

Jon Niermann, *Chairman*
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Erin E. Chancellor, *Interim Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

May 24, 2023

Laurie Gharis, Chief Clerk
Texas Commission on Environmental Quality
P.O. Box 13087, MC 105
Austin, Texas 78711-3087

Re: SOAH Docket Numbers 582-22-0259, 582-22-0260, and 582-22-0261; TCEQ Docket Nos. 2021-0571-DIS, 2021-0572-DIS, and 2021-0573-DIS; Applications for Creation of Lakeview Municipal Utility District Nos. 2, 1, and 3 of Ellis County

Ms. Gharis:

Enclosed for filing with the Texas Commission on Environmental Quality is the Executive Director's Exceptions to the Proposal for Decision for the above-referenced matter.

Please contact me at (512)239-4761 if you have any questions.

Sincerely,

A handwritten signature in cursive script that reads "Kayla Murray".

Kayla Murray
Staff Attorney
Environmental Law Division

CC: Mailing List

SOAH Docket No. 582-22-0259 – LEAD DOCKET
SOAH Docket No. 582-22-0260
SOAH Docket No. 582-22-0261
TCEQ Docket Nos. 2021-0571-DIS, 2021-0572-DIS, AND 2021-0573-DIS

Applications for the Creation of	§	Before the State Office
Lakeview Municipal Utility District	§	Of
Nos. 2, 1, and 3 of Ellis County	§	Administrative Hearings

**EXECUTIVE DIRECTOR’S EXCEPTIONS
TO THE PROPOSAL FOR DECISION**

To the Honorable Commissioners of the Texas Commission on Environmental Quality:

COMES NOW, the Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) and submits these exceptions to the Administrative Law Judges’ (ALJs) Proposal for Decision (PFD) and proposed order in the above-captioned matter.

As discussed in detail below, the Executive Director respectfully requests the Commission issue the Orders for the creation of Lakeview Municipal Utility District Nos. 2, 1, and 3 of Ellis County as drafted by the Executive Director, without the new conditions recommended by the Administrative Law Judges.

A. INTRODUCTION

On May 4, 2023, the ALJs issued their PFD recommending that the petitions to create Lakeview Municipal Utility District Nos. 2, 1, and 3 of Ellis County be denied.¹ The ALJs recommended that, in the alternative, the Applicant provide updated cost estimates.² The Executive Director respectfully disagrees with the ALJs’ primary decision as well as their alternative recommendation.

B. LEGAL STANDARD

Texas Water Code § 54.021(a) provides that the Commission shall grant a petition for the creation of a Municipal Utility District (MUD) if the Commission finds that the petition conforms to the requirements of Section 54.015 and that the project is feasible and practicable and is necessary and would be a benefit to the land to be included in the district.

The factors the Commission shall consider 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:

- (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:

¹ PFD at pages 2 and 54.

² *Id.*

- (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. ³

C. DISCUSSION

In the PFD, the ALJs found that the Applicant met all of the factors listed above in Section B, except for the reasonableness of projected constructed costs, specifically those costs related to construction of the wastewater treatment plant.

In its application materials, the Applicant provided an estimated cost of \$1,750,000 for a 1.10MGD wastewater treatment plant.⁴ However, the ALJs found that the engineer for the City of Waxahachie and Ellis County, Gary Hendricks, P.E., “credibly testified that the low-end cost estimate for a 1.56 MGD wastewater treatment plant was \$29,640,000.”⁵ Mr. Hendricks’ higher cost estimate is due to his belief that construction costs and plant capacity will be higher than anticipated.⁶ The discrepancy between the estimated cost by the Applicant and the Protestant does not render the applicant’s construction costs unreasonable. Updating the future cost estimate for the wastewater plant, if necessary, (which the Applicant will be responsible for) has no impact on the Executive Director’s reasonableness determination.

The ALJs state that the reasonableness of the projected construction costs, “...must bear some weight separate from consideration of the tax rates on the landowners, which are limited by TCEQ rule.”⁷ The ALJs then elaborate, “The reasonableness of cost estimates remains important because if the developer vastly underestimates the construction costs, it must pay the difference; and if the developer runs out of money, there is a risk that a development could remain partially built with no services.”⁸ The Executive Director notes that there is no statutory requirement for a continual review of the cost estimates provided in a MUD creation application; instead, it is the ED’s practice to review the cost estimates provided in the original engineering report submitted with such applications. TCEQ’s rules at 30 TAC § 293.11(d)(1)(E) state that a petition for MUD creation include a “statement of estimated cost of project.”

The ED’s analysis does not operate in hypotheticals. The ED analyzes MUD creation petitions by determining whether the costs proposed are reasonable at the time the petitions are submitted.

30 TAC § 293.11(d) contains the items that should be included in MUD creation applications. 30 TAC § 293.11(d)(1) lists the petition requirements for MUD creations,

³ Texas Water Code § 54.021(b).

⁴ PFD at page 17.

⁵ PFD at page 24.

⁶ *Id.*

⁷ *Id.* at page 25

⁸ *Id.*

which includes the name of the district, metes and bounds, the necessity for the work, a description of the proposed work, and a statement of the *estimated*⁹ project cost.

