

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

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| APPLICATION OF HK REAL ESTATE DEVELOPMENT, LLC FOR NEW TEXAS POLLUTION DISCHARGE ELIMINATION SYSTEM PERMIT NO. WQ0016150001 | § § § § § | BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS |
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PROTESTANT’S EXCEPTIONS TO PROPOSAL FOR DECISION

Protestant Freasier, LLC (Freasier) files these exceptions to the Proposal for Decision (PFD) regarding Applicant HK Real Estate Development, LLC’s (HK) Application for a new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0016150001. The PFD was issued on January 12, 2024. Freasier is filing this Motion on February 1, 2024, and it is therefore filed timely.¹

While Freasier continues to respectfully assert that summary disposition in HK’s favor was improperly granted and a rehearing² should be granted, there are certain statements within the PFD that should be modified for the reasons below.

A. The PFD should be revised to include a reference to Freasier’s property being included in the discharge route.

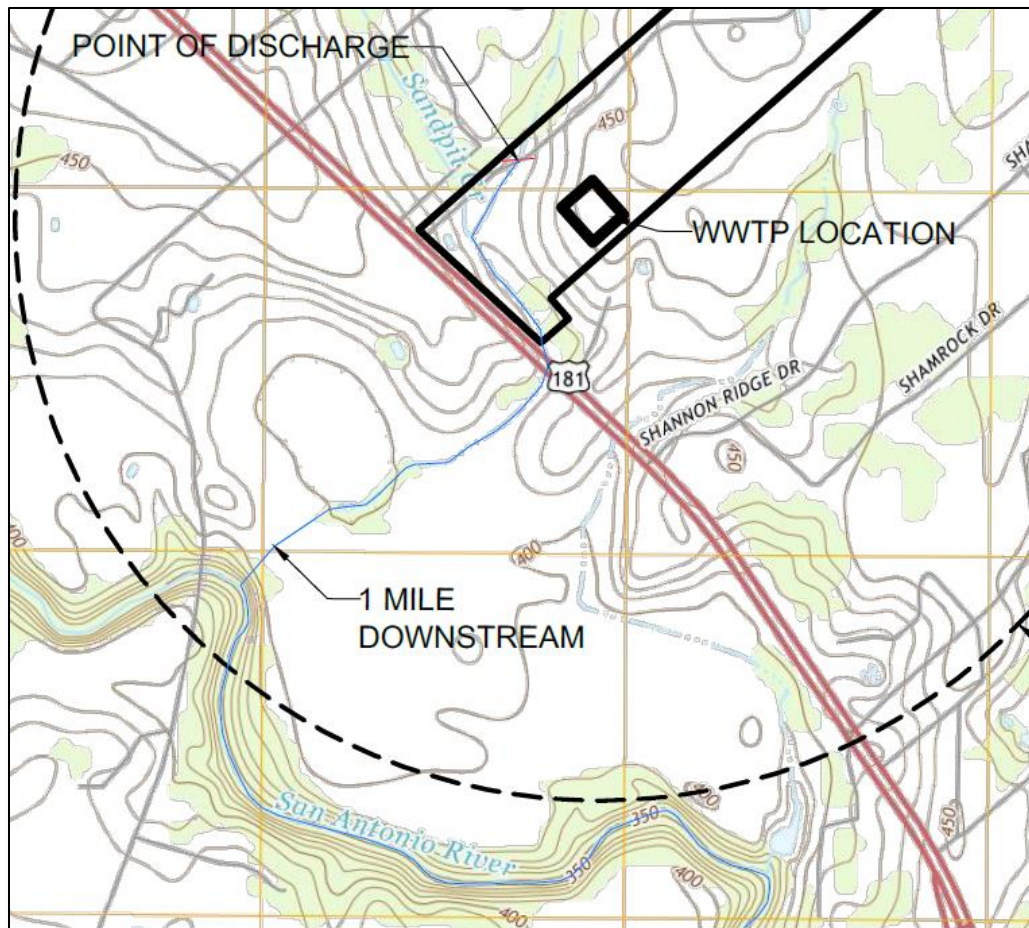
The PFD and proposed Finding of Fact No. 3 state that “[t]he treated effluent will be discharged to Sandpit Creek, then to the Upper San Antonio River in Segment No. 1911 of the San Antonio River Basin.”³ That description, however, is inaccurate, as it is undisputed that the discharge route includes passage over Freasier’s property.

¹ See 30 TAC § 80.257(a).

² Freasier filed a Motion for Rehearing on December 26, 2023, following the Order Granting Motion for Summary Disposition.

³ PFD, p. 8; Proposed Order, p. 2.

In discovery, HK admitted that its engineering firm inserted a blue line on a USGS map in its application, which appeared to show a direct connection between Sandpit Creek and San Antonio River:⁴



HK further admitted that the blue line drawn on the USGS map does not actually represent a continuous watercourse:⁵

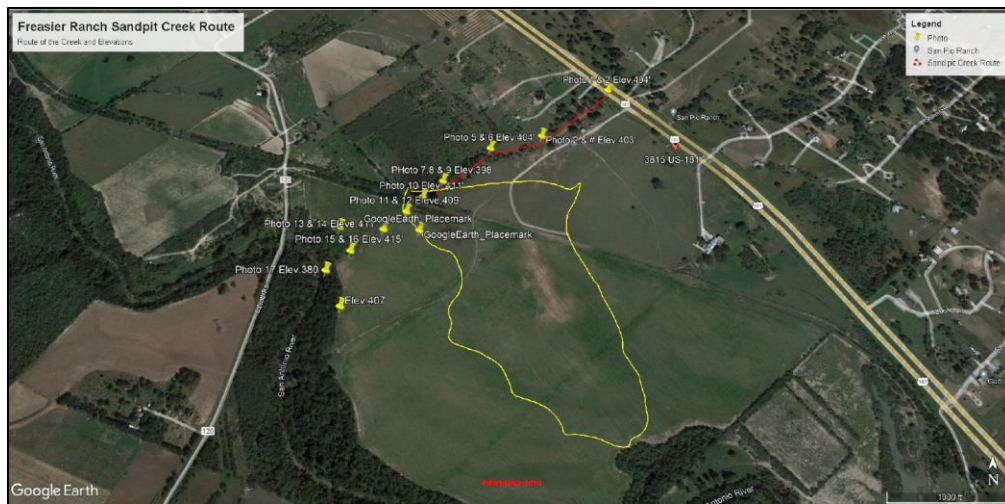
25. Admission. Admit the blue line purporting to show a connection between Sandpit Creek and the San Antonio River on Appendix B of the Application (App 273) does not actually represent a continuous watercourse.

RESPONSE: Admit.

⁴ (Ex. A, APP 273; Ex. B, p. 6)

⁵ (Ex. B, p. 7.)

Indeed, Freasier's representative testified that the topography of the land can cause water to pond at the end of Sandpit Creek, which can then overflow into a "Drainage Area" comprising approximately 80 acres of Freasier's property.⁶ Freasier testified to those facts as follows:



11 **Q: What does the yellow line on Freasier Ex. 2 show?**

12 A: There is a ponding area where Sandpit Creek ends that can overflow with water from Sandpit
13 Creek. The water flows southeast where the Property slopes downward (as shown in Freasier Ex. 2)
14 and diffuses across the Property. The yellow outline is the approximate boundary where the water
15 collects after overflowing Sandpit Creek's termination point (Drainage Area). I drew the yellow line
16 based on my observations of the Property following rain events that caused the Property to hold
17 water.

20 **Q: Based on your observations of the Property and your findings, can you describe the**
21 **topography of the Property?**

1 A: Yes. You can see that Sandpit Creek terminates where the elevation is 398 feet. That is a low
2 point in that area of the Property, which you can see by looking at the next elevation marker to the
3 west, which is 411 feet, which then inclines to as much as 415 feet if you continue west. The water
4 cannot flow back uphill, so it stays in the valley until it overflows into the Drainage Area, which
5 aligns with decreased topography toward the south/southeast.

⁶ (Ex. C, 4:11 – 4:17, 4:20 – 5:5, 6:6 – 6:7.)

6 Q: How large is the Drainage Area?

7 A: It is about 80 acres.

Thus, the discharge route undisputedly includes Freasier's property, and the PFD and proposed Finding of Fact No. 3 should be revised as follows:

The treated effluent will be discharged to Sandpit Creek, then onto Protestant's private property, 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.

