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Kevin Garza, CLERK

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SOAH DOCKET NO. 582-23-11658

TCEQ DOCKET NO. 2022-1157-DIS

**APPLICATION BY GRBK EDGEWOOD, § BEFORE THE STATE
LLC FOR THE CREATION OF ELLIS § OFFICE OF
RANCH MUNICIPAL UTILITY § ADMINISTRATIVE HEARINGS
DISTRICT NO. 1 §**

**APPLICANT’S EXCEPTIONS TO PROPOSAL FOR DECISION AND BRIEF IN
SUPPORT OF APPLICATION FOR THE CREATION OF ELLIS RANCH MUNICIPAL
UTILITY DISTRICT NO. 1**

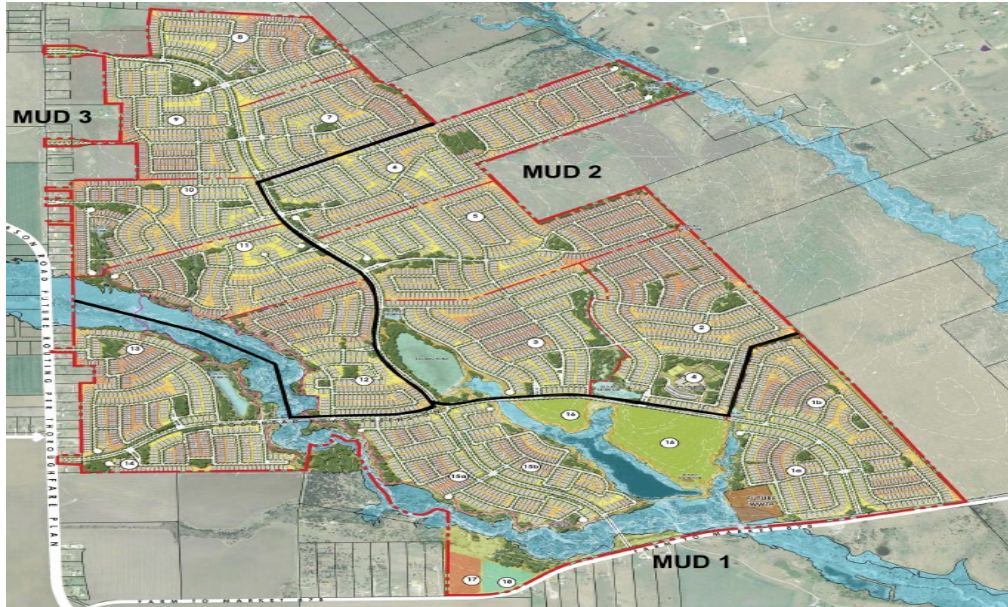
TO THE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

Applicant, GRBK Edgewood, LLC, files these Exceptions to the Proposal for Decision (“PFD”) filed in this case, and its brief in support of its Application for Creation of Ellis Ranch Municipal Utility District No. 1. Applicant also submits its proposed findings of fact and conclusions of law which are attached hereto.

I. INTRODUCTION

This case is unique inasmuch as Applicant intends to construct a wastewater treatment facility and infrastructure that will not only serve all of the land within the boundaries of the proposed district, but that also will serve all of the contiguous land in Ellis Ranch MUD No. 2 and Ellis Ranch MUD No. 3 – two districts that have already been approved by the Commission.

Ellis Ranch MUD No. 2 and Ellis Ranch MUD No. 3 will bear a substantial share of the costs of construction of the wastewater treatment facility and infrastructure proposed to be constructed in the application for the creation of Ellis Ranch Municipal Utility District No. 1 (the “District”) at issue in this case. The costs estimates for the construction of the wastewater treatment facility and infrastructure at issue already have been found to be reasonable by the Commission in connection with the approval of the applications for the creation of Ellis Ranch MUD No. 2 and Ellis Ranch MUD No. 3. A rendering of the overall design of development project is as follows:



Applicant disagrees with the Administrative Law Judges’ (“ALJs”) proposed recommendation that the application for the creation of the District should be denied. In the PFD, the ALJs failed to properly account for the contributions of the two districts that have already been approved to the overall costs of construction, and to the ability of Green Brick Partners, Inc. (“GRBK”) to fund any unreimbursed costs of construction in finding that the proposed District is not economically feasible, which is the linchpin to the overall recommendation of the ALJs. The ALJs also failed to account for the fact that because the District will be obtaining its water from Rockett Special Utility District, which supplies surface water, the issue pertaining to the effect on ground water is largely a nonissue in this case.

The District excepts to the PFD’s analysis and recommendations, including the proposed findings of fact and conclusions of law in the PFD, as detailed below. The Executive Director (“ED”) of the Texas Commission on Environmental Quality (the “Commission”) and the Office of Public Interest Counsel (“OPIC”) both agree that Applicant met its burden to demonstrate that the proposed development is feasible, practical, necessary, and would benefit the land to be

included in the District. Indeed, the Commission's witness, Andrew Paynter, testified that having heard all of the evidence at the Final Hearing, including the opposition cobbled together by Ellis County, he still would recommend approval of the creation of the District. Applicant has met its burden of proof to establish that the District is feasible, practical, necessary, and would benefit the land to be included in the District and its application should be approved by the Commission.

II. REASONABLENESS OF ESTIMATED CONSTRUCTION COSTS AND ECONOMIC FEASIBILITY OF THE DISTRICT.

A. Burden of Proof

Applicant disagrees with the ALJs' recommendation that its application be denied because it has failed to meet its burden of proof on: (i) the economic feasibility of the District; (ii) the reasonableness of District's estimated construction costs and tax rates; (iii) whether the District will have an unreasonable effect on groundwater level or rechargeability of groundwater source; and (iv) whether the requirements for a request for road powers have been met. A municipal utility district may be created for a number of purposes, including the control, distribution, reclamation, and protection of water for power, irrigation, or conservation. TEX. WATER CODE § 54.012. Such districts are created under and subject to the authority, conditions, and restrictions of Article XVI, Section 59, of the TEXAS CONSTITUTION, as well as Chapters 49 and 54 of the TEXAS WATER CODE, 30 TEXAS ADMINISTRATIVE CODE Chapter 293, and other TCEQ rules. *See* TEX. WATER CODE § 54.011.¹

The burden of proof is on the Applicant by a preponderance of the evidence. 30 T.A.C.

