

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



Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

January 28, 2013

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

Dear Ms. Bohac:

Enclosed for filing is the Office of Public Interest Counsel's Exceptions to the Proposal for Decision in the above-entitled matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott A. Humphrey".

Scott A. Humphrey, Attorney
Assistant Public Interest Counsel

cc: Mailing List

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

APPLICATION FOR	§	BEFORE THE
THE CREATION OF	§	STATE OFFICE
SOUTH PORT ALTO	§	OF
MUNICIPAL UTILITY DISTRICT	§	ADMINISTRATIVE HEARINGS
	§	

THE OFFICE OF PUBLIC INTEREST COUNSEL'S EXCEPTIONS

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (TCEQ or Commission) submits these Exceptions to the Administrative Law Judge's (ALJ's) Proposal for Decision (PFD) in the above-captioned matter and would respectfully show the following:

I. INTRODUCTION

On September 25, 2012, the Honorable ALJ Sharon Cloninger held an evidentiary hearing on behalf of the State Office of Administrative Hearings (SOAH) concerning a petition for the creation of South Port Alto Municipal Utility District (South Port Alto or MUD or Petitioners). On January 8, 2013 the ALJ issued her Proposal for Decision in which she primarily recommended that the Commission deny the petition in its entirety. The ALJ's first alternative recommendation was to grant the petition but to exclude any land owned by any of the parties that were protesting the creation of the district. Her second alternative recommendation was to grant the petition but to exclude the land owned by Robert L. & Lynn Bolleter and Paul E. & Patricia Lawson, the protesting landowners who participated in this case (Participating Landowners). OPIC supports the ALJ's first and second alternative

recommendations (in that order) for the reasons set out below; however, OPIC respectfully disagrees with the ALJ's primary recommendation for the reasons set forth herein.

II. DISCUSSION

A. OPIC Disagrees that District is Not Feasible, Practicable and Necessary

1. Necessity

In her PFD, the ALJ relies on testimony from the Participating Landowners that service is available from Enchanted Harbor, to some extent from Sunilandings and from some septic systems. She therefore concludes that the creation of the District is not necessary.

OPIC agrees that the district *in its entirety* is not necessary; however, the record contains ample evidence that the Commission should grant creation of a portion of the District. For example, South Port Alto's expert witness Jody Weaver, a civil engineer, testified that the planned improvements will eliminate raw sewage discharges and overflows that can occur with poorly maintained and aging septic systems.¹ Furthermore, ED expert witness Elizabeth Polcyn testified that the Petitioners have proposed to construct centralized wastewater collection lines, expand and improve the existing wastewater treatment plant and improve existing water supply facilities.² She included a memorandum with an engineering analysis stating the Enchanted Harbor and Sunilandings, both referred to by the ALJ as alternatives to the proposed district, have signed letters of intent to sell their facilities to the proposed MUD.³ OPIC concludes that the Petitioners have proven necessity but only for a portion of the proposed district.

¹ Tr. p. 113

² Polcyn Prefile p. 5

³ See ED-IP2, p. 3

2. Feasibility and Practicability

Both the ALJ and Participating Landowners question the feasibility and practicability of the project. While OPIC understands the concerns, we are compelled to consider what is in the record. The only evidence from an expert regarding reasonableness and feasibility came from ED witness Polcyn. She stated that the projected tax rate was feasible by establishing the debt service tax as \$1.00 per \$100.00 assessed valuation, and she provided a detailed analysis to support that figure in her technical memorandum.⁴

OPIC acknowledges that this project may turn out not to be reasonable or feasible; however, that will become evident during the bonding process. If after the MUD submits an application for a bond rate that comes out over \$1.00, then the District would be required to resubmit its application for a bond.⁵ In the resubmission, the District could employ such options as shifting the burden of operations or reducing the scope of the project.⁶ If the MUD cannot ever determine a way for the bond to come in at \$1.00 or less, then the project can never commence and the MUD will not be created. Therefore, OPIC submits that the bond process provides the mechanism for weeding out the projects that are not reasonable or feasible. However, in the absence of evidence that contradicts Ms. Polcyn's testimony and conclusion, OPIC maintains that the Commission should not speculate on the possible failure of the District to be granted a bond. Rather, we should rely on the record which suggests the project is feasible and reasonable.

