

Bickerstaff Heath Delgado Acosta LLP

3711 S. MoPac Expressway Building One, Suite 300 Austin, Texas 78746 (512) 472-8021 Fax (512) 320-5638 www.bickerstaff.com

February 7, 2013

Via E-File

Ms. Bridget C. Bohac, Chief Clerk
Texas Commission on Environmental Quality
Public Interest Counsel MC-105
P.O. Box 13087
Austin, Texas 78711-3087

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

Dear Ms. Bohac:

Enclosed for filing in connection with the above-referenced matter is Robert and Lynn Bolleter and Paul and Patricia Lawson's Reply to Exceptions to the Proposal for Decision. The ALJ and all parties of record are being served with a copy of this filing.

Should you have any questions, please do not hesitate to contact me.

Sincerely,



Joshua D. Katz

JDK/dfb
Enclosure(s)

cc: Service List

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

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

**ROBERT AND LYNN BOLLETER AND PAUL AND PATRICIA LAWSON'S
REPLY TO EXCEPTIONS TO THE PROPOSAL FOR DECISION**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

COME NOW, Robert and Lynn Bolleter (the “Bolleters”) and Paul and Patricia Lawson (the “Lawsons”) (collectively, the “Protestants”) and file this, their Reply to Exceptions to the Proposal for Decision (“PFD”) that were filed by the South Port Alto Municipal Utility District (“SPA MUD” or the “District”), the Executive Director (“ED”) of the Texas Commission on Environmental Quality (“TCEQ”), and the Office of Public Interest Counsel (“OPIC”). The Administrative Law Judge’s (“ALJ”) Proposal For Decision (“PFD”) correctly recommends that the TCEQ deny SPA MUD’s Petition to create the District. No new issue of law or correction of fact in the record has been raised by SPA MUD, the ED, or OPIC. These Exceptions to the PFD should therefore be denied.

I. Argument and Authorities

A. Exceptions of SPA MUD

- i. SPA MUD confuses the ED’s finding of administrative completeness with meeting its burden of proof in a contested case hearing.**

SPA MUD principally argues that Conclusion of Law 4 in the PFD, which states in part that the Petition to create the District is “sufficient within the meaning of . . . 30 Tex. Admin.

Code § 293.11,” is inconsistent with the other Conclusions of Law finding that the District is not feasible, practicable, necessary, and beneficial to all the land to be included in the district as required by Texas Water Code § 51.021. SPA MUD has confused the two showings – each with a separate burden of proof – that it must make in this proceeding: First, its burden to show that the Petition to create the District contained all of the necessary information for the ED to declare it administratively complete, and second, the District’s evidentiary burden during the contested case hearing to show that it met all of the statutory elements for creation of the District.

Section 293.11 of the Administrative Code contains the list of information that must accompany a petition to create a municipal utility district. This includes evidence that the district is feasible, practicable, necessary, and a benefit to the land within the district. 30 Tex. Admin. Code § 293.11(j). Once the ED receives a petition containing all of the information listed in § 293.11, the ED will notify the clerk that the application is “administratively complete” and ready for public notice. *Id.* at § 293.12. The ED merely determines whether or not all of the necessary information was included in the petition, not the legal sufficiency or probative weight of that information. At that point, any affected person may request a contested case hearing on that petition.¹ During the contested case hearing, the burden of proof was on SPA MUD to prove that the proposed District meets every legal requirement for granting or refusing a petition to create a district found in Texas Water Code § 50.021.² This is a greater burden than merely submitting an administratively complete application.

The ED’s finding of administrative completeness (and the PFD memorializing this finding) is merely a technical finding, not a legal conclusion as to the sufficiency of that evidence to meet the petitioner’s burden in an evidentiary proceeding; the legal determination is

¹ TEX. WATER CODE § 5.115(a).

² 30 TEX. ADMIN. CODE § 80.17(a).

first made by the ALJ after allowing all affected parties to introduce their own testimony and evidence, then ultimately by the Commission in its final order. In the PFD, Conclusion of Law No. 4 concludes that SPA MUD's Petition met the technical requirements necessary for the ED to declare it administratively complete, and for TCEQ to refer the Petition for an evidentiary proceeding on whether the District met its burden of proof on the legal requirements of Water Code § 54.021. After considering all of the evidence, the ALJ concluded that the District did not meet this burden.