30 TAC § 293.11(d)(5) lists the requirements for the *preliminary*¹⁰ engineering report; 30 TAC § 293.11 (d)(5) which states that the following should be included in the report: *tentative*¹¹ itemized cost estimates of the proposed capital improvements and itemized cost summary for anticipated bond issue requirement.

The rules regarding construction cost estimates for district creations require “reasonableness” of such costs when an application is initially submitted, in other words, a virtual “snapshot” of proposed construction costs *at that time*. They do not require an ongoing, real-time, or any other point-in-time review of the estimate. Furthermore, these costs will undoubtedly change over the lifetime of the project. The ED’s position, which has remained the same since the technical memorandums were issued on these applications on August 3, 2021, is that the proposed construction costs included in the Applicant’s preliminary engineering reports are reasonable and as such, TCEQ requirements on this issue are satisfied.

The information on construction costs submitted by the applicant in the preliminary engineering reports lists the full extent of the projected construction costs, of which the wastewater plant (WWTP) is just one component. In Table 4 of each of the reports, the estimated cost of the WWTP is \$1,750,000 and each district’s portion of that cost is also listed. For Lakeview MUD 1, its 38% portion is \$663,751, for Lakeview MUD 2, its 19% portion is \$325,175, and for Lakeview MUD 3, its 43% portion is \$761,150. In Table 7 (Projected Utility Bond Requirements) of each report the estimated total construction costs for water, wastewater and drainage for the districts is provided, including \$39,882,251 for No. 1, \$23,976,980 for No. 2, and \$22,845,883 for No 3. Focusing on MUD No. 1, the MUD’s portion of the estimated WWTP cost of \$663,751 is 1.66% of the total utility cost of \$39,882,251. If the WWTP cost when updated increases by a factor of four to account for a larger plant and greater costs, it would represent 6.6% of the construction costs for MUD 1. An update with the fourfold increase would then include a large increment in WWTP construction, rising to \$1,990,000 for MUD 1, which could raise the total construction cost to \$41,873,500. There would also be proportional incremental increases for MUDs 2 and 3, but all the increases would be borne by the developer. Since the tax rate is capped at \$1.00 per \$100 of assessed valuation, the projected financial feasibility calculations in the preliminary engineering reports assume that the districts would fund a limited amount of the construction costs through bonds and taxes and the remainder would be the developer’s responsibility. In Table 7 of the reports, the applicant assumes that the percentage of construction costs to be funded by each district with bonds and taxes would be limited to 67.91% for MUD 1, 62.59% for MUD 2, and 55.65% for MUD 3, with the remainder financed by the developer. The increased construction costs would result in these percentages going down and the percentages financed by the developer, 32.09% in the case of MUD 1, going up.

Moreover, the ED notes that the final costs for the wastewater treatment plant will be decided in another process altogether. The Applications currently in front of the ALJs are for creations of three municipal utility districts, not for a Texas Pollutant

⁹ Emphasis added.

¹⁰ *Id.*

¹¹ *Id.*

Discharge Elimination System Permit (TPDES). The TPDES permit process will determine the permit requirements for the proposed wastewater discharge. If the TPDES permit is approved, the applicant will then submit the final design for the wastewater treatment plant for approval. That process is handled by the wastewater permitting section of the water quality division. It is possible that the construction cost for the wastewater treatment plant will change as a result of the TPDES permitting process, which is why the cost provided in the MUD creation application is referred to as an estimate in the TCEQ's rules.

Furthermore, it is important to consider that the total construction costs presented in the preliminary engineering reports are estimates for final build-out of all the water, wastewater, drainage, and roads necessary to complete development within the districts. The WWTP cost presented is based on the capacity required upon completion of the build-out, which will take a number of years. For this reason, the WWTP will not initially need to be constructed at full capacity of 1.59 MGD. Most WWTPs for MUDs are constructed in phases so that initially the investment required is not the full amount estimated for the ultimate capacity. For instance, as development is just beginning, a developer may construct a plant with a capacity of 0.25 or 0.3 MGD, and add additional capacity in phases. This would allow a developer and a MUD to invest in wastewater capacity as needed and as development proceeds.

Lastly, the Applicant's preliminary engineering report was signed and sealed by the Applicant's engineer, Mr. Andrew Mizerek. As stated on pages 5-6 in his prefiled testimony, Districts staff Daniel Harrison testified that these costs are reasonable compared to other taxing authorities in the area. There is no evidence in the record that the proposed construction costs contained in that report are unreasonable.

D. CONCLUSION

The ALJs' alternative recommendation appears to create a new factor for MUD creations that would require applicants to provide updated cost estimates throughout the creation process. This is problematic for a variety of reasons, including that the TCEQ's Districts section does not have the resources to re-evaluate these costs throughout the creation process. It is also unknown when these updated costs are to be submitted, and if this is applicable to every applicant. More importantly, there is no authority for such a recommendation.

The ED respectfully recommends that the Commission not adopt the ALJs' proposed order. Rather, the ED recommends finding that the Applicant has met all requirements with regard to the applicable statutes and rules and therefore grant the creation of the three Lakeview MUDs.

Respectfully submitted,

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

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ATTORNEYS FOR THE
EXECUTIVE DIRECTOR

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May, 2023, a true and correct copy of the foregoing document was delivered via electronic mail, facsimile, hand delivery, interagency mail, or by deposit in the U.S. Mail to all persons on the attached mailing list.



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