

Control Number: 42946



Item Number: 32

Addendum StartPage: 0

House Bill (HB) 1600 and Senate Bill (SB) 567 83<sup>rd</sup>  
Legislature, Regular Session, transferred the functions  
relating to the economic regulation of water and sewer  
utilities from the TCEQ to the PUC effective  
September 1, 2014.

42946

# KELLY HART

BRENDA CLAYTON  
brenda.clayton@kellyhart.com

TELEPHONE: 512-495-6409  
FAX: 512-495-6401

January 10, 2012

Tammy Benter  
Brian Dickey  
TCEQ Water Supply Division MC 153  
PO Box 13087  
Austin, TX 78711

RECEIVED  
2014 OCT 16 PM 2:25  
PUBLIC UTILITY COMMISSION  
FILING CLERK

Re: *Cause No. D-1-GN-11-002972; Town of Providence Village v. TCEQ, et al*; Filed September 23, 2011 in the 53<sup>rd</sup> Judicial District Court of Travis County, Texas

*Cause No. D-1-GN-11-003846; Town of Providence Village v. TCEQ, et al*; Filed December 19, 2011 in the 201<sup>st</sup> Judicial District Court of Travis County, Texas

Dear Ms. Benter:

Enclosed please find a copy of Plaintiff's Original Petition that was filed in the two above-referenced cases. If you have any questions about the documents, please contact Brenda Clayton.

Sincerely,



Stacey Supak-Diaz  
Legal Secretary Brenda Clayton  
Telephone: 512-495-6403

Enclosures

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FORT WORTH OFFICE | 201 MAIN STREET, SUITE 2500 | FORT WORTH, TX 76102 | TELEPHONE: (817) 332-2500 | FAX: (817) 878-9280

AUSTIN OFFICE | 301 CONGRESS, SUITE 2000 | AUSTIN, TX 78701 | TELEPHONE: (512) 495-6400 | FAX: (512) 495-6401

Kelly Hart & Hallman, a Limited Liability Partnership | www.kellyhart.com

310



3. Defendant, Mark R. Vickery, Executive Director, is the Executive Director of the TCEQ. Service of process may be accomplished by personal delivery of citation to the Executive Director of the TCEQ, Mr. Mark R. Vickery, P.G., located as 12100 Park 35 Circle, Building F, Austin, Travis County, Texas 78753.
4. Other related entities are the Providence Village Water Control & Improvement District of Denton County (“Providence WCID”) and Mustang Special Utility District (“Mustang SUD”).
5. Providence WCID, a political subdivision of the State, is the applicant/transferor in an Application for Sale, Transfer, or Merger of a Retail Public Utility (STM Application).
6. Mustang SUD, a political subdivision of the State, is the transferee of the water and sewer facility assets to be transferred in the STM Application.

**II.**  
**DISCOVERY CONTROL PLAN**

7. This is a suit for judicial review of an agency decision. No discovery is anticipated at this time.

**III.**  
**JURISDICTION AND VENUE**

8. This is a suit for judicial review of the Executive Director’s decision issued on August 24, 2011 (the “Ruling”). A copy of the Ruling is attached hereto as Exhibit “A.”
9. This action is brought pursuant to § 5.351 of the Texas Water Code, which authorizes a “person affected” by a ruling or order of the TCEQ to file a petition to review, set aside, modify or suspend the TCEQ’s act.
10. The Town is a “person affected” under § 5.351 because it sought to obtain a hearing on Providence WCID’s request that the TCEQ transfer the water and sewer systems from

Providence WCID to Mustang SUD, and the hearing request was denied. The Town is also a person affected for the additional reasons stated herein.

11. This action is timely filed under the provisions of § 5.351. Section 5.351 provides that the person affected by a ruling must file his petition within 30 days of the effective date of the ruling, order, or decision. The effective date of the Ruling is August 24, 2011, so this petition is timely under § 5.351.
12. Venue is proper in Travis County District Court pursuant to § 5.354 of the Texas Water Code, which provides that a suit brought under section 55.351 must be brought in a district court in Travis County.

