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Garrett T. Arthur, *Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

April 3, 2023

Laurie Gharis, Chief Clerk  
Texas Commission on Environmental Quality  
Office of the Chief Clerk (MC-105)  
P.O. Box 13087  
Austin, Texas 78711-3087

RE: **HK Real Estate Development, LLC**  
**Docket No. 2023-0385-MWD**

Dear Ms. Gharis:

Enclosed for filing is the Office of Public Interest Counsel's Response to Requests for Hearing and Request for Reconsideration in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Eli Martinez".

Eli Martinez, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

**TCEQ DOCKET NO. 2023-0385-MWD**

**IN THE MATTER OF THE  
APPLICATION BY HK REAL  
ESTATE DEVELOPMENT, LLC,  
FOR WATER QUALITY PERMIT  
NO. WQ0016150001**

**BEFORE THE TEXAS  
COMMISSION ON  
ENVIRONMENTAL QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO  
REQUESTS FOR HEARING AND REQUEST FOR RECONSIDERATION**

To the Honorable Members of the Texas Commission on Environmental Quality:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this Response to Requests for Hearing and Request for Reconsideration in the above-referenced matter and respectfully shows the following.

**I. Introduction**

**A. Summary of Position**

Based on the information submitted in the requests and a review of the information available in the Chief Clerk's file on this application, OPIC recommends the Commission grant the hearing requests of Freasier, LLC (Freasier). The requestor is an affected person based on its proximity to the proposed Facility and outfall point. OPIC further recommends the Commission refer the issues listed in Section III.H. for a contested case hearing at the State Office of Administrative Hearings (SOAH) with a maximum duration of 180 days.

Finally, OPIC recommends the Commission deny the pending request for reconsideration.

## **B. Description of Facility**

HK Real Estate Development, LLC (HK or Applicant) has applied for new TPDES permit No. WQ0016150001 to authorize the discharge of treated domestic wastewater at a daily average flow limit of 60,000, or 0.06 million gallons per day (MGD) during Interim Phase I, a daily average flow limit of 0.12 MGD during Interim Phase II, and a daily average flow limit of 0.18 MGD in the Final Phase.

Should the draft permit be granted, the Richter Ranch WWTF (proposed Facility) would serve the Richter Ranch subdivision, which is located approximately 2,800 feet southeast of the intersection of County Road 320 and State Highway 181 North, in Wilson County. The proposed Facility is an activated sludge process plant operated in conventional mode. Treatment units across all phases of the proposed permit include mechanical auger screens, anoxic aerobic tanks, aeration tanks, Membrane Bioreactor basins, aerobic digesters, and chlorine contact chambers. Interim Phase I includes one of each treatment unit, with Interim Phase II and the Final Phase including two of each treatment unit and three of each treatment unit, respectively.

The discharge route for the proposed discharge is to Sandpit Creek, then to the Upper San Antonio River in Segment No. 1911 of the San Antonio River Basin. The draft permit requires that sludge generated at the proposed facility be disposed of at a TCEQ authorized land application site, co-disposal landfill, or wastewater treatment facility, or a facility that further processes sludge.

## **C. Procedural Background**

The TCEQ received HK's application for a new TPDES permit on April 20, 2022 and declared it administratively complete on June 27, 2022. The Applicant published the Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) in Wilson County in English in the *Wilson County News* on July 06, 2022 and in Spanish in *El Mundo* on July 07, 2022. The Executive Director (ED) completed the technical review of the application on August 25, 2022 and prepared the draft permit, which if approved, would establish the conditions under which the proposed Facility must operate. The Applicant published the Notice of Application and Preliminary Decision (NAPD) in Wilson County in English in the *Wilson County News* on September 21, 2022, in English in the *Seguin Gazette* on September 18, 2022, and in Spanish in *El Mundo* on September 15, 2022. The public comment period ended on October 21, 2022. The ED's Response to Comments was mailed on December 28, 2022. The hearing request period ended January 27, 2023.

