



RAILROAD COMMISSION OF TEXAS

HEARINGS DIVISION

OIL AND GAS DOCKET NO. 03-0295749

THE APPLICATION OF OPG ENERGY, LLC PURSUANT TO STATEWIDE RULE 46 FOR A COMMERCIAL PERMIT TO INJECT FLUID INTO A RESERVOIR PRODUCTIVE OF OIL OR GAS, HWY 21 SWD LEASE, WELL NO. 1, KURTEN (GEORGETOWN) FIELD, BRAZOS COUNTY, TEXAS

HEARD BY: Karl Caldwell - Technical Examiner
Terry Johnson - Administrative Law Judge

PROPOSAL FOR DECISION PREPARED BY: Karl Caldwell - Technical Examiner
Ryan Lammert - Administrative Law Judge

PROCEDURAL HISTORY:

Application Filed:	December 16, 2014
Protest Received:	January 5, 2015
Request for Hearing:	February 12, 2015
Notice of Hearing:	June 1, 2015
Hearing Held:	June 29, 2015
Transcript Received:	July 14, 2015
Proposal for Decision Issued:	February 5, 2016

APPEARANCES:

REPRESENTING:

APPLICANT:

OPG Energy, LLC

Stephen Fenoglio
Kerry Pollard
Justin McIntosh
Krystal Eversdyk

PROTESTANTS:

Eleanor Kindt and Karen Smith

John Hicks
John Miller
Todd Reynolds
Tim Akins
Cheryl Akins
Elyse R. Brady

Carrie Dittfurth
Dora Dittfurth
Carol Jean Rhodes

CASE SUMMARY

The Applicant requested a hearing on its commercial disposal well application pursuant to Statewide Rule 46 to inject fluid into a reservoir productive of oil or gas for the Hwy 21 SWD Lease, Well No. 1, Kurten (Georgetown) Field, Brazos County Texas. The proposed disposal well has not yet been drilled. If granted, the commercial disposal well permit would authorize the injection of a maximum volume of 25,000 barrels per day into the Georgetown, Edwards, Glen Rose, and Rodessa Formations between 8,908 feet and 10,790 feet.

The application is protested by adjacent surface owners. The Protestants believe the application should be denied because the Applicant seeks to inject waste into a productive formation for which it does not own the mineral rights, the potential for the pollution of fresh water, and the proposed commercial disposal well is not in the public interest.

In order to avoid this apparent defect, on the day of the hearing, the Applicant sought to amend its application and rely on Statewide Rule 9, as opposed to Statewide Rule 46, to justify granting the application. As explained below, the Examiners conclude that the Applicant's request to proceed with the application pursuant to Statewide Rule 9 is outside the scope of the noticed hearing. Additionally, based on the evidence presented at hearing, the Examiners recommend the application be denied for failure to satisfy the requirements of Statewide Rule 46.

APPLICABLE LAW

Any person who engages in fluid injection operations in reservoirs productive of oil, gas, or geothermal resources pursuant to 16 Tex. Admin. Code §3.46 must obtain a permit from the Commission. Pursuant to Texas Water Code § 27.051(b), the Commission has authority to permit disposal wells if it finds:

- 1) that the use or installation of the injection well is in the public interest;
- 2) that the use or installation of the injection well will not endanger or injure any oil, gas, or other mineral formation;
- 3) that, with proper safeguards, both ground and surface fresh water can be adequately protected from pollution; and
- 4) that the applicant has made a satisfactory showing of financial responsibility if required by Section 27.073 of this code.

DISCUSSION OF THE EVIDENCE

Applicant's Evidence (OPG Energy, LLC)

Application

On December 16, 2014, the Railroad Commission of Texas ("Commission") received an application filed on behalf of Applicant OPG Energy, LLC ("OPG") for a commercial disposal well, filed on Forms H-1/H-1A, pursuant to Statewide Rule 46¹ for the Hwy 21 SWD Lease, Well No. 1, Kurten (Georgetown) Field, Brazos County, Texas. Notice of the application was published in *The Eagle*, a newspaper of general circulation in Brazos County, on December 12, 2014. Notice of the application was mailed to the owner of the surface tract of the proposed disposal well location, to adjacent surface owners, and to the Brazos County Clerk. Notice of the application was not sent to any operators, as an area of review showed no active operators within a half-mile radius. The application is protested by Eleanor Kindt and Karen Smith.

The Applicant's disposal well permitting witness, Krystal Eversdyk, stated that the Applicant, OPG, provided the service list for the application. The service list was mailed a courtesy letter describing the notice, a copy of the front and back of Forms H-1/H-1A, and a map showing the proposed location of the disposal well. Notice was not sent to any offset operators. It was determined that there were no operators with active wells within a half-mile of the proposed disposal well location.

On cross-examination, the Applicant's permitting witness stated that the service list was not sent a copy of the Statewide Rule 9, Form W-14 application introduced by the Applicant at the hearing.

