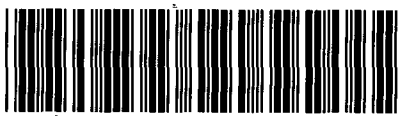

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SOAH DOCKET NO. 473-16-5296.WS
PUC DOCKET NO. 45702

APPLICATION OF THE CITY OF CIBOLO FOR SINGLE CERTIFICATION IN INCORPORATED AREA AND TO DECERTIFY PORTIONS OF GREEN VALLEY SPECIAL UTILITY DISTRICT'S SEWER CERTIFICATE OF CONVENIENCE AND NECESSITY IN GUADALUPE COUNTY	§	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

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GREEN VALLEY SUD'S RESPONSE TO CITY OF CIBOLO'S MOTION FOR PARTIAL SUMMARY DECISION AND COMMISSION STAFF'S REPLY TO CIBOLO'S MOTION

Green Valley Special Utility District ("Green Valley" or "GVSUD") files this its Response to: (1) the City of Cibolo's Motion for Partial Summary Decision; and (2) Commission Staff's Reply to Cibolo's Motion for Partial Summary Decision, and in support thereof, respectfully submits as follows:

I. INTRODUCTION

Cibolo's Motion for Partial Summary Decision ("Motion") as to Preliminary Issue No. 9 fails on both of Cibolo's asserted grounds. Cibolo's first ground appears to be that "property" must inexplicably be limited to physical infrastructure located inside the area sought to be decertified. Staff takes a similar approach, asserting Green Valley has no tangible "facility" other than its real property as proof of no "property", even though the referred issues and applicable law speak to "property" more broadly.[1] Neither Cibolo nor Staff provide factual or legal basis for their position regarding what constitutes "property" for purposes of Texas Water Code § 13.255. In contrast, Green Valley presents uncontroverted expert testimony regarding the identification of property and,

[1] Commission Staff's Reply to Cibolo's Motion for Partial Summary Decision at 2.

herein, provides legal support undermining Cibolo's bald assertions and Staff's artificial limitations regarding the nature of Green Valley's property.

Cibolo's second ground for summary decision appears to be that, even if Green Valley's position regarding the nature of its property is correct, Green Valley will not be able to provide wastewater service because another entity, Cibolo Creek Municipal Authority, a non-party to this proceeding, is the sole provider. This theory would invite the ALJ and Commission to interpret statutes outside of the Public Utility Commission's jurisdiction while the Texas Commission on Environmental Quality ("TCEQ"), which *does* have jurisdiction to interpret the statute on which Cibolo relies, is currently deciding that very issue in a pending proceeding. In fact, in that proceeding, the TCEQ Executive Director has recommended rejection of the identical argument Cibolo makes here.[2] The Commission is without jurisdiction to determine the validity of Cibolo's argument and should reject Cibolo's invitation to interfere with a pending proceeding before the TCEQ.[3]

Both of Cibolo's asserted grounds for summary decision should be rejected and its Motion should be denied as to Preliminary Issue No. 9.[4] Further, because Issue No. 9 impacts resolution of Issue No. 11 for which Cibolo does not seek summary decision, this case should proceed to a hearing on the merits so that all issues may be efficiently taken up together.

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[2] *See* **Attachment A**, which consists of portions of the TCEQ Executive Director's TCEQ Executive Director's Response to Public Comment and the Executive Director's Response to Hearing Requests and Request for Reconsideration (relevant portions highlighted) in TCEQ Docket No. 2016-1876-MWD, *Application from Green Valley Special Utility District (SUD) for New Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ1536001* (pending).

[3] Staff's reply correctly chooses not to accept Cibolo's invitation to delve into these matters outside of the Commission's jurisdiction.

[4] Green Valley does not oppose Cibolo's Motion as to Preliminary Issue No. 10.

II. STANDARD FOR SUMMARY DECISION

The Supreme Court of Texas has established that, "[t]o prevail on a traditional summary-judgment motion, a movant must show that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law."[5] In other words, a movant must *conclusively* negate at least one essential element of a cause of action in order to be entitled to summary judgment on that claim.[6] When reviewing a summary judgment, a court *must take as true* all evidence favorable to the nonmovant and indulge every reasonable inference and resolve any doubts in the nonmovant's favor.[7] Based on these longstanding standards, Cibolo's Motion fails as a matter of law.

III. CIBOLO'S MOTION FOR PARTIAL SUMMARY DECISION AS TO ISSUE NO. 9 SHOULD BE DENIED

A. Cibolo's Motion is Premature.

Green Valley respectfully submits as an initial matter that consideration of Cibolo's Motion for Partial Summary Decision would be premature at this point in the proceeding. There is no record evidence in this proceeding upon which to base a partial summary decision, including evidence upon which Cibolo relies in its Motion. The ALJ has not admitted a single document into evidence in this proceeding. According to the plain wording of the Commission's procedural rule governing summary proceedings, the ALJ is authorized to grant summary decision only "to the extent that the pleadings, affidavits, materials obtained by discovery or otherwise, admissions, matters officially noticed, or evidence *of record* show that there is no genuine issue as to any material fact. . .on the

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[5] *Southwestern Elec. Power Co. v. Grant*, 73 S.W.3d 211, 216 (Tex. 2002).

[6] *Id.*; *see also Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003); *Elliott-Williams Co. v. Diaz*, 9 S.W.3d 801, 803 (Tex.1999).