If correct, SPA MUD's exception would make the ED the *de facto* trier of fact by changing its finding of administrative completeness under 30 Tex. Admin. Code § 293.11 into a legal conclusion as to whether the contents of the Petition met the District's burden under Water Code § 54.021. Such a construction would obviate the ability of affected persons to present contravening evidence in a contested case hearing, and eviscerate the Administrative Procedure Act. The PFD's conclusion of law that SPA MUD met the TCEQ's technical requirements for an initial finding of administrative completeness therefore does not have any bearing on the ALJ's ultimate finding as to whether SPA MUD met its legal burden of proof on the issues of feasibility, practicability, necessity, and benefit.

ii. Comparable Service

SPA MUD argues that "the majority of the lots in the District are less than a half-acre in size" which "do not meet State requirements of at least a half-acre to install an on-site septic system."³ As the PFD correctly notes – but SPA MUD ignores – lots that are smaller than a half-acre in size but that were subdivided before January 1, 1988 are allowed to install an on-site

³ SPA MUD Exceptions at 2.

sewage facility such as a septic system.⁴ The lots within SPA MUD were subdivided before 1988 and therefore, under TCEQ rules, the half-acre lot size requirement does not apply and homes on smaller lots in South Port Alto can install an on-site septic system.

SPA MUD next argues that Enchanted Harbor is “in violation of TCEQ regulations.”⁵ However, while some residents of South Port Alto have private wells, the evidence in the record shows that the current residents who do receive service from Enchanted Harbor receive adequate water service.⁶ In contrast, no evidence was presented during the hearing that, if the Petition was denied, Enchanted Harbor would discontinue service to existing customers.⁷

Finally, SPA MUD’s statement that it has entered into a Letter of Intent to Sell with Enchanted Harbor has no bearing on the PFD’s findings as to whether comparable water service is currently available from Enchanted Harbor or will be in the future.

iii. Tax Rates

SPA MUD argues that the only evidence in the record on the feasibility of the District’s estimated property tax rate is an analysis by ED’s witness, Ms. Polcyn, that the District’s proposed tax rate will be \$1.00 per \$100, and is therefore feasible.⁸ The maximum tax rate allowable by TCEQ rule for district bond issues is \$1.00.⁹ However, the PFD reached its well-founded conclusion on feasibility based on three considerations: 1) Evidence that SPA MUD

⁴ 30 TEX. ADMIN. CODE § 285.4(b)(1). Evidence in the record shows a plat of the area that comprises the majority of SPA MUD’s proposed boundaries – the homes along Marshall Johnson Avenue South – that is dated August 8, 1949. (SPA MUD Ex. 3, at Ex. 6).

⁵ SPA MUD’s Exceptions at 2.

⁶ (RB-1 – 12:11 to 12); (Tr. 19:22 to 20:5).

⁷ PFD at 19.

⁸ SPA MUD states that Protestants’ only argument against the feasibility of the estimated tax rate is that Protestants are on fixed incomes and that higher taxes will decrease property values. SPA MUD Exceptions at 2. While Protestants offered evidence in support of these arguments, it is by no means the “only conflicting evidence as to the feasibility” of the District’s tax rate, as discussed above.

⁹ 30 TEX. ADMIN. CODE § 293.59(k)(3).

itself has previously estimated that its necessary tax rate could be as high as \$1.07, in contravention of the TCEQ's rule on district tax rates,¹⁰ and 2) evidence that the ED used a 95 percent tax collection rate despite the TCEQ rule requiring that projected tax rate calculations for a district's first bond issue – such as the one proposed by SPA MUD and evaluated by the ED – must use a 90 percent collection rate.¹¹ Because the use of a 95 percent collection rate results in an artificially low estimated tax rate, the actual estimated tax rate would be higher than the maximum feasible tax rate of \$1.00 per \$100.

