

# State Office of Administrative Hearings

Kristofer S. Monson  
Chief Administrative Law Judge

April 27, 2023

Restore the Grasslands LLC  
Harrington/Turner Enterprises LP

VIA EFILE TEXAS

Mary Smith, General Counsel  
Texas Commission on Environmental Quality

VIA EFILE TEXAS

**RE: Docket Number 582-22-02856.TCEQ; Texas Commission on Environmental Quality No. 2022-0326-MWD; Application by Restore the Grasslands LLC and Harrington/Turner Enterprises LP for New Texas Pollution Discharge Elimination System Permit No. WQ0016003001**

Dear Parties:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than May 17, 2023. Any replies to exceptions or briefs must be filed in the same manner no later than June 6, 2023.

This matter has been designated TCEQ Docket No. 2022-0326-MWD; SOAH Docket No. 582-22-02856. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at <http://www14.tceq.texas.gov/epic/eFiling/> or by filing an

original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

CC: Service List

**BEFORE THE  
STATE OFFICE OF ADMINISTRATIVE  
HEARINGS**

**APPLICATION BY RESTORE THE GRASSLANDS LLC AND  
HARRINGTON/TURNER ENTERPRISES, LP FOR NEW  
TEXAS POLLUTION DISCHARGE ELIMINATION SYSTEM  
PERMIT NO. WQ0016003001**

**TABLE OF CONTENTS**

**I. PROCEDURAL HISTORY ..... 2**

**II. BURDEN OF PROOF .....5**

**III.DISCUSSION AND ANALYSIS.....7**

**A. BACKGROUND AND APPLICABLE LAW.....7**

**1. DESCRIPTION OF THE PROPOSED FACILITY AND  
DISCHARGE .....7**

**2. THE DRAFT PERMIT ..... 9**

**3. TEXAS SURFACE WATER QUALITY STANDARDS .....10**

**B. ISSUES RELATED TO WATER QUALITY..... 11**

**1. COMPLIANCE WITH THE TSWQS (ISSUE F)..... 12**

2.	<b>LIVESTOCK, WILDLIFE, AND WILDLIFE HABITATS (ISSUE A)</b> .....	17
3.	<b>HEALTH AND SAFETY (ISSUE B)</b> .....	21
4.	<b>ANTIDegradation REVIEW (ISSUE G)</b> .....	22
C.	<b>ISSUES RELATED TO NOTICE, THE APPLICANTS’ LEGAL STATUS, AND THE COMPLETENESS OF THE APPLICATION</b> .....	27
1.	<b>NOTICE (ISSUE D)</b> .....	27
2.	<b>ACCURACY AND COMPLETENESS OF THE APPLICATION (ISSUE H)</b> .....	28
3.	<b>WHETHER THE APPLICANTS ARE LEGAL ENTITIES (ISSUE I)</b> .....	31
D.	<b>SITING REQUIREMENTS (ISSUE C)</b> .....	34
1.	<b>FLOODING</b> .....	35
2.	<b>NUISANCE ODORS</b> .....	36
E.	<b>REGIONALIZATION (ISSUE E)</b> .....	38
1.	<b>LAW ON REGIONALIZATION</b> .....	38
2.	<b>NEED AND AVAILABILITY</b> .....	39
3.	<b>DESIGNATION AS THE REGIONAL PROVIDER</b> .....	44
F.	<b>VECTORS (ISSUE J)</b> .....	47
G.	<b>MONITORING (ISSUE K)</b> .....	47
H.	<b>COMPLIANCE HISTORY (ISSUE L)</b> .....	49
IV.	<b>TRANSCRIPTION COSTS</b> .....	50
V.	<b>CONCLUSION</b> .....	51

SOAH Docket No. 582-22-02856

Suffix: TCEQ

TCEQ Docket No. 2022-0326-MWD

---

**BEFORE THE  
STATE OFFICE OF ADMINISTRATIVE  
HEARINGS**

---

**APPLICATION BY RESTORE THE GRASSLANDS LLC AND  
HARRINGTON/TURNER ENTERPRISES, LP FOR NEW  
TEXAS POLLUTION DISCHARGE ELIMINATION SYSTEM  
PERMIT NO. WQ0016003001**

---

**PROPOSAL FOR DECISION**

Restore the Grasslands LLC (RTG) and Harrington/Turner Enterprises, LP (H/TE) (collectively, Applicants) filed an Application on May 26, 2021, with the Texas Commission on Environmental Quality (TCEQ or Commission) for new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0016003001. Applicants seek the permit to discharge up 200,000 gallons of treated domestic wastewater per day during the final phase into Maxwell Creek in Collin County. The Administrative Law Judge (ALJ) recommends the Commission deny the application and issue an order requiring Applicants and North Texas

Municipal Water District to come to agreement on terms for providing wastewater service, failing which, the Commission will decide on those terms itself. Alternatively, the ALJ recommends granting the Application, with the addition of special conditions related to installation of carbon scrubbers and a partial enclosure of the plant that were agreed to during the hearing.

## **I. PROCEDURAL HISTORY**

The Application was filed on May 26, 2021, and TCEQ declared the Application administratively complete on August 25, 2021. Applicants published the Notice of Receipt and Intent to Obtain a Water Quality Permit in English on September 2, 2021, in the *Collin County Commercial Record*, and in Spanish on September 1, 2021, in *Al Dia*. After TCEQ's Executive Director (ED) issued the draft permit, Applicants published a combined Notice of Application and Preliminary Decision and Public Meeting in English on October 28, 2021, in the *Collin County Commercial Record*, and in Spanish on November 3, 2021, in *Al Dia*. The Chief Clerk mailed the ED's Decision and Response to Comments on February 11, 2022.

On May 20, 2022, the Commission granted a number of hearing requests and referred the following issues to SOAH for a 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 351, 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;
- 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 SOAH preliminary hearing was held on August 29, 2022, via Zoom videoconference. At the preliminary hearing, the administrative record was admitted into evidence as Exhibit AR-1. The City of Parker (Parker), the City of Murphy (Murphy), and North Texas Municipal Water District (NTMWD) were admitted as parties, as were the following individuals: Mir Abidi; Elizabeth Abraham; Tracy Jo Allen; Kim Caldwell; Harold Camp; Lance Caughfield; Scott & Wendy Clark; Don Wade Cloud Jr. & Scheri Cloud; Brian & Ashley Conner; Maya, Meerna & Michael Dalal; Cyndi & Tim Daugherty; Tami DeWeese; Jeff Dwight; Dan Shoop; Alicia Sue Evans; Shawna Fastnaught; Karen Fey; Wendy Galarneau; Katherine Harvey; Michael & Alesha Haynes; Ray & Ruth Hemmig; Laura & Tony Hernandez; Charles Ho; Deborah Ison; Mary Nell Jackson; Mary G. Trudy Jackson; Theodore Lane; Greg & Susan Ligon; Teral & Larry McDowell; Angelique Loncar; Edwin & Dianne Lundberg; Andrew & Mayela Malczewski; Jessica Marshall; James & Carolyn Moebius; Amit Nangia; Emily Plummer; Ludwig & Lynne Orozco and the Orozco Living Trust; Lee Pettle; Lindy M. (Buddy) Pilgrim; Heather Powell; Soumit & Sylvia Roy; Frank Sarris; Helena Thompson; Sunil & Sreelaxmi Unnikrishnan; Ranjani Venkataraman; Alexander Vinyukov; Gordy & Diane Viere; and Matthew Wilson.<sup>1</sup>

The hearing on the merits was held via Zoom videoconference on February 7-9, 2023. Applicants were represented by attorney Natalie Scott. Parker was represented by attorney Arturo Rodriguez. Murphy was represented by attorney

---

<sup>1</sup> Brian and Ashley Conner; Karen Fey; Mary Nell Jackson; Greg and Susan Ligon; and Alexander Vinuykov later withdrew as parties. Many of the named individual Protestants were originally represented by counsel, but by the time of hearing were self-represented.



Stephen Dickman. NTMWD was represented by attorney James Aldredge. TCEQ's Executive Director (ED) was represented by attorneys Kathy Humphreys and Audrey Pawelka. TCEQ's Office of Public Interest Counsel (OPIC) was represented by attorney Sheldon Wayne. The following self-represented individual Protestants participated in the hearing: Lance Caughfield, Laura Hernandez, Theodore Lane, Andrew Malczewski, Carolyn Moebius, Lindy "Buddy" Pilgrim, and Emily Plummer. Reply briefs were filed on February 28, 2023, at which point the record closed.<sup>2</sup>

At hearing, Murphy presented the testimony of three witnesses, Dr. Michael Morrison; Chris Pasch; and Gary Hendricks, P.E. Parker presented the testimony of Carlos Rubinstein and Luke Olson. Applicant presented the testimony of two witnesses, John Cox and Ashley Broughton, P.E. The ED presented the testimony of three witnesses, J. Alfonso Martinez, Jenna Lueg, and Gunnar Dubke, P.E. The individual Protestants who appeared at hearing testified, as well.

## **II. BURDEN OF PROOF**

The Application was filed after September 1, 2015, and TCEQ referred it under Texas Water Code section 5.556, which governs referral of environmental permitting cases to SOAH based on a request for a contested case hearing.<sup>3</sup>

---

<sup>2</sup> Ms. Moebius, Mr. Cloud, Ms. Hernandez, and Mr. Hemmig (together, Moebius Group) collectively filed a single brief and reply.

<sup>3</sup> Tex. Water Code §§ 5.551(a), .556.

Therefore, this case is subject to Texas Government Code section 2003.047(i-1)-(i-3),<sup>4</sup> which provides:

- (i-1) In a contested case regarding a permit application referred under Section 5.556 . . . [of the] Water Code, the filing with [SOAH] of the application, the draft permit prepared by the executive director of the commission, the preliminary decision issued by the executive director, and other sufficient supporting documentation in the administrative record of the permit application establishes a prima facie demonstration that:
  - (1) the draft permit meets all state and federal legal and technical requirements; and
  - (2) a permit, if issued consistent with the draft permit, would protect human health and safety, the environment, and physical property.
- (i-2) A party may rebut a demonstration under Subsection (i-1) by presenting evidence that:
  - (1) relates to . . . an issue included in a list submitted under Subsection (e) in connection with a matter referred under Section 5.556, Water Code; and
  - (2) demonstrates that one or more provisions in the draft permit violate a specifically applicable state or federal requirement.
- (i-3) If in accordance with Subsection (i-2) a party rebuts a presumption established under Subsection (i-1), the applicant and the executive director may present additional evidence to support the draft permit.

---

<sup>4</sup> Acts 2015, 84th Leg., R.S., ch. 116 (S.B. 709), §§ 1 and 5, eff. Sept. 1, 2015.

Although this law creates a presumption, sets up a method for rebutting that presumption, and shifts the burden of production on that rebuttal, it does not change the underlying burden of proof. Accordingly, the burden of proof remains with the Applicants to establish by a preponderance of the evidence that the Application would not violate applicable requirements and that a permit, if issued consistent with the draft permit, would protect human health and safety, the environment, and physical property.<sup>5</sup>

In this case, the Application, draft permit, and other materials listed in Texas Government Code section 2003.047(i-1) (collectively, the prima facie demonstration) were offered and admitted into the record at the preliminary hearing.

### **III. DISCUSSION AND ANALYSIS**

#### **A. BACKGROUND AND APPLICABLE LAW**

##### **1. Description of the Proposed Facility and Discharge**

Applicants seek a wastewater discharge permit for a proposed domestic wastewater plant to be located in Collin County, Texas (Facility). The draft permit prepared by the ED would authorize the discharge of treated domestic wastewater at an annual average flow not to exceed 200,000 gallons per day, or 0.2 million gallons per day (MGD). Under the draft permit, the treated effluent would be discharged to Maxwell Creek, then to Muddy Creek, then to Lake Ray Hubbard in

---

<sup>5</sup> 30 Tex. Admin. Code § 80.17(a), (c).

