

State Office of Administrative Hearings

Kristofer S. Monson
Chief Administrative Law Judge

January 12, 2024

Eli Martinez
Fernando Martinez
Michael Parr
Helen S. Gilbert
Clint Buck

VIA EFILE TEXAS

RE: SOAH Docket Number 582-23-21878; Texas Commission on Environmental Quality Docket No. 2023-0385-MWD; Application by HK Real Estate Development, LLC for TPDES Permit No. WQ0016150001

Dear Parties:

Please find attached a Proposal for Decision on Summary Disposition (PFD) in this case. Any party may, within 20 days after the date of issuance of the PFD, file exceptions or briefs. Any replies to exceptions, briefs, or proposed findings of fact shall be filed within 30 days after the date of issuance of the PFD. 30 Tex. Admin. Code § 80.257.

This matter has been designated **TCEQ Docket No. 2023-0385-MWD; SOAH Docket No. 582-23-21878**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs, and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at <http://www14.tceq.texas.gov/epic/eFiling/> or by filing an

original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

CC: Service List

**BEFORE THE
STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**APPLICATION BY HK REAL ESTATE DEVELOPMENT, LLC
FOR NEW TPDES PERMIT NO. WQ0016150001**

PROPOSAL FOR DECISION ON SUMMARY DISPOSITION

HK Real Estate Development, LLC (Applicant) filed an application (Application) with the Texas Commission on Environmental Quality (Commission or TCEQ) for a new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0016150001 (Draft Permit) to authorize an increase in the discharge of treated domestic wastewater from a proposed plant site (Facility) located in Wilson County, Texas.

Protestant Freasier, LLC (Freasier) opposed the Application. The Commission determined that Freasier was an affected person, granted Freasier's hearing request, and referred the matter to the State Office of Administrative Hearings (SOAH) for a hearing on six issues:

- (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 (TSWQS);
- (B) whether the discharge route is adequately characterized in accordance with 30 Texas Administrative Code section 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 Texas Administrative Code Chapter 309;
- (E) whether the draft permit adequately addresses nuisance odor in accordance with 30 Texas Administrative Code section 309.13; and
- (F) whether the Applicant complied with the requirement to make a copy of the administratively complete application available for public viewing in the county in which the Facility is located in accordance with 30 Texas Administrative Code section 39.405(g).

On October 25, 2023, Freasier pre-filed its testimony and exhibits. On November 1, 2023, Applicant filed a Motion for Summary Disposition (Motion) requesting a Proposal for Decision (PFD) in its favor as a matter of law. Freasier filed a response to the Motion on November 15, 2023. After considering the pleadings, evidence, and applicable law, on December 1, 2023, the Administrative Law Judges (ALJs) granted the Motion due to Freasier's failure to present evidence rebutting

the prima facie demonstration on any of the referred issues;¹ and the ALJs find the Commission should issue the Draft Permit without alterations.

I. NOTICE, JURISDICTION, AND PROCEDURAL HISTORY

Matters of notice and jurisdiction were undisputed; therefore, those matters are addressed in the Findings of Fact and Conclusions of Law in the Proposed Order attached to this PFD without further discussion here.

Applicant filed the Application on April 20, 2022. The Executive Director (ED) of the Commission determined the Application was administratively complete on June 27, 2022, and technically complete on August 25, 2022, and prepared the Draft Permit. On June 16, 2023, the Commission referred the Application to SOAH for a contested case hearing.

On September 27, 2023, a preliminary hearing was convened via videoconference by SOAH ALJs Katerina DeAngelo and Shelly M. Doggett. The administrative record and jurisdictional documents were admitted into evidence² and the ALJs noted jurisdiction. The following appeared and were admitted as parties: Applicant, represented by attorneys Helen S. Gilbert, Randall W. Wilburn, and Kerrie Qualtrough; Freasier, represented by attorney Clint Buck; the ED, represented by attorneys Fernando Martinez and Michael Parr; and the TCEQ Office of Public Interest Counsel, represented by attorney Eli Martinez.

¹ See Order Granting Motion for Summary Disposition (December 1, 2023) (Order Granting Motion).

² Applicant Ex. 1.