¹ To determine 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. TEX. WATER CODE § 54.021.

§ 80.17(a). For a fact to be proved by a preponderance of the evidence, the greater weight of credible evidence presented in the case must support a finding that the fact is more likely true than not true.²

B. Exceptions to the PFD’s Analysis and Recommendations regarding Estimated Construction Costs

Applicant excepts to and recommends rejection of the ALJs conclusion the Applicant’s estimated construction costs are not reasonable.³ In that regard, Applicant excepts to ALJs proposed Finding of Fact No. 24, finding against Applicant on the issue. Based on a finding that Applicant’s estimated construction costs were not reasonable, the ALJs further proposed Finding of Fact No. 55 that there is insufficient evidence to establish that the District is feasible, practicable, necessary and will benefit all of the land included in the District. Applicant excepts to and recommends rejection of that proposed finding and conclusion as well.

An application for the creation of a municipal utility district is only required to estimate the costs for full development of the utility infrastructure. See 30 T.A.C. §293.11(d)(1). The Preliminary Engineering Report submitted by an applicant is required to include “tentative itemized cost estimates of the proposed capital improvements and itemized cost summary for anticipated bond issue requirement.” 30 TAC §293.11(d)(5)(E) (Emphasis added). Applicant has met this requirement.

1. Preliminary Engineering Report Meets Statutory Requirements

The Preliminary Engineering Report submitted with the application contains the tentative itemized cost estimates for the full development of the utility infrastructure in the Opinion of

² See *McDuff v. Brumley*, No. 07-17-00248, 2022 Tex. App. LEXIS 5658 *22 (Tex. App. – Amarillo August 8, 2022, pet. denied).

³ PFD at pp. 16-22; see also proposed Findings of Fact Nos. 21-25.

Probable Cost attached to the Preliminary Engineering Report:⁴



OPINION OF PROBABLE COST

Project Name: ELLIS RANCH
 Client Name: GREENBRICK
 City: WAXAHACHIE ETJ
 County: ELLIS

Date: February 16, 2022
 Project Number: 10007003

ELLIS RANCH - DISTRICT 1

Onsite Water System Cost

ITEM	UNIT	QUANTITY	UNIT PRICE	TOTAL
8" P.V.C. WATER LINE	LF	61,300	\$42.00	\$2,574,600.00
12" P.V.C. WATER LINE	LF	14,400	\$63.00	\$907,200.00
8" GATE VALVE & BOX	EA	454	\$1,882.00	\$854,428.00
12" GATE VALVE & BOX	EA	37	\$2,823.00	\$104,451.00
1" SINGLE WATER SERVICE	EA	1,329	\$766.82	\$1,019,103.78
REMOVE PLUG, CONNECT TO OFFSITE WATER	EA	4	\$1,556.48	\$6,225.92
FIRE HYDRANT ASSEMBLY	EA	189	\$5,467.76	\$1,033,406.64
TESTING (EXCLUDING GEOTECH.)	LF	75,700	\$1.00	\$75,700.00
TRENCH SAFETY	LF	75,700	\$1.00	\$75,700.00
SUB-TOTAL				\$6,650,815.34

Note: Water lines include all fittings

Wastewater System Cost

ITEM	UNIT	QUANTITY	UNIT PRICE	TOTAL
8" P.V.C. PIPE	LF	57,200	\$45.00	\$2,574,000.00
12" P.V.C. PIPE	LF	16,400	\$70.00	\$1,148,000.00
4" DIA. WW MANHOLE	EA	195	\$4,000.00	\$780,000.00
4" SERVICE LINES	EA	1,299	\$500.00	\$649,500.00
TESTING (EXCLUDING GEOTECH.)	LF	73,600	\$1.00	\$73,600.00
TRENCH SAFETY	LF	73,600	\$1.00	\$73,600.00
SUB-TOTAL				\$5,298,700.00

Storm Drain System Cost

ITEM	UNIT	QUANTITY	UNIT PRICE	TOTAL
STORM PIPE (R.C.P.)	LF	58,900	\$150.00	\$8,835,000.00
JUNCTION BOX	EA	147	\$4,000.00	\$588,000.00
10' CURB INLET	EA	788	\$3,500.00	\$2,758,000.00
STORMWATER OUTFALL STRUCTURE	EA	15	\$10,000.00	\$150,000.00
ROCK RIP-RAP	SF	24,000	\$85.00	\$2,040,000.00
MAINTENANCE OF EXISTING DAM	LS	1	\$500,000.00	\$500,000.00
DETENTION POND (W/ OUTFALL STRUCTURE)	EA	3	\$400,000.00	\$1,200,000.00
TESTING & TV INSPECTION	LF	58,900	\$1.50	\$88,350.00
TRENCH SAFETY	LF	58,900	\$1.00	\$58,900.00
SUB-TOTAL				\$16,218,250.00

⁴ GRBK Ex. 4, Preliminary Engineering Report at GRBK000558, and GRBK000603-605.

And on Table 3 of the Preliminary Engineering Report:

Table No. 3
Estimated Total Water, Wastewater and Drainage Cost & Bond Issue Requirement