**IV.**  
**FACTS AND GROUNDS FOR APPEAL**

13. The Town incorporated as a municipal corporation on May 8, 2010.
14. The city limits of The Town are covered by dual water and sewer CCNs held by Mustang SUD and Providence WCID.
15. The developer of the area that is now The Town created Providence WCID and controlled the appointment process of its board.
16. Mustang SUD and Providence WCID – while the board was controlled by the developer – entered into a series of contracts for water and sewer service.
17. Mustang SUD had originally been created as a rural water supply cooperation to serve farms and ranches. In order to allow for construction of a large, high-density residential community that now comprises The Town, Mustang SUD consented to Providence WCID's dual certification and allowed all the new homes to be retail water and sewer utility customers of Providence WCID, in part because Mustang SUD was unable to construct the infrastructure or provide retail water or sewer service to the new high-density development.

18. In 2003, Providence WCID issued its first series of \$31 million in bond issues that paid for the construction of the water and sewer infrastructure to serve the developer's property.
19. Under various contracts entered into from 2000 to 2007, the District pays Mustang SUD a 15% fee for Mustang SUD to perform utility billing and collection services and for maintenance of Providence WCID's infrastructure.
20. The application seeks to cancel Providence WCID's CCN and *gift* the District's entire water and sewer infrastructure to Mustang SUD. Mustang SUD lacks adequate resources to operate the water system that provides services to The Town and its citizens. Mustang SUD has insufficient capacity in its sewer system. Further, Mustang SUD's audited financial statements for 2009 and 2010 show losses. These facts show that Mustang SUD will be unable to adequately serve the retail water and sewer customers in the Town.
21. In 2008, Mustang SUD asked the Attorney General to approve the issuance of \$2.7 million dollars in bond indebtedness. The Attorney General refused unless Mustang SUD paid off \$833,000.00 of debt it incurred in 2006.
22. Mustang SUD has not demonstrated that it can even adequately bill customers. It has created problems that were not rectified until The Town reported them.
23. Mustang SUD excludes residents of the Town and Providence WCID from serving on the board. Mustang SUD has already started the process of eliminating at-large elections and divided the Board into single-member districts to preserve the power of rural customers.
24. Providence WCID's rates were traditionally lower than Mustang SUD's rates. Providence WCID recently raised its rates only because it was required by its contracts with Mustang SUD to do so, before transferring the assets to Mustang SUD.

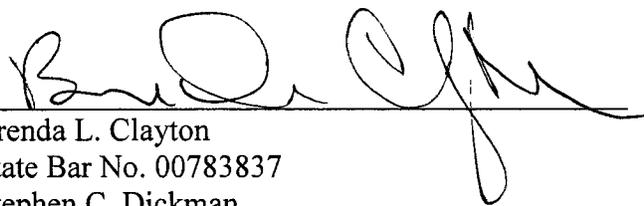
25. Providence WCID currently funds contracts to pay neighboring local entities for fire and sheriff services from utility system revenue, from which The Town benefits. If the water and sewer facilities are transferred to Mustang SUD, Providence WCID will no longer have the utility revenues it currently uses to pay for basic public safety services. Mustang SUD does not currently pay for public safety services and does not intend to pay for public safety services after the transfer.
26. The above recitations show that the Executive Director, under the factors of 30 Tex. Admin. Code § 291.109(e), abused its discretion by not requesting a hearing on the transfer.
27. Section 5.122(a)(3)(A) only allows the TCEQ to delegate decision making authority to the Executive Director in a case which is “uncontested and does not require an evidentiary hearing.” In this case, the Executive Director’s decision to deny The Town’s hearing request and grant the application is clearly contested by The Town. Moreover, this case does require an evidentiary hearing to address the various grounds raised by The Town which show that the statutory criteria for approval of the application have not been satisfied. Accordingly, the Executive Director is not statutorily authorized to make the decision on this contested matter.
28. For all of the reasons previously stated in this Petition, the Ruling is invalid, arbitrary, and unreasonable pursuant to Texas Water Code and should be overturned.
29. The Town is significantly and adversely affected by the application. Under Texas law, The Town should be afforded an opportunity to present evidence concerning such adverse impacts and to demonstrate that the statutory criteria for TCEQ approval of the STM application have not been met.

**PRAYER**

WHEREFORE, The Town prays that the Court determine that Ruling is invalid, arbitrary, or unreasonable and therefore must be overturned, and that the cause be remanded to the TCEQ for a hearing on the public interest of the proposed transfer. The Town additionally prays for any further relief to which it shows itself entitled, in law or in equity.

