

Jon Niermann, *Chairman*  
Bobby Janecka, *Commissioner*  
Catarina R. Gonzales, *Commissioner*  
Kelly Keel, *Executive Director*



## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

July 29, 2024

Laurie Gharis, Chief Clerk  
Texas Commission on Environmental Quality  
Office of the Chief Clerk (MC - 105)  
P.O. Box 13087  
Austin, Texas 78711-308

RE: The Petition for the Creation of Lampasas County Municipal Utility District No. 1  
TCEQ Docket No. 2022-1653-DIS  
SOAH Docket 582-23-16963

Dear Ms. Gharis:

Please find the Executive Director's Exceptions to the Proposal for Decision for the above referenced matter.

Please do not hesitate to contact me at 512-239-1439 or at [Harrison.Malley@tceq.texas.gov](mailto:Harrison.Malley@tceq.texas.gov) if you have any questions. Thank you for your attention to this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Cole Malley".

Cole Malley, Staff Attorney - Environmental Law Division

SOAH DOCKET NO. 582-23-16963  
TCEQ DOCKET NO. 2022-1653-DIS

APPLICATION BY PITT CREEK	§	BEFORE THE STATE
RANCH, LLC FOR THE	§	OFFICE OF
CREATION OF LAMPASAS COUNTY	§	ADMINISTRATIVE HEARINGS
MUNICIPAL UTILITY DISTRICT NO.1	§	

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

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

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

As discussed in detail below, the Executive Director respectfully requests the Commission issue an Order for the creation of Lampasas County Municipal Utility District No. 1 as drafted by the Executive Director.

**INTRODUCTION**

On July 9, 2024, the ALJ issued their PFD recommending that the petition to create Lampasas County Municipal Utility District No. 1 be denied. The Executive Director respectfully disagrees with the ALJ's decision.

**LEGAL STANDARD**

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

The factors the Commission shall consider in determining if the project is feasible and practicable and if it is necessary and would be a benefit to the land included in the district:

- (1) the availability of comparable service from other systems, including but not limited to water districts, municipalities, and regional authorities;
- (2) the reasonableness of projected construction costs, tax rates, and water and sewer rates; and
- (3) whether or not the district and its system and subsequent development within the district will have an unreasonable effect on the following:
  - (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.<sup>1</sup>

### DISCUSSION

In the PFD, the ALJ found that the Applicant met all of the factors listed above except for feasibility and necessity.

#### A) Feasibility

In order to determine whether a proposed district is feasible, the commission shall consider several factors including the reasonableness of projected construction costs, tax rates, and water and sewer rates.<sup>2</sup> TCEQ's rules require that applicants submit "tentative itemized cost estimates" as part of the engineering report accompanying an application for the creation of a district.<sup>3</sup> Applicants must also include projected tax rates and water rates. The technical review conducted for this application assessed these factors in relation to relevant district creations and found them to be reasonable.<sup>4</sup>

As part of the Applicant's and ED's direct cases, the ALJ heard extensive testimony as to the reasonableness of the proposed construction costs. In the PFD, the ALJ concluded that the proposed cost projections were reasonable at the time the application was filed in 2022.<sup>5</sup> However, citing the decision regarding the Petition for Creation of Highland Lakes Municipal Utility District No. 1 of Ellis County, the ALJ concluded that post-application costs can be considered in evaluating the feasibility of a district creation. Concluding that the proposed costs have appreciated 60%, the ALJ determined that the creation is no longer feasible. Respectfully, this analysis and interpretation of agency precedent are both incorrect.

TCEQ's rules clearly state that the proposed costs are tentative estimates.<sup>6</sup> Neither in rule nor in statute does it state that the Commission shall consider post-application costs in order to assess feasibility for a district creation. In the decision regarding Highland Lakes Municipal Utility District No. 1 of Ellis County, the Commission did not rule that any specific increase in costs would have a determinative effect on the feasibility assessment. In their decision, the Commission stated only that the costs had increased 35% and ultimately concluded that the proposed costs were still reasonable as the lot values also increased. The decision did not develop or otherwise articulate that a post application analysis should be applied when reviewing district creation petitions. To interpret that the Commission can or should incorporate

---

<sup>1</sup> TWC § 54.021(b).

<sup>2</sup> TWC § 54.021(b)(2).

<sup>3</sup> 30 TAC § 293.11(d)(5)(E).

<sup>4</sup> ED Ex. 3 at 24.

<sup>5</sup> PFD at 18.

<sup>6</sup> 30 TAC § 293.11(d)(5)(E).

post application analysis would implicate other aspects of the Commission's review of a creation petition. This analysis creates regulatory uncertainty as to what information can be considered and when the Commission is required to consider it as part of its review. Absent a clear statutory basis, information considered post application and post hearing could establish a difficult precedent for future petitions.