A second preliminary hearing was convened via videoconference on November 17, 2023, at which the ALJs heard oral argument on the Motion. Following the hearing, Applicant filed a reply brief on November 27, 2023, in support of the Motion. On December 1, 2023, the ALJs issued the Order Granting Motion; and the record closed on that same date.

II. APPLICABLE LAW, BURDEN OF PROOF, AND PRIMA FACIE CASE

Applicant, as the moving party, bears the burden of proof by a preponderance of the evidence.³ The Application was filed after September 1, 2015, and the Commission referred it to SOAH under Texas Water Code section 5.556, which governs referral of environmental permitting cases to SOAH.⁴ Therefore, this case is subject to Texas Government Code section 2003.047(i-1)-(i-3), as enacted in 2015,⁵ which provides:

(i-1) In a contested case regarding a permit application referred under Section 5.556 [of the] Water Code, the filing with [SOAH] of the application, the draft permit prepared by the executive director of the commission, the preliminary decision issued by the executive director, and other sufficient supporting documentation in the administrative record of the permit application establishes a prima facie demonstration that:

(1) the draft permit meets all state and federal legal and technical requirements; and

³ 30 Tex. Admin. Code § 80.17(a); 1 Tex. Admin. Code § 155.427.

⁴ Tex. Water Code §§ 5.551(a), .556.

⁵ Acts 2015, 84th Leg., R.S., ch. 116 (S.B. 709), §§ 1 and 5, eff. Sept. 1, 2015.

- (2) a permit, if issued consistent with the draft permit, would protect human health and safety, the environment, and physical property.
- (i-2) A party may rebut a demonstration under Subsection (i-1) by presenting evidence that:
 - (1) relates to . . . 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.
- (i-3) If in accordance with Subsection (i-2) a party rebuts a presumption established under Subsection (i-1), the applicant and the executive director may present additional evidence to support the draft permit.⁶

Although this law creates a presumption, sets up a method for rebutting that presumption, and shifts the burden of production on that rebuttal, it does not change the underlying burden of proof. The burden of proof remains with Applicant to establish by a preponderance of the evidence that the Application would not violate applicable requirements and that a permit, if issued consistent with the draft permit, would protect human health and safety, the environment, and physical property.⁷

⁶ *Accord* 30 Tex. Admin. Code § 80.17(c).

⁷ 30 Tex. Admin. Code § 80.17(a), (c).

In this case, the Application, the Draft Permit, and the other materials listed in Texas Government Code section 2003.047(i-1), which are collectively referred to as the prima facie demonstration, were offered and admitted into the record at the preliminary hearing on September 27, 2023.⁸

Summary disposition of a contested case 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.⁹

III. SUMMARY DISPOSITION EVIDENCE

Citing to the administrative record, Applicant presented uncontested summary disposition evidence establishing the following relevant facts:

New TPDES Permit No. WQ0016150001 would authorize discharge from the Facility of treated domestic wastewater at a daily average flow not to exceed 0.06 million gallons per day (MGD) in the Interim I Phase, 0.12 MGD in the

⁸ See Applicant Ex. 1.

⁹ 30 Tex. Admin. Code § 80.137(c).

Interim II Phase, and 0.18 MGD in the Final Phase.¹⁰ The Facility, which has not been constructed, will be located approximately 2,800 feet southeast of the intersection of County Road 320 and State Highway 181 North in Wilson County, Texas.¹¹ Applicant proposes to build the Facility to serve the Richter Ranch subdivision.¹²

The Facility would be an activated sludge process plant operated in the conventional mode. Treatment units in the Interim I Phase will include a mechanical auger screen, an anoxic aerobic tank, an aeration tank, a Membrane Bioreactor (MBR) basin, an aerobic digester, and a chlorine contact chamber. Interim II Phase treatment units will include two mechanical auger screens, two anoxic aerobic tanks, two aeration tanks, two MBR basins, two aerobic digesters, and two chlorine contact chambers. Treatment units in the Final Phase will include three mechanical auger screens, three anoxic aerobic tanks, three aeration tanks, three MBR basins, three aerobic digesters, and three chlorine contact chambers.¹³

Sludge generated from the facility would be hauled by a registered transporter. The Draft Permit authorizes the disposal of sludge at a TCEQ-authorized land application site, co-disposal landfill, wastewater treatment facility, or facility that further processes sludge.¹⁴

¹⁰ Applicant Ex. 1 at Bates APP000130, APP000132, APP000136.

