



# RAILROAD COMMISSION OF TEXAS

## HEARINGS DIVISION

### PROPOSAL FOR DECISION

OIL AND GAS DOCKET NO. 02-0300234

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COMMISSION-CALLED HEARING TO PROVIDE POLK OPERATING, LLC AN OPPORTUNITY TO SHOW CAUSE WHY THE OPERATOR IS NOT IN VIOLATION OF STATEWIDE RULES 8(D)(1), 8(D)(6), AND 91 AT THE POLK KARNES R3 FACILITY, KARNES COUNTY, TEXAS

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### APPEARANCES

#### FOR THE RAILROAD COMMISSION OF TEXAS:

David Cooney, Director, Enforcement Section

#### FOR RESPONDENT POLK OPERATING, LLC:

Stephen Fenoglio, Attorney at Law

#### FOR INTERVENOR EVERGREEN UNDERGROUND WATER CONSERVATION DISTRICT:

Peter Gregg, Attorney at Law

#### PROCEDURAL HISTORY:

Notice of Pre-Hearing Conference:	May 12, 2016
Pre-hearing conference:	May 31, 2016
Notice of Hearing:	January 9, 2017
Hearing on the merits:	December 15 and 16, 2016; February 21 & 22, 2017; May 1, 2 2017; and May 12, 2017
Record closed:	June 29, 2017
Proposal for Decision issued:	January 30, 2018

Heard by:

Ryan M. Lammert,  
Administrative Law Judge  
Brian Fancher,  
Technical Examiner

### SUMMARY

The Railroad Commission of Texas (“Staff”) alleges Polk Operating, LLC (Operator No. 669326), (“Polk”), violated Statewide Rules 8(d)(1)<sup>1</sup>, 8(d)(6)<sup>2</sup>, and 91<sup>3</sup> at the Polk Karnes R3 Facility, Karnes County, Texas (the “Facility”). On petition for leave to intervene, Evergreen Underground Water Conservation District (“Evergreen”) entered as a party with a justiciable interest in the proceeding (Evergreen is a groundwater conservation district charged with conservation of groundwater resources in and under Karnes County). Staff requests Polk’s operating permit be suspended until such time that Polk brings the facility in full compliance with the permit, as amended by Staff. Evergreen prays for Polk’s permits to be revoked

Polk denies all allegations, including various permit violations emphasized by Staff and Evergreen. To be clear, Polk denies that its pits are overcapacity and that the facility is a threat to natural resources—Polk proclaims the Facility to be in full compliance with its permit.

In show-cause proceedings, “the respondent . . . shall have the burden of proof which is a preponderance of the evidence” to demonstrate that it is not in violation of Commission rules, as noted by Staff during site visits to the Facility.<sup>4</sup> Polk therefore must have demonstrated by a preponderance of the evidence that it is in compliance with the Facility permit—as issued—and not in violation of Statewide Rules 8 and 91.

The Administrative Law Judge and Technical Examiner (collectively, “Examiners”) find that Polk is in violation of Statewide Rules 8 and 91 and is in violation of its permit, as alleged by Staff. The Examiners recommend the Commission suspend Polk’s permit to operate the Facility until such time that Polk demonstrates to the satisfaction of the Commission that it is in full compliance with the permit and all applicable Commission Statewide Rules.

### APPLICABLE AUTHORITY

Statewide Rule 8(d)(1), titled *Pollution control*:

Prohibited disposal methods. Except for those disposal methods authorized for certain wastes by paragraph (3) of this subsection, subsection (e) of this section, or §3.98 of this title (relating to Standards for Management of Hazardous Oil and Gas Waste), or disposal methods required to be permitted pursuant to §3.9 of this title (relating to Disposal Wells) (Rule 9) or §3.46 of

<sup>1</sup> 16 TEX. ADMIN. CODE § 3.8(d)(1).

<sup>2</sup> *Id.* at 8(d)(6).

<sup>3</sup> *Id.* at 91.

<sup>4</sup> 16 TEX. ADMIN. CODE § 1.24(b).

this title (relating to Fluid Injection into Productive Reservoirs) (Rule 46), no person may dispose of any oil and gas wastes by any method without obtaining a permit to dispose of such wastes. The disposal methods prohibited by this paragraph include, but are not limited to, the unpermitted discharge of oil field brines, geothermal resource waters, or other mineralized waters, or drilling fluids into any watercourse or drainage way, including any drainage ditch, dry creek, flowing creek, river, or any other body of surface water.

Statewide Rule 8(d)(6), titled *Permits*:

(A) Standards for permit issuance. A permit to maintain or use a pit for storage of oil field fluids or oil and gas wastes may only be issued if the commission determines that the maintenance or use of such pit will not result in the waste of oil, gas, or geothermal resources or the pollution of surface or subsurface waters. A permit to dispose of oil and gas wastes by any method, including disposal into a pit, may only be issued if the commission determines that the disposal will not result in the waste of oil, gas, or geothermal resources or the pollution of surface or subsurface water. A permit to maintain or use any unlined brine mining pit or any unlined pit, other than an emergency saltwater storage pit, for storage or disposal of oil field brines, geothermal resource waters, or other mineralized waters may only be issued if the commission determines that the applicant has conclusively shown that use of the pit cannot cause pollution of surrounding productive agricultural land nor pollution of surface or subsurface water, either because there is no surface or subsurface water in the area of the pit, or because the surface or subsurface water in the area of the pit would be physically isolated by naturally occurring impervious barriers from any oil and gas wastes which might escape or migrate from the pit. Permits issued pursuant to this paragraph will contain conditions reasonably necessary to prevent the waste of oil, gas, or geothermal resources and the pollution of surface and subsurface waters. A permit to maintain or use a pit will state the conditions under which the pit may be operated, including the conditions under which the permittee shall be required to dewater, backfill, and compact the pit. Any permits issued pursuant to this paragraph may contain requirements concerning the design and construction of pits and disposal facilities, including requirements relating to pit construction materials, dike design, liner material, liner thickness, procedures for installing liners, schedules for inspecting and/or replacing liners, overflow warning devices, leak detection devices, and fences. However, a permit to maintain or use any lined brine mining pit or any lined pit for storage or disposal of oil field brines, geothermal resource waters, or other mineralized waters will contain requirements relating to liner material, liner thickness, procedures for installing liners, and schedules for inspecting and/or replacing liners.

(B) Application. An application for a permit to maintain or use a pit or to dispose of oil and gas wastes shall be filed with the commission in Austin. The applicant shall mail or deliver a copy of the application to the appropriate district office on the same day the original application is mailed or delivered to the commission in Austin. A permit application shall be considered filed with the commission on the date it is received by the commission in Austin. When a commission-prescribed application form exists, an applicant shall make application on the prescribed form according to the instructions on such form. The director may require

the applicant to provide the commission with engineering, geological, or other information which the director deems necessary to show that issuance of the permit will not result in the waste of oil, gas, or geothermal resources or the pollution of surface or subsurface water.

