

# Underground Injection Wells/Industrial Waste: Texas Appellate Court Addresses Challenge to Texas Commission of Environmental Quality Permit



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A Texas Appellate Court addressed in a May 22nd opinion issues associated with challenges to underground injection control permits. See *Dyer, et al. v. Texas Commission on Environmental Quality, et al.*, 2019 WL 2206177.

This case arises out of a dispute relating to the Injection Well Act (“Act”) which governs the permitting process for underground injection wells in Texas.

Pursuant to the Act the Texas Commission on Environmental Quality (“TCEQ”) has jurisdiction over injection wells used for the disposal of “industrial and municipal waste.” Tex. Water Code §§27.011, .051(a). It also gives the Railroad Commission (“RRC”) jurisdiction over the injection wells used “to dispose of oil and gas waste.” *Id.* §§27.031, .051(b). This jurisdictional overlap generated certain questions.

A company sought to construct and operate an injection well to dispose of industrial and municipal waste. A TCEQ permit must be obtained. The application must also be submitted, among other requirements, with a letter from the RRC concluding that drilling or using the disposal well and injecting industrial and municipal waste will not endanger or injure any know oil or gas reservoir. This letter is known as a “no-harm letter,” and without it the TCEQ may not proceed to hearing on any issues other than preliminary matters.

TexCom Gulf Disposal, LLC (“TexCom”) sought to develop a commercial non-hazardous industrial wastewater disposal facility. It submitted an application to the TCEQ in August 2005. As part of its application TexCom provided the TCEQ with a no-harm letter from the RRC dated Sept 16, 2005.

A hearing was held on TexCom’s permit on December 2007. The existing lessee-operator of the mineral interest underlying TexCom’s proposed application site did not participate. The Administrative Law Judge (“ALJ”) issued a proposal for decision (“PFD”) in April 2008 recommending that the permits be granted with special conditions. Following this PFD TCEQ issued an interim order with the additional considerations for a later hearing in December 2008.

Denbury Onshore, LLC (“Denbury”) subsequently became the lessee operator of the mineral interest underlying TexCom’s proposed site in December 2009. It filed a motion to intervene in the contested case in March 2010. Denbury contended that it was “actively producing oil and gas from the formation underlying TexCom’s proposed facility which was “incompatible” with this purpose. The motion to intervene was granted and Denbury was designated as a party in April 2010.

In a separate matter the RRC notified TexCom and Denbury on June 14, 2010 it would hold a hearing to address Denbury’s request that the RRC withdraw the 2005 no-harm letter. Based on the RRC’s reconsideration Denbury requested a continuance and abatement in the TCEQ’s permit application hearing until after the RRC’s proceeding on the no-harm letter was decided.

The ALJ denied Denbury’s request to postpone the original permit proceeding and issued an amended PFD, recommending the TexCom permit application be denied. The PFD was based on a finding the proposed facility “posed a risk.” However, TCEQ considered the application at an open meeting in January 2011. It issued and reissued the order by April, 2011 approving TexCom’s application for the injection control well permits.

Denbury and TexCom both participated in the RRC hearing addressing the no-harm letter in August 2010. The RRC Examiners (“Examiners”) recommended the rescission of the no-harm letter. The RRC adopted its Examiners’ finding and rescinded the no-harm letter in January 2011. After the TCEQ reissued its order in April 2011, granting TexCom’s permit application, the suits leading up to this case were filed and eventually consolidated. The trial court held a hearing, ultimately affirming the TCEQ’s order.

The litigation includes multiple individually named parties, as well as Montgomery County and the City of Conroe, (“Collectively Appellants”). The Appellants filed suit against the TCEQ, Chairman of the TCEQ, and Commissioners of the TCEQ, collectively referred to as TCEQ. Their appeal to the Texas Court of Appeals (“Court”), was premised on a number of alleged deficiencies in the process of issuing the permit.

The Appellants first argued that the TCEQ’s order should have been reversed and declared void because it was issued in the absence of a “valid and subsisting” no-harm letter from the RRC. They contended that a valid no-harm letter was mandatory and jurisdictionally required. Further, they argued the RRC’s conclusions on the “potential effect of an injection well on oil and gas resources should be determinative.”

The Court took into consideration the timing of the hearings and the no-harm letter rescission. It found in favor of TCEQ. The Court explained:

. . . where TexCom filed the no-harm letter from the RRC, the no-harm letter was admitted as evidence without objection during the hearings on the merits, and the RRC did not rescind the letter until after the hearings had already concluded and the administrative record closed.

The Court declined to expand the language to include the Appellant’s mandatory prevention of the TCEQ permit without a no-harm letter.

The Appellants also argued that even if the statutory requirements did not preclude the TCEQ from issuing the permits. It acted outside of its regulatory scope. They contended it abused its discretion by refusing to consider RRC’s rescission of the no-harm letter. At a minimum the revocation of the no-harm letter “should have triggered an obligation to conduct further fact-finding on harm to the minerals” at issue.

The Court disagreed with this contention, reiterating that the RRC’s order to rescind the no-harm letter was not final until April 2011, and the initial contested case hearing was in 2007. Considering all the timing factors in this case, the Court held that TCEQ did not act arbitrarily or capriciously nor did it abuse its discretion in issuing the permit.

Third, the Appellants argued that TCEQ improperly rewrote many of the ALJ’s findings and made changes not based solely on the record. The Court found this unpersuasive and stated that Appellants failed to

show that their substantial rights were prejudiced by these changes. Respectively the Appellants argued that the TCEQ's purported explanation of the changes was not adequate, and failed to justify or support the changes. The Court found this argument much like the former, ultimately arriving at the conclusion TCEQ's explanation was sufficient to comply with requirements.

Further, Appellants also challenged various findings of fact and conclusions of law. Through an extensive analysis of the challenges, the Court found the Appellants had not made substantial evidence challenges to any of the findings of fact. It accepted the facts as established.

TCEQ's findings were argued to be flawed because a reasonably available alternative existed to TexCom's proposed injection wells. The Court once again accepted the TCEQ's finding. The Court explained TCEQ was required to research that "the use or installation of the injection well [was] in the public interest," and, in making its public interest inquiry, it was by default required to consider specific criteria, including "whether there is a practical, economic and feasible alternative to an injection well reasonably available," in addition to other factors.

The Court affirmed TCEQ's granting of the permit.

A copy of the opinion can be downloaded [here](#).