

M. Kraeger

SCANNED
OCT 25 2019
QUALITY CHECK

FILED
OCT 02 2019
Office of Administrative Hearings

COMMONWEALTH OF KENTUCKY
ENERGY AND ENVIRONMENT CABINET
DIVISION OF ENFORCEMENT
CASE NO. DOW 34434-01

IN RE: Paducah McCracken County Joint Sewer Agency, as receiver for
Marshall County Environmental Services LLC and/or Allen Artis and the Great
Oaks Waste Water Treatment Plant
Creek Side Drive
Paducah, Kentucky 42001
Master AI No. 3041
Activity ID No. ERF20170001

OCT - 9 2019
OFFICE OF ADMINISTRATIVE HEARINGS
DIVISION OF ENFORCEMENT

AGREED ORDER

WHEREAS, this Agreed Order shall become effective only upon the entry of an order by the Franklin Circuit Court (hereinafter "FCC") appointing Paducah McCracken County Joint Sewer Agency (hereinafter "PMJSA") as a temporary receiver for Marshall County Environmental Services, LLC., and/or Allen Artis (hereinafter "MCES") and the Great Oaks Waste Water Treatment Plant (hereinafter "Great Oaks WWTP" or "facility").

WHEREAS, the parties to this Agreed Order, the Energy and Environment Cabinet (hereinafter "Cabinet") and PMJSA state:

STATEMENTS OF FACT

1. The Cabinet is charged with the statutory duty of enforcing KRS Chapter 224 and the regulations promulgated pursuant thereto.
2. PMJSA is the local regional provider of comprehensive wastewater services for Paducah and McCracken County, Kentucky.
3. MCES is an inactive for-profit Kentucky corporation in "bad" standing, according to the Kentucky Secretary of State.
4. MCES and/or Allen Artis is the current owner and operator of Great Oaks

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WWTP, located at Creekside Drive, Paducah, Kentucky. The facility has a design capacity of .070 million gallons per day and discharges to Blizzard Pond Drainage Canal.

5. Great Oaks WWTP discharges under Kentucky Pollutant Discharge Elimination Systems (hereinafter "KPDES") permit number KY0080845, issued on May 01, 2012, by the Cabinet's Division of Water (hereinafter "DOW"). Its KPDES permit expired on April 30, 2017; however, the DOW has administratively continued to allow Great Oaks to operate under its expired permit.

6. On May 24, 2018, the Cabinet, MCES, and/or Allen Artis entered into an Agreed Order to resolve the Abate and Alleviate Order No. 34434-049, which the Cabinet issued after DOW representatives observed wastewater discharges flowing from manhole(s), lift station(s) and the WWTP, directly into the Blizzard Pond Drainage Canal.

7. Pursuant to Kentucky Revised Statute (hereinafter "KRS") 224.73-150(6), the Cabinet notified the Public Service Commission (hereinafter "PSC") on June 13, 2019, that it intended to petition the FCC to appoint PMJSA as a temporary receiver to operate and manage the assets of the Great Oaks WWTP.

8. MCES and Bluegrass Water Utility Operating Company, LLC., (hereinafter "BWUOC") have filed a Certified Joint Application for Approval of Acquisition and Transfer of Ownership and Control of Utility Assets with the PSC (Case No. 2019-00104). BWUOC seeks to acquire control of MCES' assets, including the Great Oaks WWTP.

9. On August 9, 2019, the Franklin Circuit Court granted the Cabinet's Motion to Appoint Receiver and appointed the PMJSA as the temporary receiver of the Great Oaks WWTP.

NOW THEREFORE, in the interest of providing corrective actions to the Great Oaks WWTP

and its collection system, the parties hereby consent to the entry of this Agreed Order and agree as follows:

REMEDIAL MEASURES

10. This Agreed Order shall have no force or effect until such date as is specified in an order of the FCC for PMJSA to commence temporary receivership duties for MCES and/or Allen Artis provided that this Agreed Order shall also not become effective if PMJSA seeks appellate review of such an order.

