

SOAH DOCKET NO. 582-23-26772
TCEQ DOCKET NO. 2023-0566-DIS

APPLICATION FOR THE CREATION § BEFORE THE STATE OFFICE
OF SHANKLE ROAD MUNICIPAL § OF
UTILITY DISTRICT OF ELLIS COUNTY § ADMINISTRATIVE HEARINGS

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 Judges' (ALJs) 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 the Order for the Creation of Shankle Road Municipal Utility District of Ellis County (District) as drafted by the Executive Director.

I. INTRODUCTION

On September 6, 2024, the ALJs issued their PFD recommending that the Application for the Creation of Shankle Road Municipal Utility District of Ellis County be denied.¹ While the ALJs did find that the Petition conformed to the requirements of Tex. Water Code § 54.015,² the ALJs found that the Applicant failed to meet his burden of proving the reasonableness of projected construction costs as required by Tex. Water Code § 54.021(b)(2).³ By finding that the Applicant did not prove the reasonableness of construction costs by a preponderance of the evidence,⁴ the ALJs concluded that the Petition has not satisfied all applicable statutory and regulatory requirements for the creation of the proposed District.⁵ The Executive Director respectfully disagrees with the ALJs' decision. The Executive Director recommends that the Commission find the Applicant met its burden of proof on all requirements

¹ Proposal for Decision, SOAH Docket No. 582-23-26772, TCEQ No. 2023-0566-DIS, at 62.

² TEX. WATER CODE § 54.015, relating to Contents of Petition.

³ PFD at 15.

⁴ PFD at 46.

⁵ PFD at 62.

with regard to the applicable statutes and rules, and that the Commission grant the Petition for the Creation of Shankle Road Municipal Utility District of Ellis County.

II. 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 TWC § 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.

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:

- (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.⁶

III. DISCUSSION

In the PFD, the ALJs found that the Applicant met the burden for all of the above factors in Tex. Water Code § 54.021(b), except for proving the reasonableness of projected construction costs under Tex. Water Code § 54.021(b)(2).⁷ The ALJs determined that under the statutory standard of Tex. Water Code § 54.021(a) and

⁶ TEX. WATER CODE § 54.021(b).

⁷ PFD at 62.

30 Tex. Admin. Code § 293.11(c)(5)(J) governing the Commission's disposition of the Petition, the Applicant's engineering report failed to provide complete justification for creation of the district supported by evidence that the project is feasible, practicable, necessary, and will benefit all of the land to be included in the district.⁸ Upon finding that the Applicant has not satisfied all of the applicable statutory and regulatory requirements for the creation of the proposed District, the ALJs recommended that the Applicant's Petition be denied.

Executive Director's Review of District Creation Applications

In their review of a district creation application, the Executive Director's Staff in the Districts Section is tasked with determining whether the required materials and data have been provided pursuant to 30 Tex. Admin. Code § 293.11(a), and for municipal utility district creation applications, the required items also listed in 30 Tex. Admin. Code § 293.11(d). Among these required items under 30 Tex. Admin. Code § 293.11(d) for a municipal utility district creation application is:

- (1) a preliminary engineering report including as appropriate:
 - (A) a description of existing area, conditions, topography, and proposed improvements;
 - (B) land use plan;
 - (C) 100-year flood computations or source of information;
 - (D) existing and projected populations;
 - (E) tentative itemized cost estimates of the proposed capital improvements and itemized cost summary for anticipated bond issue requirement;
 - (F) projected tax rate and water and wastewater rates;
 - (G) an investigation and evaluation of the availability of comparable service from other systems including, but not limited to, water districts, municipalities, and regional authorities;

⁸ PFD at 59.

- (H) an evaluation of the effect the district and its systems and subsequent development within the district will have on the following:
 - (i) land elevation;
 - (ii) subsidence;
 - (iii) groundwater level within the region;
 - (iv) recharge capability of a groundwater source;
 - (v) natural run-off rates and drainage; and
 - (vi) water quality;
- (I) a table summarizing overlapping taxing entities and the most recent tax rates by those entities; and
- (J) complete justification for creation of the district supported by evidence that the project is feasible, practicable, necessary, and will benefit all of the land to be included in the district.⁹

While the Districts Section's review does entail determining whether an applicant has provided sufficient material and data, including whether the preliminary engineering report addresses the required components specified in 30 Tex. Admin. Code § 293.11(d)(5), the Districts Section is not tasked with independently verifying the veracity of these materials and data.¹⁰ The Districts Section relies on these representations made by the applicant in making their technical memoranda, which contains the District Section's determination and recommendation to the Commission of whether an application should be approved or disapproved.¹¹

Reasonableness of Projected Construction Costs

The ALJs found that the Applicant failed to meet its burden to prove the reasonableness of projected construction costs.

As part of a MUD creation application, TCEQ rules require applicants to submit a preliminary engineering report that includes tentative itemized cost estimates of the proposed capital improvements, as well as an itemized cost summary for anticipated bond issuance requirement.¹²

⁹ 30 TEX. ADMIN. CODE § 293.11(d)(5).

¹⁰ *See* 30 TEX. ADMIN. CODE § 293.5.

¹¹ *See id.*

¹² 30 TEX. ADMIN. CODE § 293.11(d)(5)(E).

