

**SOAH DOCKET NO. 582-22-07138
TCEQ DOCKET NO. 2022-0532-DIS**

APPLICATION BY HIGHLAND LAKES	§	BEFORE THE STATE OFFICE
MIDLOTHIAN I, LLC FOR THE	§	
CREATION OF HIGHLAND LAKES	§	OF
MUNICIPAL UTILITY DISTRICT NO. 1	§	
OF ELLIS COUNTY	§	ADMINISTRATIVE HEARINGS

**PROTESTANTS’ RESPONSE TO APPLICANT AND THE EXECUTIVE
DIRECTOR’S EXCEPTIONS TO PROPOSAL FOR DECISION**

TO THE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW, the City of Waxahachie (Waxahachie), City of Midlothian (Midlothian, collectively Cities), and Ellis County (County, and collectively Protestants) and files this Response to Applicant and Executive Director’s Exceptions to the Proposal for Decision (PFD) and, in support thereof, would show the following:

I. INTRODUCTION

Protestants disagree with the exceptions to the PFD proposed by Highland Lakes Midlothian I, LLC (Applicant) and the Executive Director (ED). In its exceptions, the Applicant and the ED rely on arguments relating to stormwater quality and groundwater levels within the region. The record, however, is clear that the Applicant has not met its burden of proof to show that the proposed development is feasible, practicable, necessary, and a benefit to the land included in the proposed district as required by the Texas Water Code and the Administrative Law Judge (ALJ) correctly concluded that the Application for the creation of the Highland Lakes Municipal Utility District No. 1 (District) should be denied. Therefore, the Commission should deny the Applicant and the ED’s exceptions to the PFD.

II. RESPONSE TO APPLICANT'S EXCEPTIONS

1. Effect on Water Quality within the Region.

The ALJ correctly concluded that “[i]nsufficient evidence was presented to establish that the District will not have an unreasonable effect on water quality” and the Applicant failed to perform “any analysis regarding stormwater quality or evaluated the effect of stormwater runoff from the proposed development on water quality.” (PFD, page 42). In the exceptions, Applicant does not provide any information to rebut the ALJ’s determination, but rather cites to the qualifications of its expert and generally references that the proposed development will comply with existing law relating to stormwater pollution prevention. (Applicant Exceptions, page 6-7).

However, only following applicable federal, state, and local does not equate with the requirements of Texas Water Code § 54.021 to demonstrate that the District, its system, and subsequent development in the District, will not have an unreasonable effect on water quality, *including* stormwater quality. (Tex. Water Code § 54.021(b)(3)(F)). The Applicant is required to include in its preliminary engineering report an *evaluation* of the effect of the District, its systems, and subsequent development on water quality. (Tex. Admin. Code § 293.11(d)(5)(H)(vi)). No such analysis was performed by the Applicant relating to stormwater quality. (Tr. Vol. 1, page 71, line 25; page 72, lines 1-3).

Additionally, Applicant incorrectly states that by complying with local ordinances, the District and subsequent development will not have an unreasonable effect on water quality from stormwater. However, there are no local rules or ordinances that are applicable to the proposed District that would require analysis, design, or implementation of permanent post-construction control of nonpoint source nutrient pollutants from stormwater runoff. (Prot. Exh. 4, page 9, lines 17-19; Tr. Vol. 1, page 144, lines 8-11). Applicant has provided no information regarding how

stormwater quality will be addressed. (App. Exh. 4, page 8 lines 10-23). No storm water quality controls are proposed or were evaluated for the district. (Protestant Ex. 4 – 9:17-23 (Osting)). Ultimately, no analysis was performed by the Applicant relating to stormwater quality as required by law. (See Tr. Vol. 1, page 71, line 25; page 72, lines 1-3).

2. Effect on Groundwater Levels and Recharge within the Region

The Protestants agree with the ALJ’s conclusion that there is insufficient evidence to show that the proposed District and the subsequent development will not have an unreasonable effect on groundwater levels in the region. In its exceptions, the Applicant again tries to default to local rules and ordinances in lieu of Texas Water Code, Chapter 54 obligations, stating that local groundwater district rules will protect groundwater from any unreasonable effect. (Applicant Exceptions, page 9). Again, relying on other authorities is not the standard to determine whether the proposed development will have an unreasonable effect on groundwater levels within the region as required by the Texas Water Code.

Applicant also states that water supplier for the proposed MUD will rely solely on surface water. (Applicant Exceptions, page 11). However, the Applicant later contradicts this statement by stating that Mountain Peaks SUD proposes to serve the proposed development with a “mix of groundwater and surface water” with a plan to drill additional wells within the MUD. (Applicant Exceptions, page 12). The Applicant also fails to state that Applicant has identified Buena Vista – Bethel SUD as a water source to the MUD – a SUD that also relies on groundwater for source water. Applicant has thus recognized that the proposed district will rely on groundwater, but Applicant did not conduct any analysis to determine what impact the proposed district and subsequent development would have on groundwater given the fact that the entities providing water supply to the MUD rely on groundwater as a source for the water supply. (Tr. V.1 – 61:7-9

(McCracken)). Thus, the Applicant has not complied Texas Water Code § 54.021(b)(3)(C) to evaluate whether the proposed District and the subsequent development will not have an unreasonable effect on groundwater levels in the region. The above referenced sections of the PFD are proper, and the Protestants request that the Applicant's exceptions should be denied.