The ALJ's conclusions as to water rates in this case are derived from calculations of a decision from the Public Utility Commission in June of this year, which occurred more than three months after the evidentiary record for this hearing closed. TCEQ's rules under 30 TAC § 293.11 establish what documents are required to be included as part of a district creation petition. The proposed Corix water rates were considered reasonable based on all available information at that time the petition was submitted to TCEQ.<sup>7</sup> It is unreasonable for the ED's regulatory responsibilities in reviewing petition materials to extend beyond the time in which petition materials are received. Without timely notice or disclosure, the existence of additional information relevant to the creation becomes impractical in the context of a regulatory review.

TCEQ's rules do not require the ED or Commission to conduct a post application assessment beyond the original review. The extensive regulatory review conducted for this petition included assessing the engineering report which contained the projected costs of bringing the proposed improvements to the district. Mr. Walker testified that the associated costs and rates were reasonable at the time the report was submitted.<sup>8</sup> Mr. Walker further testified that these costs were expected to increase based on all other previous district creations he has seen. With factors such as time and inflation, these are the primary reasons the ED has repeatedly emphasized that the regulatory review assesses information at the time of submittal. Given that petitioners have no practical control over when their petitions are reviewed and submitted in front of the Commission for final approval, petitions may take considerable time before any action is taken on the application. It is inevitable that the proposed initial costs have increased by this time purely as a result that associated construction costs over time. The only way to provide certainty as to regulatory expectations for these petitions is for these associated costs to be assessed at a specific point in time; the moment they are submitted, which is what is currently required in TCEQ's rules.<sup>9</sup>

The impacts of the cost assessment issue extend to the proposed tax rates. As the ALJ correctly concluded, the tax rate is limited to \$1.00 per \$100.00 valuation of the property. However, in keeping with the post hearing analysis, the ALJ departs from TCEQ precedent and determined that the tax rates are unsupported as, "no party analyzed the projected calculations based on the updated cost projections." As repeatedly argued throughout the hearing, the feasibility assessment is based on the time the projections were submitted.<sup>10</sup> Based upon the information the ED possessed at the time the petition was submitted, the projected tax rates were reasonable based on the projected property values in the engineering report.<sup>11</sup>

---

<sup>7</sup> ED Ex. 1 at 7 (Bates 0008): 9-14.

<sup>8</sup> ED Ex. 1 at 7 (Bates 0008): 9-13.

<sup>9</sup> 30 TAC § 293.11(d)(5).

<sup>10</sup> Transcript at 175: 10-13.

<sup>11</sup> ED Ex. 1 at 7 (Bates 0008): 9-14.

If the post hearing analysis is to be employed for this application, there is still the unresolved question as to how the Commission could close the evidentiary record. If the ED is responsible for preparing a recommendation to the Commission as to a petition's regulatory compliance, which would include post application data, how could the ED make a such a determination? Furthermore, how could the Commission do so? All the parties per the ALJ's own orders are confined to arguments raised on the record and responses to those arguments. If the Commission adopts a post application and post hearing analysis, would parties be able to continuously appeal a Commission decision based on new information relevant to the criteria under TWC § 54.021? Is the ED required to continuously revise the staff memo prepared for the Commission?

In order to fulfill her obligations under 30 TAC Chapter 293, the ED must have a clear regulatory framework within which to render decisions consistent with Texas Water Code Chapter 54. TCEQ's current rules currently establish a clear path to conduct the requisite review. The ED's witness testified that the applicant submitted sufficient information for the District's section to make their determination. Using the same methods as all other previous creations, Mr. Walker testified that the creation of the district was feasible.<sup>12</sup> These include projected construction costs and water rates. Under established Commission precedent and within TCEQ rules, ED staff conducted their review and fulfilled their regulatory obligations for this petition.

#### B) Necessity

As part of the Commission's determination that the creation of a district is necessary, the Commission shall consider the same factors with the feasibility analysis.<sup>13</sup> When the ED prepares the recommendation to the Commission as to whether the district should be created, the determination of necessity is also an aspect of the staff memo created for the Commission. It is undisputed that necessity is a fundamental requirement for a district to be created. The issue for the Commission to decide is whether there was sufficient information submitted in the application to demonstrate that the creation of the district is necessary. Respectfully, the ALJ's conclusions on necessity are contradictory and do not provide the Commission an adequate basis to concur with the ALJ's conclusions.

Mr. Walker testified multiple times that the creation of the district was necessary.<sup>14</sup> Mr. Walker testified that this decision was made after reviewing the petition documents and the market study.<sup>15</sup> In Mr. Walker's opinion, this study demonstrated that there was a market need for the district. Additionally, Mr. Walker testified that he had no concerns and that the study was prepared in a form similar to the market within the Killeen-Temple metropolitan statistical area.<sup>16</sup> The protestants presented contrary evidence which the ALJ determined was more persuasive than Mr. Walker's testimony. Citing residential sales statistics in Lampasas County contained in the protestants' direct case, the ALJ disagreed that there was a market need for the types of homes the applicant has proposed to create in the district. The ALJ therefore

---

<sup>12</sup> ED Ex. 1 at 3 (Bates 0004): 31-33.

