SOAH DOCKET NO. 582-23-21878
TCEQ DOCKET NO. 2023-0385-MWD

APPLICATION OF HK REAL ESTATE DEVELOPMENT, LLC FOR NEW TEXAS POLLUTION DISCHARGE ELIMINATION SYSTEM PERMIT NO. WQ0016150001	**§**	**BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

HK REAL ESTATE DEVELOPMENT, LLC'S EXCEPTIONS TO THE SUPPLEMENTAL PROPOSAL FOR DECISION

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVRIONMENTAL QUALITY:

COMES NOW, HK Real Estate Development, LLC (Applicant), and files these Exceptions to the Supplemental Proposal for Decision (SPFD), and in support thereof would respectfully show the following:

I. SUMMARY OF EXCEPTIONS

The Administrative Law Judges (ALJs) have issued two PFDs[1] in this case – the first finding that the Texas Commission on Environmental Quality (TCEQ or Commission) should issue the Draft Permit and the second, recommending denial. The ALJs were right the first time. Freasier, LLC (Protestant or Freasier) did not rebut Applicant's prima facie case on any specifically referred issue and has not *demonstrated* that one or more Draft Permit provisions violated an applicable state or federal law.[2]

During the intervening year between PFDs and remand, the statutory framework applicable to this post-Senate Bill 709 TPDES permit proceeding and prevailing caselaw was turned on its figurative head. To deny Applicant's permit as the ALJs proposed, the Commission

[1] The first PFD (Original PFD) was issued on January 12, 2024 and the second or "supplemental" PFD (SPFD) was issued on February 3, 2025.

[2] The ALJs specifically found that the "Draft Permit is adequately protective of water quality; the discharge route is adequately characterized in accordance with 30 Texas Administrative Code section 309.12; and the Draft Permit is protective of the requester's use and enjoyment of its property in accordance with the TSWQS." *See* Proposal for Decision on Summary Disposition at 14 (Jan. 12, 2024).

must *mis*apply its rules (title 30 Texas Administrative Code (TAC) § 309.12), ignore the fundamental tenants of water law announced in *Domel v. City of Georgetown,* 6 S.W.3d 349 (Tex.App.-Austin 1999, pet. denied) and cases cited therein (hereinafter, the *Domel* case), and disregard its own precedent. Doing so will have disastrous consequences for any applicant seeking to permit a wastewater treatment plant near the thousands of intermittent or ephemeral streams in Texas.

As of 2019, the TCEQ reported to the Texas Legislature that Texas had 2,513 active wastewater permits for public-owned treatment works and 771 active domestic wastewater permits for privately-owned wastewater treatment plants.[3] Under the SPFD, the vast majority of these permits and nearly all cities located west of the Interstate Hwy. IH-35 corridor will no longer be able to discharge treated wastewater even though those discharges meet all of the TCEQ's water quality standards. The SPFD has effectively created a new standard that will devastate the majority of Texas' discharges. The SPFD also establishes policy that will thwart the State's water right programs by removing the return flows from these discharges that make up a large portion of the available water used by downstream water right holders.

The Texas Legislature authorizes the Commission to amend the findings of fact and conclusions of law overturning a PFD based on evidence in the record if the ALJs did not properly apply or interpret applicable law, agency rules, written policies or prior administrative decisions.[4] The Commission has multiple bases to overturn the SPFD for failure to apply applicable law and should do so in this case.

II. REFERRED ISSUES DEVIATED

The Commission originally referred Applicant's permit application to the State Office of Administrative Hearing (SOAH) for an evidentiary hearing after an open meeting on April 26, 2023. During its deliberation, the Commission voted unanimously to refer six (6) issues to hearing.

[3] TEXAS COMMISSION ON ENVIRONMENTAL QUALITY WASTEWATER DISCHARGE PERMITTING, Testimony of David W. Galindo, Director, Water Quality Division, Office of Water in response to the House Natural Resources Request for Information, Interim Charge No. 2 (2019).

[4] Tex. Gov't Code §§ 2001.058(e), 2003.047(m).

A. Whether the draft permit is adequately protective of water quality, including the protection of surface water, groundwater, and animals in accordance with applicable regulations including the Texas Surface Water Quality Standards;

B. Whether the discharge route is adequately characterized in accordance with 30 TAC § 309.12;

C. Whether the draft permit is protective of the requester's use and enjoyment of its property in accordance with the Texas Surface Water Quality Standards;

D. Whether the proposed facility, if it is located within a flood plain, is adequately protected from inundation as required by 30 TAC Chapter 309;

E. Whether the draft permit adequately addresses nuisance odor in accordance with 30 TAC § 309.13; and

F. Whether the Applicant complied with the requirement to make a copy of the administratively complete application available for public viewing in the county in which the facility is located in accordance with 30 TAC § 39.405(g).

Former Chairman Niermann articulated his position to his colleagues on the hearing requests, which included referring the issue of "whether the application adequately characterizes the discharge route." When Commissioner Janecka made his motion to grant Freasier's hearing request, however, the issue of "whether the *application* adequately characterizes the discharge route" was changed and expanded to "whether the discharge route is adequately characterized in accordance with 30 TAC § 309.12."[5] In their original PFD, the ALJs correctly point out that the Commission *never* referred this case on whether "the entire discharge route in the draft permit is water in the state,"[6] whether the application was incomplete, or whether the discharge constituted trespass. However, the Commission effectively added those new issues to this case on remand.[7]

At the May 10, 2024 open meeting consideration of the Original PFD's (granting of full summary disposition to Applicant), the Commissioners remanded three (3) out of the original six

[5] *See* TCEQ open meeting broadcast at 9:35-11:56 (April 26, 2023). https://www.youtube.com/watch?v=V1sAkjHknLM&list=PLwzfZK5z8LrFxR1l3K_P7mrno7mEvxVud&index=20

[6] Proposal for Decision on Summary Disposition at 14 (Footnote 51) (Jan. 12, 2024).

[7] *See* SPFD at 57. Although the SPFD states that "the ALJs decline to consider these issues" (i.e., water in the state), the SPFD focuses substantially on this issue which is inherently joined with the termination question.

(6) issues for a hearing on the merits. But the TCEQ's Interim Order on Remand, more than a year after its original, added a paragraph under the three (3) enumerated issues which greatly expanded the scope of this case:

> The hearing on the merits on Issues A, B, and C shall include, but not be limited to, determining whether Sandpit Creek flows into the San Antonio River or terminates on Protestant's property, as the nature of the watercourse and where it terminates inform whether the discharge' s effect on surface water quality was adequately evaluated.[8]

The amorphous language "shall include, but not be limited to," and "flows into . . . or terminates," essentially refocused this case in a completely different direction, as if it were a new case altogether.[9] Instead of focusing on the protection of water quality – which is the fundamental issue under the TCEQ's jurisdiction in TPDES permit reviews – the new case focused on the question of whether Sandpit Creek is "water in the state" that flows into the San Antonio River, exactly what the ALJs previously stated this case was not about.

Nevertheless, the long line of cases and agency policy answer this question clearly – Sandpit Creek is an ephemeral "sandy" creek that flows into the San Antonio River through a nine-decades old, large TxDOT culvert. Sandpit Creek is hydraulically and hydrologically connected to the San Antonio River. Experts with more than 100 years of experience confirmed this connection using highly sophisticated LiDAR technology, confirmed by multiple forms of extrinsic evidence including from the San Antonio River Authority whose specific jurisdiction includes the subject watershed. Unfortunately, the SPFD misapplies the facts, the law, and Commission precedent and policy and penalizes Applicant for a minor mapping error in the Application that has no impact on water quality and was corrected in the record.[10]

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[8] Interim Order on Remand at 2 (May 17, 2024).

[9] These were not the only irregularities in this case. Not only did the ED's three (3) witnesses present identically-worded testimony that they admitted they did *not* write, but they also redacted large swaths of the same testimony once Applicant raised questions about its similarity and origin.

[10] As is typical in the application preparation process, Applicant was not authorized to enter the property of the downstream landowner to see that part of the original flow path had been diverted by an illegal on-channel impoundment.

III. SANDPIT CREEK IS WATER IN THE STATE THAT FLOWS INTO THE SAN ANTONIO RIVER

A. Discharge at Outfall Meets Legal Standard

The SPFD states plainly that "[i]t is undisputed that Sandpit Creek is an intermittent creek and *constitutes water in the state*."[11] This finding should completely resolve the Commission's directive on remand. The proposed discharge is into Sandpit Creek, a water in the state.

The Legislature's mandate to the Commission under Texas Water Code § 26.027(a) is to issue permits for wastewater discharges "into or adjacent to water in the state."[12] The definition of the term "water in the state" is very broad and includes:

> [G]roundwater, percolating or otherwise, lakes, bays, ponds, impounding reservoirs, springs, rivers, streams, creeks, estuaries, wetlands, marshes, inlets, canals, the Gulf of Mexico, inside the territorial limits of the state, and all other bodies of surface water, natural or artificial, inland or coastal, fresh or salt, navigable or nonnavigable, and including the beds and banks of all watercourses and bodies of surface water, that are wholly or partially inside or bordering the state or inside the jurisdiction of the state.[13]

This expansive definition includes not only structures typically associated with bodies of water, but also the water itself, both surface water and groundwater. Most important, these water bodies include watercourses but are not required to have either a bed or banks or to be navigable (as Protestants contend), which the vast majority of streams in Texas are not.

