

Jon Niermann, *Chairman*
Bobby Janecka, *Commissioner*
Catarina R. Gonzales, *Commissioner*
Kelly Keel, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

February 12, 2024

Honorable Katerina DeAngelo
Honorable Shelly M. Doggett
State Office of Administrative Hearings
P.O. Box 13025
Austin, Texas 78711-3022

RE: HK Real Estate
SOAH Docket 582-23-21878
TCEQ Docket 2023-0385-MWD

Dear Judges DeAngelo and Doggett:

Earlier today, February 12, 2024, the Executive Director's Response to Freasier, LLC's Exception to the Proposal for Decision on Summary Disposition was filed with incorrect footnotes 10 and 11. The original footnotes both read, "Applicant's Ex. 2; Applicant's Ex. 1, p. 4 lines 2-5 and 12-17, p.6 lines 6-7." The footnotes should have referenced Freasier, LLC's exhibit 1 and exhibit 2. This amended copy of the Executive Director's Response to Freasier, LLC's Exception to the Proposal for Decision on Summary Disposition has the corrected footnotes 10 and 11, which both read, "Protestant's Ex. 2; Protestant's Ex. 1, p. 4 lines 2-5 and 12-17, p.6 lines 6-7."

Sincerely,

A handwritten signature in cursive script that reads "Bradford S. Eckhart".

Bradford Eckhart, Staff Attorney
Environmental Law Division

Cc: Mailing list

**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 RESPONSE TO FREASIER, LLC’S EXCEPTION TO THE
PROPOSAL FOR DECISION ON SUMMARY DISPOSITION**

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

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ/Commission), is tasked with the responsibility of completing the Administrative Record for Texas Pollutant Discharge Elimination System (TPDES) applications, which Title 30 of the Texas Administrative Code (30 TAC/TCEQ rules) section (§) 80.109 instructs. The ED submits this response to an exception that Freasier LLC, (Protestant) filed on the State Office of Administrative Hearings’ (SOAH) Administrative Law Judges’ (ALJs) Proposal for Decision on Summary Disposition (PFD) on the application by HK Real Estate Development, LLC (Applicant) for new TPDES Permit No. WQ0016150001 (Draft Permit). The ED responds specifically to Exception No.1¹ to the PFD because it seeks to alter a document prepared and maintained by the ED, which would render the administrative record incomplete because of inaccuracies.

As a preliminary matter, the ED agrees with the PFD and reconfirms her preliminary position that the Applicant has satisfied all applicable statutory and regulatory requirements in its application for the Draft Permit. Because all statutory requirements from the Texas Water Code and the regulatory requirements of the TCEQ rules on the six issues referred to SOAH by the Commission² (Referred Issues) are satisfied from

¹ In Freasier LLC’s Exceptions to the Proposal for Decision, Section A is characterized here as “Exception No. 1.”

² The six referred issues were:

- 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 TSWQS;
- B. Whether the discharge route is adequately characterized according to 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 TSWQS;
- 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;

the evidentiary and administrative record (the record), the ED respectfully recommends the Commission find that the Draft Permit should be issued, all of the Protestant's exceptions be denied, and the PFD and Findings of Fact and Conclusions of Law be adopted with the inclusion of the Applicant's exception because the Notice of Application and Preliminary Decision (NAPD) was published in English on September 21, 2022, in the *Wilson County News* and in Spanish on September 15, 2022, in *El Mundo*. The ED agrees with the Applicant that Finding of Fact (FOF) No. 19 should be revised. The NAPD described by the Applicant, and present in the record,³ is for an unrelated wastewater permit, WQ0016149001. The ED respectfully suggests that the Commission accept the Applicant's proposed FOF No. 19.

I. INTRODUCTION

To briefly summarize the relevant procedural history,⁴ the Commission found Protestant to be an affected person and granted its hearing request at an open meeting on April 26, 2023. Six issues were referred to SOAH for a contested case hearing, otherwise known as a hearing on the merits (HOM). After the preliminary hearing on September 27, 2023, the Applicant filed a Motion for Summary Disposition (MSD) on November 1, 2023. A second preliminary hearing on November 17, 2023, was held to hear oral arguments on the Applicant's MSD, and on December 1, 2023, the ALJs issued an order granting the Applicant's MSD, ordering that the Applicant was entitled to summary disposition as a matter of law.

II. DISCUSSION OF PROTESTANT'S EXCEPTIONS GENERALLY

Protestant argues in its Exceptions that: its private property should be included in the description of the discharge route (Exception No. 1); the characterization of the

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.

³ Admin. Record for SOAH Docket No. 582-23-21878, TCEQ Docket No. 2023-0385-MWD, Tab B, Bates pages 00021-00024.

⁴ For a more in-depth review at the procedural history, see Executive Director's Response to Hearing Requests, Admin. Record for SOAH Docket No. 582-23-21878, TCEQ Docket No. 2023-0385-MWD, Tab C, Bates pages 0001-0016.

discharge route was a contested fact (Exception No. 2);⁵ and the evidence it presented was related to the referred issues (Exception No. 3).⁶ The ED agrees with the ALJs' PFD that 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 TSWQS; that the discharge route is adequately characterized in accordance with 30 TAC § 309.12; that the Draft Permit is protective of the requester's use and enjoyment of its property in accordance with the TSWQS; that the proposed facility is located above the 100-year flood plain and is adequately protective from inundation as required by 30 TAC Chapter 309; that the Draft Permit adequately addresses nuisance odor in accordance with 30 TAC § 309.13; and that the Applicant complied with the requirement to make a copy of the administratively complete application available for public viewing.⁷

III. DISCUSSION OF FREASIER LLC'S EXCEPTION No. 1

The ED agrees with the ALJs that the Protestant has not presented evidence to rebut the prima facie case as described in the ALJs' Order Granting the Applicant's MSD and the ALJs' PFD.⁸ The prima facie case demonstrates that the Draft Permit meets all state and federal, legal and technical requirements and that the Draft Permit, if issued, would protect human health and safety, the environment, and physical property.⁹ Protestant, in Exception No.1, claims that the proposed discharge will flow onto an approximately 80-acre basin located on Protestant's property.¹⁰ Because Protestant believes the proposed discharge will back up due to a man-made berm, exceed the bed and banks of the water course, and flow onto Protestant's property,¹¹ Protestant claims its private property should be included in the description of the discharge route. However, the Draft Permit does not grant the Applicant the right to

⁵ In Freasier LLC's Exceptions to the Proposal for Decision, Section B is characterized here as "Exception No. 2."

