

**TCEQ DOCKET NO. 2023-0385-MWD**

<b>APPLICATION OF HK REAL ESTATE DEVELOPMENT, LLC FOR NEW TEXAS POLLUTION DISCHARGE ELIMINATION SYSTEM PERMIT NO. WQ0016150001</b>	§ § § § §	<b>BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY</b>
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**HK REAL ESTATE DEVELOPMENT, LLC’S RESPONSE TO HEARING REQUESTS**

TO THE HONORABLE COMMISSIONERS:

COMES NOW, Applicant HK Real Estate Development, LLC (“Applicant”) and files this Response to the Hearing Requests<sup>1</sup> relating to the issuance of proposed Texas Pollutant Discharge Elimination System (“TPDES”) Permit No. WQ0016150001, and would respectfully show the following:

**I. SUMMARY OF RESPONSE**

The Texas Commission on Environmental Quality (“TCEQ” or “Commission”) received hearing requests from a single requestor, Freasier, LLC.<sup>2</sup> While Freasier, LLC’s property is less than one mile downstream from the proposed discharge, it is not an affected person. The interest raised – flooding – is outside of the jurisdiction of the TCEQ and is not one protected by the law under which the Commission is considering this wastewater discharge application. Accordingly, the Commission should deny Freasier, LLC’s hearing request and remand this matter to the Executive Director (“ED”) for issuance of the proposed permit.

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<sup>1</sup> Emmanuel Ayala filed public comment on October 11, 2022; however this submittal does not include a request for hearing or even mention the word “hearing” or meeting. Accordingly, Mr. Ayala’s comments do not warrant affected person consideration by the Commission.

<sup>2</sup> Individuals James and Betty Freasier filed public comment through their attorney on July 21, 2022, which filing does not request a hearing or meeting and fails to specify how the proposed discharge would “materially and adversely impact” them. Accordingly, the Freasiers, individually, do not warrant affected person consideration by the Commission. Freasier, LLC filed hearing requests on October 19, 2022 and January 25, 2023 which are addressed herein.

## II. BACKGROUND

Applicant seeks authorization to discharge treated, domestic effluent from a wastewater treatment plan (“WWTP”) that will serve approximately 730 sewer connections in a residential subdivision located in Wilson County, Texas. The Commission considers the proposed WWTP to be a “minor” facility.<sup>3</sup>

The proposed TPDES permit would allow a daily average flow of 0.06 million gallons per day (“MGD”) in the Interim I phase, 0.12 MGD in Interim II phase and 0.18 MDG in the Final phase from a membrane bioreactor (“MBR”) plant. Proposed effluent limitations are 5 mg/L carbonaceous biochemical oxygen demand five-day (“CBOD<sub>5</sub>”), 5 mg/L total suspended solids (“TSS”), 2 mg/L ammonia-nitrogen (NH<sub>3</sub>-N), 63 colony forming units (“CFU”) of *E. coli* per 100 ml, and 5.0 mg/L minimum dissolved oxygen (“DO”), which is considered advanced treatment.

According to the ED, these limits comply with the Texas Surface Water Quality Standards (“TSWQS”) and the State of Texas Water Quality Management Plan (“WQMP”), and the proposed discharge will not impair existing water quality, which the Executive Director’s staff confirmed through a Tier 1 antidegradation review.<sup>4</sup> Treated effluent will to be discharged to Sandpit Creek and then to the Upper San Antonio River in Segment No. 1911 of the San Antonio River Basin. The TCEQ-designated aquatic life uses for the receiving water Sandpit Creek are limited aquatic life (“ALU”), and the ED’s analysis identified no endangered species concerns. Segment No. 1911 is currently listed on the 2020 Section 303(d) list for bacteria, but only in reaches upstream of the proposed facility. Thus, in all technical respects, the proposed discharge complies with all Commission rules and policy.

## III. AUTHORITY

To be granted, an “affected person” with a personal justiciable interest demonstrating a non-speculative injury resulting from the granting of the permit must make the request for hearing.

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<sup>3</sup> Statement of Basis/Technical Summary and Executive Director’s Preliminary Decision at 2 (Aug. 25, 2022) (“Technical Summary”).