In similar cases in the past, the ED properly applied the "water in the state" standard. The *Application of DHJB Development, LLC*, is a similar case where the Commission referred the nearly identical issue to hearing - "[w]hether the Discharge Route ha[d] been Properly Characterized." In the ED's exceptions to the *DHJB* PFD, the ED stated:

> The *correct standard is whether the discharge would be to water in the state*. The TCEQ may authorize permits for the "discharge of waste or pollutants into or adjacent to water in the state." The term "watercourse" is used in the definition of

[11] SPFD at 46 (emphasis added).

[12] Tex. Water Code § 26.027(a).

[13] Tex. Water Code § 26.001(5). Water in the state includes watercourses.

> "water in the state"; however, the term "*water in the state" encompasses more than a watercourse*. . . [14]

Thus, based on prevailing law, once the Applicant discharges into Sandpit Creek, a water in the state at the outfall on its property, the treated effluent becomes state water,[15] which may flow through the watercourse despite the fact that the water crosses Protestant's property. As state water, the permitted effluent has a superior right to the real property through which it flows.[16] The SPFD cites no law requiring further characterization of the discharge route beyond the point of the initial discharge, because no additional legal requirement exists.

For some unknown reason, however, the ED abandoned the controlling legal standard and replaced it with one not based in rule, statute, or caselaw. Rather, the ED invented a legal standard based on personal opinion, "experience and best professional judgment," and no "hard and fast, you know definition. . ."[17] Thus, in addition to the SPFD's improper dictionary references,[18] the ALJs, ED, OPIC, and Protestant would have the Commission base its permitting decision on staff's baseless "I know it when I see it" personal opinion instead of the proper legal standard.[19] In arriving at her ultimate position,[20] the ED proffered five (5) different and often conflicting standards, none of which are found in the Texas Water Code, Chapter 307, or the caselaw

[14] App. Ex. 29 at 526-527 (emphasis added). The Commission overturned the PFD in *DHJB* and granted the permit.

[15] *Goldsmith & Powell v. State*, 159 S.W.2d 534, 535 (Tex. Civ. App. – Dallas 1942, writ ref'd); *South Tex. Water Co. v. Bieri*, 247 S.W.2d 268, 272 (Tex. Civ. App. – Galveston 1952, writ ref'd n.r.e.) (water in a watercourse is the property of the State, held in trust for the public).

[16] *Domel*, 6 S.W.3d at 360-362.

[17] Tr. Vol. 2 at 140:18-21; Tr. Vol. 3 at 26:1-6.

[18] SPFD at 48.

[19] Protestants add another inapplicable standard, Waters of the United States. Protestants argue that the Applicant's discharge must be to navigable waters under the Clean Water Act § 402, which argument the SPFD did not include in its ultimate analysis and seems to dismiss. Texas' "into or adjacent to water in the state" standard is more expansive and protective than WOTUS. *See* 63 Fed. Reg. 51181 (Sept. 24, 1998) ("A State's right to have requirements more stringent or extensive than those of in the federal NPDES program is recognized in 40 CFR 123.1(i)").

[20] Initially although the ED did not take a position on Applicant's Motion for Summary Disposition, nor respond to *HK Real Estate Development, LLC's Brief on Domel, Hoefs and Referred Issues* (Nov. 27 2023), she supported draft permit issuance during the May 10, 2024 agenda. But thereafter, the ED changed her position via the July 15, 2024 Standards Memo which resulted in a fundamental change from the ED's support of the permit to non-support.

definitions of watercourse or water in the state. These divergent standards ultimately render any of her opinions on the subject unreliable.[21]

According to the ED, the discharge route must:

- be ***owned by the permittee all the way to the Gulf of Mexico***.[22]
- be ***contained wholly within surface waters*** in the state. . . "[23]
- have a ***surface water connection*** found flowing to the San Antonio River."[24]
- Have ". . .***bed and banks*** to convey wastewater to the San Antonio River"[25]
- "travel through a ***continuous watercourse***."[26]
- have a "***visible stream channel***" that connects the pond to the river.[27]

If the ED was correct that the Commission may only issue permits for discharges into water in the state and Sandpit Creek was not a water in the state, then the Applicant would not need a TPDES permit from the Commission. Neither would the hundreds of other utilities that discharge into intermittent streams.

B. Discharge is Consistent with *Domel*

As part of its Motion for Full Summary Disposition and post-hearing briefing, the Applicant thoroughly analyzed the applicability the *Domel* case (and cases cited therein) to this pending TPDES case because the issue of watercourse is assessed on very similar facts.[28] In *Domel,* the Texas Water Commission (a predecessor agency of the TCEQ) issued a wastewater

[21] The ED's participation in this hearing was irregular for other reasons too. For example, while it is not uncommon for applicants and the ED to disagree over appropriate permit limits, nor unheard of (though rare) for the ED to change her preliminary position, it is highly unusual for the ED to redact substantial sections of testimony. The ED witnesses not only redacted testimony (after it was shown there were large sections of "copy and paste" testimony prepared by individuals who were not the respective witness), but the ED staff directly contradicted each other. *See* Tr. Vol. 2 at 125:15-126:4; Tr. Vol. 3 at 70:10-22 (Mr. Caston and Ms. Lueg redacted large portions of their prefiled testimonies).

[22] Tr. Vol. 2 at 117:14-118:18.

[23] ED-BC-5 at 1 (July 15, 2024 Standards Memo) (emphasis added). Also many references were made to "water***s***" (plural) and "waters ***of*** the state" which have separate meanings under Tex. Water Code § 11.0235 (as does "state water" in § 11.021).

[24] ED-DD-1 at 5:1-2 (emphasis added); ED-BC-1 at 10:28-30; Tr. Vol. 2 at 135:25-136:3.

[25] ED-DD-1 at 5:8-10 (emphasis added).

[26] ED-BC-1 at 16:5-6 (emphasis added).

[27] ED-BC-1 at 7:33-8:4, 12:25-30 (emphasis added).

[28] *Domel,* 6 S.W.3d 349 (Tex.App.-Austin 1999, pet. denied).

discharge permit to the City of Georgetown and authorized the discharge of treated wastewater into the water in the state upstream of landowners, the Domels' property. In the contested case hearing on the permit issuance, the Domels' claim was almost identical to Protestant's claim here – the permit would authorize a discharge across the Domels' private property on otherwise dry land that would become a flowing stream because of the City's effluent and would interfere with the use of the land for agriculture.[29] Like the Protestant in this case, the Domels sought to have the City pipe the discharge downstream of their property.[30] The Texas Water Commission determined that the dry tributary across the Domels' land, which lacked bed and banks, was a watercourse and additionally, that the surface water in the watercourse belonged to the State of Texas (creating state water with a superior or dominant right). Further, the Water Commission found that the Commission may authorize a discharge into an ephemeral stream across private property if an applicant shows that the proposed treatment facility is capable of meeting proposed permit parameters, and that the proposed discharge will maintain the quality of the water.[31] In issuing the permit, the Water Commission also concluded that there was "no basis under the Texas Water Code or the regulations of the Texas Water Commission upon which to require [the City] to pipe the discharge past the property of [Domel]."[32] The Texas Water Commission granted the amendment and found that "a discharge in compliance with the parameters of the permit does not pose a threat to the quality of water in the state."[33]

After the permit was issued and the City began discharging, however, the Domels brought a takings case, again, making arguments similar to those presented by Protestant here, and the City moved for summary judgment. The Domels presented evidence that the character of the watercourse had changed after the City began discharging. The Domels' evidence in opposition to the City's motion for summary judgment characterized the area on the property as a "drainage

[29] *Compare, Domel*, 6 S.W.3d at 351 (the creek was intermittent, and the effluent would interfere with the agricultural use of their property), *with,* Pro-R-1 at 6:13-17 (the creek is dry and has been for decades), 12:20-26 (Mr. Freasier raises livestock that may drink the wastewater), 14:15-18 (the hay fields would be underwater and would not provide onsite food for cattle).

[30] *Domel*, 6 S.W.3d at 351.

[31] *Domel,* 6 S.W.3d at 351.

[32] *Domel,* 6 S.W.3d at 352.

[33] *Domel*, 6 S.W.3 at 351.

area."[34] However, the trial court granted the City's motion for summary judgment and found that the tributary was a watercourse as a matter of law and that the discharge was an authorized public use of a watercourse in conformance with all requisites of state law.[35] The court of appeals upheld the trial court's decision.

Just like *Domel*, the inquiry on remand in this case should have concluded there – that the discharge at the initial outfall was into water in the state. Because the SPFD concludes Sandpit Creek *is* water in the state that flows for more than 0.4 miles on Applicant's property, it was not necessary to look further at downstream characteristics.

