject the waste if it is unsatisfactory. In addition, it would be required to maintain onsite the records of all these activities

³³ TexCom Ex. 59, Brassow direct at 27.

³⁴ TexCom Ex. 59, Brassow direct at 28.

³⁵ TexCom Ex. 59, Brassow direct at 29.

for at least five years.³⁶ TexCom considers its proposed waste evaluation and acceptance procedures to be comprehensive and effective. In its view, these safeguards would ensure that it would accept only appropriate wastewaters and that it would properly contain and dispose of them.³⁷

Lone Star complains that TexCom failed to adequately design its facility to account for all possible types of chemicals that might be delivered to the site. Because actual customers for the facility are unknown, Lone Star states that TexCom can only speculate about the nature of wastes it would receive; consequently, TexCom has listed several hundred chemicals that it could possibly receive. And although TexCom has planned for one storage tank and pipes to be made of steel in order to handle wastes incompatible with the fiberglass tanks, Lone Star suggests that TexCom's acceptance plan fails to require a demonstration that chemicals incompatible with fiberglass would be compatible with steel. Likewise, it contends that TexCom has failed to require screening to determine if chemicals to be received would be compatible with the proposed PVC piping. Therefore, Lone Star argues that it is possible that a reaction could occur, causing a failure of tanks or pipes and a release of waste materials into the environment. Lone Star also criticizes TexCom's planned use of asphalt paving material in the WUSA because asphalt is susceptible to degradation by some of the solvents identified by TexCom as waste it might receive.³⁸ Thus, Lone Star argues that general plan to use a variety of materials in order to handle a variety of chemical waste streams is not an adequate infrastructure design.³⁹

Aligned Protestants criticize TexCom's plans in several respects, including: no plans for scheduling trucks; no cleaning schedule for the mixing and storage tanks; uncertainty whether the shaker screen unit would be open to the atmosphere or closed (release of odors); no landfill selected

³⁶ TexCom Ex. 59, Brassow direct at 30.

³⁷ TexCom closing brief at 51-56.

³⁸ Lone Star Ex. 5, Shull direct at 21.

³⁹ Lone Star reply to closing arguments at 63-64.

for disposal of solids; and no final selection on the type of piping to be used. Aligned Protestants also express concern that TexCom made no demonstration that the wastes it may receive would be compatible with steel tanks and piping. Likewise, they question whether TexCom should rely on its unknown clients to accurately identify the wastes they send for injection, because TexCom's plan does not require its clients to periodically or annually re-certify that no significant change in waste characteristics has occurred. In short, Aligned Protestants argue that TexCom's Waste Acceptance Plan is inadequate because it relies too heavily on customers to inform TexCom of changes in their waste stream. Finally, Aligned Protestants state that TexCom's proposed monitoring and use of “fingerprint parameters” would not detect the chemicals or agents contained in EPA's drinking water contaminant list.⁴⁰

The ED simply states that the Waste Acceptance Plan and related procedures satisfy regulatory requirements.⁴¹

The ALJs find that the proposed design and operation of the surface facility is acceptable. Lone Star and Aligned Protestants question whether the fiberglass and stainless steel tanks, the PVC piping, and the asphalt paving would be compatible with wastes that TexCom might receive. However, TexCom's application, which is incorporated into the permit, requires that all waste streams be evaluated for incompatibility before they are accepted. In addition, TexCom would not be allowed to handle corrosive materials as the nonhazardous wastewater that it would accept must be non-corrosive by definition. The Protestants concerns also seem to suggest that TexCom would handle pure solvents or acids, but instead it would only be authorized to receive and handle nonhazardous wastewater in which any such materials would be greatly diluted. Further, the tank, pipe, and other equipment inspection procedures required by the Application (which is incorporated into the permit) would provide for early detection of any deterioration or leaks.

⁴⁰ Aligned Protestants closing argument at 48-53.

⁴¹ ED closing argument at 21.

Protestants also criticize TexCom's proposed operational procedures, based primarily on the uncertainty of the wastes that may be received and reliance on clients to properly identify their wastewater constituents. Although TexCom's specific clients and the content of their wastewater is unknown at the present time, TexCom would not be accepting wastewater from random trucks that come to its facilities. Rather, it would accept wastewater only from clients who have previously provided waste information and waste samples for analysis. Clients must also notify TexCom whenever any changes may occur to their previously accepted waste. Further, TexCom's plan requires it to inspect individual loads, review the Client Waste Report, and obtain a representative sample of the wastewater and forward it to the TexCom on-site laboratory for analysis. TexCom's laboratory would then test for fingerprint parameters and compare the results to the waste acceptance criteria, re-sample and retest if necessary, and reject the waste if it is unsatisfactory. The ALJs believe that these safeguards would adequately ensure that inappropriate wastewaters are excluded from injection at the facility.