¹¹ Applicant Ex. 1 at Bates APP000004, APP000130, APP000135.

¹² Applicant Ex. 1 at Bates APP000130, APP000240.

¹³ Applicant Ex. 1 at Bates APP000130.

¹⁴ Applicant Ex. 1 at Bates APP000130, APP000132.

The treated effluent will be discharged to Sandpit Creek, then to the Upper San Antonio River in Segment No. 1911 of the San Antonio River Basin.¹⁵ The unclassified receiving water use is limited aquatic life for Sandpit Creek.¹⁶ The designated uses for Segment No. 1911 are primary contact recreation and high aquatic life use.¹⁷ The ED found that the effluent limitations in the Draft Permit will maintain and protect the existing instream uses.¹⁸

In accordance with 30 Texas Administrative Code section 307.5 and the TCEQ Procedures to Implement the TSWQS, an antidegradation review of the receiving waters was performed. A Tier 1 antidegradation review has preliminarily determined that existing water quality uses will not be impaired by this permit action and numerical and narrative criteria to protect existing uses will be maintained.¹⁹ A Tier 2 review has preliminarily determined that no significant degradation of water quality is expected in the Upper San Antonio River, which has been identified as having high aquatic life uses, and that existing uses will be maintained and protected.²⁰ The Facility is not located in the Coastal Management Program boundary.²¹

¹⁵ Applicant Ex. 1 at Bates APP000135, APP000267-68.

¹⁶ Applicant Ex. 1 at Bates APP000114, APP000131.

¹⁷ Applicant Ex. 1 at Bates APP000114, APP000131.

¹⁸ Applicant Ex. 1 at Bates APP000131, APP000176.

¹⁹ Applicant Ex. 1 at Bates APP000131, APP000175, APP000200.

²⁰ Applicant Ex. 1 at Bates APP000131, APP000175, APP000200.

²¹ Applicant Ex. 1 at Bates APP000132, APP000170.

Effluent limitations for the conventional effluent parameters (that is, Five-Day Biochemical Oxygen Demand or Five-Day Carbonaceous Biochemical Oxygen Demand, Ammonia Nitrogen, etcetera) are based on stream standards and waste load allocations for water-quality limited streams as established in the TSWQS and the State of Texas Water Quality Management Plan (WQMP).²² Staff for the ED reviewed the effluent limitations in the Draft Permit for consistency with the WQMP.²³

The effluent limitations in all phases of the Draft Permit, based on a 30-day average, are 5.0 milligrams per liter (mg/l) five-day carbonaceous biochemical oxygen demand, 5.0 mg/l total suspended solids, 2.0 mg/l ammonia-nitrogen, 63 colony forming units (CFU) or most probable number (MPN) of *E. coli* per 100 milliliters (ml), and 5.0 mg/l minimum dissolved oxygen.²⁴ The effluent shall contain a total chlorine residual of at least 1.0 mg/l and shall not exceed a total chlorine residual of 4.0 mg/l after a detention time of at least 20 minutes based on peak flow.²⁵

²² Applicant Ex. 1 at Bates APP000131, APP000176, APP000201. The proposed effluent limitations are not contained in the approved WQMP. However, these limits will be included in the next WQMP update.

²³ Applicant Ex. 1 at Bates APP000131, APP000176, APP000201.

²⁴ Applicant Ex. 1 at Bates APP000132, APP000136-38, APP000176, APP000201.

²⁵ Applicant Ex. 1 at Bates APP000132, APP000136-38, APP000176, APP000201.

The ED found that the end-of-pipe compliance with pH limits between 6.0 and 9.0 standard units reasonably assures instream compliance with the TSWQS for pH when the discharge authorized is from a minor facility.²⁶

The ED further found that the discharge from the Facility is not expected to have an effect on any federal endangered or threatened aquatic or aquatic-dependent species or proposed species or their critical habitat.²⁷ This determination is based on the United States Fish and Wildlife Service's biological opinion on the State of Texas authorization of the TPDES.²⁸

Segment No. 1911 is currently listed on the State's inventory of impaired and threatened waters (the 2020 Clean Water Act section 303(d) list).²⁹ The listings are for impaired fish community from just upstream of the confluence with Sixmile Creek to the upper end of the segment.³⁰ Segment No. 1911 is also listed for impaired macrobenthic community from just upstream of the confluence with Sixmile Creek to just upstream of the confluence with San Pedro Creek.³¹ The Facility will be discharging into a segment which is located downstream from the

²⁶ Applicant Ex. 1 at Bates APP000131, APP000136-38, APP000176, APP000201.