(C) Notice. The applicant shall give notice of the permit application to the surface owners of the tract upon which the pit will be located or upon which the disposal will take place. When the tract upon which the pit will be located or upon which the disposal will take place lies within the corporate limits of an incorporated city, town, or village, the applicant shall also give notice to the city clerk or other appropriate official. Where disposal is to be by discharge into a watercourse other than the Gulf of Mexico or a bay, the applicant shall also give notice to the surface owners of each waterfront tract between the discharge point and 1/2 mile downstream of the discharge point except for those waterfront tracts within the corporate limits of an incorporated city, town, or village. When one or more waterfront tracts within 1/2 mile of the discharge point lie within the corporate limits of an incorporated city, town, or village, the applicant shall give notice to the city clerk or other appropriate official. Notice of the permit application shall consist of a copy of the application together with a statement that any protest to the application should be filed with the commission within 15 days of the date the application is filed with the commission. The applicant shall mail or deliver the required notice to the surface owners and the city clerk or other appropriate official on or before the date the application is mailed or delivered to the commission in Austin. If, in connection with a particular application, the director determines that another class of persons, such as offset operators, adjacent surface owners, or an appropriate river authority, should receive notice of the application, the director may require the applicant to mail or deliver notice to members of that class. If the director determines that, after diligent efforts, the applicant has been unable to ascertain the name and address of one or more persons required by this subparagraph to be notified, then the director may authorize the applicant to notify such persons by publishing notice of the application. The director shall determine the form of the notice to be published. The notice shall be published once each week for two consecutive weeks by the applicant in a newspaper of general circulation in the county where the pit will be located or the disposal will take place. The applicant shall file proof of publication with the commission in Austin. The director will consider the applicant to have made diligent efforts to ascertain the names and addresses of surface owners required by this subparagraph to be notified if the applicant has examined the current county tax rolls and investigated other reliable and readily available sources of information.

(D) Protests and hearings. If a protest from an affected person is made to the commission within 15 days of the date the application is filed, then a hearing shall be held on the application after the applicant requests a hearing. If the director has reason to believe that a person entitled to notice of an application has not received such notice within 15 days of the date an application is filed with the commission, then the director shall not take action on the application until reasonable efforts have been made to give such person notice of the application and an opportunity to file a protest to the application. If the director determines that a hearing is in the public interest, a hearing shall be held. A hearing on an application shall be held after the commission provides notice of hearing to all affected persons, or other

persons or governmental entities who express an interest in the application in writing. If no protest from an affected person is received by the commission, the director may administratively approve the application. If the director denies administrative approval, the applicant shall have a right to a hearing upon request. After hearing, the hearings examiner shall recommend a final action by the commission.

(E) Modification, suspension, and termination. A permit granted pursuant to this subsection, may be modified, suspended, or terminated by the commission for good cause after notice and opportunity for hearing. A finding of any of the following facts shall constitute good cause:

(i) pollution of surface or subsurface water is occurring or is likely to occur as a result of the permitted operations;

(ii) waste of oil, gas, or geothermal resources is occurring or is likely to occur as a result of the permitted operations;

(iii) the permittee has violated the terms and conditions of the permit or commission rules;

(iv) the permittee misrepresented any material fact during the permit issuance process;

(v) the permittee failed to give the notice required by the commission during the permit issuance process;

(vi) a material change of conditions has occurred in the permitted operations, or the information provided in the application has changed materially.

(F) Emergency permits. If the director determines that expeditious issuance of the permit will prevent or is likely to prevent the waste of oil, gas, or geothermal resources or the pollution of surface or subsurface water, the director may issue an emergency permit. An application for an emergency permit to use or maintain a pit or to dispose of oil and gas wastes shall be filed with the commission in the appropriate district office. Notice of the application is not required. If warranted by the nature of the emergency, the director may issue an emergency permit based upon a verbal application, or the director may verbally authorize an activity before issuing a written permit authorizing that activity. An emergency permit is valid for up to 30 days, but may be modified, suspended, or terminated by the director at any time for good cause without notice and opportunity for hearing. Except when the provisions of this subparagraph are to the contrary, the issuance, denial, modification, suspension, or termination of an emergency permit shall be governed by the provisions of subparagraphs (A) - (E) of this paragraph.

(G) Minor permits. If the director determines that an application is for a permit to store only a minor amount of oil field fluids or to store or dispose of only a minor amount of oil

and gas waste, the director may issue a minor permit provided the permit does not authorize an activity which results in waste of oil, gas, or geothermal resources or pollution of surface or subsurface water. An application for a minor permit shall be filed with the commission in the appropriate district office. Notice of the application shall be given as required by the director. The director may determine that notice of the application is not required. A minor permit is valid for 60 days, but a minor permit which is issued without notice of the application may be modified, suspended, or terminated by the director at any time for good cause without notice and opportunity for hearing. Except when the provisions of this subparagraph are to the contrary, the issuance, denial, modification, suspension, or termination of a minor permit shall be governed by the provisions of subparagraphs (A) - (E) of this paragraph.

Statewide Rule 91, titled *Cleanup of Soil Contaminated by a Crude Oil Spill*:

(a) Terms. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

- (1) Free oil--The crude oil that has not been absorbed by the soil and is accessible for removal.
- (2) Sensitive areas--These areas are defined by the presence of factors, whether one or more, that make an area vulnerable to pollution from crude oil spills. Factors that are characteristic of sensitive areas include the presence of shallow groundwater or pathways for communication with deeper groundwater; proximity to surface water, including lakes, rivers, streams, dry or flowing creeks, irrigation canals, stock tanks, and wetlands; proximity to natural wildlife refuges or parks; or proximity to commercial or residential areas.
- (3) Hydrocarbon condensate--The light hydrocarbon liquids produced in association with natural gas.

(b) Scope. These cleanup standards and procedures apply to the cleanup of soil in non-sensitive areas contaminated by crude oil spills from activities associated with the exploration, development, and production, including transportation, of oil or gas or geothermal resources as defined in §3.8(a)(30) of this title (relating to Water Protection). For the purposes of this section, crude oil does not include hydrocarbon condensate. These standards and procedures do not apply to hydrocarbon condensate spills, crude oil spills in sensitive areas, or crude oil spills that occurred prior to the effective date of this section. Cleanup requirements for hydrocarbon condensate spills and crude oil spills in sensitive areas will be determined on a case-by-case basis. Cleanup requirements for crude oil contamination that occurred wholly or partially prior to the effective date of this section will also be determined on a case-by-case basis. Where cleanup requirements are to be determined on a case-by-case basis, the operator must consult with the appropriate district office on proper cleanup standards and methods, reporting requirements, or other special procedures.

(c) Requirements for cleanup.

