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April 6, 2009

Ms. LaDonna Castanuela
Texas Commission on Environmental Quality
Office of Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087

CHIEF CLERKS OFFICE
2009 APR -7 AM 9:50
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Re: 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

Dear Ms. Castanuela:

Please file the enclosed original with seven copies of the Reply Brief of Ellis County to Applicant's Exceptions, which was faxed filed on February 2, 2009. I have contacted counsel for the Executive Director and the Applicant, neither of whom object to the mailing. A copy of the brief has been sent to all parties of record.

Respectfully submitted,

W. Lee Auvenshine

WLA
Enclosure

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BEFORE THE
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
AUSTIN, TEXAS

2009 APR -7 AM 9:50

CHIEF CLERKS OFFICE

APPLICATION OF GALILEE	§	
PARTNERS, L.P., FOR CREATION OF	§	SOAH DOCKET NO. 582-07-2163
MAYPEARL WATER CONTROL AND	§	
IMPROVEMENT DISTRICT NO. 1	§	TCEQ DOCKET NO. 2005-1686-DIS
OF ELLIS COUNTY, TEXAS	§	

REPLY BRIEF OF ELLIS COUNTY TO APPLICANT'S EXCEPTIONS

Respectfully submitted,

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TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

INTRODUCTION

The positions of both Ellis County and Ellis Prairie SWCD are largely similar in the matter before the Texas Commission on Environmental Quality, as expressed within their closing and joint reply arguments to the Honorable Administrative Law Judge. Ellis County and Ellis Prairie SWCD each asserted within their closing arguments that the petition for the creation of the proposed WCID must be denied because the Applicant failed to prove each of the four criteria within Tex. Water Code §51.021(a). Specifically, Ellis County and Ellis Prairie SWCD urged the Honorable Administrative Law Judge to deny the Applicant's petition for the creation of the proposed WCID because: (1) the organization of the district as requested is neither feasible nor practicable; (2) the land to be included and the residents of the proposed district will not be benefitted by the creation of the proposed district; (3) there is no public necessity nor need for the district; and, (4) the creation of the district would not further the public welfare.

Within her Proposal for Decision and proposed Findings of Fact and Conclusions of Law, the Honorable Administrative Law Judge did not completely agree with the assertions presented by Ellis County and Ellis Prairie SWCD within their respective closing and reply arguments that the Applicant has failed to meet each of the four criteria within Tex. Water Code §51.021(a). However, the Honorable Administrative Law Judge, along with both the Executive Director of TCEQ and the Office of Public Interest Counsel, reached the same ultimate conclusion asserted by Ellis County and Ellis Prairie SWCD. Specifically, the Honorable Administrative Law Judge determined that the petition for the creation of the proposed WCID must be denied because the Applicant failed to prove that the organization of the district as requested is feasible and practicable pursuant to Tex. Water

Code §51.021(a)(1), that there is a public necessity or need for the district pursuant to Tex. Water Code §51.021(a)(3), and that the creation of the district would further the public welfare pursuant to Tex. Water Code §51.021(a)(4) and *Texas Citizens for a Safe Future and Clean Water v. Railroad Com'n of Texas*, 254 S.W.3d 492 (Tex. App. – Austin 2007, pet. pending).

The Executive Director of TCEQ and the Applicant each filed exceptions to the Proposal for Decision and proposed Findings of Fact and Conclusions of Law. However, the Executive Director of TCEQ did not except from the ultimate conclusion of the Honorable Administrative Law Judge that the Applicant's petition for the creation of the proposed WCID should be denied. Therefore, despite some differences in the positions asserted by Ellis County and Ellis Prairie SWCD versus those asserted by the Executive Director of TCEQ, Ellis County will not reply to its exceptions. Rather, Ellis County will rely upon the closing and joint reply briefs filed by it and Ellis Prairie SWCD in their entirety to assert that the Texas Commission on Environmental Quality must deny the Applicant's petition for the creation of the proposed WCID because the Applicant failed to prove each of the four criteria within Tex. Water Code §51.021(a). Additionally, Ellis County will reply to the positions asserted within the Applicant's exceptions.

ELLIS COUNTY'S REPLY BRIEF
IN RESPONSE TO APPLICANT'S EXCEPTIONS

I. GENERAL OBJECTION TO APPLICANT'S EXCEPTIONS

Within its Exceptions, the Applicant objects to the Honorable Administrative Law Judge's proposed Finding of Fact Nos. 9-11, 17, 29, 30, 32-47 and 50-52, and proposed Conclusions of law Nos. 6 and 8-11. However, the Exceptions filed by the Applicant are completely devoid of any references to the actual record before the Commission. For example, the Applicant excepts to the

Honorable Administrative Law Judge's proposed Finding of Fact No. 17 without any reference to the record by merely stating: "Proposed Finding No. 17 is in error. The proposed district is located in northwestern Ellis County and is within the Dallas-Fort Worth (DFW Metroplex, not south of it."¹ Not only is this statement within the Applicant's Exceptions inaccurate and completely unsupported by the record, it actually contradicts the plainly stated pre-filed testimony of the Applicant's purported expert, Ted Wilson,² upon which the Honorable Administrative Law Judge relied.

II. SPECIFIC RESPONSES

A. **The Honorable Administrative Law Judge correctly determined that the organization of the proposed WCID as requested is neither feasible nor practicable.**

The Applicant's proposed WCID cannot be evaluated by the Commission in a vacuum. To properly assess whether a water district is feasible, practicable or necessary at this location, one must analyze the Applicant's actual plans to place 800 homes and approximately 2,500 people at this location. Tex. Water Code §51.021(a)(1) instructs that the petition for the creation of a proposed WCID must be denied if the applicant cannot prove that the organization of the district as requested is feasible and practicable. In furtherance of this requirement, 30 TAC §293.11(a)(6) requires that a market study must support a petition for the creation of a special district if substantial development is proposed. The Honorable Administrative Law Judge correctly stated that to address whether the proposed WCID is practicable and feasible, one "cannot ignore the dictates of 30 TAC §293.59(b), which requires that issues such as economic conditions, the real estate market, and geographic location be addressed. Therefore, this issue brings into question the information contained in the market study required by 30 TAC §293.11(a)(6)."³

¹ Applicant's Exceptions, p.5

² Applicant's Exhibit No. 3, p.5, Reporter's Record, pp.158-160

³ Proposal For Decision, p. 8

The Applicant purchased land in a very remote area of Ellis County, much of which is located in a flood plain, immediately south of the Chambers Creek Flood Prevention Site No. 49A.⁴ The proposed WCID consists of 226 acres, which after subtracting flood plain and other areas of proposed public dedication, consists of approximately 150 acres available for development for home sites.⁵ The Applicant initially sought TCEQ's approval to build 896 homes, then 855 homes, and TCEQ eventually granted initial approval for the Applicant to build 798 homes on the available 150 acres.⁶ According to the Applicant's plans, half of the lots within the proposed WCID are little more than 4,000 square feet, and the other half are little more than 5,000 square feet.⁷

Assuming three to four people occupy each home, including one to two students per home, the Applicant's proposed WCID will create a population of approximately 2,500 to 3,000 people and approximately 1,200 students immediately downstream of this dam.⁸ The area in which the proposed WCID will be located is very remote and completely void of any commerce or industry.⁹ The closest city to the proposed WCID, Maypearl, is located six miles southeast of the proposed WCID. Maypearl has very limited commerce and almost no industry.¹⁰ The population of Maypearl at the

⁴ Applicant's Exhibits 2, 2A and 2B; Ellis County's Exhibit No. 1, pre-filed testimony of Heath Sims, p.2

⁵ Reporter's Record, pp.121-122

⁶ Reporter's Record, p. 24, pp.120-121, Applicant's Exhibit 3A, p. 9

⁷ Reporter's Record, pp. 27-28, Applicant's Exhibit 1 and 1A.

⁸ Reporter's Record, p. 122, p.161, Ellis County's Exhibit No. 5, pre-filed testimony of Danny Williams, p.2, Ellis County's Exhibit No. 4, pre-filed testimony of Lynn Dehart, p.1

⁹ Ellis County's Exhibit No. 7, pre-filed testimony of Michael Atwood, pp.17-18, Ellis County's Exhibit No. 1, p.2, Ellis County's Exhibit No. 4, p.1

¹⁰ Id.

time of the 2000 census was 746 and Maypearl Independent School District currently has approximately 1,030 students.¹¹ The projected population of the proposed WCID would represent the sixth largest in population in all of Ellis County, behind only Waxahachie, Ennis, Red Oak, Midlothian and Ovilla, which are all incorporated, and it would consist of a population larger than several of Ellis County's incorporated cities and towns, including Alma, Bardwell, Ferris, Garrett, Italy, Maypearl, Milford, Oak Leaf, Palmer and Pecan Hill.¹²

The Applicant failed to prove that a market exists for the sale of 800 home sites in the remote location for which Applicant seeks to develop.¹³ Additionally, the Applicant failed to prove that this development meets the criteria for sustainable development at this location.¹⁴ Due to the lack of commerce and industry for several miles surrounding the area proposed for development, the future residents of the proposed WCID, if any, would all necessarily be required to travel great distances for work and pleasure. Despite the remote location of the proposed WCID, the Applicant wholly failed to analyze and assess the day-to-day traffic operational conditions that are anticipated within the proposed WCID as well as the traffic conditions to be most critically impacted by the background traffic growth by the proposed WCID.¹⁵ Otherwise stated, the Applicant failed to evaluate the feasibility of the WCID as planned and the impact the proposed WCID will have on public safety in relation to public streets and highways located at or near the site of the proposed WCID, located at the intersection of FM 2258 and FM 157.¹⁶

¹¹ Id.