Injection Interval

The injection interval listed on Forms H-1/H-1A and Appendix A of the Notice of Hearing is within the Georgetown, Edwards, Glen Rose, and Rodessa Formations between 8,908 feet and 10,790 feet. In response to a preliminary matter raised by the Protestants, the Applicant stated its intention to amend the injection interval.² The Applicant proposed to amend the injection interval to 9,750 feet to 10,790 feet within the Glen Rose and Rodessa Formations to remove the productive formations and to proceed with the application filed on Form W-14 pursuant to Statewide Rule 9. Kerry Pollard, the Applicant's petroleum engineering witness stated "...what the Applicant is proposing...is that the interval - the top part of the interval that was proposed originally is not being applied for today, but we will drop it down to 9750. This will be down into the Glen Rose Formation."³

¹ 16 TEX. ADMIN. CODE §3.46 (Fluid Injection into Productive Reservoirs).

² The Oil & Gas Docket No. 03-0295749 Notice of Hearing, Appendix A states that the Applicant seeks authority to inject a maximum volume of 25,000 barrels of salt-water and RCRA exempt waste per day into the subsurface depth interval from 8,908 to 10,790 feet within the Georgetown, Edwards, Glen Rose, and Rodessa Formation.

³ Tr. pg. 69, ln 11-16.

Mr. Pollard stated that the original injection interval included both productive and non-productive intervals. The Applicant proposes to amend the injection interval by lowering the top of the originally-noticed injection interval to exclude the productive Georgetown and Edwards Formations that were included in the original injection interval.

Mr. Pollard stated a Groundwater Advisory Unit (“GAU”) letter, dated June 29, 2015, was obtained the morning of the hearing, which is required for a W-14 application. The letter stated if otherwise compliant with Railroad Commission rules and guidance, drilling and using this disposal well and injecting oil and gas waste into the subsurface strata in the depth interval from 9,750 feet to 10,790 feet will not endanger freshwater strata in that area.⁴

On cross-examination, Mr. Pollard stated that the W-14 application (Applicant’s Exhibit No. 8), was dated the day of the hearing and the UIC group did not administratively review the application. The UIC did review Forms H-1/H-1A for the Statewide Rule 46 application and considered that application to be administratively complete.

The maximum daily injection volume requested on Forms H-1/H-1A and Form W-14 is 25,000 barrels per day (bpd).

Fresh Water Formations

The GAU estimates the base of usable-quality water (BUQW) to occur at a depth of 3,425 feet at the proposed well location. The base of underground sources of drinking water (USDW) is estimated to occur at a depth of 3,975 feet at the proposed well location.

Productive Formations

The productive formations, or formations that have been listed on completion papers within two miles of the proposed well location, include the Austin Chalk, Georgetown, Buda, Woodbine, and Eagleford Formations. According to Mr. Pollard, the majority of drilling occurring in the area is the Woodbine/Eagle Ford, which is commonly referred to as the Eaglebine.

Well Construction

The depth of surface casing and cementing of the surface casing for the Form W-14 application is identical to what was proposed on the original Forms H-1/H-1A. 9 5/8-inch, 36 lb-per-foot surface casing will be set at a depth of 3,525 feet with cement circulated to surface behind the casing to protect the BUQW. 7-inch casing will be set at a depth of 10,890 feet and cement will be pumped behind the casing to be above the potentially productive zones. One difference from the original Forms H-1/H-1A application is that the tubing and packer will be lowered to be within 100 feet of the top of the amended injection interval.

⁴ Applicant’s Exhibit No. 11.

Confining Intervals

Mr. Pollard used a structural cross-section to identify the disposal interval in the Glen Rose and Rodessa Formations as well as confining intervals. The following well logs were used in the structural cross section:

- 1) The Carrabba No. 1 (unknown API No.), located 6.8 miles north-northwest of the proposed well location;
- 2) The Cody Jones No. 1, API No. 041-30889, (“Cody Joe. No. 1”), located less than a half mile to the east of the proposed well location; and
- 3) The Calvin Guest No. 1 (API No. 051-30515) located 4.6 miles to the southeast of the proposed well location.

The Applicant has proposed removing the Georgetown and Edwards Formations from the injection interval. As a result, Mr. Pollard believes the amended disposal interval correlates to 9,750 feet to 10,790 feet in the lower section of the Glen Rose Formation at the proposed well location. The upper Glen Rose Formation contains several hundred feet of tight, dense limestone that will act as an impermeable barrier above the disposal interval. The bottom of the disposal interval is bounded by the Pearsall Formation. The Pearsall Formation consists of several hundred feet of shale that will act as a lower confining interval for fluids injected into the Glen Rose Formation.

Nearby Wellbores

There are no wellbores located within a quarter-mile radius of the proposed disposal well location. There are a total of four wells located within a half-mile radius of the proposed disposal well location. Three of the four wells were drilled as vertical wells. All three of the vertical wells produced from the Buda and/or the Georgetown Formations and have been plugged and abandoned.

The fourth well located within a half-mile radius is a horizontal well that was completed in the Austin Chalk Formation. This well has also been plugged and abandoned. Mr. Pollard stated that the four wells located within a half-mile radius “... have been plugged in a manner that does protect the fresh water...All of the injected water will be in the Glen Rose...therefore...will be below where all of these wells are TDs [below the total depths of the four wells].”⁵

⁵ Tr. pg. 86, ln 9-16.