- (1) Removal of free oil. To minimize the depth of oil penetration, all free oil must be removed immediately for reclamation or disposal.
- (2) Delineation. Once all free oil has been removed, the area of contamination must be immediately delineated, both vertically and horizontally. For purposes of this paragraph, the area of contamination means the affected area with more than 1.0% by weight total petroleum hydrocarbons.
- (3) Excavation. At a minimum, all soil containing over 1.0% by weight total petroleum hydrocarbons must be brought to the surface for disposal or remediation.
- (4) Prevention of stormwater contamination. To prevent stormwater contamination, soil excavated from the spill site containing over 5.0% by weight total petroleum hydrocarbons must immediately be:
  - (A) mixed in place to 5.0% by weight or less total petroleum hydrocarbons; or
  - (B) removed to an approved disposal site; or
  - (C) removed to a secure interim storage location for future remediation or disposal. The secure interim storage location may be on site or off site. The storage location must be designed to prevent pollution from contaminated stormwater runoff. Placing oily soil on plastic and covering it with plastic is one acceptable means to prevent stormwater contamination; however, other methods may be used if adequate to prevent pollution from stormwater runoff.

(c) Remediation of soil.

- (1) Final cleanup level. A final cleanup level of 1.0% by weight total petroleum hydrocarbons must be achieved as soon as technically feasible, but not later than one year after the spill incident. The operator may select any technically sound method that achieves the final result.
- (2) Requirements for bioremediation. If on-site bioremediation or enhanced bioremediation is chosen as the remediation method, the soil to be bioremediated must be mixed with ambient or other soil to achieve a uniform mixture that is no more than 18 inches in depth and that contains no more than 5.0% by weight total petroleum hydrocarbons.

(d) Reporting requirements.

(1) Crude oil spills over five barrels. For each spill exceeding five barrels of crude oil, the responsible operator must comply with the notification and reporting requirements of §3.20 of this title (relating to Notification of Fire Breaks, Leaks, or Blow-outs) and submit a report on a Form H-8 to the appropriate district office. The following information must be included:

(A) area (square feet), maximum depth (feet), and volume (cubic yards) of soil contaminated with greater than 1.0% by weight total petroleum hydrocarbons;

(B) a signed statement that all soil containing over 1.0% by weight total petroleum hydrocarbons was brought to the surface for remediation or disposal;

(C) a signed statement that all soil containing over 5.0% by weight total petroleum hydrocarbons has been mixed in place to 5.0% by weight or less total petroleum hydrocarbons or has been removed to an approved disposal site or to a secure interim storage location;

(D) a detailed description of the disposal or remediation method used or planned to be used for cleanup of the site;

(E) the estimated date of completion of site cleanup.

(2) Crude oil spills over 25 barrels. For each spill exceeding 25 barrels of crude oil, in addition to the report required in paragraph (1) of this subsection, the operator must submit to the appropriate district office a final report upon completion of the cleanup of the site. Analyses of samples representative of the spill site must be submitted to verify that the final cleanup concentration has been achieved.

(3) Crude oil spills of five barrels or less. Spills into the soil of five barrels or less of crude oil must be remediated to these standards, but are not required to be reported to the commission. All spills of crude oil into water must be reported to the commission.

(f) Alternatives. Alternatives to the standards and procedures of this section may be approved by the commission for good cause, such as new technology, if the operator has demonstrated to the commission's satisfaction that the alternatives provide equal or greater protection of the environment. A proposed alternative must be submitted in writing and approved by the commission.



## BURDEN OF PROOF

The Examiners find that Polk has the burden of proof to show by a preponderance of the evidence that it is not in violation of the Facility's permit conditions and Commission rules and regulations as alleged by Staff. In a show-cause proceeding "the respondent . . . shall have the burden of proof which is a preponderance of the evidence."<sup>5</sup> Assigning Polk the burden of proof is not only proper under the law, but Polk also agreed on the record at the hearing on the merits to carry the burden.<sup>6</sup>

## EVIDENCE PRESENTED<sup>7</sup>

### STAFF & EVERGREEN

Staff presented a series of *District Office Inspection Reports* to demonstrate Polk's repeated violations between early 2015 and late 2016.<sup>8</sup> More than 20 inspections were conducted by Staff.<sup>9</sup> Each inspection Polk was cited for a violation of either Commission rules or permit violations—or both.<sup>10</sup> Commission staff testified that Polk has a lengthy history of violations and is not currently in compliance.<sup>11</sup>

Staff presented Polk's application to the Commission to secure the Facility's permit.<sup>12</sup> Staff asserts the application highlights the intended use of the Facility and its intended operations.<sup>13</sup> To that end, Staff maintain Polk is not permitted to stockpile by its own representations to the Commission—nowhere in its application did Polk represent to the Commission that stockpiled material would accumulate on the Facility.<sup>14</sup>

Staff also presented the *Closure Cost Estimate* for the Facility.<sup>15</sup> Staff asserts the *Closure Cost Estimate* fails to account for material stockpiled on the Facility because Polk did not intend to stockpile material and did not apply for the right to stockpile material.<sup>16</sup>

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<sup>5</sup> 16 TEX. ADMIN. CODE § 1.24(b).

<sup>6</sup> Tr., Vol. 1, pg. 17, lns. 6 – 10.

<sup>7</sup> Evidence admitted into the record is voluminous, including thousands of pages of exhibits and seven volumes of testimony. For brevity, only the most germane evidence will be described in this section.

<sup>8</sup> Staff Exs. 4-a – 4-y; see Staff Exs. 5 – 6.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Tr., Vol. 6, pgs. 205 – 225.

<sup>12</sup> Staff Ex. 2; see Evergreen Ex. 7.

<sup>13</sup> Tr., Vol. 5, pg. 166, lns. 17 – 20.

<sup>14</sup> See Evergreen Ex. 7, Attachment N.

<sup>15</sup> Staff Ex. 11.

<sup>16</sup> Tr., Vol. 6, pgs. 167 – 168.

Both Staff and Evergreen provided pit volume calculations.<sup>17</sup> Both Staff and Evergreen agree that all pits on the Facility are overcapacity.

### POLK

Polk attacks Staff's inconsistent and inaccurate measurement techniques.<sup>18</sup> Polk maintains that Staff cannot calculate to any reasonable degree of certainty any pit volumes on the Facility.<sup>19</sup> Polk again relies on Staff testimony that the Facility is free of contamination.<sup>20</sup> Polk asserts that sampling data show no pollution on or adjacent to the Facility.<sup>21</sup>

Polk states that it is an unacceptable risk to inspect the HDPE liner.<sup>22</sup> Polk demonstrated that it inspects the clay liner annually, but that inspecting deeper into the pit would risk heavy machinery damaging the HDPE liner—an unacceptable risk to underground water resources.<sup>23</sup> Polk asserts the permit does not require an inspection of the HDPE liner.

Polk also states it is permissible to stockpile material onsite.<sup>24</sup> Polk strongly argues that the permit does not preclude stockpiled material.

