

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

January 8, 2013

Les Trobman, General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin Texas 78711-3087

Re: **SOAH Docket No. 582-12-5103; TCEQ Docket No. 2011-1786-DIS; In Re: Application for the Creation of the Municipal Utility District of South Port Alto in Calhoun County, Texas**

Dear Mr. Trobman:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than January 28, 2013. Any replies to exceptions or briefs must be filed in the same manner no later than February 7, 2013.

This matter has been designated with **TCEQ Docket No. 2011-1786-DIS; SOAH Docket No. 582-12-5103**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at <http://www10.tceq.state.tx.us/epic/efilings/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,


Sharon Cloninger
Administrative Law Judge

SC/lh
Enclosures
cc: Mailing List

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STYLE/CASE: SOUTH PORT ALTO MUNICIPAL UTILITY DISTRICT
SOAH DOCKET NUMBER: 582-12-5103
REFERRING AGENCY CASE: 2011-1786-DIS

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

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

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

APPLICATION FOR THE	§	BEFORE THE STATE OFFICE
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PROPOSAL FOR DECISION

I. INTRODUCTION

A petition (Petition) has been filed with the Texas Commission on Environmental Quality (Commission or TCEQ) for the creation of the Municipal Utility District of South Port Alto (District) that would provide water and sewer service to 52.4 acres of land in Calhoun County, Texas.¹ The proposed District is located about 17 miles east of the City of Port Lavaca, just east of the intersection of State Highway 172 and County Road 314, on the western shore of Carancahua Bay.² The proposed District will serve approximately 96 homes in the South Port Alto community, as well as up to 199 homes outside the District's boundaries.³ To provide the service, the District plans to acquire and improve an existing water utility; acquire, expand, and improve an existing wastewater treatment plant; and construct centralized wastewater collection lines, for a total bond issue requirement of \$2.26 million.⁴ None of the District's proposed area is within the corporate limits or extraterritorial jurisdiction of any city in Calhoun County.

The TCEQ's Executive Director (ED) recommends that the Petition be granted in its entirety; Protestants who participated in the evidentiary hearing recommend denial of the Petition; and the Office of Public Interest Counsel (OPIC) recommends granting the Petition with the exclusion of all Protestants' land, whether they participated in the evidentiary hearing or

¹ Exhibit ED-A and District Exhibit 3.

² Exhibits ED-IP-2 and ED-RN-2.

³ District Exhibit 1 at 2 and 8. This figure includes 35 homes in the Sunilandings neighborhood adjacent to the District and another 164 lots in close enough proximity to a new system to obtain service from the District.

⁴ Exhibit ED-IP-3 at 5:23-26; Exhibits ED-IP-2 and ED-RN-2.

not. While the parties' primary recommendations differ, they all recommend, in the alternative, that the Petition be granted with the exclusion of land owned by the participating Protestants.

Based on the evidence and argument presented, the ALJ recommends that the Petition be denied. The District proved some, but not all, of the elements required for approval of the Petition. The District proved that its plan to provide area-wide sewer service would comport with the Commission's policy of promoting regionalization of wastewater treatment.⁵ The District also proved the Petition conforms to the requirements of Texas Water Code (TWC) § 54.015. But the District did not prove by a preponderance of the evidence that the project is feasible, practicable, necessary, and a benefit to the land in the District. Accordingly, the Petition must be denied pursuant to TWC § 54.021(d).

II. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

More than 50 landowners in the proposed District signed the Petition in September 2009. These petitioners asserted they collectively hold title to a majority in value of the lands situated within the area designated to become the District, as shown in the tax rolls for the central appraisal district of Calhoun County, Texas.⁶ The Petition was submitted to the TCEQ on February 19, 2010,⁷ and ED staff declared the Petition to be administratively complete on March 11, 2010. During technical review by ED staff, the original Petition was changed to reflect the District's response to ED staff's notices of deficiency and requests for more information. On August 31, 2011, ED staff recommended creation of the District after determining that all requisite criteria had been met.⁸

⁵ TWC § 26.081(a) and (c).

⁶ Exhibit ED-A at Section IV of the Petition.

⁷ Exhibit ED-A.

⁸ Exhibits ED-RN-2 at 8; ED-IP-2 at 8; ED-RN-3 at 6:16-21.

Notice of the Petition (Notice) was published in the *Port Lavaca Wave* on June 26, 2010, and July 3, 2010.⁹ The Notice was posted at the Calhoun County Courthouse on June 29, 2010.¹⁰ The Notice informed the public that the TCEQ may grant a contested case hearing on the Petition if a written hearing request was filed within 30 days after its publication. The Notice did not reflect changes made to the original Petition.

Several landowners who signed the original Petition now protest the current Petition.¹¹ They and other landowners timely and properly requested a contested case hearing, pursuant to 30 Tex. Admin. Code § 55.251. On February 22, 2012, the Commission held an open meeting regarding the Petition. On February 28, 2012, the Commission issued an Interim Order granting eight contested case hearing requests and establishing a maximum hearing duration of nine months from the preliminary hearing to issuance of the Proposal for Decision. The case was referred to the State Office of Administrative Hearings (SOAH) on March 7, 2012. A Notice of Hearing letter was issued March 14, 2012.¹² The preliminary hearing was held April 9, 2012, at SOAH in Austin.

The hearing on the merits was held September 25, 2012, before ALJ Sharon Cloninger at SOAH, William P. Clements State Office Building, 300 West 15th Street, Fourth Floor, Austin, Texas. The District appeared through Wanda Roberts, attorney. Robert L. Bolleter, Lynn Bolleter, Paul E. Lawson, and Patricia Lawson (participating Protestants) appeared through Josh Katz, attorney, and presented evidence. Protesting party Herbert Haas (Mr. Haas) appeared *pro se* and presented no evidence. Protesting parties who did not appear or participate in the hearing are Millard and Lucille Brisbois; Frederick J. Dennick, Jr.; Harry and Patricia A. Forbes; Claudia Haas; Evelyn Saucier;¹³ and Jesse Wood (non-participating Protestants). The ED was represented by Kayla Murray, Staff Attorney. OPIC was represented by Scott A. Humphrey,

⁹ Exhibit ED-B.

¹⁰ Exhibit ED-C.

¹¹ Protesting parties who signed the original Petition are Millard and Lucille Brisbois, Frederick J. Dennick, Jr., and Evelyn Saucier. Exhibits ED-A and ED-B.

¹² Exhibit ED-D.

¹³ Ms. Saucier intended to participate but was in a car accident on her way to the hearing.

Assistant Public Interest Counsel. The record closed November 15, 2012, after the submission of written closing arguments and replies.

III. APPLICABLE LAW

The standards for considering whether a petition for the creation of a municipal utility district should be granted are set out in TWC chs. 49 and 54, and 30 Tex. Admin. Code ch. 293.¹⁴ One of the purposes of a municipal utility district is “the protection, preservation, and restoration of the purity and sanitary condition of water within the state.” TWC § 54.012(7). For the Commission to grant a petition for a municipal utility district, the petition must be sufficient; the proposed district must be feasible and practicable; the land and the property to be included in the district must be benefited by creation of the district; and there must be public necessity or need for the district. TWC ch. 54.

Pursuant to TWC § 54.015, the contents of a petition for creation of a municipal utility district shall:

- (1) describe the boundaries of the proposed district by metes and bounds or by lot and block number, if there is a recorded map or plat and survey of the area;
- (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 followed by the words Municipal Utility District, or if a district is located within one county, it may be designated “_____ County Municipal Utility District No. _____.” (Insert the name of the county and proper consecutive number.) The proposed district shall not have the same name as any other district in the same county.

In addition to the requirements set out in TWC § 54.015, the petition must include evidence that it was filed with the county clerk; include a map, preliminary plan, and preliminary engineering report; a certificate by the central appraisal district indicating the owners and tax

¹⁴ Exhibit ED-IP-3 at 3:28-33.

valuation of land within the proposed district; and affidavits by those persons desiring appointments by the Commission as temporary directors. 30 Tex. Admin. Code § 293.11.

If, as in this case, the proposed municipal utility district is to be located entirely outside the extraterritorial jurisdiction of a city, the county commissioners court may review the petition. TWC § 54.0161.

If the Commission determines that a hearing is necessary under TWC § 49.011,¹⁵ the Commission shall conduct a hearing and accept evidence on the sufficiency of the petition and whether the project is feasible and practicable and is necessary and would be a benefit to all or any part of the land proposed to be included in the district. TWC § 54.020(a).

The standards for granting or refusing the petition are set out in TWC § 54.021, which states:

(a) If the commission finds that the petition conforms to the requirements of § 54.015 and that the project is feasible and practicable and is necessary and would be a benefit to the land to be included in the district, the commission shall so find by its order and grant the petition.

(b) In determining if the project is feasible and practicable and if it is necessary and would be a benefit 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:

¹⁵ The Commission is required to issue a notice indicating a petition is administratively complete; establish a procedure for public notice and hearing on a petition; and, if a hearing is requested by the Commission, the ED, or an affected person, advise all parties of the time and place of the hearing. TWC § 49.011.

- (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.

(c) 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 so find and exclude all land which is not benefited from the proposed district and shall redefine the proposed district's boundaries accordingly.

(d) If the commission finds that the petition does not conform to the requirements of § 54.015 of this code or that the project is not feasible, practicable, necessary, or a benefit to the land in the district, the commission shall so find by its order and deny the petition.

The District has the burden of proof in this proceeding.¹⁶

IV. BACKGROUND

South Port Alto is a beach community on Carancahua Bay (the Bay) in Calhoun County, Texas. The District describes the 96 properties there as "mostly year-round" residences, but according to the participating Protestants, who are permanent residents of the community, only about 21 homes are occupied year-round.¹⁷ Protestant Mr. Wood also states that the vast majority of the properties are second or weekend homes that are only inhabited a few weekends per year.¹⁸

The proposed District is located entirely within Precinct 3, Calhoun County, Texas. Precinct 3 County Commissioner Neil Fritsch supports the creation of the District because he

¹⁶ 30 Tex. Admin. Code § 80.17.

¹⁷ District Exhibit 1 at 2; Exhibit RB-1 at 3:11-13; Exhibit PL-1 at 4:1-3.

