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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

January 30, 2012

Bridget Bohac, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

RE: **SOUTH PORT ALTO MUNICIPAL UTILITY DISTRICT**
TCEQ DOCKET NO. 2011-1786-DIS

Dear Ms. Bohac:

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

Sincerely,

James B. Murphy, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2011-1786-DIS

IN THE MATTER OF THE PETITION FOR CREATION OF SOUTH PORT ALTO MUNICIPAL UTILITY DISTRICT; INTERNAL CONTROL NO. 03012010-D02	BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO REQUESTS 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 Requests for Hearing in the above-referenced matter and respectfully shows the following.

I. Introduction

A. Background of District

Ms. Wanda Roberts, attorney on behalf of over 50 individuals (Petitioners), has filed an application and petition for the creation of the South Port Alto Municipal Utility District (District) in Calhoun County. According to the petition, Petitioners are collectively the holder of title to a majority in value of the lands situated in the area designated for the District as shown in the tax rolls of the central appraisal district for Calhoun County. The proposed District will purchase, construct, acquire, improve, extend, maintain, and operate a wastewater system for residential and commercial purposes, and will maintain and operate additional facilities, systems, plants, and enterprises consistent with the purposes for which the District is created and permitted under State law. The petition also states the proposed District contains approximately

56.6 acres located in Calhoun County, entirely outside the corporate boundaries of any city or the extraterritorial jurisdiction of any city, town, or village.

According to the petition, a preliminary investigation determined the cost of the project will be approximately $1,890,000—$630,000 for the waterworks system and $1,260,000 for the sanitary works system. The acquisition, financing, operation, and maintenance of the waterworks system is not proposed for approval as part of the petition for creation of the District.

B. Procedural Background

The Commission received this application on February 19, 2010. The Executive Director (ED) declared the application administratively complete on March 11, 2010. According to an affidavit of publication, Petitioners published notice of the petition in the *Port Lavaca Wave*, a newspaper regularly published or circulated in Calhoun County, on June 26, 2010 and July 3, 2010. According to an affidavit of posting of notice, Petitioners posted notice of the petition on the bulletin board used for posting legal notices at the Calhoun County Courthouse on June 29, 2010. The deadline to file comments and a request for a contested case hearing was August 2, 2010.

The Commission received letters during the comment period from Millard Brisbois and Lucille Brisbois, Ronald Crain and Evelyn Crain, Joe Freeman and Suzanne Freeman, Kristine Naiser, David Sappington, and Chester L. Zwahr and Nelda Zwahr, requesting removal of their names from the petition for creation. The Commission also received a letter from Calhoun County Judge Michael J. Pfeifer on behalf of the Calhoun County Commissioner's Court on July 12, 2010 recommending approval of the petition.

The Commission received timely comments and requests for a contested case hearing from: Robert L. (R.L.) Bolleter on July 21, 2010 and additional comments on

July 28, 2010 and August 9, 2010; Frederick J. Dennick, Jr. and Jane F. Dennick on July 26, 2010 and an additional request for information from Mr. Dennick on January 23, 2012; Harry G. Forbes, Jr. and Patricia A. Forbes on July 27, 2010; Claudia D. Haas on August 2, 2010; Frank Hurta and D'Ann Hurta on August 2, 2010; Paul E. Lawson on July 20, 2010; James C. Towers on August 2, 2010; and Jesse Wood on July 6, 2010. For the reasons discussed below, OPIC recommends granting all of the hearing requests.

C. Subsequent Amendment to Application

Sometime after the close of the comment period, the Commission received revised application materials indicating that the District intends to purchase the existing Sunilandings Utility, which includes a 25,000 gallons per day (gpd) wastewater treatment plant, and the Enchanted Harbor Utility. The District proposes to increase the capacity of the existing facility to 50,000 gpd to provide service to the District and enhance service to existing Sunilandings customers. The revised application reduces the size of the District from 56.6 acres to 52.5 acres, due to removal of the parcel designated as the site for the proposed new wastewater facility. The revised application also increases the projected cost of the project from $1,890,000 to $2,261,000, which accounts for the purchase of and subsequent upgrades to the existing facility. The ED issued his Technical Memorandum on the revised application on August 31, 2011.