B. The characterization of the discharge route was a contested fact.

The PFD also states that "Applicant presented uncontested summary disposition evidence establishing the following relevant facts[.]" one of which was that "[t]he 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."⁷

As indicated above, Freasier has vehemently contested the characterization of the discharge route. The PFD should be modified to indicate that Freasier contested the discharge route by changing the language as follows:

Citing to the administrative record, Applicant presented ~~uncontested~~ summary disposition evidence establishing the following relevant facts, which were uncontested unless otherwise noted below:

...

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. Protestant has contested this characterization of the discharge route.

⁷ PFD, p. 6, 8.

C. Freasier's evidence related to issues referred to SOAH.

The PFD notes that “[t]he 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.”⁸ The PFD should be revised and the record reopened, however, because Freasier’s complaints *were* issues referred to SOAH.

The mischaracterization of the discharge route was expressly included as a referred issue in the Interim Order.⁹ Specifically, Issue B to be determined by SOAH was “[w]hether the discharge route is adequately characterized in accordance with 30 Texas Administrative Code section 309.12.”¹⁰ Under Section 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, the commission may consider . . . soil conditions such as stratigraphic profile and complexity, hydraulic conductivity of strata, and separation distance from the facility to the aquifer and points of discharge to surface water in the state[.]”¹¹

HK’s misrepresentation of the water course is tied to the soil conditions of the property. As Freasier argued and supported with evidence, the topography of the property causes Sandpit Creek to terminate before reaching the San Antonio River, but HK’s application represented that the two bodies connect.¹²

⁸ PFD, p. 14.

⁹ Interim Order, APP 6.

¹⁰ Interim Order, APP 6.

¹¹ 30 TAC § 309.12.

¹² (Ex. A, APP 273; Ex. B, p. 6)

In its Response to Applicant's Motion for Summary Disposition, Freasier addressed Section 309.12 and presented evidence on the soil conditions of the property, specifically referencing the separation distance from points of discharge to surface water in the state.¹³

Consideration of the distance from HK's proposed discharge point to the San Antonio River necessarily involves an evaluation of the discharge route across Freasier's property. But even if that was not the case, the topography of the land is a soil condition. The list of soil conditions is non-exclusive—the Commission may consider soil conditions “such as” those listed.¹⁴ Thus, the topography of the land is properly considered. And Freasier produced undisputed evidence that the land's topography can cause Sandpit Creek to overflow, causing water to disperse across approximately 80 undefined acres of the property.¹⁵

Further, Section 309.12 requires an evaluation of the proposed site's “design, construction or operational features,” which would include the discharge route. If the Commission did not intend to specifically refer the issue of HK's representation of the discharge route, it might have used language such as “whether the proposed facility would comply with the siting requirements set forth in 30 Texas Administrative Code section 309.12[.]”¹⁶ Instead, the Commission expressly indicated its intent for the ALJs to consider the characterization of the discharge route.

Because the PFD should reflect that Freasier's evidence related to Issues A, B, and C, proposed findings of fact 31, 32, and 33 should be revised as follows:

31. ~~No party~~ Protestant 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.

¹³ Protestant's Response to Applicant's Motion for Summary Disposition, p. 4.

¹⁴ 30 Tex. Admin. Code § 309.12(3).

¹⁵ (Ex. C, 4:11 – 4:17, 4:20 – 5:5, 6:6 – 6:7.)

¹⁶ *Cf. Wood v. Texas Comm'n Env't Quality*, No. 13-13-00189-CV, 2015 WL 1089492, at *2 (Tex. App.—Corpus Christi Mar. 5, 2015, no pet.) (granting a hearing request on the issue of “[w]hether the proposed facility would comply with the siting requirements set forth in 30 Texas Administrative Code section 309.12”).

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

33. ~~No party~~ Protestant 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.

Prayer

Therefore, Protestant Freasier, LLC respectfully requests that the Commission deny Applicant HK Real Estate Development, LLC's permit application and/or modify the Proposal for Decision as described herein. Freasier further prays for all other relief to which it may deem itself entitled.

Respectfully submitted,

BRANSCOMB LAW
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By: _____

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Certificate of Service

The undersigned certifies that a true copy of the foregoing was served on February 1, 2024, to the following:

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Clint Buck

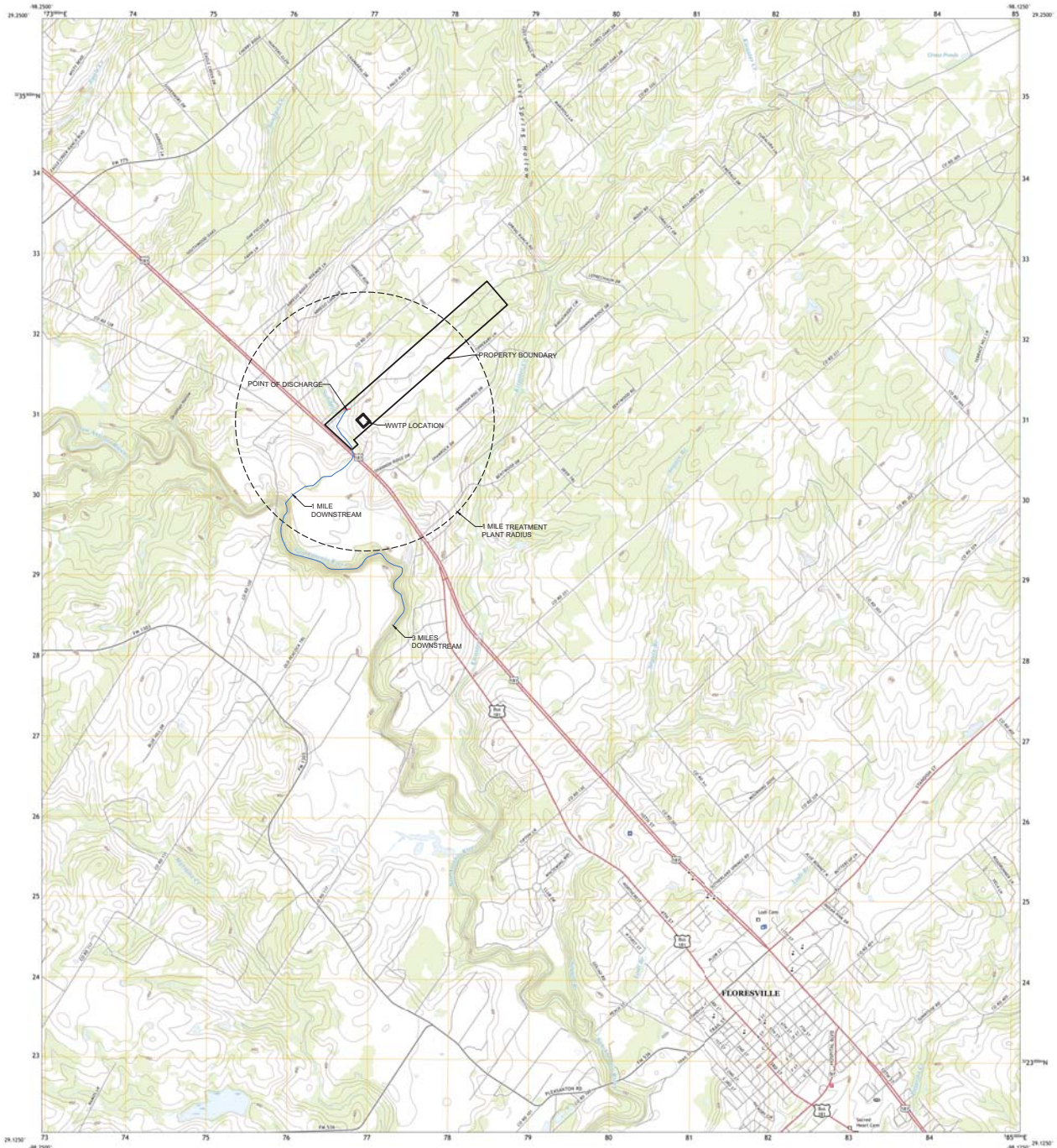
EXHIBIT A



U.S. DEPARTMENT OF THE INTERIOR
U.S. GEOLOGICAL SURVEY

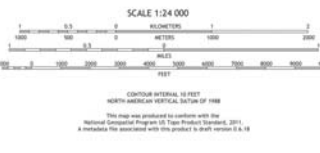


FLORESVILLE QUADRANGLE
TEXAS - WILSON COUNTY
7.5-MINUTE SERIES



Produced by the United States Geological Survey

World Geologic Map of 1985 (WGM85)
World Geologic Map of 1985 (WGM85) is a
1:500,000 scale geologic map of the world.
This map is not a legal document. It is
intended for general reference only. It
does not show the boundaries of political
units. It is not intended for use in
navigation. It is not intended for use
in engineering. It is not intended for
use in any other field.