¹⁸ District Exhibit 3, Attachment 18. Letter dated January 16, 2011, from Jesse Wood, Manager of Enchanted Harbor Utility and Sunilandings Utility, to JoAnna "Jody" Weaver, P.E., G&W Engineers.

believes it will be beneficial to have an organized political entity to address existing and possible future issues regarding water and sewer services.¹⁹

Residents within the proposed District receive water service from Enchanted Harbor Utility or private wells. For wastewater service, residents are served by individual on-site septic systems, the neighboring Sunilandings Utilities, or, in some cases, they allegedly convey wastewater directly into the Bay.²⁰ No evidence was presented as to how many or which properties convey wastewater directly into the Bay, how often the pollution occurs, whether the pollution is ongoing, how much untreated waste has entered or currently enters the Bay, or what effect the untreated effluent has had or currently has on water quality in the Bay. Owners of two septic systems were cited for violations in 2008;²¹ no evidence of any other citations is in the record. Two of the 96 properties receive sewer service from Sunilandings Utilities, which mainly serves the Sunilandings neighborhood adjacent to the proposed District.²²

H. J. “Butch” Houck and Torsten Normann-Petersen are South Port Alto landowners who initiated creation of the District due to their concerns about the proper disposal of sewage and the impacts of untreated sewage on the Bay.²³ Mr. Houck’s septic system discharges directly into the Bay.²⁴ Based on visual inspection and odor, both Mr. Houck and Mr. Normann-Petersen believe other septic systems within the proposed District have overflow problems.²⁵ Mr. Houck testified that as recently as about three months before the September 2012 hearing on the merits,

¹⁹ Tr. at 83:20-22.

²⁰ Exhibits ED-RN-2 at 7 and ED-IP-2 at 7.

²¹ District Exhibit 1, Appendix L. R. Don Sachtleben, the owner of one of the cited properties, submitted a letter containing facts which the ALJ believes support his contention that the health department citation was made in error.

²² Tr. at 36:17.

²³ District Exhibit 6 at 1:3-5; District Exhibit 7 at 1:3-5.

²⁴ Exhibit RB-5 at Interrogatories 14 and 29.

²⁵ Tr. at 47:7-10; 47:19-23; 78:8-23; 79:8-23.

he observed sewage two or three inches deep in the backyard of one of the homes that is connected to the Sunilandings system.²⁶

Mr. Houck and Mr. Normann-Petersen talked with other landowners in South Port Alto, passed out flyers, held two public meetings in 2008, and, on September 5, 2009, began collecting signatures for the Petition.²⁷ They submitted the original Petition to the ED in February 2010. During the ED staff review process, the Petition was changed to reflect the acquisition of a water utility as well as a wastewater utility; a projected cost increase from \$1.89 million to \$2.26 million; and a higher estimated tax rate of \$1 per \$100 of assessed property valuation.

The projected tax rate, submitted to ED staff in the District's November 19, 2009 Preliminary Engineering Report, was between \$0.27 and \$0.387.²⁸ By February 2011, the District estimated the tax rate would be between \$0.51 and \$1.07, depending on the amount of grant funds received after the District's creation.²⁹ The ALJ notes that, by law, the tax rate for the District cannot be higher than \$1.³⁰

The participating Protestants report that during at least one public meeting held before residents signed the Petition, a tax rate of 7.9 cents was presented in a handout prepared by Mr. Normann-Petersen.³¹ However, the number proved to be inaccurate. The property tax valuation for property within the proposed District's boundaries that had been used to calculate the 7.9 cents rate was approximately "two-thirds too high" because the "Calhoun County Tax Office" originally presented "incorrect" figures, according to Mr. Normann-Petersen.³² When residents of the proposed District began offering their signatures in support of the Petition, no estimated property tax rate other than the 7.9 cents figure had been presented, the participating

²⁶ Tr. at 47:7-23.

²⁷ District Exhibit 7 at 2:1-9 and 2:30-31.

²⁸ District Exhibit 1 at 14.

²⁹ District Exhibit 3 at 3, paragraph 13, and at 6, paragraph 23.

³⁰ 30 Tex. Admin. Code § 293.59(k)(3).

³¹ District Exhibit 7 at 2:5-7; Exhibit RB-6; Tr. 66:7 through 67:2.

³² Tr. at 70:25; Exhibit RB-5 at Interrogatory No. 6.

Protestants contend.³³ By the time the property tax valuation was corrected in January 2010, residents had already signed the Petition.³⁴

The District has signed a letter of intent with non-participating Protestant Mr. Wood to purchase Enchanted Harbor Utility, which already provides water to a number of properties in the proposed District, and Sunilandings Utilities, which provides sewer service to two homes in the proposed District. The District plans to serve Sunilandings' remaining existing customers as out-of-District customers.³⁵

Mr. Wood apparently requested a hearing to protest creation of the District within 30 days of the publication and posting of the Notice in late June and early July 2010.³⁶ On February 1, 2011, he signed the letter of intent to sell his utilities to the District.³⁷ Yet he did not withdraw his hearing request prior to the Commission's February 22, 2012 public meeting regarding the Petition, and he appeared and was admitted as a Protestant at the April 9, 2012 preliminary hearing in this matter. Mr. Wood did not appear at the September 25, 2012 evidentiary hearing to explain how it is that he intends to sell the utilities to the District yet protests the District's creation.

The District's expert witness Ms. Weaver, a civil engineer, testified that the improvements planned by the District will include decommissioning existing septic tanks and absorption fields within its boundaries.³⁸ This action will eliminate raw sewage discharges and overflows which can occur from poorly maintained and aging septic systems, she said. She

³³ Tr. at 67:12-22.

³⁴ Tr. at 72:14-19.

³⁵ Exhibits ED-RN-2 at 3 and ED-IP-3 at 5:23-26.

³⁶ Exhibits ED-B and ED-C.

³⁷ District Exhibit 4; District Exhibit 3, Attachment 17 at 4.

³⁸ District Exhibit 9 at 2:11-17.

acknowledged that not all of the septic systems within the proposed District are poorly maintained and aging,³⁹ but she provided no testimony as to how many are.

The participating Protestants presented credible evidence that their septic systems are fully functioning and in compliance with applicable regulations and rules. They also presented evidence that at least another nine septic systems in the community are permitted by the Victoria City-County Health Department.⁴⁰ No party presented evidence as to whether the remaining septic tanks in the community are in compliance or in violation of applicable regulations and rules. In its review of the Petition, ED staff did not assess the condition of septic tanks in South Port Alto.⁴¹

V. DISCUSSION

A. Sufficiency of the Petition

Pursuant to TWC § 54.021(a), one of the criteria to be met for granting the Petition is its conformance with the requirements of TWC § 54.015, which describes the contents of a petition for creation of a municipal utility district. Additional requirements for the contents of a petition are set out in the Commission rule at 30 Tex. Admin. Code § 293.11.

The original Petition stated that acquisition, financing, operation, and maintenance of a waterworks system were not proposed at that time, but nevertheless included an estimate of \$630,000 for a waterworks system in addition to the estimated \$1.26 million for a wastewater system, for a total projected cost of \$1.89 million.⁴² The original Petition stated the District would construct its own wastewater treatment plant. The current Petition indicates the District

³⁹ Tr. at 112:11-14.

⁴⁰ Exhibit RB-3. The May 22, 2012 list from the health department's data base is for septic system permits issued beginning in 2001. A note from the health department indicates information is limited for permits issued between 1984 and 2000. The health department communication contains no information or notation about permits issued prior to 1984.

⁴¹ Tr. at 141:3-6.

⁴² Exhibit ED-A.

instead intends to purchase Sunilandings Utilities, which includes a 25,000 gallons per day (GPD) wastewater treatment plant. The District plans to increase capacity of the plant to 50,000 GPD to provide service to the District and enhance service to existing Sunilandings customers. The District will upgrade the existing lift station and construct two additional lift stations.⁴³ The original Petition indicated the area of the proposed District would be 56.6 acres. But in a letter dated February 4, 2011, Ms. Weaver provided ED staff with a revised metes and bounds description for 52.5 acres. The revised area appears to be the same as the original 56.6 acres except for excluding land for a new wastewater treatment plant.⁴⁴

1. Parties' Positions and Argument

Neither the ED nor OPIC raised concerns regarding the sufficiency of the Petition. ED staff auditor Elizabeth "Izzy" Polcyn testified that after the District amended the boundaries, cost of the project, and projected tax rate in response to ED staff's August 11, 2010 Notice of Deficiency, her analysis regarding feasibility of the District did not change because the amendments submitted by the District still meet all the relevant Commission rules and TWC statutes regarding feasibility.⁴⁵ However, the participating Protestants argue that the Petition does not conform to the requirements of TWC § 54.015 and 30 Tex. Admin. Code § 293.11, primarily because the current version of the Petition differs significantly from the original Petition and the District has not informed signatories of the changes to ascertain if their support is continued under the current Petition. In addition, they state that the changes were made after the Notice was published, implying that signatories who did not request a contested case hearing regarding the original Petition might have requested a hearing had the Notice described the current Petition.

The participating Protestants point out that the original Petition does not state the current boundaries of the proposed District, as required by TWC § 54.015(1). Instead, it states the

⁴³ Exhibit ED-RN-2 at 4.

⁴⁴ Exhibits ED-RN-2 at 7 and ED-IP-2 at 7.

⁴⁵ Exhibit ED-IP-3 at 9:22-29.

boundaries of the District will include 56.6 acres of land, not the 52.4 acres of land identified in the current Petition. The original Petition, therefore, does not describe the boundaries of the proposed District by metes and bounds or block number, they argue.⁴⁶ But Randy M. Nelson, P.E.,⁴⁷ testified on behalf of the ED that applicable rules and statutes do not prohibit changes in acreage during the district-creation process.⁴⁸ Thus, the boundaries are described in metes and bounds, even if the described area is larger than what is currently proposed to be used.

The participating Protestants further argue that the Petition no longer accurately describes the nature of the work proposed to be done, as required by TWC § 54.015(2). The original Petition called for the construction of a new wastewater treatment plant and specifically stated that acquisition of Sunilandings Utilities was not part of the project. As the participating Protestants point out, the District now proposes to acquire both Sunilandings' Certificate of Convenience and Necessity as well as its facilities, and to expand Sunilandings' wastewater treatment plant rather than construct a new wastewater treatment plant.⁴⁹

The participating Protestants also point out that the original Petition does not accurately state the costs of the project or its proposed tax rate as required by Tex. Water Code § 54.015(2). As the scope and nature of the project have changed, the cost has increased approximately 20 percent over the cost as stated in the original Petition, from \$1.89 million to \$2.26 million.⁵⁰ As for the tax rate, it is unclear to the participating Protestants exactly what the District proposes. Originally, residents of the proposed District were told the property tax rate necessary to repay the District's bonds would be 7.9 cents per \$100 assessed valuation.⁵¹ However, the District later acknowledged that the tax rate could be as high as \$1.07, while ED witness Ms. Polcyn has

⁴⁶ Exhibit RB-1 at 7:12-18.

⁴⁷ Mr. Nelson has been with TCEQ since 1985 and has reviewed about 30 petitions to create municipal utility districts. Exhibit ED-RN-1.

⁴⁸ Exhibit ED-RN-3 at 6:10-14.

⁴⁹ Exhibit RB-1 at 7:20 through 8:21.

⁵⁰ Exhibit ED-A; District Exhibit 3, Attachment 14.