### ADMINISTRATIVE LAW JUDGE'S OPINION

In early 2013, the Commission issued to Polk Permit No. STF-042 authorizing the operator to “receive, store, handle, and treat certain non-hazardous oil and gas wastes”.<sup>25</sup> The permit includes a provision titled *Narrative Description of Process* which provides a global view by which the Facility is supposed to operate:

Incoming wastes will be received into Collecting Pit-A and Collecting Pit-B. The waste is then mixed with bioremediation agents in the unloading area of Collecting Pit-A and Collecting Pit-B. After the waste has been through the bioremediation process, the waste is mixed and stabilized on the mixing pad. Liquids will be pumped out of the pits and mixing pad and stored in aboveground tanks prior to being sent to a permitted injection well or disposal facility. Once solids have been mixed, they will be moved to Treated Material Storage Pit-A and Treated Material Storage Pit-B. The waste will then be tested

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<sup>17</sup> See Staff Exs. 12 – 16.

<sup>18</sup> Tr., Vol. 1, pg. 169.

<sup>19</sup> *Id.* at 159 – 160 and 165.

<sup>20</sup> Tr., Vol. 6, pg. 140, lns. 173 – 177.

<sup>21</sup> Polk Exs. 17 – 18.

<sup>22</sup> Tr., Vol. 2, pgs. 113 – 114.

<sup>23</sup> Tr., Vol. 2, pgs. 117 – 118; Tr., Vol 1, pgs. 241 – 242.

<sup>24</sup> See Polk Cross Ex. 1; Polk Ex. 34 – 35, and 42 – 44.

<sup>25</sup> Railroad Commission of Texas, Oil and Gas Division, Permit No. STF-042.

as outlined by this permit. Processed material meeting or less than process control parameters listed in this permit may be used as roadbase offsite.<sup>26</sup>

For two years, Polk seemingly operated the Facility without issue. However, in early 2015, Staff conducted a site visit and cited Polk for violations at the Facility—six violations of permit conditions.<sup>27</sup> Staff thereafter frequently conducted inspections of the Facility.<sup>28</sup> Between February 2015 and December 2016, Staff visited the Facility 24 times—Staff cited violations at each inspection.<sup>29</sup> Polk was cited for violations numerous times (in excess of 100) in that same period.<sup>30</sup>

In February and October 2015, Staff sent to Polk via certified mail letters notifying the operator of violations at the Facility and directed Polk to “discontinue accepting waste until the violations are resolved.”<sup>31</sup> In March 2016, Staff again notified Polk via certified mail of the violations:

THE ABOVE REFERENCED PROPERTY IS CURRENTLY IN VIOLATION OF RAILROAD COMMISSION RULES AND REGULATIONS. THE VIOLATIONS LISTED ABOVE **MUST BE RESOLVED WITHIN 10 DAYS** OF THE DATE OF THIS LETTER.

YOU MAY REQUEST A HEARING TO CONTEST THIS DETERMINATION. YOUR WRITTEN REQUEST, WITH A COPY OF THIS LETTER ATTACHED, MUST BE RECEIVED AT THE ADDRESS LISTED BELOW WITHIN 10 DAYS OF THE DATE OF THIS LETTER.

Failure to resolve the permit violations may result in further Commission action up to and including this matter being forwarded to the Office of General Counsel – Legal Enforcement for penalty action and suspension, modification and/or termination of the subject permits.<sup>32</sup>

Staff cited violations of Statewide Rules 8(d)(1), 8(d)(6), and 91 and violations of permit conditions VI.A.1, VI.A.2, VI.A.3, VI.A.4, VI.A.5, VI.A.6, VI.A.7, VI.A.10, VI.B.4, VI.B.10, and VI.B.13.<sup>33</sup> Staff asserted “the operator is discharging storm water from a non-contact storm water pond into a stock pond.” Staff also alleged various pits are “over the capacity”, “firewalls are not built to permit specifications [and] missing in some areas”, and “treated

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<sup>26</sup> *Id.*

<sup>27</sup> *See* Staff Ex. 5.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*; *see* Staff Exs. 4-a – 4-y.

<sup>31</sup> Staff Exs. 3-a and 3-b.

<sup>32</sup> Staff Ex. 3-c.

<sup>33</sup> *Id.*

material is stockpiled outside of the assigned pits [and] the storm water collection pond contains contact storm water.”<sup>34</sup> Staff maintains the cited violations persist at the Facility, save for a pit that is no longer over capacity.<sup>35</sup>

Polk responded to the March 2016 Commission letter by requesting a hearing on the merits. Shortly thereafter, Evergreen intervened into the matter. Evergreen insists that Polk was and continues to be a threat to underground water resources. A protracted, intense period of discovery disputes (which are ultimately not germane to the disposition of this docket) delayed the hearing on the merits and the circulation of this Proposal for Decision.

Polk characterizes any violations—if any—as “minor infractions.”<sup>36</sup> Polk however describes the alleged violations as: “1) pits are over permitted capacities; 2) the firewalls are not built to permit specifications; 3) the storm water collection pond contains contact storm water; 4) ‘treated material’ is stored outside of assigned pits or is piled outside of the pits; 5) certain pits were not emptied and liners inspected; and 6) at times, there was not at least 2 feet of freeboard in the pits.”<sup>37</sup> Staff and Evergreen vehemently disagree with Polk’s characterization:

First, as a matter of fact, the violations are significant. Second, even if any individual item could be considered minor, Polk’s violations were of such frequent occurrence, frequent citations, and of such long duration that the aggregate must be considered major. Third, the very putting forth of an assertion such as ‘the infractions were minor so they don’t matter,’ particularly along with the repetition and audacity of the violations, indicates Polk has zero regard for the laws and rules of the Commission as manifested in the permit requirements.<sup>38</sup>

Polk maintains Staff failed to accurately measure oil and gas waste in the Facility’s pits. Polk points to inadequate measurement procedures (i.e., failing to account for voids in pits) and improper calculations (i.e., cube v. pyramid volume calculation) to reach the conclusion that Staff cannot be certain that the pits are over capacity.<sup>39</sup>

Polk also denies that the storm water collection pond contains contact storm water. On cross examination, Polk elicited Staff and Evergreen to support that conclusion:

Staff admitted that the Polk facility roads are constructed with processed materials from the Polk facility and that any rainwater that falls on the roads and ends up in the storm water catch basin is non-contact storm water and

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<sup>34</sup> *Id.*

<sup>35</sup> *Tr.*, Vol. 6, pg. 225, lns. 15 – 21.

<sup>36</sup> *Closing Statement of Polk Operating, LLC* at pg. 1.

<sup>37</sup> *Id.* at pgs.

<sup>38</sup> *Railroad Commission Staff’s Reply to Closing Statement* at pg. 2.

<sup>39</sup> *See Tr.*, Vol. 1, pg. 169; *see also Tr.*, Vol. 1, pgs. 159 – 165.

consequently of no concern to the Staff. However, if the rainwater falls on the stockpiled processed materials and flows into the storm water catch basin, that water magically changes into contact storm water. This 'logic' makes absolutely no sense.<sup>40</sup>

The Facility permit requires Polk to empty and perform inspections of the pit liner and maintain a sufficient amount of "freeboard" around the pits (in case of a significant weather event). Polk maintains that the permit is ambiguous in that it fails to discriminate between the clay liner and (deeper) HDPE liner. Staff and Evergreen insist that if the permit was ambiguous regarding permit conditions, Polk should have sought clarity from the Commission—which it did not.

