

July 31, 2023

Chairman Christi Craddick
Commissioner Wayne Christian
Commissioner Jim Wright
1701 N. Congress
Austin, Texas 78701

RE: Texas Railroad Commission Rulemaking related to Class VI UIC Injection Wells

Chairman and Commissioners:

The Texas Oil & Gas Associations (TXOGA) writes to comment on the Railroad Commission of Texas' (Commission) Proposed Amendments to 16 Tex. Admin. Code Chapter 5 and Application for Class VI Primacy from the U.S. Environmental Protection Agency (EPA).

TXOGA is a statewide trade association representing every facet of the Texas oil and gas industry including small independents and major producers. Collectively, the membership of TXOGA produces approximately 90 percent of Texas' crude oil and natural gas, operates nearly 90 percent of the state's refining capacity, and is responsible for the vast majority of the state's pipelines. In fiscal year 2022, the Texas oil and natural gas industry supported 443,000 direct jobs and paid \$24.7 billion in state and local taxes and state royalties, funding our state's schools, roads, and first responders.

TXOGA fully supports the Commission's application for primacy from EPA for the permanent geologic sequestration and storage of carbon dioxide (CO₂) via Class VI underground injection control (UIC) wells. TXOGA greatly appreciates both EPA and the Commission's efforts towards achieving that goal. TXOGA submits these comments to offer a perspective on changes to improve the rule as well as to identify provisions that may be overly burdensome or operate as deterrents to the use of Class VI wells when put into practice.

TXOGA is confident in the Commission's technical and regulatory expertise and strongly supports the Commission's application in obtaining enforcement primacy for the federal Class VI UIC program.

General

TXOGA requests clarification on the Commission's use of "operators" throughout the Class VI UIC well provisions as opposed to "owners and operators" as used in the federal regulations. For reference, "operator" is defined in the Commission's regulations as "[a] person, acting for itself or as an agent for others, designated to the Railroad Commission of Texas as the person with responsibility for complying with the rules and regulations regarding the permitting, physical operation, closure, and post-closure care of a geologic storage facility, or such person's authorized representative." 16 Tex. Admin. Code § 5.102(21). "Owner" is undefined. The federal UIC regulations state that "the owner or operator of any 'facility or activity' [are] subject to regulation under the UIC program." 40 C.F.R. § 144.3. TXOGA would like additional clarification on how

the use of “operator” as opposed to “owner and operator” will impact the applicability of these provisions on its members.

5.102 - Definitions

TXOGA writes to support the revisions to the definition of anthropogenic CO₂ to include CO₂ that has been captured from, or would otherwise have been released into, the atmosphere. This revision clarifies the applicability of the regulations to CO₂ resulting from direct air capture technologies. *See* Section 5.102(2). Similarly, TXOGA supports the corresponding revision to the definition of “carbon dioxide (CO₂) stream” in Section 5.102(7).

In addition, TXOGA writes to support the revisions to the definitions of “anthropogenic CO₂ injection well” in Section 5.102(3) and “geologic storage” in Section 5.102(28) to clarify that the regulations apply to the various phases of carbon dioxide (i.e., gaseous, liquid, or supercritical). This revision is consistent with the federal Class VI UIC regulations, which refer to different phases of CO₂.

TXOGA recommends that the definition for “good faith claim”, currently included as Section 5.102(30) be removed rather than amended, as proposed. A good faith claim, as referenced in 16 Tex. Admin. Code § 5.206(b)(9), is a determination to be made by the applicant based on the property interests it needs and the property interests it has obtained and does not require definition by the Commission.

