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Emily Lindley, *Commissioner*
Bobby Janecka, *Commissioner*
Erin E. Chancellor, *Interim Executive Director*



Garrett T. Arthur, *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

May 8, 2023

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: **IN THE MATTER OF THE PETITION FOR CREATION OF
ROCKWOOD MUNICIPAL UTILITY DISTRICT NO. 1 OF
DENTON COUNTY
TCEQ DOCKET NO. 2023-0528-DIS**

Dear Ms. Gharis:

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

Sincerely,

A handwritten signature in cursive script that reads "Pranjāl".

Pranjāl M. Mehta, Attorney
Assistant Public Interest Counsel

cc: Mailing List

TCEQ DOCKET NO. 2023-0528-DIS

**PETITION FOR THE CREATION
OF ROCKWOOD MUNICIPAL
UTILITY DISTRICT NO. 1 OF
DENTON COUNTY**

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**BEFORE THE
TEXAS COMMISSION
ON
ENVIRONMENTAL QUALITY**

**OFFICE OF PUBLIC INTEREST COUNSEL’S RESPONSE
TO REQUEST FOR HEARING**

TO THE HONORABLE MEMBERS OF THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY:

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

I. INTRODUCTION

A. Summary of Position

The TCEQ Chief Clerk’s office received one timely hearing request from the Town of Ponder. For the reasons discussed herein, OPIC respectfully recommends that the Commission grant the hearing request.

B. Background

JLMCG Properties, LLC and Cendi Sherwood (Petitioners) filed a petition for creation of Rockwood Municipal Utility District No. 1 of Denton County (District) pursuant to Article XVI, Section 59 of the Texas Constitution, Chapter 49 and 54 of the Texas Water Code (TWC), 30 Texas Administrative Code (TAC) Chapter 293, and the procedural rules of the TCEQ. The application was declared administratively complete on July 22, 2022. On November 26, 2022, Notice of District Petition was published.

According to the notice, the proposed District would contain approximately 359 acres located within Denton County, and all of the land within the proposed District is within the extraterritorial jurisdiction (ETJ) of the Town of Ponder (the Town). The petition further states that, if approved, the proposed District will: (1) construct a water distribution system for domestic purposes; (2) construct a wastewater system; (3) control, abate, and amend harmful excesses of water and the reclamation and drainage of overflowed lands within the proposed District; (4) construct and finance macadamized, graveled, or paved roads, or improvements in aid of those roads; and (5) construct, install, maintain, purchase, and operate such additional facilities, systems, plants, and enterprises as shall be consonant with all of the purposes for which the proposed District is created. Additionally, the proposed District would be granted the authority to design, acquire, construct, finance, issue bonds, operate, maintain, and convey to the State of Texas, a county, or a municipality for operation and maintenance, a road, or any improvement in aid of the road. The comment and contested case hearing request periods ended on December 27, 2022.

II. APPLICABLE LAW

A municipal utility district (MUD or a district) may be created under and subject to the authority, conditions, and restrictions of Article XVI, Section 59, of the Texas Constitution and TWC § 54.011. Chapters 49 and 54 of the TWC and the Commission's administrative rules found at Title 30, Chapter 293, of the 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 must be filed with the Commission. TWC § 54.014. The petition must 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 the 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 must 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 must consider the written opinion submitted by the county commissioners. TWC § 54.0161(c).

The Commission must 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 must 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 must deny the petition. TWC § 54.021(d). The rights, powers, privileges, authority, and functions of a district are 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 must 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:

- (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 must grant a request for a contested case hearing if: (1) the request is made by the applicant or the Executive Director (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

The Commission received timely comments and a hearing request from the Town. The hearing request indicated that the proposed District's jurisdictional boundaries fall entirely within the Town's ETJ and its Certificate of Convenience and Necessity (CCN) No. 12951 service area.¹ The Town offers water service in its CCN service area, as well as sewer, waste disposal, and emergency fire-fighting services within its corporate limits and ETJ. The Town is concerned that establishing the proposed District would create overlaps and potential interference with the Town's ability to plan for and provide services and facilities within its ETJ and CCN service area. The Town stated that, since it has the exclusive right to provide water service within the proposed District's jurisdictional boundaries and is fully capable and committed to providing these services to this portion of its ETJ and water CCN service area, the proposed District is neither feasible nor necessary for the provision of such service. The Town also holds Texas Pollutant Discharge Elimination System Permit (TPDES) No. WQ0011287003 and is willing to serve as the regional provider of wastewater service to the proposed District. The Town is concerned about the potential

¹ Attachment A to the Town's hearing request includes maps depicting the Town's ETJ, water CCN boundaries, and the overlap with the proposed District's boundaries.

impact of the proposed District on the health, safety, and welfare of residents within its ETJ, including future residents within the proposed District. The Town is also concerned about the impact of the proposed development on water quality, drainage, runoff rates, and emergency fire-fighting services.