The stockpiling of "recycled", "treated", or "processed" material was a particularly contentious issue at hearing. Staff and Evergreen maintain that any material which is treated and ready for secondary use *must* remain in either Treated Material Storage Pit A or B until such time that it may be moved offsite. Polk disagrees. Polk asserts that the permit is *silent* on the issue and, in the absence of the denial to conduct such operations, Polk can stockpile material outside of the treatment storage pits.

The Examiners opine the following must be answered:

- 1) What operations are authorized under Permit No. STF-042?
- 2) How is the Polk facility supposed to operate under Permit No. STF-042?
- 3) Was oil and gas waste discharged on or from the Facility?

The Examiners find that Polk is in violation of Statewide Rule 8(d)(6) and Permit No. STF-042 conditions VI.A.1, VI.A.2, VI.A.3, VI.A.4, VI.A.5, VI.A.6, VI.A.7, VI.A.10, VI.B.4, VI.B.10, and VI.B.13. Also, the Examiners conclude Polk is in violation of Statewide Rules 8(d)(1) and 91.

#### STATEWIDE RULE 8(D)(1) AND 91

By the plain language of the rule, an actual discharge of oil and gas waste must occur for the violation to be present. Oil and gas wastes include, but are not limited to, "oil field brines, geothermal resource waters, or other mineralized waters, or drilling fluids."<sup>41</sup> Clearly the definition is not exhaustive, but the Examiners are inclined to cite Polk for violations of the rules.

Staff alleges that Polk is not and has never been authorized to stockpile processed material at the Facility—and the Examiners agree. However, that alone is not enough to show that a

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<sup>40</sup> *Closing Statement of Polk Operating, LLC* at pg. 6; see Tr., Vol. 1, pgs. 173 – 177); see also Polk Exs. 17 – 18.

<sup>41</sup> 16 TEX. ADMIN. CODE § 3.8(d)(1).

discharge occurred. But, the evidence is in favor of Staff. In at least one instance, Staff personally observed significant oil spills. Specifically, on March 19, 2015, Staff witnessed:

1. An “oil spill on water”;
2. A “50’ by 6’ oil spill outside of pit on NE side”;
3. A “60’ by 1’ oil spill on east side of pit”;
4. More “oil on the top water”; and
5. “rainwater collection pit has oil on top water”.<sup>42</sup>

Clearly a discharge occurred from one or more pits onto the Facility. Subsequent inspection reports indicate the spills were “cleaned up”<sup>43</sup>, but that does not excuse the initial violation.

Polk argues that neither water samples or samples of stockpiled materials indicate that a discharge has occurred—even though Polk stockpiled material for over two years (at least). Test reports offered into evidence at the hearing support that conclusion. However, test reports (conducted on dates other than the inspection date) do not overcome the fact that Staff personally observed a spill/discharge. While the Examiners appreciate that the areas sampled by Polk appear to be free of pollution, it was not determined that the area identified by Staff to contain a discharge was tested. From the record evidence it appears that some, but not all, of the Facility requires remediation.

An operator responsible for a crude oil spill must comport its cleanup and remediation operations with Statewide Rule 91. Obviously, Polk is responsible for remediation of the Facility, but to what extent, the Examiners can not determine—no party offered persuasive evidence indicating the alleged amount of discharged waste, an important factor regarding an operator’s duty to report/remediate. The Examiners recommend further inspections of the Facility to determine what areas (and to what extent) require remediation. It is recommended that the Commission order Polk to remediate affected areas with 120 days after the proposed final order becomes final.

Notwithstanding, the Examiners find that Polk is also in violation of numerous permit conditions and, as a result, pollution of surface or subsurface water is *also likely* to occur.

#### STATEWIDE RULE 8(D)(6) AND PERMIT VIOLATIONS

Staff presented overwhelming evidence of permit violations. Pictures, inspection reports, and witness testimony all suggest Polk is and was not operating the Facility as permitted.

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<sup>42</sup> Staff Ex. 4-c (*District Office Inspection Report* dated March 19, 2015).

<sup>43</sup> Staff Ex. 4-d (*District Office Inspection Report* dated March 23, 2015).

Polk points to Staff's inaccurate or inconsistent inspections as proof positive that the Facility's pits were not overcapacity. Testimony and evidence show otherwise and, as Staff correctly argues, Polk did not endeavor to estimate the amount of material in each pit (evidence of which is Polk's burden to show). The Examiners are also persuaded by Evergreen testimony and demonstratives showing that Commission staff must have overestimated the calculated amount of material in each pit by a *magnitude of six* for its conclusions to be wrong. Therefore, to arrive at Polk's position, Staff must have been *grossly* inaccurate in its calculations and observations *each time* an inspection was conducted (more than 20)—a bridge too far for the Examiners. That logic is equally applicable to violations of insufficient freeboard, and the Examiners arrive at the same conclusion—Polk is in violation of the permit.

The Examiners also find the Facility was designed and intended to operate as a “pass through” reclamation facility<sup>44</sup> for several reasons: 1) Polk provided to the Commission all information (i.e., closing cost estimates, diagrams, etc.) necessary to permit the Facility; 2) the general operational narrative included in the permit; and 3) Facility closing cost estimates.

The general narrative speaks for itself—it simply does not account for stockpiled material. In conjunction with estimated closing costs and other information provided by Polk (discussed below), it is clear that material is intended to leave the Facility directly from treated material storage pits, and the global description of Facility operations reflects just that.

The evidence shows Polk designed and operated the Facility. Polk provided to the Commission all information necessary to permit the Facility. At no point did Polk provide evidence demonstrating that stockpiled material was contemplated prior to permitting or construction. But, even if Polk intended to stockpile material, the estimated closure costs still fail to account for stockpiled material which, in the event of closure, should be regraded to an acceptable contour profile or, in the alternative, show that it can support vegetative cover. Polk's permit and estimated closure cost simply fail to acknowledge or account for anticipated excess onsite material.

Polk's estimated closure costs are particularly telling. As a condition for a new permit to issue, Polk must have provided to the Commission “a written estimate of the *maximum* dollar amount necessary to close the facility . . . that shows *all assumptions and calculations* used to develop the estimate.”<sup>45</sup> Polk did just that—it estimated *to the cubic yard* all *possible* material that might possibly remain onsite in the event of closure. However, the provided estimated closure costs does not account for stockpiled material outside of any pit, even though Polk has (by its estimation) an additional 58,000 cubic yards stockpiled. Are we to believe that Polk's current financial assurance (which is based on the written estimated closing cost provided by Polk to secure the permit) is sufficient to cover an additional 58,000 cubic yards of stockpiled material?

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<sup>44</sup> That is to say, a reclamation facility designed to and operate in a manner by which oil and gas waste is accepted, treated, and moved offsite expeditiously, without the necessity of onsite stockpiling.

<sup>45</sup> 16 TEX. ADMIN. CODE § 3.78(l)(i). (emphasis added).