Third, the PFD considered evidence that even this \$1.00 estimate is disproportionately higher than the tax rates of comparable municipal utility districts in the region.¹² The evidence in the record sufficiently supports the PFD's findings that the estimated tax rate for the District is not feasible.

iv. Benefit to land within the District

SPA MUD states that “only 4 people withdrew their signatures” to the Petition, which supports a conclusion that SPA MUD met its burden to show that the District benefits all of the land in the District.¹³ However, the number of signatories to the Petition is irrelevant to the conclusion of the PFD that SPA MUD has not met its burden under Texas Water Code § 54.021(c) to prove that the District benefits all of the land within its boundaries. The number of signatures is only relevant to the question of whether SPA MUD met the technical requirement of having the number of supporting signatures stipulated by 30 Tex. Admin. Code § 293.11(d)(1), which is a factor of the administrative completeness of the Petition – not whether

¹⁰ (SPA MUD Ex. 3 at 3, ¶ 13).

¹¹ 30 TEX. ADMIN. CODE § 293.11(k)(2)(C); (ED Ex. ED-IP-3 – 6:12 to 16); (ED Ex. ED-RN-2 at 5); (ED-IP-2 at 5).

¹² (PL Ex. 8 – p. 6, ¶ 23).

¹³ SPA MUD Exceptions at 2. Evidence in the record shows that in fact approximately 13 people petitioned the TCEQ to withdraw their signatures to the Petition. (RB Ex. 1 – 9:21 to 22).

the District will benefit all of the land within its boundaries.

SPA MUD next argues that TCEQ's general policy of regionalization requires a finding that the District benefits the entire South Port Alto community. This argument will be fully addressed below in Protestants' reply to the ED's Exceptions. To the extent that SPA MUD argues that "the majority of lots in the District cannot support a septic system under the prevailing regulations" and therefore a regional water district is required,¹⁴ Protestants again refer to the evidence and TCEQ rules demonstrating that any lot within South Port Alto can install an on-site septic system to meet its wastewater needs, and nearly all have.¹⁵

Texas Water Code § 54.021(c) provides that all of the land to be included in a district must be benefitted by its creation, and all land which is not benefitted must be excluded from its boundaries. Protestants presented un rebutted evidence that their property is not in any way benefitted by the District,¹⁶ and in general that the District will not benefit the community.¹⁷ Therefore PFD properly concluded that SPA MUD did not meet its burden to demonstrate that the District will benefit all of the land within the proposed District.

B. Exceptions of the ED

i. Comparable service

The ED believes that the PFD improperly found that comparable wastewater service is available to South Port Alto residents from on-site septic systems because "comparable' does not mean 'alternative.' So, 'comparable' wastewater service means other centralized systems

¹⁴ SPA MUD Exceptions at 3.

¹⁵ See *supra* p.3; 30 TEX. ADMIN. CODE § 285.4(b)(1); (SPA MUD Ex. 3, at Ex. 6).

¹⁶ See *generally* PFD at p. 37-39. Nor is the land of the other protesting parties who have on-site septic systems that were permitted by the County health department benefitted.

¹⁷ (Ex. RB-1 – 13:6 to 7); (Ex. RB-5 at Interrogatory No. 5).

providing wastewater services,” and not on-site septic systems.¹⁸ However, the ED offers no record evidence, statute, caselaw, rule, or TCEQ policy that supports its restrictive definition of what does and does not constitute “comparable” service.

The PFD is supported by ample record evidence that comparable and adequate wastewater service is available to all residents of South Port Alto via either on-site septic systems or connection to the existing Sunilandings wastewater system. All or nearly all homes in South Port Alto already have on-site septic systems, which provide comparable service to that of the proposed District.¹⁹ As SPA MUD’s expert concedes, a properly permitted on-site aerobic septic system meets the wastewater needs of a single family home.²⁰ If *any* homes in South Port Alto lack an on-site septic system, one can be installed, even on lots smaller than one-half acre.²¹ Other homes, both inside and outside of the proposed District boundaries, already receive comparable and adequate wastewater service from the same wastewater treatment system that will be the basis of SPA MUD.²² Others could as well if they paid to extend their homes to a line running down Marshall Johnson Avenue South to their properties.²³ The record therefore supports the PFD’s finding that all residents of South Port Alto already have wastewater service comparable to the service offered by the proposed District.