⁵¹ Exhibit RB-6; Tr. at 66:4 to 67:2.

estimated a tax rate of \$1 per \$100 valuation.⁵² The participating Protestants complain that the District now cannot estimate what its property tax rate will be because there are “too many variables,” according to District witness Mr. Houck, including whether grants are obtained and what interest rate is attached to any loan.⁵³

Further, the participating Protestants argue that the original Petition is lacking because it does not contain proposed water or wastewater rates as required by 30 Tex. Admin. Code § 293.11(d)(5)(F), but the Preliminary Engineering Report submitted to ED staff by the District on November 19, 2009, assumes a standard wastewater rate of \$30 per customer and no water rate, since water was not anticipated to be initially provided by the District.⁵⁴ According to ED witness Mr. Nelson there is nothing in the applicable rules that states when a new district’s rates should be set. He testified it would make sense for rates to be determined after the District is created, at the District’s first Board meeting.⁵⁵ Mr. Houck also testified the District will not set water or wastewater rates until after it is created.⁵⁶

The participating Protestants are concerned that despite acknowledging that the 7.9 cents tax rate estimate was based on flawed appraisal values⁵⁷ and that residents signed the Petition after being informed of these incorrect values,⁵⁸ the District has taken no apparent action to inform signatories of this misinformation. The District does not know how many persons signed the Petition only after being informed that the tax rate would be 7.9 cents.⁵⁹ The District also cannot state what efforts it took to only gather signatures to the Petition based on correct property valuation data.⁶⁰ The District did not point to any efforts it took to inform signatories

⁵² District Exhibit 3 at 3, paragraph 13; Exhibit ED-IP-3 at 6:12-16.

⁵³ Tr. at 27:11-15.

⁵⁴ District Exhibit 1 at 14.

⁵⁵ Exhibit ED-RN-3 at 6:6-8.

⁵⁶ Tr. at 39:8 to 40:3; *see also* Exhibit RB-5 at Interrogatory No. 12.

⁵⁷ Tr. at 69:20 through 71:15; Exhibit RB-5 at Interrogatory No. 6.

⁵⁸ Tr. at 67:12 to 67:22.

⁵⁹ Exhibit RB-5 at Interrogatory No. 30.

⁶⁰ Exhibit RB-5 at Interrogatory No. 8.

that the District's currently estimated property tax rate is much higher than the original 7.9 cents estimate presented to residents.⁶¹

The participating Protestants urge denial of the Petition based on its alleged deficiencies. In the alternative, the participating Protestants argue that the District should be required to revise and re-file the Petition with new signatures based on the current scope and details of the project.

2. ALJ's Analysis and Conclusion

It is undisputed that the original Petition and current Petition differ. The participating Protestants argue that the original Petition is insufficient because its current version does not reflect the project as initially submitted to the ED. They intimate that if the current Petition were presented to signatories of the original Petition, the signatories would reject creation of the District based on the increases in the estimated tax rate and project cost. But all affected persons, including signatories to the original Petition, had an opportunity to protest the creation of the District within 30 days after the Notice was published and posted. Admittedly, the Petition was changed after the Notice was posted. However, the participating Protestants point to no provision that requires a second Notice of Petition to be published and posted in the event an original petition is changed during the ED staff review process. Therefore, it appears the District is not required to allow signatories to the original Petition to reconsider their support for the project now that changes have been made.

The ALJ finds the current Petition meets the requirements of TWC § 54.015 and 30 Tex. Admin. Code § 293.11:

- The current Petition describes the boundaries of the proposed District by metes and bounds and includes plat maps depicting lot and block numbers,⁶² in compliance with TWC § 54.015(1).

⁶¹ Exhibit RB-5 at Interrogatory No. 7; Tr. at 72:23 to 73:11.

⁶² District Exhibit 3, Attachments 2, 3, and 6-12.

- The current Petition states the general nature of the work proposed to be done, the necessity for the work, and the projected cost of the project,⁶³ in compliance with TWC § 54.015(2). The ALJ notes that the language of TWC § 54.015(2) anticipates a change in estimated costs from the time a petition is filed until a district is created.⁶⁴ Therefore, the fact that the estimated cost of the project has changed since the original Petition was filed does not render either the original Petition or the current Petition insufficient.
- Both the original Petition and the current Petition designate the name of the District.⁶⁵ No evidence was presented that the District will have the same name as any other municipal utility district in Calhoun County. Therefore, the current Petition complies with TWC § 54.015(3).
- The current Petition complies with the requirements of 30 Tex. Admin. Code § 293.11, in that it contains evidence that it was filed with the county clerk on February 22, 2010;⁶⁶ a map;⁶⁷ a preliminary plan and preliminary engineering report;⁶⁸ a certificate by the central appraisal district indicating the owners and tax valuation of land within the proposed district;⁶⁹ and affidavits by those persons desiring appointments by the Commission as temporary directors.⁷⁰
- The current Petition addresses projected water and wastewater rates and contains an estimated tax rate, as required by 30 Tex. Admin. Code § 293.11(d)(5)(F).

For the above-stated reasons, the ALJ concludes the current Petition meets the requirements of TWC § 54.015 and 30 Tex. Admin. Code § 293.11.

⁶³ Exhibit ED-A; District Exhibit 3, Attachment 13.

⁶⁴ The petition is to state the cost of the project *as then estimated* by those filing the petition (emphasis added). TWC § 54.015(2).

⁶⁵ Exhibit ED-A.

⁶⁶ Exhibit ED-A.

⁶⁷ District Exhibit 1, Appendix H.

⁶⁸ District Exhibit 1.

⁶⁹ District Exhibit 3, Attachment 15.

⁷⁰ District Exhibit 2.

B. Is the project feasible, practical, necessary, and would it be a benefit to all or any part of the land included in the District, as required by TWC §§ 54.020 and 54.021(b)?

1. What is the availability of comparable service from other systems, including but not limited to water districts, municipalities, and regional authorities?

a. Evidence and Argument

One of the factors the Commission considers in determining the feasibility, practicality, necessity, and benefit of a project to any or all of the land included in a proposed district is the availability of comparable service from *other systems*, if any (emphasis added).⁷¹ The proposed District is wholly within the certificated area of Enchanted Harbor Utility, which holds Certificate of Convenience and Necessity (CCN) No. 12683 to provide water. Sunilandings Utilities holds CCNs to provide water and wastewater service to residents of the Sunilandings neighborhood and to property within the proposed District's boundaries. Mr. Wood, the current owner of Enchanted Harbor Utility and Sunilandings Utilities, is not prepared to build the infrastructure necessary to provide wastewater service to all properties in the proposed District.⁷² Mr. Wood and District representatives signed an agreement dated January 26, 2011, for the District to purchase Enchanted Harbor Utility, Sunilandings Utilities,⁷³ and the accompanying CCNs.

No party pointed to any statute or rule that defines "other systems." The participating Protestants note that the statute states "other systems" are "not limited to water districts, municipalities, and regional authorities,"⁷⁴ and, therefore, they argue the reference to "other systems" includes septic systems. The ED argues that "comparable service from other systems" refers to other utilities providing similar services and does not refer to service that an individual

⁷¹ TWC § 54.021(b)(1).

⁷² District Exhibit 3, Attachment 18.

⁷³ Exhibit ED-RN-2 at 3; District Exhibit 17. The ED's exhibit states that the District will purchase only the Sunilandings Utilities, but the actual letter of intent states the District will purchase both utilities. See District Exhibit 4 and District Exhibit 2, Attachment 17.

⁷⁴ TWC 54.021(b)(1).

obtains independently, such as from an on-site septic system. Accordingly, neither Mr. Nelson nor Ms. Polcyn, who testified for the ED, evaluated whether on-site septic systems offer comparable service to the wastewater service the District is proposing to provide.

No party presented evidence that comparable service options from water districts, municipalities, or regional authorities are available to the District. Ms. Polcyn testified that there was nothing in the application materials that indicated any other comparable service options were available.⁷⁵ However, except for an undetermined number of other property owners who have private wells, current residents of the proposed District receive water service from the privately-owned Enchanted Harbor Utility,⁷⁶ which is proposed to be acquired by the District. In the ALJ's opinion, Enchanted Harbor Utility could be considered an available comparable service for water even if the District does not purchase it. That is, no evidence was presented that, if the Petition is denied, Enchanted Harbor Utility would discontinue service to its current customers. In addition, two homes in the District are connected to the Sunilandings wastewater system. The ALJ agrees with ED staff that Sunilandings is not an available "comparable service" for wastewater because the Sunilandings wastewater system does not have the capacity to serve all 96 homes in the District and Mr. Wood is not interested in expanding the Sunilandings Utilities' system.⁷⁷

The participating Protestants argue that wastewater service comparable to that proposed by the District can be provided by septic systems, noting that the majority of homes in South Port Alto already have on-site septic systems.⁷⁸ As the District's expert Ms. Weaver testified, a properly permitted on-site aerobic septic system meets the needs of a single-family home.⁷⁹ Furthermore, from an engineering standpoint, a properly working septic system can easily co-

⁷⁵ Exhibit ED-IP-3 at 5:6-9.

⁷⁶ Exhibit RB-1 at 12:11-12; Tr. at 19:22 through 20:5.

⁷⁷ District Exhibit 3, Attachment 18.

⁷⁸ Exhibit PL-1 at 14:4-7; Exhibit RB-1 at 13:16-18.

⁷⁹ Tr. at 108:19-25.

exist alongside a municipal utility district, according to Ms. Weaver.⁸⁰ Both Ms. Polcyn and Mr. Nelson testified that individual septic systems can be an adequate means of wastewater treatment and disposal if there is sufficient room on each home site for a septic system.⁸¹

Ms. Weaver testified that current health department regulations generally permit on-site septic systems only on lots of at least a half-acre in size when the lot is served by a public water system, such as Enchanted Harbor Utility. She said most of the lots in the proposed District are less than 0.2 acres in size and are utilizing on-site systems.⁸² She expressed concern that the continued use of septic tank absorption field systems in the proposed District's area, where such treatment may eventually become ill-adapted to the prevalent soils, may result in an increased quantity of septic tank violations. These types of violations have the potential for seepage of sewage in residential yards and drainage ditches which drain to the Bay, possibly leading to increased public health, odor, and general nuisance problems.⁸³ The ALJ assumes Ms. Weaver's testimony about the continued use of septic tank absorption field systems applies to homes that are occupied year-round; she did not specifically address the long-term effect of using septic systems on properties that are only occupied as weekend or vacation homes.

The participating Protestants acknowledge that the Commission's general rule allows a septic system to be installed on half-acre lots in platted or unplatted neighborhoods that, like South Port Alto, are served by a public water supply.⁸⁴ But the participating Protestants disagree with Ms. Weaver's testimony that the lots within the proposed District are too small for the installation of septic systems,⁸⁵ arguing that the District has not determined the number of lots within its proposed boundaries that cannot accommodate the installation of an approved septic

⁸⁰ Tr. at 113:6-13.

⁸¹ Exhibit ED-RN-3 at 5:17-30; Exhibit ED-IP-3 at 8:29 through 9:9.

⁸² District Exhibit 9 at 2:18-22; *see* District Exhibit 3 at Attachments 6-11, for recorded plats.

⁸³ District Exhibit 9 at 2:23-28.

