

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

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

FREASIER, LLC’S REPLY TO
EXCEPTIONS TO SUPPLEMENTAL PROPOSAL FOR DECISION ON REMAND

Freasier, LLC (“Freasier”) files this Reply to Exceptions to the Supplemental Proposal for Decision on Remand (the “PFD”) and Proposed Order issued on February 3, 2025, by Administrative Law Judges DeAngelo and Doggett (“ALJs”) in the above-referenced matter.

With the minor changes recommended in Freasier’s exceptions to the PFD filed on February 24, 2025, Freasier believes the ALJs recommendation in the PFD and the findings of fact, conclusions of law, and ordering provisions in the Proposed Order are all well supported.

Both the Executive Director of the Texas Commission on Environmental Quality (“TCEQ ED”) and Applicant have filed exceptions to the PFD. And while the TCEQ ED’s exceptions reflect a few minor, technical changes to the PFD, Applicant’s exceptions advocate an outright reconsideration of its fundamental reasoning and conclusions. The TCEQ ED’s exceptions have merit, but Applicant’s do not.

I. REPLY TO TCEQ ED’S EXCEPTIONS TO THE PFD

TCEQ ED “supports the Administrative Law Judges’ conclusions and recommendation in their Supplemental Proposal for Decision that the Draft Permit does not comply with the applicable statutory and regulatory requirements and should not be issued.”¹ The ED advocates for limited changes to the PFD, which in no way alter the PFD’s conclusions and recommendation. The ED’s

¹ Executive Director’s Exceptions at 1.

suggestions are minor and mostly clarify Agency procedure. Freasier does not oppose TCEQ ED's proposed revisions to the PFD.

II. REPLY TO APPLICANT'S EXCEPTIONS TO THE PFD

A. Applicant's Misplaced Arguments on Non-Referred Issues Must be Rejected.

Applicant HK Real Estate Development, LLC's ("Applicant" or "HK") exceptions are nothing more than a regurgitation of its closing arguments in the supposed form of exceptions. Notably, Applicant delayed addressing the issues referred on remand until the 17th page of their exceptions, with a mere four pages dedicated to the actual referred issues. If these were truly corrections for the ALJ, HK's exceptions would have addressed the content in the PFD much earlier, well before page 17. This is an inappropriate and untimely new closing argument.

1. The Remand issues were properly referred to SOAH.

One of Applicant's late-filed closing arguments (at 2-4) is that the entire remand hearing has deviated from the original issues referred by the Commission to SOAH for this contested case hearing. There is no statute or TCEQ rule requiring the issues on remand to mirror the issues litigated in the original proceeding. In fact, TCEQ's rules support how this case proceeded on remand. "When a case is referred to SOAH, only those issues referred by the commission or added by the judge under §80.4(c)(16) of this title (relating to Judges) may be considered in the hearing. The judge shall provide proposed findings of fact and conclusions of law only on those issues."² The Commission referred three issues on remand to this court to evaluate in its May 21, 2024 Interim Order. With those three issues, the Commission included a determination whether Sandpit Creek flows into the San Antonio River. The Commission was clear that the issue of connectivity was of paramount concern to their determination whether to approve or deny this application. The

² 30 Tex. Admin. Code § 80.6(d).

ALJs conducted the remand hearing and issued the PFD consistent with the Commission’s May 21, 2024 Interim Order and TCEQ’s rules. HK’s attempt to invalidate the evidence and the ALJs’ proposed findings of fact and conclusions of law by suggesting the issues in the original proceeding must mirror the remand proceeding should be rejected.

Notwithstanding this clear directive, TCEQ rules permit administrative law judges to expand the scope of the contested case. ALJs may consider additional issues beyond those referred by the commission when: the issues are material; the issues are supported by evidence; and there are good reasons for the failure to supply available information regarding the issues during the public comment period.³ Your Honors could have properly added the issues HK now claims have deviated from the original proceeding. As such, no valid exception can be lodged against the PFD on those grounds.

2. The Draft Permit fails to meet *Domel* and *Hoefs*.

Applicant reargues (at 5-13) that their improperly characterized discharge somehow satisfies existing law. Despite HK’s attempt to draw a comparison between the facts here and the watercourse in *Domel* and *Hoefs*, there is no valid analogy. Freasier does not need to rehash its arguments on this case law,⁴ but it is important to note that HK’s cited evidence does not meet the applicable test for defining a state watercourse.

