

**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 STATE OFFICE OF ADMINISTRATIVE HEARINGS
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**HK REAL ESTATE DEVELOPMENT, LLC’S REPLY TO PROTESTANT’S
EXCEPTIONS TO PROPOSAL FOR DECISION ON SUMMARY DISPOSITION**

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

HK Real Estate Development, LLC (Applicant) files its Reply to the Protestant’s Exceptions to Proposal for Decision on Summary Disposition (PFD) (hereinafter, Exceptions),¹ and in support thereof would show the following:

I. SUMMARY OF REPLY

The Texas Commission on Environmental Quality (TCEQ or Commission) referred this case to the State Office of Administrative Hearings (SOAH) on six contested issues A-F raised by Protestant Freasier, LLC (Freasier or Protestant) in his hearing request. However, when Freasier had the opportunity to file direct testimony, he completely failed to present any evidence rebutting the prima facie demonstration on any referred issue. The Administrative Law Judges (ALJs) properly applied the Senate Bill 709 burden-shifting scheme and legal standard for summary disposition and found that Applicant was entitled to summary disposition on all issues as a matter of law.²

Protestant’s Exceptions to the PFD is a merit-based argument that improperly delves into evidence that was never introduced nor admitted into the evidentiary record by the ALJs.³ For

¹ Applicant filed one exception to the PFD to correct a minor error in proposed Finding of Fact (FOF) No. 19 relating to the newspaper where Notice of Application and Preliminary Decision (NAPD) was published.

² PFD at 3. Note, Freasier conceded that summary disposition was appropriate on Issues D, E and F during the prehearing conference on Applicant’s Motion for Summary Disposition on November 17, 2023.

³ For example, Protestant’s Exceptions recommend changes to several proposed FOFs (i.e., FOF Nos. 31-33) based on “facts” that were never offered nor admitted into the evidentiary record and which may not be considered. See Protestant’s Exceptions at 6-7.

example, Freasier repeatedly stated that his evidence was “undisputed,”⁴ although none of this so-called evidence was ever introduced at a hearing nor were there any evidentiary rulings by the ALJs on Applicant’s objections to same. Elsewhere, Freasier referenced discovery responses that were never admitted into the record and do not constitute evidence of anything. Because the ALJs granted summary disposition on all issues after Protestant filed his direct testimony, before Applicant or the Executive Director (ED) filed any additional evidence, and in the absence of any hearing on the merits, Protestant’s Exceptions are largely outside of the record and must be disregarded.

In its Interim Order, the Commission referred the following Issue B to SOAH: “Whether the discharge route is adequately characterized in accordance with 30 TAC § 309.12.”⁵ Instead of addressing the discharge route under section 309.12, however Protestant’s prefiled testimony focused only on whether the discharge route “connects” further downstream and therefore could flood Protestant’s property. Protestant focused on this to the exclusion of **all** the issues the Commission actually referred for hearing.⁶ Freasier should not be rewarded for this purposeful omission by remanding the matter to take additional evidence.⁷ The ALJs made a legal ruling and correctly applied the summary disposition standard within a Senate Bill 709 proceeding. The ALJs found that Protestant’s prefiled testimony did not present evidence on the referred issues and did not rebut Applicant’s prima facie demonstration.⁸ The Commission should adopt the PFD and issue the Draft Permit without changes as proposed by the ED.

⁴ Protestant’s Exceptions at 1, 4 and 6.

⁵ May 2, 2023 TCEQ Interim Order at 3 (admitted into evidence as App. Ex. 1, Tab A).

⁶ May 2, 2023 TCEQ Interim Order at 2.

⁷ Tex. Gov’t Code § 2003.047(m).

⁸ App. Ex. 1, the administrative record, was admitted into evidence without objection during the September 27, 2023 preliminary hearing.