Nevertheless, in an abundance of caution and in light of the ambiguity created by the Commission's remand language that the Sandpit Creek termination determination "shall include, but not be limited to, evaluation of the creek on Protestants' property," Applicant analyzed downstream stream characteristics. Here too, *Domel* is insightful. In looking at watercourse characteristics, *Domel* relied on an earlier Texas Supreme Court case, *Hoefs v. Short*, 273 SW 785 (Tex. 1925) (*Hoefs*). In *Hoefs,* the Texas Supreme Court established the criteria for a watercourse as having (1) defined banks and bed, (2) a current of water, and (3) a permanent source of supply.[36] As to the first factor, the Texas Supreme Court further explained that the banks may be "slight, imperceptible, or *absent*" without the stream losing its character as a watercourse.[37] It is uncontroverted that Sandpit Creek has a defined bed and banks far upstream of the Protestant's property – from the discharge point to the dry impoundment. Beyond this downstream impoundment, all parties agree that the bed and banks are "slight, imperceptible, or absent,"[38] as Sandpit Creek is similar to the watercourse in *Domel.* It is eerily coincidental that the *Domel* landowners stated that the watercourse across their property was a "drainage area" that created a

[34] *Domel*, 6 S.W.3d at 354-55.

[35] *Domel,* 6 S.W.3d at 352.

[36] *Hoefs v. Short*, 273 S.W. 785, 787 (Tex. 1925).

[37] *Hoefs,* 273 S.W. at 787 (emphasis added).

[38] "[T]he path is Sandpit Creek to the San Antonio River which is so wide (Applicant Exhibit 19) that it may not be easily discernible by visual observation but can be detected and identified by use of larger data sets such as LiDAR (topography from aircraft sources using lasers like a drone which is how all flood studies are performed now) . . . ." App. Ex. 13 at 9:7-12.

"natural location for surface water to gather."[39] Protestants said the same thing.[40] Even though the wide bed and banks may be imperceptible downstream of the impoundment, Sandpit Creek still meets the first factor of a watercourse under *Hoefs* and *Domel*. As *Domel* recognized, it is the nature of streams and rivers to shift course due to flooding and erosion and temporal changes in the course of flowing water, and this meandering does not equate to a stream lacking a bed and banks.[41]

Hoefs' second factor required a current of water, but the Texas Supreme Court recognized that the current need not be continuous and the watercourse may be dry for long periods of time.[42] In this case, the evidence shows that Sandpit Creek is predominantly a dry creek, and Mr. Freasier has seen flow on at least two occasions. The lack of flow in Sandpit Creek is attributable to the sandy soils in the area, and the creek is considered a "losing stream" as it loses water when it drains into the underlying highly transmissive sands.[43] It is by definition an intermittent stream.

Applicant was the only party to offer testimony from a geological expert who testified that the sandy soils on Freasier's property were highly transmissive with sufficient permeability that water in the alluvium (under the surface) will continue to flow to the San Antonio River.[44] The ED's construct that water must flow *on the surface* through bed and banks in order to be reach TCEQ's jurisdictional threshold is simply wrong. It also contradicts *Hoefs* (citing an Indiana Supreme Court case, *Parke County v. Wagner,* 138 Ind. 609, 38 N.E. 171 (Ind. 1894)):

> [A] water course is a living, permanent, or continuous stream of water, confined in a channel having bed and banks, but not necessarily flowing all the time, or even a greater portion of the year, if in fact it has supply of living water, although that supply need not be sufficient at all times or most of the time to flow the entire length of the channel, and need

[39] *Domel,* 6 S.W.3d at 355.

[40] Pro-R-1 at 6:13-17 ("The creek is dry and has been dry for decades. . . . I've only seen water *gather* twice during major '100-year flood' events in 1998 and 2002...").

[41] *Domel*, 6 S.W.3d at 356.

[42] *Hoefs*, 273 S.W. at 786, 787.

[43] App. Ex. 22 at 24:23-25:15.

[44] Tr. Vol. 1 at 103:14-104:24.

not necessarily empty into some other stream or body of water, ***but may sink into cavities or be absorbed by rapid percolation into a bed of gravel or soil***.[45]

Sandpit Creek is exactly the kind of losing stream where flow sinks into the porous sandy soils and is transmitted in the subsurface to the San Antonio River.

Contrary to the SPFD's statements that Sandpit Creek fails to meet *Hoefs'* three factors,[46] however, Sandpit Creek clearly has a permanent source of supply. Sandpit Creek drains an area of approximately 7,200 acres or approximately 11 square miles in size and is designated as a flood hazard area.[47] Since the 1930s, TxDOT installed (and improved) a four 9'x9' culvert to transport major flows of Sandpit Creek under the Highway 181, which separates Applicant's and Protestant's properties. These huge box culverts were designed to accommodate a flow of over 5,000 cubic feet per second, immediately adjacent to and upstream of Protestant's property.[48] As a result of this permanent source of supply, the FEMA flood zone map shows a connection between Sandpit Creek and the San Antonio River, demonstrating the hydraulic connection between the two watercourses[49] and that the creek flows all the way to the San Antonio River.[50] In fact, common sense dictates that the creek will flow into the river – by draining a large watershed of over 7,200 acres or more than 11 square miles, Sandpit Creek's water has to go somewhere.[51]

Both the SPFD and ED briefing disqualifies Sandpit Creek on the water source criteria because it cannot be used for irrigation.[52] But irrigation has never been a qualifier for water in the state any more than navigability.[53] Hundreds if not thousands of intermittent streams across Texas that are "intermittent as to flow,"[54] and without even perennial pools, cannot be used for irrigation.

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[45] *Hoefs*, 273 S.W. at 788.

[46] SPFD at 51.

[47] App. Ex. 22 at 18:9-21, 18:26-19:8.

[48] App. Ex. 22 at 18:9-21.

[49] App. Ex. 22 at 19:1-8. App. Ex. 17.

[50] App. Exs. 20, 21, 22, 30; Pro-R-1, Pro-R-18; Tr. Vol. 3 at 77:19-22.

[51] App. Ex. 22 at 16:2-13; App. Ex. 26.

[52] SPFD at 51.

[53] The SPFD and ED misunderstand that *Hoefs* was a water rights case where the issue centered on whether a party could (properly) dam a watercourse for purposes of diverting flow for irrigation. Irrigation was not a prerequisite to finding the waterbody was a watercourse.

[54] *Domel*, 6 S.W.3d at 356.

This does not prevent the ED from assigning aquatic life uses, performing dissolved oxygen models or receiving stream assessments in their permitting of these very same streams. Despite what the SPFD acknowledges to be contradictory testimony by Mr. Freasier, his description of Sandpit Creek is very similar to the description of Barilla Creek in *Hoefs* which "need not flow continuously to be a watercourse."[55] Under both *Domel* and *Hoefs,* the preponderant evidence shows that Sandpit Creek is a watercourse, falls within the definition of water in the state, under Texas Water Code § 26.001(5) and 30 TAC § 307.3(a)(71) into which discharges may be authorized under § 26.027(a).

It is clear error that the SPFD disregarded Applicant's scientific evidence characterizing Sandpit Creek as a water in the state. Instead, the ALJs relied on one ED witness' uncalibrated "eyeball" survey of whether water would flow to the river. Applicant presented multiple sources of objective and peer-reviewed expert data and surveys that demonstrated that Sandpit Creek is a defined stream with a hydraulic and hydrologic connection to the San Antonio River, including:[56]

- FEMA flood map showing a connection;[57]
- FEMA HEC-RAS model showing Sandpit Creek's large floodplain and water surfaces that connect with the San Antonio River;[58]
- USDA/NRCS soil report showing a connection between Sandpit Creek and the San Antonio River;[59]
- TXDOT information showing that Highway 181 upstream of Protestant has four 9'x9'-box culverts to pass the flows from Sandpit Creek through Protestant's property and toward the San Antonio River;[60]

[55] *Hoefs*, 273 S.W. at 788; SPFD at 55.

[56] App. Ex. 22 at 17:22-23.

[57] App. Exs. 17, 18.

[58] App. Exs. 15, 16, 19, 20.

[59] App. Ex. 28.

[60] App. Ex. 27.

- Evidence showing that Sandpit Creek drains 7,200 acres upstream, and rainfall enters Sandpit Creek and flows to the San Antonio River across Protestant's property;[61]

- Protestant's own Stantec Report showing that Sandpit Creek flows to the San Antonio River;[62]

- Protestant's expert Fig. 4 exhibit showing Sandpit Creek's connection to the San Antonio River;[63]

- Mr. Freasier's discovery responses showing that he has witnessed flows to the San Antonio River on two occasions;[64] and,

- 1954 historical USGS map showing Sandpit Creek flowed to the river before the embankment to divert flows from the original route was constructed.[65]

IV. MINOR APPLICATION ERROR DID NOT PREVENT ADEQUATE TECHNICAL REVIEW NOR DID ITS CORRECTION CONSTITUTE AN IMPERMISSIBLE AMENDMENT

The SPFD relies on a "fruit of the poisonous tree" rationale for rejecting Applicant's technical review that the proposed discharge will adequately protect surface water, groundwater, animals and requestor's use and enjoyment of its property in accordance with applicable regulations including the Texas Surface Water Quality Standards (TSWQS). According to the SPFD, the discharge route is the "central pillar" on which further technical review is based, and to the extent it was wrong – on one *part* of one page of the Application – it prevents the Applicant from meeting its burden of proof on referred issues A and C. Applicant's preponderant evidence shows otherwise.