However, if the Commission sees the need to define this term, TXOGA has the following comment and suggested amendment. The proposed definition modifies good faith claim to encompass “a perpetual property interest” rather than “a continuing possessory right”, which would drastically change the nature of said property interest. This contrasts with how the term has been used in other Commission regulations. *See, e.g.*, 16 Tex. Admin. Code § 3.15(a)(5). As a result, the proposed definition broadens the scope of a good faith claim beyond how it has been used previously without clear explanation and could be construed to exclude the use of certain types of property interests, such as an easement, which may be utilized for certain activities. Therefore, if the term must be defined, TXOGA respectfully requests that the Commission revise the proposed definition to refer to “continuing possessory right” or “continuing property interest.”

TXOGA has addressed the issue of defining “stratigraphic wells” in further detail below.

5.201 - Applicability and Compliance

TXOGA respectfully highlights that “stratigraphic wells” are a newly defined term and are not included in EPA regulations. Operators are currently encountering challenges in other states with the emerging regulation of stratigraphic and other carbon sequestration-related wells under traditional oil and gas rules. While it makes sense to regulate certain wells under the Commission’s oil and gas rules to leverage existing processes and programs, stratigraphic wells do not have any relationship to oil and gas. Thus, while TXOGA believes the Commission is the appropriate agency to manage these wells, it recommends a clear delineation between the programs to avoid creating an opportunity to mischaracterize stratigraphic wells as oil and gas wells.

The proposed language in Section 5.201(h) requires an operator to “apply for a permit to drill (Form W-1) prior to drilling a stratigraphic test well, notify the UIC Section of the application, and submit a completion report (Form W-2/G-I) once the well is completed.” Under this provision:

if the operator plans to convert the stratigraphic test well to a Class VI injection well, the well construction shall meet all requirements of this subchapter for a Class VI injection well. Any stratigraphic test well drilled for exploratory purposes only shall be governed by the provisions of the [Commission’s] rules in Chapter 3 applicable to the drilling, safety, casing, production, abandoning, and plugging of wells.

TXOGA notes that this differs from current regulations, as Class V wells would not generally be subject to primacy requirements under the Class VI program. TXOGA requests clarifying language regarding these requirements. Practically, this revision seems to require that the ultimate purpose of the well be predetermined, and the well be constructed for that purpose before knowing whether and how the well can even be used, nullifying the need for an exploratory well in the first instance. Specifically, TXOGA requests that the regulation be revised so that it is evident that these requirements are not applicable to wells that are not subsequently converted to Class VI injection wells or are converted to Class V injection wells. An example of such a well could be a monitoring well. To be clear, TXOGA fully understands and supports there may be additional well criteria upon conversion but disagrees with any requirement that applies such heightened requirements speculatively.

Additionally, TXOGA requests that Section 5.201(h) be further amended as follows:

(h) An operator shall apply for a permit to drill (Form W-1) prior to drilling a stratigraphic test well, notify the UIC Section of the application, and submit a completion report (Form W-2/G-1) once the well is completed. If the operator plans to convert the stratigraphic test well to a Class VI injection well, the well construction shall meet all of the requirements of this subchapter for a Class VI injection well. Any stratigraphic test well drilled for exploratory purposes only shall be governed by the provisions of Commission rules in Chapter 3 of this title (relating to Oil and Gas Division) applicable to the drilling, safety, casing, production, abandoning, and plugging of wells.

5.203 - Permit Application Requirements

TXOGA would like to express support for the numerous revisions to the permit application provisions to incorporate additional consistency with the federal regulations for Class VI permit applications. TXOGA appreciates the coordination between EPA and the Commission to create a robust regulatory scheme.

5.204 - Notice of Permit Actions and Public Comment Period

In Section 5.204(b)(5), the Commission proposes that, “[u]pon making a final permit decision, the director shall issue a response to comments . . . The Commission shall post the response to comments on the Commission’s internet website.” These amendments are consistent with 40 C.F.R. § 124.17, with the modification that the response to comments should be posted on the Commission’s internet website. This provides increased specificity for how the response to comments will be made public. TXOGA is supportive of these revisions and the Commission’s commitment to transparency in the permitting process.