II. Applicable Law

A municipal utility district (MUD or district) may be created under and subject to the authority, conditions, and restrictions of Article XVI, Section 59, of the Texas Constitution. TEX. WATER CODE § 54.011. Chapters 49 and 54 of the Texas Water Code (TWC) and the Commission's administrative rules at Title 30, Chapter 293, of the Texas

Administrative Code (TAC) govern petitions to create a MUD. A district is 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, semi-arid, and other land needing irrigation;
> (3) the reclamation and drainage of its overflowed land and other land needing drainage;
> (4) the conservation and developments 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.

In order to create a MUD, a petition requesting creation shall be filed with the Commission. TWC § 54.014. "The petition shall 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. If there are more than 50 persons holding title to the land in the proposed district, as indicated by the tax rolls of the central appraisal district, the petition is sufficient if it is signed by 50 holders of title to the land." TWC § 54.014. 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) (Information Required to Accompany Applications for Creation of Districts).

If all or part of the district is proposed to be located outside the extraterritorial jurisdiction of a city, 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). In the event of a review by the county, the commissioners court shall 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 think would assist the commission in making a final determination on the petition. TWC § 54.0161(b). The Commission shall consider the written opinion submitted by the county commissioners. TWC § 54.0161(c).

The Commission shall grant the petition if it conforms to the requirements of TWC § 54.015 and the project is feasible, practicable, and necessary and 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 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.

TWC § 54.021(b). If not all of the land proposed to be included in the district will be benefited by the creation of the district, the Commission 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 shall deny the petition. TWC § 54.021(d). The rights, powers, privileges, authority, and functions of a district shall be 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. In addition, 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 shall hold a public hearing if requested by the Commission, ED, or an "affected person" under the factors in 30 TAC Chapter 55. TWC § 49.011(c). *See also* 30 TAC § 55.251(a) (applying rules on 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 (Creation Notice Actions and Requirements).

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 noting the "requestor's location and distance relative to

the activity" 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." 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 but are not limited to:

> (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).

A group or association may request a contested case hearing if:

> (1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;
> (2) the interests the group or association seeks to protect are germane to the organization's purpose; and
> (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

30 TAC § 55.252(a). The ED, OPIC, or applicant may request the group or association provide an explanation of how the group or association meets these requirements. 30 TAC § 55.252(b).

The Commission shall grant a request for a contested case hearing if (1) the request is made by the applicant or the ED, or (2) the request is made by an affected person, timely filed with the chief clerk, and made pursuant to a right to hearing authorized by law. 30 TAC § 55.255(b).

III. Discussion

A. Hearing Requests

Robert L. (R.L.) Bolleter timely filed a request for a contested case hearing. His request states that he resides at 119 Marshall Johnson Ave. S., which is within the proposed MUD boundary. He states that he uses an approved septic system and has no need for the wastewater services to be provided by the MUD. He also states that an existing wastewater treatment plant is located about 300 yards from the proposed MUD boundary and could be expanded to serve those within the proposed MUD. He questions the adequacy of the Calhoun County Commissioner's Court review, specifically short notice of the hearing and its limited factual basis. He also questions the appraisal used to support the proposed tax rate. Based on the location of his property within the proposed MUD and the accompanying increase in his tax obligation, OPIC concludes Robert L. (R.L.) Bolleter is an affected person.

Frederick J. Dennick, Jr. and Jane F. Dennick timely filed a request for a contested case hearing. Their request states that they own property at 630 Marshall Johnson Drive S., described as Lot 42, Arnold Koop, which is within the proposed MUD boundary. Based on the location of their property within the proposed MUD and the

accompanying increase in their tax obligation, OPIC concludes Frederick J. Dennick, Jr. and Jane F. Dennick are affected persons.