Therefore, the ALJs find that TexCom's surface facility design and operational requirements, including its Waste Acceptance Plan, adequately protect the public health and welfare and the waters of the State.

C. Stormwater Runoff

The surface facility is situated on 0.33 acres of TexCom's 27-acre tract of land, and consists of the MCA and WUSA. The Ground and Surface Water Protection Plan of TexCom's application includes a plan that shows surface drainage features, provisions for safe passage of internal and adjacent external floodwaters, and the drainage plan for the facility.⁴² The issue raised by Lone Star and the Aligned Protestants is whether TexCom's proposed project poses an imminent threat of discharge of industrial solid wastes into or adjacent to state waters in violation of 30 TAC

⁴² ED Ex 14, Graeber at 11.

§ 335.4(1).⁴³ According to Lone Star and the Aligned Protestants, TexCom's design plan allows stormwater to overflow from its stormwater retention pond into a drainage ditch that runs along Creighton Road.

Mr. Shull explained that according to TexCom's "Run on and Run Off Management" provision of Section VI of the Application, several site drains are located along the central and eastern portions of the 27-acres and direct rain water to the site drainage pond that is located near Creighton Road. These site drains are not a part of the surface facility, but are located near the entrance roadway and around wells. What concerned Mr. Shull was TexCom's subsequent statement in the "Accidental Discharge" provision of the Application. According to TexCom, an accidental discharge of waste could flow into the site drainage pond that is connected to the Creighton Road drainage ditch—a ditch TexCom represents flows nowhere. Mr. Shull testified that in his experience a drainage ditch drains somewhere. He questions the accuracy of TexCom's assertions, and believes TexCom should have identified the water course into which the ditch drains.⁴⁴

Lone Star contends that this drainage ditch ultimately flows into the state waters or waters adjacent to state waters. State Water is defined in § 11.021(a) of the Water Code as:

The water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state is the property of the state.

Lone Star reasons that the off-site discharge of inadequately controlled storm waters would endanger the public health and the environment because the water would flow into state water or water adjacent to state waters. Equally important, is that contaminated storm water would run into

⁴³ Lone Star Closing Arguments at 50; TexCom Ex. 39 at 103, Lone Star Ex. 5, Shull at 15-19.

⁴⁴ Lone Star Ex. 5, Shull at 16.

the Creighton drainage ditch during an accidental discharge, a drainage ditch that runs by residential homes.⁴⁵

In addition, Mr. Shull questioned TexCom's ability to pump storm water out of the WUSA and into the stormwater tank, salt water tank, and injection tank, because the saltwater tank and injection tank would need to be emptied first. Mr. Shull opined that it would be difficult for TexCom to anticipate a significant storm in order to empty the two tanks. He also challenged the accuracy of TexCom's plan showing that the rain water would flow in straight lines. Mr. Shull concluded that TexCom's plan provides no meaningful information.⁴⁶

ED's expert, Mr. Graeber, included in his technical summary and the ED's Preliminary Decision issued on June 5, 2006, that TexCom's site is within the drainage area of Segment 1010 of the San Jacinto River Basin.⁴⁷ He testified that the Surface Water Protection Plan submitted by TexCom was filed in response to a notice of deficiency he sent. Mr. Graeber verified that he reviewed the plan and found it acceptable.⁴⁸ According to the ED, Section VI of TexCom's application includes plans that (1) show surface drainage features; (2) provide for safe passage of internal or adjacent external flood waters; and, (3) show the drainage plan for the facility.⁴⁹

In addition, Mr. Graeber noted that the MCA satisfied the requirements of the rules as they apply to preventing waste runoff to soil, groundwater, or surface water, and for collecting storm water.⁵⁰ He went on to clarify that TCEQ only required the containment area be designed to hold

⁴⁵ Lone Star Closing Argument at 51-52.

⁴⁶ Lone Star Ex.5 at 14-20.

⁴⁷ TexCom Ex. 63, Graeber at 23.

⁴⁸ TexCom Closing Argument at 57; TexCom Ex. 63, Graeber's deposition at 4.

⁴⁹ ED's Closing Argument at 22.