The ED next argues that “no evidence” was presented that lots could meet all of the requirements in 30 TAC Chapter 285 for installation and use of on-site septic systems.²⁴ As discussed *supra*, Protestants introduced evidence and argument that the lots in South Port Alto

¹⁸ ED Exceptions at 2.

¹⁹ (PL Ex. 1 – 14:1 to 14:12; RB Ex. 1 – 13:13 to 14:2).

²⁰ (Tr 108:19 to 108:25).

²¹ *See supra* p. 3.

²² (Tr 24:23 to 25:2; Tr 25:17 to 25:20; RB Ex. 1 – 13:20 to 14:1).

²³ (Tr 36:9 to 37:16; RB Ex. 7; Tr 39:3 to 39:6).

²⁴ ED Exceptions at 2.

are exempt from the half-acre requirement and can install an on-site septic system. But moreover, as the applicant, SPA MUD bears the burden in demonstrating that comparable water service is not available in South Port Alto. It was SPA MUD's burden to introduce evidence that homes in South Port Alto can't meet TCEQ requirements for the use of on-site septic systems and therefore can't receive comparable service from their use, but SPA MUD failed to do so. The ED cannot now meet the District's burden on their behalf.

Finally, there is no evidence in the record that the residents who receive water service from Enchanted Harbor do not receive comparable and adequate service.²⁵ Protestant Robert Bolleter, in fact, testified to the contrary.²⁶ No evidence was presented during the hearing that, if the Petition was denied, Enchanted Harbor would discontinue service to existing customers.²⁷

The PFD is therefore properly supported by record evidence demonstrating that comparable water and wastewater service is available to all residents of South Port Alto without creation of the District.

ii. Projected construction costs

The ED principally argues that the estimated \$2.26 million in construction costs does not include the cost of providing service to homes outside of the MUD boundaries who will not pay SPA MUD property taxes, but instead applies only to "existing homes within the MUD's boundaries and the Sunilandings subdivision."²⁸ The ED offers no citation to record evidence to support this assertion, nor has SPA MUD ever made this argument. To the contrary, SPA MUD has stated that an upgrade of the Sunilandings wastewater treatment plant is necessary because

²⁵ (RB-1 – 12:11 to 12); (Tr. 19:22 to 20:5).

²⁶ (RB-1 – 12:11 to 12); (Tr. 19:22 to 20:5).

²⁷ PFD at 19.

²⁸ ED Exceptions at 2.

“there could potentially be up to another 164 out-of-District lots that would be in close enough proximity to a new system to obtain service.”²⁹ Any future homes built on these lots or in the Sunilandings subdivision will not be within the boundaries of the District and therefore beyond its taxing authority, but will receive service from it, so the PFD accurately notes that the \$2.26 million cost of the District is not feasible because it will not be borne by all of its end users.³⁰

The ED next argues, on the District’s behalf, that the District could charge higher rates to out-of-District customers.³¹ SPA MUD has presented no evidence whatsoever that it will charge out-of-district customers fees sufficient to recoup the cost of providing that service and has not argued that this is a strategy it intends to utilize. The District’s water and sewer rates, connection fees, and costs for out-of-district water and wastewater customers are presently unknown and unstated.³² So too will SPA MUD defer the decision of whether it will charge impact fees – and if so, the fee amount – to new customers either within or without the proposed District until after it has already been created.³³ The burden of proof was upon the District to demonstrate that its construction costs are feasible, and it failed to meet this burden.

Although the ED argues that no evidence has been presented regarding the cost that each homeowner could pay for the installation of an on-site septic system,³⁴ both Robert Bolleter and Paul Lawson presented testimony on the cost of the septic systems that they have had installed and maintained by the same company – Hurt’s Wastewater System – that continues to install and

²⁹ (SPA MUD Ex. 1, at ¶ 5.2).

³⁰ (PL Ex. 1 – 18:3 to 18:7).