¹² Ellis County's Exhibit No. 1, p.2

¹³ Ellis County's Exhibit No. 8, Dr. Ray Perryman's pre-filed testimony, pp.18-19

¹⁴ Id., Ellis County's Exhibit No. 7, p. 49

¹⁵ Ellis County's Exhibit No. 6, Barbara Leftwich's pre-filed testimony, pp.1-2

¹⁶ Id.

Despite the fact that no homes, no internal streets, no improvements exist at the location proposed for the Applicant's proposed WCID, the Applicant urges the Commission to merely assess whether "improvements" should be built on the Applicant's property at a cost of \$8,645,304, which to ensure the Applicant earns its profit, would require a total bond amount of \$10,350,000, to be paid by the mythical residents of 800 new homes. The Applicant does not want the Commission to address the fact that the current location consists of dirt, rocks and brush, which is located between a flood prevention dam and the intersection of two desolate farm-to-market roads, several miles away from the nearest school, hospital, police or fire station, employer, grocery store, restaurant, or other place of interest.

Dr. Ray Perryman, whose shortened resume is included within his pre-filed testimony, routinely performs analyses and provides advice to the United States, the State of Texas, the North Central Texas Council of Governments, and other various entities regarding economic development, demographic trends, real estate development, absorption of housing and land, community development, infrastructure issues, and many other areas of analysis relevant to this case.¹⁷ Much of Dr. Perryman's work throughout his career has been dedicated to a thorough analysis of the Dallas/Fort Worth Metropolitan area, otherwise known as the "Metroplex", which includes parts of Ellis County.¹⁸ Ted Wilson testified on behalf of the Applicant that Dr. Perryman is "widely-very respected" and that Dr. Perryman's expert opinions can be found on a website sponsored by Mr. Wilson, www.dfwhousingfacts.org.¹⁹ In this case, Dr. Perryman thoroughly analyzed the report of Mr. Wilson, and concluded that Mr. Wilson's market analysis pertaining to the rural area for which

¹⁷ Ellis County's Exhibit No. 8, pp.4-5, pp.27-28

¹⁸ *Id.*, p.5

¹⁹ Reporter's Record, pp.179-180

the Applicant seeks to develop was incorrect at the time it was written, and is nevertheless of no relevant use to a finder of fact at this time.²⁰

Dr. Perryman addressed the current housing crisis and credit downturn as evidence that Mr. Wilson's report is of little usefulness today; however, that was not his primary focus. Dr. Perryman's pre-filed testimony and live testimony indicated that there has never been a demand for the type of development planned by the Applicant, and there will not be a demand for such development in the foreseeable future, regardless of national and regional market trends.

Dr. Perryman addressed the inadequate "Target Market Area" as defined by Ted Wilson,²¹ the change in market condition since Mr. Wilson's report,²² the need for Applicant to produce a current market analysis supportive of its position,²³ and the many costs and economic factors which would be adversely impacted by the creation of the proposed WCID which were not addressed by Mr. Wilson.²⁴ Within his pre-filed testimony, Dr. Perryman also struck at the financial justification for the proposed WCID:

"In pre-filed testimony on behalf of Galilee Partners, L.P., Maria Fernanda Urbina indicated she was relying on the real estate market study prepared by Residential Strategies, Inc., on December 9, 2004, in determining the projected total assessed valuation of the homes in the proposed district. The total assessed valuation (and resulting tax receipts) drives the reimbursement of the developer and repayment of the bonds for items allowed for water control and improvement districts. The projected costs for construction of the water distribution system, sanitary sewer system, wastewater treatment, storm drainage, and other related items total almost

²⁰ Ellis County's Exhibit No. 8, pp.-7-13

²¹ Id., p.7-11

²² Id., pp.12-13

²³ Id., pp.14-15

²⁴ Id., pp.15-18

\$10.35 million, and the calculated total bonding capacity indicated is \$10.35 million. However, if the build-out assessed valuation is lower than the assumed \$98.93 million, the ability to service the debt will clearly be affected. Moreover, if the timing is delayed, it will impact both cash flow from the proceeds and the potential for cost escalation in construction. The reliance on outdated information that is clearly no longer applicable in establishing the financial feasibility and debt service capacity of an infrastructure investment is without doubt a fatal flaw in the overall set of information used to support the creation of the Maypearl WCID, particularly in light of the notable changes in market conditions noted above.”²⁵

B. The Honorable Administrative Law Judge correctly determined that there is no public necessity nor need for the proposed WCID.

The Applicant’s entire focus throughout this proceeding has been related to the Applicant’s need for the creation of the proposed WCID’s to ensure funding and large profits for the Applicant itself, rather than the actual need of the public for the proposed WCID. Otherwise stated, the Applicants urge the Commission to wrongfully focus upon the Applicant’s need for the proposed WCID, rather than the public’s need, or absolute lack there of, for the proposed WCID.

Tex. Water Code §51.021(a)(3) requires TCEQ to deny a petition seeking the creation of a proposed WCID where an applicant has failed to prove that there is a public necessity or need for the proposed district. As stated above, no homes, no internal streets, no improvements exist at the location proposed the WCID, and the current location consists of dirt, rocks and brush, which is located between a flood prevention dam and the intersection of two desolate farm-to-market roads, several miles away from the nearest school, hospital, police or fire station, employer, grocery store, restaurant, or other place of interest. Therefore, to determine whether the Applicant has met its burden in this case, the Commission must assess whether a public necessity or need warrants the creation of a special district to support public infrastructure for the actual development that is proposed.

²⁵ Ellis County’s Exhibit No. 8, pre-filed testimony of Dr. Ray Perryman, p.14

The Applicant makes numerous erroneous assertions throughout its exceptions pertaining to the alleged need for the proposed WCID. When asked if he had been consulted by the Applicant in this matter at its inception, Dr. Perryman testified:

“I can assure you I would have never recommended to anybody to go out in a remote rural area and do 40-foot lots in dense population because that’s contrary to every principle of urban reasonable development. ... To put this many small homes in such a remote area is very, very unusual.”²⁶

In response to questions about whether a market, or public necessity, exists for the type of housing contemplated by the Applicant at this time or at any time in the foreseeable future, Dr. Perryman testified:

“This particular type of housing in this particular type of location, is contrary to everything that’s in every textbook, literally and at that level about urban and reasonable planning and development. And it goes against the very nature of how development tends to occur.”²⁷

“Maybe we can just go ahead and say if we just put aside the next couple of years and recognize that there is going to be a lot of weird stuff going on for the next couple of years with foreclosures and the mortgage situation and that sort of thing. If you just put that aside, there is a demand for this type of housing in the Dallas/Fort Worth metroplex. I think you are going to be looking at places either much closer to the current cities, wither within their ETJ’s – extra territorial jurisdictions – or more proximate for a variety of reasons. Another factor that we haven’t talked about here that comes into play is fuel costs. The folks who live in these homes are on fairly limited budgets. Right now they are going to have to drive six miles to go to the grocery stores. They are more than likely going to have to drive 20 miles to go to a job and even commuting patterns are going to be difficult here. I don’t think that demand is in this location. I think that it is more proximate to some of the cities around the metroplex.”²⁸

“I think it will be very, very difficult to sell 800, roughly, houses on 40-foot lots in

²⁶ Id., pp.440-441

²⁷ Id., pp.443-444

²⁸ Id., pp.444-445

a place that's far from even minimal commercial development and that far from folk's jobs in today's environment. It really doesn't make sense economically to put that type of housing in that location."²⁹

"I think it is going to be very, very difficult to generate sufficient demand in this location for the type of housing that is proposed because it is really – to some extent the market impacts it, and we have talked about that, the foreclosures, that sort of thing, the financing right now. But to some extent, it is just not the type of development that tends to meet the needs of people in a significant way, and with the whole history of land use patterns. So from that perspective I think it is going to, I really don't see a situation where this particular type of development becomes feasible unless you do a lot of other things along with it, a lot more retail development, more mixed types of housing, that sort of thing. You are going to have to have some activity close to people in order for them to want to have these highly, densely packed homes in a very rural area. It is almost antithetical to why you live in a rural area."³⁰

"I think it will be very, very difficult to market these types of houses in this particular location. It just doesn't fit with the way the market demand tends to go."³¹

Dr. Perryman's testimony at the contested case hearing was entirely consistent with his thorough analysis found within his pre-filed testimony.³² In addition to other findings, both Dr. Perryman and Michael Atwood concluded that the Applicant failed to prove that the organization of the WCID as requested is feasible and practicable and is a public necessity.³³

Specifically, in his pre-filed testimony, Dr. Perryman concluded:

