

Jon Niermann, *Chairman*  
Emily Lindley, *Commissioner*  
Bobby Janecka, *Commissioner*  
Toby Baker, *Executive Director*



*Vic McWherter, Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

August 30, 2022

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

**RE: FM 875 Municipal Utility District of Ellis County (Applicant)**  
**Docket No. 2022-0534-DIS**

Dear Ms. Gharis:

Enclosed for filing is the Office of Public Interest Counsel's Supplemental Response to Hearing Requests in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Eli Martinez".

Eli Martinez, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

**DOCKET NO. 2022-0534-DIS**

**PETITION FOR THE CREATION  
OF FM 875 MUNICIPAL  
UTILITY  
DISTRICT OF ELLIS COUNTY**

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**BEFORE THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL  
QUALITY**

**OFFICE OF PUBLIC INTEREST COUNSEL'S  
SUPPLEMENTAL RESPONSE TO HEARING REQUESTS**

**To the Members of the Texas Commission on Environmental Quality:**

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (TCEQ or the Commission) files this Supplemental Response to Hearing Requests in the above-entitled matter.

**I. Introduction**

**A. Summary of Position**

OPIC filed its original Response to Hearing Request in this matter on August 30, 2022. The section addressing the City of Midlothian was inadvertently excluded. This Supplemental Response to Hearing Requests amends the discussion contained in OPIC's original filing and recommends that the Commission grant the hearing requests of Ellis County and the City of Midlothian, and refer this matter to the State Office of Administrative Hearings (SOAH) for a contested case hearing.

**B. Background and Applicable Law Incorporated by Reference**

The relevant background and applicable law discussed in OPIC's original filing is hereby incorporated by reference.

**III. Discussion**

According to the proposed District's petition for creation and the map prepared by the ED in this matter, the entire District will be located within Ellis County, and entirely outside the

corporate limits of any city. Therefore, the creation of the District is subject to the procedures for County review and input authorized under TWC § 54.0161.

The County has an interest in protecting its citizens and the land within its jurisdiction. The County has expressed concerns regarding transportation, emergency services, and health and safety over which it has statutory or constitutional authority.<sup>1</sup> The County's hearing request states that potential contamination or depletion of groundwater within the region may impact the County's ability to effectively provide emergency services, may impact health and safety by lowering water quality, and may negatively impact the County's infrastructure through subsidence.<sup>2</sup>

Ellis County's concerns are relevant to the Commission's final determination on the petition. Based on the County's statutory authority over or interest in these issues that are relevant to the petition, OPIC finds that Ellis County is an affected person and respectfully recommends that the Commission grant its hearing request.

According to the proposed District's petition for creation and the map prepared by the ED in this matter, the District will be located partially within the extraterritorial jurisdiction of the City of Midlothian. The City opposes the creation of the District. Land within the City's extraterritorial jurisdiction cannot be included within the boundaries of a municipal utility district without consent

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<sup>1</sup> TEXAS LOCAL GOVERNMENT CODE §§ 232.001-.011 (county authority for road construction in subdivisions as well as other subdivision regulations); LOCAL GOV'T CODE § 251.003 (county order and rulemaking authority for roads); LOCAL GOV'T CODE Subchapter C (fire code in unincorporated areas); LOCAL GOV'T CODE Subchapter E (infrastructure planning provisions in certain urban counties); LOCAL GOV'T CODE Chapter 233, Subchapter B (building and set back lines); LOCAL GOV'T CODE Chapter 233, Subchapter E (fire code in unincorporated area); TEXAS GOVERNMENT CODE Chapter 418 (emergency management); TEXAS TRANSPORTATION CODE § 251.016 (general control over roads, highways and bridges); TRANSPORTATION CODE Chapter 254 (drainage on public roads).