²⁷ Applicant Ex. 1 at Bates APP000131, APP000177, APP000202.

²⁸ Applicant Ex. 1 at Bates APP000131, APP000177, APP000202.

²⁹ Applicant Ex. 1 at Bates APP000131, APP000176, APP000201.

³⁰ Applicant Ex. 1 at Bates APP000131, APP000176, APP000201.

³¹ Applicant Ex. 1 at Bates APP000131, APP000176, APP000201.

impaired segments and will, therefore, not contribute to the impairment of the segment.³²

Total Maximum Daily Load (TMDL) Project No. 34D has been approved for this segment.³³ On August 8, 2007, TCEQ adopted TMDLs for Bacteria in the San Antonio Area, Project No. 34D.³⁴ There are several municipal point sources in the watershed.³⁵ The TMDL calculation relies on a 63 CFU/100 ml waste load allocation for the wastewater treatment facility.³⁶ Effluent limits for these facilities should be set at 63 CFU/100 ml.³⁷ Consequently, a concentration-based effluent limitation for *E. coli* of 63 CFU or MPN per 100 ml has been included in the Draft Permit.³⁸

The ED determined that the Draft Permit fully complies with all statutory and regulatory requirements, including the TSWQS, ensuring that the proposed discharge is protective of human health, water quality, animal and aquatic life, and the environment.³⁹ Further, the ED found that if the surface water quality is

³² Applicant Ex. 1 at Bates APP000131, APP000176, APP000201.

³³ Applicant Ex. 1 at Bates APP000131.

³⁴ Applicant Ex. 1 at Bates APP000131. The Environmental Protection Agency approved the TMDL on April 21, 2009. This document describes a project developed to address water quality impairments related to bacteria for three streams located in and around the City of San Antonio: Salado Creek, Segment 1910; Walzem Creek, Segment 1910A; and the Upper San Antonio River, Segment 1911. Applicant Ex. 1 at Bates APP000131-32.

³⁵ Applicant Ex. 1 at Bates APP000132.

³⁶ Applicant Ex. 1 at Bates APP000132.

³⁷ Applicant Ex. 1 at Bates APP000132.

³⁸ Applicant Ex. 1 at Bates APP000131-32, APP000176-77, APP000201-02.

³⁹ Applicant Ex. 1 at Bates APP000130, APP000177, APP000180, APP000207.

protected, groundwater quality in the vicinity will not be impacted by the discharge.⁴⁰ Thus, the limits of the Draft Permit are intended to maintain the existing uses, preclude degradation of the surface waters, and protect against degradation of groundwater.⁴¹

Applicant is required to ensure that the Facility and all of its systems of collection, treatment, and disposal are properly operated and maintained.⁴² The design criteria for chemical disinfection by chlorine must be observed, and the Draft Permit requires the treated effluent to be disinfected prior to discharge in a manner conducive to protect both the public health and aquatic life.⁴³

The TSWQS require that discharges not cause surface waters to be toxic to animal life.⁴⁴ Likewise, the ED determined that the effluent limits of the Draft Permit will protect the uses and quality of the waterbodies in the route of the proposed discharge for the benefit of the animals that interact with those waterbodies.⁴⁵

The proposed facility will be located above the 100-year flood plain.⁴⁶ For additional protection, the Draft Permit includes Other Requirement No. 4, which

⁴⁰ Applicant Ex. 1 at Bates APP000207.

⁴¹ Applicant Ex. 1 at Bates APP000207.

⁴² Applicant Ex. 1 at Bates APP000149, APP000181, APP000206.

⁴³ Applicant Ex. 1 at Bates APP000181, APP000206.

⁴⁴ Applicant Ex. 1 at Bates APP000186, APP000211.

⁴⁵ Applicant Ex. 1 at Bates APP000186, APP000211.