11. To arrive at the terms of this Agreed Order, PMJSA submitted for Cabinet review and acceptance an Operation and Maintenance (hereinafter "O&M") Plan for the Great Oaks WWTP, generally as described below:

- i. The O&M Plan describes the actions that PMJSA will take to best operate and maintain the Great Oaks WWTP, given the current condition of the plant and resources available to PMJSA as a temporary receiver for the facility.
- ii. On July 11, 2019, PMJSA submitted the O&M Plan to Division of Enforcement (hereinafter "DENF") for review and acceptance, which was accepted on July 16, 2019. PMJSA shall complete the tasks identified in the O&M Plan in accordance with the O&M Plan. A copy of the O&M Plan is attached as Exhibit A for reference to this Agreed Order.
- iii. The accepted O&M Plan defines the scope of the operational duties expected to be performed by certified operators on behalf of PMJSA at the Great Oaks WWTP for purposes of 401 KAR 11:020.
- iv. PMJSA may request an amendment of the accepted O&M Plan by writing the Director of the Division of Enforcement at 300 Sower Boulevard,

Frankfort, Kentucky 40601 and stating the reason for the request. If granted, the amended O&M Plan shall not affect any provision of this Agreed Order unless expressly provided in the amended O&M Plan.

- v. Approval of any request for an amendment of an O&M Plan shall be at the sole discretion of the Director of the Division of Enforcement.
- vi. If the Cabinet denies the request for an amendment to the O&M Plan, the accepted O&M Plan shall remain in full effect.
- vii. If the Cabinet approves the request for an amendment to the O&M Plan, PMJSA shall then submit a draft Amended O&M Plan to the Cabinet for review and acceptance, within thirty (30) days of receipt of the Cabinet's approval. Upon review, the Cabinet may, in whole or in part, (1) accept or (2) disapprove, or (3) provide comments to PMJSA identifying the deficiencies. Within thirty (30) days of receipt of Cabinet's comments, PMJSA shall revise and resubmit the Amended O&M Plan to the Cabinet for review and acceptance. Upon receipt of the resubmitted Amended O&M Plan, the Cabinet may, in whole or in part, (1) accept, (2) disapprove or (3) provide comments to PMJSA identifying any deficiencies. If any part of the resubmitted Amended O&M Plan is disapproved, the Cabinet may reject PMJSA's request to amend and the accepted O&M Plan shall remain in full effect.

12. For the duration of this Agreed Order, PMJSA shall submit monthly reports to the Cabinet by the 15th day of the month. The monthly reports shall summarize the actions that PMJSA has completed to comply with the O&M Plan.

13. So long as PMJSA complies with the terms and conditions of this Agreed Order and the O&M Plan accepted by the Cabinet, the Cabinet's DENF agrees to hold any formal enforcement action for numeric permit parameter violations, for the KPDES permit described in paragraph 5, in abeyance. Should PMJSA fail to comply with the terms and conditions of this Agreed Order and the O&M Plan accepted by the Cabinet, the Cabinet may seek a formal enforcement action that would have otherwise been held in abeyance.

14. So long as PMJSA is in compliance with the terms and conditions of this Agreed Order and the O&M Plan accepted by the Cabinet, the Cabinet's DENF agrees to hold any formal enforcement action for violations of 401 KAR 5:065 Section 2(1) [as in 40 CFR 122.41(e)], for improper operation and maintenance, for the KPDES permit described in paragraph 5, in abeyance. Should PMJSA fail to comply with the terms and conditions of this Agreed Order and the O&M Plan accepted by the Cabinet, the Cabinet may seek a formal enforcement action that would have otherwise been held in abeyance.

15. All submittals required by the terms of this Agreed Order shall either be submitted by electronic mail or first class mail to: Division of Enforcement, Attention: Director, 300 Sower Boulevard, Frankfort, Kentucky, 40601.

16. It is agreed that PMJSA shall be permitted to petition the FCC for an order assigning PMJSA the exclusive right to all user fees and/or revenues generated by the system during the period of the temporary receivership. The Cabinet will not oppose any motion or petition filed by PMJSA seeking an assignment of the user fees during the period of the temporary receivership.

17. The parties agree that PMJSA shall have the option to hire or contract with an operator certified pursuant to 401 KAR Chapter 11 to operate the system during the period of

the temporary receivership.