⁵⁰ TexCom Ex. 63, Graeber deposition at 11-12.

the waste contained in the largest tank. TexCom's design retains the simultaneous accumulation of the waste contained in the largest tank and a 100-year, 24-hour storm event.⁵¹

TexCom claims that 100 percent of the stormwater that accumulates at the 0.33 acre surface facility would be captured in either the MCA or the WUSA and disposed into the injection wells. As noted previously, the MCA would be constructed of reinforced concrete and would be surrounded by a two-foot high, eight-inch thick concrete retaining wall. The rain water collected in this area would be directed to a storm water sump pump, and pumped into the stormwater tank before being injected into a UIC well. The WUSA would be constructed of asphalt, has a two-foot by eight-inch retaining wall on the north and south ends, with a foundation that slopes to the rear toward the sump and pump. Rainwater would be pumped into one of three tanks before being injected into a UIC well.

For the area outside the surface facility, TexCom asserts that stormwater collecting on the natural ground would not be affected by TexCom's waste handling activities. TexCom further posits that 30 TAC § 335.4 does not apply to the land adjacent to the surface facility. According to TexCom, this rule deals with containment of industrial waste, and not the offsite discharge of uncontaminated stormwater.⁵²

As for Mr. Shull's opinion that TexCom could not contain the storm water on the surface facility, particularly the WUSA, TexCom disagrees. TexCom points out that storms severe enough to fill the WUSA and require the emptying of the two additional tanks do not occur in an instant. There is some warning, and they extend for a period of time. During that time, TexCom would

⁵¹ TexCom Ex. 63, Graeber deposition at 12.

⁵² TexCom Reply at 35.

empty the tanks. But, even if the tanks could not be emptied, TexCom maintains it could pump stormwater directly from the WUSA and into the MCA, with its two-foot retaining wall.⁵³

Mr. Brassow explained that in the event of a 100-year, 24-hour storm event, the WUSA is designed to hold the contents of a tanker truck. The WUSA is where the trucks stop and transfers the waste from the truck tank into TexCom's facility. That process is described in detail above. According to Mr. Brassow, the WUSA has retaining walls, a containment berm, and is sloped toward a sump pump capable of removing any spilled fluids.⁵⁴

The ALJs find that TexCom's Ground and Surface Water Protection Plan for the surface facility (the MCA and WUSA) adequately addressed the disposition of storm water. The MCA is two feet high, and can contain more fluid than TCEQ requires even if a tank ruptured and the facility was simultaneous hit with a 100-year 24-hour storm event. Although Mr. Shull raised concerns about TexCom's ability to empty the two tanks, the ALJs find that TexCom can ensure that the storm water is contained. Finally, the area outside the surface facility has limited potential exposure to nonhazardous waste from TexCom's business. The detention pond is adequate to contain the water from the site drain, which would usually be rainwater. In the unlikely event of an accidental discharge occurring outside the surface facility, the detention pond would serve to contain this discharge particularly if the discharge did not occur during a severe 100 year, 24-hour storm event. Therefore, the ALJs find that TexCom's plans for the surface facility to protect ground and surface waters satisfy the applicable statutory and regulatory requirements.

⁵³ TexCom's Reply at 35-37.

⁵⁴ TexCom Ex. 59, Brassow direct at 14 and 22.

D. Other Issues Concerning the Surface Facility

Air Permits: Lone Star argues that TexCom failed to account for and protect against air emissions. It notes that 30 TAC § 305.45(a)(7) requires TexCom to list all permits and construction approvals necessary under the Prevention of Significant Deterioration (PSD) program under the Federal Clean Air Act and the Nonattainment Program under the Federal Clean Air Act. However, Lone Star complains, TexCom merely listed “None.” In its view, this was inadequate.⁵⁵ Further, Lone Star cites 30 TAC § 305.50(a)(2) to argue that TexCom's failure to design the facilities to account for air emissions and applicable regulatory requirements is a defect in the facility's designs and plans, which are a part of the Application.

TexCom points out that § 305.45(a)(7) does not require a listing of all necessary permits, but instead asks for a list of all permits or construction approvals “received or applied for” under various programs. At the time it filed its application, TexCom states, it truthfully answered “None” to this requirement. Then, in January 2007, well after filing its application, TexCom requested registration of its Permit by Rule (PBR). Further, TexCom notes that TCEQ recognized its use of the PBR to authorize air emissions from the facility by letter dated April 12, 2007.⁵⁶

The ALJs find that TexCom complied with the requirements of 30 TAC §§ 305.45(a)(7) and 305.50(a)(2). As noted above, § 305.45(a)(7) merely required TexCom to list the permits it had received or applied for and it truthfully answered the question “None,” as of the time it filed its application. Later, TexCom did register the emissions associated the facility under 30 TAC §§ 106.261, 106.262, and 106.472, which the Commission officially recognized by its letter of April 12, 2007.

⁵⁵ Lone Star closing argument at 52.