[7] *Knott*, 128 S.W.3d at 215; *Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex.1997); *Friendswood Dev. Co. v. McDade & Co.*, 926 S.W.2d 280, 282 (Tex.1996).

issues expressly set forth in the motion."[8] Because there is no *record evidence*, Green Valley has been deprived of its right to cross-examine Cibolo's witness and test the credibility and reliability of the Cibolo prefiled testimony and evidence relied upon in the Motion. Moreover, the discovery period established by the ALJ in Order No. 3 has yet to conclude. Green Valley's ability to inquire into the merits of Cibolo's opinions, including the pursuit of additional discovery and testing the credibility of Cibolo's witnesses through cross-examination at hearing, which in turn could form part of the basis of Green Valley's response to Cibolo's Motion, would be improperly limited by a premature ruling on the Motion.[9] Thus, consideration of Cibolo's Motion should be denied or continued until the admission of record evidence and the creation of a transcript of the hearing, so that the fundamental issue in this proceeding, the identification of property rendered useless or valueless, may be fully briefed.

Green Valley further submits that summarily disposing of the core issue in this proceeding would be inconsistent with the Commission's Supplemental Preliminary Order. The Commission referred this proceeding to SOAH for the development of a full record based on the ground that "determining what property, if any, is rendered useless and valueless by decertification *will likely be fact intensive*, lending itself to the contested-case process at SOAH."[10] The Commission further noted that "[t]his is the first case of this type to be referred to SOAH" and directed the ALJ to "*hold a hearing* on the first phase of this docket" and to "issue a PFD on those issues and *allow the Commission* to make the determinations required under TWC § 13.255."[11] Each of these Commission

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[8] P.U.C. PROC. R. 22.182(a).

[9] SOAH Order No. 3 at 2 (Sep. 12, 2016).

[10] Supplemental Preliminary Order at 2 (July 20, 2016)(emphasis added).

[11] *Id.* at 4 (emphasis added).

directives would be frustrated by consideration of the Motion at this juncture. Compliance with the Commission's directives therefore supports denial of Cibolo's Motion or, at the very least, deferral of consideration of the Motion prior to the development of a complete record on this core issue. Ruling on the Motion, by contrast, could result in unnecessary delay of the proceeding.[12]

Finally, Cibolo does not seek summary decision on Issue No. 11. The resolution of Issue No. 9 necessarily impacts Issue No. 11. Therefore, both issues are best taken up together after a full hearing on the merits.

B. Cibolo's Motion for Partial Summary Decision Based Solely on the Lack of GVSUD "Infrastructure" Inside the Area That Cibolo Seeks to Decertify is an Insufficient Grounds for Summary Decision as a Matter of Law.

Preliminary Issue No. 9 asks the parties to determine "what *property*, if any, will be rendered useless or valueless to Green Valley by the decertification sought by Cibolo in this proceeding."[13] Thus, the core issue in this phase of the proceeding is "property."

1. Cibolo's legal theories are conclusory and circular.

In sharp contrast to the plain wording of Preliminary Issue No. 9, Cibolo does not even reference the word "property" in its single paragraph devoted to seeking summary decision on this central issue.[14] Rather, Cibolo's argument consists solely of repeating no less than 4 times in the single page of its Motion that summary decision should be granted on the ground that Green Valley has no wastewater infrastructure within the land that it seeks to decertify.[15] Cibolo, without offering

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[12] Green Valley foresees that if the ALJ considers Cibolo's Motion, whether the Motion is granted or denied, the decision will be appealed to the Commission as authorized by P.U.C. Proc. R. 22.182(e), the result being that the very issue that the Commission referred to SOAH for full development of the record will be back before the Commission with an incomplete record.

[13] Supplemental Preliminary Order at 4 (Jul. 20, 2016).

[14] Cibolo Motion at 5.

[15] *Id.* Cibolo makes the following statements in its brief: ". . .there is no sewer infrastructure within the land the City seeks to decertify from GVSUD . .."; ". . .GVSUD has no wastewater infrastructure within the Decertificated Land.";

any explanation or legal basis for doing so, would have the ALJ limit consideration of Green Valley's property interests to "infrastructure." Similarly, and again, without explanation, Staff would improperly limit "property" to tangible "facilities."[16] Neither Preliminary Issue No. 9 nor Texas Water Code § 13.255 use the word "infrastructure" and Cibolo's bald assertion, unsupported by any fact, law or Commission precedent, that property is limited to "infrastructure" must be rejected as a basis for summary decision.

But Cibolo does not stop there; it seeks to further restrict Preliminary Issue No. 9 to infrastructure "within the Decertificated Land."[17] As with its presumptuous and unexplained theory that the only "property" at issue is "infrastructure," Cibolo offers no reference to facts, statutory authority or Commission precedent to support its proferred limitation on "property." This is because there are no facts, statutory authority or Commission precedent supporting its theory.

The issue before the ALJ is whether GVSUD "property" will be rendered useless or valueless, notwithstanding Cibolo's attempts to characterize the Preliminary Issue No. 9 inquiry as "infrastructure" that is "within" the area it seeks to decertificate. On this issue, Cibolo has offered no competent evidence and no legal grounds in its Motion to support its theory. Its only "evidence," assuming that the ALJ admits it into the record, consists *solely* of conclusory statements by its engineer witness, relying on an incompetent "appraisal" of a person, Mr. Stowe, whom Cibolo has

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"GVSUD has not installed any wastewater infrastructure within the Decertificated Land."; ". . .GVSUD had no existing sewer infrastructure within the area colored in light blue in Attachment A to the City's Application. . ."