Either Polk did not account for stockpiled material to secure its permit, or Polk never intended to stockpile material. In either case, Polk is not permitted to stockpile material.

Further, Polk, as part of the permitting process, was required to provide to the Commission the Facility's design and construction information:

A permit application for a stationary commercial solid oil and gas waste recycling facility shall include the layout and design of the facility by including a plat drawn to scale with north arrow to top of the map showing the location and information on the design and size of all receiving, processing, and storage areas and all equipment (e.g., pug mill), tanks, silos, monitor wells, dikes, fences, and access roads.<sup>46</sup>

Polk again provided the necessary information to the Commission. Polk again failed to account for stockpiled material—areas where stockpiled material currently sits is simply not indicated anywhere on the provided diagram/plat. Based on representations made by Polk to the Commission, the Examiners conclude Polk did not apply for and was not granted authority to stockpile material on the Facility.

Polk's attempt to distinguish between ambiguous permit terminology (i.e., "processed", "treated", "recycled" material) is without merit and does not explain permitting versus operational inconsistencies as discussed above. The Examiners are persuaded that Polk's actions and representations to the Commission *prior* to operations are largely dispositive of whether Polk is permitted to stockpile material. In other words, Polk applied for and was granted by the Commission a permit to operate a stationary commercial solid and gas waste recycling facility, exclusive of the right to stockpile material onsite.

As a condition to the permit, the Commission requires Polk to inspect the pit liners for integrity. Polk again obfuscates the issue by claiming the permit only requires Polk to inspect the clay liner, not the deeper HDPE liner. Again, Polk is incorrect—for many of the same reasons stated above. Polk provided to the Commission its plans for design and operation of the Facility. At no point in the process did Polk seek clarity from the Commission as to how it was to conduct a liner inspection—an inspection integral to ensure groundwater protection. Polk dismisses the duty to inspect the HDPE liner by blaming time and costs to do so. Staff testimony supports the conclusion that Polk was required to inspect the HDPE liners annually—the HDPE liners are the last line of defense for vertical migration of fluids and must maintain integrity to be effective. The Commission surely has an interest in tracking the integrity of such a critical part of a pit, and therefore Polk must have inspected the HDPE liners annually.

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<sup>46</sup> 16 TEX. ADMIN. CODE § 4.250(a).



## CONCLUSION

The Examiners conclude Polk is in violation of Statewide Ruled 8(d)(1) and required to conduct remediation pursuant to Statewide Rule 91. The Examiners also conclude Polk is in violation of Statewide Rule 8(d)(6) and permit conditions as alleged by Staff. Accordingly, the Examiners recommend the following Findings of Fact and Conclusions of Law:

### FINDINGS OF FACT

1. Polk Operating, LLC was given at least ten (10) days' notice of the hearing on the merits by certified mail sent to its most recent Form P-5 address.
2. Polk Operating, LLC's Form P-5 *Organization Report* Operator No. is 669326.
3. Polk Operating, LLC appeared at the hearing on the merits through Stephen Fenoglio, its attorney of record.
4. The Railroad Commission of Texas appeared at the hearing on the merits through David Cooney, its attorney of record.
5. Evergreen Underground Water Conservation District appeared at the hearing on the merits through Peter Gregg, its Attorney of record.
6. On or about February 12, 2013, the Commission issued to Polk Operating, LLC Permit No. STF-042 for the Polk Karnes R<sup>3</sup> Facility (the "Facility"), including Pit Permit Nos. STF-042, P0011769, P011770, P011771, P011772, and P011773, A. Hernandez Survey, A-4, located in Karnes County, Texas (the "Permit").
  - a. The effective of the date of the Permit is February 12, 2013.
  - b. Commission authority granted by the Permit expires February 12, 2018.
7. Polk Operating, LLC agreed on the record at the hearing on the merits to carry the burden of proof in this matter.
8. On February 23 and October 20, 2015, the Commission notified Polk Operating, LLC of violations present on the Facility and directed Polk to resolve the issues within 90 and 60 days, respectively, or risk the Commission bringing an enforcement action against Polk.
9. On March 24, 2016, the Commission notified Polk Operating, LLC of violations present on the Facility and directed Polk to resolve the issues within 10 days, respectively, or risk the Commission bringing an enforcement action against Polk.

- a. Polk was also given the option to request a hearing on the merits.
  - b. Polk timely requested a hearing on the merits.
10. Collecting Pit-A is identified as P011772 in the Permit.
11. Collecting Pit-B is identified as P011773 in the Permit.
12. Treated Material Storage Pit-A is identified as P011770 in the Permit.
13. Treated Material Storage Pit-B is identified as P011771 in the Permit.
14. The Washout Pit is identified as P011769 in the Permit.
15. On February 19, March 19, March 23, April 16, April 22, May 1, May 7, August 19, October 7, October 14, 2015; and January 14, March 11, April 4, April 5, April 25, May 10, May 23, July 7, July 27, September 7, October 4, November 4, and December 8, 2016, the Commission conducted inspections of the Facility.
16. On February 19, March 19, March 23, April 16, April 22, May 1, May 7, 2015; and January 14, March 11, April 4, April 5, April 25, May 10, May 23, July 7, July 27, September 7, October 4, November 4, and December 8, 2016, Commission staff cited Polk Operating, LLC for violations of Permit condition VI.A.1.
  - a. On those dates, Polk Operating, LLC's Collecting Pit-A contained more than 5,000 cubic yards of waste.
17. On February 19 and May 7, 2015; and January 14 and March 11, 2016, Commission staff cited Polk Operating, LLC for violations of Permit condition VI.A.2.
  - a. On those dates, Polk Operating, LLC's Collecting Pit-B contained more than 2,407 cubic yards of waste.
18. On February 19, March 19, March 23, April 16, April 22, May 1, May 7, 2015; and January 14, March 11, April 4, April 5, April 25, May 10, May 23, July 7, July 27, September 7, October 4, November 4, and December 8, 2016, Commission staff cited Polk Operating, LLC for violations of Permit condition VI.A.3.
  - a. On those dates, Polk Operating, LLC's Collecting Pit-A and Collecting Pit-B contained more than 5,000 cubic yards of waste and 2,407 cubic yards of waste, respectively.