⁸⁴ Exhibit PL-1 at 6:14-15; 30 TAC § 285.4(a)(1)(A).

⁸⁵ District Exhibit 9 at 2:19 to 2:22.

system.⁸⁶ No party presented expert testimony regarding how many lots within the District do not currently have functioning on-site septic systems or what size those lots are.

The participating Protestants point out that even for lots smaller than a half-acre, there are options.⁸⁷ Lots that are smaller than a half-acre that were subdivided before January 1, 1988, or had a site-specific sewage disposal plan approved between January 1, 1988, and the February 5, 1997 effective date of the relevant Commission rule, are allowed to use an on-site sewage facility.⁸⁸ A plat of the area that comprises the majority of the District's proposed boundaries—the homes along Marshall Johnson Avenue South—is dated August 8, 1949.⁸⁹ Because the lots within the District were subdivided before 1988, the half-acre lot size requirement does not apply and owners of smaller lots may install on-site septic systems.

The participating Protestants argue Sunilandings Utilities is also a viable option to provide comparable service to homes within the proposed District. The Sunilandings system has a wastewater line that runs down Marshall Johnson Avenue and serves two homes within the proposed District.⁹⁰ This line could be extended to serve the few additional homes needing wastewater service at far below the \$2.26 million estimated cost to create the District, the participating Protestants argue. In fact, the one home within the proposed District's boundaries that the District proved has an ongoing sewage violation—that of proposed Board member Mr. Houck—is directly across the street from the Sunilandings line.⁹¹ However, Mr. Houck has not offered to pay to extend the wastewater line across the street to

⁸⁶ Exhibit RB-5 at Interrogatory No. 26.

⁸⁷ Exhibit RB-1 at 6:6-12.

⁸⁸ 30 Tex. Admin. Code § 285.4(b)(1); Exhibit PL-1 at 6:17-21; Exhibit RB-1 at 6:9-12.

⁸⁹ District Exhibit 3 at Attachment 6.

⁹⁰ Exhibit RB-1 at 18:7-9; Tr. at 19:2-11; Tr. at 36:9-17; *see* District Exhibit 3, Attachment 1, for map of District's proposed boundaries. According to the map, Johnson Avenue becomes Whitecliff Way then Beach Drive, in one long street with lots on both sides. All but about 31 of the 96 lots front one of these streets.

⁹¹ Tr. at 36:9 to 37:16; Exhibit RB-7, map showing location of homes served by Sunilandings and Mr. Houck's home.

cure the wastewater problem at his home,⁹² and it is not clear that Sunilandings Utilities would be willing or have the capacity to offer service to Mr. Houck.

Although the proposed District is located in the Sunilandings area certificated to provide sewer service, the wastewater treatment plant does not currently have the capacity to serve all 96 homes in the District. According to a January 16, 2011 letter from Mr. Wood to Ms. Weaver, he did not want to increase the capacity of the wastewater plant and extend the wastewater collection lines to provide service to residents of the proposed District, because residents along those streets could not be required to connect to the expanded system and Sunilandings might not recoup its investment.⁹³

b. ALJ's Analysis and Conclusion

Under TWC § 54.021(b)(1), “comparable service” is not limited to water districts, municipalities, and regional authorities. A number of residences in the proposed District receive water service from the privately-owned Enchanted Harbor Utility, the very utility the District proposes to acquire to provide water service. Therefore, comparable water service not only exists but is currently being used by residents of the proposed District.

Regarding sewer service, the ALJ cannot conclude that Sunilandings can provide comparable service to homes within the proposed District. No evidence or testimony was presented during the hearing on the merits regarding the associated costs or viability of extending the Sunilandings' wastewater line. In the ALJ's opinion, the participating Protestants' suggestion that a few properties, and not the entire District, could be served by Sunilandings, does not meet the definition of “comparable service” as contemplated by TWC § 54.021(b)(1).

Septic systems are neither expressly included nor excluded from examples of “comparable service” in TWC § 54.021(b)(1). But the use of septic systems as a way to treat and dispose of wastewater is permitted under the law. 30 Tex. Admin. Code ch. 285. Therefore, the

⁹² Tr. at 37:17-22 and 39:3-6.

⁹³ District Exhibit 3, Attachment 18.

ALJ finds septic systems provide “comparable service” as that term is used in TWC § 54.021(b)(1), even for lots smaller than a half-acre, pursuant to 30 Tex. Admin. Code § 285.4(b)(1).

The evidence shows comparable sewer service is not available from a water district, municipality, or regional authority, or from Sunilandings. The evidence also shows the only comparable service currently available for the treatment and disposal of sewage is on-site septic systems. No party presented expert testimony regarding how many lots within the District do not currently have functioning on-site septic systems or what size those lots are. The ALJ is persuaded by the participating Protestants’ evidence that if, in fact, some properties have no septic system or septic systems that are out of compliance, the lots within the District are of adequate size pursuant to 30 Tex. Admin. Code § 285.4(b)(1) for installing or upgrading a septic system.

Because comparable water service is available from Enchanted Harbor Utility and wastewater service is available to some extent from Sunilandings and otherwise from septic systems, creation of the District is not necessary.

2. Are the projected construction costs, tax rates, and water and sewer rates reasonable?

a. Construction Costs

i. Evidence and Argument

One of the factors analyzed to ascertain feasibility and practicality of district creation is the reasonableness of construction costs. TWC § 54.021(b)(2). In its response to the participating Protestants’ discovery requests, the District acknowledged that the “actual costs” of the District are unknown.⁹⁴ The current Petition shows an estimated cost of \$2.26 million as of

⁹⁴ Exhibit RB-5 at Interrogatory No. 20.

February 2011, compared to the \$1.89 million contained in the original Petition filed in February 2010.⁹⁵

The ED found the construction costs to be reasonable. The participating Protestants believe the estimated construction costs of \$2.26 million are unreasonable.

According to the participating Protestants, the cost of installing an on-site septic system capable of meeting the wastewater needs of a single family home is a one-time expense of approximately \$6,000.⁹⁶ The participating Protestants contend that the estimated \$2.26 million cost of creating the District is far more expensive than the simple solution of the proper authorities taking enforcement action against those who violate existing statutes and rules regarding the discharge of wastewater effluent and requiring noncompliant property owners to either install an approved and permitted septic system or connect to the Sunilandings wastewater system.⁹⁷

The participating Protestants are also concerned about the cost to upgrade the Sunilandings wastewater treatment plant, should the District acquire it. The District has stated that a larger upgrade than is necessary to serve the 96 District homes and existing Sunilandings customers is needed because “there could potentially be another 164 out-of-District lots that would be in close enough proximity to a new system to obtain service.”⁹⁸ If costly upgrades to Sunilandings are incurred to serve those out-of-District lots, it is only fair and reasonable that those lots be included in the District and subject to the District’s tax, the participating Protestants

⁹⁵ Exhibit PL-1 at 8:17-20; District Exhibit 3, Attachment 13.

⁹⁶ Exhibit RB-1 at 12:9-10; Exhibit PL-1 at 12:16-19.

⁹⁷ Exhibit RB-1 at 15:1-4.

⁹⁸ District Exhibit 1 at paragraph 5.2.

argue. The ALJ notes that, should out-of-District customers be served, there could be a provision in the law requiring them to bear their share of the burden as far as District costs.⁹⁹

In addition, the participating Protestants predict that District creation costs are likely to rise above \$2.26 million due to facilities being located on the coast, where hurricanes are common and have caused massive damage to infrastructure in the past.¹⁰⁰ And yet, the District has not addressed the financial and engineering issues related to hurricane preparedness.¹⁰¹ When asked in discovery whether it has or intends to procure an insurance policy covering its proposed facilities in the event of hurricane or flood damage, the District responded that insurance procurement would be determined by the District's board of directors after the Petition is approved.¹⁰² The District has apparently not factored the estimated cost of any insurance policy into the projected cost of the proposed District,¹⁰³ the participating Protestants conclude. Whether the District will take any measures at all to protect its facilities from damage resulting from hurricanes or floods will only be addressed, if at all, by the board of directors after the District is created.¹⁰⁴ If a hurricane destroys the District's facilities or renders them inoperable and they are not insured, residents could be left to repay the District's bonds, the participating Protestants contend.¹⁰⁵

⁹⁹ ED staff recommends that if the Sunilandings wastewater treatment plant is purchased by the District and the Sunilandings subdivision is not included within the District's boundaries, the District should ensure that wastewater rates meet the requirements of TWC § 49.215(f). Exhibits ED-RN-2 at 8 and ED-IP-2 at 8. The statute requires "The rates, fees, rentals, tolls, or other charges shall be at least sufficient to meet the expense of operating and maintaining the services and facilities for a water and sanitary sewer system serving areas outside the district and to pay the principal of and interest and redemption price on bonds issued to purchase, construct, acquire, own, operate, repair, improve, or extend the services or facilities."

¹⁰⁰ Exhibit RB-1 at 20:1-5.

¹⁰¹ Exhibit PL-1 at 20:1-4. The ED's standard for reviewing a petition to create a municipal utility district does not include an evaluation of the effect of natural disasters on a proposed district's facilities. ED Exhibit ED-RN-3 at 5:4-6; Exhibit ED-IP-3 at 8:11-13.

¹⁰² Exhibit RB-5 at Interrogatory No. 15.

¹⁰³ Exhibit PL-1 at 20:8-10; Exhibit RB-5 at Interrogatory No. 16.

¹⁰⁴ Exhibit PL-1 at 20:11-13; Exhibit RB-5 at Interrogatory No. 24.

¹⁰⁵ Exhibit RB-5 at Requests for Admission 12; Exhibit PL-1 at 20:17-23.

ii. ALJ's Analysis and Conclusion

Perhaps the construction costs are accurately estimated, considering the District intends to acquire two existing utilities and their respective CCNs, double the capacity of the wastewater treatment plant, upgrade the water system, and acquire land for lift stations. But an unidentified amount of the \$2.26 million expenditure is planned for out-of-District service to an estimated 164 homes as well as approximately 35 out-of-District homes that currently receive service from Sunilandings Utilities. No party presented evidence as to how TWC § 49.215(f) might apply and what effect the statute could have on District property owners and out-of-District property owners as far as sharing the District's construction costs. The ALJ finds that if District property owners alone will be taxed to pay construction costs that will also benefit out-of-District customers who do not share in the cost, then the construction costs are not reasonable.

In addition, there is at least some evidence that only 21 of the 96 homes in the District are occupied year-round. No evidence was presented regarding how many homes in the adjacent Sunilandings neighborhood are occupied year-round. The ALJ finds it is not reasonable to construct a system that can serve 96 homes year-round—plus an additional 199 out-of-District properties—when most of the homes in the District are weekend or vacation homes that presumably do not need year-round water and sewer service.