Harry G. Forbes, Jr. and Patricia A. Forbes timely filed a request for a contested case hearing. Their request states that they own a home at 223 Marshall Johnson Ave. N., which is within the proposed MUD boundary. Mr. and Ms. Forbes state that they have a fully functioning septic tank and have no need for the proposed facilities. They question the need for the proposed facility when an existing plant is nearby that could be expanded. They state that taxes are already high in this area. They also state that they are part-time residents in Calhoun County and are unable to vote on county issues. Based on the location of their property within the proposed MUD and the accompanying increase in their tax obligation, OPIC concludes Harry G. Forbes, Jr. and Patricia A. Forbes are affected persons.

Claudia D. Haas timely filed a request for a contested case hearing. Her request states that she owns property described as Enchanted Harbor Section 2, Lot 644 and Enchanted Harbor Block 16, Lots 593, 594, and 646, which are within the proposed MUD boundary. She states that she invested $6,000 in a septic system and cannot afford additional costs for wastewater treatment. She questions the need for the proposed facility when a nearby existing facility has the capacity to handle wastewater from the proposed MUD. She also states that a nearby property owner outside the proposed boundary will benefit from the proposed MUD because it will increase property values in the area but will not increase that owner's tax burden. Based on the location of her property within the proposed MUD and the accompanying increase in her tax obligation, OPIC concludes Claudia D. Haas is an affected person.

Frank Hurta and D'Ann Hurta timely filed a request for a contested case hearing. Their request states that they own property described as Enchanted Harbor, Block 16, Lot 590, 591, 596, and 597, and Enchanted Harbor Section 2, Lot 643, which are within the proposed MUD boundary. They state that they purchased extra lots so they could install a licensed septic system. They question the need for the proposed facility when an existing nearby facility could be expanded. They also question the motivation behind creation of the proposed MUD. They state that additional taxes would be a financial hardship. They also state that their homestead is in a different county and they are unable to vote on this matter. Based on the location of their property within the proposed MUD and the accompanying increase in their tax obligation, OPIC concludes Frank Hurta and D'Ann Hurta are affected persons.

Paul E. Lawson timely filed a request for a contested case hearing. His request states that he owns property at 509 Marshall Johnson Ave., described as Enchanted Harbor, Section 2, Lot 507–09, and 647–49, which are within the proposed MUD boundary. He states that he has an aerobic treatment system and will not benefit from the proposed facility. He states that he should not have an additional tax burden to assist neighbors who have not installed proper septic systems. He also states that the proposed MUD is too small and not feasible from an economic or engineering standpoint. He questions the need for the facility when an existing facility is nearby. He requests denial of the petition or exclusion from the boundaries of the proposed district. Based on the location of his property within the proposed MUD and the accompanying increase in his tax obligation, OPIC concludes Paul E. Larson is an affected person.

James C. Towers timely filed a request for a contested case hearing. His request states that he owns 21 lots in Sunilandings, which is within a few hundred feet of the

proposed boundary. He states that he gathers oysters for consumption near the proposed facility's effluent discharge point. He is concerned additional effluent discharges will adversely affect his health and nearby commercial oyster reefs. He questions the need for the proposed facility when an existing facility nearby could handle the capacity. He also states that the existing facility would see fewer shocks due to weekend use because throughput would increase. He is concerned about the location of the proposed facility because it is within a protective easement for wetlands.

Although his property is located outside the proposed MUD boundary, OPIC concludes James C. Towers is an affected person. He regularly gathers and eats oysters nearby the proposed discharge point in a way not common to members of the general public. Under TWC § 54.021(b)(3)(F), the Commission must consider when evaluating a district creation petition the issue of whether a district's subsequent development will have an unreasonable effect on water quality. As a result, the factors under 30 TAC § 55.256(c)(1), (3)–(4), and (5) have been met by his request. There is a clear link between his recurring use of the oyster reef potentially affected by the proposed facility and the requirements the Commission considers when evaluating whether to approve a petition for creation of a district.

