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Erin Chancellor, *Interim Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

May 17, 2023

Laurie Gharis, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC - 105)
P.O. Box 13087
Austin, Texas 78711-3087

RE: Restore The Grasslands, LLC And Harrington/Turner Enterprises
TPDES Permit No. WQ0016003001
SOAH Docket No. 582-22-02856; TCEQ Docket No. 2022-0326-MWD

Dear Ms. Gharis:

Enclosed please find a copy of the Executive Director's Exceptions to the Proposal for Decision for the Contested Case Hearing listed above.

If you have any questions, please do not hesitate to call me at (512) 239-3417 or email at Kathy.humphreys@tceq.texas.gov.

Sincerely,

A handwritten signature in cursive script that reads "Kathy J. Humphreys".

Kathy Humphreys
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Enclosures

SOAH DOCKET NO. 582-22-02856
TCEQ DOCKET NO. 2022-0326-MWD

APPLICATION OF § BEFORE THE STATE OFFICE
RESTORE THE GRASSLANDS, LLC §
AND HARRINGTON/TURNER § OF
ENTERPRISES, LP FOR TPDES §
PERMIT NO. WQ0016003001 § ADMINISTRATIVE HEARINGS

EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S
PROPOSAL FOR DECISION

I. OVERVIEW

The Executive Director of the Texas Commission on Environmental Quality (TCEQ or Commission) submits her Exceptions to the Proposal for Decision. The Executive Director supports the Administrative Law Judge's (ALJs) conclusion that Restore the Grasslands, LLC and Harrington/Turner Enterprises, LP (RTG/HTE) has met its burden of proof on referred issues A, B, C, D, F, G, H, I, J, K, and L. However, for the reasons discussed in detail below, the Executive Director does not support the ALJ's recommendation regarding referred issue E - Regionalization. The Executive Director is also providing suggested changes and corrections to the proposed order.

Procedural Background

The TCEQ received an application from RTG/HTE for a new Texas Pollutant Discharge Elimination System (TPDES) permit on May 26, 2021, and declared it declared administratively complete on August 25, 2021. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published in English on September 2, 2021, in the *Collin County Commercial Record* and in Spanish on September 1, 2021, in the *Al Dia*. The Executive Director completed the technical review of the application on October 18, 2021. The combined Notice of Application and Preliminary Decision (NORI) and Notice of Public Meeting was published in English on October 28, 2021, in the *Collin County Commercial Record* and in Spanish on November 3, 2021, in the *Al Dia*. A Public Meeting was held on December 6, 2021, via webcast. The public comment period ended at the close of the Public Meeting.

As required by the Texas Water Code (TWC) and the Texas Administrative Code (TAC), the Executive Director reviewed the comments submitted during the comment

period and prepared a Response to Comments, which was provided on February 4, 2022, to everyone who commented and the persons on the mailing list maintained by the Office of Chief Clerk.¹ The Hearing Request/Request for Reconsideration period ended on March 14, 2022. During an Open Meeting on May 18, 2022, the Commission considered the hearing requests, responses to the hearing requests, all timely public comments, and the Executive Director's Response to Comments.

The Commission found the City of Murphy, the City of Parker, North Texas Municipal Water District (NTWD), and over 70 individuals were affected persons and referred 12 issues to the SOAH for a Contested Case Hearing:

- A) Whether the draft permit is protective of livestock, wildlife, and wildlife habitats;
- B) Whether the draft permit is protective of the requesters' and their families' health and safety;
- C) Whether the draft permit complies with applicable siting requirements in 30 Texas Administrative Code Chapter 309, including adequate prevention of nuisance odors;
- D) Whether Applicants substantially complied with applicable notice requirements;
- E) Whether issuance of the draft permit is consistent with TCEQ's regionalization policy and Texas Water Code §§ 26.081 and 26.0282, and 30 Texas Administrative Code Chapter 3 51, Subchapter C, including consideration of need for the proposed facility and designation of a regional entity;
- F) Whether the draft permit complies with the Texas Surface Water Quality Standards and is protective of surface and groundwater quality, including requesters' use and enjoyment of their property;
- G) Whether the antidegradation review complies with applicable regulations and the draft permit includes adequate nutrient limits;
- H) Whether the Application is accurate and contains all required information;
- I) Whether Applicants are legal entities;
- J) Whether the draft permit includes adequate provisions to control vectors;

¹ Tex. Water Code § 5.555 and 30 Tex. Admin. Code § 55.156.

- K) Whether the draft permit's monitoring requirements comply with applicable regulations; and
- L) Whether the Applicants' compliance history raises any issues regarding Applicants' ability to comply with the material terms of the permit that warrant denying or altering the terms of the draft permit.