³¹ ED Exceptions at 2.

³² (RB Ex. 1 – 15:13 to 15:15; RB Ex. 5, at Interrogatory 2; Tr 39:8 to 40:3).

³³ (Tr 40:4 to 40:7).

³⁴ ED Exceptions at 3.

maintain nearly all septic systems in South Port Alto.³⁵ Both witnesses testified that the cost, even today, to install an on-site septic system with a traditional sprinkler system would be similar to the \$6,000 they paid for the installation of their own systems.³⁶ In contrast to this relatively affordable one-time expense, the cost to the Bolleters in estimated SPA MUD property taxes would be \$3,000 a year for the 40 year life of a bond, a total cost of \$120,000 (excluding rate costs or potential impact or connection fees), while the cost to the Lawsons would be \$5,250 a year, for a total cost of \$210,000.³⁷ Furthermore, because the District's proposed taxes are based on property valuation, the annual District tax will only increase over time commensurate with increasing property values.

Finally, the ED asserts that the ALJ incorrectly compared the \$2.26 million proposed costs of the system to the "hypothetical cost of addressing only the wastewater issues for each home."³⁸ However, neither the ED nor SPA MUD have produced record evidence showing costs per home for wastewater service, that improvements are necessary for any homes currently receiving water service from Enchanted Harbor, or the associated costs thereof. To the contrary, the evidence in the record shows that homes are currently receiving adequate water service.³⁹ It was appropriate for the ALJ to conclude that construction costs for the District are not feasible based on the fact that the District would cost each home anywhere from \$3,000 to \$5,250 in taxes every year for 40 years, despite the fact that these homes are already receiving comparable wastewater service from an on-site septic system that costs only \$6,000 to install and adequate

³⁵ (PL Ex. 1 – 5:18 to 22).

³⁶ (PL Ex. 1 – 12:19; RB Ex. 1 – 12:10 to 11). One of the two septic systems on Mr. Lawson's property was an underground pressure injection system that, at \$9,000, is more expensive to install than most other on-site septic systems, which typically cost \$6,000 to install.

³⁷ (RB Ex. 1 – 9:5 to 6; PL Ex. 1 – 9:7 to 8).

³⁸ ED Exceptions at p. 3.

³⁹ (RB-1 – 12:11 to 12); (Tr. 19:22 to 20:5).

water service from Enchanted Harbor.

iii. Projected tax rate

The ED excepts to the ALJ's conclusion that the ED's estimate of the District's tax rate of \$1.00 is not reasonable because the ED believes that the tax collection rate assumptions used by their witness were appropriate.⁴⁰ Despite the fact that TCEQ rules require a 90% tax collection rate for first bond issues,⁴¹ the ED argues that its use of a 95% tax collection rate in calculating the District's estimated necessary tax rate was appropriate because "[d]istricts typically issue bonds in multiple series and historically, second and subsequent bond issues have a collection factor of 97-98%," so presumably a 95% "average" collection rate is appropriate.⁴² There is no evidence in the record that districts of this size, in general, issue bonds in multiple series, or any record evidence that second bond issues have a collection factor of 97-98%. To the contrary, TCEQ rules stipulate that even second and subsequent bond issues must use a 90% collection rate for projected tax rate calculations "unless the district demonstrates that its historical collection rate is higher[.]"⁴³

There is no evidence in the record – and SPA MUD has never suggested – that the District intends to issue multiple bonds, and the District has offered no evidence demonstrating that its collection rate for subsequent bond issues, if any, should be assumed to be any higher than the 90% figure prescribed by TCEQ rule. Nor does ED witness Ms. Polcyn state either in her prefiled testimony or in exhibit ED-IP-2, which explains her calculation of the \$1.00 estimated tax rate, that there is reason to assume that the District intends to issue a series of

⁴⁰ ED Exceptions at 3.

⁴¹ 30 TEX. ADMIN. CODE § 293.59(k)(2)(C).

⁴² ED Exceptions at 3.