"The TCEQ's requirements for the creation of a water district state that applicants must provide "complete justification for creation of the district supported by evidence that the project is feasible, practicable, necessary, will benefit all of the land and

²⁹ Id., p. 445

³⁰ Id., p.453

³¹ Id., p.455

³² Ellis County's Exhibit No. 8, pp.7-19

³³ Id., pp.18-19, Ellis County's Exhibit No. 7, p.64

residents to be included in the district, and will further the public welfare.” In this case, however, it is unclear that the proposed Maypearl WCID meets any of these criteria. If the district is created, bonds are issued, and a significant investment takes place, it is crucial that the development assumptions embodied in these plans come to fruition. There are very real questions as to the likelihood of the build-out absorption and pricing occurring as planned due to current conditions in the housing market. Given the uncertainty surrounding the demand for almost 800 houses on small lots located in a remote area with mediocre highway access, the Maypearl WCID fails to meet the TCEQ standard. In fact, it (1) imposes a land use (high-density single-family housing) that is contrary to typical patterns in relatively isolated rural areas; (2) creates excessive and unnecessary burdens on other residents of the county, school district, and nearby areas (among others); (3) leads to suboptimal development in the local area in a manner that results in limitations on future growth potential; (4) is in direct opposition to typical standards for effective public policy; and (5) is being supported by analysis that is outdated, incomplete, insufficient, and of limited relevance. A review of the facts in this matter and the surrounding economic environment makes it evident that the Maypearl WCID as presently construed is not demonstrated to be feasible, marketable, or necessary; will not benefit optimal land use and residential development; and will be a detriment to public welfare for multiple reasons.”³⁴

In response, Ted Wilson, testifying on behalf of the Applicant, conceded:

- Q. And are you generally familiar with Dr. Perryman’s analyses and –
A. Yes, widely – very respected.
Q. Are you aware that he has offered a report in this case?
A. Oh, absolutely. I’ve read it.
Q. Okay. Do you –
A. Or at least his testimony, so ...
Q. Do you dispute the contents of his testimony?
A. No.³⁵

The Honorable Administrative Law Judge, along with the Executive Director of TCEQ, have both correctly determined that no public necessity or need warrants the creation of a district to support the infrastructure of a development for which there is no market. Because no public necessity or need warrants the placement of 800 homes and approximately 2,500 to 3,000 people

³⁴ Id., pp.18-19

³⁵ Reporter’s Record, p.180

immediately downstream of what will become an inadequate flood prevention dam in a very remote region of Ellis County, at the intersection of what will become two very inadequate farm-to-market roads, the Commission should enter the proposed findings of the Honorable Administrative Law Judge.

C. The Honorable Administrative Law Judge correctly determined that the creation of the proposed WCID will not further the public welfare.

Tex. Water Code §51.021(a)(4) requires TCEQ to deny a petition seeking the creation of a proposed WCID where an applicant has failed to prove that the creation of the district would further the public welfare. 30 TAC §293.19(c)(5)(j) requires that applications Water Control and Improvement Districts must contain a preliminary engineering report that includes a “complete justification for creation of the district supported by evidence that the project is feasible, practicable, necessary, will benefit all of the land and residents to be included in the district, and will further the public welfare.” The adverse impact of the proposed WCID upon the public welfare is a topic that was never addressed by the Applicant in the proceedings before the Honorable Administrative Law Judge.

Within her Proposal for Decision, the Honorable Administrative Law Judge correctly referenced the controlling decision of the Austin Court of Appeals, which has established the standard to be utilized in regard to public welfare. *Texas Citizens for a Safe Future and Clean Water v. Railroad Com'n of Texas*, 254 S.W.3d 492 (Tex. App. – Austin 2007, pet. pending). Within *Texas Citizens*, the Austin Court of Appeals was forced to consider whether the Railroad Commission was required to factors other than increased capacity for oil and gas production in determining whether the use or installation of an injection well was in the public interest, for purposes of determining

whether to grant an application of a company seeking a permit to operate a commercial injection well for the disposal of gas and waste after a contested case hearing in which citizens opposed the application citing public safety concerns.³⁶

The particular statute analyzed within *Texas Citizens*, Tex. Water Code §27.051(b), provides the following; “The railroad commission may grant an application in whole or part and may issue the permit if it finds: (1) that the use or installation of the injection well is in the public interest; (2) that the use or installation of the injection well will not endanger or injure any oil, gas, or other mineral formation; (3) that, with proper safeguards, both ground and surface fresh water can be adequately protected from pollution; and (4) that the applicant has made a satisfactory showing of financial responsibility if required by Section 27.073 of this code.” During the contested case hearing, the protestants, comprised of concerned citizens offered testimony and evidence that they alleged related to the public interest, namely, a public-safety issue regarding the fact that trucks hauling saltwater waste would frequently be accessing the well site using narrow, unpaved roads. The protestants took the position that the presence of these trucks would create a public-safety issue on small roads which were often used by children and pedestrians. In response, the applicants and the Railroad Commission argued that the factor considered in granting the applicant’s application, which was the increased capacity for oil and gas production in Texas, was an appropriate factor for making a public interest finding. The applicants and the Railroad Commission also argued that the protestants’ traffic-related concerns and other types of “public interest” issues were not within the Commission’s jurisdiction and could not be considered.³⁷

³⁶ *Texas Citizens*, 254 S.W.3d at 498-499

³⁷ *Id.*

Within its opinion, the Austin Court of Appeals stated:

“Upholding the Commission’s interpretation of §27.051 would mean that the TCEQ may ignore any public-interest concerns regarding public roadways, as well as local law enforcement, emergency medical, or fire-fighting personnel, in reviewing permit applications for non-hazardous waste injection wells or for hazardous waste injection wells in industrial areas, and that the Commission may ignore such concerns in reviewing all permit applications. This Court declines to hold that public roadways and local law enforcement, emergency medical, and fire-fighting personnel are not to be afforded consideration unless a hazardous waste injection well is proposed that will be located in a non-industrial area. The specific mandate found in §27.051(a)(6), which affects only very limited types of permit applications regulated by the TCEQ, does not necessarily imply that the legislature intended to foreclose consideration of public interest concerns related to public roadways in all other situations. The statutory requirement that the TCEQ make specific findings related to public roadways for hazardous waste injection wells in non-industrial areas simply does not support an inference that the Commission may ignore traffic-related factors affecting the public interest.”³⁸

“Because the Commission believed it could only review the effect on oil and gas production in making a public interest determination on Pioneer’s permit, we hold that the Commission abused its discretion in failing to consider other factors in determining whether the permit would be in “the public interest” under Texas Water Code §27.051(b)(1). While the Legislature did not specify which factors should be considered, the scope of “the public interest” must be broader than the effect on oil and gas production. Such a narrow interpretation of “the public interest” could potentially allow the Commission to rubber stamp injection well permit applications despite legitimate public safety concerns, which the legislature, in passing §27.051(b) and requiring that the effect on the public interest be considered, clearly did not intend.”³⁹

The Austin Court of Appeals determined that the Railroad Commission used two narrow of a definition of public interest in granting a permit over the objections of the protestants. The Court of Appeals concluded:

“While administrative agencies have wide discretion in determining what factors to consider when deciding whether the public interest is served, we hold that the

³⁸ Id., at 501

³⁹ Id., at 502

Commission abused its discretion by limiting its public interest determination to the conservation of natural resources. We remand to the Commission to reconsider its public interest determination, using a broader definition of “the public interest,” which includes public-safety concerns where evidence of such concerns has been presented.”⁴⁰

Here, Ellis County, Ellis Prairie SWCD, Ellis County Emergency Services District No. 1, Maypearl Independent School District and the City of Maypearl, all passed ordinances opposing the creation of the Applicant’s proposed WCID, each citing public welfare concerns.⁴¹ Despite the utter lack of municipal services, the future residents of the proposed WCID, if any, will pay a higher tax than the rate assessed by any city within Ellis County.⁴²

Since the inception of this matter, Ellis County has asserted that the availability of adequate traffic control, police services, fire protection, emergency medical services, school services, and flood prevention to the proposed residents of the proposed WCID, along with other significant issues including an over-burdening tax rate, are all matters which must be considered by the honorable Administrative Law Judge to properly assess whether the creation of the proposed WCID would further the public welfare. At the contested case hearing, Ellis County presented the public welfare concerns addressed by Heath Sims, Tom Sulak, Don Frisbee, Lynn Dehart, Danny Williams, Barbara Leftwich, Michael Atwood and Ray Perryman. Additionally, Ellis Prairie SWCD presented the public welfare concerns of Lee Harris.