The preliminary hearing was held on August 29, 2022, via Zoom. The Hearing on the Merits was conducted via Zoom from February 7 - 10, 2023. The ALJ issued her Proposal for Decision (PFD) to the Commission on April 27, 2023.

Burden of Proof

Because the RTG/HTE application was received after September 1, 2015, the application is subject to the procedural requirements adopted pursuant to HB 801, 76th Legislature (1999) and Senate Bill (SB) 709, 84th Legislature (2015), both implemented by the Commission in its rules in 30 TAC Chapters 39, 50, and 55.² The Texas Legislature enacted SB 709, effective September 1, 2015, amending the requirements for comments and contested case hearings. This application is subject to those changes in the law. One of the major changes to the contested case hearing process as a result of SB 709 is that the filing of the administrative record with SOAH establishes a prima facie case that the draft permit meets all applicable state and federal legal and technical requirements and, if issued, will protect human health and safety and the environment. According to Commission rules at 30 TAC Section 80.118(c), the administrative record includes the application submitted by the applicant, including any revisions to the original application; the Executive Director's final draft permit, including any special provisions or conditions; the Executive Director's preliminary decision, or the Executive Director's decision on the permit application, if applicable; the summary of the technical review of the permit application; the compliance summary of the applicant; copies of the public notices relating to the permit application, as well as affidavits regarding public notices; and any agency document determined by the executive director to be necessary to reflect the administrative and technical review of the application.

² SB 709 was codified in Tex. Gov't. Code § 2003.047.

The statute further provides that a party may rebut the prima facie case by presenting evidence relating to one of the issues referred by the Commission and demonstrating that the draft permit violates an applicable state or federal requirement.³ The statute also provides that the applicant and the Executive Director may present additional evidence to support the draft permit.⁴ The Executive Director maintains that the prima facie case was not successfully rebutted.

II. EXCEPTIONS to the PROPOSAL for DECISION

A. Discussion and Analysis Regarding Issue E - Regionalization

The Executive Director maintains her position that the Commission should issue the permit as drafted. The Texas Water Code makes it clear that the statutory provisions regarding regionalization are permissive, not mandatory.

TWC § 26.0282 (Consideration of Need and Regional Treatment Options)

In considering the issuance, amendment, or renewal of a permit to discharge waste, the commission may deny or alter the terms and conditions of the proposed permit, amendment, or renewal based on consideration of need, including the expected volume and quality of the influent and the availability of existing or proposed areawide or regional waste collection, treatment, and disposal systems not designated as such by commission order pursuant to provisions of this subchapter. This section is expressly directed to the control and treatment of conventional pollutants normally found in domestic wastewater. (emphasis added)

TWC § 26.003 (Policy of this Subchapter)

It is the policy of this state and the purpose of this subchapter . . . to encourage and promote the development and use of regional and areawide waste collection, treatment, and disposal systems to serve the waste disposal needs of the citizens of the state; and to require the use of all reasonable methods to implement this policy. (emphasis added)

TWC § 26.081(a) (Regional or Area-Wide Systems; General Policy)

The legislature finds and declares that it is necessary to the health, safety, and welfare of the people of this state to implement the state policy to encourage and promote the development and use of regional and area-wide waste collection, treatment, and disposal systems to serve the waste disposal needs of the citizens of the state and to prevent

³ Tex. Gov't. Code § 2003.047(i-2).

⁴ Tex. Gov't. Code § 2003.047(i-3).

pollution and maintain and enhance the quality of the water in the state.(emphasis added)

The statute is clear that the Texas Legislature intends on encouraging regionalization, however, the statute falls short of mandating regionalization. The Executive Director acknowledges that 30 TAC Chapter 351, Subchapter C provides that NTMWD is the regional provider for the watershed area of the East Fork of the Trinity River that lies in Dallas, Kaufman, Rockwall, and Collin Counties.⁵ However, according to the testimony provided at the hearing, NTMWD is unwilling to provide service to RTE/HTE directly, thus the Executive Director respectfully recommends the ALJ reconsider her decision and recommend the Commission issue the TPDES permit to RTG/HTE.

Jerry Allen, the Permitting Manager for NTMWD testified that NTMWD has a facility and several regional collection lines within three miles of proposed outfall.⁶ Mr. Allen also testified that NTMWD has capacity to serve the proposed RTG/HTE development.⁷ However, on cross examination Mr. Allen testified that NTMWD only provides services to its customers; developers and MUDs must obtain service from NTMWD via customers or customer cities. Therefore, the only way for RTG/HTE to obtain wastewater service from NTMWD is via a customer or customer city; however, the neighboring cities that have the capacity to accept the wastewater condition the use of their collection systems on annexation or other mechanisms that are effectively land use restrictions. For example, Gary Hendricks testified on behalf of the City of Murphy that it would be impractical for the City of Murphy to serve the proposed RTG/HTE development at the density of 666 lots.⁸ During cross examination, Mr. Hendricks testified that the City of Murphy does not have capacity to serve RTG/HTE at the proposed density.⁹ Luke Olson testified on behalf of the City of Parker that RTG/HTE's property is in Parker's extraterritorial jurisdiction, and Parker had subdivision and platting approval over the property.¹⁰ Mr. Olson also testified that

⁵ 30 TAC § 351.31.