5.205 - Fees, Financial Responsibility, and Financial Assurance

The Commission proposes nearly a dozen new requirements with respect to financial assurance requirements. These proposals, by and large, are in line with EPA financial assurance requirements, and TXOGA is supportive of these changes.

TXOGA notes that under the Commission’s proposed regulations, it is unclear when financial assurance must be provided. The Commission’s proposal alludes to providing financial assurance both prior to CO₂ injection [5.205(c)(2)(B)] and prior to permit issuance [5.205(c)(2)(A)(ii)]. TXOGA believes the requirement should be prior to CO₂ injection only.

Section 5.205(c)(2)(A)(i) states that the cost estimate used for site closure should include plugging all wells (e.g., monitoring wells) that may never be drilled. EPA regulation only discusses the injection wells when determining the closure cost estimate. TXOGA proposes that the Commission adopt EPA’s language or include a mechanism to address the financial assurance associated with these other well types.

Section 5.205(c)(2)(A)(i) contemplates using a “written estimate of the highest likely dollar amount necessary” as the basis for financial assurance. This language is more stringent than the UIC Class VI regulations that require the owner or operator to include “a detailed written estimate, in current dollars, of the cost of performing corrective action on wells in the area of review, plugging the injection well(s), post-injection site care and site closure, and emergency and remedial response.” 40 C.F.R. § 146.85(c). In addition, companies solicit and receive many quotes and select a vendor based on a variety of factors. Companies do not typically default to the highest quote. TXOGA recommends that the Commission defer to EPA language on this topic, which ensures sufficient financial assurance for closure and post-closure scenarios and is updated annually.

TXOGA notes that the Commission’s regulations do not specify the financial assurance instruments that qualify under the regulations as satisfactorily demonstrating financial assurance. EPA regulations list which financial instruments must be used: trust funds; surety bonds; letter of credit; insurance; self-insurance (*i.e.*, Financial Test and Corporate Guarantee); escrow account; and any other instrument(s) satisfactory to the Director. *See* 40 C.F.R. § 146.85. While Section 5.205(c)(2)(D) states that “[b]onds and letters of credit filed in satisfaction of the financial assurance requirements for a geologic storage facility must comply with the following standards as to issuer and form”, this does not clarify if bonds and letters of credit are the only sufficient

instruments to demonstrate financial assurance. TXOGA does not believe, as has been suggested, that Texas lacks statutory authority to authorize the use of financial assurance mechanisms other than letters of credit and bonds, such as insurance, self-insurance, and trust funds.

Chapter 27 of the Texas Water Code grants the Commission ample statutory authority to allow for various forms of financial security for Class VI injection wells. Such financial assurance forms can include insurance, self-insurance, or escrow as well as bonds and letters of credit. The Commission need only adopt rules enumerating these additional acceptable forms of assurance and setting parameters for their use. This is directly supported by the plain language of Texas Water Code Section 27.073, Financial Responsibility, which provides that an injection well permit holder “may be required by the . . . railroad commission to maintain a performance bond or **other form of financial security . . .**” Tex. Water Code § 27.073(a) (emphasis added). The statute goes on to say: “[i]n addition to other forms of financial security authorized by the rules of the commission, the commission may authorize an applicant to use the letter of credit form of financial security . . .” *Id.* at § 27.073(d) (emphasis added). The statute also grants the Commission rulemaking authority for “the collection and administration of funds received from financial responsibility mechanisms under Section 27.073.” The statute therefore empowers the Commission to adopt rules providing for the use of financial security instruments beyond letters of credit and does not limit such instruments to bonds. Moreover, the Water Code does not limit the term “other form of financial security” in any way.