ROAD CLASSIFICATION
Expressway Secondary Hwy Road
Interstate Route US Route State Route

FLORESVILLE, TX
2019

EXHIBIT B

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


| | | |
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| APPLICATION OF HK REAL ESTATE DEVELOPMENT, LLC FOR NEW TEXAS POLLUTION DISCHARGE ELIMINATION SYSTEM PERMIT NO. WQ0016150001 | § § § § § | BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS |
|--|-----------------------|---|

**APPLICANT’S RESPONSE TO FREASIER, LLC’S FIRST SET OF WRITTEN
DISCOVERY REQUESTS**

To: Freasier, LLC, by and through its attorney of record, Clint Buck, Branscomb, PLLC, 4630 North Loop 1604 West, Suite 206, San Antonio, TX 78249

COMES NOW, HK Real Estate Development, LLC (“HK” or “Applicant”) and serves this Response to Freasier, LLC’s First Set of Written Discovery Requests.

Respectfully submitted,

By: 
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Randall B. Wilburn
State Bar No. 24033342
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**ATTORNEYS FOR HK Real Estate
Development, LLC**

CERTIFICATE OF SERVICE

I hereby certify that I have served or will serve a true and correct copy of the foregoing document via hand delivery, facsimile, electronic mail, overnight mail, U.S. mail, or Certified Mail Return Receipt Requested on all parties on this 8th day of November 2023:

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By: Helen S. Gilbert

RESPONSES TO DISCOVERY REQUESTS

1. **Admission.** Admit the documents attached as Freasier 1-4 are authentic and accurate copies of the USGS Topographical Maps depicting the location of Sandpit Creek on the Property, which are available by accessing the following website:

<https://ngmdb.usgs.gov/topoview/viewer/#15/29.2047/-98.2178>

RESPONSE: Applicant can neither admit nor deny that exhibits are authentic and accurate since Freasier 1-4 are partial reproductions of larger maps and the images have been cut and pasted.

2. **Interrogatory.** If You did anything other than give an unqualified admission to the immediately preceding Request for Admission, please state the legal and factual bases for Your response.

RESPONSE: HK objects to this request on the following independent bases: to the extent the maps are not related to an issue referred by the TCEQ in its May 2, 2023 Interim Order, admitted into evidence as Applicant's Exhibit 1, the request is irrelevant and is simply a part of a fishing expedition (*In re American Optical Corp.*, 988 S.W.2d 711, 713-14 (Tex. 1998) and cases cited therein).

3. **Request for Production.** If You did anything other than give an unqualified admission to the immediately preceding Request for Admission, produce all documents supporting Your response.

RESPONSE: See Appendix B of the Application for a full USGS quadrangle map, Bates Page APP000273.

4. **Admission.** Admit none of the USGS Topographical Maps attached as Freasier 1-4 show that Sandpit Creek connects to the San Antonio River.

RESPONSE: Admit.

5. **Interrogatory.** If You did anything other than give an unqualified admission to the immediately preceding Request for Admission, please state the legal and factual bases for Your response.

RESPONSE:

6. **Request for Production.** If You did anything other than give an unqualified admission to the immediately preceding Request for Admission, produce all documents supporting Your response.

RESPONSE:

7. **Admission.** Admit there is not a continuous watercourse from the Point of Discharge identified in the Application to the San Antonio River.

RESPONSE: Deny.

8. **Interrogatory.** If You did anything other than give an unqualified admission to the immediately preceding Request for Admission, please state the legal and factual bases for Your response.

RESPONSE: HK objects to this request on the following independent bases: the request is vague and ambiguous as to the undefined term “continuous watercourse;” and, to the extent such “continuous watercourse” is not related to an issue referred by the TCEQ in its May 2, 2023 Interim Order, admitted into evidence as Applicant’s Exhibit 1, the request is irrelevant and is simply a part of a fishing expedition (*In re American Optical Corp.*, 988 S.W.2d 711, 713-14 (Tex. 1998) and cases cited therein).

Subject to and without waiving the foregoing objection, hydraulically, there is a water level at which the flow will continue to the San Antonio River. If the water level in the earthen berm/impoundment on the adjacent property is low, then it will not flow.

9. **Request for Production.** If You did anything other than give an unqualified admission to the immediately preceding Request for Admission, produce all documents supporting Your response.

RESPONSE: See Appendix B of the Application for a full USGS quadrangle map, Bates Page APP000273.

10. **Admission.** Admit there are no bed and banks that connect Sandpit Creek with the San Antonio River.

RESPONSE: Applicant can neither admit nor deny that there are no bed and banks.

11. **Interrogatory.** If You did anything other than give an unqualified admission to the immediately preceding Request for Admission, please state the legal and factual bases for Your response.

RESPONSE: HK objects to this request on the following independent bases: the request is vague and ambiguous as to the undefined terms “bed and banks” and “connect;” the request is overbroad because it lacks any geographic reference location of Sandpit Creek’s connection to the San Antonio River; and, to the extent the connection of Sandpit Creek to the San Antonio River is not related to an issue referred by the TCEQ in its May 2, 2023 Interim Order, admitted into evidence as Applicant’s Exhibit 1, the request is irrelevant and is simply a part of a fishing expedition (*In re American Optical Corp.*, 988 S.W.2d 711, 713-14 (Tex. 1998) and cases cited therein).

Subject to and without waiving the foregoing objection, there are bed and banks on Sandpit Creek from the discharge point downstream to the TxDOT culvert and into the Freasier property.

12. **Production.** If You did anything other than give an unqualified admission to the immediately preceding Request for Admission, produce all documents supporting Your response.

RESPONSE: *See Appendix D of the Application, Bates Page APP000277 and Freasier Exhibit No. 6, Freasier 008 photograph.*

13. **Admission.** Admit effluent from the WWTP will not flow in the same path as depicted on Appendix B of the Application (App 273).

RESPONSE: Deny.

14. **Interrogatory.** If You did anything other than give an unqualified admission to the immediately preceding Request for Admission, please state the legal and factual bases for Your response.

RESPONSE: Freasier Exhibit 10, Freasier 15 (video of property) confirms that the flow travels approximately one mile along the flow path depicted in the Application. Sandpit Creek is well-defined into the Freasier property.

15. **Production.** If You did anything other than give an unqualified admission to the immediately preceding Request for Admission, produce all documents supporting Your response.

RESPONSE: Applicant has no responsive documents.

16. **Admission.** Admit that there is not a current of water when water collects on the Property outside of Sandpit Creek.

RESPONSE: Applicant can neither admit nor deny that there is a “current of water” as Applicant had no access to Freasier’s property for purposes of discerning current or collection of water.

17. **Interrogatory.** If You did anything other than give an unqualified admission to the immediately preceding Request for Admission, please state the legal and factual bases for Your response.

RESPONSE: HK objects to this request on the following independent bases: the request is vague and ambiguous as to the undefined term “current of water” and “Property outside of Sandpit Creek;” the request is overbroad in scope to the extent there is no geographic location reference to where “outside of Sandpit Creek” is on the “Property” which is subject to multiple possible interpretations; and, to the extent the collection of water on property that is almost entirely located within the 100-year floodplain is not related to an issue referred by the TCEQ in its May 2, 2023 Interim Order, admitted into evidence as Applicant’s Exhibit 1, the request is irrelevant and is simply a part of a fishing expedition (*In re American Optical Corp.*, 988 S.W.2d 711, 713-14 (Tex. 1998) and cases cited therein) because TCEQ rules do not require an

applicant to analyze the creek downstream of the receiving point except to identify flow route.

18. **Production.** If You did anything other than give an unqualified admission to the immediately preceding Request for Admission, produce all documents supporting Your response.

RESPONSE: Applicant has no responsive documents.

19. **Interrogatory.** If you allege there is a water channel on the Property other than Sandpit Creek, do you contend that the channel has sufficient carrying capacity to contain the effluent that will be discharged from your wastewater treatment plant?