⁴³ 30 TEX. ADMIN. CODE § 293.59(l)(1).

bonds and deserves the assumption of a higher tax collection rate for subsequent bonds.⁴⁴ The ALJ properly considered the evidence in the record as well as TCEQ rules in determining that the tax collection rate used to arrive at the \$1.00 estimated tax rate was incorrect, and therefore the calculated rate of \$1.00 was not feasible or reasonable.

The ED offers its own suggestions that, in order to keep its tax rate below \$1.00, the MUD could shift its debt burden between operations and maintenance, sell bonds in multiple series, or fund portions of the project over an extended period of time.⁴⁵ SPA MUD simply has not introduced any testimony, evidence, or argument that it has considered or is even capable of availing itself of any of these financing strategies, or that they would result in an estimated tax rate of less than the maximum allowable \$1.00. It was SPA MUD's burden – and not the ED's – to demonstrate that its estimated tax rate is reasonable, and the record evidence overwhelmingly supports the conclusion reached by the PFD: That the tax rate necessary to support the District would be higher than \$1.00, which exceeds the maximum rate allowable under TCEQ rules for issuance of bonds.

iv. Benefit to the land

The ED argues that “all of the properties” in the proposed District will be benefitted by its construction based on the statements of witnesses H.J. Houck and Torsten Normann-Petersen that sewage is disposed into the bay, and the testimony of Neil Fritsch that the county in general has “issues with wastewater disposal.”⁴⁶ The testimony cited by the ED is vague and there is no specific evidence in the record of a current, ongoing wastewater problem in South Port Alto that

⁴⁴ Ms. Polcyn appears to assume a single bond issue in the amount of \$2.26 million for her calculations. *See* ED-IP-2 at p. 6 (“Considering an estimated bond issue requirement of \$2,261,000 (assuming 100% financing), a coupon bond interest rate of 6.5%, and a 40-year bond life . . . [and] a 95% collection rate . . .”).

⁴⁵ Further, as discussed above, even a rate of \$1.00 is far higher than that of other nearby MUDs, and supports the PFD's finding that this estimated tax rate is not reasonable.

⁴⁶ ED Exceptions at 4.

would support amending the PFD to find that the District would benefit all of the land in its proposed boundaries.

The only evidence that SPA MUD introduced at hearing alleging a sewage problem in South Port Alto identifies two properties that received notices of violation in 2008 – nearly five years ago – for alleged septic violations.⁴⁷ However, SPA MUD has provided no evidence that indicates whether these nearly five year old violations have since been remedied, or that current violations (other than Mr. Houck's)⁴⁸ exist.⁴⁹ Nor was either witness for the ED aware of any violations in South Port Alto that have been reported to TCEQ.⁵⁰ SPA MUD conceded, in fact, that it has not done any study to determine, and does not know, the number of properties within the proposed District that do not utilize a properly functioning on-site septic system.⁵¹ The District failed to meet its burden in showing that it is necessary as well as that it would be beneficial to the community.

Moreover, there is no evidence in the record that Protestants' land will be benefitted by the District. The PFD correctly found that, in accordance with Texas Water Code § 54.021(c), the proposed District must be beneficial to *all of the land* proposed to be included in the District, and must exclude any land, such as that of Protestants, that will not be benefitted and redefine the District's boundaries accordingly. The proposed District will not benefit the community, particularly at its estimated cost to each homeowner, given the lack of any evidence of an ongoing pollution problem. All or nearly all landowners in South Port Alto are either connected

⁴⁷ (SPA MUD Ex. 1, at Appendix L).

⁴⁸ Ironically, the only evidence in the record of a home in South Port Alto that is *currently* discharging effluent into the Bay is that of proposed Board member and SPA MUD witness Mr. Houck. (RB. Ex. 5, at Interrogatory 14).

⁴⁹ (RB Ex. 1 – 13:6 to 13:7).

⁵⁰ (Tr 140:20 to 140:23; Tr 155:19 to 155:21).