Oil and Gas Activity in the Area

Between January 2015, and June 2015, a total of 89 drilling permits were issued within a 20-mile radius of the proposed disposal well location. In Mr. Pollard's opinion, "...this area's still being highly developed. Even with the price of oil going down...they're still pulling permits to drill wells and my belief is, is that they will continue to drill."⁶

Existing Disposal Wells in the Area

There is only one activated commercial disposal well within a 5-mile radius of the proposed disposal well location, the Vess Oil Corporation ("Vess"), Kurten Woodbine Unit 3422 D No. 1, API No. 041-31154, ("3422 D, No. 1"). This well is permitted to inject into an interval between 4,120 feet and 4,287 feet. This well is also the only activated commercial disposal well within 10 miles of the proposed disposal well location. Mr. Pollard considers activated commercial disposal wells to be wells that have had, not only a permit granted, but have had either completion papers filed, a mechanical integrity test (MIT), and/or have a P-18, showing that water has been injected.

According to Mr. Pollard, the 3422 D, No. 1 is being used for Vess' purposes only, and is not available for commercial disposal. The May 2015 Form P-18 for the 3422 D, No. 1 shows all the water (66,000 barrels for the month) is coming from the Kurten Woodbine Unit. In addition, all of the Form P-18's from January 2015 to May 2015 show all water disposed of is from the Kurten Woodbine Unit.

On cross-examination, Mr. Pollard stated that it was his conclusion that Vess would not accept commercial water for disposal and he did not contact Vess to determine whether Vess would take additional (commercial) water for disposal.

Mr. Pollard also noted that the surface casing for the 3422 D, No. 1 does not cover the BUQW and he is not sure if the well would be permitted today as a commercial well. Mr. Pollard stated that the well may be permitted today for on-lease disposal.

There are a total of four activated commercial disposal wells within a 15-mile radius of the proposed disposal well. Within a 20-mile radius, there are a total of eleven activated commercial disposal wells. Halcon Operating Company ("Halcon") is a company that is active in the immediate area. Halcon operates a total of 120 wells and has over 50 drilling permits in the area. In a letter dated June 26, 2015, Halcon's Senior Regulatory Analyst stated that if authority is granted to operate a commercial disposal well, Halcon will likely utilize the Applicant's well.⁷

⁶ Tr. pg. 91, ln 9-13.

⁷ OPG Energy, LLC Exhibit No. 21.

On cross-examination, Mr. Pollard acknowledged that none of the eleven activated commercial disposal wells within a 20-mile radius of the proposed disposal well are injecting into the Glen Rose Formation.

Seismic Survey

A review of USGS seismic data from January 1, 1970 to June 3, 2015 shows no seismic activity has been reported within a 6-mile radius of the proposed disposal well location, an area of 113 square miles.

Proposed Facility

The location of the proposed facility is a 10.853 acre tract on Highway 21, located approximately 7.32 miles northeast of Bryan, Texas. The property is partially located within a flood zone. Justin McIntosh, vice president of R-Tex Services, LLC, an oilfield construction company, prepared a conceptual view of how the proposed facility could be built on the existing property.

On cross-examination, Mr. McIntosh stated that the plans are conceptual and not necessarily how the facility will be built. Mr. McIntosh stated that he does not have a contract in place with the Applicant to build the proposed facility, and was hired to prepare plans and attend the hearing. In Brazos County, final plans require an engineering stamp, and Brazos County also has special flood plain requirements. Mr. McIntosh stated that he is not an engineer and he has never designed any facilities to be built in the flood plain in Brazos County. Mr. McIntosh acknowledged that he may not end up implementing the plans he prepared.

Mr. McIntosh is not aware of any study that either he or the Applicant has performed of how the proposed conceptual plan would affect floodwaters. Mr. McIntosh stated that no study had been performed to predict how water diverted by the facility would impact the surrounding area.

Applicant's Showing of Financial Responsibility

OPG has an active P-5 on file with the Commission, with no financial assurance on-file.

Protestants' Evidence

The Protestants' concerns with the disposal well application include:

1. injection into productive zones;
2. the pollution of fresh water; and

3. not in the public interest. The re-routing of flood waters would be disastrous for neighboring properties, including the private cemetery located on Protestant Kindt's property.

Harm to Productive Intervals

John Miller appeared at the hearing as the Protestants' petroleum engineering expert. One of Mr. Miller's work duties as a petroleum engineer includes evaluating disposal well applications. In Mr. Miller's estimation, he has reviewed in excess of 100 disposal well applications. Mr. Miller has reviewed the application for which a hearing was requested. The Applicant's Forms H-1/H-1A identified the disposal tract as a 10.853 acre lease, with injection into the Georgetown, Edwards, Glen Rose, and Rodessa Formations. The Application listed the field name as the Kurten (Georgetown Field). According to Mr. Miller, the Applicant does not have the rights to the minerals on the disposal well tract that the Applicant intends to inject into for the application that was noticed and a hearing was requested. The minerals are currently owned by Buffco Production Inc. ("Buffco").