RESPONSE: HK objects to this request on the following independent bases: the request is vague and ambiguous as to the undefined terms “water channel” and “carrying capacity;” and, to the extent the carrying capacity of Sandpit Creek is not related to an issue referred by the TCEQ in its May 2, 2023 Interim Order, admitted into evidence as Applicant’s Exhibit 1, the request is irrelevant and is simply a part of a fishing expedition (*In re American Optical Corp.*, 988 S.W.2d 711, 713-14 (Tex. 1998) and cases cited therein).

Subject to and without waiving the foregoing objection, TCEQ does not require the evaluation of downstream “carrying capacity.” The proposed discharge is into water in the state.

20. **Production.** Produce all Documents related to the carrying capacity of the channel referenced in the immediately foregoing interrogatory.

RESPONSE: See Appendix B of the Application for a full USGS quadrangle map, Bates Page APP000273.

21. **Production.** Produce all studies and reports related to the discharge route and/or the Property, including, but not limited to, any engineering reports, surveys, water modeling, topographical surveys, or hydrological studies.

RESPONSE: Applicant has no responsive documents.

22. **Production.** Produce all photos, videos, or other visual representations of the Property

RESPONSE: Applicant has no responsive documents.

23. **Production.** Produce all photos, videos, or other visual representations of the discharge route from Sandpit Creek to the San Antonio River.

RESPONSE: See Appendix D of the Application, Bates Page APP000277.

24. **Interrogatory.** Identify who inserted the blue line purporting to show a connection between Sandpit Creek and the San Antonio River on Appendix B of the Application (App 273).

RESPONSE: LJA Engineering, Inc. under the supervision of Daniel Ryan, P.E.

25. **Admission.** Admit the blue line purporting to show a connection between Sandpit Creek and the San Antonio River on Appendix B of the Application (App 273) does not actually represent a continuous watercourse.

RESPONSE: Admit.

26. **Interrogatory.** If You did anything other than give an unqualified admission to the immediately preceding Request for Admission, please state the legal and factual bases for Your response.

RESPONSE:

27. **Production.** If You did anything other than give an unqualified admission to the immediately preceding Request for Admission, produce all documents supporting Your response.

RESPONSE:

28. **Interrogatory.** Identify any surveyors, engineers, or other individuals who assisted with assessing the purported watercourse between the point where effluent will be discharged from the WWTP and the San Antonio River prior to your filing the Application.

RESPONSE: Daniel Ryan, P.E. and Lauren Crone, P.E. with LJA Engineering, Inc.

29. **Production.** Produce all Documents prepared by any of the individuals identified in the immediately preceding Interrogatory.

RESPONSE: See Appendix B of the Application for a full USGS quadrangle map, Bates Page APP000273.

30. **Interrogatory.** Identify any surveyors, engineers, or other individuals who assisted with assessing the purported watercourse between the point where effluent will be discharged from the WWTP and the San Antonio River after you filed the Application.

RESPONSE: Lauren Crone, P.E. and Brady Baggs, P.E.

31. **Production.** Produce all Documents prepared by any of the individuals identified in the immediately preceding Interrogatory.

RESPONSE: Applicant has no responsive documents.

32. **Interrogatory.** Identify all surveyors, engineers, or other individuals who have been to the Property on Applicant's behalf to examine the alleged watercourse.

RESPONSE: Lauren Crone, P.E., Brady Baggs, P.E. and Benjamin Clayton.

33. **Interrogatory.** Identify each person answering these interrogatories, supplying information, or assisting in any way with the preparation of the answers to these interrogatories.

RESPONSE: Dan Ryan, P.E., Helen Gilbert and Kerrie Qualtrough.

34. **Interrogatory.** Identify all persons who have relevant knowledge of the preparation of your Application, including the role of each person in preparing the Application.

RESPONSE: Dan Ryan, P.E. (supervision of preparation) and Lauren Crone, P.E. (preparer).

35. **Interrogatory.** Identify every person who is expected to be called to testify at the final hearing of this matter, including Your experts. See Tex. R. Civ. P. 192.3(d).

RESPONSE: See Applicant's Disclosures filed on October 25, 2023.

36. **Interrogatory.** Identify all discoverable consulting experts—that is, consulting experts whose work has been reviewed by a testifying expert. For each expert identified, provide information listed in Texas Rule of Civil Procedure 192.3(e).

RESPONSE: None.

37. **Production.** Produce the File for all of Your discoverable consulting experts—that is, consulting experts whose work has been reviewed by a testifying expert—and testifying experts. See Tex. R. Civ. P. 192.3(e).

RESPONSE: Applicant has no responsive documents.

38. **Production.** Produce all of Your e-mails, notes, correspondence, memoranda, or any other Documents or Communications You prepared related to the discharge route from your wastewater treatment plant to the San Antonio River.

RESPONSE: HK objects to this request on the following independent bases: the request seeks information protected by the attorney client, work product and investigative privileges under TRCP 192.5, 193.3 and TRE 503(b)(1)(C) and, to the extent the discharge route is not related to an issue referred by the TCEQ in its May 2, 2023 Interim Order, admitted into evidence as Applicant's Exhibit 1, the request is irrelevant and is simply a part of a fishing expedition (*In re American Optical Corp.*, 988 S.W.2d 711, 713-14 (Tex. 1998) and cases cited therein).

39. **Production.** Produce all Documents You intend to offer as exhibits at the final hearing of this matter.

RESPONSE: HK objects to this request on the following independent bases: SOAH's Order Memorializing Preliminary Hearing, Adopting Procedural Schedule, and Setting Hearing on the Merits imposes the deadline for production of exhibits to be offered at the hearing on the merits in this docket. Applicant will produce such exhibits as part of its prefiled testimony in this case on November 27, 2023.

40. **Production.** Produce all Documents used to answer or provide information for answering any of Protestant's discovery requests.

RESPONSE: Applicant has no additional responsive documents.

41. **Production.** Produce all Documents You have received in this matter by subpoena or deposition by written questions.

RESPONSE: Applicant has no responsive documents.

EXHIBIT C

FILED
582-23-21878
10/25/2023 5:08 PM
STATE OFFICE OF
ADMINISTRATIVE HEARINGS
Carol Hale, CLERK

ACCEPTED
582-23-21878
10/26/2023 9:21:21 am
STATE OFFICE OF
ADMINISTRATIVE HEARINGS
Carol Hale, CLERK

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

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| APPLICATION OF HK REAL ESTATE | § | BEFORE THE STATE OFFICE |
| DEVELOPMENT, LLC FOR NEW | § | |
| TEXAS POLLUTION DISCHARGE | § | OF |
| ELIMINATION SYSTEM PERMIT NO. | § | |
| WQ0016150001 | § | ADMINISTRATIVE HEARINGS |

FREASIER, LLC'S EXHIBIT 1

Pre-filed Testimony of James Freasier Jr.

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

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| APPLICATION OF HK REAL ESTATE | § | BEFORE THE STATE OFFICE |
| DEVELOPMENT, LLC FOR NEW | § | |
| TEXAS POLLUTION DISCHARGE | § | OF |
| ELIMINATION SYSTEM PERMIT NO. | § | |
| WQ0016150001 | § | ADMINISTRATIVE HEARINGS |

PRE-FILED TESTIMONY OF JAMES FREASIER, JR.
ON BEHALF OF PROTESTANT FREASIER, LLC

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October 25, 2023

1 **I. INTRODUCTION**

2 **Q: What is your name and title?**

3 A: My name is James Freasier, Jr., Chairman of the Board of Directors for F&W Electrical, Inc.

4 **Q: What is your relationship with Freasier, LLC?**

5 A: I am the managing member of Freasier, LLC.

6 **Q: What is Freasier, LLC's, address?**

7 A: 6880 US Highway 181 North, Floresville, Texas 78114.

8 **Q: What is the address for the property involved in these proceedings?**

9 A: 4005 US Highway 181 North, Floresville, Texas 78114.

10 **Q: What is your occupation?**

11 A: I am a major stockholder of F&W Electrical Contractors, Inc. (F&W). I am also the master
12 electrician of record, holding licenses in Texas, Louisiana, Arkansas, New Mexico, and Oklahoma.

13 **Q: What does F&W do?**

14 A: F&W is a full-service electrical contractor providing electrical services in a variety of fields
15 including airfield lighting, sports lighting, traffic signalization, and highway lighting.

16 **Q: Who owns the property involved in this proceeding?**

17 Freasier, LLC owns 100% of the property.

18 **Q: When did Freasier, LLC purchase the property?**

19 A: It was purchased at two different times. Freasier, LLC first purchased approximately 80 acres in
20 1999. It later purchased the adjacent land, which comprised approximately 280 acres in 2002 for a
21 total of approximately 340 acres (Property).