⁶ In Freasier LLC's Exceptions to the Proposal for Decision, Section C is characterized here as "Exception No. 3."

⁷ Proposal for Decision on Summary Disposition, SOAH Docket No. 582-23-21878, TCEQ Docket No. 2023-0385-MWD (Jan. 12, 2024), p. 15.

⁸ Order Granting Motion for Summary Disposition, SOAH Docket No. 582-23-21878, TCEQ Docket No. 2023-0385-MWD (Dec. 1, 2023); Proposal for Decision on Summ. Disposition, p. 14.

⁹ Tex. Gov't Code § 2003.047(i-1).

¹⁰ Protestant's Ex. 2; Protestant's Ex. 1, p. 4 lines 2-5 and 12-17, p.6 lines 6-7.

¹¹ Protestant's Ex. 2; Protestant's Ex. 1, p. 4 lines 2-5 and 12-17, p.6 lines 6-7.

use private or public property for the conveyance of wastewater along the discharge route.¹² Neither does the Draft Permit authorize the Applicant to invade any personal or property rights nor violate any federal, state, or local laws or regulations. The Draft Permit only authorizes discharges to the discharge route as contemplated in its terms and conditions.¹³ In fact, the Draft Permit negates the need for Protestant's Exception No. 1 because, if issued, the Draft Permit does not limit the ability of nearby landowners to seek common law remedies for trespass, nuisance, or other causes of action in response to activities that may, or actually do, result in injury or adverse effects on human health or welfare, animal life, vegetation, or property, or that may, or actually do, interfere with the normal use and enjoyment of animal life, vegetation, or property. As established by the prima facie case, the discharge route is adequately characterized in accordance with all applicable rules and regulations, including 30 TAC § 309.12.

As discussed above and as explained in the ALJs' Order granting the Applicant's MSD and PFD, Protestant did not present evidence rebutting the prima facie demonstration on any of the six referred issues in this proceeding. Moreover, as Protestant's evidence does not demonstrate that the Draft Permit, and by extension the description of the discharge route, fails to meet a state or federal, legal or technical requirement, Protestant did not present any evidence to substantiate its underlying arguments for any of Protestant's exceptions, especially Exception No. 1. Because Protestant has not presented any evidence to rebut the prima facie case, the Commission should not accept Protestant's proposed FOF Nos. 3, 31, 32, and 33.

IV. Conclusion

In Exception No.1, Protestant seeks to alter the description of the discharge route in the Draft Permit because Protestant believes the proposed discharge will flood onto its property before it reaches the San Antonio River. However, Protestant has not offered any evidence that rebuts the prima facie case that the discharge route is appropriately characterized in accordance with the applicable rules, including 30 TAC § 309.12.

¹² Admin. Record for SOAH Docket No. 582-23-21878, TCEQ Docket No. 2023-0385-MWD, Tab C, Bate page 00023.

¹³ *Id.*

The ED respectfully recommends the Commission find that the Draft Permit should be issued, that all of Protestant's exceptions be denied, and that the PFD and Findings of Fact and Conclusions of Law with the inclusion of the Applicant's exception referenced above, be adopted.

Respectfully submitted,

Texas Commission on Environmental Quality

Kelly Keel, Executive Director

Erin Chancellor, Director
Office of Legal Services

Charmaine Backens, Deputy Director
Environmental Law Division



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REPRESENTING THE EXECUTIVE DIRECTOR OF
THE TEXAS COMMISSION ON
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V. CERTIFICATE OF SERVICE

I certify that on February 12, 2024, the “Executive Director’s Responses to Exceptions to the PFD” for Permit No. WQ0016150001 was filed with the State Office of Administrative Hearings and the Texas Commission on Environmental Quality’s Office of the Chief Clerk and served or will be served a true and correct copy of the foregoing document via hand delivery, facsimile, electronic mail, overnight mail, or U.S. mail on all parties.



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Fernando Salazar Martinez, *Staff Attorney*
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Bradford S. Eckhart, *Staff Attorney*
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For the Office of Public Interest Counsel:

Eli Martinez - eli.martinez@tceq.texas.gov

For the Protestants:

For Freasier LLC
Clint Buck - cbuck@branscomblaw.com
Mary Adair - madair@branscomblaw.com

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¹³ *Id.*

The ED respectfully recommends the Commission find that the Draft Permit should be issued, that all of Protestant's exceptions be denied, and that the PFD and Findings of Fact and Conclusions of Law with the inclusion of the Applicant's exception referenced above, be adopted.

Respectfully submitted,

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I certify that on February 12, 2024, the “Executive Director’s Responses to Exceptions to the PFD” for Permit No. WQ0016150001 was filed with the State Office of Administrative Hearings and the Texas Commission on Environmental Quality’s Office of the Chief Clerk and served or will be served a true and correct copy of the foregoing document via hand delivery, facsimile, electronic mail, overnight mail, or U.S. mail on all parties.



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