Segment No. 0820 of the Trinity River Basin. Segment 0820 is not listed as impaired.<sup>6</sup>

The plant would use an activated sludge process operating in the complete mix mode.<sup>7</sup> The plant is proposed to consist of a bar screen, aeration basins, a secondary clarifier, cloth media filters, a chlorine contact basin, and aerated digesters or sludge holding tanks. The Facility plans to use coagulant to remove phosphorus and chlorine gas to disinfect.<sup>8</sup>

The purpose of the wastewater treatment plant is to serve RTG's proposed residential development project. According to John Cox, RTG's manager, H/TE currently owns approximately 101 acres of property that RTG intends to purchase for this development.<sup>9</sup> The plan is for approximately 660 single-family houses to be built on the acreage.<sup>10</sup> All the property to be purchased from H/TE will be included in a proposed municipal utility district (MUD)<sup>11</sup> and served by the wastewater treatment plant. Another company, Gregory Lane LLC, owns approximately

---

<sup>6</sup> Ex. ED-JL-1 at 0459.

<sup>7</sup> Ex. AR-1 (Admin. Record), Tab C at 0038.

<sup>8</sup> App. Ex. 8 at 7.

<sup>9</sup> App. Ex. 10 at 3-4.

<sup>10</sup> At hearing, there was a discussion about the actual number of planned homes—666—with an agreement from Mr. Cox that the actual number built will differ from that number. Tr. Vol. 2 at 403-04.

<sup>11</sup> The application for creation of the MUD for the proposed development is a separate proceeding.

12 acres of land that is also under contract by RTG. The Gregory Lane property would not be included in the MUD or served by the wastewater treatment Facility.<sup>12</sup>

## 2. The Draft Permit

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. In the interim phase, the following effluent limitations and monitoring requirements apply:

Effluent Characteristic	Discharge Limitations				Min. Self-Monitoring Requirements	
	Daily Avg mg/l (lbs/day)	7-day Avg mg/l	Daily Max mg/l	Single Grab mg/l	Report Daily Avg. & Max. Single Grab Measurement Frequency	Sample Type
Flow, MGD	Report	N/A	Report	N/A	Continuous	Totalizing Meter
Carbonaceous Biochemical Oxygen Demand (5-day)	10 (8.3)	15	25	35	One/week	Grab
Total Suspended Solids	15 (13)	25	40	60	One/week	Grab
Ammonia Nitrogen	3 (2.5)	6	10	15	One/week	Grab
Total Phosphorus	0.5 (0.4)	1	2	3	One/week	Grab
<i>E. coli</i> colony-forming units or most probable number per 100 ml	126	N/A	N/A	399	One/month	Grab

In the final phase, the daily average flow of effluent shall not exceed 0.2 MGD, and average discharge during any two-hour period may not exceed 556 gallons per minute. In the final phase, the following effluent limitations and monitoring requirements apply:

<sup>12</sup> App. Ex. 10 at 5.

Effluent Characteristic	Discharge Limitations				Min. Self-Monitoring Requirements	
	Daily Avg mg/l (lbs/day)	7-day Avg mg/l	Daily Max mg/l	Single Grab mg/l	Report Daily Avg. & Max. Single Grab Measurement Frequency	Sample Type
Flow, MGD	Report	N/A	Report	N/A	Continuous	Totalizing Meter
Carbonaceous Biochemical Oxygen Demand (5-day)	10 (17)	15	25	35	One/week	Grab
Total Suspended Solids	15 (25)	25	40	60	One/week	Grab
Ammonia Nitrogen	3 (5)	6	10	15	One/week	Grab
Total Phosphorus	0.5 (0.8)	1	2	3	One/week	Grab
<i>E. coli</i> colony-forming units or most probable number per 100 ml	126	N/A	N/A	399	One/month	Grab

For both phases, the effluent must have a total chlorine residual of at least 1.0 mg/L not to exceed 4.0 mg/L. The pH shall not be less than 6.0 standard units or greater than 9.0 standard units. The effluent shall contain a minimum dissolved oxygen (DO) of 4.0 mg/L, which must be monitored once per week by grab sample. There shall not be any discharge of floating solids or visible foam in other than trace amounts and no discharge of visible oil.<sup>13</sup>

### 3. Texas Surface Water Quality Standards

The Facility’s proposed discharge is subject to the Texas Surface Water Quality Standards (TSWQS) found in title 30, chapter 307 of the Texas Administrative Code. The TSWQS identify appropriate uses for the state’s surface waters (e.g., aquatic life, recreation, and public water supply), and establish narrative and numerical water quality standards to protect those uses. TCEQ has standard procedures for implementing the TSWQS, referred to as the Implementation Procedures (IPs), which are approved by the U.S. Environmental Protection Agency

<sup>13</sup> App. Ex. AR-1 (Admin. Record), Tab C at 0002-03.

(EPA).<sup>14</sup> The TSWQS and IPs are used to set permit limits for wastewater discharges and other activities that may have an effect on water quality.

The TSWQS generally provide that “surface waters must not be toxic to man from ingestion of water, consumption of aquatic organisms, or contact with the skin, or to terrestrial or aquatic life.”<sup>15</sup> In addition, the TSWQS require that “[w]ater in the state must be maintained to preclude adverse effects on aquatic life.”<sup>16</sup>

The TSWQS also require that proposed wastewater discharges undergo an antidegradation review, which is designed to ensure that standards for protecting existing uses and water quality are met.<sup>17</sup> The antidegradation review process for TPDES permits is described in the IPs.<sup>18</sup>

## **B. ISSUES RELATED TO WATER QUALITY**

Issues A, B, F, and G all relate to the water quality of the proposed discharge under the draft permit. Compliance with the TSWQS (Issue F) will be addressed first, as it affects the remaining issues.

---

<sup>14</sup> 30 Tex. Admin. Code § 307.2(e); Ex. ED-JM-3.

<sup>15</sup> 30 Tex. Admin. Code § 307.4(d).

<sup>16</sup> 30 Tex. Admin. Code § 307.6(b)(4).

<sup>17</sup> 30 Tex. Admin. Code § 307.5.

<sup>18</sup> 30 Tex. Admin. Code § 307.5(c)(1)(A); Ex. ED-JM-3.

## **1. Compliance with the TSWQS (Issue F)**

Issue F asks whether the draft permit complies with the TSWQS and is protective of surface and groundwater quality, including requesters' use and enjoyment of their property.

Murphy and many of the individual Protestants raise concerns with certain aspects of water quality. In particular, they argue that the lack of copper, zinc, and total dissolved solids limits violates the TSWQS. They also argue that the chlorine residual limits are too high and the dissolved oxygen minimum is set too low. Parker and NTWMD do not address this issue. The ED and OPIC both argue that the Applicants have met their burden on compliance with the TSWQS.

### **a) Copper and Zinc**

Murphy's witness Chris Pasch testified that he believed that the proposed Facility would have difficulty meeting copper and zinc water quality standards because "this has become a common problem in fast-growth areas of Texas like the cities of Parker and Murphy. Therefore it is reasonable to assume that the proposed RTG-H/TE wastewater discharge will experience copper and zinc exceedances of the applicable . . . TSWQS."<sup>19</sup> He proposed daily average limits of 221 micrograms per liter for copper and 1928 micrograms per liter for zinc. He also proposed daily

---

<sup>19</sup> Murphy Ex. CP-3 at 9.



maximum amounts of 469 micrograms per liter for copper and 4,080 micrograms per liter for zinc.<sup>20</sup>

The ED's witness, Mr. Martinez, testified that under the IPs, the need to perform any review for metals such as copper and zinc only arises with a proposed permitted flow of at least 1.0 MGD.<sup>21</sup> The draft permit authorizes a much lower flow. Ms. Broughton also testified that the Facility was not subject to TCEQ's rules on copper and zinc.<sup>22</sup>

The ALJ finds that Applicants have met their burden as it relates to copper and zinc. The IPs, which set out how the TSWQS are to be implemented, provide that a flow at this level does not require a review for copper and zinc.

### **b) Total Dissolved Solids**

Murphy next expressed concern about Total Dissolved Solids (TDS), in other words, salinity. The TSWQS provide that “[c]oncentrations and the relative ratios of dissolved minerals such as chloride, sulfate, and total dissolved solids must be maintained such that existing, designated, presumed, and attainable uses are not impaired.”<sup>23</sup>

---

<sup>20</sup> Murphy Ex. CP-3 at 9.

<sup>21</sup> Ex. ED-JM-1 at 0029 (citing Ex. ED-JM-3 (IPs) at 131).

<sup>22</sup> Tr. Vol. 3 at 563.

<sup>23</sup> 30 Tex. Admin. Code § 307.4(g)(1).

Mr. Pasch testified that uses such as domestic laundry and food preparation add additional salt to the water supply.<sup>24</sup> He testified that his first step in reviewing TDS was “to conduct a TDS screening exercise as required by the . . . IPs.”<sup>25</sup> Using that screening, and an average amount of TDS based on the 90th percentile of a nearby wastewater treatment plant plus 200 mg/L, Mr. Pasch determined that a permit limit for TDS was needed. He calculated that the permit limits for TDS should be 562 mg/L in the interim phase and 530 mg/L in the final phase. He testified that those limits should be included in the draft permit, and added that the proposed plant would not be able to meet those proposed limits.<sup>26</sup>

But similarly to copper and zinc, ED’s witness Ms. Lueg testified that under the IPs, TDS screening is not performed for permits that will discharge less than 1 MGD.<sup>27</sup>

The ALJ agrees that, as for copper and zinc, complying with the IPs results in complying with the TSWQS for TDS. The Applicants have met their burden.

### **c) Chlorine and WET Testing**

Mr. Pasch also testified that residual chlorine in the discharge is likely to have a negative impact on aquatic life. According to Mr. Pasch, the Facility should either

---

<sup>24</sup> Murphy Ex. CP-3 at 10-11.

<sup>25</sup> Murphy Ex. CP-3 at 11.

<sup>26</sup> Murphy Ex. CP-3 at 12-13.

<sup>27</sup> Tr. Vol. 3 at 706-07.

be required to dechlorinate its discharge or use an alternative process to disinfect.<sup>28</sup> He also testified that the draft permit should require Whole Effluent Toxicity (WET) testing.<sup>29</sup>

Mr. Martinez testified that the IPs require dechlorination only for permitted flows that are at least 0.50 MGD.<sup>30</sup> The draft permit here provides for a permitted flow of 0.1 MGD during the interim phase, and a permitted flow not to exceed 0.2 MGD in the final phase. Similarly, Mr. Martinez testified that WET testing is not required for discharges less than 1 MGD. Thus, neither dechlorination nor WET testing need to be added to the draft permit.

As for the other constituents, the ALJ finds that the ED followed the IPs regarding chlorination, and that accordingly the draft permit would be protective.

#### **d) Dissolved Oxygen**

DO is the amount of free molecular oxygen dissolved in water. It is a primary indicator of the general biologic health of a water body, and is essential for the survival of many forms of aquatic life.<sup>31</sup> The DO criterion for Maxwell Creek is

---

<sup>28</sup> Murphy Ex. CP-3 at 17-18.

<sup>29</sup> Murphy Ex. CP-3 at 18.

<sup>30</sup> Exs. ED-JM-1 at 24; ED-JM-3 at 0168.

<sup>31</sup> Ex. ED-GD-1 at 5.

5.0 mg/L, which is based on the classification of the creek as a perennial stream with high aquatic life use.<sup>32</sup>

Mr. Pasch criticized the way the ED modeled Maxwell Creek. In particular, he contended that the model treated Maxwell Creek as a flowing stream, whereas significant portions of it consist of pools. He testified that the slowed velocity in pools allow biological processes additional time to consume DO, thus decreasing the DO concentration.<sup>33</sup> He argued that the DO model should be revised to account for the pools.