At a minimum, *Domel* required the watercourse to have the “carrying capacity” to handle the discharge,⁵ while *Hoefs* required a permanent source of supply.⁶ The evidence in this case shows that Sandpit Creek going towards the San Antonio River has neither. Dr. Furnans testified

³ 30 Tex. Admin. Code § 80.4(c)(15)(A—C).

⁴ To avoid duplicative arguments, Freasier refers back to its Reply to Closing Arguments at pages 5 through 9 for briefing on *DHJB Development, Domel*, and *Hoefs*.

⁵ *Domel v. City of Georgetown*, 6 S.W.3d 349, 352 (Tex. App.—Austin 1999, pet. denied).

⁶ See also *Hoefs v. Short*, 273 SW 785, 786-87 (Tex. 1925).

that Sandpit Creek will overflow its bed and banks eliminating any possibility that it has adequate carrying capacity.⁷ Also, while the TxDOT culverts relied upon by HK may drain 7,200 acres of land, they do not address the core issue: the intermittent nature of the stream, which does not provide a consistent or permanent source of supply. TCEQ witness Brad Caston dismisses HK's notion that the existence of culverts beneath Highway 181 serves as evidence that Sandpit Creek is connected and flows to the San Antonio River. No TCEQ witness testified that road design is considered when analyzing a TPDES permit application. The Court correctly applied prevailing case law in PFD; HK's discharge, under these circumstances, does not meet the necessary criteria.

3. Denying HK's application will not invalidate TCEQ's TPDES Program.

Applicant unrealistically tries to suggest that TCEQ's TPDES permit program will unravel if their permit is not granted because Sandpit Creek is an intermittent stream. TCEQ issues permits on a case-by-case basis, therefore, denial of a single TPDES application will not disallow the vast majority of permits in nearly all cities west of Interstate Hwy IH-35 as Applicant melodramatically fears.⁸ This is a red herring. When the discharge route is flawed, the ED addresses this complication before permit issuance. As Mr. Caston testified, it is TCEQ's practice not to proceed with an application if there are problems with the discharge route, like there are here.⁹ The Commission should not be alarmed by HK—denying this permit based on the facts in this case will not dismantle the TPDES permit scheme.

⁷ Exhibit PRO-R-18 at 15:9 – 16:3 (Direct Testimony of Dr. Jordan Furnans).

⁸ Applicant Exceptions at 2.

⁹ Tr. V. 3 at 39:9-14 (As TCEQ witness Caston testified to visiting a site and seeing there's no stream where an application claims "so we notified the Applicant and they have changed the outfall location").

4. Federal law requires a surface water connection.

On another issue that was untimely briefed, Applicant misunderstands (at 6) the requirement for a discharge to be into navigable waters under the Clean Water Act § 402. Freasier agrees that the Federal law allows states to adopt “requirements which are more stringent or more extensive” than the Federal requirement.¹⁰ However, Applicant’s claim that Texas’ “into or adjacent to water in the state” is somehow more protective than the Federal definition of Waters in the United States is irreconcilable.¹¹

Federal law requires that a discharge be into waters that are connected to surface waters—meaning that those waters with a direct connection to navigable waters are protected. This is clearly a more protective approach than Texas law, which, according to the Applicant’s argument, would only require an analysis of whether the discharge (at the outfall) was into or adjacent to waters in the state. Federal law’s requirement of a meaningful connection to navigable waters is far more comprehensive and protective, as it ensures the safeguarding of water quality throughout a watercourse, not just at a single discharge point. Regardless of the stringency standard, the ALJs correctly determined by a preponderance of the evidence that Sandpit Creek does not flow into the San Antonio River, finding that there is not a watercourse past the impoundment.¹²

5. HK’s “new” discharge route constitutes a major amendment.

In yet another attempt to present a closing argument, Applicant claims (at 13-17) that their previously acknowledged incorrect discharge route is merely a minor error, and correcting it would be a minor amendment to the application. The reality could not be further from the truth. According to TCEQ’s rules, a minor amendment must not result in a material change in the pattern

¹⁰ 40 CFR § 123.1(i).