Dr. James Miertschin is a water quality modeler with over 50 years of experience. His QUAL-TX models proved **no** violation of any TSWQS using the effluent limits currently in the Draft Permit, and this evidence is undisputed. Because of the ambiguity of the Commission's

[61] App. Ex. 11; App. Ex. 22 at 14:5-13, 18:24-19:8, 20:14-26, 33:1-13, 35:22-36:2; App. Ex. 31 at 16:29-17:1; App. Ex. 13 at 7:15-19, 8:17-27, 9:21-24.

[62] App. Ex. 30.

[63] Pro-R-18 at 21.

[64] App. Ex. 4 at 340.

[65] App. Ex. 49.

remand order language, Dr. Miertschin ran the QUAL-TX model twice. First, he ran the model to verify the input/output parameters of the ED's initial analysis that Sandpit Creek never fell below 5.0 mg/L.[66] He confirmed that the dissolved oxygen (DO) "sag" had recovered by the time the effluent would reach the impoundment.[67] Dr. Miertschin's initial modeling run was included in his prefiled testimony, in response to which no other party offered comparative modeling. After Applicant corrected the direction of the end of Sandpit Creek's route, depicting its flow from southwest to southeast, Dr. Miertschin ran the model again to be absolutely sure that the discharge to the southeast following the revised path depicted in Applicant Exhibits 20 and 30 and Pro-R-18, Fig. 4. would not exceed TSWQS. It did not. This analysis was also undisputed. Additionally, under both analyses, Dr. Miertschin demonstrated that no phosphorus limit is necessary as there is no existing aquatic life currently on the discharge route and the impoundment does not hold water to sustain aquatic life.[68] Nevertheless, Mr. Machin's confirmation of DO above 5.0 mg/L would protect any aquatic life hardy enough to survive even in the dry shallow impoundment.

Despite the fact that no party introduced any model contravening Dr. Miertschin's two modeling runs, nor provided any evidence that the ED's nutrient screen to the impoundment was deficient, the SPFD dismisses Dr. Miertschin's evidence. The SPFD also dismissed Applicant's 1-page correction to the Application (that was the basis for Dr. Miertschin's second modeling run) indicating that any such "amendment" should have been made outside the hearing process. The SPFD's rejection of Applicant's rebuttal evidence is completely unsupported by TCEQ's rules and practice.

Changes to the Application are permissible during the hearing process. Section 281.23 of the TCEQ's application rules only prohibits a major amendment to an application after notice of the application and draft permit.[69] Section 281.23(a) provides that "no amendments to an application *which would constitute a major amendment* under the terms of [30 TAC § 305.62] can

[66] If Sandpit Creek terminates in the impoundment as the SPFD and ED contend, there would be no need for further technical analysis, since the model demonstrates compliance with the TSWQS at that location.

[67] App. Ex. 38 at 19:1-5; App. Ex. 46; Tr. Vol. 1 at 187:9-12 (Protestants' expert Machin agreed DO was always above 3.0 mg/L, which is the standard applied by the ED).

[68] App. Ex. 60 at 7:4-11; App. Ex. 28 (picture of dry stock pond).

[69] 30 TAC § 281.23(a).

be made by the applicant after the chief clerk has issued notice of the application and draft permit . . . ."[70] As the evidences shows, however, the refined Sandpit Creek flow path is a "minor and correctable error,"[71] and it is not a major amendment to the Application under Section 305.62.

Section 305.62 defines the terms "major amendment" and "minor amendment." A major amendment is "an amendment that changes a substantive term, provision, or a limiting parameter of a permit."[72] Conversely, a minor amendment is:

> [A]n amendment to improve or maintain the permitted quality or method of disposal of waste, or injection of fluid if there is neither a significant increase of the quantity of waste or fluid to be discharged or injected nor a material change in the pattern or place of discharge of injection. A minor amendment includes any other change to a permit issued under this chapter that will not cause or relax a standard or criterion which may result in a potential deterioration of quality of water in the state.[73]

In this case, the evidence shows that revising the discharge route as set out in Applicant Exhibits 20 and 56 is not a "material change in the pattern or place of discharge," does not meet the definition of a major amendment, nor violate § 281.23(a) as the altered flow path is clearly a minor change. Indeed the ED's witness Caston effectively *invited* Applicant's revision by insisting that only a new USGS map properly shows the discharge route as determined by the evidence. That is exactly what Applicant Ex. 56 demonstrated, an updated USGS map depicting the revised discharge route and showing that Sandpit Creek connects to the San Antonio River.[74] The undisputed evidence also shows that no landowners who would be entitled to notice would be impacted by the refined discharge route below the impoundment[75] and, significantly, no changes to the Draft Permit or public notices' narrative description (of the discharge route) are warranted.[76]

TCEQ's predecessor agency, the Texas Natural Resource Conservation Commission (TNRCC), previously adopted rules to address changes to permit applications during the hearing

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[70] 30 TAC § 281.23(a) (emphasis added).

[71] App. Ex. 60 at 6:23-7:3.

[72] 30 TAC § 305.62(c)(1).

[73] 30 TAC § 305.62(c)(2).

[74] App. Ex. 55 at 6:11-23; App. Ex. 56.

[75] App. Ex. 55 at 6:24-7:14; App. Ex. 56.

[76] App. Ex. 55 at 4:23-5:13.

process.[77] Known as "Special Procedures for Freezing the Process," aka the "Freeze Rules," the purpose of these rules was to limit the scale and number of amendments to an application throughout a multi-phase discovery and hearing process.[78] The rationale underlying the policy for the rule was that changing the application or draft permit during the hearing process "changed the rules in the middle of the game" and unfairly prejudiced protestants. However, significantly, the "Freeze Rules" were repealed,[79] and the TCEQ has never replaced them nor adopted any other rules that prohibit changes to the application or draft permit throughout the hearing process. Minor changes to permit applications during the hearing process are **not** prohibited.[80]

Although not required by the ALJs nor offered as a responsive pleading, the ED went to the unusual step of filing a brief prior to hearing announcing that, "the ED's position . . . is informed by information *obtained, developed, and analyzed* from the time the application is submitted *until the Commission issues its final order*."[81] Oddly, although the ED witness admitted that they have reviewed new information regarding a change in discharge route for permit applications in other cases,[82] the SPFD found Applicant was remiss in not citing a rule that requires the ED to do this same review.[83] The ED also had the benefit of extra time built into the procedural schedule which gave staff ample opportunity to review Applicant's additional evidence to "obtain," "develop" and "analyze" the record evidence that she went out of her way to explain was important to the ED's overall review. The ED's own actions generating ED-BC-5, the July 15, 2024 second standards memo, while the case was ongoing shows that it is possible for the ED to evaluate additional evidence and take a position on that evidence during a proceeding. Indeed the ED has certainly made changes to a draft permit while a case was under SOAH's jurisdiction before.[84] And yet

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[77] 30 TAC ch. 80, subch. E.

[78] *See* 19 Tex. Reg. 5497- (Jul. 15, 1994), *adopting* 30 TAC § 265.21-.24, 265.26-.35. The TNRCC subsequently moved the Freeze Rules 30 TAC ch. 80, subch. E.

[79] 24 Tex. Reg. 8276 (Sep. 24, 1999).

[80] *See Application of Waste Management of Texas, Inc. for a Municipal Solid Waste Permit Amendment No. MSW-249D*, SOAH Docket No. 582-08-2186, TCEQ Docket No. 2006-0612-MSW.

[81] Executive Director's Brief to ALJs at 3 (Sept. 20, 2024) (emphasis added).

[82] Tr. Vol. 2 at 13:17-15:7.

[83] SPFD at 87.

[84] ED Closing Brief at 5. Furthermore, the ED may always change a draft permit to add special provisions or make other changes as can the Commission (*see An Order Granting the Application by City of Liberty Hill for Renewal of*

despite her obvious duty and opportunity to analyze Applicant's evidence, the ED took the diametrically, and frankly inexplicable, position and refused to analyze it.[85] Making matters worse, the ED then testified that further modeling was required to address the discharge route location,[86] just as Applicant had done.

Additionally, the ED has now argued well outside the record and after the evidentiary record was closed in this case that, "[t]he Executive Director's policy is not to perform a technical review, including water quality analysis, while a draft TPDES permit is being litigated in the contested case hearing process at SOAH."[87] Not only is this untimely and improper testimony, but the ED wholly fails to provide any citation to a rule, written policy or even website guidance to support her new position – which is contrary to years of agency precedent allowing changes to the application during the hearing process.

V. REFERRED ISSUES A-C

A. Issue A - Whether the Draft Permit is Adequately Protective of Water Quality, Including the Protection of Surface Water, Groundwater, and Animals in Accordance with Applicable Regulations Including Texas Surface Water Quality Standards

The SPFD's entire water quality analysis was basically truncated because it hinges on its erroneous finding that Sandpit Creek terminated in the impoundment and the ED's refusal to review Applicant's revised discharge route and additional data. This was stunningly prejudicial in light of the significant amount of water quality evidence Applicant introduced that was never rebutted. As mentioned earlier, Dr. Miertschin re-ran and verified the ED's model then he created and ran a second "worst case scenario" model analyzing at Sandpit Creek's flow path to the southeast which verified that the TSWQS would be met.[88] On the other hand, even though Protestant's witness Mr. Machin did not take his own stream measurements and used the wrong

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TPDES Permit No. WQ0014477001 in Williamson County, Texas; SOAH Docket No. 582-22-1222; TCEQ Docket No. 2021-0999-MWD at 20-21 (Explanation of Changes)).