<sup>2</sup> HEALTH AND SAFETY CODE § 121.003 (enforcement of laws to promote public health); HEALTH AND SAFETY CODE Chapter 366 (license procedures for private sewage facilities); TEXAS WATER CODE § 26.171 et seq. (enforcement of water quality controls and inspection of public waters).

of the City.<sup>3</sup>

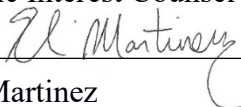
The City has authority to protect the public health and safety within its extraterritorial jurisdiction and to regulate development within its extraterritorial jurisdiction.<sup>4</sup> As a regional water and sewer service provider, the City has an interest in ensuring that new development in its extraterritorial jurisdiction regionalizes with existing systems to the greatest extent possible in order to protect the public health, safety, and welfare.<sup>5</sup>

The concerns raised by the City of Midlothian are therefore relevant to the Commission's final determination on the petition. Based on the City's statutory authority over or interest in these issues that are relevant to the petition, OPIC finds that the City of Midlothian is an affected person and respectfully recommends that the Commission grant its hearing request.

#### **IV. Conclusion**

For the reasons set forth above, OPIC respectfully recommends the Commission find that Ellis County and the City of Midlothian are "affected persons," grant their hearing requests, and refer the matter to SOAH for a contested case hearing.

Respectfully submitted,

Vic McWherter  
Public Interest Counsel  
By:   
Eli Martinez  
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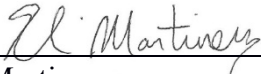
<sup>3</sup> Tex. Water Code § 54.016(a).

<sup>4</sup> TEX. LOC. GOV'T CODE §§ 42.001, 212.044.

<sup>5</sup> Texas Water Code § 26.081(a).

**CERTIFICATE OF SERVICE**

I hereby certify that on August 30, 2022, the original of the Office of Public Interest Counsel's Supplemental Response to Hearing Requests was filed with the Chief Clerk of the TCEQ and a copy was served on all persons listed on the attached mailing list via electronic mail.

  
\_\_\_\_\_  
Eli Martinez

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**TCEQ DOCKET NO. 2022-0534-DIS**

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**To the Members of the Texas Commission on Environmental Quality:**

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (TCEQ or the Commission) files this Response to Hearing Request in the above-entitled matter.

**I. Introduction**

**A. Summary of Position**

For the reasons discussed herein, OPIC respectfully recommends that the Commission grant the hearing request of Ellis County and refer this matter to the State Office of Administrative Hearings (SOAH) for a contested case hearing.

**B. Background**

Highland Lakes Midlothian I, LLC, a Texas limited liability company, (Petitioner or Applicant) filed an amended petition for creation of FM 875 Municipal Utility District of Ellis County (District) with the Texas Commission on Environmental Quality (TCEQ). The petition was filed pursuant to Article XVI, §59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TCEQ.



The amended petition states that: (1) the Petitioner holds title to a majority in value of the land to be included in the proposed District; (2) there is only one lienholder, Community National Bank & Trust of Texas, on the property to be included in the proposed District, and information provided indicates that the aforementioned entity has consented to the petition; (3) the proposed District will contain approximately 283.231 acres located within Ellis County, Texas; and (4) the land within the proposed District is partially within the extraterritorial jurisdiction of the City of Midlothian, Texas (City), and no portion of the land within the proposed District is within the corporate limits or extraterritorial jurisdiction of any other city, town or village in Texas.

In accordance with Local Government Code §42.042 and Texas Water Code §54.016, the Petitioner submitted a petition to the City, requesting the City's consent to the creation of the District. After more than 90 days passed without receiving consent, the petitioner submitted a petition to the City to provide water and sewer services to the District. The 120-day period for reaching a mutually agreeable contract as established by the Texas Water Code §54.016(c) expired and information provided indicates that the Petitioners and the City have not executed a mutually agreeable contract for service. Pursuant to Texas Water Code §54.016(d), failure to execute such an agreement constitutes authorization for the Petitioners to proceed to the TCEQ for inclusion of their Property into the District.

The amended petition further states that the proposed District will: (1) purchase, construct, acquire, improve, or extend inside or outside of its boundaries any and all works, improvements, facilities, plants, equipment, and appliances necessary or helpful to supply and distribute water for municipal, domestic, and commercial purposes; (2) collect, transport, process, dispose of, and control domestic and commercial wastes; (3) gather, conduct, divert,

abate, amend, and control local storm water or other local harmful excesses of water in the proposed District; (4) design, acquire, construct, finance, improve, operate, and maintain macadamized, graveled, or paved roads and turnpikes, or improvements in aid of those roads; and (5) purchase, construct, acquire, improve, or extend inside or outside of its boundaries such additional facilities, systems, plants, and enterprises as shall be consonant with the purposes for which the proposed District is created.