	Total	District Share 100%
CONSTRUCTION COSTS		
A. Developer Contribution Items		
1. Water	\$ 6,650,815	\$ 6,650,815
2. Wastewater	\$ 5,298,700	\$ 5,298,700
3. Drainage	\$ 16,218,250	\$ 16,218,250
4. Erosion Control and Miscellaneous	\$ 520,959	\$ 520,959
5. Contingencies (5% of Item Nos. 1 - 4)	\$ 1,434,436	\$ 1,434,436
6. Engineering Costs (10% of Item Nos. 1 - 4)	\$ 2,868,872	\$ 2,868,872
Total Developer Contribution Items	\$ 32,992,033	\$ 32,992,033
B. District Items		
1. Offsite Water Line Improvements	\$ 819,001	\$ 819,001 ⁽¹⁾
2. Wastewater Treatment Plant and Lift Station	\$ 3,161,397	\$ 3,161,397 ⁽¹⁾
3. Contingencies (5% of Item Nos. 1 & 2)	\$ 199,020	\$ 199,020
4. Engineering (10% of Item Nos. 1 & 2)	\$ 398,040	\$ 398,040
Total District Items	\$ 4,577,457	\$ 4,577,457
TOTAL CONSTRUCTION COSTS (78.0% of BIR)	\$ 37,569,490	\$ 37,569,490
NON-CONSTRUCTION COSTS		
A. Legal Fees (2.5% of BIR)		\$ 1,204,000
B. Fiscal Agent Fees (2% of BIR)		\$ 963,200
C. Interest Costs		
1. Capitalized Interest (2 yrs. @ 3.5%)		\$ 3,371,200
2. Developer Interest (2 yrs. @ 3.5% of const. cost)		\$ 2,629,864 ⁽²⁾
D. Underwriter's Discount (3.0% of BIR)		\$ 1,444,800
E. Creation / Organization		\$ 35,000
F. Bond Application Report Costs		\$ 360,000
G. TCEQ Fee (0.25% of BIR)		\$ 120,400
H. Attorney General Fee (0.1% of BIR)		\$ 48,160
I. Bond Issuance Expenses		\$ 338,886
J. Administration and Operations		\$ 75,000
TOTAL NON-CONSTRUCTION COSTS		\$ 10,590,510
TOTAL BOND ISSUE REQUIREMENT		\$ 48,160,000

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GRBK_000036

Notes:

(1) District's pro rata share of facilities based on ultimate projected homes.

(2) Assumes the bonds to reimburse the developer will be sold on average 2 years following completion of facilities.

The Preliminary Engineering Report forecasts that construction costs for the District will be approximately \$67,335,000 (\$48,160,000 for water, wastewater, and drainage plus \$19,175,000 for roads).⁵ Protestant's expert, Dennis Lozano, acknowledged that the statute only requires tentative itemized cost estimates at this stage, testifying that "cost estimates prepared at the district creation step in the development process are necessarily conceptual in nature and lack resolution required for high-confidence cost estimation."⁶ In addition, as shown on Table 3 of the Preliminary Engineering Report the District will share in the overall construction costs for wastewater treatment facility and infrastructure that will be built within the District with the two other approved districts.

2. No Controverting Itemized Cost Estimates Were Introduced to Refute the Itemized Costs Estimates in PER

No competing detailed or itemized cost estimates, tentative or otherwise, similar to what is in Applicant's Preliminary Engineering Report were introduced to contradict the estimated costs by Applicant's expert witnesses. Instead, Mr. Lozano only gave a ballpark figure that cost of the proposed wastewater treatment facility would be "approximately 50%" more than what was estimated by Applicant.⁷ Lozano based his conclusory opinion on his claimed unit price estimate of \$25-30/gallon for a water treatment facility but provided no corroborating support for this unit price estimate.⁸

Conclusory or speculative⁹ opinion testimony "is not relevant evidence, because it does not tend to make the existence of a material fact 'more or less probable.'"¹⁰ "Testimony is

⁵ GRBK Ex. 4, *Engineering Report*, at 9 (GRBK000558-59).

⁶ Protestant Ex. 1 - *Lozano Pre-Filed Direct Test. Tr.* at 6:19-21.

⁷ *Lozano Test. Tr.* at 95.

⁸ Protestant Ex. 1, *Lozano Pre-Filed Test.* at 7:9-11.

⁹ "'Speculate' means 'to take to be true on the basis of insufficient evidence.'" *Health Care Serv. Corp. v. E. Tex. Med. Ctr.*, 495 S.W.3d 333, 339 (Tex. App.—Tyler 2016, no pet.)

¹⁰ *Coastal Transp. Co., Inc. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 232 (Tex. 2014) (quoting Tex. R. Evid. 401).

speculative if it is based on guesswork or conjecture.”¹¹ And where an expert witness offers an opinion that essentially “state[s] a conclusion without an explanation” or “does not provide the underlying facts to support the conclusion,” it is conclusory and without probative value.¹²

Mr. Lozano’s bare assertion that Applicant’s tentative unit cost of \$12 per gallon per day of treatment capacity is understated by “roughly” 50% for its “size and type,” is not informed by evidence of what a wastewater treatment facility would cost in Ellis County.¹³ Mr. Lozano ignores how the costs of construction in Ellis County might differ from costs in other Texas counties. In fact, Mr. Lozano is not familiar with the construction market because he has never done work in Ellis County.¹⁴

Likewise, Mr. Lozano ignores other cost factors, such as the cost of developing a wastewater treatment plant that employs a more “stringent level of treatment” than other plants, Tr. at 85, and the costs associated with the construction site:

15	Q. All right. And also the location of the
16	plant, the size of the site it's going to be on and
17	the physical setup, that impacts the cost; correct?
18	A. It can.

Tr. at 86.

Additionally, Mr. Lozano’s competing cost assessment did not factor in contributions from Ellis Ranch MUD Nos. 2 and 3 for the construction of the wastewater treatment plant and the fact the applications for those two MUDs have been approved:

¹¹ *Nat. Gas Pipeline Co. of Am. v. Justiss*, 397 S.W.3d 150, 156 (Tex. 2012).

¹² *Id.*; *Neal v. Machaud*, No. 04-05-00037-CV, 2006 WL 3612867, at *3 (Tex. App.—San Antonio Dec. 12, 2006, no pet.); see also, *Wadewitz v. Montgomery*, 951 S.W.2d 464, 466 (Tex. 1997) (stating that conclusory statements from experts are insufficient to “raise a fact issue.”).

¹³ Protestant Ex. 1, *Lozano Pre-Filed Test.* at 7:10–11

¹⁴ *Lozano Test.*, Tr. at 84.

2 Without knowing what MUD two and MUD
3 three are going to pay for the water treatment
4 plant, how do you know what district one's going to
5 need to pay?

6 A. Well, district one's contribution is
7 listed here. My opinion of the wastewater
8 treatment plant cost was based on the total cost of
9 the wastewater treatment plant that was -- that was
10 provided.

11 Q. Right. And that total cost -- the
12 wastewater treatment plant's going to serve all
13 three MUDs; correct?

14 A. Correct. That's my understanding.

15 Q. Okay. And you know that the MUD
16 applications for MUD number two -- Ellis Ranch MUD
17 number two and Ellis Ranch MUD number three, have
18 been approved; correct?