¹¹ Applicant Exceptions at 6.

¹² Proposal for Decision at 49.

or place of discharge of injection.¹³ However, the hearing revealed a mountain of evidence proving that the discharge will end in the impoundment neighboring Freasier’s property, not in the San Antonio River as the application claims. This is not a minor discrepancy—it represents a fundamental change in both the pattern and place of the discharge. By the letter of the rule, it’s impossible for this change to simply be a minor amendment. TCEQ witness Caston verified as such, testifying that he “would characterize it [the discharge route] as to Sandpit Creek and then stopping there.”¹⁴ He would not characterize it as ending in the San Antonio River, as the current application claims.

Applicant discusses the repealed and otherwise irrelevant “Freeze Rules” for amending applications during hearings that existed when the Agency was still the Texas Natural Resource Conservation Commission (“TNRCC”).¹⁵ The TNRCC became TCEQ on September 1, 2002. HK submitted this application on April 20, 2022, nineteen years after the Agency’s name change. TCEQ has amended, changed, and repealed many rules during that nineteen-year period. This application is subject to the *current* rules of the Agency and any former rules are completely irrelevant and should not to be considered by the ALJs or the Commission.

6. HK’s comparison to a recent TCEQ permit issuance is misplaced.

Applicant incorrectly attempts (at 16) to portray their own application and this proceeding to the City of Liberty Hill’s TPDES renewal application, stating that the ED may change a draft permit while a case was under SOAH’s jurisdiction.¹⁶ In that case, the ED’s position remained steadfast throughout the SOAH hearing recommending the same draft permit after the contested case hearing that was initially referred to SOAH. HK cannot use Liberty Hill to suggest that it is

¹³ 30 Tex. Admin. Code § 305.62(c)(2).

¹⁴ Tr. V. 3 at 55:15-21.

¹⁵ Applicant Exceptions at 16.

¹⁶ Applicant Exceptions at 16.

appropriate for the ED to change the draft permit while the case was pending at SOAH because that did not happen. The Commission, not the ED, issued the permit renewal with certain changes to the draft permit. That case shows that the Commission itself may change a draft permit, and notably, outside of the ED's and SOAH's jurisdiction.

7. LiDAR cannot be considered.

Repeatedly in their exceptions, Applicant refers (at 4, 9, 20) to a mysterious “highly sophisticated LiDAR technology” showing a hydraulic and hydrological connection between Sandpit Creek and the San Antonio River being inexplicably ignored throughout the hearing. Conveniently, Applicant fails to cite to *any* LiDAR evidence in the record showing such a connection. That is because Applicant did not introduce nor produce any LiDAR data over the course of this proceeding, despite some experts stating that LiDAR informed their opinions and having ample opportunity to do so during their direct and rebuttal case. The ALJs cannot make any changes to the PFD based on LiDAR.

B. Applicant's Exceptions on Referred Issues Must Be Rejected.

Issue 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 Texas Surface Water Quality Standards.

Applicant claims (at 17) that the ED refused to review their revised discharge route causing them harm. The ED was under no obligation to review it. As indicated in the ED's Exceptions to the Administrative Law Judges' Supplemental Proposal for Decision at pages 2 to 3, there is a process to follow when an application is deficient. Here, the discharge route description was deficient. Applicant failed to follow the proper procedures, and as of the filing of this response, they have still not updated their application. Given this, Applicant has not been subjected to any prejudicial treatment whatsoever.

Moreover, HK claims (at 17) without merit that the determination that Sandpit Creek terminates in the impoundment is erroneous. The record is replete with a substantial body of evidence that conclusively establishes that Sandpit Creek ends in the impoundment. Freasier has provided compelling evidence that supports the ALJs' findings, which affirm that water quality is not being protected downstream of the impoundment.

