

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

**FOR THE CREATION OF
LAKEVIEW MUNICIPAL
UTILITY DISTRICT NOS. 2, 1,
AND 3 OF ELLIS COUNTY**

§
§
§
§
§

**BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS**

**INDIVIDUAL PROTESTANTS’ REPLY TO
EXCEPTIONS TO THE PROPOSAL FOR DECISION**

I. Introduction

Individual Protestants concur with the Reply to Exceptions filed by the City of Waxahachie, Texas (City) and Ellis County, Texas (County). Individual Protestants adopt that Reply. For the sake of judicial efficiency, Individual Protestants will not repeat those arguments.

For the following reasons, the Petitions should be denied.

II. Reply to Applicant’s Exceptions

Applicant’s attempts to resurrect its Petitions should be rejected. Applicant seeks to justify granting the Petitions based upon new estimates of the cost of construction of the wastewater treatment plant provided in Applicant’s Exceptions, and a letter from Brian Finch indicating a willingness to absorb additional costs, included as Attachment A to Applicant’s Exceptions.

This information cannot justify granting the Petitions. The Commission may only change a Proposal for Decision based upon the record made before the Administrative Law Judge (ALJ).¹ The record before the ALJs closed at the end of the hearing on the merits. Applicant’s revised cost estimations, and letter submittal from Brian Finch, were not in the record made before the ALJs, and thus cannot be a basis for the Commission’s decision.

¹ Tex. Gov’t Code 2003.047(m).

Furthermore, in a contested case, each party has a constitutional and statutory right to cross-examination, as well as the right to present and rebut evidence and argument on each issue raised in the case.² Applicant already presented Mr. Brian Finch as a witness in this matter and Mr. Finch did not provide or discuss the letter now attached to Applicant's Exceptions.³ That recent letter did not exist during the hearing in this matter. Applicant now essentially seeks to present supplemental testimony with no opportunity for the Individual Protestants to cross-examine him on the claims contained in this letter, nor any opportunity to present responsive evidence.⁴ The consideration of this letter, and arguments premised upon this letter, violates Individual Protestants' constitutional due process rights, and improperly deprives Individual Protestants of their right of cross-examination, and right to present responsive evidence, under the Texas Administrative Procedure Act.

III. Reply to Executive Director's Exceptions

The Executive Director implies that the flaw in the ALJs' finding that Applicant has not provided a reasonable estimate of construction costs is a matter of changing costs over time, and seeks to argue that an applicant's estimate need only be judged at a "snapshot" in time. This does not justify disregarding the unreasonable under-estimation of the construction costs contained in the Application.

The estimation of construction costs contained in the Application was not in error merely because it was outdated. Rather, the Application has grossly underestimated, as an engineering matter, the capacity of the wastewater treatment plant necessary to treat the wastewater that would

² *City of Corpus Christi v. Public Utility Commission of Texas*, 51 S.W.3d 231, 262 (Tex. 2001) (Justices Owen, Phillips, Hecht, Enoch, Baker, Abbott, Hankinson and Jefferson, concurring), citing *Richardson v. City of Pasadena*, 513 S.W.2d 1, 4 (Tex. 1974). Tex. Gov't Code §§ 2001.051(2), 2001.087.

³ Exhibit Applicant-14.

⁴ Attachment A to Applicant's Exceptions.

be produced by the proposed development. The ALJs' finding that the burden had not been met was premised upon information revealing this engineering flaw through the hearing process.

It is certainly not improper for the Commission to act upon the most accurate information available, even if that information is provided by protestants in the hearing process. On multiple occasions, the Commission has denied an authorization based upon information that came to light in the hearing process.

In addition, the Executive Director is incorrect that an examination of the costs of the wastewater treatment plant will be addressed in a later proceeding. The TPDES permitting process will look at the water quality impacts of the proposed discharge, and will consider certain technical aspects of the wastewater treatment facility design. However, that process will in no way consider the estimated costs of the wastewater treatment facility, nor whether the proposed development has been demonstrated to be feasible in light of those costs.

IV. Conclusion

Protestants adopt the Reply to Exceptions submitted by the City and County, and ask that the Petitions be denied due to Applicant's failure to meet its burden of proof on multiple issues.

Respectfully submitted,

/s/ Eric Allmon

Eric Allmon

State Bar No. 24031819

callmon@txenvirolaw.com

PERALES, ALLMON & ICE, P.C.

1206 San Antonio Street

Austin, Texas 78701

(512) 469-6000 (t) | (512) 482-9346 (f)

Counsel for Individual Protestants

CERTIFICATE OF SERVICE

I certify that on June 5, 2023, a true and correct copy of the foregoing document was filed with SOAH and the Chief Clerk of the TCEQ, and a copy was served to all persons listed below.

/s/ Eric Allmon
Eric Allmon

FOR THE APPLICANT:

Natalie B. Scott
Coats | Rose
Terrace 2
2700 Via Fortuna, Suite 350
Austin, Texas 78746
(512) 469-7987
(512) 469-9408 (fax)
nscott@coatsrose.com

Tim Green
Mindy Koehne
Coats | Rose
14755 Preston Road, Suite 600
Dallas, Texas 75254
(972) 982-8461
(713) 890-3979 (fax)
tgreen@coatsrose.com
mkoehne@coatsrose.com

FOR THE EXECUTIVE DIRECTOR:

Kayla Murray
Bobby Salehi
TCEQ Environmental Law Division, MC-173
P.O. Box 13087
Austin, Texas 78711-3087
kayla.murray@tceq.texas.gov
bobby.salehi@tceq.texas.gov

FOR THE OFFICE OF PUBLIC

INTEREST COUNSEL:

Sheldon P. Wayne, Attorney
TCEQ, Public Interest Counsel, MC-103
P.O. Box 13087
Austin, Texas 78711-3087
sheldon.wayne@tceq.texas.gov

**FOR THE CITY OF WAXAHACHIE &
ELLIS COUNTY:**

Emily Willms Rogers
Joshua Katz
Kimberly Kelley
BICKERSTAFF HEATH DELGADO &
ACOSTA, LLP
3711 S. MoPac Expressway,
Bldg. 1, Suite 300
Austin, Texas 78746-8013
erogers@bickerstaff.com
jkatz@bickerstaff.com
kkelley@bickerstaff.com