22 **Q: Did you participate in the purchase of the Property?**

23 Yes, both in 1999 and in 2002.

24 **Q: Were you able to observe the Property prior to 1999?**

25 Yes. In 1998, when Freasier, LLC was considering purchasing the Property.

26 **II. USES OF THE PROPERTY**

27 **Q: How familiar with the Property are you?**

1 A: Very familiar. In fact, there may not be another person that knows the features of the Property
2 better than me. I was Freasier, LLC's representative when it purchased the two parcels that comprise
3 the full Property and I have resided on the Property ever since. I have also been primarily
4 responsible for the cattle and farming operations and have overseen both since 1999. I traverse the
5 Property almost daily and have personally observed its features over the past 24 years.

6 **Q: How is the Property used?**

7 A: In addition to being where I reside, since Freasier, LLC purchased the Property, it has always
8 been used to raise and breed cattle and as farmland. Freasier, LLC leases the Property to Freasier
9 Ranch, of which I am the Managing Partner, for the cattle operations. There is a barn and some
10 working pens on the Property. F&W also offices on the Property.

11 **Q: How many head of cattle are on the Property?**

12 A: Approximately 40.

13 **III. WATERFLOW AND TOPOGRAPHY OF PROPERTY**

14 **Q: Is Sandpit Creek located on the Property?**

15 A: Yes, a portion of Sandpit Creek is on the Property.

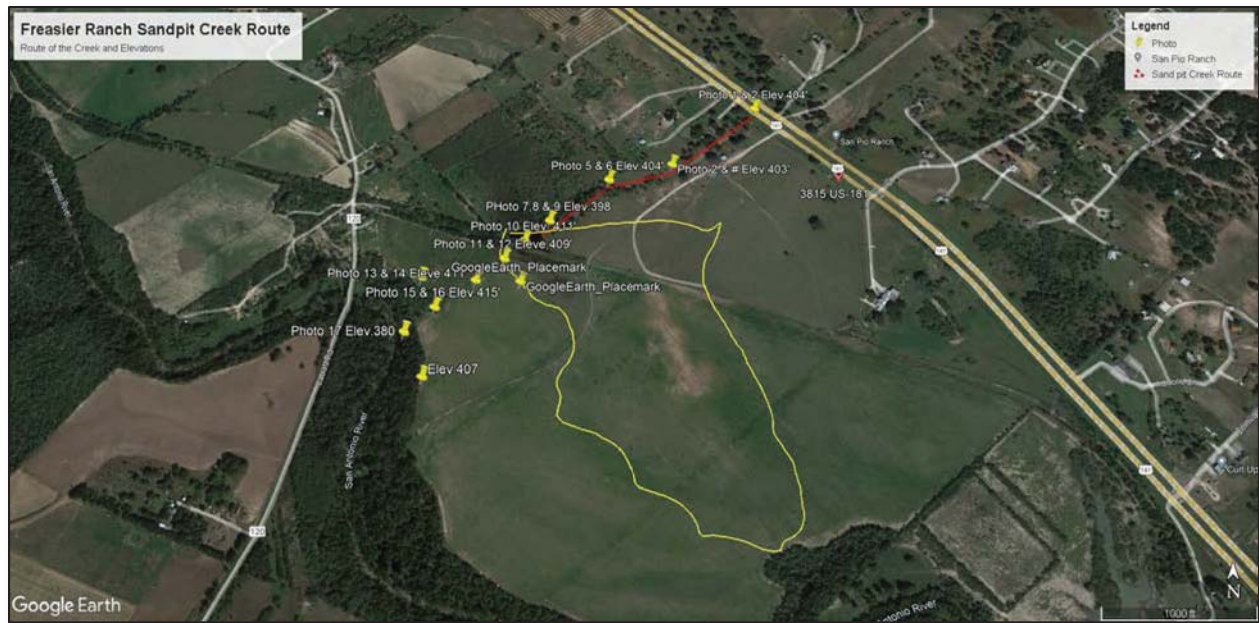
16 **Q: Have you personally observed water flowing in Sandpit Creek?**

17 A: Yes, but only twice that I recall.

18 **Q: When did those events occur?**

19 A: The first was in 1998 and the second was in 2002. Both were during major flood events.

20 **Q: Please describe what Freasier Exs. 2 and 3 are.**



1

2 Freasier Ex. 2, shown above, is an aerial view of the Property. I obtained the raw image from
 3 Google Earth, and it fairly and accurately depicts the Property based on my personal observations
 4 and knowledge of the Property. It contains lines and elevation markers, all of which I inserted into
 5 the image.

6 Freasier Ex. 3 is a similar image that I also obtained and prepared, but without the yellow line or the
 7 route of Sandpit Creek shown, and it has some additional elevations I took.

8 I shot the elevations and inserted the lines on approximately October 17 and 18, 2023.

9 **Q: What does the red line on Freasier Ex. 2 show?**

10 A: That is the route of Sandpit Creek.

11 **Q: What does the yellow line on Freasier Ex. 2 show?**

12 A: There is a ponding area where Sandpit Creek ends that can overflow with water from Sandpit
 13 Creek. The water flows southeast where the Property slopes downward (as shown in Freasier Ex. 2)
 14 and diffuses across the Property. The yellow outline is the approximate boundary where the water
 15 collects after overflowing Sandpit Creek's termination point (Drainage Area). I drew the yellow line
 16 based on my observations of the Property following rain events that caused the Property to hold
 17 water.

18 **Q: What do the pushpins show?**

19 A: Those are elevations I shot along with a helper.

20 **Q: Based on your observations of the Property and your findings, can you describe the**
 21 **topography of the Property?**

1 A: Yes. You can see that Sandpit Creek terminates where the elevation is 398 feet. That is a low
2 point in that area of the Property, which you can see by looking at the next elevation marker to the
3 west, which is 411 feet, which then inclines to as much as 415 feet if you continue west. The water
4 cannot flow back uphill, so it stays in the valley until it overflows into the Drainage Area, which
5 aligns with decreased topography toward the south/southeast.

6 **Q: Please explain your qualifications to shoot elevations.**

7 A: F&W does site surveys for the layout of foundations and equipment and shoots elevations as a
8 regular practice. I personally have over 40 years' experience with large-scale commercial projects
9 including all aspects of electrical primary distribution. I also am experienced with airfield lighting
10 control systems and ILS and Visual Runway Approach Systems. As part of my work experience, I
11 have used and am therefore familiar with the equipment used to shoot elevations, as well as how to
12 operate that equipment and generate data, and mapping the data.

13 **Q: What equipment did you use to shoot these elevations?**

14 A: I used Lecia leveling instruments.

15 **Q: Are you familiar with this equipment?**

16 A: Yes.

17 **Q: How so?**

18 A: This is the same equipment F&W uses on a day-to-day basis. As a construction Superintendent, I
19 know that it is the same equipment often utilized by surveyors. I have used it extensively in my
20 practice as a supervisor and have also trained other F&W employees on how to use it. For example,
21 F&W employees (myself included) have used this same equipment to install approach lighting
22 systems at airfields. All of those lights must be placed in a precise location, and F&W uses this
23 equipment to ensure that happens. I have also used this equipment personally to dig trenches and
24 ensure a downward slope.

25 **Q: Can you explain your process for shooting the elevations shown on Freasier Exs. 2 and 3?**

26 A: Yes. There is a Texas Department of Transportation (TXDOT) bench marker on the Property
27 that I used to establish an elevation. I then planted an elevation rod that would inform me of the
28 other elevation points on the Property. I would then go to another point on the property and,
29 utilizing an elevation rod, compare the increase or decrease in elevation compared to the TXDOT
30 marker to establish an elevation of that point.

31 **Q: Did you use anything else to aid yourself in determining the elevations across the**
32 **Property?**

33 A: Yes. I used a publicly available app called Compass Deluxe on my iPhone.

34 **Q: Did you do anything to verify whether the elevations were accurate?**

1 A: Yes. I compared them to the elevations given on Google Earth Pro and confirmed that they
2 aligned.

3 **Q: Other than the 1998 and 2002 flood events, has the Drainage Area ever held water?**

4 Yes. I have seen a handful of times since 1999 when that area becomes inundated with water after
5 heavy rainfall. That situation occurs every few years or so.

