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Blas J. Coy, Jr., *Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

February 12, 2007

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

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2007 FEB 12 PM 3:18  
CHIEF CLERKS OFFICE

**RE: ELLIS COUNTY MUNICIPAL UTILITY DISTRICT NO. 1  
TCEQ DOCKET NO. 2006-0391-DIS**

Dear Ms. Castañuela:

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

Sincerely,

*Blas J. Coy, Jr.*  
Blas J. Coy, Jr.  
Public Interest Counsel *pp jlc*

cc: Mailing List

Enclosure

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 • P.O. BOX 13087 • AUSTIN, TEXAS 78711-3087 • 512/239-6363

P.O. Box 13087 • Austin, Texas 78711-3087 • 512/239-1000 • Internet address: [www.tceq.state.tx.us](http://www.tceq.state.tx.us)

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TCEQ DOCKET NO. 2006-0391-DIS

IN THE MATTER OF THE PETITION  
FOR THE CREATION OF ELLIS  
COUNTY MUNICIPAL UTILITY  
DISTRICT NO. 1

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BEFORE THE TEXAS COMMISSION

ON

ENVIRONMENTAL QUALITY

2007 FEB 12 PM 3:19

CHIEF CLERKS OFFICE

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

TO THE 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 Request for Hearing concerning the above-referenced matter.

**I. Background**

Mac McCoy submitted a Petition, dated February 1, 2006, to the Commission for the creation of the Ellis County Municipal Utility District (MUD) No. 1 pursuant to Article XVI, Section 59 of the Texas Constitution and Chapters 49 and 54 of the Texas Water Code. The application was declared administratively complete on February 27, 2006. The Petitioner published Notice of the District Petition on March 22 and 29, 2006 in the *Midlothian Mirror*, a newspaper generally circulated in Ellis County. The petitioners also posted notice of the petition on the bulletin board used for legal notices in Ellis County on March 21, 2006 as required by 30 TAC § 293.12 (b). According to the notice the proposed district encompasses approximately 448.39 acres in Ellis County, part of which would be located within the extraterritorial jurisdiction (ETJ) of the City of Ferris in Ellis County, Texas.

On March 24, 2006 the TCEQ Chief Clerk's Office received a timely filed letter from Gus H. Pappas, City Manager for the City of Ferris (City) objecting to the creation of the District on behalf of the City. Attached to the letter was a copy of City Ordinance No. O-06-619 which

rescinded a prior Ordinance that purported to consent to the creation of the district. For the reasons set out below, OPIC recommends that the commission refer this matter to the State Office of Administrative Hearings (SOAH) to determine if the Petition for Creation of the Ellis County MUD No. 1 should be granted.

## **II. Applicable Law**

This petition was declared administratively complete on February 27, 2006. Therefore, the hearing request associated with this application is evaluated under Subchapter G of Title 30 Chapter 55 of the Texas Administrative Code (TAC). 30 TAC § 55.251 (c) requires that a hearing requester provide the commission with certain information. In particular, 30 TAC § 55.251 (c) states that the hearing request must substantially comply with the following:

- (1) Give the name, address, and daytime telephone number of the person who filed 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 activity that is the subject of the application and how and why the requestor believes he or she will be affected by the activity in a manner not common to members of the general public;
- (3) request a contested case hearing; and
- (4) provide any other information specified in the public notice of application.

In order to grant an individual's request for a contested case hearing, the Commission must find that the request is made in writing and by an affected person. 30 TAC § 55.251(b). 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." 30 TAC § 55.256(a). This justiciable interest does not include an interest common to the general public. *Id.* Section 55.256(c) provides relevant factors that will be considered in determining whether or not a person is affected. These factors include, but are not limited to:

- (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, safety, and use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

Section 55.256(b) of 30 TAC provides that, "Governmental entities, including local governments and public agencies, with authority under state law over issues contemplated by the application may be considered affected persons."

This petition and the City's request is also subject to Chapter 54 of the Texas Water Code (TWC). In particular, TWC § 54.014 provides that "to create a [municipal utility] district, a petition requesting creation shall be filed with the commission."<sup>1</sup> The requisite contents of a petition are set out in § 54.015 including the requirement to provide a description of the boundaries of the proposed district. In addition, if the petition proposes to include land located within the corporate limits of a city or within the extraterritorial jurisdiction of a city, consent of the city to the creation is required.<sup>2</sup>

The commission may act on an application without holding a hearing if a hearing is not requested by "...an affected person in the manner prescribed by commission rule..."<sup>3</sup> If a request is received by an affected person and the commission determines that a hearing is necessary, the commission shall conduct the hearing and accept evidence on the sufficiency of

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<sup>1</sup> We note that a municipal utility district may be created through legislative enactment or by petition to the Commission. Article XVI, Section 59, subsections (d) - (e) of the Texas Constitution impose certain conditions on the introduction of a bill to create a district. See TEX. CONST. art XVI, § 59. A person may also petition the commission for the creation of a municipal utility district pursuant to the requirements of Texas Water Code Chapters 49 (Provisions Applicable to All Districts) and 54 (Municipal Utility Districts).

<sup>2</sup> TWC § 54.016 (a) and 30 TAC § 293.11(a)(2) - (4).

