

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

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

**HK REAL ESTATE DEVELOPMENT, LLC’S REPLY TO THE EXECUTIVE
DIRECTOR’S EXCEPTIONS TO THE SUPPLEMENTAL PROPOSAL FOR DECISION**

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

COMES NOW, HK Real Estate Development, LLC (Applicant), and files this Reply to the Executive Director’s (ED) Exceptions to the Supplemental Proposal for Decision (SPFD) (hereinafter, Exceptions), and in support thereof would respectfully show the following:

I. REPLY TO ED’S EXCEPTIONS

The ED filed Exceptions seeking changes to proposed Findings of Fact (FOF) in the SPFD.¹ The ED’s suggested changes and rationale for changes to FOF Nos. 90 and 91 are wholly outside of the evidentiary record, may not be considered by the Administrative Law Judges (ALJs) or the Commission, and should be disregarded in their entirety. These improper changes underscore that the ED’s position in this case is wrong.

A. Proposed Revision to FOF No. 90

Tellingly, the ED’s Exceptions contain no citation to the evidentiary record, any prefiled testimony (PFT), or testimony at the hearing on the merits. But the ED’s Exceptions attempt to improperly bolster and elaborate on the ED staff’s prefiled testimony (PFT) and testimony at hearing that the ED could not issue a draft permit if the discharge route is modified slightly as discovered during the hearing process.² Specifically, the ED’s proposed revision to the FOF No.

¹ Applicant has no objection to the ED’s suggested revision to proposed FOF Nos. 20 and 51 relating to her “preliminary” determination and identity of legal counsel.

² Tr. Vol. 2 at 135:24-136:12.

91 language *deviates* from ED witness Brad Caston's testimony at hearing. The ED's proposed revision to FOF 90 states:

The Executive Director's policy is not to perform technical review, including water quality analysis, while a draft TPDES permit is being litigated in the contested case hearing process at SOAH.³

But as seen below, Caston's testimony mentions nothing about the timing of the review - during ongoing litigation - it is focused on the alleged error:

- A. Well, I would say it's – you know, our practice, our standard practice to only issue TPDES permits to surface water discharges, you know, discharges that have a, you know, a surface water connection.
- Q. Okay. So the conclusions in the memo are consistent with agency practice. Is that right?
- A. Yes.
- Q. Okay. So let's talk about –
- A. And I guess I could add that, you know. It's also our policy to not issue a draft permit if we don't have a correct discharge route. And, you know to, you know, not to do technical reviews, you know, if we don't have a correct discharge route so.⁴

Applicant already addressed at length its numerous caselaw and statutory bases for why the ED's position - that the technical review and draft permit could not proceed if the discharge route was incorrect based on a lack surface water connection - is erroneous.⁵ In her Exceptions to FOF No. 90, however, the ED does not state that the permit and technical review cannot be processed because of error in the discharge route depiction. Instead, she adds a new reason. The ED adds new information (without mention of error) that the ED cannot review information discovered during an ongoing contested case hearing.⁶ Again, there is no legal or evidentiary support for this outside-the-record assertion.

On the contrary, although not required to file, the ED submitted a Brief to ALJs stating that “the ED's position is not static and is informed by information ***obtained, developed, and analyzed***

³ Executive Director's Exceptions to the Supplemental Proposal for Decision at 2, FOF No. 90 (Feb. 24, 2025).

⁴ Tr. Vol. 2 at 135:24-136:12.

⁵ See HK Real Estate Development, LLC's Exceptions to SPFD, incorporated herein for all purposes as if set out in full.

⁶ Executive Director's Exceptions to the Supplemental Proposal for Decision at 2, FOF No. 90 (Feb. 24, 2025).

from the time the application is submitted *until the Commission issues its final order.*⁷ In the same pleading, the ED stated it was “not a static duty, but *a duty that continues throughout the permitting process as new evidence is added to the record.*”⁸ Yet, the ED ignored her previously-stated position on reviewing information discovered during the hearing.

Pursuant to SOAH’s Order Scheduling Hearing on the Merits and Amending Procedural Schedule, the record did not close until the filing of responses to closing briefs on December 4, 2024.⁹ Applicant submitted its revised and amended USGS map, depicting the flow path of Sandpit Creek to the southeast, as Applicant Exhibit 56 in its prefiled rebuttal case on October 15, 2024. According to her own statements, the ED not only had an *ongoing duty*, but also ample time to review Exhibit 56 and related testimony and analysis (James Miertschin’s modeling of discharge route to the southeast), but did not do so.

To make matters worse, not only did the ED not review Applicant’s rebuttal evidence,¹⁰ it is clear that the ED did not even review Applicant’s original PFT,¹¹ which was *filed a full week before* the ED’s testimony:¹²

Q: Okay. And you reviewed all 46 exhibits?

A: No. I just reviewed briefly their testimonies.

Q: Okay. So my questions is, simply, did you review or evaluate Dr. Grounds’ exhibit at all?