Further, the District's expert witness, Ms. Weaver, and the ED's witnesses, Ms. Polcyn and Mr. Nelson, testified that on-site septic systems can provide adequate sewer service for single family residences. There is no evidence that multi-family residences or hotels are among the 96 properties at issue. Therefore, the ALJ concludes that properly functioning on-site septic systems, at a cost of about \$6,000 per home, can provide sewer service to the residences that do not currently have adequate systems. By comparison, spending \$2.26 million to create the District is unreasonable, particularly if only District property owners will be taxed to pay the construction costs for systems that also will be used by out-of-District customers.

For the above-stated reasons, the ALJ concludes that the projected construction cost of \$2.26 million to create the District is unreasonable pursuant to TWC § 54.021(b)(2).

b. Tax Rates

i. Evidence and Argument

One of the factors analyzed to ascertain feasibility and practicality of district creation is the reasonableness of the tax rates. TWC § 54.021(b)(2). The ED found that a tax rate of \$1 per \$100 assessed property valuation would be adequate to meet the District's costs and also be within the \$1 limit provided by law at 30 Tex. Admin. Code § 293.59(k)(3).¹⁰⁶ Therefore, the District's estimated tax rate of up to \$1.07 is not allowed by law and is not reasonable.¹⁰⁷ However, the District also estimated that the tax rate could be as low as \$0.51, depending on the amount of grant funds received.¹⁰⁸ OPIC supports the ED's evaluation of the projected tax rate and agrees it is feasible.

ED staff calculated the \$1 rate by assuming a 95 percent collection rate and a January 1, 2010 assessed valuation of \$14,895,311.¹⁰⁹ Considering an estimated bond issue requirement of \$2.26 million (assuming 100 percent financing), a coupon bond interest rate of 6.5 percent, and a 40-year bond life, the annual debt service requirement would be approximately \$159,839. Assuming \$18,334 out of the \$159,839 is funded with operating revenue, the remaining \$141,505 is proposed to be funded with debt service tax.¹¹⁰ If the District is created and submits a bond application to the TCEQ, an actual tax rate will then be calculated. However, pursuant to 30 Tex. Admin. Code § 293.59(k)(3), the tax rate cannot exceed \$1 or it will no longer be considered feasible.

The participating Protestants point out that Ms. Polcyn's estimated tax rate of \$1 assumes that the costs of the District will not rise further and uses an estimated tax collection rate that is

¹⁰⁶ Exhibit ED-IP-3 at 6:1-4.

¹⁰⁷ District Ex. 3 at 3, paragraph 13.

¹⁰⁸ District Exhibit 3 at 6, paragraph 23.

¹⁰⁹ Exhibits ED-IP-3 at 6:12-16; ED-RN-2 at 5; ED-IP-2 at 5.

¹¹⁰ Exhibits ED-RN-2 at 6 and ED-IP-2 at 6.

too high.¹¹¹ The Commission rule on determining whether a district's first bond issue is economically feasible requires a cash flow analysis to determine the district's necessary tax rate that assumes only a 90 percent tax collection rate.¹¹² But Ms. Polcyn applied a 95 percent tax collection rate "to ensure the District could absorb the tax rate."¹¹³ She decided to "average" the 90 percent tax collection rate that the rule calls for with a "97 to 98 percent" tax collection rate that she uses for districts that have already issued multiple bonds.¹¹⁴ The participating Protestants argue that Ms. Polcyn's 95 percent tax collection rate incorrectly supports District creation because the assumption that the District will collect its taxes at this higher rate is the only way the District can collect enough tax money under the \$1 maximum allowable property tax rate to meet its projected costs. The participating Protestants aver that if the ED had applied the 90 percent collection rate that is called for by the Commission rule, the District's estimated tax rate would have been higher than \$1 and the issuance of bonds would not be feasible or approvable under the law. But the ED states that if, after the District is created, its bond application is not considered feasible, the District will be given an opportunity to revise the bond application by shifting more of a burden to operations or reducing the scope of the project, for instance,¹¹⁵ thus lowering the tax rate to within the amount allowed by law.

The participating Protestants also are concerned that, although the District has previously claimed that grants will help meet costs and lower property owners' tax obligations,¹¹⁶ there is no evidence in the record showing the District is likely to obtain any grants or has taken any steps to do so.¹¹⁷ The District concedes that it has not submitted any grant applications for the

¹¹¹ Exhibit ED-IP-3 at 6:12 to 6:16.

¹¹² "A 90% tax collection rate shall be used in all projected tax rate calculations . . ." 30 Tex. Admin. Code § 293.59(k)(2)(C); Tr. at 159:9-14.

¹¹³ Tr. at 159:4-18.

¹¹⁴ Tr. at 159:4-18.

¹¹⁵ TWC § 49.181(d).

¹¹⁶ District Exhibit 3 at 6, paragraph 23.

¹¹⁷ The District withdrew the written testimony of Mark Pearson, its sole witness on the availability of grants to the District and did not offer him as a witness at trial after the participating Protestants' objections to the entire substance of Mr. Pearson's pre-filed written testimony were granted in SOAH Order No. 4.

construction and operation costs of the District.¹¹⁸ Therefore, there is no evidence in the record that the District will be able to lower its property taxes to an economically feasible rate by using grants, the participating Protestants contend. But the ALJ notes there is some evidence that the District must first be created before it can apply for grants, so applying before the Petition is granted would be premature.

In addition, the participating Protestants point out that the District's necessary \$1 tax rate is disproportionately higher than that of comparable municipal utility districts in the region. In its response to the TCEQ's Second Notice of Deficiencies, the District reported that the Port O'Connor Municipal Utility District, which like South Port Alto is also in Calhoun County, has a property tax rate of \$0.20, while the Quail Creek Municipal Utility District in nearby Victoria County has a tax rate of \$0.1844, and the Pettus Municipal Utility District in Bee County has a tax rate of \$0.019.¹¹⁹ The highest tax rate of an existing municipal utility district in this region—Aransas County Municipal Utility District No.1—is only \$0.642.¹²⁰ In Ms. Polcyn's opinion, the District's proposed tax rate appears to be reasonable when compared to the aforementioned taxing authorities.¹²¹ But the participating Protestants observe that these other districts have tax rates well below the District's estimated cost to property owners, and they claim this demonstrates that the proposed District is not "practicable and feasible" under TWC § 54.021(a).

The participating Protestants are particularly concerned that the total tax assessments on property owners within the District's boundaries will rise from \$1.62 to \$2.62 per \$100 assessed valuation, based on the ED's estimated \$1 tax rate.¹²² For residents such as the Bolleters, this would quadruple the amount of property taxes they currently pay, without providing any direct

¹¹⁸ Exhibit RB-5 at Request for Production No. 2.

¹¹⁹ Exhibit PL-8 at 6.

¹²⁰ District Exhibit 3 at 6, paragraph 23; Exhibit PL-8 at 6.

¹²¹ Exhibit ED-IP-3 at 6:1-10.

¹²² The total year 2010 overlapping tax rates on land within the proposed District included \$1.133 for Calhoun Independent School District; \$0.49 for Calhoun County; and \$0.004 for the Calhoun County Port Authority, for a total of \$1.627. Exhibits ED-RN-2 at 6 and ED-IP-2 at 6.

benefit to them, in that they already receive water from Enchanted Harbor Utility and have functioning septic systems.¹²³ For a home valued at \$250,000, the \$1 tax rate would increase taxes by \$2,500 per year for upwards of 40 years (a total of \$100,000) depending on the term of the bonds the District is able to obtain.¹²⁴ This cost would not even include whatever connection fees, surcharges, impact fees, and rates the District charges to operate and maintain the system, the participating Protestants note.¹²⁵ By contrast, the cost of installing an on-site septic system capable of meeting the wastewater needs of a single family home is a one-time expense of approximately \$6,000,¹²⁶ as previously discussed. Homeowners who already have fully-functioning on-site septic systems would not even incur the \$6,000 septic tank installation expense.

At the evidentiary hearing, Ms. Polcyn was questioned about the feasibility of the District if some properties were carved out and not taxed. She testified that she performed a feasibility evaluation assuming the participating Protestants' properties were carved out, and the tax rate did not change as a result.¹²⁷ Therefore, the ED deems the District feasible with those two properties removed from it.

Mr. Nelson indicated ED staff did not review the feasibility of the project if all Protestants are excluded.¹²⁸ Without knowing the value of these additional properties, ED staff is not able to say if District creation would remain feasible if all Protestants' properties are removed.¹²⁹ Because excluding properties reduces the taxable assessed valuation, a higher tax rate could be required for the feasibility of the District, according to ED staff witness Mr. Nelson.¹³⁰ But the ALJ notes that ED staff's estimated tax rate of \$1 is the highest

¹²³ Exhibit RB-1 at 11:15-18.

¹²⁴ Exhibit PL-1 at 15:9-13.

¹²⁵ Exhibit PL-1 at 15:13-14.

¹²⁶ Exhibit RB-1 at 12:9-10.

¹²⁷ Tr. at 152:3-7; Tr. at 158:14-19.

¹²⁸ Tr. at 132:14 through 133:13.

¹²⁹ Exhibit ED-IP-3 at 6:24-28.

¹³⁰ Exhibit ED-RN-3 at 4:24-28.

rate allowed by law; a higher tax rate is not possible to compensate for removing all Protestants' properties from the District, even if a higher rate is necessary for the District's feasibility.

OPIC points out the District did not prove that excluding all Protestants' land would render its creation unfeasible. Further, OPIC contends, the District did not prove that all Protestants have poorly operating septic systems and should be included in the District, and ED staff did not ascertain the condition of individual landowners' septic systems.¹³¹ Since neither the District nor the ED addressed the issue of excluding the property of non-participating Protestants who have functioning septic systems, OPIC recommends that all Protestants' land be excluded from the District.

ii. ALJ's Analysis and Conclusion

The \$1 tax rate necessary to support the District's creation is not reasonable. The Commission rule at 30 Tex. Admin. Code § 293.11(k)(2)(C) requires a 90 percent tax collection rate to be used in all projected tax rate calculations for first bond issues. But the District's tax collection rate must be 95 percent for the \$1 tax rate to be feasible. Ms. Polcyn explained she used the higher 95 percent rate "to ensure the District could absorb the tax rate." The ALJ notes that even for "second and subsequent bond issues, a 90 percent tax collection rate shall be used in the projected tax rate calculations unless the [D]istrict demonstrates that its historical collection rate is higher[.]" 30 Tex. Admin. Code § 293.11(l)(1). ED staff's use of a 95 percent collection rate results in an artificially low tax rate for the District. Even the District estimated its tax rate without grants could be as high as \$1.07. An artificially low tax rate might favor approval of the Petition, but it will not support the District's construction costs unless a tax collection rate of 95 percent is realized. The tax rate is unreasonable because the tax collection rate used to arrive at the \$1 tax rate is too high.

Also preponderating against a finding that the District's estimated tax rate is reasonable is the fact that the neighboring municipal utility districts assess tax rates well below \$1, the highest

¹³¹ Tr. at 141:3-6.

being \$0.642. Admittedly, the evidence presented did not compare the services offered by the neighboring municipal utility districts with the services proposed to be offered by the District, so the ALJ is not certain if the rates are lower because a neighboring municipal utility district offers only water service, for instance.