⁴⁶ Applicant Ex. 1 at Bates APP000185-86, APP000210-11, APP000263.

requires that Applicant provide facilities for the protection of its wastewater treatment facility from a 100-year flood.⁴⁷ The Draft Permit further requires Applicant to comply with the requirements of 30 Texas Administrative Code sections 309.13(a) through (d).⁴⁸ In addition, by ownership of the required buffer zone area, Applicant shall comply with the requirements of 30 Texas Administrative Code section 309.13(e).⁴⁹

IV. ANALYSIS AND RECOMMENDATIONS

In response to Applicant’s Motion, Freasier conceded that summary disposition was appropriate for Issues D, E, and F, though Freasier argued that Applicant misrepresented the discharge route in the Application and, therefore, Applicant is not entitled to summary disposition on Issues A, B, and C.

Freasier’s prefiled testimony focused on the discharge route through its private property, whether the discharge route is continuous, and whether the discharge route in its entirety constitutes water in the state. Freasier argued that the entire discharge route is not “water in the state” because Sandpit Creek terminates on Freasier’s private property before reaching the San Antonio River, meaning the draft permit authorizing Applicant to discharge waste onto the property would

⁴⁷ Applicant Ex. 1 at Bates APP000170. TCEQ has no statutory authority to consider flooding or its effects in the wastewater permitting process. *See* 30 Tex. Admin. Code ch. 309, subch. B (Location Standards). The scope of TCEQ’s regulatory jurisdiction does not limit the ability of nearby landowners to seek relief from a court for trespass, nuisance, or other causes of action in response to activities that may or do interfere with the use and enjoyment of their property or result in injury or adverse effects on human health or welfare, animal life, vegetation, or property. Applicant Ex. 1 at Bates APP000186-87, APP000203-04, APP000211-12.

⁴⁸ Applicant Ex. 1 at Bates APP000132, APP000170.

⁴⁹ Applicant Ex. 1 at Bates APP000132, APP000170.

authorize a trespass. Freasier contended that the Application should have included its private property for proper evaluation of whether the Draft Permit is adequately protective of water quality and whether Freasier's private property would be affected by the permit since the property is used as a residence and office, farmland, and for raising and breeding cattle. Freasier also argued that, because the watercourse is purportedly not continuous, it raises an issue of soil conditions, including the topography of the land that causes the flow of effluent on its property.

The ALJs found that Freasier's arguments about whether the discharge route was misrepresented in the Application, whether the entire discharge route is "water in the state," and whether discharge could result in a trespass on Protestant's property were not issues referred to SOAH for a contested case hearing.⁵⁰ Moreover, no party requested that the ALJs consider any additional issues. The ALJs further found that nothing in Freasier's prefiled testimony and exhibits rebutted the prima facie demonstration that the Draft Permit is adequately protective of water quality; the discharge route is adequately characterized in accordance with 30 Texas Administrative Code section 309.12; and the Draft Permit is protective of the requester's use and enjoyment of its property in accordance with the TSWQS.⁵¹

The ALJs found that there is no genuine issue as to any material fact regarding the six issues referred to SOAH because no party presented any evidence to rebut


⁵⁰ See Order Granting Motion. Despite the ED's suggestion in its Response to Hearing Requests that the Commission refer to SOAH the issue of "[w]hether the entire discharge route in the draft permit is water in the state," the Commission did not do so. Applicant Ex. 1 at Bates APP000005, APP000122. Nor did the Commission refer any issues relating to the completeness of the application or trespass. Applicant Ex. 1 at Bates APP000005.


⁵¹ See Order Granting Motion.

the prima facie presumption that the Draft Permit meets all applicable legal and technical requirements, and, if issued, would be adequately protective of public and environmental health and safety.⁵² Therefore, the uncontroverted summary disposition evidence shows 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; the discharge route is adequately characterized in accordance with 30 Texas Administrative Code section 309.12; the Draft Permit is protective of the requester's use and enjoyment of its property in accordance with the TSWQS; the proposed facility is located above the 100-year flood plain and is adequately protective from inundation as required by 30 Texas Administrative Code Chapter 309; the Draft Permit adequately addresses nuisance odor in accordance with 30 Texas Administrative Code section 309.13; and Applicant complied with the requirement to make a copy of the administratively complete application available for public viewing.