A timely request for reconsideration and requests for a contested case hearing were filed by Freasier.

## **II. REQUEST FOR RECONSIDERATION**

### **A. Applicable Law**

Any person may file a request for reconsideration of the ED's decision under 30 TAC § 55.201(e). The request must be in writing and filed with the Chief Clerk no later than 30 days after the Chief Clerk mails the ED's decision and RTC. The request must expressly state that the person is requesting reconsideration of the ED's decision and give reasons why the decision should be reconsidered.

## **B. Discussion**

A timely request for reconsideration of the ED's decision was filed by Freasier. For the reasons discussed below, OPIC recommends that the Commission deny the request.

Freasier requests reconsideration of the ED's decision based on concerns related to adequacy of the discharge route, interference with the use and enjoyment of property, potential negative impacts on water quality, the environment, cattle and crop operations, the location of the Facility in a flood plain, the potential for nuisance odors, the failure to provide proper notice, and potential flooding. Although OPIC is sympathetic to the issues raised by Freasier concerning the proposed Facility, without further development of the record demonstrating why the draft permit does not provide sufficient protections to address these issues or establishing that the discharge route has indeed been incorrectly characterized, OPIC cannot recommend denial of the permit at this time. OPIC notes, however, in its analysis of the hearing requests addressed below, OPIC recommends referral to hearing all the issues raised in this request for reconsideration, with the exception of flooding.

## **III. Requests for Hearing**

### **A. Applicable Law**

The Application was filed after September 1, 2015, and is therefore subject to the procedural rules adopted pursuant to Senate Bill 709. Tex. S.B. 709, 84th Leg., R.S. (2015). Under Title 30, TAC § 55.201(c), a hearing request by an affected person must be in writing, must be timely filed, may not be based on an issue raised solely in a public comment which has been withdrawn, and, for applications filed on or after September 1, 2015, must be based only on the affected person's timely comments.

Section 55.201(d) states that a hearing request must substantially comply with the following:

- (1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request;
- (2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;
- (3) request a contested case hearing;
- (4) list all relevant and material disputed issues of fact that were raised by the requestor during the public comment period and that are the basis of the hearing request. To facilitate the Commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the ED's responses to the requestor's comments that the requestor disputes, the factual basis of the dispute, and list any disputed issues of law; and
- (5) provide any other information specified in the public notice of application.

30 TAC § 55.201(d).

Under 30 TAC § 55.203(a), an "affected person" is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest. Relevant factors to be considered in determining whether a person is affected include:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;

- (4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person;
- (6) for a hearing request on an application filed on or after September 1, 2015, whether the requestor timely submitted comments on the application that were not withdrawn; and
- (7) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

30 TAC § 55.203(c).

Under § 55.203(d), to determine whether a person is an affected person for purposes of granting a hearing request for an application filed on or after September 1, 2015, the Commission may also consider the following:

- (1) the merits of the underlying application and supporting documentation in the administrative record, including whether the application meets the requirements for permit issuance;
- (2) the analysis and opinions of the executive director; and
- (3) any other expert reports, affidavits, opinions, or data submitted by the executive director, the applicant, or hearing requestor.

30 TAC § 55.203(d).

Under 30 TAC § 55.211(c)(2)(A)(ii), for an application filed on or after September 1, 2015, the Commission shall grant a hearing request made by an affected person if the request raises disputed issues of fact that were raised by the affected person during the comment period, that were not withdrawn by filing a withdrawal letter with the Chief Clerk prior to the filing of the ED's RTC, and that are relevant and material to the Commission's decision on the application. Under § 55.211(c)(2)(B)–(D), the hearing request, to be granted, must also be timely filed with the Chief Clerk, pursuant to a right to hearing authorized by law, and comply with the requirements of § 55.201(d).