ED witness Gunnar Dubke testified about the modeling. He agreed with Mr. Pasch that the original modeling performed by the ED did not account for some of the site-specific data.<sup>34</sup> As a result, he created two new models using that data.<sup>35</sup> He testified that while the results of the new models were slightly different from the initial ones, the new models also confirmed that the effluent limits in the draft permit would maintain the DO criterion of 5.0 mg/L for Maxwell Creek.<sup>36</sup>

---

<sup>32</sup> Ex. ED-GD-1 at 7.

<sup>33</sup> Murphy Ex. CP-3 at 7.

<sup>34</sup> Ex. ED-GD-1 at 3.

<sup>35</sup> Ex. ED-GD-1 at 4, Ex. ED-GD-5 (modeling review checklist including pools).

<sup>36</sup> Ex. ED-GD-1 at 4.

The ALJ finds that the evidence establishes that the new models sufficiently accounted for site-specific data and that the draft permit will comply with the TSWQS regarding DO.

## **2. Livestock, Wildlife, and Wildlife Habitats (Issue A)**

Issue A asks whether the draft permit is protective of livestock, wildlife, and wildlife habitats. Murphy and many of the individual Protestants argue that the draft permit is not protective of wildlife and wildlife habitats. Parker and NTMWD do not address this issue. OPIC and the ED argue that Applicants have met their burden.

In support of its position, Murphy presented the testimony of Dr. Michael Morrison, a professor of wildlife ecology and conservation.<sup>37</sup> Dr. Morrison's testimony can be broken down into two categories—a discussion of specific parameters of water quality and a description of four species of concern.

Initially, Dr. Morrison also expressed concern about unregulated contaminants, such as pharmaceuticals and personal care products, and about stormwater runoff from the development.<sup>38</sup> He briefly discussed some impacts of antibiotics having the potential to disrupt bacterial process, but did not explain any further. And the ALJ notes that stormwater runoff from the development is outside the scope of this hearing, which concerns discharge from the proposed wastewater treatment plant, not aspects of the development.

---

<sup>37</sup> The individual Protestants did not present any expert testimony.

<sup>38</sup> Murphy Ex. MLM-3 at 13.

One of the water quality issues Dr. Morrison addressed is pH. As Dr. Morrison noted, the draft permit allows for the discharge's pH to be between 6.0 standard units and 9.0 standard units. He testified that pH lower than 6.0 standard units increased mortality of certain amphibian larvae.<sup>39</sup> He also testified that for three amphibians, "exposure in water with pH > 9.0 resulted in a blocking of larval development that was eventually lethal. With pH > 8.0 larval growth was substantially slowed." He added that this study "concluded that amphibian tolerance to water pH was species-specific."<sup>40</sup> As for fish and invertebrates, he described the findings of various studies as, "[o]verall, they found that pH lower than between 4 and 5 is where fish mortality, including different life stages, substantially increases. As reviewed . . . pH between 6.5 and 8.5 does not negatively impact the activities of most invertebrates, but as pH decreases towards 4, the invertebrate community becomes impoverished."<sup>41</sup>

Dr. Morrison also addressed DO. He testified that he was concerned that the draft permit allowed for discharge to have a minimum DO of 4.0 mg/L, but that the goal was for Maxwell Creek to maintain a DO concentration of 5.0 mg/L. He described studies finding correlations between DO and key behavioral traits in several amphibian species, and that lowering DO increases the surfacing activities of

---

<sup>39</sup> Murphy Ex MLM-3 at 10-11.

<sup>40</sup> Murphy Ex. MLM-3 at 11.

<sup>41</sup> Murphy Ex. MLM-3 at 11.

tadpoles, which in turn, provides greater opportunity for the tadpoles to be eaten by a predator.<sup>42</sup>

The ALJ notes that Dr. Morrison did not testify that any of the amphibian, fish, or invertebrate species whose sensitivities to pH or DO levels he discussed are present in Maxwell Creek. The sensitivities he discussed were largely also at pH levels below the minimum pH allowed by the draft permit or exceeding the maximum allowed by the draft permit. He did, however, express concern about pH levels greater than 8.0 or 8.5 standard units—and the draft permit allows pH levels of the discharge to be up to 9.0—but could not calculate the distance downstream from the point of discharge that pH would be expected to remain above 8.0 standard units.<sup>43</sup>

Although he did not testify that the amphibian or fish species he described were present in the area, Dr. Morrison's testimony focused on four species of concern that have been identified in the Maxwell Creek watershed: the alligator snapping turtle, the whooping crane, the river otter, and the monarch butterfly.<sup>44</sup>

Dr. Morrison agreed, however, that as of the date of the hearing, the alligator snapping turtle was not on the threatened or endangered list,<sup>45</sup> and he testified that

---

<sup>42</sup> Murphy Ex. MLM-3 at 12.

<sup>43</sup> Tr. Vol. 1 at 87.

<sup>44</sup> Murphy Ex. MLM-3 at 8.

<sup>45</sup> Tr. Vol. 1 at 85.

he did not know that the affected watershed was not included in the TCEQ IP's list of critical concerns or high priority watersheds for the whooping crane.<sup>46</sup>

Although Dr. Morrison testified that the Maxwell Creek watershed serves as stopover habitat during monarch butterfly migration,<sup>47</sup> he did not explain how the discharge into the creek would affect the monarch butterfly.<sup>48</sup>

As for the river otter, most of Dr. Morrison's testimony concerned the impact that development, as opposed to the actual discharge, had on the animal. After noting that river otters are not designated a species of greatest conservation need, he noted that changes in river otters, as predators, affect the ecosystems of their prey:

In many situations, River Otters are considered a keystone species and an indicator species for freshwater health. Keystone species often play a top-down role in an ecosystem, meaning that as a top predator their activities substantially influence the community of prey they feed upon. Additionally, the resulting species composition and abundance of members of the prey community influence other ecosystem functions (e.g., aquatic vegetation, small animal life). The predatory behavior and the creation of latrines by River Otters influence the dynamics of both their aquatic and terrestrial habitats.<sup>49</sup>

---

<sup>46</sup> Tr. Vol. 1 at 86. ED witness Jenna Lueg testified that when determining whether critical habitat of federally endangered or threatened aquatic or aquatic dependent species is present in the discharge's vicinity, the TCEQ and United States Environmental Protection Agency "only consider federal aquatic or aquatic dependent species occurring in watershed of critical concern or high priority as listed in Appendix A of the USFWS biological opinion." Ex. ED-JL-1 at 3-4. In this case, the watershed is not in that list. Ex. ED-JL-1 at 14.

<sup>47</sup> Murphy Ex. MLM-3 at 10.

<sup>48</sup> See also Ex. ED-JL-1 at 14 ("[t]he Monarch Butterfly is not considered [an] aquatic or aquatic dependent species.").

<sup>49</sup> Murphy Ex. MLM-3 at 9.



Dr. Morrison did not explain how the discharge would affect the river otters in the area.

Given the lack of connection between the testimony about the effects on amphibians, tadpoles, fish, and underwater invertebrates, and the four identified species of concern and that most of the concerns expressed by Dr. Morrison involved discharges that would violate the draft permit (e.g., pH below 6.0 standard units), the ALJ does not find that the prima facie demonstration that the draft permit is protective of livestock, wildlife, and wildlife habitat has been rebutted.

### **3. Health and Safety (Issue B)**

Issue B asks whether the draft permit is protective of the requesters' and their families' health and safety. Some of the individual Protestants presented argument on this issue. Parker, Murphy, and NTMWD do not address this issue. The ED and OPIC argue that Applicants have met their burden on Issue B.

Ms. Lueg testified that the IPs ensure that wastewater discharges do not cause instream aquatic toxicity, cause a violation of an applicable narrative or numerical water quality standard, endanger a drinking water supply, or result in aquatic bioaccumulation that threatens human health.<sup>50</sup>

---

<sup>50</sup> Ex. ED-JL-1 at 15. As set out above, the TSWQS generally provide that “surface waters must not be toxic to man from ingestion of water, consumption of aquatic organisms, or contact with the skin, or to terrestrial or aquatic life.” 30 Tex. Admin. Code § 307.4(d).

Many of the individual Protestants raised issues related to their health and safety and that of their families. In particular, they expressed concerns about asthma and about sensitivity to odors.<sup>51</sup> They did not, however, present any expert testimony on these topics. While the ALJ finds these concerns to be sincerely-held, they were unsupported by evidence. The Protestants did not rebut the prima facie demonstration on this issue.

#### **4. Antidegradation Review (Issue G)**

Issue G asks whether the antidegradation review complies with applicable regulations, and whether the draft permit includes adequate nutrient limits. Murphy and some of the individual Protestants argue that the antidegradation review was inadequate and, as a result, the draft permit's nutrient limits are inadequate as well.

The Commission's antidegradation policy is set out in 30 Texas Administrative Code section 307.5(b). Under this policy, antidegradation review is divided into tiers. Tier 1 requires that "[e]xisting uses and water quality sufficient to protect those existing uses must be maintained."<sup>52</sup> Tier 2 applies to waters that exceed fishable/swimmable quality and generally prohibits the lowering of water quality by more than a de minimis amount.<sup>53</sup> Tier 2 generally applies to "waterbodies that have an existing, designated, or presumed uses of primary and secondary contact

---

<sup>51</sup> Odors are discussed in greater detail in Section D, which addresses siting.

<sup>52</sup> 30 Tex. Admin. Code § 307.5(b)(1).

<sup>53</sup> 30 Tex. Admin. Code § 307.5(b)(2).

recreation and intermediate, high, or exceptional aquatic life waters.”<sup>54</sup> Under Tier 2, degradation is only allowed if it is shown that the lowering of water quality is necessary for important economic or social development.<sup>55</sup>

The ED’s witness Jenna Lueg testified about the work she performed for the Application, beginning with an aquatic life assessment, which is conducted by looking to the IPs and the flow of any unclassified waterbodies for three miles downstream of the discharge point.<sup>56</sup> As shown in Table 1 of the IPs, there are five subcategories for aquatic life use: exceptional, high, intermediate, limited, and minimal.<sup>57</sup>

Following a Texas Parks and Wildlife Department site visit and report, Maxwell Creek was assessed as a perennial stream.<sup>58</sup> As a result of this classification, Maxwell Creek was assigned a high aquatic life use and a 5.0 mg/L DO criterion.<sup>59</sup>

---

<sup>54</sup> Ex. ED-JL-1 at 8.

<sup>55</sup> The ED’s review did not involve this provision, and no one has argued that lowering of quality is necessary for important economic or social development. As Mr. Caughfield points out, this provision only allows for actual lowering of quality in extraordinary circumstances. Caughfield Closing Argument at 9.

<sup>56</sup> Ex. ED-JL-1 at 3.

<sup>57</sup> Ex. ED-JL-3 at 14-15.

<sup>58</sup> Originally, it was assessed as an intermittent stream with perennial pools, which under the IPs is presumed to have a limited aquatic life use. Ex. ED-JL-5; Ex. ED-JM-3 at 16.

<sup>59</sup> Each aquatic life use is associated with a DO criterion. For exceptional aquatic life use, the DO criterion is 6.0 mg/L; for high, 5.0 mg/L; intermediate, 4.0 mg/L; limited, 3.0 mg/L; and minimal, 2.0 mg/L. Intermittent streams with perennial pools are assessed as limited aquatic life use. Ex. ED-JL-1 at 5.

