

TCEQ DOCKET NO. 2023-0385-MWD

APPLICATION OF HK REAL ESTATE DEVELOPMENT, LLC FOR NEW TEXAS POLLUTION DISCHARGE ELIMINATION SYSTEM PERMIT NO. WQ0016150001	§ § § § §	BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
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FREASIER LLC’S REPLY TO HK REAL ESTATE DEVELOPMENT, LLC’S RESPONSE TO HEARING REQUESTS, THE OFFICE OF PUBLIC INTEREST COUNSEL’S RESPONSE TO REQUESTS FOR HEARING AND REQUEST FOR RECONSIDERATION, AND THE EXECUTIVE DIRECTOR’S RESPONSE TO HEARING REQUEST

TO THE HONORABLE COMMISSIONERS:

COMES NOW, Freasier LLC (“Freasier”) and files this Reply to HK Real Estate Development, LLC’s (“Applicant”) Response to Hearing Requests, the Office of Public Interest Counsel’s (“OPIC”) Response to Requests for Hearing and Request for Reconsideration, and the Executive Director’s (“ED”) Response to Hearing Request regarding the issuance of proposed Texas Pollutant Discharge Elimination System (“TPDES”) Permit No. WQ0016150001, and would respectfully show the following:

I. SUMMARY OF REPLY

Freasier provided sufficient evidence in its request for reconsideration to demonstrate the mischaracterization of the discharge route identified in the proposed TPDES permit and how such mischaracterization of the watercourse will cause Freasier to permanently lose the use and enjoyment of its property. Because of this, Freasier requests that its request for reconsideration be granted.

In the event the request for reconsideration is denied, Freasier has demonstrated that it timely addressed the issues regarding the mischaracterization of the watercourse during the public comment period and Freasier’s amended request for a contested case hearing did not withdraw its

public comments. Therefore, Freasier requests the Commissioners find that Freasier is an affected person and that all issues presented in Freasier’s public comment be referred to the State Office of Administrative Hearings (“SOAH”) for an evidentiary hearing.

II. BACKGROUND

Freasier owns property that is located less than one mile downstream from the discharge point identified in Applicant’s proposed TPDES permit. The proposed TPDES permit states that up to 180,000 gallons per day of treated wastewater will be discharged from the Richter Ranch Wastewater Treatment Facility (“Facility”) into Sandpit Creek and will then flow to the Upper San Antonio River, Segment No. 1911 of the San Antonio River Basin (the “San Antonio River”).

Freasier received notice of Applicant’s proposed TPDES permit through the Notice of Receipt of Application and Intent to Obtain Water Quality Permit, dated June 27, 2022. The ED later issued the draft TPDES permit, dated August 25, 2022. Freasier submitted its public comment on October 19, 2022, and the public comment period ended on October 21, 2022. The ED provided its response to the public comments on December 22, 2022. Freasier submitted its request for reconsideration and request for contested case hearing (“Freasier Requests”) on January 25, 2023, and the contested case hearing request period ended on January 27, 2023. Applicant, the OPIC, and the ED submitted their responses to the requests for reconsideration and contested case hearing on April 3, 2023.

III. REQUEST FOR RECONSIDERATION

A. Authority

Pursuant to 30 TAC § 55.201(e), any person may file a request for reconsideration of the ED’s decision. 30 TAC § 55.201(e). Any person submitting a request for reconsideration must submit the request within 30 days after the ED issues its decision and response to public comments.

Id. at § 55.201(a). The request must include a statement that the person is requesting reconsideration of the decision, and the request must also provide reasons why the decision should be reconsidered. *Id.* at § 55.201(e).

B. Discussion

The ED provided its decision and response to the public comments on December 28, 2022. Freasier submitted its request for reconsideration on January 25, 2023, and the contested case hearing request period ended on January 27, 2023. Therefore, Freasier submitted its request for reconsideration in a timely manner.

Freasier's request for reconsideration primarily focuses on the mischaracterization of the discharge route identified in Applicant's Domestic Wastewater Permit Application for a TPDES Permit ("Application") and in the proposed TPDES permit. *See generally* Freasier Requests. The Application and the proposed TPDES permit states that treated wastewater will be discharged from the Facility into Sandpit Creek and will then flow to the San Antonio River. Applicant submitted a 2019 USGS topographical map to demonstrate the proposed discharge route from the Facility. Applicant Application at Appendix F. The topographical map in the Application contained several notations created by Applicant, including a blue line that gave the appearance that Sandpit Creek connects to the San Antonio River. *Id.* Freasier's request for reconsideration included USGS topographical maps from 1961, 1985, 2019, and 2022 that clearly show Sandpit Creek ends on the Freasier property without connecting to Sandpit Creek. Freasier Requests at Exhibits D-1–D-3, E-2. Additionally, Freasier included a topographical survey that shows Sandpit Creek abruptly ends on its property in the request for reconsideration. *Id.* at Exhibit C.

The proposed TPDES permit mischaracterizes that discharge route by stating that treated wastewater will be discharged from the Facility into Sandpit Creek and will then flow to the San

Antonio River. As clearly indicated in the USGS topographical maps and the topographical survey submitted by Freasier in its request for reconsideration, Sandpit Creek does not connect to the San Antonio River, but instead abruptly ends on the Freasier property.