Respectfully submitted,

KELLY HART & HALLMAN LLP

A handwritten signature in black ink, appearing to read "Brenda L. Clayton", is written over a horizontal line. The signature is fluid and cursive.

Brenda L. Clayton  
State Bar No. 00783837  
Stephen C. Dickman  
State Bar No. 05836500  
301 Congress Ave., Ste. 2000  
Austin, TX 78701  
Telephone: 512-495-6400  
Facsimile: 512-495-6401

# EXHIBIT A

Bryan W. Shaw, Ph.D., *Chairman*  
Buddy Garcia, *Commissioner*  
Carlos Rubinstein, *Commissioner*  
Mark R. Vickery, P.G., *Executive Director*



## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*  
August 24, 2011

Ms. Julie Y. Fort,  
McKamie Krueger, LLP  
2007 N. Collins Blvd., Suite #501  
Richardson, Texas 75080

Re: Application from Mustang Special Utility District (SUD), Certificate of Convenience and Necessity (CCN) No. 11856, to Transfer Facilities and to Transfer and Cancel CCN No. 13020 from Denton County Fresh Water Supply District (FWSD) 9, in Denton County; Application No. 36966-S

Application from Mustang SUD, CCN No. 20930, to Transfer Facilities and to Transfer and Cancel CCN No. 20922 from Denton County FWSD 9, in Denton County; Application No. 36967-S

CN: 601363534; RN: 101222669 (water) 102946019 (sewer) (Mustang SUD)  
CN: 600739387; RN: 101410140 (water & sewer) (Denton FWSD 9)

Dear Ms. Fort:

The Texas Commission on Environmental Quality (TCEQ) received your letter on April 22, 2011, requesting a public hearing concerning the above referenced application.

In order for the TCEQ to hold a public hearing to determine if the transaction will serve the public interest, we must consider the criteria in §291.109(e) of the agency's rules. We have carefully reviewed your request and have determined that the concerns listed in your letter do not meet the criteria in §291.109(e). Therefore, a public hearing will not be scheduled. However, your name will be added to the mailing list for this application.

Thank you for taking the time to contact the TCEQ. If you have any questions or reasons other than those listed in your letter to object to the transaction, please contact Mr. Brian Dickey by phone at 512/239-0963, by fax at 512/239-6972, or by email at [Brian.Dickey@tceq.texas.gov](mailto:Brian.Dickey@tceq.texas.gov). If contacting our office by correspondence, please include MC 159 in the letterhead address.

Sincerely,

A handwritten signature in black ink that reads "Tammy Benter".

Tammy Benter, Manager  
Utilities & Districts Section  
Water Supply Division

TB/BDD

cc: Mr. John Rapier, Rapier, Wilson & Wendland, P.C.

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Bryan W. Shaw, Ph.D., *Chairman*  
Buddy Garcia, *Commissioner*  
Carlos Rubinstein, *Commissioner*  
Mark R. Vickery, P.G., *Executive Director*



## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

August 24, 2011

### **CERTIFIED MAIL**

Mr. John Rapier, General Counsel  
Rapier, Wilson & Wendland, PC  
1333 W. McDermott, Ste. 100  
Allen, Texas 75013

Re: Application from Mustang Special Utility District (SUD), Certificate of Convenience and Necessity (CCN) No. 11856, to Transfer Facilities and to Transfer and Cancel CCN No. 13020 from Denton County Fresh Water Supply District (FWSD) 9, in Denton County; Application No. 36966-S

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CN: 601363534; RN: 101222669 (water) 102946019 (sewer) (Mustang SUD)  
CN: 600739387; RN: 101410140 (water & sewer) (Denton FWSD 9)

Dear Mr. Rapier:

We have reviewed the criteria in Texas Water Code (TWC), Section 13.301(e) and determined that a public hearing will not be requested. You may complete your proposed transaction as scheduled, or any time after you receive this notification. Please note that the transaction must comply with the requirements of TWC Section 13.301(d) and therefore cannot be completed prior to the issuance of this letter.

