BLACKHORN

ENVIRONMENTAL SERVICES LLC

November 3, 2023

Kellie Martinec
Rules Coordinator
Office of General Counsel
Railroad Commission of Texas
P.O. Box 12967
Austin, Texas 78711
Via email to: rulescoordinator@rrc.texas.gov

RE: Comments on Proposed Changes to 16 T.A.C. §3.8 ("Statewide Rule 8") and §3.57, and 16 T.A.C. Chapter 4.

Dear Ms. Martinec:

Blackhorn Environmental Services, LLC ("Blackhorn") appreciates the opportunity to comment on the Commission's draft rules. Since 2014, Blackhorn has been authorized by the Commission to operate its commercial, non-hazardous oil and gas waste management and disposal facility in rural Jim Wells County, Texas. Our facility continues to benefit the South Texas oil and gas industry, while protecting the State's water resources and preventing waste. Like other permitted operators throughout the State, Blackhorn has operated in accordance with the existing Statewide Rule 8 and special permit conditions that are tailored to site-specific characteristics and local hydrogeology.

New 16 T.A.C. Chapter 4, Subchapter A ("Subchapter A") is a one-size-fits-all regulatory scheme that would govern all commercial oil and gas waste disposal facilities across the State no matter the location, and despite the material variations in geologic settings and freshwater resources. South Texas facilities located in rural and unincorporated areas like Blackhorn would be subject to the same stringent regulations as North Texas facilities located in populated areas. West Texas facilities located in dry and arid climates with sparse freshwater resources would be subject to the same stringent regulations as facilities in East Texas with higher annual rainfall and shallow groundwater zones. Blackhorn asserts that the 87 pages of new regulations in Subchapter A are not necessary because one-size ***does not*** fit-all at commercial facilities located in different regions of Texas.

Statewide Rule 8 has proven to be fair, reasonable, and environmentally protective for nearly 40 years. There is no reason to make wholesale changes today. The Commission should continue to regulate commercial facilities under Statewide Rule 8 and address site-specific issues through special permit conditions. Statewide Rule 8 in its current form is more than sufficient to carry out the Texas Legislature's intent of preventing water pollution.

Our specific comments and concerns with the draft rules in new Subchapter A are as follows.

A. Existing Commercial Facilities

Proposed new rules 4.109 and 4.121 suggest that existing commercial facilities will be governed by the new standards, if adopted, even though such facilities are authorized for construction and operation under existing permits. The existing permits were issued after an extensive review conducted by Commission Staff and often times after a contested case proceeding before the Commission's Hearing Examiners and Commissioners. Existing facilities are multi-million-dollar investments that have been fully vetted by the Commission prior to permit issuance. There is no reason to "change the game" on permitted facilities that have proven to be protective of water resources during their operational lives. Permitted facilities should continue to be governed by existing standards under Statewide Rule 8.

It appears that new Subchapter A was drafted in response to the 87th Texas Legislature's enactment of Section 91.1017 of the Texas Natural Resources Code (Location of Certain Pits). Section 91.1017 states:

> The "commission by rule shall establish standards governing permissible locations for pits used by commercial oil and gas disposal facilities. The rules must include a history of flooding in the 10 years preceding the construction of the pit as a factor in determining whether a proposed location of a pit is permissible."

This statute directs the Commission to establish new standards for proposed, not-yet-permitted pits by use of the phrases "preceding the construction" and "proposed location." This statute does not authorize the Commission to subject already-permitted pits or commercial stationary treatment facilities to new standards that were not in effect at the time the facility was originally proposed to the Commission.

We understand that Commission Staff has modeled its new Subchapter A after the State of New Mexico Oil Conservation Division's administrative rules governing commercial surface waste management facilities. There is a notable difference between new Subchapter A and New Mexico regulations in terms of grandfathering-in permitted facilities. New Mexico authorizes permitted facilities to continue to operate under the permits or orders that were in effect prior to the effective date of the new standards, unless a major modification is proposed for an existing facility. *See* New Mexico Administrative Code, Section 19.15.36.20. New Mexico does not require a permitted facility to satisfy new siting standards that were not in effect at the time the facility was originally proposed to state regulators. The Commission should follow New Mexico's guidance by grandfathering-in permitted facilities and excepting such facilities from the new standards set forth in Subchapter A.

Recommended change to new rule 4.109:

Delete paragraph (c) and replace with the following:

(c) A commercial facility permitted by the Commission prior to [insert effective date of rulemaking] may continue to operate in accordance with such permits, orders, and authorizations, and is not required to obtain a new authorization pursuant to this subchapter.

Recommended change to new rule 4.121:

Delete paragraph (b) and replace with the following:

(b) Any permit issued by the Commission under §3.8 of this title (relating to Water Protection) shall remain in effect until it expires on its own terms, is renewed under §3.8 of this title, or is modified, suspended, or terminated by the Commission pursuant to §4.123 of this title (relating to Permit Modification, Suspension, and Termination). For clarity, an application to renew a permit issued by the Commission prior to [insert effective date of rulemaking] shall be governed by the Commission's permitting standards and requirements under §3.8 that were in effect prior to [insert effective date of rulemaking].

B. Siting Requirements for Commercial Facilities

Proposed new rule 4.150(g) would implement minimum distance requirements for commercial pit locations. New rule 4.150(g) would prohibit a commercial pit from being located (a) within 300 feet of surface water, (b) within 500 feet of any public water system well or intake, or (c) within 300 feet of any domestic water well or irrigation water well. There is no technical or scientific justification for these bright-line minimum distance requirements. An engineered pit located 100 feet from a creek bed would be equally protective as an engineered pit located 300 feet away. An engineered pit located 50 feet from a water well would be equally protective as an engineered pit located 300 feet away. A pit located 295 feet from a water well is no different than a pit located 300 feet away.

