

Bryan W. Shaw, Ph.D., P.E., *Chairman*  
Toby Baker, *Commissioner*  
Zak Covar, *Commissioner*  
Richard A. Hyde, P.E., *Executive Director*



*Vic McWherter, Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

December 29, 2014

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: JPH CAPITAL, LTD.  
TCEQ DOCKET NO. 2014-1402-DIS**

Dear Ms. Bohac:

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

Sincerely,

A handwritten signature in cursive script that reads "Aaron Tucker".

Aaron Tucker, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure



**TCEQ DOCKET NO. 2014-1402-DIS**

<b>PETITION BY JPH CAPITAL, LTD</b>	<b>§</b>	<b>BEFORE THE</b>
<b>FOR CREATION OF TRAVIS COUNTY</b>	<b>§</b>	<b>TEXAS COMMISSION ON</b>
<b>MUNICIPAL UTILITY DISTRICT NO. 22</b>	<b>§</b>	<b>ENVIRONMENTAL QUALITY</b>
<b>IN TRAVIS COUNTY</b>	<b>§</b>	

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S  
RESPONSE TO HEARING REQUESTS**

**To the members of the Texas Commission on Environmental Quality:**

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (TCEQ or the "Commission") files this Response to Hearing Requests.

**I. Introduction**

On November 26, 2013, JPH Capital, Ltd. ("petitioner") filed a petition for the creation of Travis County Municipal Utility District No. 22 pursuant to Article XVI, Section 59 of the Texas Constitution and Chapters 49 and 54 of the Texas Water Code. The application was declared administratively complete on December 18, 2013. On April 17 and April 24, 2014, the Notice of District Petition was published in the *Lake Travis View/Westlake Picayune*. The petitioners also posted notice of the petition on the bulletin board used for legal notices in Travis County on May 15, 2014. According to the notice, the proposed municipal utility district shall consist of approximately 910.923 acres and would be located entirely within Travis County.

In response to the notice, the TCEQ timely received requests for a contested case hearing from attorney Eric Allmon on behalf of Hamilton Pool Road Matters ("HPR Matters"). HPR Matters submitted both an initial hearing request received by fax on April 30, 2014 and by mail on May 2, 2014 as well as a supplemental hearing request received by fax on May 23, 2014 and by mail on May 27, 2014

For the reasons discussed herein, the OPIC recommends that the Commission grant the hearing requests.

## **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 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, 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**

The Office of the Chief Clerk received timely filed requests for a contested case hearing on the creation of Travis County MUD No. 22 from the nonprofit HPR Matters. In order for a group or association to request a contested case hearing it must meet all three requirements of 30 TAC § 55.205(a). OPIC recommends that the Commission find HPR Matters to be an “affected person” because: (1) its members would otherwise have standing to request a hearing in their own right, (2) the interests it 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.

The members of HPR Matters would otherwise have standing to request a hearing in their own right because the individuals identified in the hearing requests meet the definition of an “affected person.” 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). 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).

In its hearing requests, HPR Matters states that several of its members will be adversely impacted by the authorization, activities, and subsequent development of the district. Specifically, HPR Matters asserts that the provision of water service, wastewater service, and wastewater treatment by the district, as well as subsequent development, will adversely affect natural run-off rates and drainage, groundwater and surface water quality, as well as the recharge capability of area groundwater. Under TWC § 54.021(b)(3)(D)–(F), the Commission must consider when evaluating a district creation petition the issue of whether a district, its system, and subsequent development will have an unreasonable effect on the recharge capability of a groundwater source, natural run-off rates and drainage, and water quality. In its hearing request, HPR Matters identified five members of the group (Judy Hendricks, Mehrad Morabbi, Jessica Tennant, Dick Hanson, and Kathie Hanson) who would be affected by the district. All of these individuals own property either immediately adjacent to the proposed district boundary and/or just downstream of the proposed district on Little Barton Creek. HPR Matters asserts that creation of the district and the subsequent development could adversely impact the members' use and enjoyment of their properties and/or the members' use and enjoyment of Little Barton Creek.