MISCELLANEOUS PROVISIONS

18. This Agreed Order addresses only the items described above. Other than the matters agreed to by entry of this Agreed Order, nothing contained herein shall be construed to waive or to limit any remedy or cause of action by the Cabinet based on statutes or regulations under its jurisdiction and PMJSA reserves its defenses thereto. The Cabinet expressly reserves its right at any time to issue administrative orders and to take any other action it deems necessary that is not inconsistent with this Agreed Order, including the right to order all necessary remedial measures, assess penalties for violations, or recover all response costs incurred, and PMJSA reserves its defenses thereto.

19. No aspect of PMJSA's conduct as temporary receiver will have any impact on any KPDES permit held by PMJSA or any consent decree or other regulatory action between the Cabinet and PMJSA.

20. This Agreed Order shall not prevent the Cabinet from issuing, reissuing, renewing, modifying, revoking, suspending, denying, terminating, or reopening any permit to PMJSA. PMJSA reserves its defenses thereto.

21. PMJSA waives its right to any hearing on the matters admitted herein. However, failure by PMJSA to comply strictly with any or all of the terms of this Agreed Order shall be grounds for the Cabinet to seek enforcement of this Agreed Order in FCC and to pursue any other appropriate administrative or judicial action under KRS Chapter 224 and the regulations promulgated pursuant thereto.

22. Nothing in this Agreed Order shall be construed as requiring PMJSA to seek or obtain any permit in connection with the Great Oaks WWTP.

23. The Agreed Order may not be amended except by a written order of the Cabinet's Secretary or his designee. PMJSA may request an amendment by writing the Director of the Division of Enforcement at 300 Sower Boulevard, Frankfort, Kentucky 40601, and stating the reasons for the request. If granted, the amended Agreed Order shall not affect any provision of this Agreed Order unless expressly provided in the amended Agreed Order.

24. The Cabinet does not, by its consent to the entry of this Agreed Order, warrant or aver in any manner that PMJSA's complete compliance with this Agreed Order will result in compliance with the provisions of KRS Chapter 224 and the regulations promulgated pursuant thereto. Notwithstanding the Cabinet's review and approval of any plans formulated pursuant to this Agreed Order, PMJSA shall remain solely responsible for compliance with the terms of KRS Chapter 224 and the regulations promulgated thereto, this Agreed Order, and any permit and compliance schedule requirements.

25. PMJSA shall notify the Cabinet if it is relieved of its duty as temporary receiver by order of the FCC.

26. This Agreed Order applies specifically and exclusively to the unique facility referenced herein and is inapplicable to any other facility.

27. Compliance with this Agreed Order is not conditional on the receipt of any federal, state, or local funds.

28. This Agreed Order shall be of no force and effect unless and until it is entered by the Secretary or his designee as evidenced by his signature thereon. If this Agreed Order contains any date by which PMJSA is to take any action or cease any activity, and the Secretary enters the Agreed Order after that date, then PMJSA is nonetheless obligated to have taken the action or ceased the activity by the date contained in this Agreed Order.

FORCE MAJEURE

29. PMJSA shall perform the requirements of this Agreed Order within the time limits set forth or approved herein, unless the performance is prevented or delayed solely by events, which constitute a force majeure, in which event the delay in performance shall be excused, and no performance or stipulated penalty shall be assessed. A force majeure is defined as any event arising from causes not reasonably foreseeable and beyond the control of PMJSA, or PMJSA's consultants and contractors, which could not be overcome by due diligence and which delays or prevents performance by a date required by this Agreed Order. Force majeure events do not include unanticipated or increased costs of performance, changed economic or financial conditions, normal precipitation events, the failure by a contractor to perform, or the failure by a supplier to deliver unless such failure is itself caused by a force majeure event.

30. PMJSA shall notify the Director of the Division of Enforcement by telephone by the end of the next business day and in writing within fifteen (15) business days after it becomes aware of events which it knows or should know constitute a force majeure. The notice shall estimate the anticipated length of delay, including necessary demobilization and remobilization, its cause, measures taken or to be taken to minimize the delay and an estimated timetable for implementation of these measures. The Cabinet will respond in writing to any written notice received. Failure to comply with the notice provision of this section shall be grounds for the Cabinet to deny an extension of time for performance.

