TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

January 22, 2009

Honorable Commissioners
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

Re: Application of Galilee Partners, L.P., for Creation of Maypearl Water Control and Improvement District No. 1 of Ellis County, Texas;
SOAH Docket Nos. 582-07-2163 & 582-08-0020; Exceptions to PFD

Dear Honorable Commissioners:

The representative for the Executive Director of the Texas Commission on Environmental Quality has enclosed the Executive Director's Exceptions to the Proposal for Decision.

If you have any questions, please call me at (512) 239-6743.

Sincerely,

Christiaan Siano
Staff Attorney
Environmental Law Division

Enclosure

cc:

MAILING LIST

SOAH DOCKET NO. 582-07-2163
TCEQ DOCKET NO. 2005-1686-DIS

APPLICATION OF GALILEE PARTNERS, L.P., FOR CREATION OF MAYPEARL WATER CONTROL AND IMPROVEMENT DISTRICT NO. 1 OF ELLIS COUNTY, TEXAS	§ § § § §	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

THE EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE PROPOSAL FOR DECISION

TO THE HONORABLE COMMISSIONERS OF THE TCEQ:

COMES NOW the Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) and files the following Executive Director's Exceptions to the Administrative Law Judge's (ALJ) Proposal for Decision (PFD) in the above captioned matter.

A. SUMMARY

The Executive Director will address issues and concerns with various sections of the PFD, however, the main exceptions the Executive Director will address include: the coupling of the feasibility determination with the necessity determination; and the expansive view of public welfare. The Executive Director will address each issue for which he would like to file an exception, therefore, any issues not mentioned by the ED can be deemed consented to by the ED.

B. EXCEPTIONS/COMMENTS

1. Tying Feasibility to Necessity[1]

Under Texas Water Code, Section 51.021(a) one element for the creation of a district is that the district be feasible and practicable; another is that there be a public necessity or need for the district. The ALJ addressed the issue of feasibility and practicability by tying the determination to that of necessity. She did this by focusing on the last sentence of 30 TAC §293.59(b). ALJ errs in overemphasizing that last sentence while disregarding the first sentence.

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1 PFD, Section III, begins p. 8

Section 293.59(b) sets out a brightline test of feasibility. The first sentence of that section defines "economic feasibility" as "the determination of whether the land values, existing improvements, and projected improvements in the district will be sufficient to support **a reasonable tax rate** for debt service payments for existing and proposed bond indebtedness while maintaining **competitive utility rates**." Agency practice has been to follow this very clear rule in determining feasibility. Agency rules also set out the upper limit of what constitutes a reasonable tax rate: For the District's first bond issue, the combined projected tax rate cannot exceed $1.00. § 293.59(k)(3)(C). In this case, the Petitioner's financial advisor, Ms. Urbina, testified that the tax rate of the District would be $1.00 per assessed valuation, which is within the guidelines; the tax rate, therefore, is reasonable. The only remaining inquiry is whether the district can charge this while maintaining competitive utility rates.

The utility rates for the proposed district were set out in the Applicant's Preliminary Engineering Report (Report), which involves a reasonable base rate and an inclining block rate structure thereafter.[2] The Report also states that "Mountain Peak SUD will be the water provider and charge rates equivalent to its existing customer." The utility rates within the district will be the same as those in the surrounding area and are therefore competitive.

The last sentence of Subsection (b), which the ALJ focused on, lists several factors that can influence feasibility, including "economic conditions, the real estate market, the number of competing projects, and the geographic location." However, where a brightline test for feasibility exists, that test should be followed when possible. Though the ED agrees that marketability and feasibility are closely linked, the two should not be equated. The ED recommends finding that the district is feasible, consistent with previous agency practice, looking solely to the formula in Rule

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2 For example, the Engineering Report shows the following:

Gallons used per month	Cost per 1,000 gallons
0 – 2,000	$18.75 base rate (5/8" or ¾")
2,001 – 7,000	$3.60
7,001 – 12,000	$4.00
12,001 – 20,000	$4.40
Et cetera	

293.59(k). The ED is satisfied that proposes district meets the feasibility limits set out in that Rule.