According to Ms. Polcyn, creation of the District remains feasible if the participating Protestants' properties are removed. The evidence is silent as to the feasibility of the project should additional properties with septic systems that meet all rules and regulations be excluded from the District, such as those belonging to the participating Protestants. ED witness Mr. Nelson suggests that excluding more properties, as OPIC recommends, would reduce the District's taxable assessed valuation and a higher tax rate could be necessary for the feasibility of the District. But the highest tax rate permitted under the law is already necessary for feasibility of the project, as is a higher than normal 95 percent collection rate, assuming that only the participating Protestants' properties are excluded from the District. If the reason that the participating Protestants' properties are excluded is because they have properly functioning septic systems, then it follows that the properties of all Protestants with properly functioning septic systems should be excluded. The law permits land that is not benefited to be excluded from the District, and properties with fully-functioning septic systems are not benefited and should be excluded.¹³²

There is neither evidence that, if all Protestants' properties are removed, the \$1 tax rate will fail to meet the District's costs nor that its creation will remain feasible if those properties are removed. The District already requires the highest tax rate allowed by law as well as an artificially high 95 percent tax collection rate to meet its costs. The District cannot, by law, increase the tax rate, if necessary, to compensate for the removal of more than two properties from its proposed boundaries. Therefore, the proposed tax rate is not reasonable.

¹³² See Section V.C., *infra*, discussing whether District creation would benefit the land to be included within its boundaries.

c. Water and Sewer Rates

i. Evidence and Argument

Under TWC § 54.021(a), the District must demonstrate that its water and sewer rates are reasonable in order for the District to be considered feasible and practicable. The normal operations and maintenance costs, as well as depreciation of infrastructure assets, will be covered by the water and sewer rates charged to the customers.¹³³ Based on the information provided to ED staff by the District after the original Petition was filed, the estimated monthly rate for water would be \$36.50 for the first 2,000 gallons of usage and \$1.50 for each 1,000 gallons of use after that. The District proposes to provide wastewater service at a rate of \$40 per month. The combined total minimum monthly fee for water and wastewater service would be \$76.50.¹³⁴ ED staff has found these rates and costs to be reasonable and to meet the feasibility requirements set out in 30 Tex. Admin. Code § 293.59.¹³⁵

The participating Protestants believe the District has not met its burden on this issue. The participating Protestants argue that it is impossible for the Commission to determine if the District's proposed water and sewer rates are reasonable because the District cannot state what these rates might be. The District's rates, connection fees, and other costs for its water and wastewater service within the proposed District will be "determined by the [District's] Board of Directors," once the District has already been created.¹³⁶ The District's water and sewer rates, connection fees, and costs for out-of-District water and wastewater customers will also be determined at an unknown later time by the Board.¹³⁷ Additionally, the District will defer the

¹³³ District Exhibit 3 at 6, paragraph 23.

¹³⁴ Exhibits ED-RN-2 at 6 and ED-IP-2 at 6.

¹³⁵ Exhibit ED-IP-3 at 6:1-4. Information provided estimates that annual operating costs will be \$65,400. The portion of debt service to be funded with operating revenue is estimated to be \$18,334. The total of \$83,734 (\$65,400 + \$18,334) divided by 12 months and the 96 existing homes would require a monthly water and wastewater revenue of at least \$73 per connection. If all of the debt service (\$159,839) and operating (\$65,400) costs—a total of \$225,239—were funded with revenues, then monthly water and wastewater revenue would need to be \$196 (\$225,239/12/96) per connection. Exhibits ED-RN-2 at 6 and ED-IP-2 at 6.

¹³⁶ Exhibit RB-1 at 15:8-12; Exhibit RB-5 at Interrogatory No. 12; Tr. at 39:8 to 40:3.

¹³⁷ Exhibit RB-1 at 15:13-15; Exhibit RB-5 at Interrogatory No. 2; Tr. at 39:8 to 40:3.

decision of whether it will charge the impact fees—and if so, the fee amount—to new customers either within or outside the proposed District until after it has been created.¹³⁸

ii. ALJ's Analysis and Conclusion

The only expert testimony regarding the District's proposed water and wastewater rates was provided by Ms. Polcyn, who testified the rates are reasonable. The ALJ is not persuaded by the participating Protestants' argument that the Commission cannot determine if the rates are reasonable because the rates have not been set. The rates cannot be set until the District is created. ED staff can only offer an opinion regarding estimated rates. In Ms. Polcyn's opinion, the District's projected water and wastewater rates are reasonable. Therefore, the ALJ concludes the District proved that the estimated water and wastewater rates are reasonable.

3. Will the District and its system and subsequent development within the District have an unreasonable effect on (A) land elevation; (B) subsidence; (C) groundwater level within the region; (D) recharge capability of a groundwater resource; (E) natural run-off rates and drainage; (F) water quality; and (G) total tax assessments on all land located within a district?

a. Evidence

In evaluating the feasibility and practicality of the District, the Commission must determine if the District will have an unreasonable effect on the following: land elevation; subsidence; groundwater level within the region; recharge capability of a groundwater source; natural run-off rates and drainage; water quality; and total tax assessments on all land located within its boundaries.¹³⁹ In Ms. Polcyn's opinion, creation of the District will not have an unreasonable effect on any of the aforementioned factors.¹⁴⁰ Ms. Weaver offered testimony that supports Ms. Polcyn's conclusions as to TWC § 54.021(b)(3)(A)-(F), but offered no testimony

¹³⁸ Tr. 40:4-7. An impact fee is defined by Tex. Loc. Gov't Code § 395.001(4) as "a change or assessment imposed by a political subdivision against new development in order to generate revenue for funding or recouping the costs of capital improvements or facility expansions necessitated by and attributable to the new development."

¹³⁹ TWC § 54.021(b)(3).

¹⁴⁰ Exhibit ED-IP-3 at 6:30 through 7:30; Exhibit ED-RN-2 at 4; Exhibit ED-IP-2 at 4.

regarding the effect of total tax assessments on all land located within the District.¹⁴¹ No party controverted the testimony of Ms. Polcyn or Ms. Weaver.

b. ALJ's Analysis and Conclusion

The ALJ is not sure if “total tax assessments” refers to combining the District’s projected rate of \$1 with the existing total property taxes of \$1.62, for a total of \$2.62, or if the combined projected tax rate is as defined at 30 Tex. Admin. Code § 293.59(f).¹⁴² Because no evidence was presented to controvert Ms. Polcyn’s evaluation of TWC § 54.021(b)(3)(A)-(G) or Ms. Weaver’s testimony concerning the effect of the District on items listed in TWC § 54.021(b)(3)(A)-(F), the ALJ concludes the District has met its burden on those factors.

C. Is all land proposed to be included in the District benefited by its creation?

1. Evidence and Argument

As the TWC provides, “[i]f 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 so find and exclude all land which is not benefited from the proposed district and shall redefine the proposed district’s boundaries accordingly.”¹⁴³ ED staff witness Ms. Polcyn stated that the Petition indicated that failed or non-existent on-site septic systems within the proposed District cause untreated wastewater to flow into the Bay, so the proposed improvements will benefit the land by remedying those water quality issues within the area of the proposed District.¹⁴⁴ But, as discussed previously, ED staff did not independently ascertain the extent of wastewater pollution in the District. The participating Protestants argue that not all the land in the District, particularly their properties, will be benefited by its creation.

¹⁴¹ District Exhibit 9 at 3:4-21.

¹⁴² The rule, relating to economic feasibility of a project, defines the combined projected tax rate as a sum of several factors, including the projected debt service tax rate of the district. No evidence was presented indicating whether any of the remaining six factors specifically apply to the District.

¹⁴³ TWC § 54.021(c).

¹⁴⁴ Exhibit ED-IP-3 at 8:4-9.

To prove that creation of the District will be a benefit to land within its proposed boundaries, the District must show that an ongoing water or wastewater service problem will be remedied by its creation. In its discovery responses, the District refers to a limited number of health or safety violations within its proposed boundaries that have resulted from homes without septic systems or improperly functioning septic systems.¹⁴⁵ The District's evidence identifies only two properties that have received citations for alleged septic violations, and those citations were issued in 2008.¹⁴⁶ The District did not address whether the two violations are ongoing or have been remedied in the intervening four years, but does not believe they have been remedied.¹⁴⁷ Nor was Mr. Normann-Petersen, the District's witness, aware of whether the TCEQ or the county health department has since taken any legal or enforcement action against property owners for discharging untreated effluent into the Bay.¹⁴⁸ Similarly, neither witness for the ED is aware of any violations in South Port Alto that have been reported to the TCEQ.¹⁴⁹ The District provided no evidence to show that current violations, other than Mr. Houck's, exist.¹⁵⁰

Further, the District's expert testimony on the alleged pollution problem is entirely speculative in nature. Ms. Weaver repeatedly stated that pollution related to septic systems "may" and "can" occur, and the "potential" for seepage into the Bay that "could" lead to public health problems.¹⁵¹ Her testimony did not cite to any evidence or study of ongoing discharge of sewage into the Bay or attendant public health problems.¹⁵² The ALJ finds her conversation with the health department inspector, as previously discussed, in which he told her there are septic system violations in the proposed District, is too vague to prove the existence of pollution problems that warrant creation of the District.

¹⁴⁵ Exhibit RB-1 at 12:17-19; Exhibit RB-5 at Interrogatory No. 5.

¹⁴⁶ District Exhibit 1 at Appendix L.

¹⁴⁷ Exhibit RB-1 at 13:6-7; Exhibit RB-5 at Interrogatory No. 5.

¹⁴⁸ Tr. at 62:14-21.

¹⁴⁹ Tr. at 140:20-23; Tr. at 155:19-21.

¹⁵⁰ Exhibit RB-1 at 13:6-7; Exhibit RB-5 at Interrogatories 14 and 29.

¹⁵¹ District Exhibit 9 at 2:23-27.

¹⁵² District Exhibit 9 at 2:11-17 and 2:23-27.

The District concedes that it has not done any study to determine, and does not know, the number of properties within its proposed boundaries that do not use a properly functioning on-site septic system.¹⁵³ By contrast, the participating Protestants live in South Port Alto year-round and are very familiar with their community and its homes and residents.¹⁵⁴ Mr. Bolleter offered un rebutted testimony that only 21 homes in the proposed District are occupied full time;¹⁵⁵ of those, five have permitted aerobic septic systems and three are connected to the Sunilandings sewer system.¹⁵⁶ The remaining thirteen homes that are occupied full-time and might benefit from the District most likely utilize an on-site septic system, according to Mr. Bolleter.¹⁵⁷

The ALJ notes that the Victoria City-County Health Department lists twelve permitted septic systems on Marshall Johnson Avenue in South Port Alto. Two of those systems are listed as belonging to participating Protestant Mr. Lawson. Three of the remaining ten septic systems belong to the Bolleters, Ms. Saucier, and Mr. Haas; seven of the permitted septic systems belong to property owners who are not Protestants in this proceeding.¹⁵⁸

The participating Protestants argued that their properties, specifically, will not benefit from creation of the District. They testified that they have invested the time and money necessary to install and properly maintain permitted water and wastewater systems on their respective properties, and state they will experience no benefits from the creation of the District:

- The Bolleters have lived at 119 Marshall Johnson Avenue South in South Port Alto for about 21 years.¹⁵⁹ Their property consists of approximately 0.5 acres of land.¹⁶⁰ It is

¹⁵³ Exhibit RB-5 at Request for Admissions Nos. 4 and 5; Tr. at 26:6-9.