19 A. Yes.

Tr. at 83.

Ultimately, Protestant's claim that Applicant's construction cost estimates are unreasonable is not supported by credible and competent evidence.

21 Q. All right. And you didn't do your own
22 independent analysis of the specific items of cost,
23 did you?

24 A. No.

Tr. at 95. To say that there is an "analytical gap" between Mr. Lozano's reasoning and his conclusions is an understatement. Mr. Lozano offers his general conclusory opinion that the costs

of construction, tax rates, and sewer rates provided in materials included with GRBK's application are unreasonable. Mr. Lozano references some kind of "conservative estimating strategies[,]" but altogether fails to explain what those strategies are. Mr. Lozano did not specifically challenge any of the itemized costs set out in the Preliminary Engineering Report or provide an alternative "itemized cost estimate" as required by the statute. "An expert's bare opinion will not suffice."¹⁵ His opinion testimony constitutes no evidence.

Despite this, the ALJs proposed finding is that Applicant underestimated its projected construction costs by 40% to 60%. Applicant excepts to and requests that the Commission reject the proposed Finding of Fact No. 22 and corresponding conclusion that Applicant's estimated construction costs are not reasonable. Applicant has met its burden to show its tentative itemized cost estimates for the proposed capital improvements within the District are reasonable.

3. Applicant's Cost Contingency is Reasonable.

Applicant also excepts to and recommends rejection of the ALJs proposed Finding of Fact No. 23 that a 15-20% contingency would be expected in the construction costs estimate in connection with this application. A 5% cost contingency was approved by the Commission in connection with the approval of Ellis Ranch MUD Nos. 2 and 3. Applicant's experts, Ken Heroy and Josh Millsap, also prepared the cost estimates for those districts and were fully aware of the cost sharing arrangement among the districts. Because the District's share of the overall costs for the wastewater treatment facility is approximately 25-33% of the overall cost, a 5% cost contingency for the District is the equivalent to an overall 15-20% cost contingency because the other two districts also included a 5% cost contingency to address any increase in their share of the costs of construction.

¹⁵ *Mack Trucks v. Tamez*, 206 S.W.3d 572, 578 (Tex. 2006).

In addition, Mr. Lozano did not dismiss the reasonableness of a 5% cost contingency entirely. Instead, he conceded that a 5% cost contingency is an indication of a high level of specific knowledge of the process, timing and scope of the project and that Mr. Millsap may have some specific knowledge to arrive at that contingency number. Neither Mr. Lozano, nor any other witness, conducted any study of what is a typical cost contingency percentage used in applications submitted to the Commission or provided any evidence to support Mr. Lozano's conclusory remark. The statute does not require a "conservative estimating strategy" be employ by an applicant in arriving at a tentative construction cost estimate for purposes of an application for creation of a municipal utility district, nor does it require that a cost contingency of a minimum of 15-20 % be included in any cost estimate. Further, by its nature, a contingent event is one that is not certain to occur.

There is no dispute that Messrs. Heroy and Millsap have estimated projects in the Ellis County area and each opined that based on their experiences and knowledge that the estimated construction costs as of the time of the application were reasonable, and that the District is economically feasible even when taking into consideration costs increase due to the passage of time. There also was no dispute that the value of the homes that are contemplated to be built in the District have likewise increased due to the passage of time by 4.98 % from 2021-2023.¹⁶

C. Exceptions to the PFD's Analysis and Recommendations regarding Cost Contributions from Ellis Ranch MUD Nos. 2 and 3.

The ALJs acknowledged that the District will benefit from some amount of cost contribution from the two approved MUDs, but erroneously found that there is no evidence of the amount of any such contribution in the record. Applicant also excepts to and recommends rejection

¹⁶ GRBK Ex. 8, *Gibson Pre-Filed Test.* at 6:19-21. Mr. Lozano did not consider the increase in land values by 4.98% in over this time period in formulating his opinions.

of the proposed Finding of Fact No. 21 that there is no evidence of any amount of contributions from the other approved utility districts because there is. Ellis Ranch MUD Nos. 2 and 3 are contiguous to the District and will utilize the same wastewater treatment facility and associated infrastructure. Ellis Ranch MUD Nos. 2 and 3 already have been approved and the total projected cost of construction and the wastewater treatment plant have been found to be reasonable.

The Preliminary Engineering Report that is part of the creation application and a part of the record sets out the total estimated costs of the development and the District’s share of that cost. Table No. 3 of the Preliminary Engineering Report states that the District’s share of the wastewater treatment facility and lift station is projected to be \$3,161,397. That amount is explained in the footnote to the report that the District’s pro rata share of facilities is based on ultimate projected homes. The Opinion of Probable Cost attached to the Preliminary Engineering Report provides that the overall projected cost of the shared wastewater system is \$12,300,000.00. Thus, Ellis Ranch MUD Nos. 2 and 3 will contribute \$9,138,603.00 or 74.29% of the overall estimated cost of the wastewater treatment plant and lift station.

ELLIS RANCH - SHARED COSTS

Offsite Water System Cost

ITEM	UNIT	QUANTITY	UNIT PRICE	TOTAL
12" P.V.C. WATER LINE	LF	10,380	\$85.00	\$882,300.00
18" P.V.C. WATER LINE	LF	10,840	\$110.00	\$1,192,400.00
12" GATE VALVE & BOX	EA	26	\$3,210.00	\$83,299.50
18" BUTTERFLY VALVE & BOX	EA	27	\$10,000.00	\$271,000.00
REMOVE PLUG, CONNECT TO EXISTING WATER	EA	2	\$6,000.00	\$12,000.00
FIRE HYDRANT ASSEMBLY	EA	92	\$5,467.76	\$503,033.92
BORINGS & CROSSINGS	LS	1	\$200,000.00	\$200,000.00
TESTING (EXCLUDING GEOTECH.)	LF	21,220	\$1.00	\$21,220.00
TRENCH SAFETY	LF	21,220	\$1.00	\$21,220.00
			SUB-TOTAL	\$3,186,473.42