When performing an antidegradation review, Ms. Lueg first determines what level of review is needed. Tier 1 requires that existing uses and water quality sufficient to protect existing uses are maintained. The uses include the aquatic life use category, primary and secondary contact recreation, public drinking water, among others.<sup>60</sup> Once Maxwell Creek was redesignated as perennial, a Tier 2 antidegradation review was added.<sup>61</sup> As a result of the nutrient screening, conducted as part of this review, she added a total phosphorous limit of 0.5 mg/L daily average.<sup>62</sup>

Murphy witness Mr. Pasch testified that the ED's Tier 2 assessment, particularly as to phosphorous, was inconsistent with the antidegradation requirements.<sup>63</sup> He testified that the total phosphorous limit of 0.5 mg/L will cause significant degradation of the trophic state, and that the degradation of the trophic state "will certainly be more than de minimis."<sup>64</sup> As support, he cited two samples taken from Maxwell Creek in October 2022, one showing total phosphorous as 0.258 mg/L and the other with total phosphorous at 0.1 mg/L. For both samples, the orthophosphate was below detectible limits, which are 0.0326 mg/L, although for the first sample (with the larger total phosphorous amount), there is an unexplained

---

<sup>60</sup> Ex.ED-JL-1 at 8.

<sup>61</sup> Tr. Vol. 3 at 701.

<sup>62</sup> Ex. ED-JL-1 at 9.

<sup>63</sup> Murphy Ex. CP-3 at 17.

<sup>64</sup> Murphy Ex. CP-3 at 17.

notation that “orthophosphate analyses performed outside of recommended holding time.”<sup>65</sup>

His testified about his concerns about phosphorous:

Both samples have total phosphorus concentrations well below the total phosphorus limit in the permit. More importantly, orthophosphate is reported at concentrations below the detection limit. This is very significant because orthophosphate is the fraction of total phosphorus that can be directly used by aquatic plants and is usually the limiting nutrient in freshwater streams. The TCEQ’s IPs also identify effluent phosphorus as the primary nutrient of concern for freshwater discharges. In wastewater, orthophosphate is a major portion of the total phosphorus concentration. Therefore, I believe the wastewater effluent discharged from the proposed RTG-[H/TE] wastewater plant will result in a tenfold increase of the orthophosphate concentration.<sup>66</sup>

When asked at hearing to explain how he reached his conclusion about the tenfold increase, he testified:

Well, the data that we have shows that orthophosphate was not even at detectable levels. So assuming that the detection limit is actually representative of what would be there, so that’s an assumption. It’s — may like even less, but what was the concentration — or the measurements as it’s less than the detection limit and then TCEQ permit it at .5 milligrams per liter. So that’s a ten-fold increase, a huge increase, in nutrients.<sup>67</sup>

---

<sup>65</sup> Murphy Ex. CP-3 at 16.

<sup>66</sup> Murphy Ex. CP-3 at 16.

<sup>67</sup> Tr. Vol. 1 at 49-50.

As set out in its IPs, TCEQ uses total phosphate, not orthophosphate, to determine water quality. But Mr. Pasch’s explanation switches between total phosphate and orthophosphates. He does not state what amount of total phosphate is orthophosphates. He merely states it “is a major portion of the total phosphorous concentration,” without elaboration.<sup>68</sup> Nothing in his testimony indicates that orthophosphates are, say, 90% of wastewater discharge total phosphorous. Even assuming the testing numbers were accurate and representative,<sup>69</sup> his ten-fold increase is unsupported.

Ms. Lueg described her process of setting the draft permit’s total phosphorous limit. She noted that the total phosphorous limit for this flow of less than 0.5 MGD is typically 1.0 mg/L, but here the draft permit includes a more-protective limit of 0.5 mg/L.<sup>70</sup> She also completed a nutrient screening, using a worksheet that showed how she scored various aspects of the Application. This form also follows the IPs in how it weights various factors that are then used to determine whether total phosphorous limits are needed.<sup>71</sup> Among these factors are the proposed discharge flow rates, instream dilution, substrate type, depth, stream type, shading, impoundments, water clarity, sensitivity to growth of aquatic vegetation, existing water quality concerns and impairments, and consistency with other permits in the

---

<sup>68</sup> Murphy’s brief argues, without support, that Mr. Pasch’s testimony was that orthophosphate is “the” major portion. Murphy Closing Argument at 6.

<sup>69</sup> Again, the notation that the orthophosphate analysis occurred outside the window to conduct that analysis is not explained. Also, although there is information about who conducted the testing, other information—such as where in Maxwell Creek the testing was conducted and whether the conditions were normal—was not included. Additionally, both samples were taken in the same month without explanation.

<sup>70</sup> Ex. ED-JL-1 at 11-12.

<sup>71</sup> Ex. ED-JL-4.

area.<sup>72</sup> The result of the screening worksheet places the Facility in the category of “[total phosphorous] monitoring or a limit is possible, depending.”<sup>73</sup> Ms. Lueg consequently set a limit of 0.5 ml/L. Given this examination, the ALJ finds that the antidegradation review complies with applicable regulations and that the draft permit includes adequate nutrient limits.

### **C. ISSUES RELATED TO NOTICE, THE APPLICANTS’ LEGAL STATUS, AND THE COMPLETENESS OF THE APPLICATION**

#### **1. Notice (Issue D)**

Issue D asks whether Applicants substantially complied with applicable notice requirements. Of the Protestants, the Moebius Group and Mr. Malczewski raised arguments on this issue.

The Moebius Group complains of another property owner’s lack of notice. A party does not have standing to object to someone else’s lack of notice, however.<sup>74</sup> The Moebius Group and Mr. Malczewski also argue that the notice was not published in the newspaper of largest circulation in the county, as required by TCEQ’s instructions. They do not cite to evidence of what the newspaper would be.

---

<sup>72</sup> Ex. ED-JL-1 at 10.

<sup>73</sup> Ex. ED-JL-4.

<sup>74</sup> *Tex. Comm’n on Envtl. Quality v. Denbury Onshore, LLC*, No. 03-11-00891-CV, 2014 WL 3055912, at \*10 (Tex. App.—Austin July 3, 2014, no pet.); *see also* *McDaniel v. Tex. Nat. Res. Conservation Comm’n*, 982 S.W.2d 650, 654 (Tex. App.—Austin 1998, pet. denied) (no standing to assert the interest of a third party who was never given notice of the applicant’s affiliation).

The ALJ finds that Protestants did not rebut the prima facie demonstration and that Applicants substantially complied with applicable notice requirements.

## **2. Accuracy and Completeness of the Application (Issue H)**

Issue H asks whether the Application is accurate and contains all required information. Parker and NTMWD do not discuss this issue; Applicant, OPIC, and the ED recommend finding that the Application is accurate and complete. Murphy and Mr. Pilgrim raise several arguments on this issue.

The ED's witness Mr. Martinez testified that the Application was deemed administratively and technically complete, and that it was both accurate and contained all required information.<sup>75</sup>

### **a) Legitimate Applicant**

In addressing the Application's completeness, Murphy first argues that H/TE is not a "legitimate" co-applicant or potential co-permittee. Instead, according to Murphy, H/TE is simply the current owner of the property. Mr. Pilgrim makes a similar argument, arguing that H/TE is not the intended owner of the Facility.

Under 30 Texas Administrative Code section 305.43, an owner of a "facility" must be one of the parties to apply for a TPDES permit. "Facility," in turn, is defined as including "all contiguous land and fixtures, structures, or appurtenances

---

<sup>75</sup> Ex. ED-JM-1 at 25-26.



used for storing, processing, treating, or disposing of waste, or for injection activities. A facility may consist of several storage, processing, treatment, disposal, or injection operational units.”<sup>76</sup> H/TE is the current owner of the land, and land is part of the facility, under the definition. There is no other owner of the facility. Thus, as the owner of the land, H/TE necessarily had to be on the Application, even if it intends to sell the property.

### **b) Real Party in Interest**

Murphy also argues that RTG is not the real party in interest for the Application. As support, Murphy points to RTG’s small size, and that a family’s trusts are providing the money for the development. According to Murphy, this means that the Application misrepresents “the true parties who are seeking the wastewater permit and who will be financially responsible for compliance with the permit.”<sup>77</sup> But Murphy does not cite authorities to support its idea that the source of the funding of a company, who it calls the real parties in interest, not an existing LLC, must be included on an application.

### **c) Attestation**

Next, Murphy argues that the attestation Margaret Turner submitted on behalf of H/TE as part of the Application is inaccurate. In this attestation, Ms. Turner affirmed that the Application and attachments were prepared under her direction or supervision, and that upon inquiring with the persons directly

---

<sup>76</sup> 30 Tex. Admin. Code § 305.2(14)(A).

<sup>77</sup> Murphy Closing Argument at 20.

responsible for gathering the information, all the information in the Application is true, accurate and complete.<sup>78</sup> Murphy argues that this attestation is incorrect—no one from H/TE directed or supervised the Application’s preparation, nor did anyone inquire about the truth or accuracy of the application. In fact, according to Ms. Turner’s deposition, she did not even read the application.<sup>79</sup>

Murphy cites 30 Texas Administrative Code section 305.66, which provides that a permit may be suspended or revoked for good cause, including for “the permittee’s failure in the application or hearing process to disclose fully all relevant facts, or the permittee’s misrepresentation of relevant facts at any time.”<sup>80</sup> Based on this rule, Murphy argues that the Application should be returned to the ED for consideration.

The ALJ agrees with Murphy and the individual Protestants that the situation in which an applicant inaccurately attests to having reviewed the application is not ideal. The ALJ does not see denial of the application as a consequence of that. In this case, H/TE was not the only applicant, and Mr. Cox also independently attested to the necessary items.<sup>81</sup> There is sufficient representation from the more actively involved party, and the ED was able to verify the information it needed to verify. The

---

<sup>78</sup> App. Ex. 1 at 14.

<sup>79</sup> Murphy Ex. 11 at 5, 19.

<sup>80</sup> 30 Tex. Admin. Code § 305.66(a)(4). Under the rule, revocation would occur after opportunity for a hearing.

<sup>81</sup> Ex. ED-JM-1 at 25.

ALJ finds that there was sufficient evidence to indicate the application was complete and sufficiently accurate.

### **3. Whether the Applicants are Legal Entities (Issue I)**

Issue I asks whether the Applicants are legal entities. Murphy, Mr. Pilgrim, and Mr. Malczewski addressed this issue as it relates to H/TE. Parker, NTMWD, and the other Protestants do not discuss this issue. Applicant, OPIC, and the ED recommend finding that the Applicants are legal entities.

H/TE is a limited partnership, currently registered with the Texas Secretary of State,<sup>82</sup> and its general partner is Harrington/Turner Enterprises Management, LLC (HTEM). Murphy and Mr. Pilgrim raise two issues relating to HTEM. The first issue involves the status of the trust that is listed as HTEM's member. The second issue involves the effect of the forfeiture of HTEM's corporate privileges.

It is undisputed that both RTG and H/TE are registered with the Texas Secretary of State.<sup>83</sup> The certificate of HTEM (H/TE's general partner) was forfeited on February 12, 2012.<sup>84</sup> HTEM's certificate was reinstated sometime before the hearing on the merits, but it is uncertain from the evidence in the record

---

<sup>82</sup> Tr. Vol. 3 at 520. RTG is also registered with the Secretary of State. Tr. Vol. 3 at 520. Although RTG's status was the subject of questioning at hearing, no party argues that RTG was not a legal entity.

<sup>83</sup> Tr. Vol. 3 at 520.

<sup>84</sup> Murphy Ex. 8.

when that occurred.<sup>85</sup> There is no evidence that H/TE’s authority to do business, as opposed to HTEM’s authority, was forfeited by the Secretary of State.