A review of the area shows the Kristen Unit encompasses the proposed disposal well location. To-date, one well has been completed on the Kristen Unit, the Kristen Unit Well No. 1, API No. 42-041-30723, ("Kristen No. 1"). The Kristen No. 1 is located just outside the one-half mile notice to operator requirement by rule.⁸ The Kristen No. 1 has three laterals, 8,715 to 8,934 feet true vertical depth (TVD), 8,715 to 8,854 feet TVD, and 8,715 to 9,855 feet TVD. The Kristen No. 1 completion report (Form W-2) lists the top of the Buda Formation at 8,713 feet and the top of the Georgetown Formation at 8,813 feet.

The June 1, 2015 oil proration schedule for the Kurten (Buda) Field lists the Buffco Kristen No. 1 as a producing well on 680 acres. The Certificate of Pooling Authority, P-12 for the Kristen No. 1 also lists a total of 680 acres in the pooled unit. On the P-12, Tract/Plat Identifier No. 5 lists Protestant E.A. Kindt's 76.05 acres as included in the pooled unit. On the P-12, Tract/Plat Identifier No. 7 lists the Aren K. & Dan O. Murray tract of 10.853 acres, as included in the pooled unit. Mr. Miller notes that 10.853 acres is the same number of acres the Applicant listed on Forms H-1/H-1A. The plat included with the P-12 shows the Kindt acreage and the Murray's acreage within the pooled unit. A production plot of the Kristen No. 1 shows the well has produced 89,000 BO and 166,000 Mcf of gas and is currently a producing well.

The injection interval listed on the Forms H-1/H-1A application includes the correlative interval for the the Kurten (Georgetown) Field. In Oil and Gas Docket No. 03-0294343, a hearing was held on January 15, 2015 to amend the field rules for the Kurten (Buda) Field. The Examiners' Report and Recommendation states that the Kurten (Georgetown) Field was consolidated into the Kurten (Buda) Field for oil wells.

A study of past production within a half mile radius of the proposed well location shows the Cody Joe No. 1 was perforated within the injection interval listed on Forms H-1/H-1A. The

⁸ T.A.C §3.46 and §3.9.

Form W-2 for the Cody Joe No. 1 shows the well was completed in the Kurten (Georgetown) Field. The Cody Joe No. 1 was perforated in the Georgetown Formation from 8,916 feet to 8,940 feet, and also perforated in the Buda Formation from 8,811 feet to 8,860 feet. A production rate versus time plot for the Cody Joe No. 1 shows the initial oil production exceeded 15,000 BO. In total, the Cody Joe No. 1 produced more than 37,000 BO between 1983 and 2001 in the Kurten (Georgetown) and Kurten (Buda) Fields.

Local Geology

Todd Reynolds, the Protestant's expert geology witness, constructed a stratigraphic log cross section which included the Cody Joe No. 1. According to Mr. Reynolds, the Cody Joe No. 1 is effectively a direct offset to the Applicant's proposed well location. In Mr. Reynolds opinion, the Applicant's proposed disposal well location is a very poor geologic setting to try to inject water. The Edwards Formation, included in the noticed injection interval, is highly porous and fairly thick to the southwest in Burleson, Lee and Fayette Counties. However, that zone pinches out in Brazos County, and is effectively pinched out at the proposed disposal well location. As a result, Mr. Reynolds is not surprised that there are few wells injecting into the proposed disposal interval in this area of Brazos County.

Pollution of Fresh Water and Public Interest Concerns

Kindt Property

Protestant Eleanor Kindt's property is adjacent to the proposed disposal well location. Tim Akins is the son-in-law of Eleanor Franze Kindt and caretaker of the 76-acre estate. Mr. Akins runs longhorn cattle on the property, and the property has been in the family for 110 years. Located on the Kindt property is the Franze Cemetery, consisting of a grave from 1909 and a grave from 1926. The Franze Cemetery is recognized as a private cemetery in Brazos County.

Mathis Creek

The Mathis Creek is the eastern boundary between the Kindt property and the proposed disposal well tract. The Mathis Creek frequently floods, and in some instances, the elevated water levels reach the top of fence lines on the Kindt property. In photos and videos taken by Mr. Akins after a recent rainfall event, Mr. Akins estimated the water level to be approximately four feet at the proposed disposal well location. Mr. Akins stated that the current surface owners of the disposal well tract have been living in the house on that property for approximately 18-20 months. Mr. Akins knew the previous owners of that property, the Murray's, and the disposal well tract currently floods and has flooded in the past.

Wixon Industrial Park

The Wixon Industrial Park is located to the west of the Kindt property. During rainfall events, runoff from the industrial park runs across the Kindt property and into Mathis Creek.

On cross-examination, Mr. Akins stated that, to his knowledge, the cemetery on the Kindt property has not flooded in the six years that he has been on the property. On re-direct, Mr. Akins stated that the industrial park was built within the past three years. Prior to the construction of the industrial park there were two retention-type areas for water on the 75-acre industrial park site. A concern is that the cemetery may flood due to the re-routing of water if the disposal well facility were to be built on the adjacent property.