The ALJs recommend that the Commission adopt the attached proposed order containing Findings of Fact and Conclusions of Law and issue the Draft Permit to Applicant. All requests for findings of fact that are not included in the Proposed Order are denied.

Signed January 12, 2024.


Katerina DeAngelo
Administrative Law Judge


Shelly M. Doggett
Administrative Law Judge

⁵² See Order Granting Motion.



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

**AN ORDER
GRANTING THE APPLICATION BY
HK REAL ESTATE DEVELOPMENT, LLC
FOR NEW TPDES PERMIT NO. WQ0016150001
IN WILSON COUNTY, TEXAS;
SOAH DOCKET NO. 582-23-21878;
TCEQ DOCKET NO. 2023-0385-MWD**

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the application of HK Real Estate Development, LLC (Applicant) for a new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0016150001 in Wilson County, Texas. A Proposal for Decision (PFD) was presented by Katerina DeAngelo and Shelly M. Doggett, Administrative Law Judges (ALJs) with the State Office of Administrative Hearings (SOAH), after granting Applicant's Motion for Summary Disposition on December 1, 2023. After considering the PFD, the Commission makes the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

Application

1. Applicant filed its application (Application) for a new TPDES permit with TCEQ on April 20, 2022.

2. The Application requested authorization to discharge treated domestic wastewater from a proposed plant site (Facility) to be located approximately 2,800 feet southeast of the intersection of County Road 320 and State Highway 181 North in Wilson County, Texas.
3. The treated effluent will be discharged to Sandpit Creek, then to the Upper San Antonio River in Segment No. 1911 of the San Antonio River Basin. The unclassified receiving water use is limited aquatic life for Sandpit Creek. The designated uses for Segment No. 1911 are primary contact recreation and high aquatic life use.
4. TCEQ's Executive Director (ED) declared the Application administratively complete on June 27, 2022, and technically complete on August 25, 2022.
5. The ED completed the technical review of the Application, prepared a draft permit (Draft Permit), and made the Draft Permit available for public review and comment.

The Draft Permit

6. The Draft Permit would authorize a discharge of treated domestic wastewater at a daily average flow not to exceed 0.06 million gallons per day (MGD) in the Interim I Phase, 0.12 MGD in the Interim II Phase, and 0.18 MGD in the Final Phase.
7. The Facility would be an activated sludge process plant operated in the conventional mode.
8. The Facility would have treatment units including a mechanical auger screen, an anoxic aerobic tank, an aeration tank, a Membrane Bioreactor (MBR) basin, an aerobic digester, and a chlorine contact chamber in the Interim I Phase. In the Interim II Phase, treatment units will include two mechanical auger screens, two anoxic aerobic tanks, two aeration tanks, two MBR basins, two aerobic digesters, and two chlorine contact chambers. Treatment units in the Final Phase will include three mechanical auger screens, three anoxic aerobic tanks, three aeration tanks, three MBR basins, three aerobic digesters, and three chlorine contact chambers. The Facility has not been constructed.

9. The effluent limitations in all phases of the Draft Permit, based on a 30-day average, are 5.0 milligrams per liter (mg/l) five-day carbonaceous biochemical oxygen demand, 5.0 mg/l total suspended solids, 2.0 mg/l ammonia-nitrogen, 63 colony forming units or most probable number of *E. coli* per 100 milliliters, and 5.0 mg/l minimum dissolved oxygen. The effluent shall contain a total chlorine residual of at least 1.0 mg/l and shall not exceed a total chlorine residual of 4.0 mg/l after a detention time of at least 20 minutes based on peak flow.
10. A Tier 1 antidegradation review has preliminarily determined that existing water quality uses will not be impaired by this permit action, and numerical and narrative criteria to protect existing uses will be maintained.
11. A Tier 2 antidegradation review has preliminarily determined that no significant degradation of water quality is expected in the Upper San Antonio River, which has been identified as having high aquatic life uses; and that existing uses will be maintained and protected.
12. The end-of-pipe compliance with pH limits between 6.0 and 9.0 standard units reasonably assures instream compliance with the Texas Surface Water Quality Standards (TSWQS) for pH when the discharge authorized is from a minor facility.
13. The discharge from the Facility is not expected to have an effect on any federal endangered or threatened aquatic, or aquatic-dependent species or proposed species, or their critical habitat.
14. Segment No. 1911 of the San Antonio River Basin is currently listed on the State's inventory of impaired and threatened waters. The listings are for impaired fish community from just upstream of the confluence with Sixmile Creek to the upper end of the segment. Segment No. 1911 is also listed for impaired macrobenthic community from just upstream of the confluence with Sixmile Creek to just upstream of the confluence with San Pedro Creek.
15. The Facility will be discharging into a stream segment which is located downstream of the impaired segments; therefore, the Facility will not contribute to the impairment of listed segments.
16. The proposed facility will be located above the 100-year flood plain.