Evidence in the record establishes that the projected costs are based on estimated construction costs. The Applicant's preliminary engineering report includes an itemized table that shows the following costs:

- Earthwork: \$3,404,731.48
- Onsite Water Distribution System: \$1,706,374.36
- Onsite Sanitary Sewer Collection System: \$1,878,912.22
- Storm Drainage System: \$6,104,297.20
- Paving - Residential: \$6,705,855.37
- Erosion Control: \$79,498.80
- Street Sign and Lighting: \$1,011,844.78
- Subtotal Construction Costs: \$20,891,514.21
- 10% Contingency: \$2,089,151.42
- TOTAL CONSTRUCTION COSTS: \$22,980,665.63¹³

On behalf of the Executive Director, Mr. James Walker testified that he considered the Applicant's estimated costs appear to be reasonable during his technical review based on the information provided.¹⁴ While the ALJs gave Mr. Walker's testimony "little weight,"¹⁵ Mr. Walker's review does not entail performing any independent evaluation as to the accuracy of the estimated costs contained in the Applicant's engineering report.

The ALJs did however give great weight to Ellis County's expert, stating that Gary Hendricks' "superior experience" result in "more reliable" estimates than those provided by the Applicant's witness, Yash Farah.¹⁶ The ALJs went on to state that Mr. Hendricks' explanations for his higher estimates were "clearer" than the Applicant's.¹⁷

Experts will disagree as to construction prices. The discrepancy between the estimated cost by the Applicant and the Protestant does not render the applicant's construction costs unreasonable. The Texas Water Code and TCEQ rules do not provide any standard for determining reasonableness of estimated construction costs.

¹³ App. Ex. 8, Preliminary Engineering Report, 0017.

¹⁴ Prefiled Testimony of James Walker, ED-JW-1, at 0010:3-15; Tr. 166 (Walker).

¹⁵ PFD at 45.

¹⁶ *Id.* at 45-46.

¹⁷ *Id.* at 46.

Texas Water Code § 54.021(b)(2) requires the commission to consider, “the reasonableness of *projected* construction costs, tax rates, and water and sewer rates.”¹⁸ Furthermore, 30 Tex. Admin. Code § 293.11(d)(5) requires an applicant to submit a *preliminary* engineering report, which is signed and sealed by the Applicant’s engineer, containing a statement of the *estimated* project cost¹⁹. There is nothing in the TCEQ rules or the Texas Water Code which calls for finalized (or close to finalized) costs at this stage of the district creation process as the ALJs appear to be requiring. The projected construction costs will undoubtedly change over time, as they inevitably have in virtually every district creation application that has been submitted to the TCEQ.

Lastly, the ED points to the guidance provided in Chairman Niermann’s Change Document from the Commission’s discussion of the Ellis Ranch MUD No.1 PFD at the June 26, 2024 agenda meeting.²⁰ The 5th bullet on page one of the document states, in full, “Although the ALJs based their conclusion that the construction costs are unreasonable on there being a difference of opinion between the Applicant and the Protestant on construction costs, the discrepancy between the estimated costs by the Applicant and the Protestant does not render the Applicant’s construction costs unreasonable.”²¹ The ED would argue that this direction applies to the case at hand.

IV. ADDITIONAL COMMENTS

The ED would also like to comment on the ALJs’ statement that Mr. Walker “has no apparent experience with estimating costs for real estate development, and he testified that he did not consider Mr. Farah’s lack of experience, nor did he independently investigate how Mr. Farah had arrived at his estimates or whether they were reasonable.”²² In that same paragraph, the ALJs go on to assert that Mr. Walker’s review of the district creation application, “consisted of little more than

¹⁸ Emphasis added.

¹⁹ *Id.*

²⁰ TCEQ, Chairman’s Change Document, Commissioners’ Agenda, Jun. 26, 2024, Item No. 2, Petition by BRBK Edgewood, LLC for the Creation of Ellis Ranch Municipal Utility District No. 2 of Ellis County, TCEQ Docket No. 2022-1157-DIS, SOAH Docket No. 582-23-11658. Available at: <https://www.tceq.texas.gov/downloads/agency/decisions/agendas/backup/2022/2022-1157-dis-change-document.pdf>.

²¹ *Id.*

²² PFD at 45.

confirming that Applicant had provided a cost projection and had represented that it was reasonable.”²³

The ED is unaware of any authority that requires the technical reviewer of district creation applications to be experienced with real estate development cost estimations, nor is the ED aware of any authority that also requires the technical reviewer to independently research an applicant’s cost estimates. The preliminary engineering report is signed and sealed by a professional engineer and the ED relies on the engineer’s representations. The ALJs appear to imply that they find this somehow insufficient for this application. If that is accurate, the ED disagrees with this implication. Mr. Walker’s prefiled testimony clearly states the scope of his participation in the case at hand.²⁴ Later on in his testimony, Mr. Walker explains the nature of the projected construction costs for the proposed District, as well as his determination on the reasonableness of such costs.²⁵ In sum, Mr. Walker did exactly what is required for technical reviewers during this stage of the district creation process.

V. CONCLUSION

In their Proposal for Decision, the ALJs appear to call for final construction costs rather than the statutorily required projected costs. The standard for creating a MUD is established in Chapter 54 of the Texas Water Code and may not be changed through the hearing process. An applicant should not be held to standards that did not exist at the time of the application.

As such, the ED respectfully recommends that the Commission not adopt the ALJ’s proposed order. Rather, the ED recommends finding that the Applicant has met all requirements with regard to the applicable statutes and rules and grant the Petition for Creation of the Shankle Road Municipal Utility District of Ellis County.

²³ *Id.*

²⁴ ED-JW-1 at 0005:26 - 0006:11.

²⁵ *Id.* at 0009:8 - 0011:18.

Respectfully submitted,

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REPRESENTING THE
EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

CERTIFICATE OF SERVICE

I certify that on September 26, 2024, a true and correct copy of the foregoing document was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, inter-agency mail, electronic submittal, or by deposit in the U.S. Mail.



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