⁴ ED-IP2, pgs. 5-7; Polcyn Prefile p. 6

⁵ Tr. p. 168

⁶ *Id.*

B. OPIC Supports the ALJ's Alternate Recommendations

OPIC supports the ALJ's two alternate recommendations in the order they are presented in the PFD. The ALJ's first alternate recommendation, the one OPIC supports most fully, is to remove all protesting landowners' land from the proposed district, whether they participated in the hearing or not. As clear as the record is that many landowners in the proposed district do own septic tanks, there is no evidence from the Petitioners or the ED regarding which landowners own septic tanks and whether those septic tanks are fully functioning and compliant. It is equally clear any protesting landowner who had signed the original petition would not do so today, lest they would not be protesting the petition. It is the Petitioners' burden of proof to demonstrate the necessity of the proposed MUD. If the Commission finds that 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 which is not benefited from the proposed district and redefine the proposed district's boundaries accordingly.⁷ Therefore, in accordance with the Texas Water Code, the Commission should exclude from the proposed district all land owned by any protesting landowners, whether they participated or not.

OPIC also supports the ALJ's final recommendation, to exclude the land owned by the Participating Landowners. OPIC agrees the record shows that the Bolleters and the Lawsons both maintain fully functioning and compliant septic systems, and no evidence has been presented to the contrary.⁸ At the very least, their land should be excluded from the proposed district.

⁷ Tex. Water Code § 54.021(c)

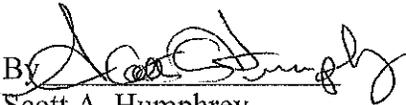
⁸ PFD pgs. 37-38

III. CONCLUSION

Based on the foregoing, OPIC recommends the Administrative Law Judge amend the Proposal for Decision and recommend the petition for the proposed district be granted in part. OPIC primarily recommends that the proposed MUD exclude all land owned by landowners who are protesting the creation of the district. Alternatively, OPIC recommends excluding the land owned by the Bolleters and the Lawsons.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By 
Scott A. Humphrey
Assistant Public Interest Counsel
State Bar No. 10273100
P.O. Box 13087
Austin, TX 78711-3087
(512) 239-6363 (TEL)
(512) 239-6377 (FAX)

CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2013 the original of the foregoing 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, other electronic transmission, Inter-Agency Mail or by deposit in the U.S. Mail.


Scott A. Humphrey

MAILING LIST
SOUTH PORT ALTO MUNICIPAL UTILITY DISTRICT
SOAH DOCKET NO. 582-12-5103
TCEQ DOCKET NO. 2011-1786-DIS

The Honorable Sharon Cloninger
Administrative Law Judge
State Office of Administrative Hearings
P.O. Box 13025
Austin, Texas 78711-3025
Tel: 512/475-4993 Fax: 512/322-2061

Wanda Roberts, Attorney
PO Box 9
Port Lavaca, Texas 77979
361/552-2971 Fax: 361/552-5368
Representing: South Port Alto MUD
wanda@portlavacalaw.com

Josh Katz, Attorney
3711 S. Mopac Expy., Suite 300
Austin, Texas 78746
512/472-8021 Fax: 512/320-5638
*Representing: Paul E. & Patricia Lawson,
Robert & Lynn Bolleter*
jkatz@bickerstaff.com

Harry & Patricia A. Forbes
433 Crestwind Drive
San Antonio, Texas 78239
210/215-1640
pforbes@flash.net

Herbert & Claudia D. Haas
522 Marshall Johnson Ave. S.
Port Lavaca, Texas 77979
210/768-0120
chaasart@yahoo.com

Jesse Wood
2301 Nancy Lou
El Campo, Texas 77437
979/637-0100
jwood@jwnet.net

Millard & Lucille Brisbois
PO Box 330
Ganado, Texas 77962
361/771-2146

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

Kayla Murray, Staff Attorney
TCEQ Environmental Law Division MC
173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4761 Fax: 512/239-0606

Docket Clerk
TCEQ Office of Chief Clerk MC 105
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-3300 Fax: 512/239-3311