31. PMJSA demonstrates to the Cabinet that the delay has been or will be caused by a force majeure event, the Cabinet will extend the time for performance for that element of the Agreed Order for a period at least equal to the delay resulting from such circumstances. This shall be accomplished through an Agreed Order amending this Agreed Order. The amended

Agreed Order may alter the schedule for performance or completion of other tasks required by this Agreed Order.

32. If a dispute over the occurrence or impact of a force majeure event cannot be resolved, the Cabinet reserves its right to bring an action before the FCC to enforce this Agreed Order and PMJSA reserves its defenses thereto.

TERMINATION

33. If acquisition of the Great Oaks WWTP occurs, by BWUOC or any other entity, then the Cabinet and PMJSA shall tender an agreed notice to the FCC informing it of that fact and requesting that the FCC relieve PMJSA as a temporary receiver.

34. If a valid KPDES permit is issued by the DOW for the Great Oaks WWTP, then the Cabinet and PMJSA shall tender an agreed notice to the FCC informing it of that fact and requesting that the FCC relieve PMJSA as a temporary receiver.

35. This Agreed Order shall terminate and be of no further force or effect when PMJSA is relieved as temporary receiver by order of the FCC.

36. The Cabinet reserves its right to enforce this Agreed Order, and PMJSA reserves its right to file a petition for hearing pursuant to KRS 224.10-420(2) contesting the Cabinet's determination.

37. Notwithstanding anything herein to the contrary, in the event the Certified Joint Application for Approval of Acquisition and Transfer of Ownership and Control of Utility Assets submitted to the PSC by MCES and BWUOC is denied, PMJSA shall have the option to terminate this Agreed Order upon ninety (90) days written notice to the Director of the Division of Enforcement at 300 Sower Boulevard, Frankfort, Kentucky 40601. Upon receipt of such notice, the parties shall tender an Agreed Order to the FCC terminating and relieving PMJSA as

the temporary receiver effective at the expiration of the ninety (90) day notice period.

38. In the event the proposed acquisition and transfer of ownership and control of the utility assets of MCES by BWUOC fails to consummate for any reason and/or fails to consummate within 180 days from the effective date of this Agreed Order, PMJSA shall have the option to notify the Cabinet that it intends to terminate this Agreed Order upon ninety (90) days written notice to the Director of the Division of Enforcement at 300 Sower Boulevard, Frankfort, Kentucky 40601. Upon receipt of such notice, the parties shall tender an Agreed Order to the FCC terminating and relieving PMJSA as the temporary receiver effective at the expiration of the ninety (90) day notice period.

39. In the event the FCC denies PMJSA's petition or motion for an order assigning PMJSA the exclusive right to all user fees and/or revenues generated by the system during the period of the temporary receivership, PMJSA shall have the right upon ninety (90) days written notice to terminate this Agreed Order.

CASE NO. DOW 34434-01

AGREED TO BY:



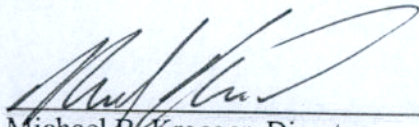
Mr. John C. Hodges, Executive Director
Paducah McCracken Joint Sewer Agency,
as Temporary Receiver for Marshall County Environmental
Services and/or Allen Artis and the Great Oaks WWTP.

8/16/19

Date

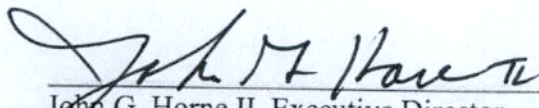
APPROVAL RECOMMENDED BY:

CASE NO. DOW 34434-01



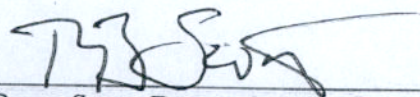
Michael B. Kroeger, Director
Division of Enforcement

8/28/19
Date



John G. Horne II, Executive Director
Office of Legal Services
Energy and Environment Cabinet

9/3/19
Date



R. Bruce Scott, Deputy Secretary
Energy and Environment Cabinet

9/3/19
Date