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**

EXECUTIVE DIRECTOR'S REPLY TO EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGES' SUPPLEMENTAL PROPOSAL FOR DECISION

I. OVERVIEW

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) submits her Reply to Exceptions to the Administrative Law Judges' Supplemental Proposal for Decision. The Executive Director maintains her position[1] 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 (Applicant) 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 Decision[2] that the Draft Permit does not comply with the applicable statutory and regulatory requirements and should not be issued. Nonetheless, the Executive Director provides this reply to Applicant's Exceptions to the Supplemental Proposal for Decision (Applicant's Exceptions).[3]

II. REPLY TO APPLICANT'S EXCEPTIONS

Applicant's Exceptions rehash many of the same arguments that Applicant has previously made throughout the course of this proceeding, which were considered and rejected at length in the ALJs SPFD.[4] For example, Applicant reiterates its insistence

[1] Executive Director's Response to Closing Arguments, filed Dec. 4, 2024, 9 – 10.
[2] Supplemental Proposal for Decision on Remand (SPFD), issued Feb. 3, 2025.
[3] HK Real Estate Development, LLC's Exceptions to the Supplemental Proposal for Decision, filed Feb. 24, 2025.
[4] *See* SPFD, §§ IV.A.,1, IV.A.4, IV.A.8, at 20, 36, 45; IV.B.1-2, 58-59; IV.C.1, IV.C.5-6, at 63, 76, 82; IV.D.1, IV.D.4, IV.D.6, at 89, 92, 94; and IV.E.1, IV.E.5-6, at 96, 104.

that both *Domel v. City of Georgetown* and *Hoefs v. Short* support the issuance of the Draft Permit and contends that the ED misunderstands *Hoefs*.[5] However, Applicant fails to explain why the ED's interpretation of the other *Hoefs* factors is either incorrect or inapplicable to this case.[6] Neither does Applicant explain how the *Domel* court's implementation of the *Hoefs* factors to a non-water rights case is distinguishable from the ED's argument.[7]

Applicant offers a new argument, however, that comes in two parts: First, that the original representation of the flow path is a minor and correctable error;[8] and second, that by filing Applicant's Exhibit 56 on October 15, 2024, Applicant made a permissible minor amendment to its application under title 30 Tex. Admin. Code §§ 281.23(a) and 305.62.[9]

Regarding amendments, 30 Tex. Admin. Code § 281.23(a) states, in part:

> No amendments to an application which would constitute a major amendment under the terms of §305.62 of this title (relating to Amendment) can be made by the applicant after the chief clerk has issued notice of the application and draft permit, unless new notice is issued which includes a description of the proposed amendments to the application.[10]

Also, 30 TAC § 305.62(c) defines major and minor amendments as follows:

> (1) A major amendment is an amendment that changes a substantive term, provision, requirement, or a limiting parameter of a permit.[11]
> (2) A minor amendment is an amendment to improve or maintain the permitted quality or method of disposal of waste, or injection of fluid if there is neither a significant increase of the quantity of waste or fluid to be discharged or injected nor a material change in the pattern or place of discharge.[12]

[5] *See* Applicant's Exceptions, at 7–13, and n. 53, at 11; *see also* HK Real Estate Development, LLC's Closing Brief and Proposed Order, 5–9.
[6] *See id.*; *see also* Executive Director's Response to Closing Arguments, 3 – 7.
[7] The ALJs have previously addressed the Applicant's and ED's arguments regarding *Hoefs* and *Domel* in the SPFD, § IV.A.4-5 and IV.A.8, at 37 – 43, 49 – 52.
[8] Applicant's Exceptions, Exhibit A, Finding of Fact No. 60, at 1.
[9] Applicant's Exceptions, Exhibit A, Finding of Fact Nos. 61 and 62, at 2.
[10] 30 TEX. ADMIN. CODE § 281.23(a).
[11] 30 TEX. ADMIN. CODE § 305.62(c)(1).
[12] 30 TEX. ADMIN. CODE § 305.62(c)(2); *see also* §§ 305.62(a) (relating to amendments generally), 305.62(b) (relating to application for amendments), 305.62(c)(3) (relating to minor modifications for TPDES permits), *and* 305.62(d) (relating to good cause for amendments).

Here, though, the pattern of discharge has changed. The discharge path does not follow the fence line southwest of the impoundment to the San Antonio River, but instead follows a meandering path to the southeast, across Protestant's property.[13] Changing the description of the proposed discharge route at the impoundment from southwest to southeast would constitute a material change because the discharge route is a substantive term of the Draft Permit.[14] Thus, even if Applicant's Exhibit 56 were a valid amendment to the application,[15] it would not be classified as a minor amendment under 30 Tex. Admin. Code § 305.62(c).[16] So, contrary to Applicant's claim,[17] the ED is uncertain whether the terms of the current Draft Permit are appropriate for the proposed discharge path as shown in Applicant's Exhibit 56.[18]

For these reasons, the Executive Director recommends the ALJs deny adopting the Applicant's proposed corrections to the Proposed Order. The Executive Director also recommends the ALJs adopt the Executive Director's proposed corrections to the Proposed Order as described in her previous filing.[19]

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 decline to adopt the Applicant's proposed corrections contained in their Exceptions; instead, the ED recommends the ALJs issue a Revised Supplemental Proposal for Decision adopting the Executive Director's recommended corrections as noted in her previously filed Exceptions.[20]

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[13] *See* SPFD, § IV.A.1, at 20 – 22; n. 62, at 21; § IV.A.8, at 54 – 58.
[14] *See* 30 TEX. ADMIN. CODE § 305.62(c)(1)-(2); *see also* SPFD, § IV.A.1, at 20 – 22, *and* n. 62, at 21.
[15] But see supra n. 16.
[16] *See supra* n. 16.
[17] Applicant's Exceptions, Exhibit A, Finding of Fact No. 96, at 5.
[18] Executive Director's Response to Closing Arguments, 8 – 10; *see also* SPFD, § IV.C.2 and IV.C.6, 68 – 72, 85 – 86.
[19] Executive Director's Exceptions to the ALJs' SPFD, filed on Feb. 24, 2025.
[20] Id.

Respectfully submitted,

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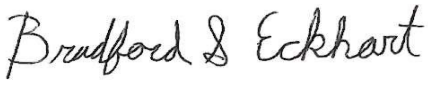

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IV. CERTIFICATE OF SERVICE

I hereby certify that on March 5, 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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