[85] Although it is typical for the ED to present standards, modeling and permit writing staff at TPDES hearings, the ED never offered the opinion of a trained modeler, either in prefiled testimony or at hearing.

[86] Tr. Vol. 2 at 179:15-180:3.

[87] Executive Director's Exceptions to the Administrative Law Judges' Supplemental PFD at 2 (Feb. 24, 2025).

[88] App. Ex. 38 at 19:16-23; App. Exs. 44-46; App. Exs. 60-64.

depth in his model, 3.5 feet instead of the 2-foot depth,[89] he still conceded that that aquatic life use and assigned DO was reasonable.[90] In fact, Protestant's concern that non-existent fish will be harmed was debunked by its own witness.[91] Whether the small 0.28 cfs discharge ends in the impoundment or flows to the southeast, no party rebutted Applicant's demonstration that 3.0 mg/L DO criterion will be maintained in Sandpit Creek.[92]

The ED's witnesses were also wrong that the TCEQ only issues wastewater discharge permits under "critical conditions." According to the Procedures to Implement the TSWQS (IPs), the TCEQ evaluates aquatic life uses and models wastewater discharges based upon critical conditions *of the receiving stream*,[93] it does not evaluate permits under critical conditions. Moreover, the ED's staff uses this misinterpretation about flooding as the basis for their blanket disregard of Applicant's expert Dr. Grounds' testimony showing that Sandpit Creek has both a hydraulic and hydrologic connection to the San Antonio River.[94] However, much of the ED's testimony conflates the modeling term "critical conditions"[95] with their incorrect "water in the state" determination.[96] The term "water in the state" is very broad and not limited to drought or "critical conditions," as the ED staff seems to believe. As discussed earlier, both the Texas Water Code and the TSWQS expansively define the term "water in the state," and neither definition references "critical conditions" or excludes flood flows[97] in determining whether a receiving stream is hydraulically or hydrologically connected to a downstream water body. Likewise, the Texas Water Code requires the TCEQ to adopt water quality standards for "water in the state" and,

[89] Pro-R-11 at 9:9-10.

[90] Tr. Vol. 1 at 174:18-20, 176:2-16.

[91] Tr. Vol. 1 at 176:2-3.

[92] App. Ex. 38 at 18:17-23.

[93] ED-DD-3 at 18 (June 2010 Procedures to Implement the Texas Surface Water Quality Standards (RG-194) or IPs).

[94] ED-DD-1 at 5:7-8 (Mr. Dutta conflates critical conditions with bed and banks to convey wastewater across private property); Tr. Vol. 2 at 181:18-20 (Mr. Caston testified that when "we're doing discharge route, we're mainly just . . . concerned with the water conditions at base flow."), Tr. Vol. 3 at 91:17-22 (Ms. Lueg testified that the TCEQ does not "review downstream characteristics under . . . flood events.").

[95] ED-DD-3 at 86.

[96] Tex. Water Code § 26.027(a).

[97] Tex. Water Code § 26.001(5); 30 TAC § 307.3(71).

again, does not limit those standards to only critical conditions or exclude flood flows or any other condition from the protection of the standards.[98]

Instead, the TCEQ's modelers use "critical conditions" as inputs into their models to determine appropriate effluent limits and then predict whether a proposed discharge would violate the TSWQS.[99] Modelers use this low flow condition, or critical condition, to determine if the TSWQS would be violated in an effluent-dominated stream (i.e., when the effluent is not diluted by stormwater). As Dr. Miertschin explained, the TCEQ's QUAL-TX model is set up to model water quality impacts from a discharge in "critical conditions, low flow conditions."[100] However, the use of critical conditions in a model is a separate analysis from determining whether an applicant proposes to discharge into or adjacent to a water in the state. By conflating the terms, the ED's witnesses damage the reliability of their opinions.

As indicated earlier, there is also no justification for a no phosphorus limit[101] under the IPs (and the ED's own nutrient screen) because there is no aquatic life use based on Mr. Freasier's own testimony[102] and Mr. Caston's photograph of the impoundment[103] showing that the existing impoundment is a dry, shallow stock tank.[104]

B. Whether the Discharge Route is Adequately Characterized in Accordance with 30 Texas Administrative Code § 309.12[105]

Applicant witness Dr. Grounds presented reliable evidence to characterize Sandpit Creek and its connection to the San Antonio River. His analysis was based on highly sophisticated HEC-

[98] Tex. Water Code § 26.023.

[99] ED-DD-3 at 21 ("When determining seasonal permits limit, TCEQ generally use either a low-flow frequency or a seasonal 7Q2 and associated temperatures to estimate critical conditions in a particular month or season."), 84 (an important input into the model to evaluate discharges into nontidal streams and rivers is "critical conditions"), 86 ("Critical conditions are those combinations of environmental conditions and wastewater inputs that typically result in the lowest dissolved oxygen levels in a water body. . . .").

[100] Tr. Vol. 2 at 173:20-23 ("[W]hat we're doing here is we're trying to model worst-case conditions, so that's what the QUAL-TX is set up to do, which is critical conditions, low flow conditions.").

[101] There is certainly no justification and no evidentiary support for the imposition of a Total Nitrogen limit which is rarely imposed in domestic TPDES permit and certainly not here where there is no shallow drinking water.

[102] Tr. Vol. 1 at 28:13-15.

[103] App. Ex. 48.

[104] App. Ex. 60 at 7:6-9.

[105] This issue is largely addressed above at Section III of these Exceptions.

RAS models and other mapping techniques that use much larger, scientifically-based data sets such as LiDAR technology,[106] which is based on land use, meteorology, structure as-builts, soils and other geometric data taken at multiple cross sections or intervals and measuring multiple storm events (1-50%).[107] It is frankly incomprehensible that the same ED who maintains that her position "is informed by information *obtained, developed, and analyzed* from the time the application is submitted *until* the Commission issues its final order,"[108] would eschew multiple varied forms of evidence of the connection in favor of *less* sophisticated personal visual observation and the admittedly outdated USGS mapping. On top of her change of position, redaction of testimony, inter-staff contradictions, and failure to review that which she says it is her duty to evaluate, the ED has opted for less (and less rigorous types of) information and the SPFD is content to defer to this flawed approach.

Applicant was the only party to address the elements of 30 TAC § 309.12 in any substantive manner.[109] Section 309.12 is a rule (with permissive factors) that pertains to the siting of the plant, not discharge route.[110] While the SPFD acknowledges this, it then goes on to improperly expand the scope of § 309.12, applying it to the entire discharge route.[111] Nevertheless, Applicant's geological expert Mr. Khorzad testified that the proposed wastewater treatment plant (WWTP) site and Sandpit Creek sit atop the Reklaw formation, which is a clay-rich formation between the surface and the Carrizo Wilcox Aquifer located beneath the Reklaw. As there are no faults in the area, there is no viable pathway for the wastewater discharge to enter the Carrizo Wilcox Aquifer and thus no potential for groundwater contamination.[112] Additionally, Applicant's experts Messrs. Price and Ryan testified on soil conditions both at the WWTP site, on the Applicant's property, as

[106] Tr. Vol. 1 at 141:12-16.

[107] App. Ex. 13 at 6:4-5, 8:17-21; App. Ex. 19.

[108] Executive Director's Brief to ALJs at 3 (Sept. 20, 2024)(emphasis added).

[109] Protestant's witness Dr. Furnans offered a half a page of testimony looking at Sandpit Creek well downstream of (instead of at) the WWTP.

[110] In past cases, the TCEQ has found that § 309.12 has permissive factors and applies to Texas Land Application Permits (TLAP), while other subsections (§ 309.13) pertain to TPDES applications.

[111] SPFD at 94.

[112] App. Ex. 10 at 7:21-9:19.

well as on Protestant's property.[113] The porosity of the sandy soils mirror the *Hoefs'* explanation that water may sink and be absorbed by rapid percolation which explains why there has historically been little or no ponding at Freasier's cattle pen. Sandy soils not only allow water to move rapidly through them regardless of saturation,[114] but the porous soils also account for the fact that Sandpit Creek's stream channel is not readily observable to the naked eye.[115] Finally and more importantly, sandy, highly transmissive soils with sufficient permeability mean that water in the alluvium (on Freasier's property) will continue to migrate to the San Antonio River.[116]

C. Whether the Draft Permit is Protective of the Requestor's Use and Enjoyment of Its Property in Accordance with the Texas Surface Water Quality Standards

Here again, the SPFD relies on its earlier finding of Sandpit Creek's termination to relieve it of any serious consideration of Issue C relating to use and enjoyment of property. Impacts to use and enjoyment of property must be tied directly to the TSWSQ as explicitly referenced in both the Interim Order and Interim Order on Remand.[117] Additionally, the TSWQS do not set a standard for mere "use and enjoyment of property" by itself.[118] Therefore, if the proposed discharge meets the TSWQS, as Dr. Miertschin has proven two times now, the Draft Permit is protective of Freasier's use and enjoyment of property as required by and in accordance with the TSWQS.