[16] Staff Reply at 2.

[17] Cibolo Motion at 5. It is worth noting that Cibolo uses the term "Decertificated Land", presuming that its desired result of obtaining decertification is somehow preordained, despite pending federal litigation addressing that very issue.

not designated to testify.[18] The following are illustrative of Cibolo witness Rudy Klein's bald assertions:

- "There is no real property or personal property of GVSUD that would be rendered useless or valueless, in whole or in part, by the Application."[19]

  "In my opinion, GVSUD's Appraisal includes costs and expenses that are not property and well beyond the scope of property that has been rendered useless and valueless by decertifcation, where (i) no property of GVSUD has been rendered useless or valueless . . ."[20]

  "In other words, all of the costs asserted in GVSUD's Appraisal are for costs other than property that has been rendered useless and valueless by deertification."[21]

Moreover, as with Cibolo's Motion, Mr. Klein's testimony is limited to "infrastructure on or in the decertificated land.."[22] None of these statements offer a factual or legal basis and are therefore insufficient as grounds for summary decision.

At its essence, Cibolo's argument is a tautology. Cibolo seeks to convince the ALJ and Commission that Green Valley's acknowledgment that it has no "infrastructure" located "within" the area Cibolo seeks to decertify means that GVSUD has no property that will be rendered useless or valueless.[23] Cibolo's assertion, unexplained in its Motion and unexplained in its testimony, should be rejected as logically flawed and contrary to the plain words of both TWC § 13.255 and Commission Preliminary Issue No. 9.

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[18] Judges Drews and Vickery ruled in Order No. 5 that Mr. Stowe's purported appraisal is inadmissible for the truth of any matter asserted therein. SOAH Order No. 5 at 3 (Nov. 22, 2016).

[19] Direct Testimony of Rudy Klein at page 14, lines 1-2.

[20] *Id.* at page 14, lines 19-23 (To paraphrase, Mr. Klein asserts that there is no property rendered useless and valueless because there is no property rendered useless and valueless.).

[21] *Id.* at page 15, lines 1-2.

[22] *Id.* at page 16, lines 3-11.

[23] An equivalent argument would be that because a person does not have any apples he therefore does not have any fruit.

2. Staff's theories are also incorrect.

Staff's attempt to limit the meaning of "property" to tangible "facilities" likewise has no merit. If anything, the Texas Water Code's definition of "facilities" only serves to bolster a broad reading of property. Chapter 13 defines "facilities" to consist of "*all* plant and equipment, including *all tangible and intangible real and personal property without limitation*, and *any and all means and instrumentalities in any manner* owned, operated, leased, *licensed, used, controlled, furnished, or supplied for, by, or in connection with the business* of any retail public utility."[24]

3. Green Valley's property theories are properly supported.

In contrast to the position of Cibolo and Staff, Green Valley has offered competent evidence (contested only by Cibolo's unexplained theory that only infrastructure inside the decertified area constitutes property) specifically delineating its property interests in Green Valley witness Joshua Korman's appraisal that conservatively allocates invested and lost dollars (*i.e.*, "property") proportionally to the parts of Green Valley's wastewater CCN that Cibolo wishes to appropriate cost free. Mr. Korman, a qualified, licensed appraiser, identified the property interests that would be rendered useless or valueless as the result of Cibolo's intended decertification of nearly 1,700 acres of Green Valley's wastewater CCN. Mr. Korman's opinions as to what constitutes property have been accepted in a similar proceeding addressing property to rendered useless or valueless following decertification.[25] Mr. Korman's pre-filed testimony is that the appraisal, attached as Exhibit GVSUD-1 to his testimony, and previously submitted to the Commission on June 28, 2016 per the

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[24] TWC § 13.002(9).

[25] Joshua Korman Direct Testimony at page 5, lines 1-11 (referencing Mr. Korman's testimony in PUC Docket No. 45848, SOAH Docket No. 473-16-5011.WS on behalf of Aqua Texas, Inc.)

Commission's directive in Order No. 7 in this Docket,[26] identified the property that will be rendered useless or valueless.[27] Mr. Korman went through a comprehensive and detailed process of identifying GVSUD property, and relied on the *Uniform Standards of Professional Appraisal Practice*, 2016-2017 Edition, where applicable, in his property identification.[28] Mr. Korman's methodology and identification of GVSUD property that will be rendered useless and valueless upon decertification is uncontroverted other than through the unexplained and unsubstantiated theory that only "infrastructure" located "within" the decertificated area constitutes property.[29] In short, the *only* competent testimony on property identification is that of Green Valley's witnesses.

While Cibolo's theory that property should be limited to infrastructure within the decertified area does not appear to be based on any legal or factual basis, Green Valley's identification of its property interests is consistent with, and supported by, legal authority and principles of statutory construction. It is further consistent with Staff's choice of the term "facilities" in its Reply. Neither the Legislature nor the Commission has articulated precisely what "property" or other key terms, such as "useless" or "valueless," mean in the context of TWC §13.255 and 16 TAC §24.120. Regardless, constitutional concerns would dictate a broad reading of the term.

4. Legal authority for interpretation of "property" in TWC § 13.255.

Here, Green Valley will present what is the required view of "property" in order to ensure that the Commission fulfills the overriding purpose of the TWC § 13.255 compensation provisions:

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[26] Order No. 7 at 1 (June 22, 2016).