<sup>4</sup> *Id.* Also, the Tier 2 review determined no significant degradation of water quality is expected.

Section 55.203 provides the standing criteria for individuals, including limited liability companies, as follows:

- (a) For any application, an affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest.
- (b) Except as provided by §55.103 of this title (relating to Definitions), governmental entities, including local governments and public agencies, with authority under state law over issues raised by the application may be considered affected persons.
- (c) In determining whether a person is an affected person, all factors shall be considered, including, but not limited to, the following:
  - (1) whether the interest claimed is one protected by the law under which the application will be considered;
  - (2) distance restrictions or other limitations imposed by law on the affected interest;
  - (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
  - (4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;
  - (5) likely impact of the regulated activity on use of the impacted natural resource by the person;
  - (6) for a hearing request on an application filed on or after September 1, 2015, whether the requestor timely submitted comments on the application that were not withdrawn; and
  - (7) for governmental entities, their statutory authority over or interest in the issues relevant to the application.
- (d) In determining whether a person is an affected person for the purpose of granting a hearing request for an application filed on or after September 1, 2015, the commission may also consider the following:
  - (1) the merits of the underlying application and supporting documentation in the commission's administrative record, including whether the application meets the requirements for permit issuance;
  - (2) the analysis and opinions of the executive director; and
  - (3) any other expert reports, affidavits, opinions, or data submitted by the executive director, the applicant, or hearing requestor.
- (e) In determining whether a person is an affected person for the purpose of granting a hearing request for an application filed before September 1, 2015, the commission may also consider the factors in subsection (d) of this section to the extent consistent with case law.<sup>5</sup>

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<sup>5</sup> 30 TAC § 55.203.

Freasier, LLC did not specify any of the ED’s responses that it disputes, the factual basis of the dispute, nor listed any disputed issues of law as required by 30 TAC § 55.201(d)(B).

#### **IV. RESPONSE TO HEARING REQUESTS**

##### **A. Proximity**

Applicant does not dispute that Freasier, LLC’s property is located less than one mile downstream from the discharge point.

##### **B. Relevant and Material Issues**

Freasier, LLC’s October 19, 2022 hearing request focused on flooding and potential problems related to flooding. It asserted that Sandpit Creek is “usually a dry creek bed” and speculated that the discharge will cause flooding.<sup>6</sup> However, the request also stated that flooding is already occurring and has occurred for years due to the construction of an illegal dam by its adjacent neighbor. Relatedly, Freasier, LLC expressed concern that flooding could damage or compromise concrete drains under Highway 181. It is flooding and events associated with flooding that Freasier, LLC posits will result in the loss of its use and enjoyment of the property.

In its October 19, 2022 request, Freasier, LLC also raised the issue about whether Sandpit Creek is truly “connected” to the Upper San Antonio River. Here again, this issue is the same as its first issue and directly related to its overall flooding concern:

“If it is determined that Sandpit Creek does [sic] connect with the Upper San Antonio River, the discharge of the additional treated water will likely cause the Upper San Antonio River to overflow its banks and flood additional portions of the property.”<sup>7</sup>

In other words, the only substantive issue raised by Freasier, LLC in its October 19, 2022 is flooding, which is outside the Commission’s jurisdiction and neither relevant nor material to any water quality issues. Time and again, the Commission has found that flooding, and issues relating

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<sup>6</sup> Freasier, LLC’s Hearing Request (Oct. 19, 2022).

<sup>7</sup> *Id.*

to flooding, are not protected by the law under which the application will be considered in accordance with 30 TAC § 55.203(c)(1). As such, Freasier, LLC cannot be considered an affected person on the basis of concerns raised in its October 19, 2022 submittal.