VI. TRANSCRIPT COSTS

The SPFD wrongly assesses $7,590.50 to Applicant because it is "more likely to have the ability to pay than Protestant" and is "also the party seeking a benefit."[119] The SPFD not only gives these 2 of 6 factors undue weight, but its rationale is also highly speculative and not supported by any evidence in the record. At the same time, there was supporting evidence that

[113] App. Ex. 22 at 24:11-25:5; App. Ex. 31 at 16:1-17:27; App. Ex. 28 (NRCS Soils Report for Wilson County indicating presence of Zavala Fine Sandy Loam and Atco Loam).

[114] App. Ex. 31 at 17:20-24, 22:4-7 (Price calculated that that a one-foot-deep pond would drain (by seepage into soil) within 24 hours).

[115] App. Ex. 31 at 16:3-4.

[116] Tr. Vol. 1 at 103:14-104:24.

[117] App. Ex. 1 at Tab A (Interim Order) (emphasis added).

[118] 30 TAC § 307.1 (the stated purpose of the standards is to *maintain water quality consistent with* public health and enjoyment) (emphasis added).

[119] SPFD at 108.

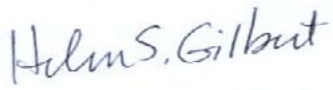
Protestant's testimony was inconsistent[120] which only prolonged, belabored and confused the evidentiary record increasing costs.

Protestant willingly participated every bit as much in this proceeding as Applicant and it also stands to benefit greatly if Applicant's affordable housing development is blocked. Protestants should pay one-half of the total in reporting and transcription costs of $9,425.50.

VII. CONCLUSION

For the foregoing reasons, Applicant HK Real Estate Development, LLC, respectfully requests that the Commission overturn the SPFD, issue an order consistent with the revised proposed Order attached as **Exhibit A**, and issue the Draft Permit without changes and grant all other relief to which it is entitled.

Respectfully submitted,



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[120] SPFD at 55.

CERTIFICATE OF SERVICE

I hereby certify that I have served or will serve a true and correct copy of the foregoing document via hand delivery, facsimile, electronic mail, overnight mail, U.S. mail, or Certified Mail Return Receipt Requested on all parties on this 24th day of February 2025:

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EXHIBIT A

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

AN ORDER ~~DENYING~~ GRANTING THE APPLICATION BY HK REAL ESTATE DEVELOPMENT, LLC FOR NEW TPDES PERMIT NO. WQ0016150001 IN WILSON COUNTY, TEXAS; SOAH DOCKET NO. 582-23-21878; TCEQ DOCKET NO. 2023-0385-MWD

On_____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the application of HK Real Estate Development, LLC (Applicant) for a new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0016150001 in Wilson County, Texas. A Supplemental Proposal for Decision on Remand (Supplemental PFD on Remand) was issued by Katerina DeAngelo and Shelly M. Doggett, Administrative Law Judges (ALJs) with the State Office of Administrative Hearings (SOAH) and considered by the Commission.

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

I. FINDINGS OF FACT

1-56 ***No Exceptions***

Sandpit Creek and San Antonio River

~~61~~.57. Sandpit Creek used to flow to the San Antonio River as represented in the Application—southwest along the fence line to the San Antonio River.

~~62.~~58. The 1936 and 1954 United States Geological Survey (USGS) maps show Sandpit Creek connecting to the San Antonio River.

~~63~~. 59. There have been changes to the topography of the Property and its vicinity since the 1950s, including the construction of the impoundment.

60. The Application's original representation of the discharge route past the impoundment following a flow path to the southwest to the San Antonio River is ~~incorrect~~ a minor and correctable error. App. Ex. 60 at 6:23-7:3.

61. Applicant prefiled a rebuttal case on October 15, 2024, including the prefiled rebuttal testimonies and exhibits of Mr. Ryan and Dr. Miertschin. The rebuttal case included a minor amendment to the Application in the form of a 2022 USGS map showing Sandpit Creek's flow path southeast from the impoundment to the San Antonio River. App. Ex. 56.

62. Applicant Exhibit 56 is a permissible minor amendment to the Application under title 30 Texas Administrative Code §§ 281.23(a) and 305.62 because the change will not cause or relax a standard or criterion which may result in a potential deterioration of quality of water in the state.

~~58~~.63. Sandpit Creek has a wide channel starting near the Facility and going through four 9'x9' box ~~to the~~ culverts ~~on~~ under State Highway 181 ~~and entering the impoundment.~~ The treated effluent then flows approximately 0.5 miles onto Protestant's property to a low point or impoundment. From there, the effluent would then flow generally southeast through Freasier's property for 0.9 miles before connecting to Segment 1911 of the San Antonio River.

64. The total length of the route before connecting to the San Antonio River is approximately 1.8 miles. Accordingly, the treated effluent will be discharged to Sandpit Creek, thence to the Upper San Antonio River in Segment No. 1911 of the San Antonio River Basin. App. Ex. 22 at 12:7-22, 18:9-21; App. Exs. 20, 56.

65. A hydraulic connection is a defined and contiguous flow path from a source to an outfall. The path from Sandpit Creek to the San Antonio River is wide and may not be easily discernible by visual observation. The path was detected and identified by the use of larger data sets such as LiDAR (topography from aircraft sources using lasers like a drone which is how all flood studies are performed now). App. Ex. 13 at 9:7-12; App. Ex. 19.

66. A hydrologic connection is where rainfall runoff within the watershed will have a path overland and into the creek channel to where it will enter into the river. App. Ex. 13 at 18:14-16.

67. Sandpit Creek drains a watershed of over 7,200 acres that represents a permanent source of supply for Sandpit Creek. This drainage area is sufficient to require a special flood hazard area for the watercourse. This water will flow to the San Antonio River. App. Ex. 22 at 15:15-16:13, 18:24-19:8; App. Ex. 26.

68. Sandpit Creek has both a hydraulic and hydrologic connection to the San Antonio River. App. Ex. 13 at 9:7-30.

69. Sandpit Creek is a defined stream and water in the state through Applicant's property, based both on topographic maps and visual inspection. The topographic maps also illustrate a stream through Protestant's property. Additionally, decades of USGS contour maps do not depict an elevation change that would imply flow cannot normally exit Sandpit Creek to the San Antonio River. The HEC-RAS model performed by FEMA, the plans and specifications for the TXDOT culvert, and the Stantec Report all essentially show that Sandpit Creek will flow in a path to the southeast toward the San Antonio River. App. Ex. 22 at 17:20-18:6.

70. As demonstrated by the FEMA maps and modeling, Sandpit Creek flows to the San Antonio River, with different elevations shown for the various rainfall events. The modeling

demonstrates the breadth of the water flow during these rainfall events and the connection of Sandpit Creek to the San Antonio River. App. Ex. 13 at 9:26-30.

71. Existing and preliminary maps and models were developed and reviewed by FEMA, San Antonio River Authority (SARA) and their professional engineers and contractors. These multiple federal and state agencies performed highly detailed engineering studies and hydraulic modeling that have been peer reviewed by specialists. The ED's field observation on one site visit may provide a general overview of local topography, but it did not provide sufficient detail of the topography to determine hydraulic connection, watershed divides, or channel geometry. The preliminary FEMA models (produced by FEMA in conjunction with SARA) relied on LiDAR topography collected at sufficient detail and accuracy. These models show that Sandpit Creek flows into the San Antonio River. App. Ex. 13 at 11:1-12.

72. FEMA thoroughly verifies the accuracy of its models by calibrating to know water surface elevations and discharges. App. Ex. 13 at 10:1-7. This makes FEMA's models highly reliable and predictive.

73. Sandpit Creek does not terminate in an impoundment or in a field on Protestant's property. Water from storm events does not vanish. The drainage would find a path to the San Antonio River, and that path is Sandpit Creek. App. Ex. 13 at 10:18-29.

74. Water in Sandpit Creek flows into the San Antonio River. App. Ex. 13 at 9:27-30.

~~59. Sandpit Creek ends in the impoundment adjacent to the Property.~~

~~60. Sandpit Creek does not connect to the San Antonio River.~~

~~64. The impoundment hindered the course of Sandpit Creek.~~

~~65. There is no longer a Sandpit Creek channel past the impoundment.~~

~~66. There are no Sandpit Creek beds or banks past the impoundment.~~

~~67. There are no slope and vegetation patterns past the impoundment indicating a direction of water flow.~~

~~68~~. 75. Sandpit Creek is ~~not~~ a watercourse past the impoundment.

~~69. The 1973, 2010, 2019, and 2022 USGS maps do not show Sandpit Creek connecting to the San Antonio River, but show Sandpit Creek ending at the impoundment or in a field on the Property.~~

~~70. Approximately 20 years of Google Earth historical aerial images show that Sandpit Creek's flow ends at the impoundment except for the instances where the water fills up the impoundment and then spills over into the field.~~

~~71.~~ 76. ~~Sandpit Creek does not have a current of water that flows to the San Antonio River.~~ Sandpit Creek has beds and banks that may be slight, imperceptible, or absent in some places; a current of

water that flows to the San Antonio River, although not a continuous current because the creek is dry for long periods of time; and a permanent source of supply from the 7,200 acres of drainage area.