## **B. Determination of Affected Person Status**

The commission received two timely hearing requests from Freasier. The requests raise concerns related to the proposed discharge route indicated in the application. The requestor states that “the watercourse shown in the Application indicates that Sandpit Creek, the point of delivery of discharge, connects to the Upper San Antonio River,” when, in fact, “an earthen berm...constructed by an adjacent landowner many years ago, likely in the 1950s, alters the course of Sandpit Creek so that it no longer connects to the San Antonio River.” Rather, “the earthen berm forces Sandpit Creek’s current route to abruptly end on the (requestor’s) property without connecting to a watercourse.” This mischaracterization could lead to loss of use and enjoyment of the requestor’s property, as well as potentially contaminate the environment and negatively impact Freasier’s cattle and crop operations. Additionally, Freasier is concerned the proposed Facility will negatively impact water quality, lies in a flood plain, will emit nuisance odors, and will result in flooding. Finally, Freasier contends the Applicant failed to provide proper notice. With the exception of flooding, all of these interests are protected under the law under which the application will be considered.

The ED has produced a map in these proceedings indicating the requestor’s property lies within a half mile radius of the proposed Facility and outfall, and the discharge route would run directly through the requestor’s property. Given the proximity of the property to Applicant’s Facility, outfall, and discharge route, OPIC finds that a reasonable relationship exists between the interests claimed and the activity regulated. Therefore, OPIC finds that Freasier is an affected person in accordance with 30 TAC § 55.203 and recommends the hearing request be granted.



### **C. Issues Raised**

The following issues have been raised in the hearing request:

1. Whether the discharge route has been properly characterized in the application and properly addressed by the draft permit;
2. Whether the proposed facility will unreasonably interfere with the use and enjoyment of the requestor's property if it is operated according to the terms and conditions of the draft permit;
3. Whether the proposed facility will negatively impact the environment and terrestrial life if it is operated according to the terms and conditions of the draft permit;
4. Whether the proposed facility will negatively impact water quality if it is operated according to the terms and conditions of the draft permit;
5. Whether the proposed facility, if it is located within a flood plain, is adequately protected from as required by Chapter 309 of the Texas Administrative Code;
6. Whether the draft permit contains sufficient provisions to prevent nuisance odors;
7. 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;
8. Whether the proposed Facility would result in flooding of the requestor's property if operated according to the terms and conditions of the draft permit.

### **D. Issues of Fact**

If the Commission considers an issue to be one of fact, rather than one of law or policy, it is appropriate for referral to hearing if it meets all other applicable requirements.

30 TAC § 55.211(c)(2)(A).

All of the issues raised by Freasier are issues of fact.

### **E. Issues Were Raised by the Affected Person During the Comment Period**

All of the issues raised by Freasier were raised in the comment period and have not been withdrawn. 30 TAC §§ 55.201(c) and (d)(4), 55.211(c)(2)(A).

## **F. Disputed Issues**

There is no agreement between Freasier and the ED on the issues raised in the hearing request.

## **G. Relevant and Material Issues**

The hearing request raises issues relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). In order to refer an issue to SOAH, the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny this permit. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–251 (1986) (in discussing the standards applicable to reviewing motions for summary judgment the Court stated “[a]s to materiality, the substantive law will identify which facts are material...it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs”). Relevant and material issues are those governed by the substantive law under which this permit is to be issued. *Id.*

The Commission is responsible for the protection of water quality under TWC Chapter 26 and 30 TAC Chapters 307 and 309. The Texas Surface Water Quality Standards (“Standards”) in 30 TAC Chapter 307 require that the proposed permit “maintain the quality of water in the state consistent with public health and enjoyment, propagation and protection of terrestrial and aquatic life, operation of existing industries, and economic development of the state.” 30 TAC § 307.1. Therefore, the concerns raised relating to impacts to property, impacts to the environment, negative impacts on cattle and vegetative life, and potential negative impacts on water quality are all relevant and material considerations in the Commission's decision on this Application.