Freasier, LLC appeared to raise a second issue in its October 19, 2022 filing, relating to notice by stating that the “entire Application was not available at Floresville City Hall.”<sup>8</sup> There is simply no merit to this allegation. Upon investigation, Applicant confirmed that Freasier, LLC did not obtain a full copy of the Application, because Freasier, LLC failed to copy both the front and back of the Application pages available for public review at the Floresville City Hall. Freasier, LLC simply copied every other page of the Application. Even assuming Freasier, LLC’s complaint was valid, it received constructive notice of the Application and met its deadline to submit public comment. Therefore, this complaint does not rise to the level of a relevant and material issue, nor is Freasier, LLC’s incomplete copying of the Application properly “the basis of the hearing request” in accordance with 30 TAC § 55.201(d)(4)(B).

Freasier, LLC filed a second request for hearing on January 25, 2023, which is likewise flawed. Specifically, Freasier, LLC stated that its second filing is a Request for Reconsideration and an amendment to its request for a contested case hearing.<sup>9</sup> Importantly, the January 25, 2023 filing conceded that, “Freasier understands flooding is not within the regulatory authority of the Texas Commission on Environmental Quality.”<sup>10</sup> Freasier, LLC’s second filing is not so much an amendment – for which there is no procedure under Chapter 55 – but rather a withdrawal and attempt to fix its flawed October 19, 2022 request. Now understanding that basing its earlier filing during the TCEQ comment period on a non-jurisdictional issue was fatal, Freasier, LLC attempts to recast the flooding issue as “mischaracterization of the watercourse.” Freasier LLC’s bait and switch of the term “flooding” for the term “mischaracterization” effectively *withdraws* the earlier comment, which is clearly prohibited by TCEQ rules. Section 55.201(c) provides:

(c) A request for a contested case hearing by an affected person must be in writing, must be filed with the chief clerk within the time provided by subsection (a) of this section, *may not be based on an issue that was raised solely in a public comment*

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<sup>8</sup> *Id.*

<sup>9</sup> Freasier, LLC’s Amended Hearing Request (Jan. 25, 2023).

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

*withdrawn* by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director’s Response to Comment, and for applications filed on or after September 1, 2015, *must be based only on the requestor’s timely comments.*<sup>11</sup>

Freasier, LLC’s second filing was not based on its timely comments of October 19, 2022, which is prohibited by the rules as well.

The problem with this rebranding is that it deprived the Executive Director of the opportunity to respond to the “new issue” of mischaracterization, raised after the comment period closed, and it thwarts the purpose of the rules. Although the January 25, 2023 filing was careful to avoid the use of the word “flooding,” Freasier, LLC’s concern remained the same and still centered around flooding – that a so-called lack of “connection” between Sandpit Creek and the Upper San Antonio “will ultimately end up on the Property and not the San Antonio River.”<sup>12</sup> The sheer mischaracterization of a water course would not uniquely impact Freasier, LLC in a manner not common to the general public.

The Commission cannot consider Freasier, LLC to be an affected person, because its first filing was based on a non-jurisdictional issue and its second filing was not based on comments filed during the TCEQ comment period. Freasier, LLC is not an unsophisticated party; at all relevant times, it was represented by legal counsel who were aware of the agency’s standing requirements. The Commission must deny Freasier, LLC’s deficient hearing requests.

## V. CONCLUSION

For the aforementioned reasons, the Commission cannot grant Freasier, LLC’s hearing requests based on its flooding comment, which is neither relevant nor material to a wastewater permit proceeding and outside the scope of the Commission’s jurisdiction. Nonetheless, if the Commission refers the Application to hearing, it should be referred immediately without mediation for a hearing duration not to exceed 180 days.

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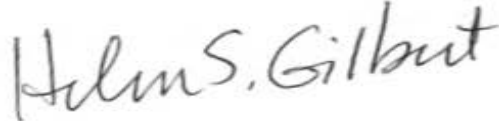
<sup>11</sup> 30 TAC § 55.201.

<sup>12</sup> Freasier, LLC’s Amended Hearing Request (Jan. 25, 2023).

**VI. PRAYER**

WHEREFORE, PREMISES CONSIDERED, Applicant HK Real Estate Development, LLC respectfully prays that the Commission deny Freasier, LLC's hearing requests and issue the TPDES permit as recommended by the ED.

Respectfully submitted,



By: \_\_\_\_\_  
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**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 3rd day of April 2023:

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