⁶ NTMWD Direct Examination Ex. 100, J Allen, 12:9-18.

⁷ NTMWD Direct Examination Ex. 100, J Allen, 14:11.

⁸ City of Murphy Testimony, Direct Testimony of Gary C. Hendricks, 17:1-7.

⁹ Tr. Vol. 1; 116:4-8.

¹⁰ City of Parker Testimony, Parker Ex. 3, 6:6-11.

Parker doesn't have sufficient information to provide definitive data concerning connection to its system.¹¹

Mr. Martinez testified on behalf of the Executive Director that the Executive Director requires applicants for TPDES permits to provide certain information regarding neighboring wastewater treatment facilities.¹² Mr. Martinez testified that if there are any domestic permitted wastewater treatment facilities within a three-mile radius of the proposed facility, applicants must provide information regarding whether the wastewater treatment facility or facilities have sufficient existing capacity to accept the additional volume of wastewater.¹³ According to the information provided by RTG/HTE, the City of Allen, City of Lucas, City of Parker, and the City of Plano indicated that they did not have the capacity to serve the proposed development.¹⁴

Using the ALJ's analysis, RTG/HTE is put in the untenable position of not being able to obtain a TPDES permit to provide wastewater service to the development because NTMWD is a regional provider; but NTMWD will not provide service directly to RTG/HTE, thus RTG/HTE must contract with a customer or customer city. The neighboring customer cities are either unable or unwilling to provide RTG/HTE access to their collection systems without conditions. If this permit application is denied, RTG/HTE would be required to find a way to transport the wastewater from the development to NTMWD's treatment facility. Ideally RTG/HTE would be able to tie into of the neighboring cities wastewater collection lines; however, as previously discussed, the neighboring cities have all either denied service to RTG/HTE or conditioned service on land use controls, including density.¹⁵

It is also important to note that the rule NTMWD, City of Murphy, and the City of Parker rely on in their regionalization argument requires NTMWD to provide . . . regional wastewater collection and treatment service to all legal entities . . ." (emphasis added). 30 TAC § 351.35. However, as noted by Mr. Allen, NTMWD's "willingness depends on the location of Collin County MUD No. 7 and if access to the regional system is available and feasible."¹⁶ NTMWD seeks to have it both ways. They argue that

¹¹ City of Parker Testimony, Parker Ex. 3, 7:8-14.

¹² ED-JM-1, 17:17 to 18:3.

¹³ ED-JM-1, 19:5-15.

¹⁴ ED-JM-1;19:18-26.

¹⁵ Direct Testimony of Gary C, Hendricks, pg. 17 line 1 through line 25.

they are the regional provider for the area and RTG/HTE cannot obtain its own TPDES permit, but refuse to accept wastewater directly from RTG/HTE.

Considering the information provided in the RTG/HTE application and the testimony provided at the hearing, the Executive Director maintains her position that the application and draft permit comply with all applicable statutory and regulatory requirements and the draft permit should be issued without changes.

B. Executive Director's Recommended Changes to Findings of Facts

The Executive Director recommends the following changes to the ALJ's Findings of Facts:

1. Finding of Fact #8 (Correction/Clarification)

The Executive Director notes that this finding of fact appears to be incomplete as it does not include the effluent limitations for the final phase of the draft permit. The Executive Director suggests adding the following language from the Draft Permit and this finding of fact be revised to read:

"The Draft Permit provides for two phases, an interim phase and a final phase. During the interim phase, which extends through completion of the expansion to the 0.2 MGD facility, the daily average flow of effluent shall not exceed 0.1 MGD, and average discharge during any two-hour period may not exceed 278 gallons per minute (gpm). During the period beginning upon the completion of expansion to the 0.2 MGD facility and lasting through the date of expiration, the daily average flow of effluent shall not exceed 0.2 MGD, nor shall the average discharge during any two-hour period exceed 556 gpm."¹⁶

2. Finding of Fact #63 (Correction/Clarification)

The Executive Director notes that the TCEQ's predecessor agency, the Texas Water Commission, designated NTMWD as the regional provider for the watershed of area of the East Fork of the Trinity River when it adopted 30 TAC Chapter 351 Subchapter C on February 24, 1978.¹⁷ The Executive Director respectfully recommends this finding of fact be modified to read: "The Facility is within the watershed area of

¹⁶ Administrative Record, Tab C, 0003.