6 **Q: How large is the Drainage Area?**

7 A: It is about 80 acres.

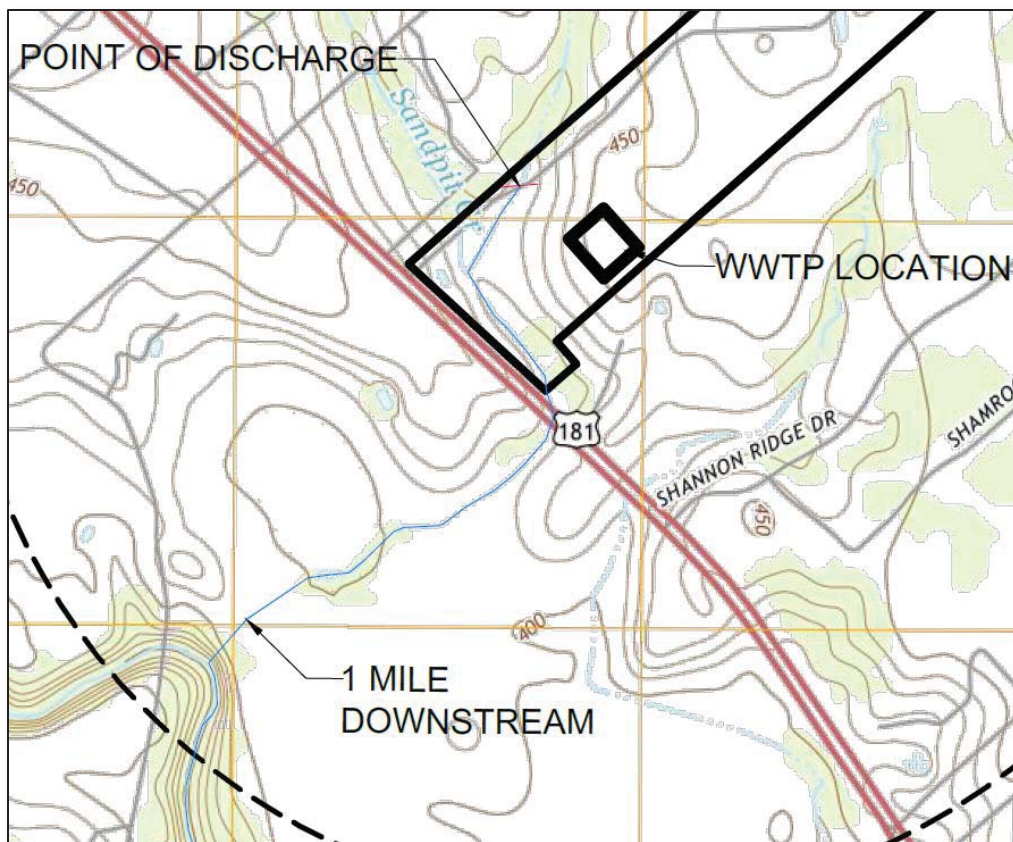
8 **Q: What were your observations of the waterflow?**

9 The water overflowed out of the pond at the end of Sandpit Creek and inundated the land that
10 forms the Drainage Area.

11 **Q: Did the water that flowed to the San Antonio River flow through a channel?**

12 No.

13 **Q: Please look at the page Bates-labeled App 238, with specific attention to this portion of**
14 **the map:**



1 **Q: Does the blue line accurately represent any watercourse on the Property?**

2 A: No.

3 **Q: Can you elaborate?**

4 A: The blue line purports to show a continuous watercourse from Sandpit Creek to the San Antonio
5 River. That is a misrepresentation. Sandpit Creek does not connect to the San Antonio River.

6 **Q: How do you know?**

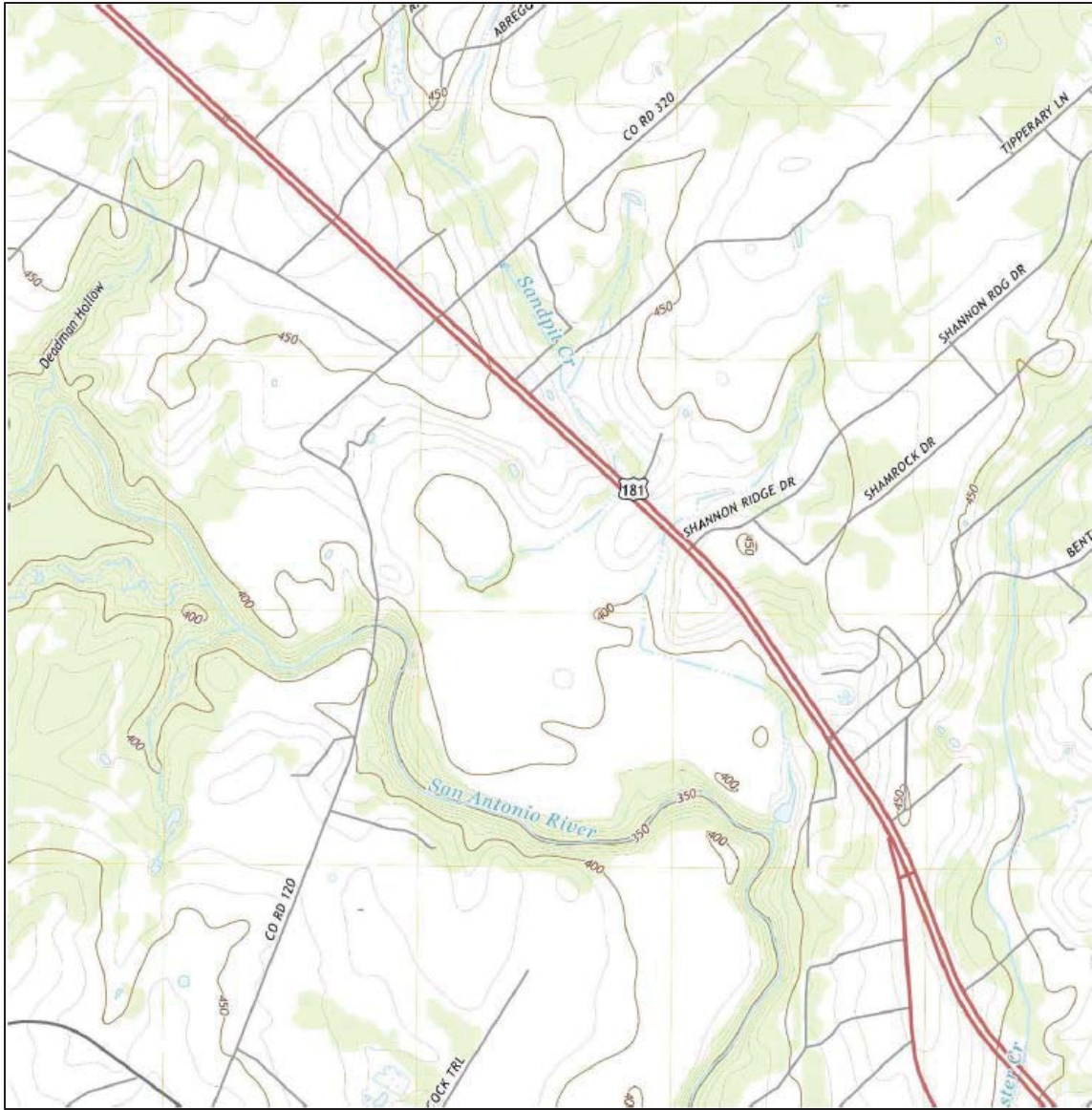
7 A: As I said, I am personally very familiar with the Property. I have traversed the portion of the
8 Property where Sandpit Creek ends and where the banks of the San Antonio River are. There is no
9 channel that exists that connects Sandpit Creek to the San Antonio River.