17. The Draft Permit requires Applicant to comply with the requirements of 30 Texas Administrative Code section 309.13(a) and to provide facilities for the protection of its wastewater treatment facility from a 100-year flood.

Notice and Jurisdiction

18. The Notice of Receipt of the Application and Intent to Obtain a Water Quality Permit was published on July 6, 2022, in the *Wilson County News*, in English; and, on July 7, 2022, in *El Mundo* in Spanish.
19. The Notice of Application and Preliminary Decision was published on September 21, 2022, in the *Wilson County News*, in English; on September 18, 2022, in the *Seguin Gazette*, in English; and on September 15, 2022, in *El Mundo*, in Spanish.
20. The comment period for the Application closed on October 21, 2022.
21. TCEQ received a timely hearing request from Freasier, LLC (Protestant) based upon issues raised during the public comment period.
22. TCEQ issued its Response to Comments on December 22, 2022.
23. On April 26, 2023, the Commission considered the hearing request at its open meeting and, on May 2, 2023, issued an Interim Order, directing that the following six issues be referred to SOAH, denying all issues not referred, and setting the maximum duration of the hearing at 180 days from the date of the preliminary hearing until the date the PFD is issued by SOAH:
 - 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 in accordance with 30 Texas Administrative Code section 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 Texas Administrative Code Chapter 309;
 - E) Whether the draft permit adequately addresses nuisance odor in accordance with 30 Texas Administrative Code section 309.13; and
 - F) Whether the Applicant complied with the requirement to make a copy of the administratively complete application available for public viewing.
24. On August 23, 2023, notice of the preliminary hearing was published in English, in the *Wilson County News*; and, on August 24, 2023, notice of the preliminary hearing was published in Spanish, in *El Mundo*. The notices included the time, date, and place of the hearing, as well as the matters asserted, in accordance with the applicable statutes and rules.

Proceedings at SOAH

25. On September 27, 2023, a preliminary hearing was convened in this case via videoconference by SOAH ALJs DeAngelo and Doggett. The following appeared and were admitted as parties: Applicant, represented by attorneys Helen S. Gilbert, Randall W. Wilburn, and Kerrie Qualtrough; Protestant, represented by attorney Clint Buck; the ED, represented by attorneys Fernando Martinez and Michael Parr; and the TCEQ Office of Public Interest Counsel, represented by attorney Eli Martinez.
26. Jurisdiction was noted by the ALJs and the administrative record, comprised of Applicant's Exhibit 1, was admitted.
27. On November 1, 2023, Applicant filed a Motion for Summary Disposition (Motion) and asserted that summary disposition should be granted pursuant to Texas Government Code section 2003.047(i-1)-(i-2) because no party

presented any evidence to rebut the prima facie demonstration made by the Applicant. Protestant filed a response to the Motion on November 15, 2023.

28. A second preliminary hearing was held via videoconference on November 17, 2023, at which the ALJs heard oral argument on the Motion. Following the hearing, Applicant filed a reply brief on November 27, 2023, in support of the Motion.
29. On December 1, 2023, the ALJs issued the Order Granting Motion for Summary Disposition, finding that there was no genuine issue as to any material fact, and that Applicant was entitled to summary disposition as a matter of law.
30. The record closed on December 1, 2023.

Issue 1: 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

31. No party presented evidence rebutting the prima facie demonstration that the 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.

Issue 2: Whether the discharge route is adequately characterized in accordance with 30 Texas Administrative Code section 309.12

32. No party presented evidence rebutting the prima facie demonstration that the discharge route is adequately characterized in accordance with 30 Texas Administrative Code section 309.12.