The second part of the applications, which is transferring the CCNs, will occur following receipt of the following documents:

- a copy of the signed contract or bill of sale, and
- documents supporting the disposition of customer deposits.

The applications cannot be approved nor the CCNs transferred and issued until we receive evidence that the transaction was completed. These items must be received by the Utilities & Districts Section, Water Supply Division, within 30 days after the effective date of the transaction.

After the proper documentation is received, staff will prepare proposed maps, certificates, and recommendation for both applicants to review before submitting them to the Executive Director for approval and the issuance of the CCNs. A copy of this information will be sent to both the buyer and seller.

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Mr. John Rapier, General Counsel

Page 2

August 24, 2011

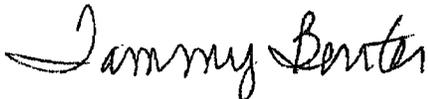
If you concur with the recommendation, the consent forms must be signed and returned by both applicants before the recommendation to transfer the CCNs can be approved by the Executive Director. If both consents are not received, the CCNs will remain in the name of the seller and the seller remains responsible for the systems for purposes of TWC Section 13 regulations. (See TWC, Section 5.122 and 30 Texas Administrative Code Section 50.33).

As an alternative to the seller's continued involvement in the process, the closing document(s) and any accompanying correspondence may include a statement that the seller consents with the transfer of the CCNs to the buyer with specific references to the statute and rule noted above. The statement will serve to authorize the Executive Director to take action upon receipt of the buyer's signed consent form. In this situation, however, the seller is relying on the buyer to provide the final consent on the CCN transfers.

Finally, please note that from the time the applications are filed until the CCNs are issued, it is the applicants' (buyer and seller) responsibility to notify and update the Utilities & Districts Section, Water Supply Division, of changes in the financial, managerial, or technical information provided in the applications.

If you have any questions, please contact Mr. Brian Dickey by phone at 512/239-0963, by fax at 512/239-6972, by email at [brian.dickey@tceq.texas.gov](mailto:brian.dickey@tceq.texas.gov), or if by correspondence, include MC 1539 in the letterhead address below.

Sincerely,



Tammy Benter, Manager  
Utilities & Districts Section  
Water Supply Division  
Texas Commission on Environmental Quality

TB/BDD/

cc: mailing list

MAILING LIST FOR APPLICATION NOs. 36966-S and 36967-S

Mr. John Rapier, General Counsel  
Rapier, Wilson & Wendland, PC  
1333 W. McDermott, Ste. 100  
Allen, Texas 75013

Representing Mustang Special Utility District

Mr. John Mitchell  
1208 Oakcrest Drive  
Aubrey TX 76227

President, Denton County FWSD 9

Ms. Julie Y. Fort,  
McKamie Krueger, LLP  
2007 N. Collins Blvd., Suite #501  
Richardson, Texas 75080  
Email: [Julie@mckamiekrueger.com](mailto:Julie@mckamiekrueger.com)

Representing Town of Providence Village

Mr. Russell Pfeiffer  
10303 Lakeview Drive.  
Providence Village, Texas 76227

Protestant

Mr. and Ms. Garcia  
10245 Lakeview Drive  
Providence Village, Texas 76227

Protestant

Mr. and Ms. Trimboli  
1316 Kingston Place  
Aubrey, Texas 76227

Protestant

Mr. Brian D Roberson  
1315 Oakcrest Drive  
Providence Village, Texas 76227

Protestant

TCEQ, Region 4 Office  
TCEQ, Mr. Brian Dickey, MC-159  
TCEQ, Ms. Erin Selvera, MC-173



TCEQ, Mr. Mark R. Vickery, P.G., located as 12100 Park 35 Circle, Building F, Austin, Travis County, Texas 78753.

3. Defendant Mark R. Vickery, Executive Director, is the Executive Director of the TCEQ. Service of process may be accomplished by personal delivery of citation to the Executive Director of the TCEQ, Mr. Mark R. Vickery, P.G., located as 12100 Park 35 Circle, Building F, Austin, Travis County, Texas 78753.
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**II.**  
**DISCOVERY CONTROL PLAN**

7. This is a suit for judicial review of an agency decision. No discovery is anticipated at this time. To the extent any discovery will be needed, discovery in this case will be conducted under a Level 3 Discovery Control Plan.