Note: Water lines include all fittings

Shared Wastewater System Cost

ITEM	UNIT	QUANTITY	UNIT PRICE	TOTAL
WASTEWATER TREATMENT PLANT	GAL	1,000,000	\$12.00	\$12,000,000.00
LIFT STATION	EA	1	\$300,000.00	\$300,000.00
			SUB-TOTAL	\$12,300,000.00

Similarly, the estimated overall offsite projected water system cost in the report was \$3,186,473.42 of which the District's share was only to be \$819,001, or 25.71% of the total cost. Therefore, the other two approved districts will contribute \$2,367,472.42, or 74.29%, toward the overall offsite water system costs. Mr. Millsap testified that an increase in these construction costs of the utility infrastructure due to the passage of time or other reason will be only partially borne by the District as Ellis Ranch MUD Nos. 2 and 3 will contribute their proportionate share of any such increase. Thus, the District will only bear approximately \$0.25 of every one dollar increase in costs of construction. The record includes evidence of Ellis Ranch MUD Nos. 2 and 3 contributions to the overall development costs and the ALJs proposed finding to the contrary should be rejected.

D. Exceptions to the PFD's Analysis and Recommendations regarding Estimated Roadway Costs.

Applicant excepts to and recommends rejection of ALJs proposed Finding of Fact No. 60 that Applicant underestimated the District's road construction costs by 40% to 60%. Applicant's request for road powers meets the requirements of 30 T.A.C. §§ 293.202(a)(4), (7), (8), and (9). An applicant for the creation of a district may also petition the Commission to acquire "power under the authority of Article III, Section 52, TEXAS CONSTITUTION, to design, acquire, construct, finance, issue bonds for, operate, maintain, and convey to this state, a county, or a municipality for operation and maintenance, a road or any improvement in aid of the road." TEX. WATER CODE § 54.234(a). An application for road powers must include evidence of (1) consent obtained from the municipality or procedures of TEX. WATER CODE § 53.016 otherwise followed;¹⁷ (2) a preliminary layout showing the proposed location for road facilities to be constructed, acquired, or improved;¹⁸ (3) a cost analysis and detailed cost estimate of the proposed road facilities with a

¹⁷ 30 Tex. Admin. Code § 293.202(a)(4).

¹⁸ 30 Tex. Admin. Code § 293.202(a)(7).

statement of the amount of bonds estimated to be necessary to finance the proposed road facilities;¹⁹ and (4) a narrative statement analyzing the effect of the proposed facilities upon the district's financial condition and demonstrating that the creation or improvement of the proposed facilities is economically feasible.²⁰

Here, Applicant provided preliminary layouts of the roads, detailed cost estimates, and reports on the tax rate allocation for bonds which established that the funding of the road improvements are financially and economically feasible.²¹ The cost estimates are as follows:



OPINION OF PROBABLE COST

Roadway and Paving Cost

ITEM	UNIT	QUANTITY	UNIT PRICE	TOTAL
6" REINFORCED CONCRETE STREET PVMT.	SY	208,000	\$38.00	\$7,904,000.00
8" REINFORCED CONCRETE STREET PVMT.	SY	77,800	\$47.00	\$3,656,600.00
6" LIME-STABILIZED SUBGRADE	SY	315,000	\$2.30	\$724,500.00
LIME (36#/SY)	TON	5,700	\$160.00	\$912,000.00
SUB-TOTAL				\$13,197,100.00

No evidence was introduced to refute Applicant's representations regarding road facilities and estimated costs.

Mr. Lozano testified he did not analyze the costs related to concrete pavement and has no opinion as to the accuracy of the costs estimates related to the roadway or paving.²² The pavement costs comprise of 87.60% of the estimated roadway and paving costs. Remarkably, the ALJs applied Mr. Lozano's opinion that the wastewater and utility infrastructure costs are undervalued and applied his ballpark estimate to the roadway costs notwithstanding the fact that he did not

¹⁹ 30 Tex. Admin. Code § 293.202(a)(8).
²⁰ 30 Tex. Admin. Code § 293.202(a)(9).
²¹ GRBK Ex. 4, *Engineering Report*, at 10–11; Bates GRBK000559–60.
²² *Lozano Test. Tr.* at 8:23 -82:1; See also Protestant Ex. 1 at 7:3-4.

perform any analysis on the costs related to the roadways. There is no evidence in the record to support any finding that Applicant's estimated roadway costs are not reasonable, much less that any such costs are underestimated by 40-60%. Therefore, the ALJs proposed findings and conclusions on this issue should be rejected.

Similarly, Applicant excepts to the ALJs proposed Findings of Fact Nos. 61 and 62 that a 5% contingency is insufficient to cover the eventual costs of road construction and that the funding of the road improvements is financially and economically feasible. ALJs again misapplied Mr. Lozano's inapt opinion testimony with respect to the wastewater and utility infrastructure to roadway costs which he did not analyze. Mr. Lozano's unit price estimate of \$25-30/ gallon for construction of a wastewater treatment facility has no bearing whatsoever on the costs to build the roads within the District. As mentioned above, Mr. Lozano admitted he did no analysis as to the costs of concrete pavement associated with the construction of the roads within the District. Thus any conclusory opinion testimony that roadway costs are 40% to 60% undervalued has no probative value and the ALJs findings and conclusions with respect to this issue should be rejected. Applicant met its burden of proof that its estimated tentative roadway costs are reasonable as there was no competent evidence introduced to refute the reasonableness of Applicant's cost estimates.

E. Exceptions to the PFD's Analysis and Recommendations regarding Economic Feasibility of the District and Reasonableness of Projected Tax Rate.

Applicant excepts to and recommends rejection of the ALJs analysis and recommendation with respect to reasonableness of projected tax rates, namely, proposed Findings of Fact Nos. 25 and 29, 30, 31, and 32 and corresponding conclusions (i) that the projected tax rate for the District would raise to \$1.03 per \$100 valuation if the cost contingency was raised by even 10%; (ii) that it would exceed the maximum tax rate if Applicant realistically estimated construction costs and contingency percentage; (iii) that based on that erroneous reasoning the projected tax rate of .9941

per \$100 valuation is not reasonable due to unrealistically low costs; and (iv) that it would be insufficient to fund a reasonable assessment.