Issue 3: Whether the draft permit is protective of the requester's use and enjoyment of its property in accordance with the TSWQS

33. No party presented evidence rebutting the prima facie demonstration that the Draft Permit is protective of the requester's use and enjoyment of its property in accordance with the TSWQS.

Issue 4: Whether the proposed facility, if it is located within a flood plain, is adequately protected from inundation as required by 30 Texas Administrative Code Chapter 309

34. No party presented evidence rebutting the prima facie demonstration that the the proposed location for the Facility is above the 100-year flood plan and that the Facility is adequately protected from inundation as required by 30 Texas Administrative Code Chapter 309.

Issue 5: Whether the draft permit adequately addresses nuisance odor in accordance with 30 Texas Administrative Code section 309.13

35. No party presented evidence rebutting the prima facie demonstration that the Draft Permit adequately addresses nuisance odor in accordance with 30 Texas Administrative Code section 309.13.

Issue 6: Whether the Applicant complied with the requirement to make a copy of the administratively complete application available for public viewing

36. No party presented evidence rebutting the prima facie demonstration that Applicant complied with the requirement to make a copy of the administratively complete application available for public viewing.

II. CONCLUSIONS OF LAW

1. TCEQ has jurisdiction over this matter. Tex. Water Code chs. 5, 26.
2. SOAH has jurisdiction to conduct a hearing and to prepare a PFD in contested cases referred by the Commission under Texas Government Code section 2003.047.
3. Notice was provided in accordance with Texas Water Code sections 5.114 and 26.028; Texas Government Code sections 2001.051 and 2001.052; and 30 Texas Administrative Code sections 39.405 and 39.551.
4. The Application is subject to the requirements in Senate Bill 709, effective September 1, 2015. Tex. Gov't Code § 2003.047(i-1)-(i-3).
5. The Administrative Record established a prima facie case (prima facie demonstration) that: (1) the Draft Permit meets all state and federal legal and

technical requirements; and (2) a permit, if issued consistent with the Draft Permit, would protect human health and safety, the environment, and physical property. Tex. Gov't Code § 2003.047(i-1); 30 Tex. Admin. Code § 80.17(c)(1).

6. Applicant retains the burden of proof on the issues regarding the sufficiency of the Application and compliance with the necessary statutory and regulatory requirements. 30 Tex. Admin. Code § 80.17(a).
7. To rebut the prima facie demonstration, a party must present evidence that (1) relates to one of the referred issues; and (2) demonstrates that one or more provisions in the Draft Permit violates a specifically applicable state or federal requirement. Tex. Gov't Code § 2003.047(i-2); 30 Tex. Admin. Code § 80.17(c)(2).
8. No party rebutted the prima facie demonstration. Tex. Gov't Code § 2003.047(i-2); 30 Tex. Admin. Code § 80.117(c).
9. 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.
10. The discharge route is adequately characterized in accordance with 30 Texas Administrative Code section 309.12.
11. The Draft Permit is protective of the requester's use and enjoyment of its property in accordance with the TSWQS.
12. The Facility is adequately protected from inundation as required by 30 Texas Administrative Code Chapter 309.
13. The Draft Permit adequately addresses nuisance odor in accordance with 30 Texas Administrative Code section 309.13.
14. Applicant complied with the requirement to make a copy of the administratively complete application available for public viewing in the county in which the Facility is located in accordance with 30 Texas Administrative Code section 39.405(g).

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. Application of HK Real Estate Development, LLC for a new Texas Pollutant Discharge Elimination System Permit No. WQ0016150001 in Wilson County, Texas is granted as set forth in the Draft Permit.
2. The Commission adopts the ED's Response to Public Comment in accordance with 30 Texas Administrative Code section 50.117. If there is any conflict between the Commission's Order and the ED's Responses to Public Comment, the Commission's Order prevails.
3. All other motions, request for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
4. The effective date of this Order is the date the Order is final, as provided by Texas Government Code section 2001.144 and 30 Texas Administrative Code section 80.273.
5. TCEQ's Chief Clerk shall forward a copy of this Order to all parties.
6. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Jon Niermann, Chairman, For the Commission