⁵¹ (RB Ex. 5, at Requests for Admission Nos. 4 and 5; Tr 26:6 to 26:9).

to the Sunilandings wastewater system or have paid to install and maintain an on-site septic system, which is a state-approved means of adequately treating and disposing of domestic wastewater.⁵² Protestants, in particular, already have on-site septic and water service that adequately meets their needs. State law recognizes that homeowners like Protestants who have responsibly taken care of their wastewater needs by installing an on-site wastewater holding or treatment facility receive no benefit from a new district by prohibiting new districts from requiring such a property owner to connect to the district's wastewater system.⁵³ Protestants would receive no benefit whatsoever from the District, while incurring significant additional property taxes.

v. Regionalization

No evidence in the record contradicts the ALJ's conclusion that creation of the District would not do any more to prevent pollution and maintain water quality in the Carancahua Bay than the proper use of on-site septic systems and the Sunilandings system. TCEQ's general goal of regionalization could easily be served by ordering the few properties not currently served either by the Sunilandings system or by a permitted, properly functioning on-site septic system to connect to Sunilandings, with connection fees paying for any necessary line extensions or upgrades, or install and/or properly maintain an on-site septic system.⁵⁴ Enforcement by TCEQ or the County health department should ensure that each homeowner takes responsibility for his or her wastewater needs. Since SPA MUD's expert concurred that a properly permitted on-site aerobic septic system meets the wastewater needs of a single family home, it is not necessary to create a public entity to provide the service that the handful of homes in this community have

⁵² (PL Ex. 1 – 17:2 to 17:6; Tr 108:19 to 108:25).

⁵³ TEX. WATER CODE § 49.234(a).

⁵⁴ (RB Ex. 1 – 13:20 to 14:2).

already addressed.⁵⁵

vi. ED Clarification

The ED's position is that there is only one Petition to create the District, and therefore the PFD should not refer to the "original" and the "current" Petition.⁵⁶ Protestants maintain that this distinction is appropriate, as the District's geographic size, scope, cost, and proposed property tax rate have changed so significantly since notice of the Petition was published that it is now fundamentally a different Petition from the one originally filed with TCEQ.

C. Exceptions of OPIC

The majority of OPIC's Exceptions to the PFD have been addressed above, and in the interests of brevity, Protestants will not repeat these arguments. However, Protestants disagree with OPIC's position that a finding on the practicability of the District's necessary tax rate should be deferred to the bond process at a later date. One of the legal showings that the District bears the burden of proof to establish *before the District can be created* is that the proposed property tax rate is reasonable.⁵⁷ If it is not, then the district is not "feasible and practicable,"⁵⁸ and the Commission cannot approve the Petition. The ALJ concluded, based on the record evidence, that the District's tax rate is not reasonable because 1) the District itself has estimated that a tax rate of \$1.07, which is higher than the maximum allowed by rule, might be necessary; 2) the ED's estimate of \$1.00 was based on the improper usage of a tax collection rate higher than provided for by TCEQ rule, so the actual estimated tax rate is higher than allowable, and 3) even at exactly \$1.00, the District's taxes would be much higher than those of comparable MUDs in the region.

⁵⁵ (Tr 108:19 to 108:25).

⁵⁶ ED Exceptions at 5.

⁵⁷ TEX. WATER CODE §§ 54.021(b)(2); § 54.021(d).

⁵⁸ *Id.* at § 54.021(b).

It is inappropriate to defer a finding on the reasonableness of the District's tax rate to a future proceeding, as it is necessary to make this determination *before* creating a district. It was the District's burden to demonstrate that its tax rate would comply with the TCEQ's rules, and it failed to do so. OPIC's Exceptions to the PFD on the necessity, feasibility, and practicability should therefore be denied.

II. Correction

Page 31 of the PFD contains citations to 30 Tex. Admin. Code §§ 293.11(k)(2)(C) and 293.11(l)(1). These citations should read 30 Tex. Admin. Code §§ 293.59(k)(2)(C) and 293.59(l)(1), respectively. The substance of the PFD, as well as the Proposed Order, would be unchanged by this correction.