[27] Joshua Korman Direct Testimony at page 8, lines 4-5; Exhibit GVSUD-1. Mr. Korman's appraisal specifically identifies its property interest that will be rendered useless or valueless as including investment dollars related to planning and design costs, legal and professional expenses and lost economic opportunity interests and allocated those costs so that only the small portion commensurate with the impact of decertification are sought.

[28] Joshua Korman Direct Testimony. at pages 9-15.

[29] Cibolo's Motion does not even go so far as to explicitly state that only infrastructure constitutes property. Green Valley is left to speculate that this is the essence of its argument.

making sure that decertification of a portion of a retail public utility's CCN, such as that portion of Green Valley's CCN sought by Cibolo, will result in monetary compensation in an amount "adequate and just to compensate the retail public utility for such property"[30] Compensation for lost property resulting from decertification must be adequate to prevent an unlawful regulatory taking, damaging, or destruction of property for public use.[31] Green Valley properly relied on its wastewater CCN No. 20973 rights in planning, designing and preparing to serve its entire certificated area, including the approximately 1,694 acres that Cibolo seeks to decertify. Green Valley has a reasonable expectation of receiving income from its investments, including an allocable portion of those costs commensurate with the portion of its CCN area that Cibolo desires to appropriate.[32] Preventing a regulatory taking of these property rights is the only reason to have compensation provisions in the TWC. To fulfill this purpose, the statutory terms at issue must be applied in a manner that serves to make decertified retail public utilities whole.

The Texas Supreme Court has held that the term "property" must be applied in its broadest sense where no further definition is provided in the statute where used. The following is an excerpt from *State v. Public Utility Commission of Texas*:

> In construing a statute, if the legislature does not define a term, its ordinary meaning will be applied. By its ordinary meaning, the term "property" extends to "every species of valuable right and interest." It is "commonly used to denote everything to

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[30] TWC § 13.255(c); PUC SUBST. R. 24.120.

[31] *E.g.*, *City of Blue Mound v. Southwest Water Co.*, 449 S.W.3d 678, 681-690 (Tex. App.–Fort Worth 2014, no pet.) (discussing *Lone Star Gas Co. v. City of Fort Worth*, 128 Tex. 392, 98 S.W.2d 799, 799-806 (Tex. 1936) and its application in *Barshop v. Medina County Underground Water Conservation District*, 925 S.W.2d 618 (Tex. 1996) and *Texas Building Owners and Managers Association, Inc. v. Public Utility Commission of Texas*, 110 S.W.3d 524 (Tex. App.–Austin 2003, pet. denied)).

[32] Green Valley is not seeking, as Staff intimates, compensation specifically on the ground that its CCN itself constitutes a compensable property right for the purpose of this proceeding, and Staff's reliance on *Crystal Clear* and related precedent is therefore inapposite. Staff Reply at 3, n. 12. Rather, Green Valley seeks compensation for specific investments made in reliance on its CCN, including legal and professional fees incurred here, and lost revenue rights as described in its appraisal report.

which is the subject of ownership, corporeal or incorporeal, *tangible or intangible*, visible or invisible, real or personal."[33]

The Texas Constitution requires just compensation when the government takes, damages, or destroys property of any variety for public use whether that property is real or personal and provides no limitation on the term "property."[34]

Various sections of TWC Chapter 13 further demonstrate a broad view of "property" is required:

1. TWC Chapter 13 broadly defines "facilities" to mean "all the plant and equipment of a retail public utility, *including all tangible and intangible real and personal property without limitation*, and any and all means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with the business of any retail public utility."[35]

2. The language in TWC § 13.255 originated through H.B. 2035 in 1987[36] The House Sponsor of H.B. 2035, Representative Hinojosa, specifically stated in a Senate Committee Meeting discussing H.B. 2035 that affected water supply corporations would be compensated for "any bonded indebtedness that it may have or *for any other property that it may lose because the City is going into*

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[33] *State v. Public Util. Comm'n*, 883 S.W.2d 190, 199-200 (Tex. 1994) (emphasis in original) (citations omitted).

[34] TEX. CONST. Art. I, § 17 ("No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made . . ."); *see also Steele v. Houston*, 603 S.W.2d 786, 792-93 (Tex. 1980) (holding in pertinent part that destruction of personal property by police required compensation).

[35] TWC §13.002(9); *see also* 16 TAC §24.3(26). Plant may not be construed as only physical plant because "intangibles are ordinarily included in a utility's rate base" and included in "plant in service." *State v. Public Utility Commission of Texas*, 883 S.W.2d 190, 199-200 (Tex. 1994); *see also* TWC § 13.185(a) ("original cost of *property* used by and useful to the utility in providing service") (emphasis added); 16 TAC §24.31(c)(2)(A)-(B) (referring to "plant, *property* and equipment"in original cost rules) (indicating that plant schedules used for rate base may include all three interchangeably) (emphasis added); *Class A Water-Sewer Utility Rate Filing Package,* Instructions, at 13-14 (9/17/2015) (available at www.puc.texas.gov/industry/water/Forms/Forms.aspx); and *Class B Rate-Tariff Change Application Instructions*, at 10 (9/17/2015) (available at www.puc.texas.gov/industry/water/Forms/Forms.aspx).

[36] Tex. H.B. 2035, 70th Leg., R.S. (1987).

the certified area and providing water."[37] Thus, no "property" limitation was contemplated.