On behalf of Ellis County generally and Ellis County Road and Bridge Precinct No. 3, Commissioner Heath Sims testified:

⁴⁰ Id., at 503

⁴¹ Ellis County’s Exhibits No. 1A, 3A, 4A, 10, 11 and 15

⁴² Ellis County’s Exhibit No. 1A

“The proposed WCID is six miles from the nearest fire department, which is an all-volunteer department that is a part of Ellis County Emergency Services District No. 1. The nearest hospital and ambulance service is located near downtown Waxahachie, which is approximately fifteen miles from the proposed district. The proposed WCID would be provided police protection from the Ellis County Sheriff’s Department which is responsible for more than 950 square miles, with generally no more than five officers designated for patrol at any given time. The WCID as proposed would create the sixth largest in population in all of Ellis County, behind only Waxahachie, Ennis, Red Oak, Midlothian and Ovilla, which are all incorporated. Additionally, the WCID as proposed would create a population larger than several of Ellis County’s incorporated cities and towns, including Alma, Bardwell, Ferris, Garrett, Italy, Maypearl, Milford, Oak Leaf, Palmer and Pecan Hill. The proposed WCID falls inside the Maypearl ISD which currently receives money from the state of Texas. The significant increase in student population from the proposed WCID would require the school district to seek additional funding from the State of Texas.”⁴³

“Ellis County is seeing growth in the northern part of the county. As the elected Commissioner representing Precinct 3 it is my duty and responsibility to stand for the residents of Precinct 3 and protect Ellis County from anything that will adversely affect the health and safety of its residents, its land and its wildlife. The creation of the proposed WCID will not only adversely affect the health and safety of the residents of Precinct 3, but it will adversely affect all of Ellis County. Ellis County does not want and cannot condone development that could potentially cause harm to its residents nor have an adverse affect on the value and use of property inside Ellis County. In regard to the significant costs associated with the proposed WCID, the district will adversely affect its potential residents with a total tax rate of approximately \$3.00 per hundred dollar value who will not receive typical municipal services. Additionally, the proposed WCID will adversely affect other Ellis County residents with an increased burden in property taxes, not only increased school taxes caused by the additional educational cost per student compared to the value of property inside the WCID, but it will also adversely affect county taxes due to the increase in health and safety concerns of fire, roads and police protection. The density of the population within the proposed WCID will require our officers to spend more time on calls to protect and serve this development and the rest of Ellis County will suffer because of inadequate health and safety protection.”⁴⁴

In regard to available police services, Captain Danny Williams of the Ellis County Sheriff’s

Department testified:

⁴³ Ellis County’s Exhibit No. 1, pp.2-3

⁴⁴ Id., p.4

"The Ellis County Sheriff's Department is located on 300 S. Jackson in downtown Waxahachie, Texas, approximately 15 miles east of the proposed subdivision. Based on the demonstrated ratio of calls per home per year from the Spanish Grant and Buffalo Hills subdivisions, the Ellis County Sheriff's Department would expect to receive approximately 1378 calls per year from the subdivision proposed by Galilee Partners. Based on the distance between the proposed subdivision and the location of the Ellis County Sheriff's Department, the response times for each call could be quite lengthy. The Ellis County Sheriff's Department will continue to strive to adequately answer every call for service and protect the public within the unincorporated area of Ellis County. However, the Ellis County Sheriff's Department is not presently equipped to provide the type of municipal police services currently provided to the residents of cities within Ellis County."⁴⁵

In regard to the expected traffic concerns expressed within her traffic impact analysis, Ellis County Planner Barbara Leftwich testified:

"...I have the following concerns:

The lack of an internal road / bridge connecting the two tracts will create a hazardous situation for residents, their children and the traveling public. Children living within the west tract and walking to school located in the east tract have two options to cross the creek; 1) cross the flood plain using the FM 2258 bridge, 2) cross the flood plain and creek stream by self made footpath. Both are unsafe options. FM 2258 is a high speed facility with a standard rural bridge. The existing bridge does not provide a safe separation of pedestrians and vehicles. A footpath thorough the flood plain during high rains is hazardous especially for young children who cannot gauge the strength of fast moving water flow.

The lack of an internal connector between these tracts also presents a potential hazard for residents living in the west tract. Residents wanting to access retail in the eastern tract can only do so by making a left turn onto FM 2258. This increases the number of vehicular conflicts (left turn from local road conflicting with through movement of major road) along the high speed rural facility. The lack of an internal connector may cause an increase in accidents as well as the severity of accidents. The location of the local streets in relation to the existing bridge may also create critical sight distance problems for residents in the western tract."⁴⁶

⁴⁵ Ellis County's Exhibit No. 5, p.2, *and see* Ellis County's Traffic Impact Analysis

⁴⁶ Ellis County's Exhibit No. 6, pp.1-2

Ms. Leftwich also raised a concern about the reservation of 500 feet of right of way for a potential extension of State Hwy. 360, a portion of which presently ends at U.S. Hwy 287, a location many miles north of the proposed WCID.⁴⁷ The proposed extension, which is presently only a part of a study, would be utilized by the Texas Department of Transportation within the Texas Trans Corridor as a high speed industrial and commercial route with limited access via exits and entrances.⁴⁸ Whether the proposed extension is ever built is highly speculative. However, it is relevant for the purpose asserted by Ms. Leftwich, which indicates that portions of the Applicant's property lie within the reserved right-of-way, which cannot be developed.⁴⁹

In regard to the availability of adequate fire suppression and prevention services to the future residents of the proposed WCID, if any, Don Frisbee, President of the Board of Directors for Ellis County Emergency Services District No. 1, testified:

"At the present time we do not have the resources available nor do we see in the near future having the resources to provide adequate emergency services to a development of this magnitude."⁵⁰

"A development of this size would require new facilities and equipment along with staffing which would put an undue burden on our existing improvement plan and that would compromise services to all of our existing constituents. We would possibly have to abandon current plans on upgrading facilities and equipment."⁵¹

"Given the potential increase in population of our district of almost 42% from one development and the costs of providing services to these homes, we strongly encourage you to carefully consider this matter as being detrimental to our

⁴⁷ Id.

⁴⁸ Id., Reporter's Record, pp.424-426

⁴⁹ Id.

⁵⁰ Ellis County's Exhibit No. 3, p.1

⁵¹ Id., p.2

constituents within Ellis County Emergency Services District No. 1 and Ellis County Road and Bridge Precinct No. 3.”⁵²

In regard to the available educational services for the potential proposed residents of the proposed WCID which would more than double the current school population, Midlothian Independent School District Superintendent Lynn Dehart testified:

“At MISD we are committed to providing a "Superior Educational Community" for ALL children within our district. That will never change. However, if we are faced with rapid explosive growth that challenge will be very difficult to sustain.”⁵³

Dr. Perryman referenced the adverse impact the proposed WCID will have upon educational services, along with the other areas of public concern addressed above, and Dr. Perryman referenced the Applicant’s failure to consider such factors.⁵⁴ In fact, Ted Wilson testified on behalf of the Applicant:

Q. You mentioned within your report – I’m on Page 43 – Maypearl ISD. And you stated Maypearl ISD is recognized by the Texas Education Agency and that, in fact, the elementary was even exemplary. Correct?

A. Yes.

Q. People consider the strength of the school district when they decide to purchase a home?

A. Sure. It’s a big factor.

Q. It’s relevant to a housing analysis. Correct?

A. Yes.

Q. Did you contact anybody at Maypearl ISD?

A. No.

Q. Okay.

⁵² Id.

⁵³ Ellis County’s Exhibit No. 4, p.2

⁵⁴ Ellis County’s Exhibit No. 8, pp.15-16

A. Those statistics are generally available, you know, through the [sic] different Texas Education Association.

Q. Did you at all analyze the capital improvement cycle related to Maypearl ISD?

A. No.⁵⁵

In furtherance of the precedence established by the Austin Court of Appeals in *Texas Citizens*, the Honorable Administrative Law Judge did not ignore or treat as merely superfluous the fourth element of Tex. Water Code §51.021. The availability of adequate traffic control, police services, fire protection, emergency medical services, school services, and flood prevention to the proposed residents of the proposed WCID, along with other significant issues including an overburdening tax rate, are all matters which must be considered by the Commission to properly assess whether the creation of the proposed WCID would further the public welfare. The Applicant failed to provide evidence, and certainly failed to prove, that the future residents of the proposed WCID, if any, would be supported by adequate police services, fire protection, emergency medical services, school services, and flood prevention, despite the fact that the proposed residents would be charged a tax rate significantly higher than that assessed by any city located in Ellis County.

D. The Honorable Administrative Law Judge correctly determined that Ellis County and Ellis Prairie SWCD have a sufficient justiciable interest in this proceeding to warrant a contested case hearing before the Texas Commission on Environmental Quality.

An affected party 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 §55.251(b). “Governmental entities, including local governments and public agencies, with authority under state law over issues contemplated by the application may be considered affected persons.” 30 TAC §55.256(b). Furthermore, Tex. Water Code §51.333 provides that TCEQ shall hear and determine

⁵⁵ Reporter’s Record, pp.175-176

the petition to create the proposed water control and improvement district at issue pursuant to Sections 51.027-51.031 of the Texas Water Code. Tex. Water Code §51.031, which governs appeals from the decisions of TCEQ, states that any person who comes within the requirements specified in Sections 51.020-51.025 of the Texas Water Code may prosecute an appeal from the judgment of TCEQ. Tex. Water Code §51.020 indicates that a justiciable interest and/or standing attaches to “any person whose land is included in or would be affected by the creation of the district.”