III. Conclusion

Petitioners have failed to meet their burden under Texas Water Code § 54.021 to show that the proposed District is feasible, practicable, necessary, and beneficial to South Port Alto. Protestants Robert and Lynn Bolleter and Paul and Patricia Lawson respectfully request that the Commission overrule all of the proposed Exceptions to the PFD and issue an order denying SPA MUD's Petition to create the South Port Alto Municipal Utility District. In the alternative, if the Commission approves the Petition to create the District, Protestants support the ALJs alternative recommendation to remove all protesting landowners' properties from the proposed district based on the evidence in the record that these parties have on-site septic systems and therefore would receive no benefit from the District, or the PFD's second alternative recommendation to remove all of Protestants' property from the boundaries of the District.

Respectfully submitted,

BICKERSTAFF HEATH DELGADO ACOSTA LLP
3711 S. MoPac Expwy.
Building One, Suite 300
Austin, TX 78746
(512) 472-8021
(512) 320-5638 (fax

By:



JOSHUA D. KATZ
State Bar No. 24044985
EMILY W. ROGERS
State Bar No. 24002863

COUNSEL FOR PROTESTANTS ROBERT AND
LYNN BOLLETER AND PAUL AND PATRICIA
LAWSON

CERTIFICATE OF SERVICE

By my signature below, I hereby certify that on this 7th day of February, 2013, a true and complete copy of the foregoing was sent to the following by facsimile, e-mail, or by first class mail:

Wanda Roberts
Roberts, Roberts, Odefey & Witte
P.O. Box 9
Port Lavaca, TX 77979
361.552.2971 (tel)
361.552.5638 (fax)
wanda@portlavacalaw.com
ATTORNEYS FOR SOUTH PORT ALTO MUD

Bridget C. Bohac, Chief Clerk
Texas Commission on Environmental Quality
Public Interest Counsel MC-105
P.O. Box 13087
Austin, TX 78711-3087

Judge Sharon Cloninger
State Office of Administrative Hearings
300 West 15th Street, Suite 502
Austin, TX 78701
512.475.4993 (tel)
512.322.2061 (fax)

Kayla Murray, Staff Attorney
Texas Commission on Environmental Quality
Environmental Law Division MC-173
P.O. Box 13087
Austin, TX 78711-3087
512.239.4761 (tel)
512.239.0606 (fax)
kayla.murray@tceq.texas.gov

Elizabeth Polcyn, Technical Staff
Texas Commission on Environmental Quality
Water Supply Division MC-152
P.O. Box 13087
Austin, TX 78711-3087
512.239.1286 (tel)
512.239.6972 (fax)
izzy.polcyn@tceq.texas.gov

Scott A. Humphrey, Assistant Public Interest Counsel
Texas Commission on Environmental Quality
Office of Public Interest Counsel MC-103
P.O. Box 13087
Austin, TX 78711-3087
512.239.6363 (tel)
512.239.6377 (fax)
Scott.humphrey@tceq.texas.gov
james.murphy@tceq.texas.gov

Frederick J. Dennick, Jr.
402 Gladeview Drive
Round Rock, TX 78681-4917
512.769.6681 (tel)
512.647.6017 (fax)
fred@dennick.org
fdengr@gmail.com
PROTESTANT

Harry & Patricia A. Forbes
433 Crestwind Drive
San Antonio, TX 78239
210.215.1640 (tel)
210.590.4468 (fax)
pforbes@flash.net
hforbes@flash.net
PROTESTANT

Herbert & Claudia D. Haas
522 Marshall Johnson Ave. S.
Port Lavaca, TX 77979
210.768.0120 (tel)
chaasart@yahoo.com
shaas@camdongraphics.com
PROTESTANT

Paul E. & Patricia Lawson
509 Marshall Johnson Ave. S.
Port Lavaca, TX 77979
631.893.5822 (tel)
jahnlawson@hotmail.com
plawson@pepperlawson.com
PROTESTANT

Jesse Wood
2301 Nancy Lou
El Campo, TX 77437
979.637.0010 (tel)
jwood@jwnet.net
PROTESTANT

Millard & Lucille Brisbois
P.O. Box 330
Ganado, TX 77962
361.771.2146 (tel)
PROTESTANT

Evelyn Saucier
4404 Balcones Woods Drive
Austin, TX 78759
512.345.0882 (tel)
esaucier@juno.com
PROTESTANT



Joshua D. Katz