Other agencies have not chosen to limit the forms of financial security that can be used for Class VI injection wells. For instance, EPA’s financial assurance rule provides that an “owner or operator shall demonstrate and maintain financial responsibility for post-closure by using a trust fund, surety bond, letter of credit, financial test, insurance or corporate guarantee that meets the specifications for the mechanisms and instruments revised as appropriate to cover closure and post-closure care . . .” 40 C.F.R. § 146.73. By acknowledging the appropriateness of these financial assurance mechanisms for use in Texas, the Commission would not be acting within the Legislature’s mandate to develop this program as it sees fit, but it would also be consistent with the Legislature’s desire that “[r]ules adopted by the railroad commission . . . must be consistent with applicable rules or regulations adopted by the United States Environmental Protection Agency . . . governing the injection and geologic storage of anthropogenic carbon dioxide.” Tex. Water Code § 27.048(a). The Commission must adopt rules consistent with those of EPA. Including insurance and corporate guarantees among the available financial assurance mechanisms would be consistent. Ample statutory authority supports the Commission’s ability to promulgate rules that include insurance and corporate guarantees among the suite of financial assurance options for Class VI wells.

5.206 - Permit Standards

TXOGA supports the Commission’s proposal requiring that “within 30 days after the completion or conversion of an injection well subject to this subchapter, the operator must file with the division a complete record of the well on Commission Form W-2, Oil Well Potential Test, Completion or Recompletion Report and Log showing the current completion” as opposed to “the appropriate

form.” Section 5.206(c)(2). TXOGA appreciates the additional specificity and clarity provided in the regulation.

TXOGA would like to highlight a potential drafting error in Section 5.206(d)(1)(B)(ii). The Commission proposes that prior to approval for the operation of a Class VI injection well, the operator shall submit and the director shall consider “any relevant updates, based on data obtained during logging and testing of the well and the formation as required by §5.203(f) of this title, to the information on the geologic structure and hydrogeologic properties of the proposed storage site and overlying formations, submitted to satisfy the requirements of clauses (iii), (iv), (v), (vii), and (x) of this subparagraph”. Section 5.206(d)(1)(B)(ii). This appears to likely be a drafting mistake, both in the reference to Section 5.203(f) and the references to the subsections (iii), (iv), (v), (vi), (vii), and (x). Federal regulations require consideration of any relevant updates, based on data obtained during logging and testing of the well and the formation as required by paragraphs (c)(3), (4), (6), (7), and (10), or correspondingly for the Commission’s regulations Section 5.206(d)(1)(B)(iii), (iv), (vi), (vii), and (x). *See* 40 C.F.R. § 146.82(c)(2). To comply with federal regulations, the Commission may have switched the references in this provision, and it appears the Commission may be referring to incorrect subsections in its references. TXOGA encourages the Commission to further review this section and provide clarity on the requirements.

There are conflicting record retention timing requirements within the permit standards (5.206) and recordkeeping and reporting (5.207) sections for injected fluids and testing and monitoring data. We have delineated those sections below for clarity.

- a. Testing and monitoring data
 - i. 5.206(e)(5)(B)(i)
 1. **Calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation**, copies of all reports required by the permit, and records of all data used to complete the permit application, for a period of at **least three years** from the date of the sample, measurement, report, or application. This period may be extended by the director at any time; and
 - ii. 5.206(m)(1)(A)
 1. **Calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation**, copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least **three years** from the date of the sample, measurement, report, or application. This period may be extended by the director at any time; and
 - iii. 5.207(e)(3)
 1. **The operator must retain all testing and monitoring data collected pursuant to the plans required under §5.203(j)** of this title, including wellhead pressure records, metering records, and integrity test results, and modeling inputs and data used to support AOR calculations for at **least 10 years** after the data is collected.