¹⁵⁴ Exhibit RB-1 at 4:5 to 5:3; Exhibit PL-1 at 4:1-21.

¹⁵⁵ Exhibit RB-1 at 4:8-9.

¹⁵⁶ Exhibit RB-1 at 18:6-9. Mr. Normann-Petersen testified that only two homes in the District are connected to Sunilandings. See Tr. at 36:17.

¹⁵⁷ Exhibit RB-1 at 18:9-11.

¹⁵⁸ Exhibit RB-3. There is no explanation in the record as to why the Victoria City-County Health Department issues permits for septic systems in Calhoun County.

¹⁵⁹ Exhibit RB-1 at 3:12-13.

¹⁶⁰ Exhibit RB-1 at 4:1; Exhibit RB-2.

located within the proposed boundaries of the District.¹⁶¹ The Bolleters receive adequate water supply from Enchanted Harbor Utility.¹⁶² The Bolleters' wastewater needs are currently met by an aerobic septic system that was installed on their property around 2001. It is a 500 GPD Norweco aerobic unit with two 900 gallon tanks installed by Hurt's Wastewater Management Company of Ganado, Texas, and permitted by the Victoria City-County Health Department, Environmental Health Division.¹⁶³ The Bolleters spent approximately \$6,000 to install their septic system.¹⁶⁴ The Bolleters have paid to have their septic system properly maintained.¹⁶⁵

- The Lawsons have lived at 509 Marshall Johnson Avenue South in the South Port Alto community for about nine years.¹⁶⁶ Their property consists of approximately two acres of land.¹⁶⁷ The Lawsons' water comes from a private well.¹⁶⁸ The Lawsons' wastewater needs are met by two fully functional Norweco aerobic septic systems—an underground distribution system installed in approximately 2003 and a traditional sprinkler system installed in approximately 2000.¹⁶⁹ Both were installed by Hurt's Wastewater Management Company of Ganado, Texas, at a combined cost of about \$15,000.¹⁷⁰ The Lawsons' wastewater systems were permitted by the Victoria City-County Health Department, Environmental Health Division.¹⁷¹ They have paid to have their septic systems properly maintained.¹⁷²

¹⁶¹ Exhibit RB-1 at 5:5-7.

¹⁶² Exhibit RB-1 at 5:20-21 and 13:15-16.

¹⁶³ Exhibit RB-1 at 5:9-18; Exhibit RB-3.

¹⁶⁴ Exhibit RB-1 at 12:9-10.

¹⁶⁵ Exhibit RB-1 at 13:16-18.

¹⁶⁶ Exhibit PL-1 at 4:1-3.

¹⁶⁷ Exhibit PL-1 at 4:9-10.

¹⁶⁸ Exhibit PL-1 at 6:6-7.

¹⁶⁹ Exhibit PL-1 at 5:18-22.

¹⁷⁰ Exhibit PL-1 at 5:18-22 and 12:16-19.

¹⁷¹ Exhibit PL-3.

¹⁷² Exhibit PL-1 at 6:11-12.

If the Commission grants the Petition without excluding the participating Protestants' properties, the participating Protestants are concerned they will be required to use District services. Ms. Weaver speculated that after District creation, the Board will decide whether to allow homes within its boundaries that currently receive wastewater service from a privately maintained septic system and/or water service from a private well to opt out from receiving service from the District.¹⁷³ According to Ms. Weaver, the District has not discussed whether it will purchase existing on-site septic systems that are currently in use.¹⁷⁴ Residents who have paid to install and maintain their own on-site wastewater systems could see their septic systems "decommissioned" and taken out of service, at an estimated cost to District taxpayers of \$600 apiece.¹⁷⁵

2. ALJ's Analysis and Conclusion

The District presented insufficient evidence to prove its creation would be a benefit to the land within its proposed boundaries. Except for an undetermined number of residences that receive water from private wells, Enchanted Harbor Utility provides property owners with water service, so creation of the District to provide water service will not benefit the land.

To show that its proposed service is necessary, the District had the burden to present evidence regarding the extent of wastewater pollution within its proposed boundaries. The District's evidence of wastewater pollution is vague, conclusory, or dated (as in the case of the two 2008 citations for septic system violations). The District presented no substantive evidence of wastewater pollution such as the addresses of polluting properties, other than Mr. Houck's; the amount of untreated wastewater being discharged; whether the discharges are ongoing or a one-time occurrence; or what effects the discharges have on public health and safety. Further, the District did not demonstrate how the land would be benefited by wastewater service from the District as compared to wastewater treatment by on-site septic systems. Ms. Weaver's

¹⁷³ Tr. 110:16-20.

¹⁷⁴ Tr. at 109:21-24.

¹⁷⁵ Tr. 109:8-20 and 110:6-8.

testimony that the health department inspector told her there were violations in the area for discharging untreated effluent into the Bay is too conclusory and vague to determine the extent of wastewater pollution by area septic tanks.¹⁷⁶ The inspector presumably regularly inspects septic systems; it seems to the ALJ that the District could have obtained a report from him outlining the results of those inspections as evidence of how many septic systems are out of compliance, in support of the District's contention that its creation is necessary. In addition, the evidence shows that most homes are unoccupied for a good part of the year and have no need for year-round wastewater service from the District. The ALJ therefore cannot find the District proved by a preponderance of the evidence that land within its proposed boundaries would be benefited by its creation.

Conversely, the participating Protestants provided credible evidence that their land will not benefit from creation of the District. The ALJ finds the participating Protestants use properly installed and maintained septic systems on their respective properties that adequately meet their wastewater needs and do not pollute the land. The District presented no evidence to show that its wastewater service will benefit the participating Protestants' land.

Neither the District nor the ED controverted the participating Protestants' evidence that most landowners in South Port Alto either 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,¹⁷⁷ or are connected to the Sunilandings wastewater system. This evidence, combined with the District's lack of evidence regarding wastewater pollution, leads the ALJ to find that the estimated \$2.26 million in construction costs to create the District is not necessary to benefit the land. The ALJ agrees with the participating Protestants that the land could more reasonably be benefited if property owners who do not currently have a functioning on-site septic system or connection to Sunilandings either install a septic system or pay to connect to Sunilandings at a one-time cost equivalent to only a few years' worth of the District's estimated tax.

¹⁷⁶ Tr. at 105:7-20.

¹⁷⁷ Exhibit PL-1 at 17:1-7; Tr. at 108:19-25.

Because most of the land within the proposed District will not benefit from its creation, the Commission should not approve the current Petition. However, if the Commission approves the Petition, the participating Protestants' properties should be excluded from the boundaries of the District as required by TWC § 54.021(c) because their land will not be benefited, and exclusion of their properties will not affect the feasibility of creating the District.¹⁷⁸ The ALJ further recommends that if the Petition is granted, the properties of all Protestants should be excluded from the District, regardless of the effect on the feasibility of District creation, because the District did not prove its creation will benefit all Protestants' properties.

D. Regionalization

1. Parties' Evidence and Argument

The District, the ED, and OPIC support the District's plan to purchase and expand Sunilandings Utilities, consistent with the Commission's view of regionalization and the legislature's mandate in favor of regionalization for waste collection:

The legislature finds and declares that it is necessary to the health, safety, and welfare of the people of this state to implement the state policy to encourage and promote 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(a).

In those portions of the state that 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. . . . TWC § 26.081(c).

The District suggests that omitting the participating Protestants, or possibly more property owners from the District, would not be in compliance with the Commission's regionalization policy set out at TWC § 26.081(a). The participating Protestants respond that the TCEQ's goal of regionalization does not require every landowner within the state whose

¹⁷⁸ Tr. at 152:3-7.

wastewater needs are currently served by an on-site septic system to connect to a regional system, because a properly functioning and permitted on-site septic system provides legally sufficient and adequate wastewater service to a home.¹⁷⁹

While creating the District would certainly provide area-wide wastewater service to the 96 homes in the District, the 35 homes in the Sunilandings neighborhood, and up to 164 additional out-of-District properties, this fact alone is not enough to find the District has met its burden on the necessity for creating the District pursuant to the Commission's regionalization policy. One goal of the policy is "to prevent pollution and maintain and enhance the quality of the water in the state." TWC § 26.081(a). The District provided insufficient evidence to demonstrate that its wastewater system would prevent pollution and enhance the quality of water in Texas any more than the existing septic systems and connections to Sunilandings Utilities do. Nor did the ED present evidence comparing the benefits of the District's proposed wastewater service and current wastewater treatment in the District. OPIC understands that the ED does not normally review specific landowners' septic systems when considering the feasibility or necessity of a district; however, based on evidence in the record to demonstrate that there are areas within the proposed boundaries in which the District is neither feasible nor necessary, OPIC maintains that the District should be created but only to the extent necessary.

2. ALJ's Analysis and Conclusion

The Commission encourages and promotes, but does not require, the use of regional sewage collection outside standard metropolitan statistical areas. The District presented no evidence to show it is located within a standard metropolitan statistical area. The District 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. The District would provide area-wide wastewater treatment, but that fact alone is not enough to prove that its creation is necessary. The District did not prove there is an ongoing pollution problem due to untreated sewage or

¹⁷⁹ Exhibit PL-1 at 17:2-4; Tr. at 108:19-25; Tr. at 141:7-10.

faulty septic systems being used within its proposed boundaries and thus, even though it would provide area-wide sewer service, did not prove its creation is necessary.

VI. SUMMARY

The ALJ finds the District did not meet its burden of proving its creation would meet the requirements of TWC § 54.021 and 30 Tex. Admin. Code § 293.11, or that its creation is necessary pursuant to the Commission's regionalization policy. For the reasons stated in the Proposal for Decision, the ALJ recommends that the Petition be denied. In the alternative, should the Commission approve the Petition, the ALJ recommends that the properties of all Protestants be excluded from the District's boundaries because the District did not prove its creation will benefit their land, and any land that is not benefited must be excluded from the District pursuant to TWC 54.021(c). At the very least, the participating Protestants' properties should be excluded, in that their land will not be benefited by the District and removing their land from the District will not affect the feasibility of its creation.

SIGNED January 8, 2013.



SHARON CLONINGER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN ORDER Denying Application for the Creation of the Municipal Utility District of South Port Alto in Calhoun County Texas, TCEQ DOCKET NO. 2011-1786-DIS; SOAH DOCKET NO. 582-12-5103.