3. Green Valley's expert witness on the legislative history and implementation of TWC § 13.255 testified that he participated directly in the legislative and rules processes that implemented the updated compensation process and that the compensation factors are instructive of the broad array of both tangible and intangible property interests that must be compensated as the result of decertification if rendered useless or valueless.[38]

Moreover, Exhibit GVSUD-2 to Mr. Korman's testimony, offered here as summary decision evidence, consists of Standards 1-10 of the *Uniform Standards of Professional Appraisal Practice*, 2016-2017 Edition.[39] Those standards show that there are methods of valuing all types of property whether tangible, intangible, real, or personal.[40]

The non-exclusive list of compensation factors used to value personal property per TWC § 13.255(g) include multiple items that are not necessarily tied to constructed or physical infrastructure, such as planning and design expenditures, "necessary and reasonable legal expenses and professional fees," and the broadly written "other relevant factors."[41] While compensation is not an issue in this phase, the Commission's procedural mechanism established to parse this proceeding into separate phases cannot serve as a basis for simply ignoring the factors enumerated in the same statutory scheme/provision: the factors would be rendered meaningless if they are, on the one hand,

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[37] *See* **Attachment B** (Partial transcript of the Senate Committee on Intergovernmental Relations hearing on May, 28, 1987, 70th Leg. R. S. The audio of the full hearing is available at https://www.tsl.texas.gov/ref/senaterecordings/70th-R.S./700795a/index.html.) This Senate Committee Meeting discussion also reveals that the primary purpose for adding this process to TWC §13.255 was to permit cities to extend service to colonia areas in South Texas where CCN holders could not serve them, not harm responsible retail public utilities.

[38] Stephen Blackhurst Direct Testimony at page 6, lines 15-20; page 12, lines 7-16; page 15, lines 1-13. Green Valley only cites to its testimony because it must respond to Cibolo's Motion at this time. Green Valley does not intend to waive its argument that consideration of the Motion is premature at this time. *See* Section III, *supra*.

[39] Joshua Korman Direct Testimony at Ex. GVSUD-2.

[40] *Id.*

[41] TWC §13.255(g).

required to be considered in determining compensation for property rendered useless or valueless, yet on the other hand are somehow considered to have no connection to the *identification* of such property (*e.g.* planning and building, legal expenses incurred, other factors). This would be an absurd result of the Commission's established *procedural* mechanism. As the Texas Supreme Court has stated:

> Language *cannot be interpreted apart from context.* The meaning of a word that appears ambiguous when viewed in isolation may become clear when the word is analyzed in light of the terms that surround it. . . . [W]e look not only to the words themselves but *to the statute in its entirety* to determine the Legislature's intent. It is a fundamental principle of statutory construction and indeed of language itself that words meanings cannot be determined in isolation but must be drawn from the context in which they are used.[42]

Taken as a whole, this statutory and common law authority demonstrate that Cibolo's attempts to limit the term "property" to physical "infrastructure" located "within" the area sought to be decertifed has no legal or factual foundation and therefore constitute insufficient grounds for granting summary decision. At a bare minimum, there is a genuine issue of material fact regarding what constitutes "property" in this proceeding. Green Valley reiterates that, in reviewing a motion for summary judgment, the reviewing court must resolve every doubt and indulge every reasonable inference in the nonmovant's favor.[43] All evidence favorable to the nonmovant must be taken as true.[44] Cibolo's bald assertions of what it believes should constitute "property" are insufficient to meet its burden of proof to show that there is no genuine issue of material fact as a matter of law. As such, the burden does not shift to Green Valley under longstanding precedent.[45] Given these

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[42] *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011)(emphasis added).

[43] *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003).

[44] *Tex. Commerce Bank, N.A. v. Grizzle*, 96 S.W.3d 240, 252 (Tex. 2002).

[45] *E.g., M.D. Anderson Hosp. & Tumor Ins. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000); *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979).

well-established summary decision standards, the only appropriate course is for the ALJ to deny Cibolo's Motion in its entirety.

C. Cibolo's Assertion That the Cibolo Creek Municipal Authority is the *Only* Entity That May Provide Wastewater Service Fails as a Matter of Law.

Cibolo's disingenuous argument that CCMA is the only entity that may provide service in the area to be decertificated "as a matter of law" in support of granting summary decision should be rejected in its entirety. Cibolo inexplicably omits relevant facts regarding its theory. First, Cibolo fails to inform the ALJ that it has made this *identical* argument with regard to CCMA in Green Valley's *pending* Texas Pollutant Discharge Elimination System ("TPDES") permit application proceeding before the TCEQ.[46] Indeed, Cibolo has made this argument to the TCEQ repeatedly. To illustrate, Green Valley attaches hereto as **Attachment C** relevant highlighted excerpts of correspondence that Cibolo has submitted to the TCEQ in Green Valley's pending TPDES permit proceeding. As early as August of 2015, Cibolo, as part of its concerted effort to prevent Green Valley from obtaining its TPDES permit, argued that "CCMA is the governmental entity designated to provide wastewater treatment services in the region."[47]

Second, Cibolo's Motion fails to explain that the *only* findings of TCEQ staff in the pending proceeding in which this identical issue is currently being litigated, *reject* Cibolo's contention that only CCMA is entitled to provide wastewater service in Green Valley's wastewater CCN area. Green Valley has attached as **Attachment A** portions of the TCEQ Executive Director's Response to Public Comment and the Executive Director's Response to Hearing Requests and Request for

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[46] TCEQ Docket No. 2016-1876-MWD, *Application from Green Valley Special Utility District (SUD) for New Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ1536001* (pending).