Murphy first argues that because Ms. Turner testified that the trust that was HTEM’s member dissolved, HTEM—and thus H/TE—cannot exist:

As a fundamental premise of Texas business organizations law, every limited partnership must have at least one general partner who is fully responsible for debts and other actions of the limited partnership. See generally, Texas Business Organizations Code, Chapter 153 on limited partnerships, and Subchapter D on general partners. If H/TE’s general partner H/TEM has no member due to the dissolution of the 1999 Margaret E. Dinapoli Exempt Family Trust, then H/TEM cannot exist as a valid legal entity, and H/TE therefore has no general partner. Without a general partner, H/TE itself cannot exist as a valid legal entity.<sup>86</sup>

Reviewing the testimony, the ALJ cannot find that it establishes that the member trust was actually dissolved. Ms. Turner’s testimony was confusing and contradictory. She testified she thought the trust “went away” when her mother passed away in 2020, but added “I’m not a hundred percent positive about how all that legal stuff works.”<sup>87</sup> At one point she testified that another trust with the same name that was the member of Gregory Lane, LLC, had not dissolved.<sup>88</sup> Given the confusion in the testimony, that it seems unlikely that there would be more than one

---

<sup>85</sup> Tr. Vol. 2 at 389.

<sup>86</sup> Murphy Closing Argument at 22.

<sup>87</sup> Murphy Ex. 11 at 7.

<sup>88</sup> Murphy Ex. 11 at 7-11.

trust with an identical name,<sup>89</sup> and that the trust is still listed on documents, the ALJ finds that the trust's dissolution was not established by the evidence.<sup>90</sup>

Both Murphy and Mr. Pilgrim argue that H/TE stopped being a legal entity when HTEM's certificate was forfeited. Under Texas Business Organizations Code section 153.501, an event of withdrawal of a general partner from a limited partnership requires winding up of that limited partnership, unless not later than one year after the event, all remaining partners, or another group or percentage of partners specified in the partnership agreement:

- (A) agree in writing to continue the business of the limited partnership; and
- (B) to the extent that they desire or if there are no remaining general partners, agree to the appointment of one or more new general partners.<sup>91</sup>

A forfeiture of a certificate is an event of withdrawal,<sup>92</sup> but there has been no evidence about whether there were any agreements to continue or substitute a new general partner. Similarly, there is no evidence about whether the partnership was

---

<sup>89</sup> See Murphy Ex. 11 at 11 (containing the following statement from Mr. Dickman about the identical trust names, "Well, I've been involved with a lot of business associations, but that's a new one on me.").

<sup>90</sup> Additionally, the ALJ notes that Texas law provides that members of LLCs can be replaced and their interests may be assigned. Tex. Bus. Org. Code § 11.056, 101.101, 101.108.

<sup>91</sup> See also Tex. Bus. Code § 11.058 (providing that events requiring winding up of limited partnerships can be canceled).

<sup>92</sup> Tex. Bus. Code § 153.155(10).

reconstituted following the withdrawal of the general partner.<sup>93</sup> Nor was there any evidence that winding up, if required, occurred. Likewise, there is no evidence of when the forfeiture was set aside, only that at some point it was, so that HTEM is currently in good standing.

At this point, no party has set out what a “legal entity” means for purposes of this case. H/TE appears in the Secretary of State’s website as a valid entity. There is no evidence that H/TE’s authority to do business was ever forfeited. Although HTEM’s certificate was forfeited, it was later reinstated.<sup>94</sup> HTEM is currently listed as a valid entity. Texas Business Organizations Act provides for many ways that the withdrawal of a general partner does not necessarily require winding up of the limited partnership. Murphy and Mr. Pilgrim do not cite anything other than general principles to indicate that H/TE’s conduct during that time was void. For purposes of this hearing, there has been sufficient evidence that both H/TE and RTG are currently valid legal entities.

#### **D. SITING REQUIREMENTS (ISSUE C)**

Issue C asks whether the draft permit complies with the applicable siting requirements in 30 Texas Administrative Code chapter 309, including adequate prevention of nuisance odors. Several of the individual Protestants have raised concerns about siting. Parker, Murphy, and NTMWD do not address this issue. The

---

<sup>93</sup> See Tex. Bus. Code § 153.158(c).

<sup>94</sup> There is a suggestion, but no evidence, that the reinstatement was after the Application was filed. In the absence of evidence, the ALJ cannot make a finding about HTEM’s status at that time.

ED and OPIC argue that the draft permit complies with the applicable siting requirements.

## 1. Flooding

Chapter 309 sets out requirements and standards for the siting of domestic wastewater treatment plants. Among those requirements are that a wastewater treatment plant may not be located in the 100-year flood plain<sup>95</sup> unless the plant unit is protected from inundation and damage that may occur during that flood event.<sup>96</sup>

Although many of the individual Protestants' concerns with siting address flooding, they did not present evidence that the Facility is located within the 100-year flood plain. Mr. Caughfield admits in his argument that it is not.<sup>97</sup> The Moebius Group suggests that the FEMA flood map is out of date, but does not present evidence of the existence of a more current map or of one that places the Facility within the 100-year floodplain. Nor do the Protestants point to another flooding-related siting requirement that the Draft Permit violates.

Instead, the Moebius Group argues that the proposed development must comply with Collin County floodplain regulations. Compliance with Collin County regulations is outside the scope of this proceeding. Relatedly, many of the Moebius

---

<sup>95</sup> The 100-year flood pain is defined as “[a]ny land area which is subject to a 1.0% or greater chance of flooding in any given year from any source.” 30 Tex. Admin. Code § 309.11(7).

<sup>96</sup> 30 Tex. Admin. Code § 309.13(a). Other restrictions prohibit wastewater treatment plant units from being located in wetlands, provide a minimum distance from wells, and require certain separation between surface impoundment and an aquifer.

<sup>97</sup> Caughfield Closing Argument at 11.

Group’s arguments about siting involve concerns about the development, not the wastewater treatment plant.<sup>98</sup> Those concerns, too, are outside the scope of this hearing on the Application.

## 2. Nuisance Odors

To comply with the siting rules, an applicant is also required to submit a nuisance odor prevention request to the ED. This request may either be submitted with an application “or submitted for [ED] approval after the permitting process is complete.”<sup>99</sup> The nuisance odor prevention plan must use one of three available options to control odor. Among those options are locating the treatment units at least 150 feet from the nearest property line and imposing legal restrictions prohibiting construction of residential structures within the portion of the 150-foot buffer zone not owned by a permittee.<sup>100</sup>

According to testimony, RTG plans to comply by locating the treatment units at least 150 feet from the nearest property line and by imposing legal restrictions prohibiting construction of homes within the portion of the 150-foot buffer zone not currently owned by H/TE and under contract to RTG.<sup>101</sup>

---

<sup>98</sup> “The neighborhood as designed in the concept plan that the plant will be serving will have concrete over much of the 100 acres of land. If there is one inch of rain, an extra 2.7 million gallons of water will run off to the creek . . . . The development as planned will result in the adverse impact of flooding.” Moebius Closing Argument at 12-13 (internal citations omitted).

<sup>99</sup> 30 Tex. Admin. Code § 309.13(e).

<sup>100</sup> 30 Tex. Admin. Code § 309.13(e)(3).

<sup>101</sup> Ex. ED-JM-1 at 12; Ex. AR-1 (Admin. Record), Tab C., att. A at 0037.



Many of the individual Protestants expressed concern about nuisance odors. They presented no expert evidence about odors, although many testified about odor concerns, based in part on experience with other plants.<sup>102</sup> They did not present evidence that Applicant's plan does not meet the buffer-zone compliance option.

Accordingly, the Protestants failed to rebut the prima facie demonstration that the draft permit complies with applicable siting requirements in 30 Texas Administrative Code chapter 309.

Nevertheless, at hearing, Mr. Cox committed to installing carbon scrubbers and partially enclosing the Facility. He testified:

From discussing it with my engineers and to be aware that based upon question raised by Mr. Pilgrim at my deposition, I asked the engineers to explore covering the plant or a portion of the plant where the biggest odor emissions could occur. And they said, Yes, we can do that, and install carbon scrubbers. And I said, Hey, that's fine. So anyway, we're not at all opposed to it, and I'm telling you now if we build the plant, we'll do that.<sup>103</sup>

In light of this commitment under oath, the ALJ recommends that the installation of carbon scrubbers and a partial enclosure of the plant be added to the draft permit, if issued.

---

<sup>102</sup> See, e.g., Caughfield Ex. A at 8; Tr. Vol. 2 at 308-09.

<sup>103</sup> Tr. Vol. 2 at 402.

## **E. REGIONALIZATION (ISSUE E)**

Parker, Murphy, NTMWD, the individual Protestants, and OPIC all argue that the Application should be denied for failure to comply with TCEQ's regionalization rules. The Commission's question on this topic asks, "Whether issuance of the draft permit is consistent with TCEQ's regionalization policy and Texas Water Code sections 26.081 and 26.0282, and 30 Texas Administrative Code Chapter 351, Subchapter C, including consideration of need for the proposed facility and designation of a regional entity."

### **1. Law on Regionalization**

Texas Water Code section 26.081 generally sets out the state's policy in favor of regionalization:

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 pollution and maintain and enhance the quality of the water in the state.

Relatedly, under Texas Water Code section 26.0282, the Commission has the authority to deny or alter the terms of a proposed permit 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.

In addition to the general regionalization policy, TCEQ has specifically 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.<sup>104</sup> The rules provide that NTMWD “shall provide regional wastewater collection and treatment service to all legal entities requiring such services within the defined area, upon such terms as may be agreed upon by the parties or as may be ordered by the commission if agreement cannot be reached.”<sup>105</sup> It is undisputed that the Facility is proposed to be located in this watershed area.

## 2. Need and Availability

In their arguments, the parties address the need for the Facility and the availability of service when that service is conditioned on significant density restrictions. The parties also address the specific provision designating NTWMD the regional provider.

The issue of need is related to, but distinct from, the regionalization inquiry.<sup>106</sup> To obtain a permit, an applicant must demonstrate a need for its proposed facility by showing that no other wastewater treatment facilities in the area could provide service.<sup>107</sup> On the related issue of regionalization, TCEQ requires an applicant to address whether any wastewater treatment plant or collection system within three

---

<sup>104</sup> 30 Tex. Admin. Code § 351.31, .33

<sup>105</sup> 30 Tex. Admin. Code § 351.35.

<sup>106</sup> Ex. ED-JM-1 at 16.

<sup>107</sup> Ex. ED-JM-1 at 16.

miles of the proposed plant has sufficient existing capacity to accept the additional volume of wastewater that is proposed.<sup>108</sup> For that reason, TCEQ requires applicants to provide copies of all correspondence with the owners of the existing facilities within three miles of the proposed facility concerning connection to their system.<sup>109</sup>

To show compliance with that requirement, Applicant introduced evidence that its engineers mailed service requests to systems within three miles of the Facility. The City of Plano and the City of Lucas indicated that they lacked capacity.<sup>110</sup> The City of Allen indicated that it had no wastewater treatment facilities.<sup>111</sup> The City of Wylie and the City of Richardson do not appear to have responded to their letters.<sup>112</sup> Applicant's evidence indicates that NTMWD did not respond, but NTMWD disagrees.<sup>113</sup> Parker's Public Works Director responded in writing by noting "[w]e do not have any wastewater treatment facility."<sup>114</sup> Similarly, Murphy's Public Services Director responded to an inquiry by stating, "the City of Murphy is not interested in providing water and wastewater to any outside jurisdictions."<sup>115</sup>

---

<sup>108</sup> Ex. ED-JM-1 at 17.

<sup>109</sup> Ex. ED-JM-1 at 17-18.

<sup>110</sup> App. Ex. 1 at 0089, 0091.

<sup>111</sup> Appl. Ex. 1 at 0090.

<sup>112</sup> App. Ex. 1 at 0082-84, 0092-94.

<sup>113</sup> App. Ex. 1 at 0095-97; NTMWD Ex. 100 at 12-14, Ex. 102.

<sup>114</sup> App. Ex. 1 at 0085.

<sup>115</sup> App. Ex. 1 at 0087.