- Tr. at V. 1 at 135:3 – 136:15 (Grounds Cross).
- Tr at V. 1 at 231:1-12 (Ryan Cross).
- Tr at V. 2 at 135:6-17 (Caston Cross).
- *See Exhibit* PRO-R-17 (TCEQ Interoffice Memorandum of Peter Schaefer Dated July 15, 2024)
- Tr. at V. 3 at 149:1-5 (Caston Cross).
- *See Exhibit* PRO-R-18 at 11:15-17 (Revised Direct Prefiled Testimony of Dr. Jordan Furnans).
- Tr. at V. 3 at 35:6-20 (Caston Cross).
- *See Exhibit* PRO-R-18 at 22:2-5.
- *See Exhibit* PRO-R-1 at 11:17 (Protestant Freasier, LLC's Remand Direct Testimony of James R. Freasier, Jr.)
- *See Exhibit* PRO-R-11 at 12:1-7 (Protestant Freasier, LLC's Remand Direct Testimony of James L. Machin, P.E.).

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

HK's reliance on evidence (at 19) dismissed as unreliable by the ED is improper. The Applicant points to Dr. John Grounds' testimony, which is based on HEC-RAS models. However, the record is clear: the methods Grounds relied on are not utilized by the TCEQ in analyzing TPDES applications. This fact alone significantly undermines the credibility of his testimony.

Furthermore, the Applicant failed to produce any LiDAR data to substantiate Grounds' opinions, rendering any reference to such data us not only unreliable but also outside the bounds of the official hearing record. Without this supporting evidence, the claims based on LiDAR are unsubstantiated and should be disregarded.

In contrast, Freasier has provided substantial evidence that supports the ALJs' findings, specifically that the discharge route has not been adequately characterized below.

- Tr. at V. 3 at 39:1-8 (Caston Cross).
- *See Exhibit* PRO-R-18 at 21:5—22:5 (Revised Direct Prefiled Testimony of Dr. Jordan Furnans).
- Tr. V. at 3 39:9-14 (Caston Cross).
- Tr. at V. 1 at 211:13-15; *Id.* at 216:5-15 (Ryan Cross).
- Tr. at V. 1 at 216:5-15; 218:16-19 (Ryan Cross).
- Tr. at V. 1 at 62:3-17 (Baggs Cross).
- *See Exhibit* PRO-R-18 at 16:21-22.
- *See Exhibit* PRO-R-18 at 16:22-24.
- *See Exhibit* PRO-R-18 at 14:12-18.
- *See Exhibit* PRO-R-18 at 14:20-28.
- Applicant's Exhibit 1 at APP000281 (USGS Quadrangle Map).
- Tr. at V. 3 at 139:17—140:12 (Ryan Rebuttal Cross).
- *See Exhibit* PRO-R-11 at 13:25 – 14:9 (Protestant Freasier, LLC's Remand Direct Testimony of James L. Machin, P.E.).
- *See Exhibit* PRO-R-1 at 7:7; 22:8:3 (Protestant Freasier, LLC's Remand Direct Testimony of James R. Freasier, Jr.).
- Tr. at V. 3 at 45:18-22 (Caston Cross).
- Tr. at V. 3 at 48:4-7 (Caston Cross).
- Tr. at V. 3 at 55:20-21 (Caston Cross).
- Tr. at V. 3 at 26:17-27:4 (Caston Cross).
- Applicant's Exhibit 20 at APP000419; Tr. at V. 1 at 133:2-13 (Grounds Cross).
- Tr. at V. 1 at 132:20-24 (Grounds Cross).
- Tr. at V. 1 at 134:24-135:2 (Grounds Cross).
- Tr. at V. 1 at 135:20-24, 136:3-7. (Grounds Cross).
- Tr. at V. 1 at 206:17-20 (Ryan Cross).
- Tr. at V. 1 at 207:13-17 (Ryan Cross).
- Applicant's Exhibit 55 at 6:15-18. (Rebuttal Testimony of Dan Ryan).
- Tr. at V. 3 at 144:7-16 (Ryan rebuttal cross).
- Applicant's Exhibit 55 at 5:7-9; *See also* Tr. at V. 3 at 117:20-25.
- Tr. at V. 3 at 24:11-23 (Caston Cross).
- Tr. at V. 3 at 25:3-7 (Caston Cross).
- Tr. at V. 3 at 35:13-20 (Caston Cross).
- Tr. at V. 3 at 34:16-23 (Caston Cross).
- Tr. at V. 3 at 34:24-35:5 (Caston Cross).

Issue C: Whether the Draft Permit is protective of Requestor's use and enjoyment of its property in accordance with the Texas Surface Water Quality Standards.