Jesse Wood timely filed a request for a contested case hearing. His request states that he is the holder of the Certificate of Convenience and Necessity (CCN) for the land proposed for inclusion in the district. He states that the MUD organizers have refused to communicate with him. He also states that the appraisal numbers used by the Petitioners are flawed. He states that he has received no written notice from the Petitioners of the application. He is concerned that many residents will not be qualified to vote in county decisions because they are not full-time residents. Based on potential

effects on the service area conferred by his CCN, OPIC concludes Jesse Wood is an affected person.

OPIC notes that Mr. Wood submitted a letter dated January 16, 2011 to the Utilities and Districts Section of the Commission that stated his intent to sell his CCNs and accompanying facilities to the proposed MUD. To OPIC's knowledge, however, Mr. Wood has not withdrawn his hearing request. In addition, the intent to sell appears to have expired on December 31, 2011, and may no longer be valid. *See* Letter from H.J. Houck to Jesse Wood dated January 26, 2011, at ¶ 1. Regardless of the intent to sell, Mr. Wood still owns the CCN and facilities and remains an affected person. Accordingly, OPIC recommends that the Commission find Jesse Wood is an affected person.

B. Public Notice

Due to the amendment of the application after the public comment period, OPIC recommends publication of notice of the revised application. The amendment increases the projected cost of the project by $371,000, which represents a significant increase in the tax burden on homeowners within the proposed MUD from what the District previously proposed and published. In addition, the District proposes a completely different solution to its wastewater treatment concerns—purchase and upgrade of an existing system instead of construction. These changes are significant enough that some residents may decide to protest who previously did not. In addition, many of the hearing requesters expressed concern about constructing a new facility when a nearby facility was available to upgrade. The revised application may address those concerns and result in withdrawn hearing requests.

Furthermore, the revised application presents a new issue that may impact persons outside of the proposed MUD boundary. In conjunction with purchasing and

upgrading the neighboring wastewater and water systems, the District may propose a change in rates to upgrade the facility for both existing customers and those within the proposed MUD. *See* Technical Memorandum from Izzy Polcyn, Districts Bond Team, to Linda Brookins, Director, Water Supply Division (August 31, 2011), at 6. As a result, they should receive public notice of the application.

If the Commission grants one or more hearing requests but declines to require publication of the revised application, OPIC requests the Commission require the District to publish notice of the hearing. Ordinarily, public notice of the hearing on a district creation petition is not required. TWC § 49.011(d). Given the circumstances here, however, public notice of the revised application is appropriate for the reasons discussed above. Although public notice of the hearing will not allow for an additional public comment period, which OPIC argues could be beneficial, publication of the hearing notice provides affected persons the opportunity to contest the revised application.

C. Withdrawn Petition Signatures

The Commission received letters during the comment period from persons who signed the petition for district creation requesting removal of their names from the petition. Assuming withdrawal of the signatures has any legal effect, it appears the 50 signature threshold for a petition under TWC § 54.014 remains met and the withdrawals do not defeat the petition. Based on available materials, OPIC is unable to determine whether the signatories represent a majority in value in the land in the proposed district. If the Commission has concerns on this jurisdictional issue, OPIC recommends the Commission refer the preliminary factual question of whether TWC § 54.014 has been met to SOAH.

IV. Conclusion

OPIC recommends granting the hearing requests from Robert L. (R.L.) Bolleter, Frederick J. Dennick, Jr. and Jane F. Dennick, Harry G. Forbes, Jr. and Patricia A. Forbes, Claudia D. Haas, Frank Hurta and D'Ann Hurta, Paul E. Lawson, James C. Towers, and Jesse Wood, and referring the matter to SOAH for a contested case hearing. OPIC further recommends public notice of the revised application or, in the alternative, public notice of the contested case hearing.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2012 the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Requests for Hearing was filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.

_____
James B. Murphy

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TCEQ DOCKET NO. 2011-1786-DIS

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