¹⁷ 3 TexReg 595.

the East Fork of the Trinity River, for which TCEQ's predecessor agency, the Texas Water Commission, has designated NTMWD as the regional provider.”

3. Finding of Fact #64 (Correction)

The Executive Director respectfully requests this finding of fact be modified to conform with her recommendation that the Commission direct NTMWD and RTG/HTE either reach an agreement for service within 90 days of the Commission Order, or petition the Commission for an Order delineating the terms of NTMWD providing service to RTG/HTE. Specifically, the Executive Director recommends the following: Based on the Designation of NTMWD as the regional provider, it (alone or with a customer city) should be instructed to attempt to reach an agreement on terms of service with Applicants within 90 days of the Commission Order or petition the Commission for an Order delineating the terms of NTMWD providing service to RTG/HTE. ~~Should those attempts fail, the Commission will set those terms.~~”

4. Finding of Fact #66 (Correction/Clarification)

Ms. Jenna Lueg performed her antidegradation review in preparation of the Draft Permit on behalf of the Executive Director. To avoid any potential confusion, the Executive Director respectfully suggests this finding of fact be revised to read: “Jenna Lueg performed the antidegradation review on ~~for~~ the Application using the procedures set out in the IPs.”

5. Finding of Fact #67 (Correction/Clarification)

Similar to Finding of Fact #66, Ms. Lueg performed her nutrient screen in preparation of the Draft Permit on behalf of the Executive Director. To avoid any potential confusion, the Executive Director respectfully requests that the first sentence of this finding of fact be revised to read: “Ms. Lueg also performed a nutrient screening on ~~for~~ the Application.”

C. Executive Director's Recommended Changes to Conclusions of Law

The Executive Director respectfully recommends new Conclusion of Law numbers 18 and 19 and the remaining Conclusions of Law be sequentially remembered.

1. New Conclusion of Law #18

The purpose of Chapter 26, subchapter A is to “encourage and promote the development and use of regional and areawide waste collection, treatment, and disposal systems to serve the waste disposal needs of the citizens of the state; and to require the use of all reasonable methods to implement this policy.” TWC § 26.003.

2. New Conclusion of Law # 19

The phrase “encourage and promote” as used in TWC § 26.003 is permissive.

3. Conclusion of Law #19 (Original number, Correction/Clarification)

The Executive Director notes that 30 TAC Chapter 351, Subchapter C was adopted on February 24, 1978. (FN: 3 TexReg 595). The TCEQ’s predecessor, the Texas Water Commission, designated NTMWD as the regional provider. The Executive Director respectfully requests that this conclusion of law be modified to read: “The Texas Water Commission, The TCEQ has TCEQ’s predecessor agency, designated NTMWD as the regional provider for the watershed area of the East Fork of the Trinity River that lies in Dallas, Kaufman, Rockwall, and Collin Counties. 30 Tex. Admin. Code §§ 351.31, .33.”

4. Conclusion of Law #22 (Original Number) (Revision)

Existing Conclusion of Law #22 should be deleted in its entirety and replaced with:

“The Draft Permit should be issued as proposed with the addition of new Other Requirement 8 as follows:

Other Requirement 8.

In addition to the buffer zone requirements in Other Requirement No. 3, the permittee shall install carbon scrubbers to the facility and cover the portions of the facility where the largest odor emissions are likely to occur.

III. Conclusion

The Executive Director maintains her position that the draft permit meets all applicable statutory and regulatory requirements and respectfully recommends the Administrative Law Judge issue a Revised Proposal for Decision recommending the

Commission issue the draft permit with new Other Requirement No. 8 requiring the permittee to install carbon scrubbers and partially enclose the plant.

If the Commission agrees with the ALJ that the permit cannot be issued based on 30 TAC Chapter 351, subchapter C, the Executive Director respectfully recommends the Commission direct NTMWD and RTG/HTE to either reach an agreement for service within 90 days of the Commission Order, or petition the Commission for an Order delineating the terms of NTMWD providing service to RTG/HTE.

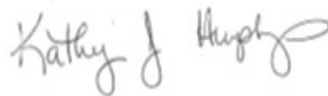
Respectfully submitted,

Texas Commission on Environmental Quality

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IV. CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on the following by U.S. Regular Mail, Certified Mail (return receipt requested), electronic mail, hand delivery and/or facsimile at the addresses listed below on this 17th day of May 2023.



Kathy Humphreys, Staff Attorney
Environmental Law Division

CERTIFICATE OF SERVICE

I certify that on May 17, 2023, the “Executive Director’s Exceptions To The Administrative Law Judge’s Proposal For Decision” for SOAH Docket No. 582-22-02856 was filed with the Chief Clerk of the TCEQ, and a copy was served to all parties via hand delivery, facsimile transmission, inter-agency mail, or by deposit in the U.S. Mail.



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