

Bryan W. Shaw, Ph.D., *Chairman*
Carlos Rubinstein, *Commissioner*
Toby Baker, *Commissioner*
Zak Covar, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

January 28, 2013

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

Re: Petition for the creation of South Port Alto Municipal Utility District; SOAH
Docket No. 582-12-5103; TCEQ Docket No. 2011-1786-DIS

Dear Ms. Bohac:

Enclosed for filing with the Texas Commission on Environmental Quality is the original plus seven copies of "The Executive Director's Exceptions to the Proposal for Decision and Proposed Order" for the above-referenced matter.

Please contact me at (512) 239-4761 if you have any questions.

Sincerely,

A handwritten signature in cursive script that reads "Kayla Murray".

Kayla Murray
Staff Attorney
Environmental Law Division

Enclosure

cc: Mailing List

SOAH DOCKET NO. 582-12-5103
TCEQ DOCKET NO. 2011-1786-DIS

PETITION FOR THE CREATION	§	BEFORE THE
OF SOUTH PORT ALTO	§	STATE OFFICE
MUNICIPAL UTILITY DISTRICT	§	OF
IN CALHOUN COUNTY	§	ADMINISTRATIVE HEARINGS

**THE EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE PROPOSAL FOR
DECISION AND PROPOSED ORDER**

TO THE HONORABLE COMMISSIONERS OF THE TCEQ:

COMES NOW, the Executive Director ("ED") of the Texas Commission on Environmental Quality ("TCEQ" or "Commission") and files these exceptions to the Administrative Law Judge's ("ALJ") Proposal for Decision ("PFD") and proposed order in the above-captioned matter.

A. INTRODUCTION

On January 8, 2013, the ALJ issued her PFD recommending that the petition to create the South Port Alto Municipal Utility District ("MUD") be denied.¹ The ALJ recommended that, in the alternative, should the Commission approve the petition, that the properties of all the Protestants be excluded from the MUD's boundaries.² Lastly, the ALJ recommended, "at the very least," that should the Commission approve the petition, that the participating Protestants' properties be excluded from the MUD's boundaries.³ The Executive Director respectfully disagrees with the ALJ's primary recommendation and first alternative recommendation.

B. FEASIBILITY AND PRACTICABILITY

1. Comparable service

In the PFD, the ALJ concluded that on-site septic systems constitute comparable wastewater service available to residents located within the proposed MUD. She also concluded that an existing neighboring water utility (Enchanted Harbor Utility) constituted comparable water service that was available to residents located within the proposed MUD. Based on these conclusions, the ALJ recommended a finding that creation of the district was not necessary.⁴

¹ PFD at pages 4 and 43

² PFD at page 43

³ PFD at page 43

⁴ PFD at pages 22-23

The ED respectfully disagrees with the ALJ's conclusion. The ED's position is that comparable wastewater service refers to other utilities providing similar services, not individual on-site septic systems. "Comparable" does not mean "alternative." So, "comparable" wastewater service means other centralized systems providing wastewater services. The record indicates that there is no comparable wastewater service available to the residents within the proposed boundaries of the MUD.

Furthermore, even if comparable service did include on-site septic systems, no evidence was presented at the evidentiary hearing that the lots within the proposed MUD could meet all of the requirements in 30 TAC Chapter 285 for installation and use of on-site septic systems.⁵

Regarding the water service provided by the Enchanted Harbor Utility, the engineering report provided by the MUD in its application stated that the utility's water facilities are not adequate to serve the needs of the customers within the proposed boundaries of the MUD.⁶ To serve the needs of those customers, the utility would need to expand and upgrade its water system. Therefore, other service is available, but the ED would recommend a finding that it is not comparable.

As such, the ED recommends that the Commission find that no comparable service, water or wastewater, exists.

2. Projected construction costs

In the PFD, the ALJ found that if the MUD property owners alone were taxed to pay construction costs that would also benefit customers outside the proposed MUD who do not share the cost, then the construction costs would not be reasonable.⁷ The ALJ also concluded that that on-site septic systems for the 96 properties at issue at a cost of about \$6,000 per home, can provide adequate wastewater service and therefore \$2.26M in construction costs is unreasonable.⁸

The ED concluded that these costs were reasonable and meet the feasibility requirements set out in 30 TAC § 293.59.

First, the ED points out that the estimated \$2.26M in construction costs does not include the cost of providing service to homes outside of the proposed MUD boundaries. It only applies to existing homes within the MUD's boundaries and the Sunilandings subdivision.

Next, if the MUD does eventually provide service to out-of-district customers, these customers would have to pay higher rates than customers within the proposed MUD pursuant to TEXAS WATER CODE ("TWC") §49.215(f). This statute requires the MUD to charge out-of-district rates sufficient to cover both operating expenses and out-of-district customers' portions of constructions costs.

⁵ An exception exists in 30 TAC 285.4(b)(1) that allows lots smaller than a half-acre that were platted prior to January 1, 1988 to have an on-site septic system and the MUD was platted prior to that date.