HK continues to assert (at 21) that their application complies with the Texas Surface Water Quality Standards (TSWQS), despite the fact that the “new” discharge route has never been evaluated by the ED. This evaluation is a critical and required step in TCEQ’s technical review process before the Commission can determine whether the Freasier’s property—Casa del Sueno—can continue to be used and enjoyed without any adverse water quality impacts from the discharge.

By failing to undergo this necessary review, HK’s claim of compliance with the TSWQS is not only premature but also baseless. Freasier has provided substantial evidence supporting the ALJs’ findings and conclusions that the draft permit fails to adequately protect the Freasier’s property under the TSWQS.

- Tr. at V. 3 at 124:20 –125:18 (Ryan Cross).
- Tr. at V. 3 at 126:13-16 (Ryan Cross).
- *See Exhibit* PRO-R-18 at 10:15-23 (Direct Prefiled Testimony of Dr. Jordan Furnans).
- *See Exhibit* PRO-R-11 at 12:9-13 (Direct Prefiled Testimony of James L. Machin, P.E.).
- *See Exhibit* PRO-R-18 at 25:24-29 (Direct Prefiled Testimony of Dr. Jordan Furnans).
- *See Exhibit* PRO-R-18 at 25:29-30 (Direct Prefiled Testimony of Dr. Jordan Furnans).
- *See Exhibit* PRO-R-18 at 25:30-26:5; 15:1-8. (Direct Prefiled Testimony of Dr. Jordan Furnans).
- *See Exhibit* PRO-R-18 at 26:21-24 (Direct Prefiled Testimony of Dr. Jordan Furnans).
- *See Exhibit* PRO-R-18 at 26:26-30 (Direct Prefiled Testimony of Dr. Jordan Furnans).
- Tr. at V. 3 at 52:12-17 (Caston Cross).
- *See Exhibit* PRO-R-1 at 12:4-13 (Direct Prefiled Testimony of James Freasier).
- *See Exhibit* PRO-R-7 at 4:18-22 (Direct Prefiled Testimony of Jennifer Kincaid).
- *See Exhibit* PRO-R-18 at 27:7-28:4 (Direct Prefiled Testimony of Dr. Jordan Furnans).
- *See Exhibit* PRO-R-1 at 5:10-14 (Direct Prefiled Testimony of James Freasier).
- *See Exhibit* PRO-R-1 at 14:13-18 (Direct Prefiled Testimony of James Freasier).
- *See Exhibit* PRO-R-11 at 12:9-14 (Direct Prefiled Testimony of James Machin).
- *See Exhibit* PRO-R-7 at 9:1-12 (Direct Prefiled Testimony of Jennifer Kincaid).

C. Applicant’s Exceptions on Transcript Costs Must Be Rejected.

HK’s attempt (at 21) to shift half of the transcript costs onto Freasier, a landowner who is merely trying to protect his property, is both unreasonable and unjustified. The entire dispute could

have been avoided if HK had properly vetted the discharge route before applying and fully explained it to the Commission. Instead, HK failed in its due diligence, creating the necessity of this contested case proceeding.

HK attempts to play up the significance of a minor inconsistency by James Freasier—statements related to whether he has seen water flowing from his property to the San Antonio River—suggesting that his statements contributed to the confusion or prolongation of the evidentiary record. This is an exaggeration. It was not Freasier’s testimony that caused delays; it was HK’s failure to get the discharge route correct in the first place. As a result, both Freasier and the ED had to present at least five expert witnesses combined to properly characterize the discharge route, rather than HK addressing the issue properly from the outset or amending their application once they realized their mistake.

The real issue here is HK’s glaring misstep in their efforts to secure a wastewater permit for their housing development, a project from which they stand to gain monetary benefits. Freasier, on the other hand, has no such financial incentive—he is merely trying to protect his land from future harm. Given this, the ALJs were right to rule that the majority of the transcript costs should fall on HK.

III. CONCLUSION

For the foregoing reasons, Freasier respectfully requests that the ALJs reject HK’s exceptions to the PFD, issue an exceptions letter incorporating the ED’s and Freasier’s minor edits to the PFD, and seeks any other relief to which it is entitled.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Protestant Freasier, LLC’s Replies to Closing Arguments have been forwarded via electronic mail or U.S. Mail to the persons on the attached Service List on this the 5th day of March, 2025.

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