A: I did not evaluate that.¹³

And,

Q: So I’m not going to ask you to go through all that right now. Suffice to say, you would not accept a FEMA HEC-RAS representation of the connection to San Antonio River. Correct?

A: That’s correct.

Q: But you didn’t review it either. Right?

A: Review what?

⁷ Executive Director’s Brief to ALJs at 3 (Sept. 20, 2024) (emphasis added).

⁸ Executive Director’s Brief to ALJs at 5 (Sept. 20, 2024) (emphasis added).

⁹ Order Scheduling Hearing on the Merits and Amending Procedural Schedule at 1 (Sept. 9, 2025).

¹⁰ Despite no SOAH order requiring prefiling of rebuttal, which could have been offered live during the normal course of hearing, Applicant prefiled its rebuttal case in writing to give the other parties an opportunity to review the discharge route revision and supporting documentation. This was provided **6 days before** the resumed hearing, giving the other parties more than sufficient time to address it.

¹¹ Both the ED and Applicant are entitled to present additional evidence under Tex. Gov’t Code § 2003.047(i-3) which is normally done in the form of PFT.

¹² Applicant filed its PFT on Sept. 6 while the ED file her testimony on Sept. 13, 2024.

¹³ Tr. Vol. 2 at 27:10-11; 28:12-14.

Q: Review Exhibit 20 or any of Dr. Grounds' exhibits. Correct?
A: I did not review – I reviewed his testimony.
Q: Uh-huh.
A: I reviewed that map, but I did not review any of the technical modeling.. .¹⁴

To now suggest that Applicant's minor correction to the USGS map (in rebuttal) and other demonstration of Sandpit Creek's connection with the San Antonio River in Applicant's direct PFT somehow deviates from the ED's review protocol is the height of irony. The ED had ample opportunity, but she ignored her expressed "duty" to conduct a technical review of Applicant's stream characterization that was offered multiple times.

The ED's proposed changes to FOF No. 20 further supports Applicant's position that the revised discharge route (Applicant Exhibit 56 and supporting documentation) should have been reviewed. The ED emphatically declares that her positions are "always *preliminary until the related draft permit* is issued."¹⁵ If that is the case, it was incumbent on the ED to confirm the preliminary nature of her opinion by reviewing the discharge route revision offered by Applicant in its rebuttal testimony. The ED cannot refuse to review pertinent information to avoid finalizing her opinion.

The ED's late, after-the-fact explanation that the discharge route could not be amended during the hearing process is further contradicted by TCEQ's rules and prior precedent. The ED can point to nothing in the record that justifies ignoring rules or precedent. As set forth more fully in Applicant's Exceptions, title 30 Tex. Admin. Code §§ 281.23(a) and 305.62 clearly allow minor amendments to the permit application during the hearing process. Changes to the Liberty Hill and Waste Management draft permits,¹⁶ cited in Applicant's Exceptions, were made after the contested case hearing process began without remand or complaint by the ED.

In the ED's just-filed Reply to Exceptions, she again cites no evidence from any PFT or the hearing on the merits to substantiate the now new claim that Applicant's minor revision to the

¹⁴ Tr. Vol. 2 at 178:21-179:8.

¹⁵ Executive Director's Exceptions to the Supplemental Proposal for Decision at 2 (Feb. 24, 2025) (emphasis added).

¹⁶ See *An Order Granting the Application by City of Liberty Hill for Renewal of 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); *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.

discharge route is really a major amendment.¹⁷ This new legal argument, that is disguised as “testimony” offered by *no* ED witness at hearing, is also improperly outside the record and should be disregarded. Furthermore, it is counter-intuitive – why would the ED insist the change in orientation constitutes a major amendment when the ED has consistently (and erroneously) said the discharge ends in the impoundment?

On the contrary, Applicant offered the testimony of 30-year permit engineer Dan Ryan that the update to the discharge route did *not* result in a change to any substantive term, provision, requirement or limiting parameter of the permit and the change would not cause or relax standard that would deteriorate water quality.¹⁸ These are the criteria for determining whether a change is a major or minor amendment.¹⁹ The ED could have elicited testimony at the evidentiary hearing on whether the update was substantive or not and chose not to do so. The ED can point to *no* term, provision or requirement in the Draft Permit that would actually need to be changed as a result of the update to the discharge route below the impoundment.

On the other hand, Mr. Ryan specifically testified that the update to the stream orientation from southwest to southeast would also not change any narrative description in the Draft Permit or public notices that the discharge is “to Sandpit Creek, thence to the Upper San Antonio River in Segment No. 1911 of the San Antonio River Basin.”²⁰ The discharge route description never specified the direction of flow path for the short distance Sandpit Creek flows below the impoundment across Freasier’s property to the San Antonio River, it still correctly remains “from Sandpit Creek to the San Antonio River.” Importantly, even though the SPFD wrongly determined that an amendment could not be made during the hearing process, it also concluded that notice was properly provided.²¹ Thus, if the reorientation below the impoundment is a substantive change as the ED now contends, new notice would have been triggered and that is not the case. Everyone

¹⁷ Executive Director’s Reply to Exceptions to the Administrative Law Judges’ Supplemental Proposal for Decision at 3 (Mar. 5, 2025).