⁶ SPA MUD Exhibit 1, page 15

⁷ PFD at page 26

⁸ PFD at page 26

In addition, the ED points out that no evidence was presented that \$6,000 would be the amount that each homeowner would pay for a complete, functioning on-site septic system. That was the amount that Mr. Bolleter paid for his system in 2001, as well as the amount that Mr. Lawson paid for his bunk house system in 2000.⁹ Mr. Lawson had a main house system installed in 2003 that cost \$9,000.¹⁰ Costs to install on-site septic systems can vary widely, and thus, \$6,000 cannot be used as a benchmark for what it would cost to install septic systems throughout the subdivision.

Lastly, the ALJ is comparing the \$2.26M total that includes both water and wastewater improvements, to the hypothetical cost of addressing only the wastewater issue for each home. At best, this is comparing the cost of apples to the cost of apples and *oranges*.

Therefore, the ED recommends that the Commission find the \$2.26M in construction costs to be reasonable.

3. Projected tax rate

The ALJ concluded that the proposed tax rate of \$1.00 was not reasonable.¹¹ The ED respectfully disagrees with the ALJ's conclusion. The ED's position is that the proposed rate, which the ED staff calculated, is reasonable.

The ALJ relied on the requirement in 30 TAC § 293.59(k)(2)(C) that a 90% tax collection rate must be used in all projected tax rate calculations on first bond issues and that the ED used a higher 95% collection rate. The ED agrees that the requirement for the first bond issue is to use a collection rate of 90%. Districts typically issue bonds in multiple series and historically, second and subsequent bond issues have a collection factor of 97-98%.¹² Therefore, the 95% collection rate does not result in an "artificially low tax rate."¹³ There is no requirement that 90% be applied to the entire anticipated bond amount in a creation application; it is only a requirement for evaluating a first bond issue.

The ALJ also determined that since the MUD cannot increase the tax rate if it needs to compensate for multiple properties being excluded from the MUD's boundaries, then the proposed tax rate is not reasonable.¹⁴ The ED does not have the necessary information to determine if the tax rate for the MUD creation is still feasible if the non-participating protestants are carved out of the proposed MUD. The participating protestants provided documentation regarding their property values which allowed the ED to determine that the proposed MUD tax rate could be sustained if those properties were excluded, but the ED does not have that information on the non-participating protestants.

⁹ Exhibit RB-1 at 5:10-12 and 12:9-10; Exhibit PL-1 at 5:20-21 and 12:16-17

¹⁰ Exhibit PL-1 at 5:19-20 and 12:17-19

¹¹ PFD at page 31

¹² Transcript, 159:9-14

¹³ PFD at page 31

¹⁴ PFD at page 32

Lastly, the ED notes that the MUD could shift more of its debt burden to operations and maintenance to keep the tax rate at \$1.00 or lower.¹⁵ Another option is that the MUD could sell bonds in multiple series and fund portions of the project over an extended period of time.

Therefore, the ED recommends that the Commission find that the proposed tax rate of \$1.00 is reasonable.

C. BENEFIT TO THE LAND

The ALJ concluded that the MUD did not meet its burden by showing the extent of wastewater pollution within the MUD boundaries, and therefore, she did not find that the MUD proved that the land within its proposed boundaries would be benefitted by creation.¹⁶ The ED respectfully disagrees and recommends finding a benefit to the land from the proposed MUD. The MUD witnesses, Torsten Normann-Petersen and H.J. Houck, both testified that sewage is being improperly disposed of into the bay, indicating there are wastewater issues that will be resolved by the proposed MUD.¹⁷ In addition, Neil Fritsch, the County Commissioner of Precinct 3 of Calhoun County, testified that the county “has issues with wastewater disposal.”¹⁸ Furthermore, all of the properties in the proposed MUD will benefit from a properly constructed, operated, and maintained central wastewater system.¹⁹ As such, the ED’s position is that, pursuant to TWC §54.021, the proposed MUD will be a benefit to the land to be included in the district.

D. REGIONALIZATION

The ALJ concluded that the MUD did not show that its creation “would do any more to prevent pollution and maintain and enhance the quality of water in Texas than the current use of on-site septic systems and Sunilandings for sewer service within the District’s proposed boundaries.”²⁰ The ED respectfully disagrees; one of the main benefits of a centralized system is that a public entity is responsible for its maintenance and operations. Therefore, since the purpose of a district is to benefit the community as a whole, which is consistent with the agency’s position on regionalization, the ED’s position is that the proposed MUD is consistent with TWC §26.081 (a) and (c).²¹

¹⁵ Transcript, 168:9-12

¹⁶ PFD at pages 39-40

¹⁷ Exhibit SPA MUD-7 at 1:5-7 and Exhibit SPA MUD-6 at 4-6

¹⁸ Exhibit SPA MUD-8 at 1:10-11

¹⁹ TWC §26.081

²⁰ PFD at page 42

²¹ TWC §26.081 (a) “encourage[s] and promote[s] the development and use of regional and area-wide waste collection, treatment, and disposal systems to serve the waste disposal needs of the citizens of the state and to prevent pollution and maintain and enhance the quality of the water in the state.” TWC §26.081 (c) states that, “In those portions of the state which are not within a standard metropolitan statistical area, the commission shall observe this state policy by encouraging interested and affected persons to cooperate in developing and using regional and area-wide systems.” Also see Transcript 163:5-8.