<sup>13</sup> TWC § 54.021(b)(1)-(3).

<sup>14</sup> ED Ex. 1 at 7 (Bates 0008): 22-24.

<sup>15</sup> ED Ex. 1 at 6 (Bates 0007): 10-19.

<sup>16</sup> ED Ex. 1 at 11 (Bates 0012): 29-32.

ruled that the applicant had failed to establish that project was necessary. However, while ruling that the creation was not necessary, the ALJ determined that the Petitioner met its burden that the project would be a benefit to the land to be included in the district.<sup>17</sup> From a regulatory perspective, the conclusion that the district is not necessary but would nonetheless be a benefit creates an irreconcilable contradiction.

The necessity of a district speaks not only to the market need for the project as well as the need for the creation in order to bring those proposed benefits to the land to be included in the district. For this aspect of the regulatory decision, the ED reviews the market study and engineering report to determine whether the creation is necessary. If the materials the petitioner submits conform to the requirements of TCEQ's rules and they provide a basis for the district, the ED does not have a sufficient basis to set them aside or otherwise rule that the petition is incomplete. As Mr. Walker testified, the determination of necessity was consistent with other district creations.<sup>18</sup> The engineering report addressed the lack of comparable water services and utilities in the area of the district, which the petitioner cited a basis for the necessity of the district. In the opinion of the ED's expert witness, these materials supported the necessity of the district and were sufficient to demonstrate the proposed improvements would be a benefit to the land to be included in the district. This is where the contradiction begins: if the improvements are a benefit to the land to be included, and the means to bring these improvements to the land is through the creation of a district, then the district must be necessary.

The factors the Commission is required to consider are interconnected and are viewed in the totality of the circumstances. It is virtually impossible to consider feasibility, practicability, necessity, and benefit separately as they all relate to each other. For example, if a district were not feasible, then it would not be necessary or a benefit because there would be no means to financially support the project. In the PFD, the same issue exists. How can the improvements be a benefit to the district if neither the homes they support nor the entity that creates them are necessary? The ED reiterates that the underlying petition materials support the ED's conclusion that the district is necessary and is consistent with other similar district creations.

### CONCLUSION

Commission decisions regarding District creations must be based on relevant materials and established procedures. The ED conducted the review of the application consistent with all applicable statutes and regulations. The PFD presents the Commission with a decision that would present precedential concerns that would complicate future district creation reviews. A post hearing analysis standard is unsupported both in statute and rule.

The ED reiterates that there is sufficient basis for the Commission to create the district based on the materials the Petitioner submitted. The record establishes that the Petitioner submitted sufficient information for the ED to make her determination. The ED respectfully disagrees with the ALJ's conclusions. The post hearing analysis and interpretation of necessity contradict well established TCEQ precedent.

---

<sup>17</sup> PFD at 36.

<sup>18</sup> ED Ex. 1 at 7 (Bates 0008): 25-27.

The record establishes that the district is both feasible and necessary. As to feasibility, the analysis should have ended with the initial conclusion that the proposed costs were reasonable at the time the petition was submitted. The ALJ's conclusion that the district is a benefit to the land to be included contradicts the analysis that the district is unnecessary.

For these reasons, the ED respectfully recommends that the Commission not adopt the ALJs' proposed order. Rather, the ED recommends finding that the Petitioner has met all requirements with regard to the applicable statutes and rules and therefore grant the creation of Lampasas County Municipal Utility District No. 1.

Respectfully submitted,

Texas Commission on Environmental Quality

Kelly Keel, Executive Director

Charmaine Backens, Deputy Director  
Environmental Law Division



---

Harrison Cole Malley  
Staff Attorney  
Environmental Law Division  
State Bar of Texas No. 24116710  
MC-173, P.O. Box 13087  
Austin, Texas 78711-3087  
Phone: (512) 239-1439  
Fax: (512) 239-0626

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was served on the following by electronic mail at the addresses listed below on this 29<sup>th</sup> day of July, 2024.

**For the Chief Clerk:**

Laurie Gharis  
TCEQ Office of the Chief Clerk, MC 105  
P.O. Box 13087  
Austin, Texas 7811-3087

**For the Public Interest Counsel:**

Jennifer Jameson: [jennifer.jamison@tceq.texas.gov](mailto:jennifer.jamison@tceq.texas.gov)

**For the Applicant:**

Richard Hamala: [rhamala@tiemannlaw.com](mailto:rhamala@tiemannlaw.com)

**For the Association of Concerned Landowners of Lampasas County:**

Eric Allmon: [eallmon@txenvirolaw.com](mailto:eallmon@txenvirolaw.com)



---

Harrison Cole Malley  
Staff Attorney