¹⁸ App. Ex. 55 at 7:18-23; *See also* App. Ex. 60 at 6:5-7:3 (“My model shows that water quality will be maintained. . .[i]n fact, the DO would also be compliant with a higher DO. . .[t]he Application does not violate the rules.”).

¹⁹ 30 TAC § 305.62(c)(1), (2).

²⁰ App. Ex. 1, Tab C at APP000135 (Draft Permit).

²¹ SPFD at 60.

who was entitled to notice, within one mile downstream of the discharge point (before and after the reorientation), was notified.²²

Finally, the ED's new "major amendment" argument also contradicts her testimony at hearing that she *could not confirm* that no additional landowners would be entitled to mailed notice.²³ Thus, at hearing, the ED could not confirm, but in briefing she now emphatically declares that the "pattern has changed," that (Sandpit Creek) "follows a meandering path," and this constitutes a material change.²⁴ The ED's analysis is improperly outside the record and unreliable.

B. Proposed Revision to FOF No. 91

The ED again inserts an explanation of a remand and/or notice of deficiency (NOD) process that is not supported by evidence in the record. In a proposed revision to FOF No. 91, the ED elaborates on the policy of the timing of her review as follows:

It is the ED's policy that. . .after the technical review has been performed, but before the draft permit is issued, then the technical reviewer will issue a notice of deficiency, and the applicant must provide the documents identified in the notice of deficiency to continue with the draft permit process.²⁵

Indeed, the scope of remand referenced in her Exception (i.e., "does not have to be one-size-fits-all remedy") was never discussed by *any* witness.

Not only is this new remand/NOD testimony outside the evidentiary record, but it simply rings hollow. If the ED is correct that Sandpit Creek terminates in the impoundment, contrary to what Applicant, Freasier, Protestants' witness Furnans, and over 40 exhibits show, why would *any* further technical review be warranted? What would be the point of remand, to look at a discharge route below the impoundment that is supposedly non-existent? However, as 50-year water quality modeling expert James Miertschin testified, no further technical review *is* justified under the ED's interpretation, because the dissolved oxygen criteria had recovered by the time the proposed flow enters the impoundment, exceeding a 5.0 mg/L and the Texas Surface Water Quality Standards.

²² App. Ex. 55 at 7:3-7; App. Ex. 57 (Form TCEQ-10053 at 7(b)).

²³ SPFD at 58 (citing ED's Closing Br. at 10).

²⁴ Executive Director's Reply to Exceptions to the Administrative Law Judges' Supplemental Proposal for Decision at 3 (Mar. 5, 2025).

²⁵ Executive Director's Exceptions to the Supplemental Proposal for Decision at 3, FOF No. 91 (Feb. 24, 2025).

The ED's new testimony about the remand/NOD process is also meaningless, if the ED lacks sufficient manpower to actually review such additional evidence as staff contends. During the evidentiary hearing, counsel for Applicant asked the ED staff why no modeling expert was offered who had reviewed and could testify about Dr. Miertschin's two modeling analyses (both ending in the impoundment and flowing southeast to the San Antonio River). Staff justified the lack of review on:

A: ". . .you know, shortage of manpower and a heavy workload so.

Q: Okay. Do you know why a modeler wasn't presented at hearing?

A: Beyond being short-staffed and having a heavy workload, that's would be my best guess.²⁶

Applicant offered at least 30 exhibits with its PFT and another 10 exhibits on rebuttal that all provided additional characterization of Sandpit Creek's flow into the San Antonio River and the water quality protection afforded by the same. Applicant was entitled to have the ED review this information, compiled by experts with over a 100 years of combined water quality experience. The fate of Applicant's permit should not rest on the ED's shortage of manpower.

II. CONCLUSION

For the foregoing reasons, Applicant HK Real Estate Development, LLC, respectfully requests that the Commission disregard the ED's Exceptions to the SPFD and Reply to Exceptions, including revisions to FOF Nos. 90 and 91, overturn the SPFD, issue an order consistent with the revised proposed Order attached to Applicant's Exceptions, issue the Draft Permit without changes and grant all other relief to which it is entitled.

²⁶ Tr. Vol. 2 at 179:21-180:1.

Respectfully submitted,

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CERTIFICATE OF SERVICE

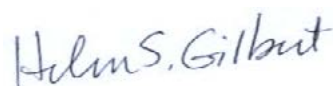
I hereby certify that I have served or will serve a true and correct copy of the foregoing document via hand delivery, facsimile, electronic mail, overnight mail, U.S. mail, or Certified Mail Return Receipt Requested on all parties on this 5th day of March 2025:

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