II. AUTHORITY

The ALJs are correct that the burden of proof established under Texas Government Code § 2003.047(i-1)-(i-3) governs this case. Because Protestant failed to present *any* rebuttal evidence on issues A, B, C, D, E or F, Applicant’s section 2003.047(i-1) demonstration conclusively established that the Draft Permit meets all state and federal legal and technical requirements and, if issued, will protect human health and safety, the environment, and physical property.

Under Section 2003.047(i-2), to rebut the prima facie case, a party must present evidence that “relates to the issues referred:”

(i-2) A party may rebut a demonstration under Subsection (i-1) by presenting evidence that:

- (1) *relates to a matter referred* under Section 5.557, Water Code, or an issue included in a list submitted under Subsection (e) in connection with a matter referred under Section 5.556, Water Code; and
- (2) demonstrates that one or more provisions in the draft permit violate a specifically applicable state or federal requirement.⁹

Protestant not only failed to present evidence that specifically related to the six referred issues, but Freasier made zero effort to identify one or more Draft Permit provisions that would violate state or federal law.

The governing statute does not allow parties to put on evidence outside the scope of the referred list of issues.¹⁰ Similarly, it does not allow a protestant to change referred issues to fit its evidence. The Commission could have referred different issues – had Protestant raised any in his hearing request – but they were not so raised. To consider new or broadened issues outside of the scope and after issuance of the Interim Order would not only thwart the intent of Senate Bill 709, but it would also deprive Applicant of its due process rights.

⁹ Tex. Gov’t Code § 2003.047(i-2) (emphasis added).

¹⁰ Tex. Gov’t Code § 2003.047(f). No party requested that the ALJs consider issues not referred by the Commission.

Commission rule 30 TAC § 80.137 then allows for summary disposition on all or any part of an action, like this pending TPDES permitting case, when there is no genuine issue as to any material fact.

(c) Summary disposition. Summary disposition shall be rendered if the pleadings, admissions, affidavits, stipulations, deposition transcripts, interrogatory answers, other discovery responses, exhibits and authenticated or certified public records, if any, on file in the case at the time of the hearing, or filed thereafter and before judgment with the permission of the judge, show that there is no genuine issue as to any material fact and the moving party is entitled to summary disposition as a matter of law on all or some of the issues expressly set out in the motion or in an answer or any other response.¹¹

III. ARGUMENT

Notwithstanding the fact that Protestant failed to address issues A-F in prefiled testimony entitling Applicant to summary disposition, Protestants also failed to specifically except to referred issues A and C in Exceptions, thus waiving any opportunity to challenge the PFD on those subjects (i.e., water quality and use and enjoyment of property). Applicant's brief procedural summary of issues A and C is provided below.

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

Protestant's prefiled testimony made no mention of water quality, let alone groundwater, animals, chapter 307, the Texas Surface Water Quality Standards, effluent limits, or antidegradation. Protestant simply skipped this issue altogether, and the ALJs correctly granted summary disposition on this referred issue.

B. Whether the Discharge Route is Adequately Characterized in Accordance with 30 TAC § 309.12

As indicated above, Protestant's Exceptions arguably addressed only Issue B, not A or C (or previously conceded D, E and F) and the explanation of Issue B is, again, lacking. Protestant's prefiled testimony clearly related solely to the discharge route on his property and whether Sandpit Creek "connects" with the San Antonio River as depicted in

¹¹ 30 TAC § 80.137(c).

the application which was **not** the narrowly-focused issue explicitly referred here – that the discharge route be adequately characterized *in accordance with 30 TAC § 309.12*.¹²

As is clear from the plain language of the rule, section 309.12 relates to location standards for a plant¹³ and its potential impact on groundwater protection. Yet the Protestant’s prefiled testimony was completely silent on section 309.12. That is, it was silent on the parameters of section 309.12(1)-(4) -- geological processes, groundwater conditions (i.e., shallow or hydraulically connected surface and groundwater), soil conditions (i.e., stratigraphic profile, and complexity, hydraulic conductivity of strata, and separation distance from facility to aquifer and points of discharge to surface water) or climatological conditions.¹⁴ Additionally, the prefiled testimony did not allege that the new plant would not minimize possible contamination of water, which is the primary consideration of section 309.12.