⁵⁶ TexCom response brief at 31, Lone Star Ex. 19 (TCEQ letter).

Section 305.50(a)(2) requires, among other things, that the information provided by an applicant must be sufficient to allow the ED to determine whether the facility would be constructed and operated in compliance with all pertinent state and local air statutes. As discussed previously concerning the completeness of the application, the ED determined that TexCom's Application was administratively and technically complete, which would include TexCom providing sufficient information under § 305.50(a)(2). Further, even Lone Star has agreed that air permitting is a regulatory process separate and independent from the current proceeding,⁵⁷ so it is beyond the scope of this case to determine whether TexCom's facility is subject to any air permitting requirements. In short, because TexCom complied with the requirements applicable to the permit it is requesting in this case and because air permitting issues are beyond the scope of this proceeding, the ALJs are not persuaded by Lone Star's arguments.

Qualifications of Employees / Financial Ability: Individual Protestants complain that TexCom provided no information about specific individuals who would operate the surface facility and who would test incoming wastewater at TexCom's on-site laboratory, despite TexCom's representation that it would staff the facility with highly trained and qualified personnel. They further contend that failing to operate the facility with properly trained personnel “suggests a high likelihood of disaster in the future.”⁵⁸ Likewise Lone Star criticizes TexCom because it has no experience operating a Class I UIC well and has not yet hired any employees to operate the facility. It also questions whether TexCom has the financial ability to operate the facility, noting that TexCom is seeking additional financial support from Foxborough Energy Company.⁵⁹

The ALJs find that these objections are not well founded. Although TexCom does not have prior experience operating a Class I UIC well, its Application, which is incorporated into its permit,

⁵⁷ Lone Star closing argument at 54.

⁵⁸ Individual Protestants closing statement at 22.

⁵⁹ Lone Star closing arguments at 52-53.

requires it to have competent, qualified employees. Further, it simply is not reasonable or required for TexCom to hire all of the employees for its proposed facility months or even years before the facility is permitted and constructed. In addition, the facility and operation is subject to numerous reporting requirements, as well as inspection and monitoring by the TCEQ. Likewise, the ALJs do not find that TexCom's permit should be denied simply because it is seeking financial support from another company. The parties have not cited any statute or rule that requires such a result.

Nuisance: Without discussion, Lone Star contends that TexCom's facility may create and perpetuate a nuisance, which is prohibited by 30 TAC § 335.4(2).⁶⁰ Similarly, Aligned Protestants complain that unscheduled tanker trucks may get backed up at the entrance of the facility and cause noise, and the shaker screen unit or other tanks may emit odors.⁶¹ TexCom did not directly address this question in its closing argument. However, Mr. Brassow testified that, in his experience, wastewater facilities of this type generate little or no odors.⁶²

A “nuisance” is a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities. Foul odors, dust, noise, and bright lights— if sufficiently extreme—may constitute a nuisance.⁶³ While there is some evidence that slight odors may exist at the facility at times, and it is common knowledge that trucks create noise, there is no evidence that the noise or odors from TexCom's facility would be extreme or that they would cause unreasonable discomfort or annoyance to any neighbors. In addition, the ALJs recommended in the PFD concerning TexCom's application for UIC permits that the Commission adopt a special condition requiring TexCom to move the truck entrance from Crieghton Road to FM 3083, and TexCom indicated that it was agreeable to this requirement. If the

⁶⁰ Lone Star closing arguments at 51.

⁶¹ Aligned Protestants closing arguments at 49-50.

⁶² Tr. at 521-22.

⁶³ *Schneider National Carriers, Inc. v. Bates*, 147 S.W.3d 264, 269 (Tex. 2004).

entrance is moved as recommended, it should further reduce the noise to which residences on Crieghton Road might be exposed. Therefore, the ALJs do not find that TexCom's IHW permit should be denied based on arguments that a nuisance may be created by the facility.

VI. ASSESSMENT OF REPORTING AND TRANSCRIPTION COSTS

The hearing of this case was consolidated with the hearing of TexCom's application for four UIC permits in SOAH Docket No. 582-07-2673, TCEQ Docket No. 2007-0204-WDW. The assessment of reporting and transcription costs is addressed in the PFD issued in that proceeding; therefore, the assessment of reporting and transcription costs is not addressed in this PFD.

VII. CONCLUSION AND RECOMMENDATION

After considering the evidence and the parties' arguments, the ALJs recommend that the Commission approve TexCom's application and grant ISW Permit No. 87758.

SIGNED April 25, 2008.

CATHERINE C. EGAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

THOMAS H. WALSTON
ADMINISTRATIVE LAW JUDGE
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