The discussions with Parker, Murphy, and NTMWD did not end with the initial letters, however. NTMWD would not just directly provide service to the Facility: although NTMWD operates the regional treatment system, it does not operate any collection systems. NTMWD's permitting manager Jerry Allen described it as operating as a wholesale sewer service provider.<sup>116</sup> It treats wastewater collected by member and customer cities, such as Parker and Murphy. NTMWD undisputedly has the treatment capacity to treat the proposed wastewater once it is collected.

After the initial letters, RTG or its engineers followed up with Parker and Murphy.<sup>117</sup> Parker's City Administrator Luke Olson initially testified that after Parker indicated that connection would be challenging, RTG never followed up with the city.<sup>118</sup> Nevertheless, he agreed on cross-examination that he did not know whether RTG provided Parker's public utilities director with additional information, as an email exchange shows.<sup>119</sup>

Mr. Cox testified that he met with Parker employees, who asked if RTG would build one-and-one-half acre lots and suggested that minimum lot size was what they would require as a condition of service.<sup>120</sup> According to Mr. Cox, that density would

---

<sup>116</sup> NTMWD Ex. 100 at 9.

<sup>117</sup> App. Ex. 4.

<sup>118</sup> Parker Ex. 3 at 5, 6.

<sup>119</sup> Tr. Vol. 1 at 180-82.

<sup>120</sup> Tr. Vol. 2 at 475.

make the development economically unfeasible.<sup>121</sup> He testified that “my understanding from the City of Parker is that they would not let me access their collection system unless I agreed to a number of land use controls, including density.”<sup>122</sup>

RTG also had discussions with Murphy about service. Murphy’s City Manager provided a preliminary estimate of \$2,361,905 for accessing the city’s wastewater distribution system. He wrote in a February 17, 2022 email:

The Engineer for this project assures me that the service is attainable for the MUD. I think there are a host of policy discussions and decisions regarding cost and service delivery that will need to be decided upon before I am willing to authorize extensive engineer discussions. I cannot tell you when that moment will occur, but we are a great distance away from that.<sup>123</sup>

Discussions continued, and as Mr. Cox described it, Murphy wanted RTG to not only pay costs and but also comply with density requirements Murphy would set.<sup>124</sup> Murphy’s witness Mr. Hendricks testified that, without improvements, Murphy does not have capacity to serve the proposed development at the current number of proposed lots.<sup>125</sup> At hearing, Mr. Cox testified that RTG would pay costs

---

<sup>121</sup> App. Ex. 10 at 6.

<sup>122</sup> Tr. Vol. 3 at 515-16.

<sup>123</sup> App. Ex. 4 at 0176.

<sup>124</sup> Tr. Vol. 3 at 517.

<sup>125</sup> Tr. Vol. 1 at 116

of connecting to either city's (or NTMWD's) systems, but is not willing to subject the development to either city's land-use controls.<sup>126</sup>

The parties disagree about whether service is available if conditioned on accepting a city's land-use controls, which would significantly alter the density of the proposed development. Parker's expert Carlos Rubinstein testified that in a previous case, *Midtex*, the Commission denied a permit because treatment was available at a nearby city's facility, even though the applicant would have to comply with that city's land code, which would reduce the total number of lots.<sup>127</sup> Mr. Rubinstein emphasized one of the *Midtex* conclusions of law, which stated "Service from a qualified or willing municipality is not rendered unavailable because the municipality insists on compliance with its interpretation of other law it administers."<sup>128</sup> He added that he was not concerned that a city would place certain conditions on providing service and testified that he would be surprised if there were no conditions of service.<sup>129</sup>

The ED's witness Mr. Martinez disagreed with Mr. Rubinstein's positions. He noted that recent SOAH rulings, in particular in *AIR-W-20017*, have found that

---

<sup>126</sup> Tr. Vol. 3 at 490-91.

<sup>127</sup> Parker Ex. 1 at 23-25 (citing *Application of Midtex Partners Ltd, for Water Quality Permit No. 14472-0001, Authorizing the Disposal of Treated Domestic Wastewater*, SOAH Docket No. 582-06-1581, TCEQ Docket No. 2005-1720-MWD, 2007 WL 3085936 (2008)).

<sup>128</sup> Parker Ex. 1 at 25.

<sup>129</sup> Parker Ex. 1 at 26.

if a city requires annexation as a condition for it to provide wastewater service, then the city has denied the request for service.<sup>130</sup>

This case is distinguishable from both *Midtex* and *AIR-W-1027*, however. In *Midtex*, the city's extraterritorial jurisdiction expanded to include the facility during the application process, and by the time of hearing, the property where the facility would be located had been annexed.<sup>131</sup> In this case, although there were some references to the cities requiring annexation in the testimony, the ALJ does not find that the evidence establishes that either city was going to require annexation, as opposed to compliance with specific land-use restrictions, as an actual condition for service, a quasi-annexation. This is distinguishable from *AIR-W-2017*, where actual annexation was the required condition.

Ultimately, however, the ALJ does not believe this case requires determination of whether service is considered available if it is conditioned on compliance with land use requirements that significantly alter the economics of the development. This is because the general regionalization and need concerns are supplemented by a more specific rule.

### **3. Designation as the Regional Provider**

In 30 Texas Administrative Code section 351.35, NTMWD is designated as the regional provider that “shall provide regional wastewater collection and

---

<sup>130</sup> Ex. ED-JM-1 at 21 (citing *Application of AIR-W 2017-7 L.P.*, SOAH Docket No. 582-22-1016).

<sup>131</sup> *Midtex*, 2007 WL 3085936 at \*3.



treatment service to all legal entities requiring such services within the defined area, upon such terms as may be agreed upon by the parties or as may be ordered by the commission if agreement cannot be reached.”<sup>132</sup>

As noted by the Protestants and OPIC, the use of the word “shall” in the rule imposes a duty.<sup>133</sup> It makes the requirement mandatory. Therefore, NTMWD has the obligation to provide service to Applicants, either on terms they agree to or on terms the Commission orders.

The ED argues that this provision does not apply because no one has petitioned the Commission for an order. The ED also notes that subchapter C of Chapter 351, addressing the East Fork of the Trinity River, does not specify that wastewater discharge permits may only be issued to the designated regional entity, unlike Subchapter F. According to the ED, this absence reduces the requirement.

Applicants argue that the Commission generally has broad discretion regarding regionalization and notes that Parker, Murphy, and NTMWD are only arguing in favor of denial, and not requesting an order.

Despite the ED’s argument, the ALJ finds that the rule requires service to be provided by NTMWD and that granting the application would not be consistent with 30 Texas Administrative Code Chapter 351, subchapter C. The ALJ recognizes that

---

<sup>132</sup> 30 Tex. Admin. Code § 351.35.

<sup>133</sup> Tex. Gov’t Code § 311.016(2).

NTMWD, Parker, and Murphy are in an unusual position of arguing that some subset of them should be ordered to provide service on terms the Commission ultimately will decide. It could appear that the cities attempted to condition wastewater collection on compliance with land-use restrictions they would not otherwise be able to impose and are trying use the Commission’s regionalization rules to force their acceptance.<sup>134</sup> The oddity of their position—and their role in creating the situation—does not change the mandatory language of the rule, however.

OPIC suggests that the Commission deny the application and order the parties to come to an agreement on terms of service, with instructions that if terms cannot be agreed upon, the Commission will set the terms of service. Alternatively, OPIC recommends that the Commission deny the application and issue an order setting terms of service.

OPIC’s first approach appears to the ALJ to be the correct one, given the mandatory nature of the rule and the method by which this issue was raised. Thus, the ALJ recommends, based on designation of NTMWD as the regional provider, that the parties be instructed to attempt to reach an agreement on terms of service, and that if they fail to reach an agreement, the Commission will set those terms. In the interest of preserving resources, there is no reason why the Applicants should

---

<sup>134</sup> *See e.g.*, Murphy Closing Argument at 24 (“Unfortunately, getting wastewater service from a NTMWD plant, whether or not the wastewater service is provided through a customer city, will not solve the primary concern of Murphy which is the oppressive density of the proposed development—all for the profit maximization of the Huffines.”).

have to start over with a petition, when the relevant parties are already part of this proceeding.

## **F. VECTORS (ISSUE J)**

Issue J asks whether the draft permit includes adequate provisions to control vectors. Mr. Malczewski was the only Protestant to address this issue in testimony or argument, and he presented no expert testimony on it. The ALJ finds that the prima facie demonstration was not rebutted on this issue.

## **G. MONITORING (ISSUE K)**

In Issue K, the Commission asks whether the draft permit's monitoring requirements comply with applicable regulations. Murphy and some of the individual Protestants argue that the draft permit is not in compliance with the regulations. Parker and NTMWD do not address this issue, and the ED and OPIC both argue that the draft permit complies with monitoring requirements.

TCEQ's rule found at 30 Texas Administrative Code section 319.9(a) and (b) sets out monitoring schedules for treated domestic sewage effluent. These schedules designate out how often samples must be taken for each parameter and for bacteria based on the permitted daily average flow. ED witness Mr. Martinez testified that the draft permit's sampling requirements are based on the requirements contained in this rule.<sup>135</sup>

---

<sup>135</sup> Ex. ED-JM-1 at 10.

For a permitted average daily flow of less than 0.5 MGD, the rule provides for weekly sampling, via grab sample, for CBOD5, TSS, and monthly sampling for *E. coli*.<sup>136</sup> The rule also sets out that chlorine residual is to be sampled once each working day but not less than five times per week, and for pH to be sampled once a month.<sup>137</sup>

The draft permit's monitoring requirements match those set out in 30 Texas Administrative Code section 319.9 (a) and (b). Thus, the draft permit requires weekly grab samples for CBOD5, TSS, ammonia nitrogen, total phosphorous, *E. coli*, and DO.<sup>138</sup> The draft permit requires the chlorine residual to be monitored five times per week by grab sample. The pH level is to be monitored once per month by grab sample.

Nevertheless, Dr. Morrison testified about his concerns with the grab sampling protocol provided for in the draft permit.<sup>139</sup> Specifically, Dr. Morrison was concerned that the method of grab sampling at the discharge point did not sufficiently consider conditions in the rest of the creek, and he expressed his belief that Applicant should be required to test all affected areas in the creek. He did not, however, testify that the monitoring requirements in the draft permit do not comply with the applicable regulations. Nor did any of the Protestants provide any additional expert testimony about monitoring requirements.

---

<sup>136</sup> 30 Tex. Admin. Code § 319.9(a), (b).

<sup>137</sup> 30 Tex. Admin. Code § 319.9(a).

<sup>138</sup> Admin. Record Tab. C at 0002-0003.

<sup>139</sup> City of Murphy Ex. MLM-1 at 14-15.

The ALJ finds that the Protestants did not rebut the prima facie demonstration related to monitoring.

## **H. COMPLIANCE HISTORY (ISSUE L)**

In Issue L, the Commission asked 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. Moebius Group argues that because Applicants have not yet named an operator and because Applicants have no history, the ED could not review the history. Mr. Malczewski argues that the Applicants lack experience, and he questions the competence of the engineering firm. The other Protestants do not discuss this issue, and both the ED and OPIC argue that the Applicants' have met their burden on this issue.

Mr. Martinez testified about the review that was performed of Applicants' compliance history. Following procedures, TCEQ's Enforcement Division compiles an applicant's compliance history and assigns a rating number and classification of high, satisfactory, unsatisfactory, or unclassified for both the applicant and the facility site.<sup>140</sup> Mr. Martinez testified that both the customer and facility site were rated "no rating," which translates into an "unclassified" classification.<sup>141</sup> He testified that this rating and classification are "pretty common" for a new permit

---

<sup>140</sup> Ex. ED-JM-1 at 33.