**III.**  
**JURISDICTION AND VENUE**

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community that now comprises The Town, Mustang SUD consented to Providence WCID's dual certification and allowed all the new homes to be retail water and sewer utility customers of Providence WCID, in part because Mustang SUD was unable to construct the infrastructure or provide retail water or sewer service to the new high-density development.

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19. Under various contracts entered into from 2000 to 2007, Providence WCID pays Mustang SUD a 15% fee for Mustang SUD to perform utility billing and collection services and for maintenance of Providence WCID's infrastructure.
20. The application seeks to cancel Providence WCID's water and sewer CCNs thus making Mustang SUD the exclusive retail provider of water and sewer service to the Town, and to *gift* (gratuitously donate) the District's entire water and sewer infrastructure to Mustang SUD. Mustang SUD lacks adequate resources to operate the water system that provides services to The Town and its citizens. Mustang SUD has insufficient capacity in its sewer system. Further, Mustang SUD's audited financial statements for 2009 and 2010 show losses. These facts show that Mustang SUD will be unable to adequately serve the retail water and sewer customers in the Town.
21. In 2008, Mustang SUD asked the Attorney General to approve the issuance of \$2.7 million dollars in bond indebtedness. The Attorney General refused unless Mustang SUD paid off \$833,000.00 of debt it incurred in 2006.
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23. Mustang SUD excludes residents of the Town and Providence WCID from serving on the Mustang SUD board. Mustang SUD has already started the process of eliminating at-large elections and divided the Board into single-member districts to preserve the power of rural customers.
24. Providence WCID's rates were historically lower than Mustang SUD's rates. Providence WCID recently raised its rates only because it was required by its contracts with Mustang SUD to do so, before transferring the assets to Mustang SUD.
25. Providence WCID currently funds contracts to pay neighboring local entities for fire and sheriff services from utility system revenue, from which The Town benefits. If the water and sewer facilities are transferred to Mustang SUD, Providence WCID will no longer have the utility revenues it currently uses to pay for basic public safety services. Mustang SUD does not currently pay for public safety services for its water and sewer customers and does not intend to pay for public safety services after the transfer.
26. The STM Application is not proper because it arises out of and is entirely based on the June 20, 2005 Merged, Amended and Restated Water and Sewer Agreement between Mustang SUD and Providence WCID, as amended on October 5, 2007 (the "Mustang-Providence Agreement"), and the Mustang-Providence Agreement is invalid for a variety of reasons: (1) it violates the Reserved Powers Doctrine (i.e., the board of directors of a political subdivision cannot contractually obligate a future board of directors); (2) it violates the Texas Constitutional prohibition (Tex. Const. Art. III, §§ 51 and 52(a)) on a political subdivision lending its credit or granting public money or thing of value in aid of, or to any individual, association or corporation; and (3) it never became effective by its terms because it was never approved by the TCEQ.

27. The TCEQ's approval of the STM Application without a hearing will not improve retail water and sewer service for, nor lower the cost of that service to, the Providence WCID customers residing in the Town.
28. It is not in the public interest to allow taxpayer financing of water and sewer facilities (i.e., through the issuance of the Providence WCID taxpayer-financed water and sewer facility bonds) while also stripping those taxpayers of all rights of local control over the use of those facilities (i.e., through the gratuitous transfer of the water and sewer facilities to Mustang SUD and giving Mustang SUD the exclusive right to serve the taxpayers residing in the Town).
29. It is not in the public interest for TCEQ to approve the gratuitous transfer of the water and sewer facilities from Providence WCID to Mustang SUD as there may be a substantial adverse impact on the Providence WCID tax base and its ability to pay debt service on the water and sewer facility bonds.
30. The TCEQ's approval of the STM Application and transfer of the Providence WCID water and sewer facilities to Mustang SUD contravenes the authority of the Town under Section 43.075 of the Texas Local Government Code to succeed to the powers, duties, assets and obligations of the Providence WCID, including the right to provide retail water sewer services to the residents of the Town.
31. The above recitations show that the Executive Director, under the factors of 30 Tex. Admin. Code § 291.109(e), abused its discretion by not requesting or holding a hearing on the cancellation of the Providence WCID's water and sewer CCNs and the transfer of the service area encompassing the Town exclusively to Mustang SUD.
32. Section 5.122(a)(3)(A) only allows the TCEQ to delegate decision making authority to the Executive Director in a case which is "uncontested and does not require an

evidentiary hearing.” In this case, the Executive Director’s decision to deny The Town’s hearing request and grant the application is clearly contested by The Town. Moreover, this case does require an evidentiary hearing to address the various grounds raised by The Town which show that the statutory criteria for approval of the application have not been satisfied. Accordingly, the Executive Director is not statutorily authorized to make the decision on this contested matter without a public hearing.