Despite the Applicant’s erroneous statement within its closing argument to the Honorable Administrative Law Judge, Ellis Prairie SWCD owns, and Ellis County co-sponsors, property immediately adjacent to the property for which the Applicant seeks creation of the proposed WCID. Ellis County, a co-sponsor of Chambers Creek Flood Prevention Site No. 49A, appropriates funds annually towards the operation and maintenance of the 113 improved sites managed by Ellis Prairie SWCD, the other co-sponsor and easement holder of Chambers Creek Flood Prevention Site No. 49A.⁵⁶ Ellis County and Ellis Prairie SWCD entered into an agreement, entitled “Watershed Protection Operation and Maintenance Agreement,” on September 5, 1958.⁵⁷ In general, Ellis County and Ellis Prairie SWCD are financially responsible for the operation and maintenance of the aforementioned 113 improved sites, and Chambers Creek Flood Prevention Site No. 49A is one of the 113 improved sites co-sponsored by Ellis County and Ellis Prairie SWCD. Chambers Creek Flood Prevention Site No. 49A was never constructed to meet any criteria other than that of a low hazard class structure due to the lack of life and improved property located downstream.

⁵⁶ Ellis County’s Exhibit No. 2, Tom Sulak’s pre-filed testimony, p.1

⁵⁷ Ellis County’s Exhibit No. 14

In addition to the foregoing, Ellis County is the local governmental entity of general jurisdiction over the area in which Applicant seeks to create the proposed WCID. The proposed WCID is located in rural western Ellis County, outside the incorporated limits or extraterritorial jurisdiction of any municipality in Ellis County. Ellis County has the authority and obligation to protect the general public health, safety and welfare of its citizens.

The issue of whether Ellis County and Ellis prairie SWCD had a sufficient justiciable interest in this proceeding was set for a hearing before the TCEQ on January 24, 2007.⁵⁸ Pursuant to the notice of hearing dated December 15, 2006, the Applicant was given the opportunity to assert all claims and defenses regarding the nature of the parties requesting a contested case hearing before the State office of Administrative Hearings.⁵⁹ In response to the hearing requests of Ellis County and Ellis Prairie SWCD, the Executive Director addressed at length whether each protestant had a justiciable interest sufficient to warrant a contested case hearing.⁶⁰ Within the Executive Director's Response to Hearing Requests, a copy of which is attached hereto and fully incorporated herein, the Executive Director determined that both Ellis County and Ellis Prairie SWCD satisfied the criteria sufficient to establish a justiciable interest warranting a contested case hearing before SOAH.⁶¹ Similarly, within the Office of Public Interest Counsel's Response to Request for Hearing, a copy of which is attached hereto and fully incorporated herein, OPIC also determined that Ellis County

⁵⁸ Ellis County's Reply Exhibit No. R-1, an original of which is on file with the Chief Clerk of TCEQ, TCEQ Docket No. 2005-1686-DIS

⁵⁹ Id.

⁶⁰ Ellis County's Reply Exhibit No. R-2, an original of which is on file with the Chief Clerk of TCEQ, TCEQ Docket No. 2005-1686-DIS

⁶¹ Id.

and Ellis Prairie SWCD had a justiciable interest sufficient to warrant a contested case hearing before SOAH.⁶²

The Applicant did not file a response to the hearing requests of Ellis County and Ellis Prairie SWCD, nor did it file a reply to the responses of the Executive Director of TCEQ and the Office of Public Interest Counsel. TCEQ determined that Ellis County and Ellis Prairie SWCD had a justiciable interest warranting a contested case hearing on January 24, 2007. This matter was scheduled for a preliminary hearing before the Honorable Administrative Law Judge Thomas H. Walston, which was conducted on May 14, 2007. At the hearing, Applicant did not object to the justiciable interest of Ellis County and Ellis Prairie SWCD, nor did assert any claim or defense regarding the jurisdiction of SOAH to conduct a contested case hearing regarding this matter. After the conclusion of the hearing, within Order No. 1, Judge Walston concluded that jurisdiction over this matter by TCEQ and SOAH had been formally confirmed. Furthermore, within her Proposal for Decision, the Honorable Administrative Law Judge correctly determined that both Ellis County and Ellis Prairie SWCD were proper parties in this matter.

CONCLUSION AND PRAYER

Tex. Water Code §51.021(a), requires that an Applicant seeking to create a Water Control and Improvement District must prove: (1) that the organization of the district as requested is feasible and practicable; (2) that the land to be included and the residents of the proposed district will be benefitted by the creation of the proposed district; (3) that there is a public necessity or need for the district; and, (4) that the creation of the district would further the public welfare. The Applicant

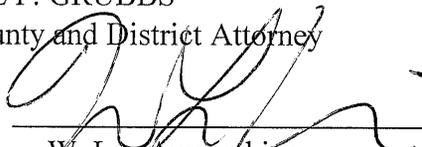
⁶² Ellis County's Reply Exhibit No. R-3, an original of which is on file with the Chief Clerk of TCEQ, TCEQ Docket No. 2005-1686-DIS

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failed to prove any of the four. Accordingly, and for the many reasons addressed herein above, within the briefs of Ellis County and Ellis Prairie SWCD and within the Honorable Administrative Law Judge's Proposal for Decision, the Applicant's petition to create Maypearl Water Control and Improvement District No. 1 must be denied.

Respectfully submitted,

JOE F. GRUBBS
County and District Attorney

By: 
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Ellis County's Closing Argument has been sent in compliance with the Texas Rules of Civil Procedure via facsimile by certified mail, return receipt requested with exhibits to the following parties on this the 2nd day of February, 2009:

Docketing Clerk
State Office of Administrative Hearings
Fax: (512)475-4994

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W. Lee Auvenshine

Exhibit R-1

Kathleen Hartnett White, *Chairman*
Larry R. Soward, *Commissioner*
Martin A. Hubert, *Commissioner*
Glenn Shankle, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

December 15, 2006

TO: Persons on Attached Mailing List

RE: **Docket No. 2005-1686-DIS; TCEQ Internal Control No. 04212005-D01, Maypearl Water Control and Improvement District No. 1.** Requests filed regarding a creation of a Water Control and Improvement District in Ellis County, Texas.

The above-referenced application and all timely filed requests filed on the application will be considered by the Commissioners of the Texas Commission on Environmental Quality during the public meeting on **January 24, 2007**. The meeting will begin at 9:30 a.m. in Room 201S of Building E, at the Commission's offices located at 12100 Park 35 Circle in Austin, Texas.

In accordance with Commission rules, copies of the request(s) have been forwarded to the applicant, the Executive Director of the TCEQ, and the Public Interest Counsel of the TCEQ. They may file written responses to these requests no later than twenty-three days before the public meeting date, that is by **December 29, 2006**. Persons who filed requests (requesters) may file a written reply to responses no later than nine days before the public meeting, that is by **January 12, 2007**. All responses and replies must be filed with the Chief Clerk of the TCEQ, and sent on the same day to all individuals on the attached mailing list. The address of the Chief Clerk's Office is: Chief Clerk, ATTN: Agenda Docket Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087 (Fax 512/239-3311). The procedures for evaluating requests are found in Chapter 55 of the Commission's rules. Commission Rules 1.10, 1.11, and 55.254 concern the filing and serving of documents.

The Commissioners will not take oral argument or public comment on this matter, but may wish to ask questions of the applicant, hearing requesters, or staff. The Commissioners will make their decision based on the requests, written responses to the requests, any written replies to those responses, and any response to questions.

Copies of all requests have also been referred to the Alternative Dispute Resolution Office, where they will be evaluated to determine if informal, voluntary mediation might help resolve any dispute.

The attachment to this letter is intended to help you better understand public participation and the processing of requests. Individual members of the public may seek further information concerning the application, public participation, the processing of requests, copies of Commission rules, or the attachment, by calling the TCEQ Office of Public Assistance, toll free, at 1-800-687-4040.

Sincerely,

A handwritten signature in cursive script, appearing to read "LaDonna Castañuela".

LaDonna Castañuela, Chief Clerk

Public Participation in TCEQ Proceedings

The Commission encourages public participation. The Commission's Office of Public Assistance (OPA) provides individual members of the public information on applications, and on Commission procedures. OPA may respond to your inquiries in writing and provide you with information. OPA may be reached, toll free, at 1-800-687-4040.

The formal way for public participation is through the contested case hearing. The law allows for holding contested case hearings on certain types of applications; the remainder of this document provides an overview of the processing of requests for a contested case hearing. It describes the requirements for a hearing request and how the Commission processes hearing requests.

A hearing request must:

- (1) give the name, address, and daytime telephone number of the person who files the request. If the request is made by a group or association, the request must identify one person by name, address, daytime telephone number, and, where possible, fax number, who shall be responsible for receiving all official communications and documents for the group;
- (2) identify the person's personal justiciable interest affected by the application;
- (3) request a contested case hearing;
- (4) provide any other information specified in the public notice of application;
- (5) be timely filed with the Chief Clerk, as set out in the public notice; and
- (6) be pursuant to a right to hearing authorized by law.