~~72. Sandpit Creek is not used for irrigation.~~

~~73~~. 76. In heavy rain events, the Property floods and the water drains across the Property to the San Antonio River.

~~74~~. 77. The Federal Emergency Management Agency identified the area where the Facility and the Protestants' Property are located as having a high risk of flooding.

~~75. During the contested case hearing, Applicant provided a revised proposed discharge route representing that, from the impoundment, the effluent would flow generally southeast through the Property before connecting to Segment No. 1911 of the San Antonio River, not southwest as was depicted in the Application.~~

~~76.~~ 78. The distance between the originally depicted confluence with the San Antonio River and the revised confluence location to the southeast is approximately one mile.

~~77~~. 79. The total length of the revised discharge toute before connecting to the San Antonio River is approximately 1.8 miles.

~~78. Applicant did not update the Application with the revised proposed discharge route.~~

~~79. Commission staff did not perform an administrative or technical review of the revised discharge route.~~

~~80. It is TCEQ's policy not to issue TPDES permits if a proposed discharge route has been identified incorrectly.~~

Issues ~~A and C~~: Whether the Draft Permit is adequately protective of water quality, including protection of surface water, groundwater, and animals in accordance with applicable regulations including the TSWQS

80. The effluent limits are very stringent. The effluent limits in the Draft Permit are 5 mg/l five-day carbonaceous biochemical oxygen demand (CBOD5), 5 mg/l total suspended solids (TSS), 2 mg/l ammonia-nitrogen (NH3-N), and 63 colony forming units (CFU) of E. coli per 100 ml, along with 5 mg/l dissolved oxygen (DO). Applicant will provide tertiary treatment to meet these stringent effluent limits, and tertiary treatment is the most advanced wastewater treatment. App. Ex. 22 at 10:7-11:2.

81-89 ***No Exceptions***

90. Sandpit Creek is the receiving stream, which is located on the Applicant's property. Sandpit Creek is an intermittent stream that will convey the discharged effluent toward the San Antonio River. After Sandpit Creek crosses Hwy 181, it flows across Protestant's property, and

the creek channel travels through a cattle pen. After exiting the cattle pen, the creek then enters a small, impounded area which is primarily located on a property adjacent to Mr. Freasier. Sandpit Creek exits the small impoundment and moves toward the San Antonio River across Protestant's property. Sandpit Creek flows into to the San Antonio River. App. Ex. 38 at 11:10-24; App. Ex. 20; App. Ex. 13 at 9:18-24.

91. As required by the TSWQS, the designated uses of the San Antonio River Segment 1911 are primary contact recreation, and high aquatic life use with a 5.0 mg/L DO criterion. As an intermittent stream, Sandpit Creek has a limited aquatic life use and a dissolved oxygen criterion of 3.0 mg/L. App. Ex. 38 at 12:7-15.

92. Based on modeling results, effluent limits of 5 mg/L CBOD5, 2 mg/L NH3-N and 5 mg/L DO are adequate to maintain the DO criteria of 3 mg/L in Sandpit Creek, including the small impoundment, along with 5 mg/L for the San Antonio River. This analysis was based upon the assumption of worst-case, critical conditions in the receiving stream. These assumptions include high temperature, low streamflow, and full permitted discharge volume of 0.18 million gallons per day, which is the same as 180,000 gpd. App. Ex. 38 at 16:7-13.

93. The model was conducted in accordance with TCEQ's normal procedures and protocols. It is an uncalibrated QUAL-TX model that adheres to TCEQ's default assumptions. The model adequately represents the proposed receiving stream in this permit application and includes the first portion of Sandpit Creek as a flowing stream, then it includes the small impoundment. It also includes a segment below the impoundment going to the San Antonio River. App. Ex. 38 at 16:16-21.

94. The TCEQ develops the effluent limits and monitoring requirements to ensure that the TSWQS will be maintained in the receiving waters. App. Ex. 38 at 8:20-22.

95. A Tier 1 antidegradation review determined that the permit action would not impair existing water quality uses and that numerical and narrative criteria to protect existing uses will be maintained. A Tier 2 antidegradation review determined that no significant degradation of water quality is expected in the Upper San Antonio River. The discharge is not expected to impact any endangered or threatened species or result in any degradation of the water quality in the receiving stream. App. Ex. 38 at 12:7-15.

96. More information was obtained during the contested case hearing regarding the flow path of Sandpit Creek and Applicant submitted a revised 2022 USGS map, Applicant Exhibit 56. Even though the flow path was refined based on the new information, the modeling and the antidegradation review are still valid predictors of the discharge's impact, if any, on water quality in the receiving stream. App. Ex. 38 at 18:10-23; App. Ex. 56.

97. ~~The ED's policy is not to perform a technical review, including water quality analysis, if a proposed discharge route in a TPDES permit application has been identified incorrectly.~~ The TCEQ's original modeling of Sandpit Creek from the proposed discharge point to the small impoundment is valid because the discharge route did not change. No Commission rule requires the ED to perform an additional technical review on Applicant's amendment during the hearing process. Only the modeling work that simulates a channel that connects directly to San Antonio

River is affected by the issue of the exact flow path, because the exact path is unknown. However, the conclusions of the modeling for this reach remain valid, given the very limited oxygen demand associated with the very high quality of the proposed effluent. There are no anticipated impacts on dissolved oxygen regardless of the flow path. The discharge in compliance with the effluent limits in the Draft Permit will meet the dissolved oxygen standard of 3.0 mg/L by the time the effluent reaches the small impoundment. Therefore, treated effluent will meet the TSQWS. App. Ex. 38 at 18:10-23.

98. The permitted effluent will also meet the TSWQS downstream of the impoundment as the discharge will meet the 3.0 mg/L DO criterion in Sandpit Creek. The DO criterion of 5.0 mg/L will also be maintained in the San Antonio River. App. Ex. 38 at 18:10-23; App. Ex. 60 at 6:1-4.

99. ~~It is the ED's policy that, if an applicant has identified the proposed discharge route incorrectly in a TPDES permit application after technical review has been performed, the applicant must revise the application and submit a new USGS topographic map and updated and edited versions of pages in the application regarding the discharge route before undergoing another technical review.~~ Based on the new information presented in the contested case hearing and refined discharge route, reflected in Applicant Exhibit 56, Applicant re-ran the ED's original QUAL-TX model to include a flow path that cuts across Protestant's field and flows into the San Antonio River, consistent with Protestant's Stantec Report in Applicant Exhibit 30, and FEMA route mapping in Applicant Exhibit 20. The model showed no DO excursions within any part of the Sandpit Creek discharge route. This new model addresses the ED's concerns that she lacked sufficient information or there is information preventing her staff from rendering an opinion on whether the Draft Permit protects water quality. No Commission rule requires the ED to perform additional technical review on Applicant's amendment during the hearing process. App. Ex. 60 at 4:14-19, 5:23-6:11.

100. Water quality will be maintained and any effluent discharged pursuant to the Draft Permit will meet all water quality standards. App. Ex. 60 at 5:23-6:11.

101. A permit may not cause or contribute to a violation of applicable water quality standards.

102. Even if Sandpit Creek terminates in the impoundment, the TSWQS are still met because the 3.0 mg/L DO criterion in Sandpit Creek would be maintained, and the lowest simulated DO was above 5 mg/L. App. Ex. 38 at 20:1-2, 22:17-25; App. Ex. 60 at 6:16-18.

103. No party presented sufficient evidence showing that the impoundment is a perennial pool, necessitating a higher dissolved oxygen criteria higher than 3.0 mg/L.

104. Water quality will be protected in the receiving stream, regardless of the pathway. Because water quality is protected, there will be no detrimental effects on groundwater or animals. App. Ex. 38 at 26:10-14.

105. The effluent limits in the Draft Permit will protect the aquatic life uses and comply with the TSWQS. App. Ex. 38 at 21:16-18, 21:19-22; App. Ex. 60 at 6:6-11.

106. The discharge will meet the Texas Surface Water Quality Standards. App. Ex. 38 at 26:18-21; App. Ex. 60 at 6:6-11.

107. The proposed permit will protect groundwater quality. The proposed site is situated atop the Reklaw Formation. The Reklaw is characterized as a clay-rich formation that acts as a confining unit or aquitard between the Queen City Sand located above the Reklaw and the Carrizo Sand located beneath the Reklaw. Large portions of the Freasier, LLC, property and Sandpit Creek are located atop Quaternary alluvium deposits (river deposits) with the Reklaw Formation beneath the alluvial deposits. There are no known faults in the area, and there is no viable pathway for the effluent to enter the Carrizo Wilcox Aquifer, the only known aquifer in the area. App. Ex. 10 at 7:21-8:13; App. Ex. 12.