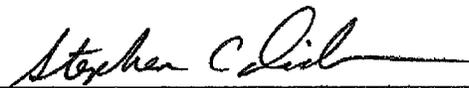
33. For all of the reasons previously stated in this Petition, the Ruling is invalid, arbitrary, and unreasonable pursuant to Texas Water Code and should be overturned.
34. The Town is significantly and adversely affected by the application. Under Texas law, The Town should be afforded an opportunity to present evidence concerning such adverse impacts and to demonstrate that the statutory criteria for TCEQ approval of the STM application have not been met.

#### **PRAYER**

WHEREFORE, The Town prays that the Court determine that Ruling is invalid, arbitrary, or unreasonable and therefore must be overturned, and that the cause be remanded to the TCEQ for a hearing on the public interest of the proposed transfer. The Town additionally prays for any further relief to which it shows itself entitled, in law or in equity.

Respectfully submitted,

KELLY HART & HALLMAN LLP



---

Brenda L. Clayton  
State Bar No. 00783837  
Stephen C. Dickman  
State Bar No. 05836500  
301 Congress Ave., Ste. 2000  
Austin, TX 78701  
Telephone: 512-495-6400  
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Bryan W. Shaw, Ph.D., *Chairman*  
Buddy Garcia, *Commissioner*  
Carlos Rubinstein, *Commissioner*  
Mark R. Vickery, P.G., *Executive Director*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

November 21, 2011

To: Persons on the attached mailing list (by mail and facsimile as indicated)

Re: Motion to Overturn filed by the Town of Providence Village concerning the Executive Director's decision not to request a hearing on the applications filed by Mustang Special Utility District for the "Sale, Transfer, or Merger" of water and sewer systems in Denton County: TCEQ Docket No. 2011-1763-DIS, Application Nos. 36966-S & 36967-S

This courtesy letter is to advise you that the time has passed for the Commission to act on the Motion to Overturn ("Motion") filed on September 23, 2011, by the Town of Providence Village in the above-referenced matter. According to the records of the Office of Chief Clerk and the Office of the General Counsel's deadline extension letter dated October 10, 2011, the deadline for the Commission to act on the Motion was November 18, 2011.

If you have any questions about this matter, please contact Todd Burkey, Assistant General Counsel, at (512) 239-2941.

Respectfully,



Les Trobman  
General Counsel

Mailing List



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Mailing List  
Mustang Special Utility District  
TCEQ Docket No. 2011-1763-DIS

John Rapier, General Counsel  
Rapier, Wilson & Wendland, PC  
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Allen, Texas 75013  
972/727-9904 FAX 972/727-4273

Erin Selvera  
TCEQ Environmental Law Division MC 173  
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Austin, Texas 78711-3087  
512/239-0600 FAX 512/239-0606

John Mitchell  
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Blas Coy  
TCEQ Office of Public Interest Counsel MC 103  
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Julie Y. Fort  
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Docket Clerk  
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Russell Pfeiffer  
10303 Lakeview Drive  
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Brian Christian  
TCEQ SBEA Division  
Public Participation and Education Program MC 108  
P.O. Box 13087  
Austin, Texas 78711-3087  
512/239-4000 FAX 512/239-5678

Mr. and Ms. Garcia  
10245 Lakeview Drive  
Providence Village, Texas 76227

Mr. and Ms. Trimboli  
1316 Kingston Place  
Aubrey, Texas 76227

Mr. Brian D. Roberson  
1315 Oakcrest Drive  
Providence Village, Texas 76227

Misti R. Howell  
1365 Portsmouth Drive  
Providence Village, Texas 76227

Tammy Benter  
Brian Dickey  
TCEQ Water Supply Division MC 153  
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