Mr. Miller reviewed a survey of the proposed disposal well location, a National Flood Insurance Rate Map (FIRM) for Brazos County, and a FEMA floodplain map. The FEMA floodplain map shows that the proposed disposal well would be located within the 100-year floodplain as designated on the FIRM. In addition, the nearby area is considered a special flood hazard area per FEMA. A portion of the disposal well tract is not within the 100-year floodplain. In Mr. Miller's analysis, a nearby gas pipeline facility appears to be outside the 100-year floodplain. In Mr. Miller's opinion, the Applicant has not shown that fresh water or the surface waters of the state of Texas will be protected. The Applicant is proposing to raise the proposed disposal site above the floodplain due to flooding in the area. However, Mr. Miller is concerned with the effect and impact that changing flow patterns and diverting water within the floodplain may have on the adjacent properties and Mathis Creek.

Other Area Flooding

Else Brady is a nearby land owner and stated that Mathis Creek had already flooded four times in 2015 between January and June. According to Ms. Brady, the water rises over the creek and over a bridge to the Brady property to the point where you cannot cross a bridge on foot or by vehicle.

On cross-examination, Ms. Brady stated that the top part of her property is located in the flood zone.

OPG's Showing of Financial Responsibility

Mr. Miller noted that the Applicant's initial P-5 was filed on November 13, 2014, approximately 33 to 34 days prior to the initial Forms H-1/H-1A application being signed. The organization report shows no financial assurance on file, and the Applicant does not operate any wells or have any drilling permits in Texas.

Applicant's Request to Change the Application and Statewide Rule During the Hearing

Mr. Miller has several concerns with the Applicant proposing to change its application from the Forms H-1/H-1A application (Statewide Rule 46) to a Form W-14 application (Statewide Rule 9) at the hearing. Due to these concerns, Mr. Miller believes the application should be denied. The concerns include:

1. The application has not been determined to be administratively complete for a Form W-14 application;

2. The publication for the disposal well that was originally filed was incorrect;
3. The notice provided to the adjacent surface owners was incorrect;
4. The notice to the county clerk was incorrect; and
5. There's been no fifteen day period with regards to changing the application to a Form W-14.

On cross-examination, Mr. Miller stated that the difference in notice requirements between a Statewide Rule 46 (Forms H-1/H-1A) and a Statewide Rule 9 (Form W-14) is notice that you would be injecting into a productive formation for a Statewide Rule 46, and a non-productive formation for a Statewide Rule 9. The same people receive notice, however, in making this change at the last moment all the parties required to be noticed were not provided a copy of the Form W-14.

Applicant's Rebuttal

Mr. Pollard had an email conversation with the director of the UIC Division the night prior to the hearing. Mr. Pollard provided a brief description that the Applicant filed Forms H-1/H-1A and indicated that a protest was received. The Applicant had decided to alleviate the Protestants' concern of hydrocarbon productivity by lowering the top of the injection interval. This would reduce the overall disposal interval and result in only injecting into non-productive formations. Mr. Pollard posed a hypothetical question, stating that if the Applicant had filed a GAU no-harm letter⁹, would it be considered for administrative review if there was no protest. According to Mr. Pollard, the UIC Director indicated that if it was an administrative process, that he would not require any additional notice.

On cross examination, Mr. Pollard stated that he sent the email posing the question to the UIC Director at 4:09 pm on the Saturday prior to the hearing. Mr. Pollard received a reply at 9:43 pm on the Sunday prior to the hearing. The hearing was at 9:00 am the next day, Monday, June 29, 2015.

With regard to the Protestants' evidence and geologist's opinion that this was a poor location for a disposal well, Mr. Pollard's opinion is that the new disposal interval will take water. Mr. Pollard stated that the downside if the interval does not accept water, they would not have a disposal well.

⁹ 16 TEX. ADMIN. CODE, §3.9(2).

EXAMINERS' ANALYSIS OF THE EVIDENCE

Applicant's Proposal to Amend its Application from Statewide Rule 46 to Statewide Rule 9

As a matter of procedure, the fundamental issue before the Commission is whether allowing amendment of the application on the day of hearing comports with procedural due process considerations. For the following reasons, the Administrative Law Judge and Technical Examiner (collectively, Examiners) conclude it does not and, therefore, the scope of the hearing should be limited to whether the application meets the requirements of Statewide Rule 46.

The Pleadings Filed in the Present Docket Indicate the Application is Based on Statewide Rule 46

The Commission's Rules of Practice and Procedure provide that "pleadings filed in proceedings before the commission should be designated as one of the following: application, petition, complaint, notice of protest, answer, motion, exception . . ." ¹⁰ "Unless otherwise permitted or required by commission rules or by statute, a pleading shall contain a statement of the pleading's objectives, a concise statement of supporting facts, and a specific request for any relief requested."¹¹ In an adversarial proceeding, pleadings serve to define the issues.¹² Further - - and most germane to this matter -- pleadings provide notice of the evidence likely to be introduced.¹³

On December 17, 2014, OPG Energy, LLC, Applicant, submitted to the Commission Forms H-1 and H-1A (Application to Inject Fluid into a Reservoir Productive of Oil or Gas), pursuant to Statewide Rule 46, for the commercial application to inject saltwater (and, RCRA exempt waste) into the Georgetown, Edwards, Glen Rose, and Rodessa Formations, in Brazos County, Texas.¹⁴ The application contemplated an injection interval of 8,908 feet to 10,790 feet.