A permitted facility undergoing the permit renewal process should not be subject to the new minimum distance requirements that were not in effect at the time of original permit issuance. Proximity to freshwater resources, offset water wells, and surface water features are factors already considered by the Commission prior to issuance of an original pit permit under Statewide Rule 8. The same permit should not be automatically denied during the renewal process for failure to satisfy the new minimum distance requirement when it has been proven that the permitted location is fully protective of water resources despite its close proximity. In addition, the minimum distance requirement can be manipulated by opponents during the permit renewal process to the detriment of the applicant.

For example, a person could drill a new irrigation water well located 299 feet from the permitted location after the effective date of the new rules and the existing permit would
not technically qualify for renewal under new rule 4.150(g), since the permitted location would now be located within 300 feet of the well. The Commission should not adopt a rule that promotes the opportunity for an ill-intentioned protestant to force the sudden closure of a facility due to a technicality when the facility is otherwise fully protective of the environment and beneficial to the oil and gas industry under Statewide Rule 8.

Recommended change to new rule 4.150(g):

> Delete paragraphs (g) (2), (3), and (4).

Proposed new rule 4.150(h) would implement a minimum 50-foot buffer zone between the boundaries of the property and the outer edge or toe of the pit walls or berms. Again, there is no technical or scientific justification for this minimum distance requirement, especially in regard to facilities located in rural settings. There is no reasonable basis for a 50-foot buffer zone between the boundary line of an abandoned South Texas ranch and the outer edge of a pit. A 5-foot buffer zone in certain areas of the State serves the same purpose as a 50-foot buffer zone. A 20-foot buffer zone is equally protective as a 50-foot buffer zone when a pit is engineered appropriately and located in a suitable geologic setting.

Instead of a minimum distance buffer requirement, the focus of the Commission's permitting analysis should be on the design of outer berms and other engineered features that prevent surface migration of constituents onto neighboring lands, and the quality and characteristics of geologic strata that prevents the subsurface migration of constituents into offset groundwater.

Recommended change to new rule 4.150(h):

> Delete paragraph (h) in its entirety. In the alternative, specify that paragraph (h) only applies to a pit located in an incorporated area or urban setting.

Proposed new rule 4.153(a)(2) provides additional siting requirements for commercial disposal pits. Paragraph (a)(2)(C) prohibits a commercial disposal pit from being located in "any other location where there is an increased risk to surface or subsurface waters." This provision is too vague and calls for a subjective determination of an "increased risk" without identifying specific factors that would be considered in order to determine whether or not an "increased risk" exists. This provision creates uncertainty for the regulated community and is not necessary since paragraph (a)(2)(A) calls for the prevention of pollution of surface and subsurface waters, which is consistent with governing statutes and Statewide Rule 8.

Recommended change to new rule 4.153(a):

Delete paragraph (a)(2)(C) in its entirety.

C. <u>Jurisdictional Issues</u>

Section 91.101 of the Texas Natural Resources Code requires the Commission to adopt rules to "prevent pollution of surface water or subsurface water in the state." Proposed new rule 4.101(b) references minimum permitting standards for the "purpose of protecting public health, public safety, and the environment." The proposed new rule is broader in scope and coverage than the Commission's statutory obligation to prevent water pollution. Likewise, proposed new rule 4.120(b) follows Statewide Rule 8 by requiring a determination that a proposed activity will not result in pollution or waste of resources, but then expands the permit requirement to also include "will not result in the endangerment of human health or the environment." These generalized and undefined provisions in the proposed new rules are beyond the scope of statutory authority and could be interpreted to mean that the Commission will consider other factors in the permitting process besides the prevention of pollution and waste of resources, such as roads and traffic, noise, odors, and air contaminants. A broader application of the proposed new rules would contradict the Commission's longstanding policy that roads, traffic, and nuisances are not within the agency's jurisdiction. The proposed new rules present an opportunity for the Commission to avoid unintended consequences by clarifying under rule that roads, traffic, and nuisances are not within its jurisdiction.

Recommended change to new rule 4.101:

Add new paragraph (d) to state as follows:

<u>(d) The Commission does not have regulatory authority or jurisdiction over roads, traffic, noise, odors, air contaminants, and other nuisances, and such matters will not be considered by the Commission during the permitting process under this subchapter.</u>

D. <u>New Subchapter A, Division 3</u>

Proposed new Division 3 of Subchapter A sets forth draft rules allowing for certain types of waste disposal methods to be employed without a permit. However, new rule 4.114 in Division 3 then lists exhaustive requirements that would apply to "all authorized pits." It appears that the intent of new rule 4.114 is to only apply to non-commercial pits, since commercial pits are not included in the definition of "authorized pits." However, we are not certain if this is how the Commission would implement the new rule. A provision should be added to the beginning of new rule 4.114 to clarify that it only applies to non-commercial pits.

Blackhorn respectfully requests that the Commission deny the adoption of new Subchapter A and continue to regulate commercial oil and gas waste management facilities under Statewide Rule 8. If the Commission finds that new rules are necessary, we ask that you strongly consider our comments and incorporate our changes above into an updated version of the proposed new rules.

Respectfully,

Jerry D. Pogue
General Manager
Blackhorn Environmental Services, LLC