Issue B: Whether the discharge route is adequately characterized in accordance with 30 Texas Administrative Code section 309.12

99-104 No Exceptions

108. The proposed site is situated atop the Reklaw Formation. The Reklaw is as a clay-rich formation that acts as a confining unit or aquitard between the Queen City Sand located above the Reklaw and the Carrizo Sand located beneath the Reklaw. Large portions of the Freasier, LLC, property and Sandpit Creek are located atop Quaternary alluvium deposits (river deposits) with the Reklaw Formation beneath the alluvial deposits. There are no known faults in the area, and there is no viable pathway for the effluent to enter into and recharge the Carrizo Wilcox Aquifer, the only known aquifer in the area. App. Ex. 10 at 7:21-8:13; App. Ex. 12.

109. The proposed site minimizes possible contamination of water in the state, including groundwater. The presence of the Reklaw Formation prevents the downward flow of the discharge water, and there is no viable pathway for it to reach the Carrizo Wilcox Aquifer. The separation distance from the facility to the aquifer and points of discharge to surface water in the state are not relevant factors when considering impacts to the Carrizo-Wilcox Aquifer given the location of the site and the Reklaw Formation being present beneath it. App. Ex. 10 at 9:20-10:11.

110. Sandpit Creek is characterized by soils that are extremely permeable, meaning that they will quickly transmit water downward from the discharge point on HK property to Mr. Freasier's land. These soils are hydraulically conductive downward even in fully saturated conditions. However, given the location of the Reklaw Formation, an aquitard, groundwater contamination of the Carrizo-Wilcox Aquifer will not occur. App. Ex. 10 at 9:20-10:11; App. Ex. 22 at 18:16-21.

111. Climatological conditions are weather-related conditions that would allow for flooding or other event that would pose a specific or unique contamination threat to water quality. Such conditions do not exist at the site. App. Ex. 22 at 25:16-21.

112. The proposed site minimizes contamination of water in the state considering climatological conditions. Given the presence of the Reklaw Formation, there is no viable pathway for contamination of the Carrizo Wilcox Aquifer. Therefore, in terms of groundwater protection, climatological conditions are not important factors given the location of the site and formation with respect to the discharge water impacting the Carrizo-Wilcox Aquifer. App. Ex. 10 at 10:14-23.

113. The proposed site, when evaluated in light of the proposed design, construction or operational features, minimizes possible contamination of water in the state. App. Ex. 22 at 26:1-3.

Issue C: Whether the draft permit is protective of the requester's use and enjoyment of its property in accordance with the TSWQS

114. The Draft Permit has three phases. The final phase would authorize the permittee to discharge 180,000 gallons per day (gpd). The volume of the discharged effluent is analogous to five or six garden hoses flowing at the same time. App. Ex. 22 at 20:25-26.

115. The effluent limits are very stringent and require the most advanced wastewater treatment. The effluent limits in the Draft Permit were 5 mg/l five-day carbonaceous biochemical oxygen demand (CBOD5), 5 mg/l total suspended 9 solids (TSS), 2 mg/l ammonia-nitrogen (NH3-N), and 63 colony forming units (CFU) of E. coli per 100 ml, along with 5 mg/l dissolved oxygen (DO). This is tertiary treatment and is the most advanced wastewater treatment. App. Ex. 22 at 10:7-11:2.

116. The treated effluent of 180,000 gallons per day or 0.28 CFS will not flood the Freasier property. App. Ex. 13 at 11:21-29.

117. Protestant's modeling showing inundation of its property is not reasonable. Protestant's analysis did not consider seepage losses due to the saturated hydraulic permeability of the soils in the area that leads to considerable loss of water to the shallow soils. Therefore, the failure to consider water loss due to permeability through the soils exaggerates the predicted extent of the water coverage from the proposed discharge. App. Ex. 38 at 23:21-25, 24:1-15.

118. The discharge in compliance with the Draft Permit will meet the TSWQS. App. Ex. 38 at 26:18-21; App. Ex. 60 at 6:6-11.

119. It is highly unlikely that the permitted discharge will reach Protestant's property. The soils are highly permeable, and it is unlikely that any flow will actually reach the downstream property. A basic calculation of the losses experienced by flow along this losing stream using conservative values for both the depth of flow and the saturated hydraulic conductivity of the soil (represented as "Ksat") indicates that at the final phase of the permit, the entire flow over 24 hours would be absorbed by the soil in approximately 10 hours. This means that unless all the flow is discharged in a 10-hour or less period, none of it would reach Protestant's property. However, the maximum permitted flow of the facility would never be discharged in a 10-hour period because wastewater flows follow a 24-hour pattern (known as a diurnal pattern). App. Ex. 22, at 21:25-22:10.

120. A discharge in compliance with the Draft Permit will comply with the TSWQS and protect water quality in the receiving stream. As water quality will be protected in the receiving stream, regardless of the pathway, the discharge will not have a detrimental effect on Protestant's use and enjoyment of its property. App. Ex. 38 at 26:10-14.

121. Effluent discharged in compliance with the Draft Permit will not impair the requester's use and enjoyment of the property.

Transcription Costs

110-111 ***No Exceptions***

~~112. Protestant transcript costs are $1,835.~~

122. Applicant and Protestant were the primary participants at the hearing; and they both benefitted from the transcript and frequently cited to the transcript in their closing arguments, proposed finding of fact, and reply arguments.

123. There is no direct evidence concerning the respective financial abilities of Applicant and Protestant to pay the transcript cost. ~~Applicant, a real estate development company, however, is more likely to have the ability to pay than Protestant.~~ Protestant did not offer any evidence that he was financially unable to pay his share of the costs.

124. ~~Applicant is the party seeking a benefit – a permit for the Facility.~~ Allocating one-half of the total in reporting and transcription costs of $9,425.50 for the hearing on the merits to Protestant and one-half to the Applicant is appropriate.

125. Protestant must pay $4,712.75 representing one-half of the total reporting and transcription costs.

II. CONCLUSIONS OF LAW

1-12 No Exceptions

13. The entirety of the proposed discharge route in the Application is ~~not~~ water in the state because Sandpit Creek ~~terminates in the impoundment and does not~~ reaches the San Antonio River.

14. The Draft Permit is ~~not~~ adequately protective of water quality, including the protection of surface water, groundwater, and animals in accordance with applicable regulations including the TSWQS.

15. TCEQ may not issue a permit unless it finds that the proposed site, when evaluated in light of the proposed design, construction or operational features, minimizes possible contamination of water in the state. In making this determination, the Commission may consider the following factors: (1) active geologic processes; (2) groundwater conditions such as groundwater flow rate, groundwater quality, length of flow path to points of discharge, and aquifer recharge or discharge conditions; (3) soil conditions such as stratigraphic profile and complexity, hydraulic conductivity of strata, and separation distance from the facility to the aquifer and points of discharge to surface water in the state; and (4) climatological conditions. 30 Tex. Admin. Code § 309.12.

16. The discharge route is ~~not~~ adequately characterized in accordance with 30 Texas Administrative Code section 309.12.

17. The Draft Permit is ~~not~~ protective of the requester's use and enjoyment of its property in accordance with the TSWQS.

18. The Facility is adequately protected from inundation as required by 30 Texas Administrative Code Chapter 309.

19. The Draft Permit adequately addresses nuisance odor in accordance with 30 Texas Administrative Code section 309.13.

20. Applicant made a copy of the administratively complete application available for public viewing in the county in which the Facility is located in accordance with 30 Texas Administrative Code section 39.405(g).

21. No transcript costs may be assessed against the ED or OPIC because the TCEQ's rules prohibit the assessment of any cost to a statutory party who is precluded by law from appealing any ruling, decision, or other act of the Commission. 30 Tex. Admin. Code § 80.23(d)(2).

22. Factors to be considered in assessing transcript costs include: the party who requested the transcript; the financial ability of the party to pay the costs; the extent to which the party participated in the hearing; the relative benefits to the various parties of having a transcript; the budgetary constraints of a state or federal administrative agency participating in the proceeding; and any other factor which is relevant to a just and reasonable assessment of the costs. 30 Tex. Admin. Code § 80.23(d)(1).

23. Considering the factors in 30 Texas Administrative Code section 80.23(d)(1), a reasonable assessment of hearing transcript costs against parties to the contested case proceeding is ~~$1,835.00~~ 4,712.75 to Protestant and ~~$7,590.50~~ 4,712.75 to Applicant.

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

1. Application of HK Real Estate Development, LLC for a new Texas Pollutant Discharge Elimination System Permit No. WQ0016150001 in Wilson County, Texas is ~~denied~~ granted.

2. Protestant Freasier, LLC, must pay ~~$1,835.00~~ 4,712.75 of the reporting and transcription costs. HK Real Estate Development, LLC must pay ~~$7,590.50~~ 4,712.75 of the reporting and transcription costs.

3. The Commission adopts the ED's Response to Public Comment in accordance with 30 Texas Administrative Code section 50.117. If there is any conflict between the Commission's Order and the ED's Responses to Public Comment, the Commission's Order prevails.

4. All other motions, request for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.

5. The effective date of this Order is the date the Order is final, as provided by Texas Government Code section 2001.144 and 30 Texas Administrative Code section 80.273.

6. TCEQ's Chief Clerk shall forward a copy of this Order to all parties.

7. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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Brooke Paup, Chairman, For the Commission