III. RESPONSE TO EXECUTIVE DIRECTOR'S EXCEPTIONS

A. Effect on Groundwater Levels within the Region.

Protestants disagree with the ED's exceptions relating to groundwater levels within the region. The ALJ correctly concluded that the Applicant failed to meet its burden to show that the proposed development will not have an unreasonable effect on groundwater levels and water quality in the region. (PFD, page 5). The ED argues that the Applicant carried its burden regarding groundwater levels under Texas Water Code § 54.021(a)(2) simply because the Applicant will be receiving water from an entity that holds a Certificate of Convenience and Necessity (CCN), and it is not relevant to look beyond that source to determine where the CCN holder will be obtaining water to serve the proposed development. This position does not comply with the Legislature's directive to this Commission in Chapter 54 of the Texas Water Code.

The ED acknowledges (1) that the statute requires the Commission to consider "whether or not the district and its system and subsequent development within the district will have an unreasonable effect on . . . groundwater level within the region" in section 54.021(b)(3)(C) before creating a municipal utility district; and acknowledges (2) that there is evidence in the record that the CCN holder plans to drill three groundwater wells on the property to provide groundwater to the proposed development. (ED's Exceptions, page 1-2.). Despite acknowledging this testimony, the ED erroneously represents that "the evidence in the record does not show that groundwater levels will be negatively impacted by the creation of the District" (ED's Exceptions, page 2.). On

the contrary, at the hearing on the merits, the Protestants put forth evidence that the two SUDs who hold CCNs in the area are primarily reliant on groundwater wells for water supply. (Proposal for Decision, page 31). The ALJ – the trier of fact in this proceeding¹ – found this fact credible and persuasive. (*See* PFD, page 32). Further, the ALJ found that the Applicant neither addressed nor evaluated the impacts of the proposed development in its preliminary engineering report or in its testimony. Therefore, there is evidence in the record groundwater levels may be impacted and that Applicant failed to meet its burden to show that the proposed development will not have an unreasonable effect on groundwater levels and water quality in the region. Therefore, the above referenced sections of the PFD are proper, and the ED’s exceptions should be denied.

B. Effect on Water Quality within the Region

The Applicants disagree with the ED’s representation that no review of stormwater controls is needed. The ED advocates that it should not have to review the impact of the District on water quality, but instead chooses to defer to the rules of local authorities. However, there is clear directive in the statute that requires the Commission to consider “whether or not the district and its system and subsequent development within the district will have an unreasonable effect on . . . water quality” in section 54.021(b)(3)(F) before creating a municipal utility district. Instead of independently reviewing, the ED states that its “review relied on the representations in the petition and the accompanying engineering report.” (ED’s Exceptions, Page 3.). The Texas Commission on Environmental Quality – not the local entities – is charged with evaluating the effects of the

¹ *See, e.g., Texas Dept. of Public Safety v. Pruitt*, 75 S.W.3d 634, 639 (Tex. App.—San Antonio, 2002) (“[T]he ALJ is deemed the ultimate trier of fact. *See* Tex. Gov’t Code Ann. § 2001.174.”); *see also Rogers v. Texas State Board of Public Accountancy*, No. 03-00-000738-CV, 2001 WL 1337606 (Tex. App.—Austin 2001, pet. denied) (“‘An ALJ has broad discretion in determining whether to admit or exclude expert testimony in an administrative hearing.’ *Fay Ray Corp. v. Texas Alcoholic Beverage Comm’n*, 959 S.W.2d 362, 367 (Tex. App.—Austin 1998, no pet. ‘Expert opinion testimony should be admitted when it will assist the trier of fact in understanding the evidence or determining a fact issue.’ *Id.* An ALJ’s decision on the issue of expert testimony will not be disturbed absent an abuse of discretion. *Id.*”).

proposed district on water quality. There is no evidence in the record that either the TCEQ or the Applicant performed any analysis regarding stormwater quality or non-point source pollution. (PFD, Page 41-42). Therefore, the above referenced sections of the PFD are proper, and the ED's exceptions should be denied.

IV. CONCLUSION AND PRAYER

The exceptions asserted by the Applicant and the ED should be denied. The ED basically admits that it took the Application and preliminary engineering report at face value and relied on the Applicant's unsupported assertion that it would use surface water, without investigating the source of the water, and that water quality would not be impacted by stormwater discharge from the development. The point of conducting a contested case hearing on the merits of this Application is to have an independent trier of fact analyze the evidence and testimony, determine the credibility of such evidence and testimony, and issue a proposed decision. If the Applicant is permitted to carry its burden of proof solely through the original submission of cursory, unsupported statements regardless of subsequent evidence presented, then the whole contested case hearing process is rendered meaningless.

The Protestants respectfully request that the Commission deny the Applicant and the ED's exceptions and recommend the PFD with the corrections as set out in Protestants' exceptions to the PFD. The Protestants respectfully request any other relief to which they are entitled.

Respectfully submitted,

Emily W. Rogers
State Bar No. 24002863
erogers@bickerstaff.com

Joshua D. Katz
State Bar No. 24044985
Jkatz@bickerstaff.com

Stefanie P. Albright
State Bar No. 24064801
salbright@bickerstaff.com

Kimberly G. Kelley
State Bar No. 24086651
kkelley@bickerstaff.com

BICKERSTAFF HEATH DELGADO ACOSTA LLP
3711 S. MoPac Expressway
Building One, Suite 300
Austin, Texas 78746
Telephone: (512) 472-8021
Facsimile: (512) 320-5638

BY: *Emily W. Rogers*
Emily W. Rogers

Attorneys for Protestants

CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2023, a true and correct copy of the above and foregoing document was served on all parties on the mailing list via electronic or regular mail.

Emily W. Rogers
Emily W. Rogers