The "need" for the district, on the other hand, means simply that there must be a market demand for the product the district will provide. As contemplated by Texas Water Code, Section 51.021(a)(3), need, though influencing feasibility, is not confluent with feasibility. Equating need with feasibility confuses the elements and results in the collapsing of the two elements into one. The same facts cannot prove both elements. The ED recommends finding that the applicant did meet the criteria for feasibility, for the reasons state above, but did not meet the criteria for need, for the reasons set out in the PFD.

2. Public Welfare[3]

Of all districts the TCEQ is authorized to create, Water Control and Improvement Districts are unique in requiring a finding that the district furthers the public welfare. Texas Water Code, §51.021(a)(4). None of the other districts require this finding. *See, e.g.,* Texas Water Code, §§54.021(a) and 65.021(a).

The ALJ concluded that the applicant failed to meet its burden to show that the district will further the public welfare. The ALJ arrived at this conclusion by adopting the broad interpretation of "public welfare" suggested by the Third Court of Appeals in a case dealing with "public interest." In *Texas Citizens for a Safe Future & Clean Water v. R. R. Commission of Texas*, 254 S. W. 3d 492 (Tex. App.—Austin, 2008, pet. pending) the Court noted that "Administrative agencies have wide discretion in determining what factors to consider when public interest is served." 254 S.W. 3d at 499 (quoting *Public Util. Comm'n of Texas v. Texas Tel. Assoc.*, 163 S.W.3d 204, 213 (Tex.App.—Austin, 2005, no pet.). Moreover, "[p]ublic interest determinations are dependent upon the special knowledge and expertise of the Commission." *Public Util. Comm'n of Texas v. Texas Tel. Assoc.*, 163 S.W.3d 204, 213 (Tex.App.—Austin, 2005, no pet.) (quoting *Amtel Communications, Inc. v. Public Util. Comm'n,* 687 S.W.2d 95, 99 (Tex.App.--Austin 1985, no pet.)).

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3 PFD, Section III, begins p. 18

The interpretation adopted by the ALJ would have the Commission examining areas far beyond the special knowledge and expertise of the Commission when reviewing a WCID creation. Although the ED does have expertise in dam safety issues, the ALJ suggests that the ED would abuse its discretion for failure to consider a district's impact on police, fire, and medical services or even traffic safety issues. These are not matters about which the ED has any special knowledge. Moreover, such an interpretation of public welfare would require the ED to examine impacts far beyond the boundaries of the district.

Adopting such an interpretation would pose other practical problems. How far beyond the district boundaries is the ED to look in determining public welfare? Is police, fire and EMS services the exclusive list of public welfare considerations or may others arise? The ALJ suggests that all emergency services are fair game for consideration of public welfare. However, there is no guidance on how that information would be collected. The provision of the emergency services of the type contemplated by the ALJ is properly the province of the county, not the ED. Without the participation of counties in every WCID creation, the ED would have no way to determine this broad element.

The ED is satisfied that the Engineering Report did contain items relating to public welfare, as the term has been previously used by the TCEQ, namely, drainage, regional sanitary sewer system, water service, and fire protection. Additionally, the Applicant proposes to offer affordable housing, which furthers the public welfare. Although the ED agrees that nothing prevents an interpretation of public welfare to include impacts on emergency services, such an interpretation is a significant departure from how the ED has historically interpreted this phrase and poses significant obstacles to the processing of WCID creation applications. As noted by the PFD, due to the significant departure from prior practice, the ED declined to interpret public welfare in the manner suggested by the protestants without guidance from the Commission on this issue. If the Commission adopts the ALJ's interpretation, the ED has no objection to the ALJ's recommendation on this issue.

C. CONCLUSION

The ED agrees with the ALJ that the application should be denied, but for the reasons stated above, he requests clarification on the reasons for denial. The ED recommends interpreting "feasibility" under Texas Water Code § 51.016 to mean a satisfaction of the guidelines setout in 30 TAC § 293.59(b) and (k), and not to include the factors involved in the determination of "need." Additionally, the ED recommends a narrow interpretation of "public welfare" consistent with previous agency practice, to include only items within the ED's specialized knowledge and expertise, but not to include items properly in the province of other government bodies.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of January, 2009 a true and correct copy of the foregoing document was delivered via facsimile, hand delivery, interagency mail, or by deposit in the U.S. Mail to all persons on the attached mailing list.

Christiaan Siano
Environmental Law Division

MAILING LIST

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Water Control and Improvement District No. 1 of Ellis County, Texas
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