As an initial matter, Applicant agrees with the ALJs' conclusion that the proposed District will not have an unreasonable effect on total tax assessment on all lands located within it.²³ ALJs acknowledge that by rule, the combined tax rate of a district cannot exceed \$1.00 per \$100 valuation.²⁴ The ALJs also acknowledge that the Commission and OPIC did not find the situation problematic because any developer reimbursement of any cost overruns could be limited to satisfy the tax rate cap when each bond is evaluated by the Commission before issuance. Regardless of the cost of the wastewater treatment facilities and other utilities, the developer would only be eligible to be reimbursed for the amount that can be collected up to the \$1.00 tax rate cap, and each utility bond will be evaluated on its own merits by the TCEQ for economic feasibility before issuance. No one has questioned developer's ability to fund such costs or any cost overruns.

Indeed, the record shows that developer is financially backed by GRBK, a publicly traded company listed on the NYSE, with over \$1 billion dollars in assets. There is no evidence in the record that GRBK will not move forward with the development if it does not receive 100% reimbursement through bond issuances, much less that it would be incapable of moving forward with the development unless it received 100% reimbursement from bond issuances. Further, the ALJs do not account for any increase in value of the houses which the undisputed evidence established increase by 4.98% from third quarter of 2021 to first quarter of 2023, which would result in an increase in tax revenues without an increase the tax rate.²⁵

The initial estimated construction costs and value of houses are preliminary in nature based

²³ PFD at p. 52; see also Proposed Finding of Fact No. 54.

²⁴ See PFD, Proposed Finding of Fact No. 26.

²⁵ GRBK Ex. 8, *Gibson Pre-Filed Test.* at 6:19-21.

on a point in time in February of 2022.²⁶ The developer will pay all up-front utility costs and can only be reimbursed up to what is allowed under the \$1.00 maximum tax rate. Protestant's witness Mr. Lozano acknowledged this fact as well.²⁷ The analysis in the Preliminary Engineer Report and the Technical Memorandum acknowledges that the District complies with the TCEQ requirement that it must not exceed \$1.00 in Ellis County. *See* 30 T.A.C. § 293.59(k)(3)(C). The total overlapping tax rate on within the District will range from \$2.66 to \$2.75, which is comparable to common tax rates in North Texas, with the goal of keeping the overlapping tax rate below \$3.00 per \$100 valuation.²⁸

The ALJs acknowledge this fact, but then propose a finding that proposed rate would be insufficient to fund a reasonable assessment of costs. The tax rate needs to be sufficient to service the debt for the existing bond indebtedness of the District, not pay the 100 % of the costs of construction. Given GRBK's financial position and the increase in home values in the region, the economic feasibility of the District should not be an issue in the case. Accordingly, the ALJs proposed findings of fact and conclusions of law this issue should be rejected.

III. THE DISTRICT WILL HAVE NO UNREASONABLE EFFECT ON GROUNDWATER LEVELS OR RECHARGEABILITY.

A. Exceptions to the PFD's Analysis and Recommendations regarding Whether the District will have an Unreasonable Effect on Ground Water within the Region.

Applicant excepts to and recommends rejection of ALJs analysis and recommendations with respect to the District's effect on ground water, including proposed Findings of Fact Nos. 40-41 that there is no evidence in the record as to whether the amount of impervious cover will impact groundwater or that it will not have an unreasonable effect on groundwater level of the

²⁶ *Heroy Test. Tr.* at 32:3-17.

²⁷ Protestant Ex. 1, *Lozano Pre-Filed Test.* at 7:21-8:1.

²⁸ GRBK Ex. 2, *Heroy Pre-Filed Test.*, at 9:22 -10:12.

rechargeability capability of a groundwater source. Under Texas Water Code Section 54.021(b)(3)(C) and (D), the Commission must consider whether the district, its system, and the subsequent development will have an unreasonable effect on “groundwater level within the region” and the “recharge capability of a groundwater source.” Applicant has established that the District, its system, and the subsequent development within the District will not have an unreasonable effect on groundwater levels or recharge capability of a groundwater source because there is uncontested that it will not be using groundwater as its source of water.

The ALJs acknowledged that the District will receive its water from Rockett Special Utility District, which supplies surface water.²⁹ Thus, the District will not require any groundwater pumping for water, and thus, will not have an unreasonable effect on groundwater levels. As a result, the District’s effect on groundwater levels was not a contested issue in the proceeding. Indeed, the shift toward the use of surface water in Texas has slowed the overall depletion of ground water aquifers across the State. Therefore, the proposed District will not have an unreasonable effect on groundwater levels.

B. Exceptions to the PFD’s Analysis and Recommendations regarding Whether the District will have an Unreasonable Effect on Recharge Capability of a Groundwater Source.

Similarly, Applicant excepts to and recommends rejection of the ALJs analysis and recommendations with respect to the District’s effect on the recharge capability of a groundwater source. In particular, Applicant excepts to the ALJs proposed finding that impervious cover impacts groundwater recharge and limits the volume of rain infiltrated into the soil to the extent it is intended to apply to the District. Aside from the fact there was no evidence introduced in the hearing to suggest, much less establish, that the District is within any aquifer recharge zone, the

²⁹ See PFD, Proposed Finding of Fact No. 37.

undisputed evidence at the hearing established the impact of impervious cover on recharge depends on the topography of the area, the type of aquifer in the area, and recharge features.

Mr. Heroy's uncontradicted testimony was that there will not be any significant alterations to the overall patterns of runoff from the development in the District, whether from open space or houses and streets, so the overall drainage will continue the same pattern as prior to the development.³⁰ The ALJs agreed with Mr. Heroy and found that the District will not change the overall patterns of runoff or have an unreasonable effect on natural run-off rates and drainage.³¹ The Preliminary Engineering Report also states that the District will not significantly change current topographical drainage patterns or have any anticipated impact on the recharge ability of a groundwater source and therefore will have little to no effect on the groundwater levels in the region.³² Thus, there will be no unreasonable impact on rechargeability of a groundwater source.

As Mr. Heroy testified, this element is more relevant when proposed districts are within areas such as the Edwards Aquifer where there are sensitivities and additional concerns regarding aquifer recharge.³³ No such issues are present in this case.