[47] **Attachment C**, August 31, 2015 letter at 3.

Reconsideration with relevant provisions highlighted. The TCEQ Executive Director's Response to Public Comment on the issues raised by Cibolo in Green Valley's TPDES permit proceeding indicates an extensive and thorough research effort to reach a conclusion directly opposed to Cibolo's grounds for partial summary decision here.

While Green Valley readily acknowledges that the Executive Director's recommendations may not ultimately be approved by the TCEQ Commissioners and are therefore not determinative of the issue, they serve to illustrate that the issue is not as cut and dry as Cibolo would have the ALJ believe and that the issue is wholly inappropriate as grounds for being decided as a "matter of law" as Cibolo's Motion argues. The very issue is *currently being litigated* before the TCEQ.

The ALJ should reject Cibolo's improper invitation to determine as a matter of law that "CCMA is the only entity in the state of Texas that can collect, transport, treat, and discharge wastewater generated within the Decertified Land" or that 30 TAC § 351.62 "is clear and unambiguous"[48] when: (1) the only statements from the TCEQ reject Cibolo's arguments; and (2) another agency is currently litigating the precise issue. What Cibolo is essentially asking the ALJ to do is interfere with a pending agency proceeding in what amounts to forum shopping between agencies. Should the ALJ accept Cibolo's request to make a determination regarding its CCMA theory, the result could be a potential (and absolutely unnecessary) conflict between two state agencies. For these reasons alone, Cibolo's Motion should be rejected.

More importantly, the Public Utility Commission does not have jurisdiction to address the CCMA-related arguments raised by Cibolo. Even Cibolo's own witness admits as much. In discussing Cibolo's CCMA/regionalization theories, Cibolo witness Rudy Klein states, "[t]his policy is contained in TWC Chapter 26. I believe that *the TCEQ is the state agency that implements this*

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[48] Cibolo Motion at 6

policy."[49] Specifically with regard to Cibolo's claim that CCMA is the only entity that may provide wastewater service, Mr. Klein states, "I believe that there is a system-specific regionalization policy where *the TCEQ* designates certain wastewater entities to be the regional sewerage system for a specific geographic area. I believe that these 8 entities are identified in 30 TAC Chapter 351 *of the TCEQ's regulations.*"[50] Cibolo's argument is currently being considered by the only agency of competent jurisdiction to determine the issue. Neither the regionalization policies under TWC Chapter 26 nor the regulations found in 30 TAC Chapter 351 have been transferred to the jurisdiction of the PUC from the TCEQ and Cibolo's improper attempt to assert TCEQ jurisdictional issues in this proceeding should be rejected.

Finally, under Cibolo's theory, Cibolo could not meet responsibilities required under the single sewer CCN its application seeks as the new certificated retail sewer public utility for the subject areas in its application. Such responsibilities would include, at a minimum, constructing a wastewater collection system for retail sewer service in those areas. This bolsters the conclusion that Cibolo's regionalization theories on this issue is simply incorrect.

IV. CIBOLO'S MOTION AS TO PRELIMINARY ISSUE NO. 10

Finally, Green Valley agrees that: (1) Cibolo's Motion as to Preliminary Issue No. 10 is not premature; and (2) the ALJ may grant that portion of Cibolo's Motion. Specifically, Green Valley stipulates that Cibolo has not requested Green Valley to transfer any GVSUD property to the City.

V. CONCLUSION AND PRAYER

For the reasons set out above, Green Valley Special Utility District respectfully requests that the Honorable Administrative Law Judge: (1) deny the City of Cibolo's Motion for Partial Summary

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[49] Testimony of Rudy Klein at page 17, lines 12-13 (emphasis added).

[50] *Id.* at page 18, lines 3-7 (emphasis added).

CERTIFICATE OF SERVICE

I hereby CERTIFY that on December 5, 2016, a true and complete copy of the above was sent by the method indicated to counsel of record at the following addresses in accordance with P.U.C. PROC. R. 22.74:

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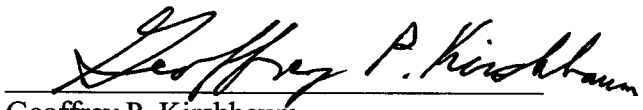
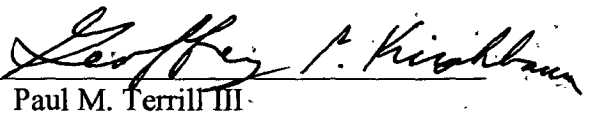
ATTORNEY FOR COMMISSION STAFF



Geoffrey P. Kirshbaum

Decision on all grounds as to Preliminary Issue No. 9; (2) grant Cibolo's Motion as to Preliminary Issue No. 10; (3) proceed with the hearing on the merits as currently scheduled; and (4) grant all other relief to which Green Valley shows itself to be entitled.