According to the amended petition, a preliminary investigation has been made to determine the cost of the project, and it is estimated by the Petitioners that the cost of said project will be approximately \$37,395,000 (\$24,800,000 for water, wastewater, and drainage plus \$12,595,000 for roads).

The application was declared administratively complete on December 2, 2021. On March 13, 2022 and March 20, 2022, the Notice of District Petition was published in the *Waxahachie Daily Light*. On March 8, 2022, the Ellis County Clerk posted the notice on the bulletin board in the Ellis County Courthouse. The comment and contested case hearing request periods ended on April 19, 2022. Ellis County timely filed a hearing request on March 30, 2022.

## **II. Applicable Law**

A municipal utility district may be created under and subject to the authority, conditions, and restrictions of Article XVI, Section 59, of the Texas Constitution. Tex. Water Code § 54.011. Chapters 49 and 54 of the Texas Water Code (TWC) and the Commission's administrative rules found at Title 30, Chapter 293, of the Texas Administrative Code (TAC) govern petitions to create a MUD. A district shall be created for the following purposes:

- (1) the control, storage, preservation, and distribution of its storm water and floodwater, 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 needing

- irrigation;
- (3) the reclamation and drainage of its overflowed land and other land needing drainage;
  - (4) the conservation and development of its forests, water, and hydroelectric power;
  - (5) the navigation of its inland and coastal water;
  - (6) the control, abatement, and change of any shortage or harmful excess of water;
  - (7) the protection, preservation, and restoration of the purity and sanitary condition of water within the state; and
  - (8) the preservation of all natural resources of the state. TWC § 54.012.

To create a MUD, a petition requesting creation shall be filed with the Commission. TWC § 54.014. The petition shall be signed by a majority in value of the holders of title of the land within the proposed district, as indicated by the tax rolls of the central appraisal district. *Id.* Among other things, the petition shall: (1) describe the boundaries of the proposed district by metes and bounds or by lot and block number; (2) state the general nature of the work proposed to be done, the necessity for the work, and the cost of the project as then estimated by those filing the petition; and (3) include a name of the district which shall be generally descriptive of the locale of the district. TWC § 54.015. *See also* 30 TAC § 293.11(a) and (d).

If all of the district is proposed to be located outside corporate limits of a municipality, the commissioners court of the county in which the district is to be located may review the petition for creation and other evidence and information relating to the proposed district that the commissioners consider necessary. TWC § 54.0161(a). If the commissioners court votes to make a recommendation to the Commission, the commissioners court shall submit to the Commission, at least 10 days before the date set for the hearing on the petition, a written opinion stating whether or not the county would recommend the creation of the proposed district and stating any findings, conclusions, and other information that the commissioners court thinks would assist the Commission in making a final determination on the petition. TWC § 54.0161(b). The Commission shall consider the written opinion submitted by the county commissioners. TWC § 54.0161(c).

The Commission shall grant the petition if it conforms to the requirements of § 54.015 and

the project is feasible, practicable, necessary, and further, would be a benefit to the land to be included in the district. TWC § 54.021(a). In determining if the project is feasible, practicable, necessary, and beneficial 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.

TWC § 54.021(b).

If the Commission finds that not all of the land proposed to be included in the district will be benefited by the creation of the district, it shall exclude all land not benefited and redefine the proposed district's boundaries accordingly. TWC § 54.021(c). If the petition does not conform to the requirements of TWC § 54.015 or the project is not feasible, practicable, necessary, or a benefit to the land in the district, the Commission shall deny the petition. TWC § 54.021(d). The rights, powers, privileges, authority, and functions of a district shall be subject to the continuing right of supervision by the Commission. TWC § 54.024.

