

SOAH DOCKET NO. 582-24-19086
TCEQ DOCKET NO. 2024-0671-DIS

APPLICATION OF STEPHEN
SELINGER FOR THE
CREATION OF ELLIS COUNTY
MUNICIPAL UTILITY DISTRICT
FM 984

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BEFORE THE STATE
OFFICE OF
ADMINISTRATIVE HEARINGS

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

COMES NOW, the Executive Director (“ED”) of the Texas Commission on Environmental Quality (“TCEQ” or “Commission”) and files this reply to the exceptions in the above-referenced matter.

I. Overview

The Executive Director supports the ALJ’s findings that the Applicant did not meet his burden of proof that the Petition meets all applicable requirements. For the reasons articulated in this reply, the ED argues there is no basis for the changes to the PFD proposed by both the Applicant and Protestants. Therefore, the ED respectfully requests that the Commission adopt the ALJ’s proposed order, with the ED’s recommended changes presented in her original exceptions to the PFD, and deny the petition.

II. Response to the Applicant’s Exceptions

In his exceptions, the Applicant asserts that the ALJ made three “mistakes” with the determinations in the PFD regarding proposed construction costs, setback requirements for wastewater infrastructure, and the determination of the proposed district’s feasibility. The ED argues that these arguments are without merit and the PFD should not be revised.

A) Proposed Construction Costs

In the PFD, the ALJ determined that the Applicant failed to establish that the construction costs were reasonable due to the discrepancies between the Petition and the Applicant’s experts. The Applicant argues that the figures the ALJ concluded in the PFD are incorrect and that the actual costs are lower than

what the ALJ concluded. The ED argues that the Applicant's argument is flawed and that the ALJ's conclusions are correct.

After reviewing the Applicant's expert's direct testimony and evidence, the ED's witness concluded that there was insufficient evidence to support the creation.¹ The Applicant submitted revised figures for new construction costs which exceeded those originally filed by 8.5 million dollars.² The ED's witness emphasized that the technical review is based on materials submitted with the original petition.³ The new evidence the Applicant submitted undermined the ED's original conclusions in the application, and the ED's witness could not support the creation with this evidence.

The ED supports the ALJ's findings as to this issue and respectfully requests that the Commission reject the Applicant's proposed revisions to the PFD.

B) Setback Requirements of 30 TAC 290.41

In the PFD, the ALJ cited to the ED's and Protestants' arguments regarding the discrepancies as to the total number of lots in the proposed district. The Applicant argues that the ALJ should have ruled that TCEQ's requirements within 30 TAC 290.41 did not prohibit homes from being constructed within a sanitary sewer easement. The ED argues that the Applicant's arguments are incorrect and ignore TCEQ's regulations. While exceptions exist for certain regulations, TCEQ rules do impose setback requirements and the Applicant has failed to produce evidence that would provide him the authority to construct homes within a 150 foot sanitary easement as prescribed in the rules.

While the Applicant requests that the ALJ rule on a setback requirement, there are fundamental flaws with the Applicant's petition based on the additional evidence presented at the hearing. Even if the ALJ were to accept the Applicant's arguments that the Protestants and ED are incorrect, the discrepancies as to the construction costs and total number of lots affect the projects feasibility and

¹ ED-JT-1 at 5: 21-23 (Bates 6).

² Transcript at 76: 4-10.

³ ED-JT-1 at 5: 24 - 7: 26 (Bates 6-8).

practicability. As the ALJ notes, the Applicant's testimony exacerbated confusion in the hearing and ultimately was a detriment to the Applicant's case.

The ED supports the ALJ's findings as to this issue and respectfully requests that the Commission reject the Applicant's proposed revisions to the PFD.

C) The District's Feasibility

In the PFD, the ALJ determined that the district was neither feasible nor practicable based on the new construction costs and the discrepancies in the record about the number of homes to be constructed within the district. The ALJ rejected the Applicant's arguments that revenue shortfalls could be addressed by the increased value of homes when they are constructed as the Applicant did not provide evidence in support of this argument. In his exceptions, the Applicant argued that the ALJ mischaracterized his arguments and that that the ALJ should accept a new calculation based on 204 homes that the Applicant argues were incorrectly deducted from the application.

The Applicant's recommendations are not supported by evidence and exacerbate the confusion as to what the project actually entails. The ED supports the ALJ's findings as to this issue and respectfully requests that the Commission reject the Applicant's proposed revisions to the PFD.

III. Response to Protestants' Exceptions

The Protestants generally accept the ALJ's recommendation to deny the petition but have specific objections to the ALJ's determinations that the District will not have unreasonable effects on land elevation, subsidence, natural run-off rates and drainage, water quality, and total tax assessments within the district. The Protestants present two arguments in support of their claims. The first being that the Applicant did not present sufficient evidence to support the materials in the petition and engineering report. The second was that the ED's witness did not perform a sufficient technical review of the petition materials and that Mr. Taack's conclusions of the petition's statutory and regulatory compliance are conclusory.

In response to the Protestants' assessment of the ED's witness' review of the application, their arguments are incorrect and their recommendations to the PFD should be denied.

The ED's witness Justin Taack clearly established that he performed a technical review of the petition pursuant to all applicable TCEQ regulations and policies.⁴ This review assessed all the criteria outlined in Texas Water Code (TWC) § 54.021 and initially concluded that the applicant met the applicable requirements for the district to be created.⁵ In Mr. Taack's testified that he conducted the review as he did for all previous creation reviews.⁶ Mr. Taack also testified that the original findings in the engineering report submitted with the application adequately addressed all the factors of TWC § 54.021.⁷

The protestants' characterization of Mr. Taack's work is undermined by the length and breadth of the ED's technical memo.⁸ Each of the issues the Protestants identified in their exceptions was evaluated in the ED's technical memo and was supported by Mr. Taack's testimony.⁹ As further evidence of Mr. Taack's diligence in reviewing the application, the ED reversed her position based on the additional evidence the Applicant submitted pursuant to 30 TAC § 80.108. The evidence in the record establishes that the ED performed all her obligations under the applicable TCEQ rules and statutes within Chapter 54 of the Water Code.

The ED supports the ALJ's findings and respectfully requests that the Commission reject the Protestants' proposed revisions to the PFD.

IV. CONCLUSION

The Executive Director completed a full technical review of the petition. Pursuant to her rights and responsibilities under TCEQ rules, she reversed her position

⁴ ED-JT-1 at 3: 25 - 4: 8 (Bates 4-5).

⁵ ED-JT-3.

⁶ ED-JT-1 at 4: 1-2 (Bates 5).

⁷ ED-JT-1 at 4: 3-8 (Bates 5).

⁸ ED-JT-3.

⁹ ED-JT-1 at 4: 1-8 (Bates 5).

based on the Applicant's additional evidence as it became clear that the evidence in the record did not support the creation.

The ED supports the findings and conclusions contained in the ALJ's PFD and respectfully recommends the Commission revise the Findings of Fact, Conclusions of Law, and Proposed Order, as reflected in the ED's Exceptions. The ED also requests that the Commission reject both the Applicant's and Protestants' proposed changes to the PFD.

Respectfully submitted,

Texas Commission on Environmental Quality

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V. 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 address listed below on this 30th day of July, 2025.

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