19. On May 7, 2015; and January 14, March 11, April 4, April 5, April 25, May 10, May 23, July 7, July 27, September 7, October 4, November 4, and December 8, 2016, Commission staff cited Polk Operating, LLC for violations of Permit condition VI.A.4.
  - a. On those dates, Polk Operating, LLC's Collecting Pit-A and Collecting Pit-B were not surrounded on four sides by earthen berms to a height of two feet and width at base of 33 feet.
20. On April 16, April 22, May 1, 2015; and January 14, March 11, April 4, April 5, April 25, May 10, May 23, 2016, Commission staff cited Polk Operating, LLC for violations of Permit condition VI.A.5.
  - a. On those dates, Polk Operating, LLC's Treated Storage Pit-A contained more than 1,715 cubic yards of partially treated waste and recycled product.
21. On April 16, April 22, May 1, 2015; and January 14, March 11, April 4, April 5, May 23, 2016, Commission staff cited Polk Operating, LLC for violations of Permit condition VI.A.6.
  - a. On those dates, Polk Operating, LLC's Treated Storage Pit-B contained more than 1,715 cubic yards of partially treated waste and recycled product.
22. On January 14, March 11, April 4, April 5, April 25, May 10, May 23, July 7, July 27, September 7, October 4, November 4, and December 8, 2016, Commission staff cited Polk Operating, LLC for violations of Permit condition VI.A.7.
  - a. On those dates, Polk Operating, LLC's Treated Storage Pit-A and/or Treated Storage Pit-B were not surrounded on four sides by earthen berms to a height of two feet and width at base of 19.5 feet.
23. On March 19 and March 23, 2015, Commission staff cited Polk Operating, LLC for violations of Permit condition VI.A.10.
  - a. On those dates, Polk Operating, LLC's storm water collection pit contained contact storm water.
24. On May 10, 2016, Commission staff cited Polk Operating, LLC for violation of Permit condition VI.A.13.
  - a. On that date, Polk Operating, LLC allowed waste to collect on the mixing pad for temporary storage.
25. On March 11 and May 23, 2016, Commission staff cited Polk Operating, LLC for violations of Permit condition VI.B.1.

- a. On those dates, Polk Operating, LLC did not unload incoming waste directly into Collecting Pit-A and/or Collecting Pit-B, rather Polk Operating, LLC unloaded incoming waste directly into the Washout Pit and/or mixing pad.
26. Since beginning operations, Polk Operating, LLC has not conducted an inspection of Collecting Pit-A's HDPE liner.
    - a. Polk Operating, LLC is required to annually inspect Collecting Pit-A's HDPE liner pursuant to Permit condition VI.B.4.
  27. Since beginning operations, Polk Operating, LLC has not conducted an inspection of Collecting Pit-B's HDPE liner.
    - a. Polk Operating, LLC is required to annually inspect Collecting Pit-B's HDPE liner pursuant to Permit condition VI.B.4.
  28. Since beginning operations, Polk Operating, LLC has not conducted an inspection of Treated Material Storage Pit-A's HDPE liner.
    - a. Polk Operating, LLC is required to annually inspect Treated Material Storage Pit-A's HDPE liner pursuant to Permit condition VI.B.4.
  29. Since beginning operations, Polk Operating, LLC has not conducted an inspection of Treated Material Storage Pit-B's HDPE liner.
    - a. Polk Operating, LLC is required to annually inspect Treated Material Storage Pit-B's HDPE liner pursuant to Permit condition VI.B.4.
  30. Since beginning operations, Polk Operating, LLC has not conducted an inspection of the Washout Pit's HDPE liner.
    - a. Polk Operating, LLC is required to annually inspect the Washout Pit's HDPE liner pursuant to Permit condition VI.B.4.
  31. Since beginning operations, Polk Operating, LLC has not conducted an inspection of the mixing pad's HDPE liner.
    - a. Polk Operating, LLC is required to annually inspect the mixing pad's HDPE liner pursuant to Permit condition VI.B.4.
  32. On January 14, March 11, April 4, April 25, May 10, May 23, July 7, July 27, September 7, October 4, November 4, and December 8, 2016, Commission staff cited Polk Operating, LLC for violations of Permit condition VI.B.10.

- a. On those dates, Polk Operating, LLC did not properly segregate treated material into the proper lots and did not appropriately label each lot "OK FOR USE".
33. On February 19, March 23, April 22, 2015; and January 14, March 11, 2016, Commission staff cited Polk Operating, LLC for violations of Permit condition VI.B.13.
    - a. On those dates, Polk Operating, LLC did not maintain at least two feet of freeboard in Collecting Pit-A, Collecting Pit-B, Treated Material Storage Pit-A, Treated Material Storage Pit-B, and/or the Washout Pit.
  34. On March 19 and March 23, 2015, Commission staff cited Polk Operating, LLC for violations of Statewide Rule 8(d)(1).
    - a. On those dates, Polk Operating, LLC disposed of oil and gas wastes without obtaining a permit to dispose of such wastes. Polk Operating, LLC disposed of oil and gas wastes into the Facility's storm water collection pond, and also disposed of oil and gas wastes onto the Facility resulting in a 50 foot by 6 foot area of contamination and a 60 foot by 1 foot area of contamination.
  35. Polk Operating, LLC is not permitted to stockpile any material onsite at the Facility.
  36. Pollution of surface water has occurred and is likely to occur as a result of the Facility's permitted operations.
  37. Pollution of subsurface water is likely to occur as a result of the permitted operations.
  38. Polk Operating, LLC has violated the terms and conditions of the Permit and Commission rules.
  39. Polk Operating, LLC's Permit should be suspended until such time that the operator is in full compliance with the Permit, all applicable Commission rules and regulations, and has conducted full remediation of the Facility pursuant to Statewide Rule 91 to the satisfaction of the Commission.
  40. Polk Operating, LLC's violations of 16 TEX. ADMIN. CODE § 3.8(d)(1) are serious and a hazard to the public health and safety.
  41. For purposes of TEX. NAT. RES. CODE § 91.114, at all times relevant hereto Mickey Polk was a person who held a position of ownership or control in Polk Operating, LLC.

42. Polk Operating, LLC acted in bad faith because it failed to correct Commission rules violations and Permit violations and failed to adequately explain its inaction to the Commission.

#### CONCLUSIONS OF LAW

1. Proper notice of hearing was timely issued to the appropriate persons entitled to notice.
2. All things necessary to the Commission attaining jurisdiction have occurred.
3. Polk Operating, LLC's Permit to operate the Facility should be suspended pursuant to 16 TEX. ADMIN. CODE § 3.8(d)(6)(i) and (iii) because pollution of surface water has occurred and is likely to occur as a result of the Facility's permitted operations, pollution of subsurface water is likely to occur as a result of the Facility's permitted operations, and because Polk Operating, LLC has violated the terms and conditions of the Permit and Commission rules.
4. There is good cause to suspend Polk Operating, LLC's Permit to operate the Facility.
5. Because Collecting Pit-A contained more than 5,000 cubic yards of waste, Polk Operating, LLC violated Permit condition VI.A.1.
6. Because Collecting Pit-B contained more than 2,407 cubic yards of waste, Polk Operating, LLC violated Permit condition VI.A.2.
7. Because Collecting Pit-A and Collecting Pit-B contained more than 5,000 cubic yards of waste and 2,407 cubic yards of waste, respectively, Polk Operating, LLC violated Permit condition VI.A.3.
8. Because Collecting Pit-A and Collecting Pit-B were not surrounded on four sides by earthen berms to a height of two feet and width at base of 33 feet, Polk Operating, LLC violated Permit condition VI.A.4.
9. Because Treated Storage Pit-A contained more than 1,715 cubic yards of partially treated waste and recycled product, Polk Operating, LLC violated permit condition VI.A.5.
10. Because Treated Storage Pit-B contained more than 1,715 cubic yards of partially treated waste and recycled product, Polk Operating, LLC violated Permit condition VI.A.6.
11. Because Treated Storage Pit-A and/or Treated Storage Pit-B were not surrounded on four sides by earthen berms to a height of two feet and width at base of 19.5 feet, Polk Operating, LLC violated Permit condition VI.A.7.