E. CLARIFICATION

The ED would like to clarify the use of two terms used throughout the PFD by the ALJ. Throughout the PFD, the ALJ makes a distinction between the "original" petition and the "current" petition. The ED's position is that there is only one petition. The MUD submitted a district creation petition, which resulted in Notices of Deficiency from the ED. Those notices resulted in changes to the petition, but did not result in a new petition. The differences noted in the PFD are differences between the original petition and the current version of the petition.

F. CONCLUSION

Based upon the above exceptions, the ED respectfully recommends that the Commission not adopt the ALJ's primary recommendation or first alternative recommendation in the PFD. The ED also respectfully recommends that the Commission not adopt the ALJ's proposed order. Rather, the ED recommends finding that the MUD has met all requirements with regard to the applicable statutes and rules and therefore grant the MUD's creation in its entirety. Alternatively, the ED recommends adopting the ALJ's second alternative recommendation in the PFD and create the MUD with the exclusion of the properties of the Bolleters and Lawsons.

Respectfully submitted,

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Zak Covar, Executive Director

Robert Martinez, Director
Environmental Law Division

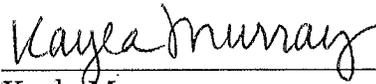


By: _____
Kayla Murray, Staff Attorney
Environmental Law Division
State Bar of Texas No. 24049282
P.O. Box 13087, MC-173
Austin, Texas 78711-3087
Phone: (512) 239-4761
Fax: (512) 239-0606

ATTORNEY FOR
THE EXECUTIVE DIRECTOR

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of January, 2013, a true and correct copy of the foregoing document was delivered via electronic mail, facsimile, hand delivery, interagency mail, or by deposit in the U.S. Mail to all persons on the attached mailing list.



Kayla Murray
Staff Attorney
Environmental Law Division

MAILING LIST
SOUTH PORT ALTO MUD
SOAH Docket No. 582-12-5103
TCEQ DOCKET NO. 2011-1786-DIS

FOR THE APPLICANT:

Wanda Roberts
Roberts, Roberts, Odefey & Witte
P.O. Box 9
Port Lavaca, Texas 77979-0009
(361) 552-2971 (PH)
(361) 552-5368 (FAX)
wanda@portlavacalaw.com

PROTESTANTS:

Josh Katz
Attorney for Robert & Lynn Bolleter
3711 S. Mopac Expressway, Suite 300
Austin, Texas 78746
(512) 472-8021 (PH)
(512) 320-5638 (FAX)
jkatz@bickerstaff.com

Herbert & Claudia D. Haas
522 Marshall Johnson Avenue South
Port Lavaca, Texas 77979-5340
(210) 768-0120 (PH)
chaasart@yahoo.com

Harry G. & Patricia A. Forbes
433 Crestwind Drive
San Antonio, Texas 78239-2408
(210) 215 1640 (PH)
(210) 590-4468 (FAX)
pforbes@flash.net

Paul E. & Patricia Lawson
509 Marshall Johnson Avenue South
Port Lavaca, TX 77979
(361) 893-5822 (PH)
jahnlawson@hotmail.com

Frederick J. Dennick, Jr
402 Gladeview Drive
Round Rock, Texas 78681-4917
(512) 769-6681 (PH)
(512) 647-6017 (FAX)
fred@dennick.org

Jesse Wood
2301 Nancy Lou St.
El Campo, Texas 77437-2427
(979) 637-0010 (PH)
jwood@jwnet.net

Lucille & Millard Brisbois
PO BOX 330
Ganado, Texas 77962-0330
(361) 771-2146 (PH)

Evelyn Saucier
4404 Balcones Woods Dr.
Austin, Texas 78759
(512) 345-0882 (PH)
esaucier@juno.com

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY
P.O. Box 13087
Austin, Texas 78711-3087

FOR THE OFFICE OF THE PUBLIC
INTEREST COUNSEL

Scott Humphrey, Attorney
Public Interest Council (MC-103)
(512) 239-4014 (PH)
(512) 239-6377 (FAX)

FOR THE OFFICE OF THE CHIEF CLERK

Bridget C. Bohac, Chief Clerk (MC-105)
(512) 239-3300 (PH)
(512) 239-3311 (FAX)

FOR THE STATE OFFICE OF
ADMINISTRATIVE HEARINGS:

Sharon Cloninger, ALJ
P.O. Box 13025
Austin, Texas 78711-3025