IV. CONCLUSION.

The Applicant has met its burden of proof to establish that the proposed project is feasible and practical and is necessary and would benefit the land to be included in the proposed district. The Applicant respectfully requests that the Commission grant their exceptions to the ALJs Proposal for Decision and proposed finding of fact and conclusions of law, and adopt Applicant's proposed findings of fact and conclusions of law attached hereto, and approve the creation of the District. Applicant respectfully requests such other any further relief to which it may be entitled.

³⁰ *Heroy Test.* Tr. at 23:22- 24:5.

³¹ PFD Proposed Finding of Fact Nos. 46-47.

³² GRBK Ex. 4, *Engineering Report*, at 14 (Bates GRBK000563).

³³ *Heroy Test.* Tr. at 25:2-5.

Respectfully submitted,

/s/ James G. Ruiz

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**ATTORNEY FOR APPLICANT
GRBK EDGEWOOD, LLC**

CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2024, a true and correct copy of the above and foregoing document has been served on all parties on the mailing list electronically and/or by regular mail.

/s/ James G. Ruiz

James G. Ruiz

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

**AN ORDER GRANTING PETITION FOR CREATION OF ELLIS RANCH
MUNICIPAL UTILITY DISTRICT NO. 1;
SOAH DOCKET NO. 582-23-11658; TCEQ DOCKET NO. 2022-1157-DIS**

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Petition for Creation of Ellis Ranch Municipal Utility District No. 1 (the “District”). A Proposal for Decision (PFD) was issued by Heather Hunziker and Amy Davis, Administrative law Judges (ALJs) with the State Office of Administrative Hearings, and considered by the Commission.

After considering the PFD, the Commission makes the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

1. GRBK Edgewood, LLC, filed its electronic application materials to TCEQ on March 17, 2022, including a Petition for the Creation of Ellis Ranch Municipal Utility District No. 1, dated March 1, 2022.
2. The application for creation of Ellis Ranch Municipal Utility District No. 1 was declared administratively complete on March 23, 2022.
3. On May 1 and 8, 2022, notice of the Petitions was published in the *Waxahachie Daily Light*.
4. On June 9, 2022, the Ellis County Clerk posted the notice on the bulletin board used for posting legal notices in Ellis County.
5. The TCEQ received one letter on May 12, 2022, opposing the creation of the district.

6. On November 2, 2022, the Commissioners referred the matter to the State Office of Administrative Hearings (SOAH) for a contested case hearing.
7. At the preliminary hearing for the creation of Ellis Ranch MUD No. 1 on March 21, 2023, Applicant, the Executive Director (ED) of TCEQ, the Office of Public Interest Counsel (OPIC) and Ellis County (County) were named as parties.
8. SOAH ALJs Heather Hunziker and Amy Davis convened the hearing via videoconference on October 5, 2023. Applicant was represented by attorney James Ruiz. The County was represented by attorney Emily Rogers. The ED of the Texas Commission on Environmental Quality (Commission) was represented by attorney Kayla Murray. The Office of Public Interest Counsel (OPIC) was represented by attorney Jessica Anderson. The record closed after submission of written closing arguments on November 17, 2023, and written replies thereto on January 4, 2024.

Request for Service

9. The District is proposed to be located partially within the extra-territorial jurisdiction of the City of Waxahachie and partially within the unincorporated area of Ellis County, outside the extraterritorial jurisdiction of any other city or town.
10. Applicant delivered its request for consent to the creation of the District to the City on June 2, 2021, and did not receive a written response within 90 days.
11. Applicant petitioned the City for water and sewer services on September 30, 2021, and did not receive a written response.
12. The 120-day period for reaching a mutually-agreeable contract expired without a contract for service.
13. The City did not grant written consent, by resolution or ordinance, to the inclusion of the land within the District.

14. Applicant complied with the requirements to submit a request for service where a proposed municipal utility district would be located within the extraterritorial jurisdiction of a city.
15. Thereafter, Applicant filed its petition for the creation of the District with the Commission.

Availability of Comparable Service from Other Systems

16. The land to be included in the District is located within Rockett Special Utility District's water Certificate of Convenience and Necessity. Rockett SUD has agreed to provide water service to the District once the developer constructs the necessary infrastructure.
17. There is no currently existing infrastructure to provide wastewater service to the District.

Reasonableness of Protected Construction Costs, Tax Rates, and Water and Sewer Rates

18. Applicant's preliminary engineering report provided that the District's share of the construction costs for the lift station and wastewater treatment plant that will serve the District, as well as Ellis Ranch Municipal Utility District Nos. 2 and 3 will be \$3,161,397.
19. Applicant's projected construction costs are reasonable.
20. The developer will pay all up-front utility costs and can only be reimbursed in the amount allowed by a MUD tax rate of \$1.00 per \$100 assessed value.
21. Applicant's proposed tax rates are reasonable.
22. Applicant's proposed water and sewer rates are reasonable.

Effect on Groundwater Levels and Recharge Within the Region

23. The District will use surface water rather than groundwater as its water supply source.

24. The District, its systems, and subsequent development will not have an unreasonable effect on groundwater level within the region and recharge capability of a groundwater source.

Effect on Natural Run-off Rates and Drainage

25. The District's drainage systems will include storm sewers, drainage ditches, and if required, detention facilities.
26. The District, its systems, and subsequent development will not have an unreasonable effect on natural run-off rates and drainage.

Effect on Water Quality

27. The District will own and operate a wastewater treatment plant pursuant to the permit issued by TCEQ on May 5, 2022.
28. The District, its system, and subsequent development will not have an unreasonable effect on water quality.

Effect on Total Tax Assessments on All Land Located Within the District

29. The total overlapping rates in the District are projected to range between \$2.63 and \$2.75 per \$100 valuation, which is reasonable and comparable to other districts in North Texas.
30. The combine projected tax rate for the District must not exceed \$1.00 per \$100 valuation pursuant to 30 Texas Administrative Code Section 293.59(k)(d)(C).
31. The District, its system, and subsequent development within the District will not have an unreasonable effect on total tax assessments on all land located within the District.

Feasible, Practicable, Necessary, and Will Benefit All of the Land to be Included in the District

32. Applicant has presented sufficient evidence to establish the District is feasible, practicable, necessary and will benefit all the land included in the District.