The three Commissioners determine the validity of hearing requests, and vote to approve or deny the hearing requests during a public meeting, which are usually held every other Wednesday in Austin. Leading up to the meeting, the following occurs:

- (1) the written hearing requests are distributed to the Executive Director, the Public Interest Counsel, and the Applicant; these persons may file a response to the hearing requests 23 days before the meeting;
- (2) the hearing requester may then file a reply to the responses nine days before the meeting; this is the hearing requester's opportunity to correct any deficiencies in the hearing request that have been identified by TCEQ staff or the applicant. The hearing requester should be sure to submit any information (for example, maps or diagrams showing the requestor's location relative to the applicant's proposed activities) by this deadline he or she wishes the Commissioners to consider; and
- (3) the Commissioners read the hearing requests, the responses to the hearing requests, and the replies, before the public meeting. Then during the public meeting the Commissioners discuss the application and the hearing requests, and vote to grant or deny the hearing requests.

If the Commissioners deny the hearing requests then they often will proceed and vote to approve or deny the application. If the Commissioners grant the hearing requests they will refer the application to the State Office of Administrative Hearings (SOAH), which will conduct a contested case hearing. A SOAH judge will then submit a recommendation to the Commission to approve or deny the application.

The Commission's evaluation of a hearing request is based on Texas Water Code Chapter 5, which provides the Commission need not grant a hearing request if the requester does not have a personal justiciable interest. The

Commission's rules on processing hearing requests are at 30 Texas Administrative Code, Chapter 55. The "personal justiciable interest" requirement means that a hearing requester must be impacted personally, not just as a member of the general public, by the Commission's decision on the application. Also, the hearing requester's interest must be "justiciable," meaning the Commission will grant hearing requests only if the requester complains of matters within the Commission's authority. So a hearing request complaining of other matters outside the Commission's authority would be denied.

The Alternative Dispute Resolution Office may contact hearing requesters to learn if they would participate in informal discussions with the applicant and a mediator. The Public Interest Counsel may also provide information on the processing of hearing requests.

By necessity this document gives a very general description of Commission procedures. Call the Office of Public Assistance to get answers about your specific questions. Again, the telephone number is 1-800-687-4040.

MAILING LIST
MAYPEARL WATER CONTROL AND IMPROVEMENT DISTRICT NO. 1
DOCKET NO. 2005-1686-DIS; TCEQ INTERNAL CONTROL NO. 04212005-D01

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RESOLUTION

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FOR THE CHIEF CLERK:

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REQUESTER:

Clyde Melick
Ellis County Engineering Department
101 West Main St.
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Exhibit

R-2

TCEQ DOCKET NO. 2005-1686-DIS

APPLICATION FOR THE CREATION § BEFORE THE
OF MAYPEARL WATER CONTROL § TEXAS COMMISSION ON
AND IMPROVEMENT DISTRICT NO. 1 § ENVIRONMENTAL QUALITY

EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUESTS

I. INTRODUCTION

The Executive Director of the Texas Commission on Environmental Quality ("TCEQ" or "Commission") files this Response to Hearing Request on the application by the Ellis County Commissioner's Court, Ellis Prairie Soil and Water Conservation District, and Mountain Peak Special Utility District, for the creation of Maypearl Water Control and Improvement District No.1 ("District"). A copy of the application and the Executive Director's technical summary have been filed separately with the Office of the Chief Clerk for Commission consideration.

The proposed District would contain 226.64 acres, located within Ellis County. The proposed District is located approximately 6 miles northwest of the City of Maypearl in western Ellis County, and north and west of the intersection of FM 157 and FM 2258. Application material indicates that the proposed District is not located within the extraterritorial jurisdiction of any city. The application asserts that the general nature of the District's work will include the provision of water, wastewater and stormwater drainage services within the District's boundaries.

II. PROCEDURAL HISTORY

The Petitioner filed an application for the creation of the District on April 21, 2005, which was declared administratively complete on May 25, 2005. The Petitioner published the Notice Of District Petition in the *Waxahachie Daily Light*, a newspaper generally circulated in Ellis County, on August 16, and August 23, 2005. On August 17, 2005, proper notice of the application was posted on the bulletin board used for posting legal notices in Ellis County, Texas. On August 12, 2005, TCEQ received a letter of protest from Ellis County Engineering Department, attaching an August 9, 2005, resolution from Ellis County Commissioner's Court, opposing the creation of the district. On September 12, 2005, TCEQ received a letter of protest from the Ellis-Prairie Soil and Water Conservation District (SWCD) raising several dam safety issues. On September 15, 2005, TCEQ received a letter from Mountain Peak Special Utility District voicing concerns that the proposed District may interfere with its CON. The period to request a contested case hearing ended September 22, 2005. In response to dam safety concerns raised by the TCEQ, the Petitioner's engineer provided TCEQ a revised engineering report on May 9, 2006, in which residential development was excluded from the area potentially affected by a dam breach. The Office of the Chief Clerk sent notice of the agenda setting for the Commission's consideration of the hearing requests on December 15, 2006.

III. THE CREATION OF WATER CONTROL AND IMPROVEMENT DISTRICTS

A Water Control and Improvement District (WCID) may be created under and subject to the authority, conditions, and restrictions of either Article III, Section 52 of the Texas Constitution, or Article XVI, Section 59 of the Texas Constitution. *TEX. WATER CODE § 51.011*. The District in this case is proposed to be created and organized according to the terms and provisions of Article XVI, Section 59, of the Texas Constitution, and Chapters 49 and 51 of the Texas Water Code. Although single-county districts may be created by a commissioners court,¹ a WCID seeking sewer powers requires the approval of TCEQ. *TEX. WATER CODE §§ 51.333, 51.331*.

A WCID may be created for the following purposes:

- (1) the control, storage, preservation, and distribution of its water and floodwater and the water of its rivers and streams for irrigation, power, and all other useful purposes;
- (2) the reclamation and irrigation of its arid, semiarid, and other land which needs irrigation;
- (3) the reclamation, drainage, conservation, and development of its forests, water, and hydroelectric power;
- (4) the navigation of its coastal and inland water;
- (5) the control, abatement, and change of any shortage or harmful excess of water;
- (6) the protection, preservation, and restoration of the purity and sanitary condition of water within the state; and
- (7) the preservation and conservation of all natural resources of the state.

TEX. WATER CODE § 51.121(b). WCIDs have been created mainly to develop and provide water service, wastewater service and stormwater drainage to developing areas. The primary business of the instant proposed district is to provide water, sewer and drainage service to the District. Because the proposed District seeks sewage powers, the commission has jurisdiction to hear this case and create the district. *TEX. WATER CODE §§ 51.333, 51.331*.

The Commission must grant or deny a WCID creation application in accordance with Section 51.021 of the Texas Water Code. In order to grant an application, the Commission must find that organization of the district as requested is feasible and practicable; that the land to be included and the residents of the proposed district will be benefited by the creation of the district; that there is a public necessity or need for the district; and that the creation of the district would further the public welfare. *TEX. WATER CODE § 51.021(a)*. If the commission fails to make these findings, it shall refuse to grant the petition. *TEX. WATER CODE § 51.021(b)*.

TCEQ's regulations incorporate the procedures established by the Texas Water Code. Title 30, Section 293.13 of the Texas Administrative Code allows the Commission to grant a district creation application

¹ Cf. *Tex. Water Code § 51.016* (single county districts created by commissioners court) and *Tex. Water Code § 51.027* (multi-county district created exclusively by the commission)

and to issue an order including a finding that the project meets applicable statutory requirements. 30 *TEX. ADMIN. CODE* § 293.13(b)(1). The Commission, however, must exclude the areas that it finds would not be benefited by the creation of the district and must redefine the boundaries of the proposed district according to its findings. 30 *TEX. ADMIN. CODE* § 293.13(b)(2); *TEX. WATER CODE* § 51.021(c).

IV. DAM SAFETY RULES

TCEQ has authority over dam safety under Texas Water Code, Section 12.052. See also, *TEX. WATER CODE* § 5.013(a)(5), and *TITLE 30, TEX. ADMIN. CODE, CHAPTER 299*. Under Section 12.052, "The commission shall make and enforce rules and orders and shall perform all other acts necessary to provide for the safe construction, maintenance, repair, and removal of dams located in this state." *TEX. WATER CODE* § 12.052(a). Under Subsection (c), a dam owner who willfully fails to comply with an order to reconstruct, repair or remove a dam "is liable to a penalty of not more than \$ 5,000 a day for each day he continues to violate this section." *TEX. WATER CODE* § 12.052(c). The commission has authority over "the adoption and enforcement of rules and performance of other acts relating to the safe construction, maintenance, and removal of dams." *TEX. WATER CODE* § 5.013(a)(5).

Under Title 30, Texas Administrative Code, Section 299, the dam owner can become the subject of an order or injunction if the Executive Director finds that the level of danger to the public becomes unacceptable. 30 *TEX. ADMIN. CODE* § 299.2. An unacceptable danger arises when the dam's structure is inadequate compared to the potential danger if the dam should fail. All dams are classified according to three hazard levels—low, significant, and high—to indicate the dam's downstream hazard potential. 30 *TEX. ADMIN. CODE* § 299.11. Hazard classification does not indicate any condition of the dam itself. 30 *TEX. ADMIN. CODE* § 299.13. Existing dams are subject to re-evaluation "in consideration of continuing downstream development." 30 *TEX. ADMIN. CODE* § 299.15(a). A re-evaluation subjects the owner to action under Section 299.2 if the Executive Director finds that the dam falls short of certain hydrological criteria. *Id.* Thus, the danger to the public can change throughout the life of the dam. A "significant" hazard exists "where failure would not be expected to cause loss of human life, but may cause damage to isolated homes [or] secondary highways . . ." 30 *TEX. ADMIN. CODE* § 299.13. When a dam poses an unacceptable danger to the public, TCEQ can order the owner to upgrade the dam. 30 *TEX. ADMIN. CODE* § 299.2.