Now for the first time in Exceptions, Protestant makes a tortured, after-the-fact argument that it really did address section 309.12 by claiming that “topography of the land is a soil condition.”¹⁵ Even if that were true, which Applicant again disputes, this information simply is not in evidence.¹⁶ Legal argument cannot substitute for actual evidence.

Freasier’s real problem in this case is with well-settled law.¹⁷ Again, the connection of Sandpit Creek and the San Antonio River and thus, the discharge route’s character as a watercourse, was not a referred issue in this case. Even if it were, the *Hoefs* and *Domel* cases establish that as a matter of law discharges into often dry intermittent streams are permissible, and such streams may still remain watercourses. As a practical matter, the

¹² May 2, 2023 TCEQ Interim Order at 3.

¹³ See Protestant’s Exceptions at 6. Protestant argues that “design, construction or operational features” pertain to the discharge route. The discharge route is not “facilities” under the clear meaning of 30 TAC chapter 309, subchapter B. Section 309.10 relating to Purpose, Scope and Applicability states that the subchapter applies to “*domestic wastewater treatment facilities*.”

¹⁴ 30 TAC § 309.12(1)-(4).

¹⁵ Protestant’s Exceptions at 6.

¹⁶ Also, although Protestant attached a USGS map to his Exceptions, there is no supporting argument that such map is evidence of topography, let alone soil conditions, which are wholly separate features.

¹⁷ *Domel v. City of Georgetown*, 6 S.W.3d 349 (Tex.App.-Austin 1999, pet. denied) (*Domel*); *Hoefs v. Short*, 273 S.W. 785 (Tex. 1925) (*Hoefs*). Also see, HK Real Estate Development, LLC’ Brief on *Domel, Hoefs*, and Referred Issues (Nov. 27, 2023) incorporated herein for all purposes.

Commission grants discharge permits for hundreds if not thousands of sites across Texas where banks may be “slight, imperceptible, or absent”¹⁸ in some instances and where flowing water shifts and meanders as a natural result of flooding and erosion.¹⁹ The ALJs properly granted summary disposition to Applicant on this issue just as the Third Court of Appeals upheld a summary disposition in favor of the City of Georgetown in the *Domel* case – as there was no genuine issue of material fact about the nature of the discharge route as a watercourse.

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

The only testimony relating to the use and enjoyment of property was by lay person Mr. Freasier about the potential for mosquito breeding and impacts to hay farming only. That testimony was wholly unrelated and untethered to the TSWQS, the issue specifically referred by the Commission.

In this case, as there were no genuine issues of material fact relating to referred issues A, B, C, D, E or F and because Protestant did not present evidence as required by Subsection 2003.047(i-2), the ALJs correctly found that Applicant was entitled to summary disposition in its favor as a matter of law, and the Draft Permit should be issued as uncontested.

IV. CONCLUSION

Applicant HK Real Estate Development, LLC respectfully requests that the Commission adopt the PFD and Proposed Order, make the minor correction to proposed FOF No. 19 noted in Applicant’s Exception, issue the Draft Permit without changes, and for all other relief to which it has shown itself to be entitled.

¹⁸ *Hoefs*, 273 S.W. at 787.

¹⁹ *Domel*, 6 S.W.3d at 355.

Respectfully submitted,

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CERTIFICATE OF SERVICE

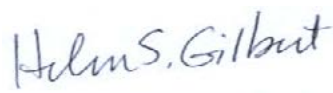
I hereby certify that I have served or will serve a true and correct copy of the foregoing document via hand delivery, facsimile, electronic mail, overnight mail, U.S. mail, or Certified Mail Return Receipt Requested on all parties on this 12th day of February 2024:

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