Petition Signature of a Majority in value of the Landowners

33. The petition for the creation of the District was signed by GRBK Edgewood, LLC and by certificate, dated March 11, 2022, the Ellis Appraisal District certified that the appraisal roll indicates that GRBK Edgewood, LLC is the owner of all the property in the proposed District.

Request for Road Powers

34. The petition for the creation of the District requested the TCEQ grant the District the authority to provide roads.
35. Applicant provided a preliminary layout as to the known roads and major thoroughfares and a cost estimate of the proposed road facilities.
36. Applicant established that the funding of the road improvements is financial and economically feasible.

Allocation of Transcript Costs

37. No party requested the transcript because SOAH required a transcript.
38. All parties fully participated in the hearing and benefited from the transcript.
39. Applicant consists of a company that owns, maintains, subdivides, and develops land.

II. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter. TEX. CONST., art. XVI, section 59; TEX. WATER CODE Ch. 49 & 54.
2. SOAH has jurisdiction over all matters relating to the conduct of a hearing in this hearing, including the preparation of a proposal for decision with findings of fact and conclusions of law. TEX. GOV'T CODE Ch. 2003.

3. Applicant and TCEQ have satisfied all applicable public notice requirements. TEX. WATER CODE § 49.011; 30 TEX. ADMIN. CODE § 293.12.
4. Applicant carries the burden of proof by a preponderance of the evidence. 30 TEX. ADMIN. CODE § 80.17(a).
5. Applicant satisfied the requirements related to requests for service when a MUD is proposed to be located within the extraterritorial jurisdiction of a city. TEX. WATER CODE § 54.016(a)-(d); TEX. GOV'T CODE § 42.042(a)-(f).
6. Applicant satisfied the requirements related to availability of comparable service from other systems. TEX. WATER CODE § 54.021(b)(1) and 30 TEX. ADMIN. CODE § 293.11(d)(5)(G).
7. Applicant's requests for road powers meets all applicable requirements. TEX. WATER CODE § 54.234; 30 TEX. ADMIN. CODE §§ 293.11(d)(11), .202(a), (b).
8. If the Commission finds that the petition conforms to the requirements of Texas Water Code 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 Commission shall find so by its order and grant the petition. TEX. WATER CODE § 54.021(a).
9. If the Commission finds that the project is not feasible, practicable, necessary, or a benefit to the land in the district, the Commission shall so find by its order and deny the petition. TEX. WATER CODE § 54.021(d).
10. 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: the availability of comparable service from other systems; the reasonableness of projected construction costs, tax rates, and water and sewer rates; and whether the district and its system and subsequent development within the district will have an unreasonable effect on land elevation, subsidence, ground water level within the region, recharge capability of a groundwater source, natural

run-off rates and drainage, water quality, and total tax assessments on all land located within a district. TEX. WATER CODE § 54.021(b).

11. Applicant presented sufficient evidence to establish the reasonableness of projected construction costs, tax rates, and water and sewer rates. TEX. WATER CODE § 54.021(b)(2).
12. The Applicant has presented sufficient evidence to establish that the District, its systems, and subsequent development will not have an unreasonable effect on groundwater levels TEX. WATER CODE § 54.021(b)(3)(C).
13. The Applicant has presented sufficient evidence to establish that the District, its systems, and subsequent development will not have an unreasonable effect on recharge capability of a groundwater source within the region. TEX. WATER CODE § 54.021(b)(3)(D).
14. The Applicant has presented sufficient evidence to establish that the District, its systems, and subsequent development will not have an unreasonable effect on natural run-off rates and drainage. TEX. WATER CODE § 54.021(b)(3)(E).
15. The Applicant has presented sufficient evidence to establish that the District, its systems, and subsequent development will not have an unreasonable effect on water quality. TEX. WATER CODE § 54.021(b)(3)(F).
16. The Applicant has presented sufficient evidence to establish that the District, its systems, and subsequent development will not have an unreasonable effect on total tax assessments on all land located within the district. TEX. WATER CODE § 54.021(b)(3)(G).
17. Applicant presented sufficient evidence to establish that the project is feasible, practicable, and necessary and would be a benefit to the land included in the District. TEX. WATER CODE § 54.021; 30 TEX. ADMIN. CODE § 293.11(d)(5)(J).
18. No transcript costs may be assessed against the ED or OPIC because the TCEQ's rules prohibit the assessment of any cost to a statutory party who is precluded by law from appealing any ruling, decision, or other

act of the Commission. TEX. WATER CODE §§ 5.275, .356; 30 TEX. ADMIN. CODE § 80.23(d)(2).

19. Factors to be considered in assessing transcript costs include: the party who requested the transcript; the financial ability of the party to pay the costs; the extent to which the party participated in the hearing; the relative benefits to the various parties of having a transcript; the budgetary constraints of a state or federal administrative agency participating in the proceeding; and any other factor which is relevant to a just and reasonable assessment of the costs. 30 TEX. ADMIN. CODE § 80.23(d)(1).
20. Considering the factors in 30 Texas Administrative Code section 80.23(d)(1), an appropriate allocation of transcript costs is: 50 percent to Applicant, 50 percent to Protestant.
21. Applicant's Petition should be granted.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. Applicant GRBK Edgewood, LLC's Petition for Creation of Ellis Ranch Municipal Utility District No. 1 is granted.
2. The transcript costs are allocated 50 percent to Applicant and 50 percent to the Protestant.
3. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted, are denied.
4. The effective date of this Order is the date the Order is final as provided by 30 Texas Administrative Code § 80.273 and Texas Government Code § 2001.144.
5. The Commission's Chief Clerk shall forward a copy of this Order to all parties.

6. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

**TEXAS COMMISSION ON ENVIRONMENTAL
QUALITY**

Jon Niermann, Chairman for the Commission

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James Ruiz on behalf of James Ruiz

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Filing Code Description: Exceptions to PFD

Filing Description: Applicant's Exceptions to Proposal for Decision

Status as of 3/18/2024 4:52 PM CST

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Filing Code Description: Exceptions to PFD

Filing Description: Applicant's Exceptions to Proposal for Decision

Status as of 3/18/2024 4:52 PM CST

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