Likewise, Commission rules do not allow wastewater treatment facilities to be located within a 100-year floodplain unless the plant unit is protected from inundation and damage that may occur during that flood event.<sup>1</sup> The issue of odor nuisance is addressed by § 309.13(e), which requires an applicant to abate nuisance odors, and the general prohibition on a permit holder creating or maintaining a nuisance that interferes with a landowner's use and enjoyment of his or her property. Therefore, these issues are also relevant and material to the Commission's decision on the Application.

The affected person also questions whether the Application properly characterizes and the draft permit properly addresses the discharge route due to the berms created on neighboring property, which will interfere with effluent flowing to the San Antonio River as intended. Under 30 TAC § 309.12, "[t]he Commission may not issue a permit for a new facility or for the substantial change of an existing facility unless it finds that the proposed site, when evaluated in light of the proposed design, construction, or operational features, minimizes possible contamination of water in the state." In making this determination under 30 TAC § 309.12(1), the Commission may consider active geologic processes and their impact on contamination. According to 30 TAC § 309.11(1), active geologic processes consist of any natural process which alters the surface and/or subsurface of the earth. Therefore, this issue is also relevant and material to the Commission's decision on the Application.

The requestor also raises the issue of 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 as required by 30 TAC

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<sup>1</sup> 30 TAC §309.13(a).

§ 39.405(g). The issue of whether the Applicant complied with this notice requirement is relevant and material to the Commission's decision on this application and is appropriate for referral to SOAH.

Lastly, the requestor raises an issue that is not material and relevant to the Commission's decision. The Commission does not have jurisdiction over flooding when determining whether to grant a wastewater discharge permit application. This issue is therefore not proper for referral to a contested case hearing.

## **H. Issues Recommended for Referral**

OPIC recommends that the following disputed issues of fact be referred to SOAH for a contested case hearing:

1. Whether the discharge route has been properly characterized in the application and properly addressed by the draft permit;
2. Whether the proposed facility will unreasonably interfere with the use and enjoyment of the requestor's property if it is operated according to the terms and conditions of the draft permit;
3. Whether the proposed facility will negatively impact the environment and terrestrial life if it is operated according to the terms and conditions of the draft permit;
4. Whether the proposed facility will negatively impact water quality if it is operated according to the terms and conditions of the draft permit;
5. Whether the proposed facility, if it is located within a flood plain, is adequately protected from as required by Chapter 309 of the Texas Administrative Code;
6. Whether the draft permit contains sufficient provisions to prevent nuisance odors;
7. 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;

## **I. Maximum Expected Duration of Hearing**

SOAH s

Commission rule 30 TAC § 50.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date

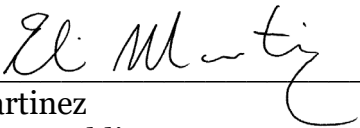
by which the judge is expected to issue a proposal for decision. The rule further provides that, for applications filed on or after September 1, 2015, the administrative law judge must conclude the hearing and provide a proposal for decision by the 180th day after the first day of the preliminary hearing, or a date specified by the Commission, whichever is earlier. 30 TAC § 50.115(d)(2). To assist the Commission in setting a date by which the judge is expected to issue a proposal for decision, and as required by 30 TAC § 55.209(e)(7), OPIC recommends that the duration of hearing on this Application be stated in the Commission's order as 180 days from the first date of the preliminary hearing until the proposal for decision is issued.

#### **IV. Conclusion**

OPIC recommends that the Commission grant the hearing request of Freasier. OPIC also recommends denying the pending request for reconsideration. Lastly, OPIC recommends referring the matter to SOAH for an evidentiary hearing on the issues in Section III.H. for a hearing duration of 180 days.

Respectfully submitted,

Garrett T. Arthur  
Public Interest Counsel

By:  \_\_\_\_\_

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## CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2023, the original of the Office of Public Interest Counsel's Response to Requests for Hearing and Request for Reconsideration was filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.

  
\_\_\_\_\_  
Eli Martinez

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**TCEQ DOCKET NO. 2023-0385-MWD**

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