Respectfully submitted,

By: 

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ATTORNEYS FOR GREEN VALLEY SPECIAL UTILITY DISTRICT

ATTACHMENT
A

TPDES Permit No. WQ0015360001

APPLICATION FROM GREEN VALLEY SPECIAL UTILITY DISTRICT (SUD) FOR NEW TEXAS POLLUTANT DISCHARGE ELIMINATION SYSTEM (TPDES) PERMIT NO. WQ0015360001	**§**	**BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

EXECUTIVE DIRECTOR'S RESPONSE TO PUBLIC COMMENT

The Executive Director (ED) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this Response to Public Comment on Green Valley SUD's application for new TPDES Permit No. WQ0015360001 and the ED's preliminary decision. As required by title 30, section 55.156 of the Texas Administrative Code, before a permit is issued, the ED prepares a response to all timely, relevant, and material, or significant comments. The Office of the Chief Clerk received timely comments from John E. Bierschwale, Cibolo Creek Municipal Authority (CCMA), City of Cibolo, City of Santa Clara, City of Schertz, Guadalupe County, Douglas Jones, San Antonio River Authority (SARA), and Jennifer Schultes (as an individual and representative of the City of Cibolo). This response addresses all such timely public comments received, whether or not withdrawn. For more information about this permit application or the wastewater permitting process, please call the TCEQ Public Education Program at 1-800-687-4040. General information about the TCEQ can be found on the TCEQ's web site at www.tceq.texas.gov.

I. BACKGROUND

A. Facility Description

Green Valley SUD has applied to the TCEQ for new TPDES Permit No. WQ0015360001 to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 0.25 million gallons per day (MGD) in the Interim I phase and an annual average flow not to exceed 2.5 MGD in the Interim II phase and 5.0 MGD in the Final phase. The Santa Clara Creek No. 1 Wastewater Treatment Facility will be an activated sludge process plant operated in the extended aeration mode. Treatment units in the Interim I phase will include a lift station, bar screen, equalization basin, aeration basin, final clarifier, sludge digester, belt filter press, chlorine contact chamber, and disk filter. Treatment units in the Interim II and Final phases will include a lift station, a bar screen, two sequencing batch reactor basins, an equalization basin, a sludge digester, a belt filter press, an ultraviolet light disinfection system, and a disk filter. The facility will serve proposed developments in the Santa Clara Creek watershed in Guadalupe County, Texas. The facility has not been constructed.

Effluent limits in the Interim I phase of the proposed permit, based on a thirty-day average, are 10 milligrams per liter (mg/L) five-day carbonaceous biochemical oxygen demand ($CBOD_5$), 15 mg/L total suspended solids (TSS), 3 mg/L ammonia

nitrogen (NH_3-N), 0.5 mg/L total phosphorus, 126 colony-forming units (CFU) or most probable number (MPN) of *E. coli* per 100 milliliters (mL), and 4 mg/L minimum dissolved oxygen. The effluent shall contain a chlorine residual of at least 1 mg/L and not exceed a chlorine residual of 4 mg/L after a detention time of at least twenty minutes based on peak flow. Effluent limits in the Interim II phase of the proposed permit, based on a thirty-day average, are 7 mg/L $CBOD_5$, 15 mg/L TSS, 2 mg/L NH_3-N, 0.5 mg/L total phosphorus, 126 CFU or MPN of *E. coli* per 100 mL, and 6 mg/L minimum dissolved oxygen. Effluent limits in the Final phase of the proposed permit, based on a thirty-day average, are 5 mg/L $CBOD_5$, 5 mg/L TSS, 1.8 mg/L NH_3-N, 0.5 mg/L total phosphorus, 126 CFU or MPN of *E. coli* per 100 mL, and 6 mg/L minimum dissolved oxygen. The permittee shall use an ultraviolet light system for disinfection purposes in the Interim II and Final phases. The pH must be in the range of 6.0 to 9.0 standard units in all phases.

The wastewater treatment facility will be located at 3930 Linne Road, in Guadalupe County, Texas 78155. The treated effluent will be discharged to Santa Clara Creek, then to Lower Cibolo Creek in Segment No. 1902 of the San Antonio River Basin. The unclassified receiving water use is high aquatic life use for Santa Clara Creek. The designated uses for Segment No. 1902 are high aquatic life use and primary contact recreation.

B. Procedural Background

The TCEQ received the application on April 1, 2015, and declared it administratively complete on May 18, 2015. The Notice of Receipt and Intent to Obtain a Water Quality Permit was published on June 11, 2015, in the *Seguin Gazette.* ED staff completed the technical review of the application on August 13, 2015, and prepared a draft permit. The Notice of Application and Preliminary Decision for a Water Quality Permit was published on October 27, 2015, in the *Seguin Gazette.* The Notice of Public Meeting was published on February 25, 2016, in the *Seguin Gazette.* A public meeting was held on March 29, 2016, which was also the day the public comment period ended. This application was administratively complete on or after September 1, 1999. Therefore, it is subject to the procedural requirements adopted pursuant to House Bill 801, 76th Legislature, 1999.

C. Access to Rules, Statutes, and Records

- Secretary of State web site for all Texas administrative rules: www.sos.state.tx.us
- TCEQ rules in title 30 of the Texas Administrative Code: www.sos.state.tx.us/tac (select "View the current *Texas Administrative Code*" on the right, then "Title 30 Environmental Quality")
- Texas statutes: www.statutes.legis.state.tx.us
- TCEQ web site: www.tceq.texas.gov (for downloadable rules in Adobe portable document format, select "Rules," then "Download TCEQ Rules")
- Federal rules in title 40 of the Code of Federal Regulations: www.ecfr.gov
- Federal environmental laws: www2.epa.gov/laws-regulations

Commission records for this application are available for viewing and copying at the TCEQ's main office in Austin, 12100 Park 35 Circle, Building F, First Floor (Office of

the Chief Clerk), until the TCEQ takes final action on the application. The application, proposed permit, and Fact Sheet and ED's Preliminary Decision are also available for viewing and copying at Marion City Hall, 303 South Center Street, Marion, Texas.

