TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

February 2, 2009

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

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

Dear Honorable Commissioners:

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

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

Sincerely,

Christiaan Siano
Staff Attorney
Environmental Law Division

Enclosure

cc:

MAILING LIST

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Application of Galilee Partners, L.P. for Creation of Maypearl
Water Control and Improvement District No. 1 of Ellis County, Texas
SOAH DOCKET NO. 582-07-2163
TCEQ DOCKET NO. 2005-1686-DIS

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

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

THE EXECUTIVE DIRECTOR'S REPLY TO EXCEPTIONS TO THE PROPOSAL FOR DECISION

TO THE HONORABLE COMMISSIONERS OF THE TCEQ:

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

A. BACKGROUND

Much of the legal argument in this case centers on the meaning of the findings required for the creation of a water control and improvement district (WCID) under TWC § 51.021(a). These requirements—feasible and practicable, benefit, necessity, and public welfare—are largely subjective. Similar findings are required for the creation of MUDs under TWC § 54.021. For MUDs, the creation statute provides some guidance on what the Commission should consider in making its findings.[1] No such guidance exists for the creation of WCIDs. While the ED has

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1 Tex. Water Code, §54.021(b) provides: (b) In determining if the project is feasible and practicable and if it is necessary and would be a benefit to the land included in the district, the commission shall consider:

(1) the availability of comparable service from other systems, including but not limited to water districts, municipalities, and regional authorities;

(2) the reasonableness of projected construction costs, tax rates, and water and sewer rates; and

(3) whether or not the district and its system and subsequent development within the district will have an unreasonable effect on the following:

(A) land elevation; (B) subsidence; (C) groundwater level within the region; (D) recharge capability of a groundwater source; (E) natural run-off rates and drainage; (F) water quality; and (G) total tax assessments on all land located within a district.

historically borrowed the considerations mandated for MUDs for WCID creations, the Applicant correctly observes that there is a dearth of case law interpreting these terms.

The Applicant refers to two cases, one from 1927, and one from 1929, as support for its position that the ALJ erred in her findings. The earlier case is *Missouri-Kansas-Texas R. Co. of Texas v. Rockwell County Levee Improvement District No. 3*, 297 S.W. 206 (Tex. 1927), a Texas Supreme Court case that involved a levee improvement district's power of condemnation and the assessment of damages pursuant thereto. Though using the term "public welfare" in several places, the case has no bearing on the issues of this case. Cited by the court in *San Saba* (discussed below) for the general proposition that public benefit must be determined by considering the rights of the individuals composing that public, the Applicant uses this to allege that "such public benefit criteria [public welfare] has historically and judicially been viewed as requiring consideration of the benefits to the tracts to be included within the district." App. Exceptions, p. 9.

The mere fact that a district must be a benefit to all the tracts within the proposed district (even, as here, where there is only one tract), does not refute the ALJ's finding on public welfare. Under §51.021, one finding addresses the benefit to the land and the residents *of the district*; another finding addresses *furthering the public welfare*. Although the ED disagrees with the ALJ's finding on public welfare, the ED also disagrees with the Applicant to the extent that it seems to equate "benefit to the land and residents" with "public welfare."

The second case cited by the Applicant is *San Saba County Water Control and Improvement District No. 1 v. Sutton*, 12 S.W.2d 134 (Tex. Comm'n App. 1929, judgm't adopted).[2] (This is an opinion decided by the Texas Commission of Appeals, of which the Texas Supreme Court adopted the judgment, but not the holding or the reasoning.) This case was brought by property owners to enjoin the district from collecting taxes. They challenged the district's creation on constitutional grounds, alleging that the creation denied them due process because under the statute it appeared that the commissioners court could only grant or deny the district as a whole, but did not have the power to exclude certain tracts of land that would not be benefited by the district. Only the board of directors could later decide to exclude certain land from the district if it would not be benefited by the district. Vernon's Ann. Tex. Stat. 1925, art. 7880, §76. The Commission of Appeals disagreed,

2 Styled alternatively as *Tarrant County WCID No. 1 v. Pollard* and *Tarrant County WCID No. 1 v. Sutton* by the Applicant.

and held that the finding of a "benefit to the land" related to a benefit to each tract of land within the district, and not the general boundaries of the proposed district as a whole. *San Saba*, 12 S.W.2d at 136-137. Moreover, the Commission of Appeals held that commissioners court did have discretion to exclude certain lands that would not be benefited by the district. *Id.* There was no due process violation because there was a hearing on the benefit to each tract of land within the district. On such a finding, the commissioners court could either exclude any tract that would not be benefited or deny the district in its entirety. *Id.*

The statute under consideration in *San Saba* required a finding that the district would be "feasible and practicable, that it would be a benefit to the land to be included therein, or be a public benefit, or utility . . . ." Vernon's Ann. Tex. Stat., 1925, art. 7880, §19. The case deals with conditions as they were in 1929, before the Texas Water Code, and before Chapter 293 of the Texas Administrative Code. The commissioners court did not have to find that the district would further the public welfare, nor even that it was necessary, although want of necessity was grounds for denying the district. *Id.* Single-county WCIDs were created by commissioners' courts, not a statewide government agency. Vernon's Ann. Tex. Stat., 1925, art. 7880, §§17 and 18.

