

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

February 7, 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 Reply to 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 REPLY TO 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 this Reply to 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). South Port Alto disagrees with the ALJ's PFD and urges the

Commission to grant the petition in its entirety. The ED agrees with the Petitioners but can accept the ALJ's second alternative recommendation (to exclude the land owned by the Participating Landowners). After reviewing the Exceptions filed by the other parties, OPIC continues primarily to support the ALJ's first alternative recommendation (excluding all protesting landowners) and secondarily the ALJ's final alternative recommendation (excluding only the Participating Landowners).

II. DISCUSSION

A. OPIC Agrees with the Petitioners and ED Regarding Denial—To an Extent

Both South Port Alto and the ED are urging the ALJ to recommend granting the creation of the entire area of the MUD.¹ The Petitioners suggest that “While one could argue that the Participating Protestants would not benefit at the present by the creation of the District, there is no evidence that the Non-Participating Protestants would not.”² Such a remark suggests that the protesting parties are carrying the burden of proof. OPIC contends that in the presence of landowners who do not want their land to be included in the proposed MUD, it is up to the Petitioner to prove that their land would benefit by the creation of the District. In the absence of any evidence regarding these land holdings, South Port Alto has failed to meet its burden of proof that inclusion of the protesting parties' land is necessary to the creation of the district or that land would benefit by the district's creation.

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.

¹ South Port Alto Exceptions, p. 3; ED Exceptions, p. 3

² South Port Alto Exceptions, p. 3

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.³ 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.⁴ 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.⁵ OPIC concludes that the Petitioners have proven necessity but only for a portion of the proposed district.

B. OPIC Supports the ED's Position Regarding Bond Issues and Projected Tax Rate

In his exceptions, the ED argued in support of his position regarding the projected tax rate. OPIC supports the ED's position.

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

³ Tr. p. 113

⁴ Polcyn Prefile p. 5

⁵ See ED-IP2, p. 3

service tax as \$1.00 per \$100.00 assessed valuation, and she provided a detailed analysis to support that figure in her technical memorandum.⁶

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 per \$100.00 assessed valuation, then the District would be required to resubmit its application for a bond.⁷ In the resubmission, the District could employ such options as shifting the burden of operations or reducing the scope of the project.⁸ 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.

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.

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

⁷ Tr. p. 168

⁸ *Id.*

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.⁹ 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.¹⁰ At the very least, their land should be excluded from the proposed district.

III. CONCLUSION

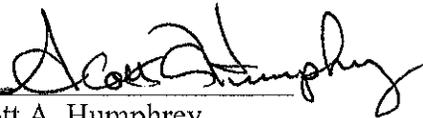
Based on the foregoing, OPIC recommends the Administrative Law Judge amend the Proposal for Decision and recommend the petition for the proposed district be granted in part. OPIC primarily recommends that the proposed MUD exclude all land owned by landowners who are protesting the creation of the district.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

⁹ Tex. Water Code § 54.021(c)

¹⁰ PFD pgs. 37-38

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 7, 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

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

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