<sup>141</sup> Ex. ED-JM-1 at 34.

application. He testified that the compliance history does not raise an issue regarding the Applicant's ability to comply with the permit, if it is issued.<sup>142</sup>

While the ALJ appreciates the difficulty of judging the compliance history of someone who does not have a compliance history, or who has not been identified yet, the lack of compliance history or experience does not rebut the prima facie demonstration. The ALJ finds that the Applicants' compliance history does not warrant denying or altering the terms of the draft permit.

#### **IV. TRANSCRIPTION COSTS**

The Commission may assess reporting and transcription costs to one or more of the parties participating in a proceeding, and when doing so, must consider the following factors:

- (A) The party who requested the transcript;
- (B) The financial ability of the party to pay the costs;
- (C) The extent to which the party participated in the hearing;
- (D) The relative benefits of the various parties of having a transcript;  
... and
- (G) Any other factor which is relevant to a just and reasonable assessment of costs.<sup>143</sup>

---

<sup>142</sup> Ex. ED-JM at 34.

<sup>143</sup> 30 Tex. Admin. Code § 80.23(d)(1).

Parker, who was the only party to address transcription costs, argued that it should bear its own costs. A transcript was required by SOAH's rules. The parties extensively participated in the hearing and most used the transcript in their closing arguments. No evidence about financial ability to pay transcript costs has been presented.

Considering these factors, the ALJ recommends that all parties bear their own transcription costs.

## V. CONCLUSION

In conclusion, the ALJ recommends that the Commission deny the application and order the Applicants to attempt to reach an agreement with NTMWD (either alone or through a customer city) to provide service. Failing to reach an agreement would result in the Commission deciding on appropriate terms. In the alternative, the ALJ recommends granting the Application, with the additional installation of carbon scrubbers and a partial enclosure of the plant that Mr. Cox agreed to during the hearing.

**Signed April 27, 2023.**

ALJ Signature:



---

Rebecca Smith

Presiding Administrative Law Judge

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

**AN ORDER DENYING THE APPLICATION OF  
RESTORE THE GRASSLANDS, LLC AND HARRINGTON/TURNER  
ENTERPRISES, LP FOR NEW TPDES PERMIT NO. WQ001600301  
SOAH DOCKET NO. 582-22-02856 TCEQ DOCKET NO. 2022-0326-MWD**

On \_\_\_\_\_, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the application of Restore the Grasslands, LLC (RTG) and Harrington/Turner Enterprises, LP (H/TE) (collectively, Applicants), for new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ001600301 in Collin County, Texas. A Proposal for Decision (PFD) was presented by Administrative Law Judge (ALJ) Rebecca S. Smith with the State Office of Administrative Hearings (SOAH), who conducted an evidentiary hearing concerning the application on February 7-9, 2023, via Zoom videoconference.

After considering the PFD, the Commission makes the following findings of fact and conclusions of law.



## I. FINDINGS OF FACT

### Application

1. Applicants filed their application (Application) for a TPDES permit with the Commission on May 26, 2021.
2. The Application requested authorization to discharge treated domestic wastewater from a wastewater treatment facility (Facility), that will be located approximately 0.4 miles northwest of the intersection of North Murphy Road and Rolling Ridge Drive, in Collin County, Texas.
3. The proposed discharge route is to Maxwell Creek, then to Muddy Creek, and then to Lake Ray Hubbard in Segment No. 0820 of the Trinity River Basin.
4. The Application requested to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 0.1 million gallons per day (MGD) in the interim phase and a daily average flow not to exceed 0.2 MGD in the final phase.
5. The Executive Director (ED) of the Commission declared the Application administratively complete on August 25, 2021.
6. The ED completed the technical review of the Application, prepared a draft permit (Draft Permit) and made it available for public review and comment.
7. The plant would use an activated sludge process operating in the complete mix mode. The plant is proposed to consist of a bar screen, aeration basins, a secondary clarifier, cloth media filters, a chlorine contact basin, and aerated digesters or sludge holding tanks. The Facility plans to use coagulant to remove phosphorus and chlorine gas to disinfect.
8. 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.

9. The Draft Permit contains the following effluent limits for the interim phase:

<b>Effluent Characteristic</b>	<b>Daily Average Limit</b>
5-day Carbonaceous Biochemical Oxygen Demand	10 milligrams per liter (mg/L)
Total Suspended Solids	15 mg/L
Ammonia Nitrogen	3 mg/L
Total Phosphorous	0.5 mg/L
<i>E. coli</i>	126 colony-forming units (CFU) per 100 milliliters (mL)
Dissolved Oxygen (DO)	4.0 mg/L minimum

10. The Draft Permit contains the following effluent limits for the final phase:

<b>Effluent Characteristic</b>	<b>Daily Average Limit</b>
5-day Carbonaceous Biochemical Oxygen Demand	10 mg/L
Total Suspended Solids	15 mg/L
Ammonia Nitrogen	3 mg/L

<b>Effluent Characteristic</b>	<b>Daily Average Limit</b>
Total Phosphorous	0.5 mg/L
<i>E. coli</i>	126 CFU per 100 mL
Dissolved Oxygen (DO)	4.0 mg/L minimum

11. In both phases, the effluent shall contain a chlorine residual of at least 1.0 mg/L and shall not exceed a chlorine residual of 4.0 mg/L after a detention time of at least 20 minutes.
12. In both phases, the pH shall not be less than 6.0 standard units nor greater than 9.0 standard units.

**Notice and Jurisdiction**

13. The Notice of Receipt of Application and Intent to Obtain Water Quality Permit was published in English on September 2, 2021, in the *Collin County Commercial Record*, and in Spanish in *Al Dia* on November 3, 2021.
14. The Application was determined technically complete on October 13, 2021.
15. The Applicant published a combined Notice of Application and Preliminary Decision and Public Meeting in English in the *Collin County Commercial Record* on October 28, 2021, and in Spanish in *Al Dia* on November 3, 2021.
16. The ED’s Final Decision letter was mailed on February 11, 2022, and the period for requesting a contested case hearing ended on March 14, 2022.
17. On May 20, 2022 the Commission granted 61 hearing requests and referred the following 12 issues to 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 351, 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;
  - 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.
18. The SOAH preliminary hearing was held on August 29, 2022, via Zoom videoconference. The City of Parker, the City of Murphy, and North Texas

Municipal Water District (NTMWD) were admitted as parties, as were the following individuals: Mir Abidi; Elizabeth Abraham; Tracy Jo Allen; Kim Caldwell; Harold Camp; Lance Caughfield; Scott & Wendy Clark; Don Wade Cloud Jr. & Scheri Cloud; Brian & Ashley Conner; Maya, Meerna & Michael Dalal; Cyndi & Tim Daugherty; Tami DeWeese; Jeff Dwight; Dan Shoop; Alicia Sue Evans; Shawna Fastnaught; Karen Fey; Wendy Galarneau; Katherine Harvey; Michael & Alesha Haynes; Ray & Ruth Hemmig; Laura & Tony Hernandez; Charles Ho; Deborah Ison; Mary Nell Jackson; Mary G. Trudy Jackson; Theodore Lane; Greg & Susan Ligon; Teral & Larry McDowell; Angelique Loncar; Edwin & Dianne Lundberg; Andrew & Mayela Malczewski; Jessica Marshall; James & Carolyn Moebius; Amit Nangia; Emily Plummer; Ludwig & Lynne Orozco and the Orozco Living Trust; Lee Pettle; Lindy M. (Buddy) Pilgrim; Heather Powell; Soumit & Sylvia Roy; Frank Sarris; Helena Thompson; Sunil & Sreelaxmi Unnikrishnan; Ranjani Venkataraman; Alexander Vinyukov; Gordy & Diane Viere; and Matthew Wilson.

19. Brian and Ashley Conner; Karen Fey; Mary Nell Jackson; Greg and Susan Ligon; and Alexander Vinuykov later withdrew as parties.
20. At the preliminary hearing, the administrative record was admitted into evidence.
21. The hearing on the merits was held via Zoom videoconference on February 7-9, 2023. Applicants were represented by attorney Natalie Scott. Parker was represented by attorney Arturo Rodriguez. Murphy was represented by attorney Stephen Dickman. NTMWD was represented by attorney James Aldredge. TCEQ's Executive Director (ED) was represented by attorneys Kathy Humphreys and Audrey Pawelka. TCEQ's Office of Public Interest Counsel (OPIC) was represented by attorney Sheldon Wayne. The following self-represented individual Protestants participated in the hearing: Lance Caughfield, Laura Hernandez, Theodore Lane, Andrew Malczewski, Carolyn Moebius, Lindy "Buddy" Pilgrim, and Emily Plummer. Reply briefs were filed on February 28, 2023, at which point the record closed.

### **Texas Surface Water Quality Standards (TSWQS)**

22. The TSWQS were developed to protect surface water quality in regards to human health, aquatic life, terrestrial life, and the environment.

23. The TSWQS designate uses for the state's surface waters and establish narrative and numerical water quality standards to protect those uses.
24. TCEQ has adopted standard procedures to implement the TSWQS, which are approved by the United States Environmental Protection Agency and set forth in "Procedures to Implement the Texas Surface Water Quality Standards" (IPs).
25. The TSWQS and IPs are used to set permit limits for wastewater discharges.
26. Under the IPs, the need to perform any review for metals such as copper and zinc only arises with a proposed permitted flow of at least 1.0 MGD.
27. Because the Draft Permit would authorize a maximum flow of 0.2 MGD, no review for copper or zinc was necessary.
28. Under the IPs, total dissolved solids screening is not performed for permits that will discharge less than 1.0 MGD.
29. Because the Draft Permit would authorize a maximum flow of 0.2 MGD, no screening for total dissolved solids was necessary.
30. The IPs require dechlorination only for permitted flows that are at least 0.50 MGD.
31. Because the Draft Permit would authorize a maximum flow of 0.2 MGD, dechlorination is not required.
32. Under the IPs, Whole Effluent Toxicity (WET) testing is not required for discharges less than 1 MGD.
33. Because the Draft Permit would authorize a maximum flow of 0.2 MGD, WET testing is not required.
34. Because Maxwell Creek is a perennial stream with a high aquatic life use, it has a DO criterion of 5.0 mg/L.
35. Although the ED's original DO modeling did not account for some of the site-specific data about Maxwell Creek, Gunnar Dubke created two new models using that data. While the results of the new models were slightly different

from the initial ones, the new models also confirmed that the effluent limits in the draft permit would maintain the DO criterion of 5.0 mg/L for Maxwell Creek.

36. Because the Draft Permit will maintain the 5.0 mg/L DO criterion for Maxwell Creek, its DO limits comply with the TSWQS.

### **Livestock, Wildlife, and Wildlife Habitat**

37. Reducing the pH in water lower than 6.0 standard units increased mortality of certain amphibian larvae, and fish mortality substantially increases at pH lower than between 4 and 5 standard units.
38. Because the Draft Permit provides for a minimum pH of 6.0 standard units, it should not negatively affect amphibian larvae or fish.
39. Although pH of greater than 8.0 standard units can slow larval development of certain amphibians, amphibian tolerance to pH is species-specific, and there was no evidence showing that the sensitive amphibians are found in Maxwell Creek.
40. Concerns about the whooping crane, river otter, monarch butterfly, and alligator snapping turtle were not sufficient to rebut the prima facie demonstration.
41. When determining whether critical habitat of federally endangered or threatened aquatic or aquatic dependent species is present in the discharge's vicinity, the TCEQ and Environmental Protection Agency only consider federal aquatic or aquatic dependent species occurring in watershed of critical concern or high priority as listed in Appendix A of the USFWS biological opinion.
42. As of the date of the hearing on the merits, the alligator snapping turtle was not on the threatened or endangered list.
43. River otters are not designated a species of greatest conservation need.
44. Maxwell Creek is not contained in the IPs as a watershed of critical concern or high priority for the whooping crane.

45. Although the Maxwell Creek watershed serves as stopover habitat during monarch butterfly migration, there was no evidence addressing how the discharge would negatively affect the monarch butterfly, which is not considered an aquatic or aquatic-dependent species.