Because the proposed discharge route will abruptly end on the Freasier property without flowing to the San Antonio River, the analyses initially conducted by the Water Quality Division staff (“WQD staff”) may no longer accurately depict the potential impacts on water quality if the proposed TPDES permit is issued. If the proposed TPDES permit is granted without reconsidering the proposed discharge route and the mischaracterization of the watercourse, not only will the surface of the Freasier property be altered in such a way that Freasier will permanently lose the use and enjoyment of its property, but also may impact the results of any analyses or modeling conducted by the WQD Staff.

IV. REQUEST FOR HEARING

A. Authority

A request for a contested case hearing must be filed within 30 days of the ED’s decision and response to public comments. *Id.* at § 55.201(a). The request may be filed by an affected person, and must be in writing, may not be based on issues “raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director’s Response to Comment,” and must be based on timely comments filed by the requestor. *Id.* at § 55.201(c).

A hearing request must substantially comply with the following:

- (1) give the name, address, 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, specific, written statement explaining 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 executive director'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.

Id. at § 55.201(d).

An “affected person” is defined as a person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application that is not common to the general public. *Id.* at § 55.203(a). Factors to be considered when determining whether a person is an affected person 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) 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.

Id. at § 55.203(c).

The Commission must grant a request for contested case hearing if the request is made by an affected person and the disputed issues of fact were raised during the public comment period, were not withdrawn by the requestor by filing a withdrawal letter with the chief clerk prior to the ED's response to comments, and are relevant and material to the Commission's decision on the application. *Id.* at § 55.211(c)(2)(A)(ii).

B. Discussion

Applicant alleges Freasier is not an affected person because it did not timely raise the issue regarding the mischaracterization of the watercourse route in its public comment and that the amended request for contested case hearing effectively acted as a withdrawal of Freasier's public comment.

Freasier submitted its public comment and initial request for a contested case hearing on October 19, 2022, and the public comment period ended on October 21, 2022. Freasier's public comment raised multiple issues regarding the proposed TPDES permit, including the fact that Sandpit Creek does not connect to the San Antonio River. Specifically, the public comment stated:

As to the Application itself, [Applicant] stated in its Domestic Wastewater Permit Application for a Texas Pollutant Discharge Elimination System Permit (the "Application") that "effluent will be discharged into Sandpit Creek. The effluent will then flow South to the San Antonio River (Segment 1911)." The Permit also states that treated water will be discharged "to Sandpit Creek, thence to the Upper San Antonio River...." According to the USGS quadrant map on the San Antonio River Authority's website . . . Sandpit Creek does not connect with the Upper San Antonio River, but instead ends on the Property. Several hundred feet separate Sandpit Creek from the Upper San Antonio River. [Applicant] is incapable of abiding by the discharge terms of the Permit because Sandpit Creek does not connect with the Upper San Antonio River and instead ends on the Property.

Freasier Public Comment at 2.

Freasier's public comment also raised issues related to the Facility's interference with Freasier's use and enjoyment of its property, the negative impacts on Freasier's cattle, the potential

of nuisance odors, and whether a complete Application was available for public viewing.¹ The ED filed its response to the public comments on December 22, 2022. Freasier submitted its amended request for contested case hearing on January 25, 2023, and the contested case hearing request period ended on January 27, 2023.

Applicant alleges that Freasier’s request for a contested case hearing that further expanded on the mischaracterization of the watercourse route effectively acted as a withdrawal of Freasier’s public comment. Section 55.201(c) states a request for a contested case hearing may not be based on issues “raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director’s Response to Comment,” and must be based on timely comments filed by the requestor. *Id.* at § 55.201(c). At no time did Freasier submit a withdrawal letter to the chief clerk. Freasier’s amended request for a contested case hearing further expands on how the mischaracterization of the watercourse route in the proposed TPDES permit, which was clearly identified in Freasier’s public comment, will adversely affect Freasier in a manner not common to members of the general public.

Freasier has identified multiple issues of fact as set out above that both the ED and the OPIC agree should be referred to the SOAH for an evidentiary hearing. For the reasons outlined above, the Commissioners should refer all issues addressed in Freasier’s requests for contested case hearing to SOAH for an evidentiary hearing.

V. CONCLUSION

Therefore, Freasier LLC respectfully requests that the Commissioners grant its request for reconsideration. Freasier further requests that if the request for reconsideration is denied, that the

¹ While flooding was addressed in Freasier’s public comment, Freasier acknowledges that flooding is not within the regulatory authority of the Texas Commission on Environmental Quality (“TCEQ”). However, as discussed in more detail in this Reply, Freasier’s public comment regarding the mischaracterization of the watercourse is a separate and distinct issue from flooding.

Commissioners find that Freasier timely addressed the issues regarding the mischaracterization of the watercourse during the public comment period and that Freasier's amended request for a contested case hearing did not withdraw its public comments. Freasier also requests the Commissioners find that Freasier is an affected person and that all issues timely presented in Freasier's public comment should be referred to the SOAH for an evidentiary hearing.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been filed with or served on all persons listed on the attached mailing list via hand delivery, facsimile, electronic mail, overnight mail, U.S. mail, or Certified Mail Return Receipt Requested on this 17th day of April, 2023.

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