<sup>3</sup> TWC § 49.011 (c) (Notice Applicable to Creation of a District by the Commission).

the petition and whether the project is feasible and practicable and is necessary and would be a benefit to all or part of the land proposed to be included in the district.<sup>4</sup> In determining if the project is feasible and practicable and if it is necessary and would be a benefit to the land proposed to be included, the commission shall consider:

- (1) the availability of comparable service from other systems, including but not limited to water districts, municipalities, and regional authorities;
- (2) the reasonableness of projected construction costs, tax rates, and water and sewer rates; and
- (3) whether or not the district and its system and subsequent development with the district will have an unreasonable effect on the following:
  - (A) land elevation;
  - (B) subsidence;
  - (C) groundwater level within the region;
  - (D) recharge capability of a groundwater source;
  - (E) natural run-off rates and drainage;
  - (F) water quality; and
  - (G) total tax assessments on all land located with a district.<sup>5</sup>

### **III. Discussion**

In its letter, the City states that the property in question is immediately adjacent to and west of the Ferris city limits but that over 80 per cent of the land to be included in the district is within the City's extraterritorial jurisdiction. The City believes the creation of the district "would jeopardize the future rational growth of our community and the planned expansion of the water and sewer system to this property and beyond." The City notes that the land is located within the area of two "City sponsored improvement districts" which the City has developed in order to provide services to the area. The City is concerned that the removal of the proposed area from these improvement districts will threaten their financial solvency. The City believes the creation of the MUD will detrimentally impact the City's ability to serve that area or to

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<sup>4</sup> TWC § 54.020 (a).

<sup>5</sup> TWC § 54.021 (b).

extend its boundaries beyond that property – a situation which the City contends will not operate in the City’s best interests.

The City attaches City Ordinance No. O-06-619 dated March 20, 2006 declaring it does not support the creation of the MUD and repealing a previous ordinance (City Ordinance NO. 482) and resolution passed on January 20, 2004 in which the City consented to the creation of the district. This action was taken when the City learned that the “developers/principles [sic], having failed in a legislative attempt to create the district, were continuing to seek the creation of the district through the approval process of TCEQ.”<sup>6</sup> Apparently, the consent given in 2004 was predicated on an understanding that the Petitioner would be seeking Legislative creation of the district<sup>7</sup>, an effort that was not successful.

The notice of the petition states that part of the proposed district is within the extraterritorial jurisdiction of the City of Ferris. The City agrees and argues that most of the proposed district lies within its ETJ. Although it appears that the City consented to the creation of the district at some point in the past, it is clear that it does not consent at this time. Indeed, the City not only opposes the creation of the district but goes on to make it clear that it “DOES NOT support, encourage, condone or desire that a ... political subdivision be created in its extraterritorial jurisdiction.” The City further states that it “will resist its creation with all possible means at our disposal.”<sup>8</sup> In addition, the City has invested funds in engineering studies and issued debt in order to construct certain “improvement districts” for the provision of service

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<sup>6</sup> In its letter the City says that it had met with the Applicant to discuss the development of the improvement districts to provide the requested services, and believed there was general agreement that the City’s proposal was best for the area and that the MUD would no longer be pursued. Based on that understanding, the City proceeded with its planning, spent considerable sums on engineering and has issued debt to begin the physical work on the districts.

<sup>7</sup> See footnote 1, *supra*.

<sup>8</sup> Although the City never uses the magic words “I request a contested case hearing” it is clear that a hearing is available to the City if it shows that it is an affected person.

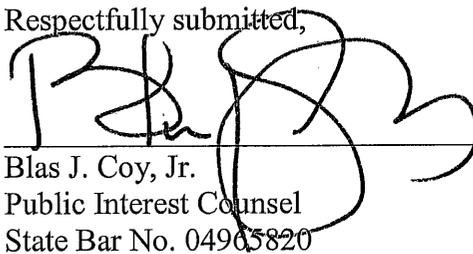
to this land. We read this action to raise the issue of whether the MUD is now necessary. Based on our review of the law, agency rules, the City's allegations and notwithstanding the somewhat limited information contained in the Chief Clerk's file, we conclude that the City of Ferris is an affected person.

If a contested case hearing is held concerning the proposed district, the State Office of Administrative Hearings (SOAH) will make findings pursuant to Texas Water Code § 54.021. Specifically, SOAH will make a recommendation to grant or refuse the petition based on whether the petition conforms to the requirements of Tex. Water Code § 54.015 and whether the project is feasible, practicable, necessary and beneficial to the land included within the proposed district. In addition, if there is a question as to whether the City could rescind its earlier consent, the Commission could direct SOAH to address that issue.

#### **IV. Conclusion**

We believe the issues raised in the City's hearing request lie within the scope of Chapter 54 of the Water Code. For the reasons set forth above, OPIC recommends that the Commission refer this matter to the State Office of Administrative Hearings.

Respectfully submitted,

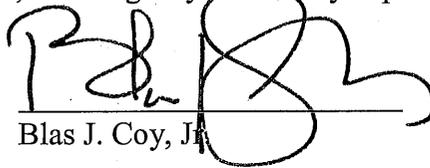


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**CERTIFICATE OF SERVICE**

I hereby certify that on this 12<sup>th</sup> day of February, 2007, the original and eleven copies of the Office of the Public Interest Counsel's Response to Request for Hearing were served upon 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 or by deposit in the U.S. Mail.

  
Blas J. Coy, Jr.

TEXAS  
COMMISSION  
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QUALITY  
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CHIEF CLERKS OFFICE

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**TCEQ DOCKET NO. 2006-0391-DIS**

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