### **Human Health and Safety**

46. Protestants did not present expert testimony to rebut the prima facie demonstration that the Draft Permit is protective of the requesters' and their families' health and safety.
47. Compliance with the IPs ensures the discharge will not harm human health and safety.
48. The Draft Permit is protective of the requesters' and their families' health and safety.

### **Siting Requirements, Including Prevention of Nuisance Odors**

49. The Facility is not located within the 100-year flood plain.
50. RTG plans to locate treatment units at least 150 feet from the nearest property line and to impose legal restrictions prohibiting construction of homes within the portion of the 150-foot buffer it will not own.
51. The Draft Permit will adequately prevent nuisance odors.
52. At hearing, Mr. Cox committed to installing carbon scrubbers and partially enclosing the Facility.
53. Mr. Cox's commitments under oath should be incorporated into the Draft Permit, if issued.

### **Notice**

54. Protestants have not challenged their own notice.
55. Based on Findings 13-16, Applicants substantially complied with applicable notice requirements.



## **Regionalization**

56. To obtain a permit, an applicant must demonstrate a need for its proposed facility by showing that no other wastewater treatment facilities in the area could provide service.
57. As part of its policy encouraging regionalization of wastewater services, TCEQ requires an applicant to provide information about whether any wastewater treatment plant or collection system within three miles of the proposed plant has sufficient existing capacity to accept the additional volume of wastewater that is proposed. In particular, TCEQ requires applicants to provide copies of all correspondence with the owners of the existing facilities within three miles of the proposed facility concerning connection to their system.
58. Although NTMWD operates the regional treatment system, it does not operate any collection systems. It treats wastewater collected by member and customer cities, such as Parker and Murphy.
59. NTMWD has the treatment capacity to treat the proposed wastewater once it is collected.
60. In discussions with RTG, Parker conditioned providing wastewater service on the development's compliance with Parker's land-use controls, particularly minimum lot sizes.
61. In discussions with RTG, Murphy conditioned providing wastewater service on payment of costs and compliance with Murphy's land-use rules involving density of the development.
62. RTG views complying with the lot size restrictions as making its proposed development economically unfeasible.
63. The Facility is within the watershed area of the East Fork of the Trinity River, for which TCEQ has designated NTMWD as the regional provider.
64. Based on the designation of NTMWD as the regional service provider, it (alone or with a customer city) should be instructed to attempt to reach an

agreement on terms of service with Applicants. Should those attempts fail, the Commission will set those terms.

### **Antidegradation Review and Nutrient Limits**

65. Tier 1 and Tier 2 antidegradation review were required due to the high aquatic life designation of Maxwell Creek.
66. Jenna Lueg performed the antidegradation review for the Application using the procedures set out in the IPs.
67. Ms. Lueg also performed a nutrient screening for the Application. The results of that screening indicated that total phosphorous monitoring or a limit is possible.
68. Although the standard limit for total phosphorous for a flow of 0.2 MGD is 1.0 mg/L, Ms. Lueg provided a lower, more protective, limit of 0.5 mg/L for the Draft Permit.
69. The antidegradation review complies with applicable regulations.
70. The ED's antidegradation review demonstrates that the proposed discharge will maintain existing uses and not lower water quality by more than a de minimis amount.
71. The draft permit includes adequate nutrient limits.

### **Accuracy and Completeness of the Application**

72. H/TE is the current owner of the land on which the Facility is proposed to be built.
73. Because the owner of the facility must be on the application, H/TE was properly on the Application.
74. Even though it does not disclose RTG's funding source, the Application does not misrepresent the true parties who are seeking the permit.

75. Although H/TE's manager, Margaret Turner, attested to the accuracy of the Application without having read it, her attestation was not the only one for the Application. Mr. Cox also independently attested to the necessary items.
76. The ED was able to verify the information needed for the Application.
77. The Application was complete and contained all required information.

### **Legal Entities**

78. RTG is a limited liability corporation currently registered with the Texas Secretary of State.
79. H/TE is a limited partnership, currently registered with the Texas Secretary of State.
80. H/TE's general partner is Harrington/Turner Enterprises Management, LLC (HTEM).
81. The evidence did not establish that the trust that is listed as HTEM's member dissolved.
82. HTEM's certificate was forfeited by the Texas Secretary of State in 2012.
83. At some point, HTEM's certificate was reinstated, and HTEM is currently registered with the Texas Secretary of State.
84. Applicants are legal entities.

### **Vectors**

85. No expert testimony was presented to rebut the prima facie demonstration on control of vectors.
86. The draft permit includes adequate provisions to control vectors.

### **Monitoring**

87. The draft permit requires weekly grab samples for CBOD5, TSS, ammonia nitrogen, total phosphorous, *E. coli*, and DO.

88. The draft permit requires the chlorine residual to be monitored five times per week by grab sample.
89. The draft permit requires the pH level to be monitored once per month by grab sample.

### **Compliance History**

90. TCEQ's Enforcement Division rated both the Applicants and the regulated entity as "no rating," which translates into an "unclassified" compliance history.
91. An "unclassified" rating is common for new permit applications.
92. The Applicants' compliance history does not raise any issues regarding their ability to comply with the material terms of the permit, if issued, that warrant denying or altering the terms of the draft permit.

### **Transcription Costs**

93. No transcript costs may be assessed against the ED or OPIC.
94. No evidence was presented about the parties' ability to pay transcription costs.
95. All parties participated extensively in the hearing on the merits.
96. The parties used the transcript in their briefs.
97. Based on the factors set out in 30 Texas Administrative Code section 80.23(d)(1), each party should bear its own transcription costs.

## **II. CONCLUSIONS OF LAW**

1. TCEQ has jurisdiction over this matter. Tex. Water Code chs. 5, 26.

2. SOAH has jurisdiction to conduct a hearing and to prepare a PFD in contested cases referred by the Commission under Texas Government Code section 2003.047.
3. Notice was provided in accordance with Texas Water Code sections 5.114 and 26.028; Texas Government Code sections 2001.051 and .052; and 30 Texas Administrative Code chapter 39.
4. The Application is subject to the requirements in Senate Bill 709, effective September 1, 2015. Tex. Gov't Code § 2003.047(i-1)-(i-3).
5. Applicant's filing of the Administrative Record established a prima facie demonstration that: (1) the Draft Permit meets all state and federal legal and technical requirements; and (2) a permit, if issued consistent with the Draft Permit, would protect human health and safety, the environment, and physical property. Tex. Gov't Code § 2003.047(i-1); 30 Tex. Admin. Code §§ 80.17(c)(1), .117(c)(1), .127(h).
6. To rebut the prima facie demonstration established by the Administrative Record, a party must present evidence that (1) relates to one of the Referred Issues; and (2) demonstrates that one or more provisions in the Draft Permit violates a specifically applicable state or federal requirement. *See* Tex. Gov't Code § 2003.047(i-2); 30 Tex. Admin. Code §§ 80.17(c)(2), .117(c)(3).
7. If a party rebuts the prima facie demonstration, the Applicant and the ED may present additional evidence to support the Draft Permit. Tex. Gov't Code § 2003.047(i-3); 30 Tex. Admin. Code §§ 80.17(c)(3), .117(c)(3).
8. Applicant retains the burden of proof on the issues regarding the sufficiency of the Application and compliance with the necessary statutory and regulatory requirements. 30 Tex. Admin. Code § 80.17(a).
9. Surface waters must not be toxic to man from ingestion of water, consumption of aquatic organisms, or contact with the skin, or to terrestrial or aquatic life. 30 Tex. Admin. Code § 307.4(d).
10. The Draft Permit complies with the TSWQS and is protective of surface and groundwater quality.

11. The Draft Permit is protective of livestock, wildlife, and wildlife habitats.
12. The Draft Permit is protective of the requesters' and their families' health and safety.
13. Because the plant will not be in the 100-year flood plain, the draft permit does not violate 30 Texas Administrative Code section 309.13(a), which prohibits a wastewater treatment plant from being located in the 100-year flood plain unless plant unit is protected from inundation and damage that may occur during that flood event.
14. The Applicants will comply with 30 Texas Administrative Code section 3019.13(c) by locating the treatment units at least 150 feet from the nearest property line and by imposing legal restrictions prohibiting construction of residential structures within the portion of the 150-foot buffer zone not owned by a permittee.
15. Protestants lack standing to complain about another landowner's lack of notice. *Tex. Comm'n on Env'tl. Quality v. Denbury Onshore, LLC*, No. 03-11-00891-CV, 2014 WL 3055912, at \*10 (Tex. App.—Austin July 3, 2014, no pet.); *see also McDaniel v. Tex. Nat. Res. Conservation Comm'n*, 982 S.W.2d 650, 654 (Tex. App.—Austin 1998, pet. denied) (no standing to assert the interest of a third party who was never given notice of the applicant's affiliation).
16. The antidegradation review ensures compliance with the Tier 1 and Tier 2 antidegradation standards. 30 Tex. Admin. Code § 307.5(b).
17. It is the state's 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 pollution and maintain and enhance the quality of the water in the state. Tex. Water Code § 26.081.
18. The Commission has the authority to deny or alter the terms of a proposed permit 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. Tex. Water Code § 26.0282.

19. The TCEQ has 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.
20. NTMWD, as the regional provider for the watershed area of the East Fork of the Trinity River, “shall provide regional wastewater collection and treatment service to all legal entities requiring such services within the defined area, upon such terms as may be agreed upon by the parties or as may be ordered by the commission if agreement cannot be reached.” 30 Tex. Admin. Code §§ 351.31, .35.
21. The use of the word “shall” in the rule imposes a duty. Tex. Gov’t Code §311.016(2).
22. The Application should be denied, and discussions ordered, so that NTMWD (alone or with a member or customer city) can reach an agreement on terms of service. If an agreement cannot be reached, then the Commission is to order terms of service.
23. For permitting, “facility” is defined as including “all contiguous land and fixtures, structures, or appurtenances used for storing, processing, treating, or disposing of waste, or for injection activities. A facility may consist of several storage, processing, treatment, disposal, or injection operational units.” 30 Tex. Admin. Code § 305.2(14)(A).
24. As the owner of the facility, H/TE had the duty to apply for a TPDES permit. 30 Tex. Admin. Code § 305.43.
25. Applicants are legal entities.
26. The draft permit includes adequate provisions to control vectors.
27. The draft permit’s monitoring requirements comply with 30 Texas Administrative Code section 319.9(a) and (b).
28. No transcript costs may be assessed against the ED or OPIC because TCEQ’s rules prohibit the assessment of any cost to a statutory party who is precluded

by law from appealing any ruling, decision, or other act of the Commission. Tex. Water Code §§ 5.275, .356; 30 Tex. Admin. Code § 80.23(d)(2).

29. Factors to be considered in assessing transcript costs include: the party who requested the transcript; the financial ability of the party to pay the costs; the extent to which the party participated in the hearing; the relative benefits to the various parties of having a transcript; and any other factor which is relevant to a just and reasonable assessment of the costs. 30 Tex. Admin. Code § 80.23(d)(1).
30. Considering the factors in 30 Texas Administrative Code section 80.23(d)(1), a reasonable assessment of hearing transcript costs is for each party to bear its own costs.

**NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:**

1. The Application of Restore the Grasslands, LLC and Harrington/Turner Enterprises, LP for Texas Pollutant Discharge Elimination System Permit No. WQ0016003001 is denied.
2. The parties are to bear their own transcription costs.
3. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
4. The effective date of this Order is the date the Order is final, as provided by Texas Government Code section 2001.144 and 30 Texas Administrative Code section 80.273.
5. TCEQ's Chief Clerk shall forward a copy of this Order to all parties.
6. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.



**ISSUED:**

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

---

**Jon Niermann, Chairman for the Commission**