On dates thereafter, Applicant noticed the necessary parties of its application to inject fluid into a reservoir productive of oil or gas, pursuant to Statewide Rule 46. On December 24, 2014, Eleanor F. Kindt and Karen Smith (Protestant) protested the application. Applicant then requested a hearing on the matter. Based on the pleadings, Protestants were justified to believe the issues and evidence presented at hearing would center on Statewide Rule 46.

The Discovery Propounded in the Present Docket was Based on Statewide Rule 46

Based on the pleadings, parties conduct discovery in order to obtain full knowledge of the relevant issues and facts in a particular case.¹⁵ As a consequence, discovery rules are constructed

¹⁰ 16 TEX. ADMIN. CODE § 1.22.

¹¹ 16 TEX. ADMIN. CODE § 1.25.

¹² *Murray v. O&A Express, Inc.*, 630 S.W.2d 633, 636 (Tex.1982).

¹³ *Crain v. San Jacinto Sav. Ass'n*, 781 S.W.2d 638, 639 (Tex.App.—Houston [14th Dist.] 1989, writ dismissed).

¹⁴ 16 TEX. ADMIN. CODE § 3.46.

¹⁵ *West v. Solito*, 563 S.W.2d 240, 243 (Tex.1978).

to prevent trial by ambush.¹⁶ Additionally, discovery allows parties to determine what evidence will be presented and admitted at a trial or hearing.¹⁷

A hearing on the present matter was held on June 29, 2015. Prior to a hearing on the merits, the following exchange occurred:

[PROTESTANT]: Examiners, in this case, I have a concern that the – there is no dispute that the Applicant does not have a good faith claim to inject into a productive formation. And the discovery response admits that . . . But I think we can save a lot of time today by addressing at the very initial stage as a preliminary matter, do they even have a good faith claim under the Commission’s order and Proposal for Decision . . . which said, you need a minimum right to inject into a productive formation, and this Applicant does not have that, admittedly.¹⁸

...

[APPLICANT]: We engaged in discovery and looked at their evidence. And while we disagree with them, nonetheless, we’re amending – the zone . . . we’re going to file a W-14 and proceed with an injection into a nonproductive formation at 9750 to 10790 . . . and, therefore, the case that he cites is inapplicable to this proceeding.¹⁹

...

[LEGAL EXAMINER]: What does that do to your argument, [Protestant]?

[PROTESTANT]: It shifts my argument to – that’s not what we’re here for today. We had a Rule 46 application for injection into a productive formation. That was what was noticed. That is the scope of the hearing. That’s what we’re here for today. [Applicant is] talking about an application into a nonproductive formation, which is a W-14, under Rule 9, which has not been noticed and is not what we’re here for today.

Based on the hearing testimony, the Examiners deduce that discovery in this matter, conducted in accordance with Rules 1.81-1.85, focused solely on issues and facts affecting a Statewide Rule 46 application.²⁰ Had the application been filed pursuant to Statewide Rule 9, Protestants would have likely shifted the emphasis and type of discovery they conducted.

¹⁶ *Gutierrez v. Dallas ISD*, 729 S.W.2d 691, 693 (Tex.1987).

¹⁷ 16 TEX. ADMIN. CODE §1.101 (“The rules of evidence as applied in nonjury civil cases in the district courts of Texas shall be followed in contested cases. Irrelevant, immaterial, or unduly repetitious evidence may be excluded.”)

¹⁸ Tr. pg. 16-17.

¹⁹ Tr. pg. 18-19.

²⁰ 16 TEX. ADMIN. CODE §§1.81-1.85 (addressing Commission discovery rules).

The Notice of Hearing Issued in the Present Docket was based on Statewide Rule 46

On June 1, 2015, Notice of Hearing was issued to all parties entitled to notice—a total of 10 parties. Appendix A to the Notice of Hearing provided that:

The purpose of this hearing is to consider the application of OPG, Energy, LLC for a commercial permit to dispose of oil and gas waste by injection for the Hwy 21 SWD Lease, Well No. 1, Kurten (Georgetown) Field, Brazos County, Texas, *pursuant to 16 TEX. ADMIN. CODE §3.46.* (emphasis added).

At the hearing, however, the Applicant attempted to “amend” its application from Statewide Rule 46 to Statewide Rule 9. In support of its request, Applicant noted that the notice requirements for Statewide Rule 9 and Statewide Rule 46 are identical. Yet, the Applicant’s attempt to “amend” its application failed to observe the Administrative Procedure Act’s (“APA”) or Commission’s Rules of Practice and Procedure.

The APA provides that “it is the public policy of the state through this chapter to provide minimum standards of uniform practice and procedure for state agencies” – inclusive of the Commission.²¹ Additionally, the APA states that “notice of a hearing in a contested case must include . . . a statement of the legal authority and jurisdiction under which the hearing is to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the factual matters asserted.”²² These sections of the APA were adopted to provide certainty to parties to a contested matter that the matters to be addressed at an administrative hearing, are the same matters noticed to the parties. Allowing an applicant to change the legal authority and jurisdiction of an application at the last minute does not promote certainty to parties to a contested matter.