The applicant must publish notice of the petition to create a district once a week for two consecutive weeks in a newspaper regularly published or circulated in the county where the district is proposed to be located not later than the 30th day before the date of the Commission's decision on the application. TWC §§ 49.011(b) and 54.018. Additionally, the applicant must post notice of the petition on the bulletin board used for posting legal notices in each county in which all or part of the proposed district is to be located. 30 TAC § 293.12(b)(2). The Commission shall hold a

public hearing if requested by the Commission, Executive Director, or an “affected person” under the factors in 30 TAC, Chapter 55. TWC § 49.011(c). *See also* 30 TAC § 55.250 (applying rules governing contested case hearings to applications declared administratively complete after September 1, 1999). Affected persons must file their hearing requests during the 30 days following the final notice publication date. TWC § 49.011(c). *See also* 30 TAC § 293.12(c).

A hearing requestor must make the request in writing within the time period specified in the notice and identify the requestor’s personal justiciable interest affected by the application, specifically explaining 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.” 30 TAC § 55.251(b)–(d).

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. An interest common to members of the general public does not qualify as a personal justiciable interest.” 30 TAC § 55.256(a). Governmental entities with authority under state law over issues contemplated by the application may be considered affected persons. 30 TAC § 55.256(b). Relevant factors to be considered in determining whether a person is affected 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. 30 TAC § 55.256(c).

The Commission shall grant a request for a contested case hearing if: (1) the request is made by the applicant or the ED; or (2) the request is made by an affected person, complies with

the requirements of § 55.251, is timely filed with the chief clerk, and is made pursuant to a right to hearing authorized by law. 30 TAC § 55.255(b).

### **III. Discussion**

According to the proposed District's petition for creation and the map prepared by the ED in this matter, the entire District will be located within Ellis County, and entirely outside the corporate limits of any city. Therefore, the creation of the District is subject to the procedures for County review and input authorized under TWC § 54.0161.

The County has an interest in protecting its citizens and the land within its jurisdiction. The County has expressed concerns regarding transportation, emergency services, and health and safety over which it has statutory or constitutional authority.<sup>1</sup> The County's hearing request states that potential contamination or depletion of groundwater within the region may impact the County's ability to effectively provide emergency services, may impact health and safety by lowering water quality, and may negatively impact the County's infrastructure through subsidence.<sup>2</sup>

Ellis County's concerns are relevant to the Commission's final determination on the petition. Based on the County's statutory authority over or interest in these issues that are

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<sup>1</sup> TEXAS LOCAL GOVERNMENT CODE §§ 232.001-.011 (county authority for road construction in subdivisions as well as other subdivision regulations); LOCAL GOV'T CODE § 251.003 (county order and rulemaking authority for roads); LOCAL GOV'T CODE Subchapter C (fire code in unincorporated areas); LOCAL GOV'T CODE Subchapter E (infrastructure planning provisions in certain urban counties); LOCAL GOV'T CODE Chapter 233, Subchapter B (building and set back lines); LOCAL GOV'T CODE Chapter 233, Subchapter E (fire code in unincorporated area); TEXAS GOVERNMENT CODE Chapter 418 (emergency management); TEXAS TRANSPORTATION CODE § 251.016 (general control over roads, highways and bridges); TRANSPORTATION CODE Chapter 254 (drainage on public roads).

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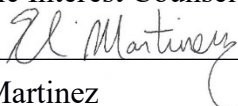
relevant to the petition, OPIC finds that Ellis County is an affected person and respectfully recommends that the Commission grant its hearing request.

#### **IV. Conclusion**

For the reasons set forth above, OPIC respectfully recommends the Commission find that Ellis County is an “affected person,” grant its hearing request, and refer the matter to SOAH for a contested case hearing.

Respectfully submitted,

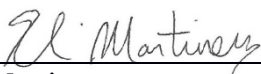
Vic McWherter  
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#### **CERTIFICATE OF SERVICE**

I hereby certify that on August 30, 2022, the original of the Office of Public Interest Counsel’s Response to Hearing Request was filed with the Chief Clerk of the TCEQ and a copy was served on all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail, electronic mail, and/or by deposit in the U.S. Mail.

  
Eli Martinez

**MAILING LIST**  
**FM 875 MUNICIPAL UTILITY DISTRICT OF ELLIS COUNTY**  
**TCEQ DOCKET NO. 2022-0534-DIS**

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RESOLUTION

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FOR THE CHIEF CLERK

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