V. OUTLINE OF THE EVALUATION PROCESS FOR HEARING REQUESTS

The Commission may act on a WCID creation application if no public hearing is requested within 30 days of the final publication of notice that the petitioners were required to publish. 30 *TEX. ADMIN. CODE* § 293.12(c). As the application was declared administratively complete after September 1, 1999, it is subject to the requirements of Title 30, Chapter 55, Subchapter G, Sections 55.250-55.256 of the Texas Administrative Code. The Commission, the Executive Director, the applicant or affected persons may request a contested case hearing on this application. 30 *TEX. ADMIN. CODE* § 55.251(a). The Commission must evaluate the hearing requests and may take one of the following actions:

- (1) determine that the hearing requests do not meet the rule requirements and act on the application;
- (2) determine that the hearing requests do not meet the rule requirements and refer the application to a public meeting to develop public comment before acting on the application;
- (3) determine that the hearing requests meet the rule requirements and refer the application to the State Office of Administrative Hearings ("SOAH") for a hearing; or
- (4) refer the hearing requests to SOAH for a hearing on whether the hearing requests meet the rule requirements.

30 TEX. ADMIN. CODE § 55.255(a). The regulations provide that a hearing request made by an affected person must be in writing and must be filed with the Office of the Chief Clerk within the time provided in the Notice Of District Petition. *30 TEX. ADMIN. CODE § 55.251(b) and (d)*. These two requirements are mandatory. The affected person's hearing request must also substantially comply with the following:

- (1) give the name, address, and daytime telephone number of the person who files 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.

30 TEX. ADMIN. CODE § 55.251(c). An affected person's personal justiciable interest must be related to a legal right, duty, privilege, power, or economic interest affected by the application belonging to the requestor and not an interest common to members of the general public. *30 TEX. ADMIN. CODE § 55.256(a)*. The regulations give the Commission flexibility to determine affected person status by considering any relevant factor, including the following:

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

30 TEX. ADMIN. CODE § 55.256(a). Government entities, including local governments, may be affected persons if they have authority under state law over issues contemplated by the application. 30 TEX. ADMIN. CODE § 55.256(b).

VI. THE HEARING REQUESTS

TCEQ received three hearing requests on the application for the creation of the proposed District from the following individuals:

- 1) Ellis County Commissioners Court
- 2) Ellis Prairie Soil and Water Conservation District (SWCD)
- 3) Mountain Peak Special Utility District (MPSUD)

VII. ANALYSIS OF THE HEARING REQUESTS

1. The Executive Director recommends that the Commission grant the Hearing Requests of Ellis County Commissioner's Court and Ellis Prairie Soil and Water Conservation District.

Both Ellis County Commissioners Court (Ellis County) and Ellis-Prairie Soil and Water Conservation District (SWCD) have substantially complied with Title 30, Tex. Admin. Code, Section 55.251(c) by providing their contact information and identifying a personal justiciable interest affected by the application. Ellis County also requested a hearing. SWCD did not request a hearing, but it is clear from its letter, by providing recommendations, seeking assurances, and stating its opposition to the district's creation, that it wishes to participate in the hearing process. Accordingly, the Executive Director believes SWCD has substantially complied with Section 55.251(c).

Both raise issues that address the fundamental findings required for a WCID to be created, namely, whether the district is feasible, whether the district benefits the residents of the proposed district, and whether the district furthers the public welfare. Ellis County raises a number of issues in its hearing request. First, it states that the creation of the district would be detrimental to the citizens of Ellis County, by creating unsafe traffic volume on county roads; creating drainage and flooding problems; it would have an unreasonable effect on the natural run-off rates and drainage and have an adverse affect on the quality of storm water runoff for downstream landowners. Second, Ellis County raises the issue of dam safety, observing that the proposed District lies directly within the potential breach inundation area of a Soil Conservation Service Dam known as Chambers Creek Site 49A, and that, should the dam's hazard rating increase as a result of the District, Ellis County would be liable for keeping the dam in compliance with TCEQ's more stringent requirements. Finally, Ellis County puts at issue whether the District is feasible.

Ellis Prairie Soil and Water Conservation District (SWCD), like Ellis County, is concerned with dam safety. It is concerned that the homes that will be located downstream of the dam will be at risk in event

of a breach. It is also concerned that when homes are built within the district, it will raise the hazard classification of the dam.

By raising the issue of dam safety, both Ellis County and the SWCD's hearing requests put at issue whether the district furthers the public welfare. The TCEQ technical staff memo, dated June 21, 2006, states that after an inspection, the TCEQ Dam Safety Team determined that a large number of planned homes would be endangered in event of a breach. The memo further states that the proposed District addressed this issue by cutting the planned homes out of the breach zone. These actions satisfied the Dam Safety Team's concerns about the hazard to residences within the district. Nevertheless, the hazard classification of the dam will be increased because Farm-to-Market Road 2258 runs parallel to, and downstream from, the dam and the increase population of the district will increase traffic along this road. This increased traffic will cause the dam's hazard classification to be raised from "low" to "significant."

An affected person is "[a] person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application." 30 TEX. ADMIN. CODE § 55.256(a). As government entities, Ellis County and the SWCD may be considered affected persons if they can show they have authority under state law over issues contemplated by the application. 30 TEX. ADMIN. CODE § 55.256(b). Both are sponsors of the dam. A dam sponsor is a person who has signed a sponsor agreement with the U.S. Department of Agriculture, Natural Resources Conservation Service, agreeing to be responsible for the operation and maintenance of the dam. The sponsor thereby assumes the responsibilities of the dam owner, for purposes of Texas Water Code, Section 12.052(a) and Title 30, Texas Administration Code, Section 299.2. Because the dam-owner's liability for the cost of making upgrades is imputed to the sponsor, both Ellis County and SWCD have "a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application." 30 TEX. ADMIN. CODE § 55.256(a). They have a justiciable interest in whether the dam's increased safety classification would obligate them to incur financial expenses for the upgrade of the dam and whether the district intends to participate in sharing those expenses. They have raised issues covered by a law applicable to this application and they have standing due to their economic interest in the case. Accordingly, they should be named as affected persons.

2. The Executive Director recommends that the Commission grant the Hearing Requests of Mountain Peak Special Utility District.

Mountain Peak has substantially complied with Title 30, Tex. Admin. Code, Section 55.251(c) by providing its contact information, identifying a personal justiciable interest affected by the application, and requesting a hearing. claims to hold a CCN for the area in which the proposed district is located. Commission Rules prevent a district from providing service within another's district or CCN territory without first having obtained consent or a CCN. Specifically, TCEQ rules provide that

A district may not provide services within an area for which a retail public utility holds a certificate of convenience and necessity or within the boundaries of another district

without the district's consent, unless the district has a valid certificate of convenience and necessity to provide services to that area.

30 TEX. ADMIN. CODE 291.101(c). The hearing request from Mountain Peak states that it contests the creation of the District and, specifically, contests any CCN within the CCN of Mountain Peak. The ED is in possession of a map that shows the proposed district to be well within Mountain Peak's district and CCN boundaries, and has no evidence that Mountain Peak has consented to the district providing service within its certificated area. The primary purpose of the proposed district is to provide water, sewer and drainage service to the District. Under the above rule, the proposed district would not be able to provide either water or wastewater service without a CCN or consent from Mountain Peak. Accordingly, Mountain Peak has an interest protected by the law under which the application will be considered, and therefore "a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application," *30 TEX. ADMIN. CODE § 55.256(c) and (a)*, and should be named as an affected person.

Note that a February 3, 2006, letter Mountain Peak made a conditional withdrawal of its hearing request. It conditioned its withdrawal on assurances that the proposed district obtain its water service from Mountain Peak and that Mountain Peak have an opportunity to review and make suggestions with respect to the form of the final order, before it is presented to the Commission for entry. Because Mountain Peak is conditional, this letter can not be treated as a formal withdraw of protest. Accordingly, Mountain Peak's hearing request should be granted unless it provides TCEQ with a letter expressing an unconditional of withdrawal of protest.

VIII. DURATION FOR THE CONTESTED CASE HEARING

If the Commission refers the matter to SOAH for a contested case hearing, the Executive Director recommends that the projected duration for any contested case hearing between preliminary hearing on the matter and presentation of a proposal for decision before the Commission, should be **nine (9) months**.

IX. EXECUTIVE DIRECTOR'S RECOMMENDATION

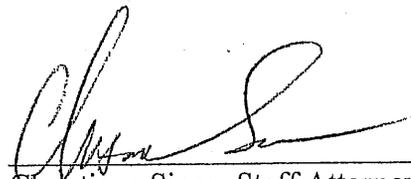
The ED recommends finding all the hearing requestors to be affected persons and refer to SOAH for a contested case hearing, pursuant to *Title 30, Tex. Admin. Code § 55.255(a)(3)*.