Additionally, the Applicant failed to observe Commission rules and procedure. In contested cases, findings of fact may be based only on the evidence and on matters that are officially noticed.²³ Rule 1.145(a) states that the Commission shall issue notice not less than 10 days prior to hearings in contested cases.²⁴ Subsection (b) requires a reference to the rules involved.²⁵ The notice referred to Statewide Rule 46, with no reference to Statewide Rule 9. Subsection (c) states that if a party is unable to state the matters in detail at the time the notice is served, upon timely written application, a more definite and detailed statement must be furnished not less than three days prior to the date set for the hearing.²⁶ The Applicant did not state its

²¹ TEX. GOV’T CODE §2001.001.

²² *Id.* at §2001.052(2) – (4).

²³ *Id.* at § 2001.141(c).

²⁴ 16 TEX. ADMIN. CODE § 1.145(a).

²⁵ *Id.* at 1.145(b).

²⁶ *Id.* at 1.145(c).

intent to change the Statewide Rule for which it was requesting commercial disposal authority until the Applicant made a verbal statement during the hearing.²⁷

Additionally, the Applicant failed to: 1) file a Form W-14 with Commission staff; and 2) provide notice of a Statewide Rule 9 application to necessary parties. Without proper notice, a potentially affected party is unable to evaluate how its rights may be affected by an application, precluding it from asserting an effective challenge – as was declared by the Protestant.²⁸ The Applicant is of the opinion that there is no difference in proceeding with a Statewide Rule 9 application in a hearing that was noticed as a Statewide Rule 46 hearing. The Examiners disagree.

The Applicant argued that the affected persons required to be noticed are the same for a Statewide Rule 46 and Statewide Rule 9 application. Though, one additional requirement of a Statewide Rule 9 application that is not required for a Statewide Rule 46 application is a letter from the GAU stating that the use of the requested formations for disposal will not endanger the freshwater strata in that area, and the formations to be used for disposal are not freshwater-bearing.²⁹ The Applicant furnished a copy of this letter at the hearing. However, the Protestants were not afforded the opportunity to review the contents of this letter prior to the hearing.

Further, the requirements of a Statewide Rule 46 and a Statewide Rule 9 differ as to the setting depth of the tubing and packer. The Applicant proposed to set the tubing and packer within the Statewide Rule 9 requirements for its Statewide Rule 9 application. Aside from the differences previously mentioned, whether a disposal well is permitted and injecting into productive or non-production formations has implications on other Statewide Rules. For example, Statewide Rule 13(a)(4)(A) requires wells completed within one quarter-mile to be cased and cemented across and above all formations permitted for injection pursuant to Statewide Rule 9.³⁰ However, a well need only be cemented immediately above all formations permitted for injection under Statewide Rule 46. These differences illustrate why it is important to allow UIC Section to conduct an administrative review at the outset of the application process.

The Applicant's email exchange with UIC Section the day prior to the hearing was also given no weight, as the Applicant's question with regards to changing a Statewide Rule 46 application to a Statewide Rule 9 application was predicated on the basis of an unprotested application. The Statewide Rule 46 application in this case is protested. An application may be administratively approved if no protest from an affected person is received by the Commission.³¹

²⁷ Additionally, Rule 1.128 states that the examiner shall open the hearing and make a concise statement of its scope and purposes. 16 Tex. Admin. Code § 1.128(a) (Hearing Procedures). When the Examiners called the present hearing, it was limited to review of the application under Statewide Rule 46. Consequently, the Examiners conclude that the scope of the hearing is limited to whether the application meets the requirements of Statewide Rule 46. Tr. Pg. 9, ln 7-12.

²⁸ Tr. pg. 231.

²⁹ 16 TEX. ADMIN. CODE §3.9(2).

³⁰ 16 TEX. ADMIN. CODE §3.13(a)(4)(A).

³¹ 16 TEX. ADMIN. CODE §3.46 (c)(6) and §3.9 (5)(F).

Additionally, Protestants were not given an opportunity to review this evidence during the discovery process.

Conclusion

Based on the evidence in the record, the Examiners conclude that the Applicant's request to change the authority for its application to Statewide Rule 9 does not comport with the procedural requirements of the APA or Commission's Rules of Practice and Procedure. The Examiners make no recommendation as to whether the Applicant's proposed amendments to the injection interval and subsequent re-filing of an application pursuant to Statewide Rule 9 would meet the requirements of Statewide Rule 9. The Examiners have concluded that the Applicant's request to proceed with a Statewide Rule 9 application was outside the scope of the noticed hearing.

Endangerment to Oil or Gas Resources

Based on the evidence, the Examiners conclude the proposed disposal well does not meet the requirements of Statewide Rule 46. The evidence in the record shows the proposed disposal well has the potential to endanger oil or gas resources. The injection interval includes the Georgetown Formation. The Applicant's witness stated that the Georgetown Formation is either productive and/or has been listed on well completion reports within two miles of the proposed well location. The Applicant provided no evidence that injection into the Georgetown Formation would not harm oil or gas resources. The Applicant did not dispute that it did not own the minerals on the disposal well tract its application was intending to inject into. The Applicant's proposed remedy to the Protestants' concern of endangerment to oil or gas resources was to change its application from a Statewide Rule 46 application to a Statewide Rule 9 application. The Applicant provided no evidence to show that oil and gas resources would be protected in support of its Statewide Rule 46 application.