OPIC concludes that the individuals identified in the hearing requests would qualify as affected persons because the factors under 30 TAC § 55.256(c) have been met. First, the individuals' interest in the district's effect on the recharge capability of a groundwater source, natural run-off rates and drainage, and water quality is one protected by Section 54.021 of the Texas Water Code. Second, no distance restrictions or other limitations are imposed by law on the affected interest. Third, a reasonable relationship exists between the individuals' interest in

the protection of water resources and the creation and subsequent development of the MUD. Finally, the fact that the individuals own property either immediately adjacent to the proposed district boundary and/or just downstream of the proposed district on Little Barton Creek indicates that the district is likely to impact the use and enjoyment of their property and Little Barton Creek. As a result, OPIC concludes that each of the individual members identified in the hearing request would be an “affected person.”

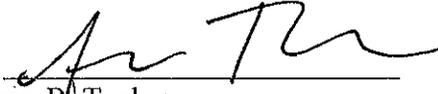
Additionally, the interests HPR Matters seeks to protect are germane to the organization’s purpose. In its hearing requests, HPR Matters states that is a Texas nonprofit corporation whose purpose includes the protection of the natural environment along and near Hamilton Pool Road. Specifically, HPR Matters seeks to protect surface water and groundwater sustainability, as well as minimize the adverse impact of the contamination or use of such water on residents in southwest Travis County. In its hearing requests, HPR Matters raises issues about natural run-off rates and drainage, groundwater and surface water quality, as well as the recharge capability of area groundwater from the creation of a district along Hamilton Pool Road in southwest Travis County. These interests are germane to the organizational purpose of HPR Matters. Finally, OPIC recommends the Commission grants the hearing requests of HPR Matters because neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

#### **IV. Conclusion**

For the reasons set forth above, the OPIC recommends the Commission grant the hearing requests from HPR Matters and refer the matter to SOAH for a contested case hearing.

Respectfully submitted,

Vic McWherter  
Public Interest Counsel

By   
Aaron B. Tucker  
Assistant Public Interest Counsel  
State Bar No. 24088553  
P.O. Box 13087, MC-103  
Austin, TX 78711-3087  
Tel: 512-239-5757  
Fax: 512-239-6823

**CERTIFICATE OF SERVICE**

I hereby certify that on December 29, 2014 the original and seven true and correct copies of the Office of the Public Interest Counsel's Response to Hearing Requests were 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 or by deposit in the U.S. Mail.

A handwritten signature in black ink, appearing to read "Aaron B. Tucker", written over a horizontal line.

Aaron B. Tucker

**MAILING LIST  
JPH CAPITAL, LTD.  
TCEQ DOCKET NO. 2014-1402-DIS**

FOR THE APPLICANT:

Anthony S. Corbett  
Freeman & Corbett LLP  
8500 Bluffstone Cove, Suite B104  
Austin, Texas 78759-7811  
Tel: 512/451-6689 Fax: 512/453-0865

REQUESTER:

Eric Allmon  
Frederick, Perales, Allmon & Rockwell  
707 Rio Grande Street, Suite 200  
Austin, Texas 78701-2733

FOR THE EXECUTIVE DIRECTOR

Kayla Murray, Staff Attorney  
TCEQ Environmental Law Division  
MC-173  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: 512/239-0600 Fax: 512/239-0606

Thomas Glab, P.E.  
TCEQ Water Supply Division, MC- 152  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: 512/239-4958 Fax: 512/239-2214

Brian Christian, Director  
TCEQ Environmental Assistance  
Division, MC-108  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: 512/239-4000 Fax: 512/239-5678

FOR ALTERNATIVE DISPUTE  
RESOLUTION

Kyle Lucas  
TCEQ Alternative Dispute Resolution,  
MC-222  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: 512/239-4010 Fax: 512/239-4015

FOR THE CHIEF CLERK:

Bridget Bohac  
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