- b. Injection fluid
 - i. 5.206(e)(5)(B)(ii)
 - 1. the **nature and composition of all injected fluids** until **three years** after the completion of any plugging and abandonment of the injection well. The director may require the operator to submit the records to the director at the conclusion of the retention period.
 - ii. 5.206(m)(1)(B)
 - 1. the **nature and composition of all injected fluids** until **three years** after the completion of any plugging and abandonment procedures. The director may require the operator to submit the records to the director at the conclusion of the retention period.
 - iii. 5.206(m)(3)
 - 1. The operator must retain for **10 years** following storage facility closure records collected to prepare the permit application, **data on the nature and composition of all injected fluids**, and records collected during the post-injection storage facility care period. The operator must submit [deliver] the records to the director at the conclusion of the retention period, and the records must thereafter be retained at the Austin headquarters of the Commission.
 - iv. 5.207(e)(2)
 - 1. The operator must retain **data on the nature and composition of all injected fluids** collected pursuant to §5.203(j)(2)(A) of this title until **10 years after storage facility closure**. The operator shall submit the records to the director at the conclusion of the retention period, and the records must thereafter be retained at the Austin headquarters of the Commission.

In Section 5.206(k)(5), the Commission is proposing to require that for authorization of storage facility closure, following storage facility closure and the operator's plugging of all wells, the operator must submit a plugging record (Form W-3) as required by Section 3.14. TXOGA supports this revision and the demonstration of consistency throughout the Commission's regulations.

In Section 5.206(o)(2)(M)(iii), the Commission should clarify that entities under common control would not be considered a permit transfer.

5.207 - Reporting and Record Keeping

The Commission proposes in Section 5.207(a)(2)(A) that certain reports for specific issues be reported within 24 hours of discovery, i.e.:

- (i) the discovery of any significant pressure changes or other monitoring data that indicate the presence of leaks in the well or the lack of confinement of the injected gases to the geologic storage reservoir; (ii) any evidence that the injected CO₂ stream or associated pressure front may cause an endangerment to a USDW; (iii) any noncompliance with a permit condition, or malfunction of the injection system, which may cause fluid migration into or between USDWs; (iv) any triggering of a

shut-off system (i.e., down-hole or at the surface); and (v) any failure to maintain mechanical integrity.

This provision also requires that the information must be reported in writing within five working days of discovery and that the written submission shall contain “a description of the noncompliance and its cause, the period of noncompliance, including exact dates and times and, if the noncompliance has not been corrected, the anticipated time it is expected to continue, and steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance.” Section 5.207(a)(2)(A). Federal regulations do not include a similar requirement. *See* 40 C.F.R. § 146.91. TXOGA believes the written reporting requirement is unduly burdensome and that reporting the issues listed above within 24 hours of discovery should be sufficient for the purposes of notice under the regulation. TXOGA recommends that this condition to report such findings within five working days be removed.

The Commission is proposing that annual reports must include “other information as required by the permit.” Section 5.207(a)(2)(D)(vi). TXOGA believes this requirement is unnecessarily vague and may make compliance with the regulation difficult. TXOGA recommends that the Commission clearly identify and list any requirement that must be included within an annual report.

Further, TXOGA would like to express concern with the Commission’s proposal that an operator must retain “data and information used to develop the demonstration of the alternative post-injection storage facility care timeframe, and the closure report collected pursuant to the requirements of §5.206(k)(6) and (m) of this title for 10 years following storage facility closure.” Section 5.207(e)(4). In contrast, EPA regulations require an operator to retain such data and information for 10 years “if appropriate.” *See* 40 C.F.R. § 146.91(f)(4). As “data and information used to develop the demonstration of the alternative post-injection storage facility care timeframe and the closure report collected pursuant to the requirements of § 5.206(k)(6) and (m)” may not always be collected for each facility, TXOGA recommends that the Commission require the retention of this information only “if appropriate” for the facility.

Conclusion

TXOGA would like to reiterate its thanks to the Commission and EPA for their ongoing coordination and efforts to streamline the transition of Class VI well permitting authority to the Commission and look forward to timely issuance of primacy. As an organization that has the privilege of representing all aspects of Texas’ oil and gas industry, TXOGA is grateful for the opportunity to provide comments in support and furtherance of carbon capture, utilization, and storage to improve environmental quality and enhance the responsible development of Texas’ natural resources.