Respectfully submitted,

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY
Glenn Shankle, Executive Director

Robert Martinez, Director
Environmental Law Division

By:



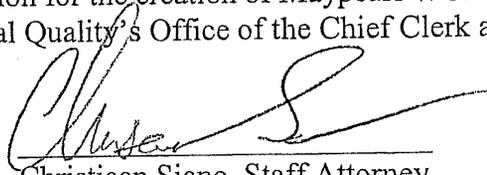
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(512) 239-0606 (Fax)

ATTORNEYS FOR
THE EXECUTIVE DIRECTOR

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of December, 2006, the original of "Executive Director's Response To Hearing Request" relating to application for the creation of Maypearl WCID No. 1 was filed with the Texas Commission On Environmental Quality's Office of the Chief Clerk and mailed to the individuals on the mailing list.



Christian Siano, Staff Attorney
Environmental Law Division
Texas State Bar No. 24051335

MAILING LIST
MAYPEARL WATER CONTROL AND IMPROVEMENT DISTRICT NO. 1
DOCKET NO. 2005-1686-DIS; TCEQ INTERNAL CONTROL NO. 04212005-DO1

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Tel: (972) 923-5193
Fax: (972) 923-1351

Mountain Peak SUD

David Miller
Miller & Mentzer, P.C.
100 North Main St.
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Fax: (972) 845-3398

Ellis-Prairie Soil & Water Conservation District

Lee Harris, Chairman
1822 FM 66
Waxahachie, Texas 75167-5507
Tel: (972) 937-2660

Exhibit R-3

Kathleen Hartnett White, *Chairman*
Larry R. Soward, *Commissioner*
Martin A. Hubert, *Commissioner*

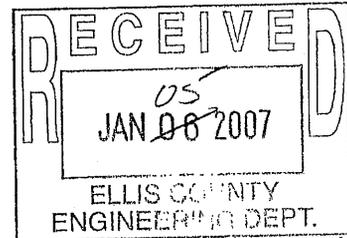


Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

December 29, 2006



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

RE: **MAYPEARL WATER CONTROL AND IMPROVEMENT DISTRICT NO. 1**
TCEQ DOCKET NO. 2005-1686-DIS

Dear Ms. Castañuela:

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

Sincerely,

A handwritten signature in cursive script, appearing to read "Scott A. Humphrey".

Scott A. Humphrey, Attorney
Public Interest Counsel

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

TCEQ DOCKET NO. 2005-1686-DIS

PETITION FOR THE	§	BEFORE THE TEXAS
CREATION OF MAYPEARL	§	COMMISSION ON
WATER CONTROL AND	§	ENVIRONMENTAL
IMPROVEMENT DISTRICT NO. 1	§	QUALITY

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

On April 21, 2005, Galilee Partners, L.P. (Petitioner) filed a petition with the TCEQ for the creation of Maypearl Water Control and Improvement District No. 1 of Ellis County (District). The petition states that: (1) the Petitioner is the owner of a majority of the value of the land to be included in the proposed District; (2) there are two lienholders, Palestine Partners L.P., and Sanders Asset Management L.P., on the property to be included in the proposed District and by affidavit they have all consented to the petition; (3) the proposed District will contain approximately 227.67 acres located within Ellis County, Texas; and (4) the proposed District is within Ellis County, Texas, and no portion of land within the proposed District is within the extraterritorial jurisdiction of any city, town or village in Texas. The petition further states that the proposed District will: (1) construct, maintain and operate a waterworks system for

residential, industrial and commercial purposes; (2) construct, maintain and operate a sanitary sewer collection system and wastewater treatment plant; (3) control, abate and amend the harmful excesses of water, and the reclamation and drainage of overflowed lands within or affecting the District; and (4) construct, install, maintain, purchase and operate additional facilities, systems, plants and enterprises consistent with the purposes for which the District is organized. According to the petition, the Petitioner has conducted a preliminary investigation to determine the cost of the project, and from the information available at the time, the cost of the project is estimated to be approximately \$11,100,000.

The application was declared administratively complete on May 25, 2005. Pursuant to the notice rules set out in 30 Tex. Admin. Code (TAC) § 293.12, the Petitioner published notice of the application for the creation of the District in the *Waxahachie Daily Light*, a newspaper generally circulated in Ellis County, on August 16 and August 23, 2005. In addition, on August 17, 2005, the Petitioner posted notice of the application at a place convenient to the public, at the Ellis County Courthouse where public notices are posted.

In response to the notices the TCEQ received a request for a contested case hearing from Ellis County Planner Clyde Melick. The Office of Public Interest Counsel recommends that the Commission grant the request for hearing.

II. Requirements of Applicable Law

This application is filed pursuant to Chapter 51 of the Texas Water Code and was declared administratively complete on May 25, 2005. Therefore, the hearing request associated with this application is evaluated under Subchapter G of Chapter 55 of the Commission's rules.

Under 30 TAC § 55.251, a hearing request must substantially comply with the following:

- (1) Give the name, address, and daytime telephone number of the person who file 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) of 30 TAC 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."

III. Affected Person Analysis

Since Mr. Melick signed his protest letter in his capacity as Ellis County Planner, and since he adopts the Ellis County Commissioners' Court (Court) Resolution No. 179.05 (Resolution) opposing the creation of the District as his basis for requesting the contested case hearing, OPIC infers that Mr. Melick is making the request on behalf of Ellis County and/or the Commissioners Court. In the Resolution, the Court states: it has the authority and obligation to protect the general public health, safety and welfare of the citizens of Ellis County (County); the Court believes the District would be detrimental to the citizens of the County; the County cannot provide service to the District at such a density as it would create unsafe traffic volume on the county roads; the District will create drainage and flooding problems on Boggy Creek downstream in the County, and the County drainage criteria will not be applicable due to the level of density the District proposes over five houses per acre; the District will drastically have an unreasonable effect on the natural run-off rates and drainage; the District will adversely affect landowners downstream due to the quality of storm water runoff; the Natural Resource Conservation Service has many concerns regarding the Soil Conservation Service Dam known as Chambers Creek Site 49A directly upstream from the District, and the District lies directly within the potential inundation area of the dam; and that for the above reasons stated, the Court concludes the District is not feasible and urges the Commission to deny the application for the District. Mr. Melick adds his concern about the proposed tax rate of .99/\$100.00 valuation. Such a rate would make houses in the District the highest taxed in the county and substantially higher than the city tax rate of the closest city, the City of Maypearl, at .73/\$100.00 valuation. Mr. Melick points out that the total tax rate for the District, which would also include Ellis

County and the Maypearl Independent School District, would be \$3.10/\$100.00 valuation thereby, in Mr. Melick's opinion, restricting the feasibility of the District. Finally, Mr. Melick expresses concern about police protection. Specifically, the Sheriffs department is currently working at its capacity, and the Court does not believe they could handle such an influx of rapid growth.

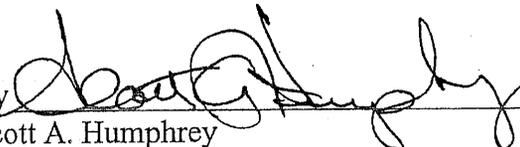
Specific requirements for petitions to create Water Control and Improvement Districts (WCIDs) are set out 30 TAC 293.11(c). Among those special requirements are existing and projected populations, projected tax rate, an evaluation of the effect of the district and its systems on natural run-off rates and drainage and water quality, a table of overlapping taxing entities and the most recent tax rates by those entities, and complete justification for creation of the district supported by evidence that the project is feasible, practicable, necessary, will benefit all of the land and residents to be included in the district and will further public welfare. Mr. Melick's hearing request, including the concerns raised in the Resolution, takes into consideration these factors and questions the feasibility and benefit of the District. As the Resolution states, the Commissioners Court has the authority and obligation to protect the general public health, safety and welfare of its citizens. In some instances, the Commissioners Court actually makes the determination as to the creation of a WCID (see, e.g., Tex. Water Code § 51.016). In this case, under Tex. Water Code §§ 51.331 & 51.333, the Commission will make the ultimate decision regarding this proposed district. However, OPIC is persuaded that Ellis County is an affected person and has raised issues that may be adjudicated in a WCID creation proceeding.

IV. Conclusion

For the reasons set forth above, OPIC recommends that the Commission grant the hearing request submitted by Clyde Melick.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By 

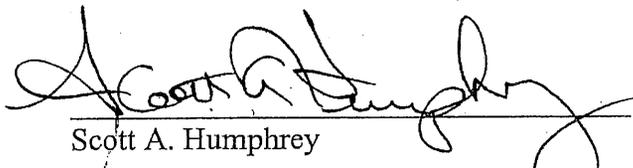
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TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2009 APR - 7 AM 9:50
CHIEF CLERKS OFFICE

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of December, 2006, 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.



Scott A. Humphrey

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MAYPEARL WATER CONTROL AND IMPROVEMENT DISTRICT NO. 1
TCEQ DOCKET NO. 2005-1686-DIS

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