

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

APPLICATION BY HK REAL ESTATE DEVELOPMENT, LLC FOR TPDES PERMIT NO. WQ0016150001	§ § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
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**EXECUTIVE DIRECTOR’S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGES’
SUPPLEMENTAL PROPOSAL FOR DECISION**

I. OVERVIEW

The Executive Director of the Texas Commission on Environmental Quality (TCEQ or Commission) submits her Exceptions to the Administrative Law Judges’ Supplemental Proposal for Decision. The Executive Director maintains her position¹ that the Draft Permit should not be issued until the Executive Director completes a Technical Review to consider the evidence that was not previously included in HK Real Estate Development, LLC’s original Application regarding the proposed discharge route and to make any appropriate revisions to the Draft Permit. The Executive Director supports the Administrative Law Judges’ conclusions and recommendation in their Supplemental Proposal for Decision² that the Draft Permit does not comply with the applicable statutory and regulatory requirements and should not be issued. However, the Executive Director recommends corrections to the Proposed Order accompanying the Proposal for Decision.

II. CORRECTIONS TO PROPOSED ORDER

The Executive Director recommends the following corrections to clarify the Findings of Fact and Conclusions of Law in the Proposed Order:

a. Finding of Fact No. 20

The Executive Director recommends that the ALJs amend Finding of Fact No. 20 to insert the word “preliminary” after the word “ED” so that it reads:

¹ Executive Director’s Response to Closing Arguments, filed Dec. 4, 2024, 9 - 10.

² Supplemental Proposal for Decision on Remand, issued Feb. 3, 2025.

“The ED preliminarily determined that a total phosphorus limit was not warranted.”

The Executive Director’s determination is always preliminary until the related draft permit is issued. This point is reflected in other Findings of Fact within the “Facility and raft Permit” section of the ALJ’s Draft Order.³

b. Finding of Fact No. 51

The Executive Director recommends that the ALJs amend Finding of Fact No. 51 to insert “Bradford S. Eckhart” after “Fernando Salazar Martinez” so that it reads:

“Applicant was represented by attorneys Helen S. Gilbert, Randall B. Wilburn, and Kerrie Jo Qualtrough; Protestant was represented by attorneys Natasha J. Martin and Bobby M. Salehi; the ED was represented by attorneys Fernando Salazar Martinez, Bradford S. Eckhart, and Michael T. Parr, II; and OPIC was represented by attorney Eli Martinez.”

The Executive Director notes that Mr. Bradford S. Eckhart, who also represented the Executive Director in this proceeding⁴, was inadvertently omitted.

c. Finding of Fact No. 90

The Executive Director recommends that the ALJs amend Finding of Fact No. 90 to read:

“The 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.”

It is the policy of the Executive Director not to perform a technical review if a proposed discharge route has been incorrectly identified in a TPDES permit application, but the Executive Director notes that she has a process to remedy that

³See Proposed Order, “Facility and Draft Permit,” Finding of Fact Nos. 16–19, 3–4.

⁴See Executive Director’s Initial Disclosures Pursuant to Texas Rules of Civil Procedure 194.2(b) and 195.5(a), 4, filed Oct. 18, 2023.

type of situation. Typically, if the Executive Director's staff determines that a discharge route has been incorrectly identified while the application is undergoing a technical review, then her staff will issue a notice of deficiency. The notice of deficiency allows an applicant to amend their application by submitting documents. Here, however, the deficiency was identified during the contested case hearing process at SOAH. At the preliminary hearing, the ALJs establish SOAH's jurisdiction over an application and draft permit.⁵ Once that happens, an application is only remanded to the Executive Director when either an applicant withdraws their application⁶ or when an applicant requests it.⁷ Therefore, the Executive Director cannot perform a technical review of a draft TPDES permit while that draft permit is undergoing the contested case hearing process at SOAH.

d. Finding of Fact No. 91

The ED recommends that the ALJs amend Finding of Fact No. 91 to read:

“It is the ED’s policy that, if an applicant has identified the proposed discharge route incorrectly in a TPDES permit application 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.”

The ED notes that her staff will issue a notice of deficiency if the discharge route is incorrectly identified in a TPDES permit application. The notice of deficiency describes documents that an applicant must submit to continue with the application process. The documents required by the notice of deficiency, however, may vary depending on the specific application and the deficiency that the technical reviewer identified. Due to the fact dependent nature of a notice of deficiency, the Executive Director does not have a one-size-fits-all remedy for all applications in which the discharge route is incorrectly identified.

⁵ 30 TAC § 80.105(a)&(b).

⁶ 30 TAC § 80.25(b)&(c).

⁷ 30 TAC § 80.101.

III. CONCLUSION

The Executive Director maintains her position that the Draft Permit should not be issued until the Executive Director completes a technical review to consider the evidence that was not previously included in HK Real Estate Development, LLC's original Application regarding the proposed discharge route, and until the Executive Director has the opportunity to make any appropriate revisions to the Draft Permit which result from that technical review. The Executive Director respectfully recommends that the honorable Administrative Law Judges grant the ED's exceptions to the supplemental Proposal for Decision to accurately reflect the record and the Commission's policies and issue an Exceptions letter to that effect.

Respectfully submitted,

Texas Commission on Environmental Quality

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REPRESENTING THE EXECUTIVE DIRECTOR
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IV. CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2025, a true and correct copy of the foregoing document was served on the following by U.S. Regular Mail, Certified Mail (return receipt requested), electronic mail, hand delivery and/or facsimile at the addresses listed below.



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