On _____, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the Application for the Creation of the Municipal Utility District of South Port Alto in Calhoun County, Texas. Administrative Law Judge (ALJ) Sharon Cloninger, with the State Office of Administrative Hearings (SOAH), presented a Proposal for Decision (PFD), which recommended that the Commission deny the Application.

After considering the ALJ's PFD and the evidence and arguments presented, the Commission adopts the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

Procedural History

1. On February 19, 2010, a petition (Petition) was filed with the TCEQ to create the Municipal Utility District of South Port Alto (District) in Calhoun County, Texas.
2. The Petition was declared administratively complete on March 11, 2010.

3. On June 26, 2010, and July 3, 2010, Notice of the Petition was published in the *Port Lavaca Wave*, a newspaper regularly published or circulated in Calhoun County, Texas.
4. On June 29, 2010, Notice of the Petition was posted on the bulletin board used for posting legal notices at the Calhoun County Courthouse.
5. After completing the technical review of the Petition, the Executive Director (ED) recommended on August 31, 2011, that the creation of the District be approved.
6. On February 22, 2012, the Commission considered the Petition, the requests for a contested case hearing on the matter submitted by property owners within the proposed District, the responses to the hearing requests, and replies to the responses. In an Interim Order dated February 28, 2012, the Commission referred the case to SOAH for a hearing, where it was assigned SOAH Docket No. 582-12-5301.
7. Notice of the hearing was issued by the TCEQ Chief Clerk on March 14, 2012.
8. A preliminary hearing was held on April 9, 2012. Named as parties were the District; the ED; the Office of Public Interest Counsel (OPIC); and the following persons who protest creation of the District: Robert L. and Lynn Bolleter; Millard and Lucille Brisbois; Frederick J. Dennick, Jr.; Henry and Patricia A. Forbes; Herbert and Claudia Haas; Paul E. and Patricia Lawson; Evelyn Saucier; and Jesse Wood.
9. The hearing on the merits was held on September 25, 2012. The record closed on November 15, 2012, after the submission of written closing arguments and responses.

General Information

10. The District is proposed to encompass 52.4 acres in Calhoun County, located just east of the intersection of State Highway 172 and County Road 314 on the western shore of Carancahua Bay, about 17 miles east of the City of Port Lavaca.
11. South Port Alto is a beach community in which about 21 of the 96 homes are occupied year-round. The remaining homes are vacation or weekend properties.
12. The District proposes to provide water and sewer service to the 96 homes in the South Port Alto community, and out-of-District service to 35 homes in the adjacent Sunilandings neighborhood and as many as another 164 homes located outside the District's boundaries.
13. To provide the proposed service, the District plans to acquire and improve Enchanted Harbor Utility, which currently provides water to an undetermined number of homes in the District; acquire, expand, and improve Sunilandings Utilities, a water and wastewater utility that is adjacent to the District and provides wastewater service to two homes in the District; and construct centralized wastewater collection lines.
14. Protestant Mr. Wood, owner of Enchanted Harbor Utility and Sunilandings Utilities, signed a January 26, 2011 letter of intent to sell both utilities and convey their respective Certificates of Convenience and Necessity to the District.
15. None of the District's proposed area is within the corporate limits or extraterritorial jurisdiction of any city in Calhoun County.

Sufficiency of the Petition

16. The Petition describes the boundaries of the proposed District by metes and bounds and includes plat maps depicting lot and block numbers.

17. The Petition states the general nature of the work proposed to be done, the necessity for the work, and the projected cost of the project.
18. The Petition designates the name of the District, which does not have the same name as any other municipal utility district in Calhoun County.
19. The Petition contains evidence that it was filed with the county clerk on February 22, 2010; a map; a preliminary plan and preliminary engineering report; a certificate by the central appraisal district indicating the owners and tax valuation of land within the proposed District; and affidavits by those persons desiring appointments by the Commission as temporary directors.
20. The Petition addresses projected water and wastewater rates and contains an estimated tax rate.

Project Feasibility, Practicality, Necessity, and Benefit to the Land

Comparable Service

21. Comparable water and sewer service options are not available to District properties from water districts, municipalities, or regional authorities.
22. Comparable water service currently is provided to an undetermined number of District properties by the privately-owned Enchanted Harbor Utility, which holds a certificate of convenience and necessity to provide water service to properties within the District's proposed boundaries.
23. Comparable sewer service currently is provided by the privately-owned Sunilandings Utilities to two homes in the District.
24. Sunilandings Utilities does not have the capacity and is not willing to provide sewer service to all properties in the District.

25. Most properties in the District that are not served by Sunilandings Utilities use on-site septic systems to treat wastewater.
26. A properly permitted on-site aerobic septic system meets the needs of a single-family home.
27. Individual septic systems can be an adequate means of wastewater treatment and disposal if there is sufficient room on each home site for a septic system.
28. Current health department regulations generally permit on-site septic systems on lots of at least a half-acre in size when the lot is served by a public water system such as Enchanted Harbor Utility.
29. Most of the lots in the District are less than 0.2 acres in size and are using on-site septic systems.
30. Lots smaller than a half-acre that were subdivided before January 1, 1988, or had a site-specific sewage disposal plan approved between January 1, 1988, and the February 5, 1997 effective date of 30 Tex. Admin. Code § 285.4(b)(1), are allowed to use an on-site sewage facility.
31. A plat of the area that comprises the majority of the District's proposed boundaries—the homes along Marshall Johnson Avenue South—is dated August 8, 1949.
32. Service comparable to that proposed by the District is available to property owners through Enchanted Harbor Utility, on-site septic systems, and from Sunilandings Utilities on a limited basis.

Construction Costs

33. An on-site septic system that meets all rules and regulations can be installed on a landowner's lot for about \$6,000.

34. Property owners who violate existing rules and regulations regarding discharge of wastewater effluent could be required by the proper authorities to either install permitted septic systems or connect to Sunlandings Utilities, if service is available.
35. Requiring property owners in the District to pay \$2.26 million in construction costs for water and wastewater systems that are not necessary is unreasonable.

Tax Rates

36. The maximum allowable tax rate for a municipal utility district in Calhoun County is \$1 per \$100 assessed valuation.
37. A \$1 tax rate with a 95 percent collection rate is needed to fund the District's estimated \$2.26 million construction costs, assuming 100 percent financing, a coupon bond interest rate of 6.5 percent, and a 40-year bond life.
38. The Commission rule on determining whether a district's first bond issue is economically feasible requires a cash flow analysis to determine the District's necessary tax rate that assumes only a 90 percent tax collection rate.
39. If the District's bond application is not considered feasible, the repayment burden may be shifted away from taxes to operations or to a reduction in the scope of the project, for instance.
40. The District's \$1 tax rate is higher than that of comparable municipal utility districts in the region.
41. If the properties of the Bolleters and Lawsons are carved out of the District, the \$1 tax rate would be adequate to support the District's creation.
42. No evidence was provided as to the feasibility of creating the District if all Protestants' properties are carved out of the District.

43. The District estimates its tax rate could be as low as \$0.51 if grants are received, but the District cannot apply for grants until it is created.
44. Because creation of the District requires the highest tax rate allowed by law and a 95 percent collection rate, which is above the 90 percent collection rate to be assumed when determining the economic feasibility of a district, the District will not be able to increase its tax rate, if necessary, to compensate for the removal of more than two properties from its proposed boundaries.
45. Because the proposed \$1 tax rate assumes a 95 percent tax collection rate, rather than the 90 percent collection rate required by Commission rule, the District's proposed tax rate of \$1 is artificially low and is not reasonable.

Water and Sewer Rates

46. The District's estimated monthly rate for water service is \$36.50 for the first 2,000 gallons of usage and \$1.50 for each 1,000 gallons used after that.
47. The District proposes to provide wastewater service at a rate of \$40 per month.
48. The combined total minimum monthly fee for water and wastewater service will be \$76.50.
49. The District's proposed water and wastewater rates are reasonable.

Effect on land elevation, groundwater, water quality, and total tax assessments

50. Creation of the District will not have an unreasonable effect on land elevation, subsidence, groundwater level within the region, recharge capability of groundwater resources, natural run-off rates and drainage, water quality, and combined tax rate.

Benefit to the Land

51. No land in the District will benefit from the District's water service because Enchanted Harbor Utility currently provides public water service to an undetermined number of homes and the remaining homes are on private water wells.
52. In 2008, two properties in the District received citations for septic system violations.
53. No evidence was presented as to whether the two septic system violations have been remedied in the intervening four years or are ongoing.
54. No evidence of any other citations or any reports of violations to the TCEQ was presented.
55. The District has not determined how many properties within its proposed boundaries do not use properly functioning on-site septic systems.
56. The Victoria City-County Health Department lists twelve permitted septic systems within the District's boundaries, including one owned by Protestant Mr. Bolleter; one owned by Protestants Mr. and Mrs. Haas; one owned by Protestant Ms. Saucier; and two owned by Protestants Mr. and Ms. Lawson.
57. The Bolleters' property and the Lawsons' property will not be benefited by creation of the District.
58. The Haas's property and Ms. Saucier's property will more than likely not be benefited by creation of the District.
59. Any property with a functioning and maintained on-site septic system will not be benefited by creation of the District.

Regionalization

60. The District will provide area-wide water and sewer service to 96 homes within its boundaries, to 35 out-of-District customers in the Sunilandings neighborhood, and to as many as 164 additional out-of-District customers.

II. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Texas Water Code (TWC) chapters 49 and 54 and the Texas Constitution, article XVI, section 59.
2. SOAH has jurisdiction over all matters relating to the conduct of a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to Texas Government Code, chapter 2003.
3. The District and the TCEQ have satisfied all applicable public notice requirements.
4. The Petition is sufficient within the meaning of TWC § 54.015 and 30 Tex. Admin. Code § 293.11.
5. Creation of the District would comport with the Commission's regionalization policy. TWC § 26.081(a).
6. The proposed District is not feasible and practicable, in accordance with TWC § 51.021(a), (b)(1), and (b)(2).
7. Creation of the District would not have an unreasonable effect on land elevation, subsidence, groundwater level within the region, recharge capability of a groundwater source, natural run-off rates and drainage, water quality, and total tax assessments on all land located within the District. TWC § 51.021(b)(3).
8. There is not a public necessity or need for the District, in accordance with TWC § 51.021(a).

9. The proposed District will not benefit all the land to be included in the District in accordance with TWC § 51.021(c).
10. The proposed District is not feasible, practicable, necessary, or a benefit to all of the land in the District and the Petition must be denied. TWC § 54.021(d).

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY THAT:

1. The Petition for Creation of the Municipal Utility District of South Port Alto is denied.
2. The Chief Clerk of the Texas Commission on Environmental Quality shall forward a copy of this Order to all parties.
3. If any provisions, sentence, clause or phrase of this Order is for any reason held to be invalid, the invalidity of any portion shall not affect the validity of the remaining portions of the Order.
4. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and other requests for general or specific relief, if not expressly granted herein, are hereby denied for want of merit.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Bryan W. Shaw, Ph.D
Chairman