Governmental entities with authority under state law over issues contemplated by the application may be considered affected persons. 30 TAC § 55.256(b). Additionally, a relevant factor for determining whether governmental entities qualify as affected persons is their statutory authority over or interest in the issues relevant to the application. 30 TAC § 55.256(c)(6). Here, the Town stated that its interest in serving as the exclusive retail water service provider in its water CCN service area is protected under TWC §§ 13.242 and 13.250. While OPIC acknowledges that the Town's CCN was granted by the Public Utility Commission of Texas under statutory provisions that do not necessarily confer authority over the issues contemplated by this application, OPIC agrees that such statutory protections are relevant when the Commission considers the feasibility and practicality of a petition to create a district while assessing whether to approve or deny the petition under TWC § 54.021(a) and (b). Moreover, the Town has identified other interests that are relevant to the proposed District, such as the availability of its own comparable sewer service, water quality, and drainage and run-off rates—all of which are relevant to the Commission's decision in this matter. *See* TWC § 54.021(b)(1); (b)(3)(E), (F). Further, the Town has statutory authority to protect public health and safety and regulate development within its ETJ. *See* Texas Local Government Code §§ 42.001 and 212.044.


Based on the Town's identified interests and the District's location within its ETJ, OPIC finds that the Town has demonstrated it qualifies as an affected person in this matter. Therefore, OPIC respectfully recommends that the Commission grant the Town of Ponder's hearing request.

IV. CONCLUSION

For the reasons set forth above, OPIC respectfully recommends the Commission find that the Town of Ponder qualifies as an affected person and refer the matter to the State Office of Administrative Hearings for a contested case hearing.

Respectfully submitted,

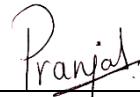
Garrett T. Arthur
Public Interest Counsel

By:  _____

Pranjal M. Mehta
Assistant Public Interest Counsel
State Bar No. 24080488
P.O. Box 13087, MC 103
Austin, Texas 78711-3087
(512) 239-0574 Phone
(512) 239-6377 Fax

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2023, the foregoing document was filed with the TCEQ Chief Clerk, and copies were served to all parties on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.



Pranjal M. Mehta

MAILING LIST
ROCKWOOD MUD NO. 1 OF DENTON COUNTY
TCEQ DOCKET NO. 2023-0528-DIS

FOR THE APPLICANT

via electronic mail:

Natalie B. Scott
Kevin R. Bartz
Coats Rose PC
Terrace 2
2700 Via Fortuna, Suite 350
Austin, Texas 78746
nscott@coatsrose.com
kbartz@coatsrose.com

Tim Green
Mindy Koehne
Coats Rose PC
16000 North Dallas Parkway, Suite 350
Dallas, Texas 75248
tgreen@coatsrose.com
mkoehne@coatsrose.com

Thomas Fletcher
Kimley-Horn
6160 Warren Parkway, Suite 210
Frisco, Texas 75034

FOR THE EXECUTIVE DIRECTOR

via electronic mail:

Harrison "Cole" Malley, Staff Attorney
Texas Commission on Environmental
Quality
Environmental Law Division MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-0600 Fax: 512/239-0606
harrison.malley@tceq.texas.gov

James Walker, Technical Staff
Texas Commission on Environmental
Quality
Water Supply Division MC-152
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-2532 Fax: 512/239-2214
james.walker@tceq.texas.gov

Ryan Vise, Director
Texas Commission on Environmental
Quality
External Relations Division
Public Education Program MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4000 Fax: 512/239-5678
pep@tceq.texas.gov

FOR ALTERNATIVE DISPUTE
RESOLUTION

via electronic mail:

Kyle Lucas, Attorney
Texas Commission on Environmental
Quality
Alternative Dispute Resolution MC-222
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-0687 Fax: 512/239-4015
kyle.lucas@tceq.texas.gov

FOR THE CHIEF CLERK

via eFiling:

Docket Clerk
Texas Commission on Environmental
Quality
Office of Chief Clerk MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-3300 Fax: 512/239-3311
<https://www14.tceq.texas.gov/epic/eFiling/>

REQUESTER(S):

David J. Klein
Lloyd Gosselink Rochelle & Townsend PC
816 Congress Avenue, Suite 1900
Austin, Texas 78701