The statutes that govern district creations have changed since *San Saba*, though much of the original language was preserved. For example, the statute still speaks of districts being created by a group of landowners within the proposed district, and being protested by people owning land within the boundaries of the proposed district. *See* TWC §§ 51.013, and 51.020. The statute thus contemplates layering districts over existing homes and residences, and multiple tracts of land. And yet, such a scenario is far removed from today's district creation process.

The Commission recognized the changing world of districts at its November 15, 2006 Agenda when considering the hearing requests for *Lerin Hills MUD*, Docket No. 2006-0969-DIS. The Commission noted that we are in a different stage in our State's history, where there is such rapid growth and competitive interests for the same water resources, and that past practices with regard to district creations may need to adjust to changing times and changing circumstances. Today, districts are created on single, bare tracts of land upon which development will occur someday in the future. The statute contemplates an immediate need for the district. Today, districts are used as a vehicle to fund development projects through taxing future homeowners. In sum, the findings as

they were interpreted in 1929 in a different statute, even if they did apply, simply do not clarify our understanding of the findings in Texas Water Code, Section 51.021.

B. CONTESTED ELEMENTS

1. Feasibility

In ascertaining "feasibility," the Applicant would have the Commission review districts at the creation phase for the "reasonableness of the proposed structure as a utility operation and infrastructure funding or reimbursement mechanism . . . ." App. Exceptions, p. 3. According to the Applicant, feasibility at the time of creation means reasonableness, and at the time of the first bond issuance it means the economic feasibility set out in Rule 293.59. The ED believes that feasibility should not have multiple meanings depending upon what stage of development the district is in. Accordingly, the ED urges the commission to find that a district is feasible because it meets the feasibility calculations set out in Rule 293.59(b) and (k), and not because the proposed structure as a utility operation and funding mechanism is reasonable.

2. Necessity

The Applicant states that the "need" for the district requires "an examination of whether the proposed facilities are suitable and necessary to serve the lands included within the district, not a snapshot economic assessment of housing demand, real estate markets and demographic projections." App. Exceptions, p. 3. The Applicant quotes *San Saba* to refute the ALJ's position that an examination of immediate economic feasibility is not required under §51.021. The ED does not agree with the ALJ on the issue of feasibility, but not for the reason proposed by the Applicant. While the ED believes that the statute does contemplate a present/immediate need for the district, it has historically allowed applicants to meet this requirement by showing that there will be a market for the project within the near future. The Applicant failed to do this. While failure to prove an immediate market for the tracts of land to be served by the district does not disprove feasibility, it

does disprove necessity. *San Saba* dealt with whether the shall-grant-or-deny provision in the creation statute eliminated the commissioners court's discretion in excluding land that would not be benefited by the district. It resolved the issue by showing that the statute required a finding of benefit to each tract of land within the district as opposed to the district as a whole. *San Saba* at no time addressed the underlying meaning behind the findings that had to be made to create a district. Therefore, the ED does not read *San Saba* to refute the ALJ's position.

C. REPLY TO APPLICANT'S EXCEPTIONS TO SPECIFIC FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Findings of Fact.

Finding No. 38. The ED agrees with the Applicant's Exception to Finding No. 38 insofar as it refers to a "high" hazard criterion. The only testimony adduced at trial was that the dam's hazardous classification would increase to significant, not high.

Finding No. 50. The ED agrees with the Applicant's Exception to this finding to the extent that it couples a need for the district with the feasibility of the district. The Applicant did not fail to prove that the District is not economically feasible, as the ALJ believes, "because the applicant did not establish that there is a need for the proposed development." Such a coupling of two elements would mean that any district for which no need could be proven would automatically be not feasible. The ED believes that this goes against the intent of the statute and is contrary to TCEQ Rules. These are separate findings and should stand alone.

Finding No. 52. The ED agrees with the Applicant's Exception to Finding No. 52. If the Commission adopts the broad interpretation of "public welfare" suggested by *Texas Citizens for a Safe Future & Clean Water v. R. R. Commission of Texas*, 254 S. W. 3d 492 (Tex. App.—Austin, 2008, pet. pending), the ED requests clarification on what factors may be considered in making this finding.

2. Conclusions of Law:

Conclusion No. 6. The ED agrees with the Applicant's Exception to Conclusion No. 6, for the reasons stated above, and in the ED's Exceptions to the PFD. The ED believes that the Applicant did meet its burden of proof in showing that the district was feasible under 30 TAC § 293. 59(b) and (k).

Conclusion No. 10. The ED agrees with the Applicant's Exception to Conclusion No. 10. The ED does not believe that the Applicant failed to meet its burden of proof on *all* issues, only on the issue of need. The ED believes that the Applicant met its burden of proof on the issues of feasibility and public welfare, as those terms have been historically understood by the Agency. Additionally, the ED believes, and the ALJ concludes in Conclusion No. 5, that the Applicant met its burden of proof on whether the district would benefit the land. Clearly, the Applicant did not fail to meet its burden of proof on *all* issues.

C. CONCLUSION

The ED agrees with the Applicant that the above listed Findings of Fact and Conclusions of law should be changed, some for internal congruity, some for reasons of statutory interpretation. Accordingly, the ED prays the commission for clarification and guidance in the correct interpretation of the terms within TWC §51.021(a), should it adopt the ALJ's Findings of Fact and Conclusions of Law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of February, 2009 a true and correct copy of the foregoing document was delivered via facsimile, hand delivery, interagency mail, or by deposit in the U.S. Mail to all persons on the attached mailing list.

Christiaan Siano
Environmental Law Division