The evidence in the record shows both the disposal well tract minerals, in addition to adjacent surface owner and Protestant Ms. Kindt's minerals, are leased to Buffco, and pooled in the 680-acre Kristen Unit. The Kristen No. 1 has been completed on the Kristen Unit. This well is located just over a half-mile from the proposed disposal well location, and as a result, Buffco was not provided notice of the application.³² The Kristen No. 1 has three laterals, completed in the Buda and Georgetown Formations. The 680-acre Kristen Unit, Well No. 1 is listed on the June 2015 oil proration schedule for the Kurten (Buda) Field. The Kristen No. 1 is a producing well and has produced 89,000 BO and 166, 000 Mcf of gas.

The evidence also shows that there is past production from the Cody Joe No. 1, which was completed in the Buda and Georgetown Formations. The Cody Joe No. 1 is located within a half-mile radius of the proposed disposal well location. The Cody Joe No. 1 produced over 37,000 BO between 1983 and 2001.

³² TEX. ADMIN. CODE §3.46 (c)(1).

FINDINGS OF FACT

1. OPG Energy, LLC seeks a permit authorizing commercial disposal operations pursuant to 16 Tex. Admin. Code § 3.46 for the Hwy 21 SWD Lease, Well No. 1, Kurten (Georgetown) Field, Brazos County, Texas.
 - a. The application for the Hwy 21 SWD Lease, Well No. 1, was mailed to all adjacent surface owners, and to the Brazos County Clerk. No operators were given notice, as no wells are located within a half-mile. 16 Tex. Admin. Code § 3.46(c)(1),(2).
 - b. Notice of the Hwy 21 SWD Lease, Well No. 1 commercial disposal well application was published in *The Eagle*, a newspaper of general circulation in Brazos County, Texas on December 12, 2015. 16 Tex. Admin. Code § 3.46(c)(4).
 - c. The application is protested by adjacent surface owners.
 - d. At least 10 days' notice of the hearing was provided to all adjacent surface owners and to the Brazos County Clerk. 16 Tex. Admin. Code § 3.46(c)(5)(A).
2. The use or installation of the Hwy 21 SWD Lease, Well No. 1 will endanger or injure oil, gas, or other mineral formations.
 - a. The Georgetown formation is a productive formation within two miles of the proposed Hwy 21 SWD Lease, Well No. 1.
 - b. The injection interval includes the Georgetown Formation.
 - c. The Applicant does not own the minerals under the disposal well tract.
 - d. The disposal well tract minerals are leased to Buffco Production Inc.
 - e. Protestant and adjacent surface owner Eleanor Kindt's minerals are leased to Buffco Production Inc.
 - f. The minerals under the disposal well tract and Eleanor Kindt's minerals are pooled in the 680 – acre Kristen Unit.
 - g. The Kristen Unit includes the disposal well tract.
 - h. The Kristen Unit, Well No. 1 is completed on the Kristen Unit.
 - i. The Kristen Unit, Well No. 1 is completed in the Buda and Georgetown Formations.

- j. The Kristen Unit, Well No. 1 is listed on the Kurten (Buda) Field June 1, 2015 oil proration schedule.
 - k. The Kristen Unit, Well No. 1 has produced 89,000 BO and 166,000 Mcf of gas.
3. The Proposal For Decision is based on whether the application meets the requirements of Statewide Rule 46. OPG is not precluded from filing an application pursuant to Statewide Rule 9 in the future.

CONCLUSIONS OF LAW

- 1. Resolution of the subject application is a matter committed to the jurisdiction of the Railroad Commission of Texas. TEX. NAT. RES. CODE § 81.051.
- 2. Findings of fact may be based only on the evidence and on matters that are officially noticed. TEX. GOV'T CODE §2001.141 (b).
- 3. The proposed fluid disposal operations will endanger oil, gas or geothermal resources. Texas Water Code § 27.051(b)(2), 16 Tex. Admin. Code § 3.46 (a).
- 4. OPG Energy, LLC has not met its burden of proof and the application for Hwy 21 SWD Lease, Well No. 1, Kurten (Georgetown) Field, Brazos County, Texas does not meet the requirements of Chapter 27 of the Texas Water Code and the Railroad Commission's Statewide Rule 46.
- 5. A Statewide Rule 9 application was not evaluated. OPG Energy, LLC is not precluded from filing an application pursuant to Statewide Rule 9 in the future.

EXAMINERS' RECOMMENDATION

Based on the above findings of fact and conclusions of law, the Examiners recommend that the application of OPG Energy, LLC for commercial disposal authority pursuant to Statewide Rule 46 for Hwy 21 SWD Lease, Well No. 1, Kurten (Georgetown) Field, Brazos County, Texas, be denied, as set out in the attached Final Order.

Respectfully submitted,



Karl Caldwell
Technical Examiner



Ryan Lammert
Administrative Law Judge