12. Because the storm water collection pit contained contact storm water, Polk Operating, LLC violated Permit condition VI.A.10.
13. Because waste was allowed to collect on the mixing pad for temporary storage, Polk Operating, LLC violated Permit condition VI.A.13.
14. Because incoming waste was not unloaded directly into Collecting Pit-A and/or Collecting Pit-B, Polk Operating, LLC violated Permit condition VI.B.1.
15. Because an inspection of Collecting Pit-A's HDPE liner has not been conducted, Polk Operating, LLC violated Permit condition VI.B.4.
16. Because an inspection of Collecting Pit-B's HDPE liner has not been conducted, Polk Operating, LLC violated Permit condition VI.B.4.
17. Because an inspection of Treated Material Storage Pit-A's HDPE liner has not been conducted, Polk Operating, LLC violated Permit condition VI.B.4.
18. Because an inspection of Treated Material Storage Pit-B's HDPE liner has not been conducted, Polk Operating, LLC violated Permit condition VI.B.4.
19. Because an inspection of the Washout Pit's HDPE liner has not been conducted, Polk Operating, LLC violated Permit condition VI.B.4.
20. Because an inspection of the mixing pad's HDPE liner has not been conducted, Polk Operating, LLC violated Permit condition VI.B.4.
21. Because treated material was not properly segregate into the proper lots and were appropriately labeled "OK FOR USE", Polk Operating, LLC violated Permit condition VI.B.10.
22. Because at least two feet of freeboard was not maintained in Collecting Pit-A, Collecting Pit-B, Treated Material Storage Pit-A, Treated Material Storage Pit-B, and/or the Washout Pit, Polk Operating, LLC violated Permit condition VI.B.13.
23. Because oil and gas wastes were disposed of without first obtaining a permit to dispose of such wastes, Polk Operating, LLC violated Statewide Rule 8(d)(1).
24. The documented violations committed by Polk Operating, LLC constitute acts deemed serious and a hazard to the public health and safety within the meaning of Texas Natural Resources Code §81.0531.
25. Polk Operating, LLC did not demonstrate good faith within the meaning of Texas Natural Resources Code §81.0531.

- 26. Polk Operating, LLC shall conduct remediation of the Facility within 120 days after the date the final order becomes final pursuant to 16 TEX. ADMIN. CODE § 3.91.
- 27. Polk Operating, LLC is not permitted to stockpile any material onsite at the Facility.

**RECOMMENDATIONS**

The Examiners recommend the Commission suspend Polk Operating, LLC's Permit No. STF-042 for the Polk Karnes R<sup>3</sup> Facility, including Pit Permit Nos. STF-042, P0011769, P011770, P011771, P011772, and P011773, A. Hernandez Survey, A-4, located in Karnes County, Texas, until such time that the operator is in full compliance with the Permit, all applicable Commission rules and regulations, and has conducted full remediation of the Facility pursuant to Statewide Rule 91 to the satisfaction of the Commission.

RESPECTFULLY SUBMITTED,



RYAN M. LAMMERT  
Administrative Law Judge



PAUL DUBOIS, P. E.  
Technical Examiner



**RAILROAD COMMISSION OF TEXAS  
HEARINGS DIVISION**

**OIL AND GAS DOCKET NO. 02-0300234**

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**COMMISSION-CALLED HEARING TO PROVIDE POLK OPERATING, LLC AN OPPORTUNITY TO SHOW CAUSE WHY THE OPERATOR IS NOT IN VIOLATION OF STATEWIDE RULES 8(D)(1), 8(D)(6), AND 91 AT THE POLK KARNES R3 FACILITY, KARNES COUNTY, TEXAS**

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**FINAL ORDER**

The Commission finds that after statutory notice the captioned proceedings were heard by an Administrative Law Judge on December 15 and 16, 2016; February 21 & 22, 2017; May 1, 2 2017; and May 12, 2017. The Administrative Law Judge has circulated a Proposal for Decision containing Findings of Fact and Conclusions of Law. Having been duly submitted to the Railroad Commission of Texas at conference held in its offices in Austin, Texas, the Findings of Fact and Conclusions of Law are hereby adopted and made a part hereof by reference.

**IT IS HEREBY ORDERED** that not later than the 120<sup>th</sup> day following the date on which this order becomes final under law Polk Operating, LLC shall conduct and complete full remediation of the Polk Karnes R<sup>3</sup> Facility, including Pit Permit Nos. STF-042, P0011769, P011770, P011771, P011772, and P011773, A. Hernandez Survey, A-4, located in Karnes County, Texas, pursuant to 16 TEX. ADMIN. CODE § 3.91.

It is further **ORDERED** that Polk Operating, LLC's Permit No. STF-042 for the Polk Karnes R<sup>3</sup> Facility, including Pit Permit Nos. STF-042, P0011769, P011770, P011771, P011772, and P011773, A. Hernandez Survey, A-4, Karnes County, Texas, is hereby **SUSPENDED** until such time that Polk Operating, LLC and the Polk Karnes R<sup>3</sup> Facility are in full compliance with Permit No. STF-042, all applicable Commission rules and regulations, and has conducted full remediation of the Facility pursuant to 16 TEX. ADMIN. CODE § 3.91 to the satisfaction of the Commission's site remediation staff.

It is further **ORDERED** by the Commission that this order shall not be final and effective until 25 days after the Commission's order is signed, unless the time for filing a motion for rehearing has been extended under TEX. GOV'T CODE § 2001.142, by agreement under TEX. GOV'T CODE § 2001.147, or by written Commission Order issued pursuant to TEX. GOV'T CODE § 2001.146(e). If a timely motion for rehearing of an application is filed by any party at interest, this order shall not become final and effective until such motion is overruled, or if such motion is granted, this order shall be subject to further action by the

Commission. Pursuant to TEX. GOV'T CODE § 2001.146(e), the time allotted for Commission action on a motion for rehearing in this case prior to its being overruled by operation of law is hereby extended until 100 days from the date Commission Order is signed.

Each exception to the Administrative Law Judge's proposal for decision not expressly granted herein is overruled. All requested findings of fact and conclusions of law which are not expressly adopted herein are denied. **All pending motions and requests for relief not previously granted or granted herein are denied.**

Noncompliance with the provisions of this order is subject to enforcement by the Attorney General and subject to civil penalties of up to \$10,000 per day per violation.

**ENTERED** in Austin, Texas on this \_\_\_\_\_.

**RAILROAD COMMISSION OF TEXAS**

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**CHAIRMAN CHRISTI CRADDICK**

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**COMMISSIONER RYAN SITTON**

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**COMMISSIONER WAYNE CHRISTIAN**

**ATTEST**

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**SECRETARY**