10 **Q: Have you corroborated your observations in any way?**

11 A: Yes.

12 **Q: How so?**

13 A: I have compared my observations with publicly available ~~ble~~ USGS maps (Freasier Ex. 4) and a
14 TXDOT map (Freasier Ex. 5), both of which were obtained from the Internet. All show that
15 Sandpit Creek does not connect to the San Antonio River. For example, the USGS map below
16 depicts the Property in 2019 and evinces that Sandpit Creek terminates before reaching the San
17 Antonio River:



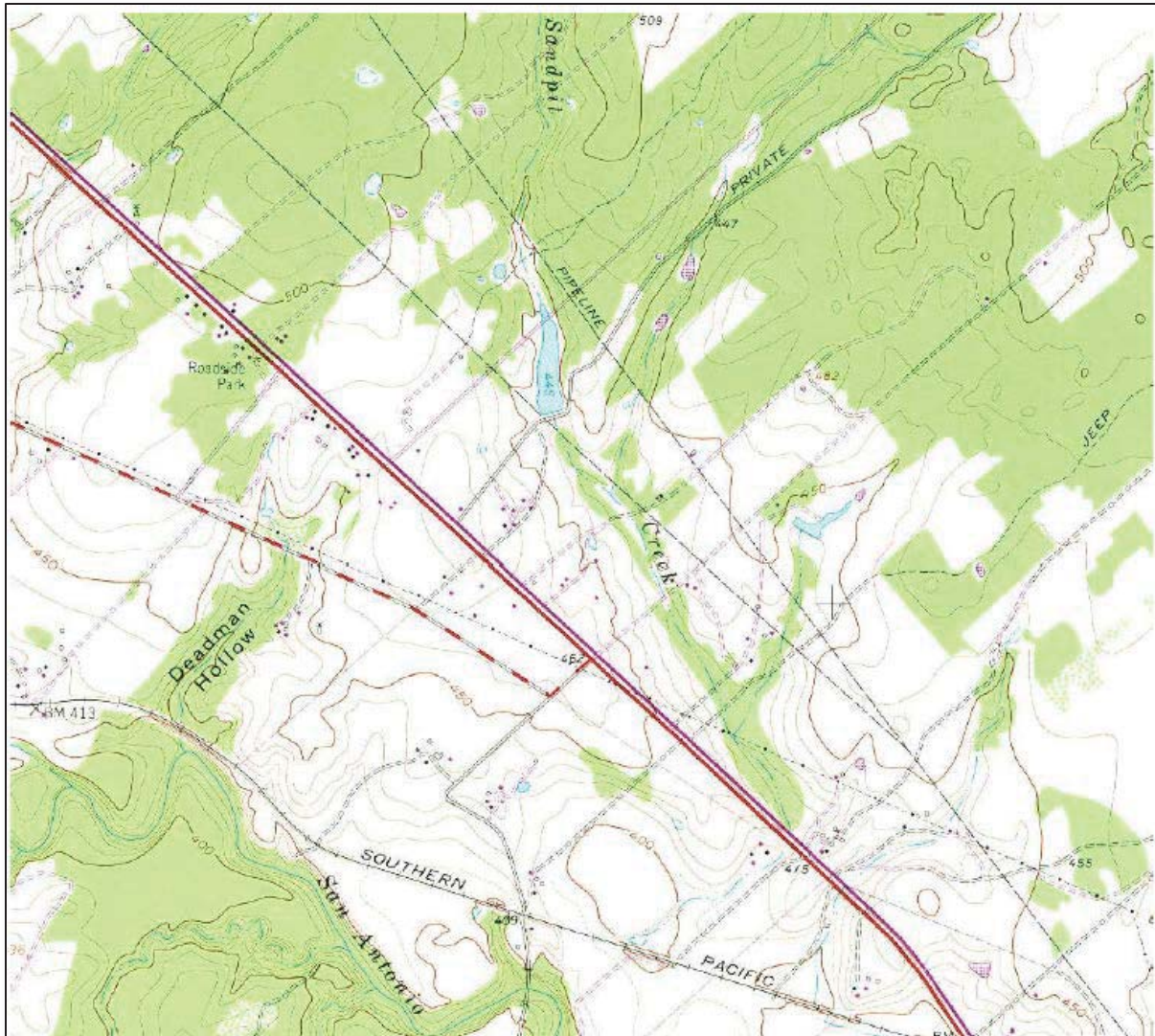
1

- 1 The USGS map from 2022 shows the same thing:

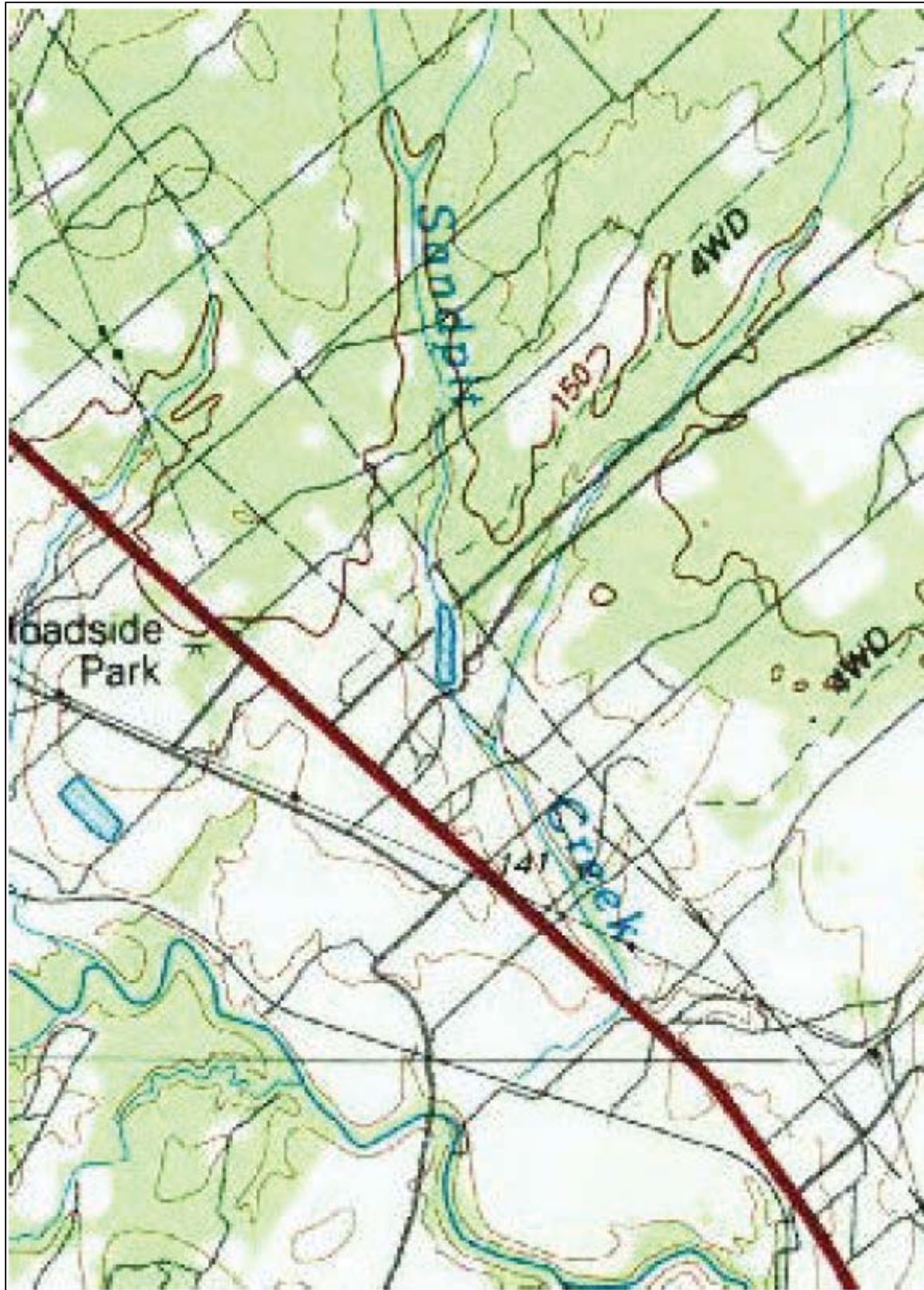


- 2

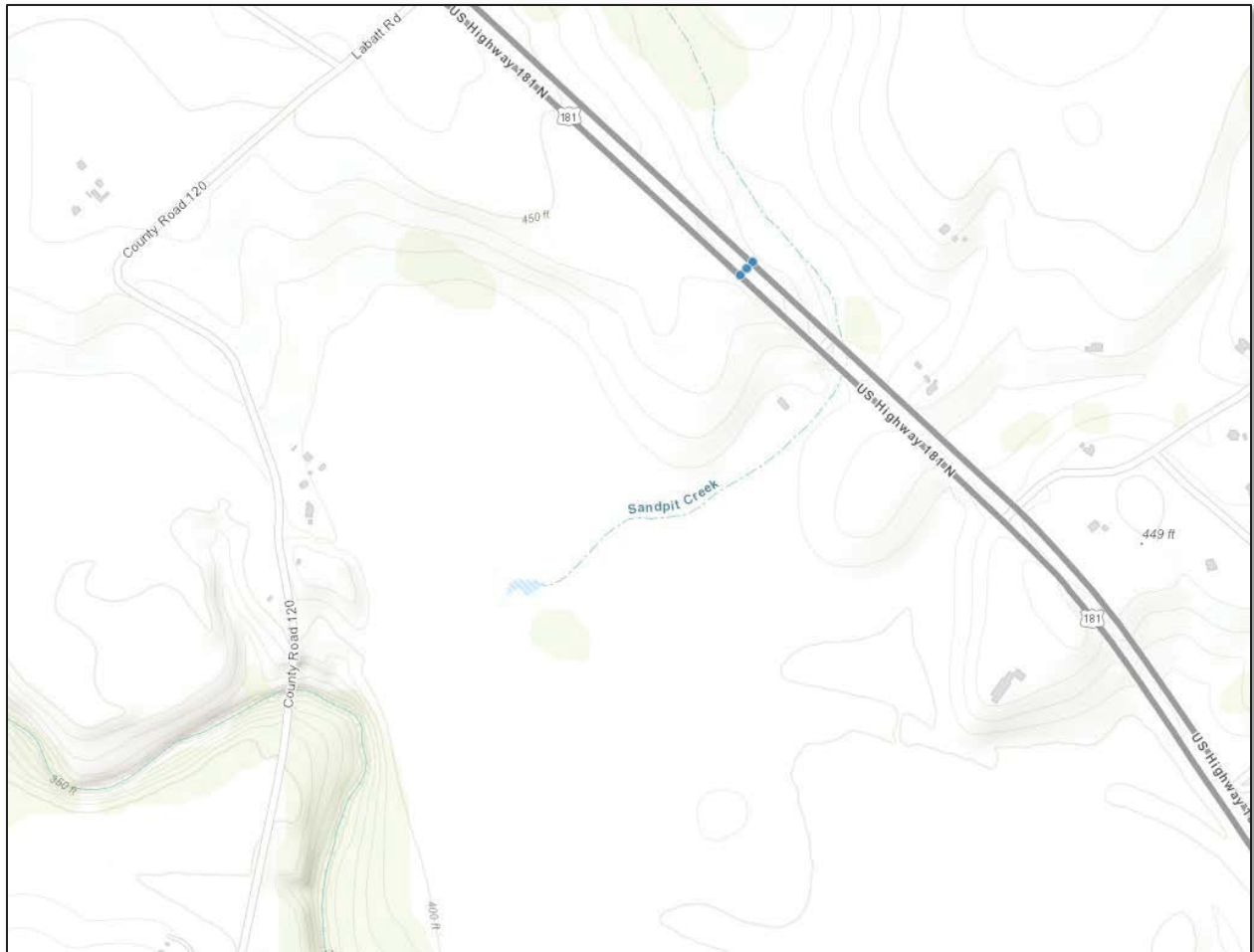
- 1 In fact, the USGS maps from 1961 (seen below) and 1985 (seen on the following page) also evince
- 2 that Sandpit Creek has not connected to the San Antonio River in that time frame:



3



1 You can also see that Sandpit Creek does not connect to the San Antonio River on this TXDOT
2 map, which is an image that I obtained by accessing the following website on October 25, 2023:
3 [https://gis-txdot.opendata.arcgis.com/datasets/TXDOT::txdot-reference-](https://gis-txdot.opendata.arcgis.com/datasets/TXDOT::txdot-reference-markers/explore?location=29.198262%2C-98.212613%2C16.23)
4 [markers/explore?location=29.198262%2C-98.212613%2C16.23](https://gis-txdot.opendata.arcgis.com/datasets/TXDOT::txdot-reference-markers/explore?location=29.198262%2C-98.212613%2C16.23)



5
6 **Q: Do the TXDOT and USGS images reveal anything else to you?**

7 A: Yes. There are topographical lines visible on the maps, which align with my elevation findings
8 and observations.

9 **Q: How is the Drainage Area utilized?**

10 A: That area is farmland. Freasier, LLC rotates its crops, so it has used that part of the Property to
11 grow corn, milo, cotton, and hay among other crops. Freasier, LLC is currently growing hay there,
12 which is used to feed the cattle that graze on the Property.

13 **Q: How frequently is the Drainage Area utilized?**

14 A: At a minimum, there are crops in that area every day of the year. Currently, Freasier, LLC is
15 growing hay in the Drainage Area.

1 **Q: Can you tell us what Freasier 0008 is a picture of?**



2

3 A: Yes. This is a picture of the land that I took. It fairly and accurately represents how the Property
4 currently looks where Sandpit Creek enters through a culvert under US Highway 181. The
5 coordinates are shown in Freasier Ex. 6.

6 **Q: Can you tell us what Freasier 0010 is a picture of?**



7

8 Yes. This is a picture of the land that I took. It fairly and accurately represents how the Property
9 currently looks where Sandpit Creek heads northeast from the entry of the Property. The
10 coordinates are shown in Freasier Ex. 7.

1 **Q: Can you tell us what Freasier 0012 is a picture of?**



2

3 A: Yes. This is a picture of the land that I took. It fairly and accurately represents how the Property
4 currently looks from the creek bed looking northeast approximately 1,000 feet from the entry point
5 of Sandpit Creek at the culvert located on US 181. On the right side of the photo to the south are
6 the ranch working barn and cattle pens. The coordinates are shown in Freasier Ex. 8.

7 **Q: Can you tell us what Freasier 0014 is a picture of?**



8

9 A: Yes. This is a picture of the land that I took. It fairly and accurately represents how the Property
10 currently looks from the creek bed looking southwest approximately 1,100 feet from the termination
11 point of Sandpit Creek. The coordinates are shown in Freasier Ex. 9.

1 **Q: What is Freasier Ex. 10?**

2 A: It is a video that I took of a portion of the Drainage Area on September 4, 2016, after a rain
3 event. You can see that a tremendous amount of water is stagnant on Property, temporarily
4 rendering that portion of the Property useless. You can hear my voice on the video, and I
5 incorporate my statements on the video into this pre-filed testimony as if set forth in full herein.

6 **IV. COMMUNICATIONS WITH APPLICANT**

7 **Q: Have you ever directly communicated with any representatives of HK Real Estate**
8 **Development, LLC?**

9 A: Yes.

10 **Q: When was that?**

11 A: It was shortly after Freasier, LLC received a “Notice of Receipt of Application and Intent to
12 Obtain Water Quality Permit” in approximately June or July 2022.

13 **Q: What was the substance of the communication?**

14 A: I reached out to HK to let them know that Sandpit Creek did not connect to the San Antonio
15 River, which was a problem. That representative asked if HK could survey the Property, and I said
16 that would be fine.

17 **Q: What happened next?**

18 A: HK sent a survey crew to the Property. I met with them but do not remember their names. There
19 were three individuals that represented themselves as employees of HK: two males and one female.
20 A survey crew came to the Property two weeks later and worked for two days.

21 **Q: Did you ever see the results of their work?**

22 A: No.

23 **Q: Did you ask for it?**

24 A: I asked for hydrological information that was collected on the property. HK’s attorney said it did
25 not have hydrological information nor had HK done any analysis on drainage.

26 **V. CONCERNS**

27 **Q: What are your concerns about the permit being issued?**

28 A: I am concerned that, because Sandpit Creek does not connect to the San Antonio River, the
29 constant inundation on the Property will cause Freasier, LLC to lose the ability to use a large portion
30 of the Property because Sandpit Creek does not connect to the San Antonio River. As it is now, the
31 Drainage Area only holds water after a large rain event, which has only happened a couple of times
32 since Freasier, LLC has owned the Property. If there is constant discharge of effluent onto the

1 Property, that area will be useless, causing a significant economic impact to Freasier, LLC because
2 no crops will be able to be grown in that area. For example, right now Freasier, LLC has a hay crop
3 in that area yielding about 1,200 bales of hay, which is used to feed the cattle. Freasier, LLC would
4 either have to find a new space on the Property to reestablish the crop or purchase hay to replace
5 what could have otherwise been grown in the Drainage Area.

6 **Q: Do you have any other concerns?**

7 A: Yes. I am concerned that constant presence of water on the Property will cause an odor and
8 mosquito breeding that will be a nuisance. I am also concerned that the market value of the Property
9 may be diminished by the constant presence of water.

10 **VI. CONCLUSION**

11 **Q: Does this conclude your testimony?**

12 A: Yes, subject to any amendments or supplements as may be allowed