If you would like to file a complaint about the facility concerning its compliance with provisions of its permit or TCEQ rules, you may call the TCEQ Environmental Complaints Hot Line at 1-888-777-3186 or the TCEQ Region 13 Office directly at 1-210-490-3096. Citizen complaints may also be filed by sending an e-mail to cmplaint@tceq.texas.gov or online at the TCEQ web site (select "Reporting," then "Make an Environmental Complaint"). If the facility is found to be out of compliance, it may be subject to enforcement action.

II. COMMENTS AND RESPONSES

Comment 1

CCMA commented that Green Valley SUD's application violates title 30, chapter 351, subchapter F of the Texas Administrative Code because Green Valley SUD seeks to obtain a permit to discharge domestic wastewater effluent within area where only CCMA is authorized to obtain a permit related to discharging domestic wastewater effluent. The cities of Cibolo and Schertz supported this comment, noting that they are purchasers of wholesale sewer service from CCMA and cities named in title 30, section 351.62 of the Texas Administrative Code. The City of Cibolo commented that CCMA should remain the sewer service provider in the area. CCMA asked why the TCEQ issued the proposed permit if the TCEQ cannot issue a TPDES permit for a service area that overlaps a regional wastewater provider's service area, and the application includes CCMA's service area.

Response 1

When the Texas Legislature created the Texas Water Code in 1971, it included the state's regionalization policy in what is today known as chapter 26, subchapter C of the Texas Water Code.[1] As part of that policy, the TCEQ has the authority to conduct a hearing to determine if a regional waste collection, treatment, or disposal system is necessary "to prevent pollution or maintain and enhance the quality of the water in the state" based on the existing or reasonably foreseeable residential, commercial, industrial, recreational, or other economic development in the area.[2] This authority exists within any standard metropolitan statistical area in the state.[3] After a hearing, if the TCEQ determines it should designate a system as a regional provider, it can enter an order making the designation.[4] After issuing that order, the TCEQ can enter an order requiring a person "discharging or proposing to discharge waste into or adjacent

[1] Until 1977, the regionalization statutes were sections 21.201 through 21.205 of the Texas Water Code. The statutes were readopted in 1977 as sections 26.081 through 26.086, which is how they are still numbered today. (Section 26.087 was created as section 21.206 in 1977 and renumbered in 1985.) For simplicity's sake, the ED will refer to the current statutes.
[2] TEX. WATER CODE § 26.082(a) (Vernon 2008).
[3] *Id.* § 26.081(b).
[4] *Id.* § 26.083(c).

to the water in the state in an area" defined in a section 26.082 order to use the regional system; refuse to grant any permit for the discharge of waste in an area defined in a section 26.082 order; or cancel, suspend, or amend any permit which authorizes the discharge of waste in an area defined in a section 26.082 order.[5]

On March 27, 1970, the Texas Water Quality Board (TWQB), a TCEQ predecessor, considered three applications at its agenda: SARA's application to establish a regional wastewater system in the vicinity of Cibolo Creek and the cities of Schertz and Universal City and Schertz's and Universal City's separate applications to amend their wastewater discharge permits.[6] A hearing had been conducted regarding the three applications, and the hearing commissioner recommended denying Schertz's and Universal City's applications and granting SARA's application.[7] Both Schertz and Universal City opposed designating SARA as the regional provider, and Schertz expressed an intention to combine Schertz's and Universal City's systems.[8] Ultimately, TWQB agreed with the hearing commissioner. It denied Schertz's and Universal City's applications and issued Order No. 70-0327-2 designating SARA as the regional provider for the area known today as the Cibolo Creek regional area.[9]

Following the designation of SARA as the regional provider, Schertz and Universal City continued to oppose receiving service from SARA, and SARA was not able to construct a regional facility without their financial assistance.[10] The Texas Legislature created CCMA in 1971 to provide service to the two cities.[11] On November 29, 1971, a hearing commission conducted a hearing to determine if TWQB should grant CCMA a discharge permit, as well as SARA's regional area.[12] The hearing commission recommended granting the discharge permit, replacing SARA with CCMA as the regional provider, and requiring the cities of Cibolo and Selma to connect to the regional system whenever they built collection systems.[13] TWQB considered CCMA's application at its February 17 and March 15, 1972, agendas. The issue of water quality was discussed at both agendas, including whether the stream standards would be met.[14] On March 15, 1972, TWQB issued an order granting CCMA a discharge permit and amending its March 1970 order to designate CCMA as the regional provider in place of SARA.[15] The order, which refers to the area "in the vicinity of the cities of Cibolo, Schertz, Universal City, Selma, Bracken, and Randolph Air Force Base," indicated that the designation was, in part, for water quality protection, stating, "The

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[5] *Id.* § 26.084(a).
[6] TWQB, Minutes of the Meeting of March 27, 1970, at 5-6.
[7] *Id.* at 6.
[8] *Id.* at 6-7.
[9] *Id.* at 7; Hearing Comm'n Report, TWQB (Feb. 8, 1972) (application from CCMA for a new discharge permit); 30 TEX. ADMIN. CODE §§ 351.61(2), .65 (West 2016).
[10] Hearing Commission Report 3 (Feb. 8, 1972) (application from CCMA for a new discharge permit).
[11] *Id.* 3; H.B. 1339, 62nd Leg., R.S. (Tex. 1971).
[12] Hearing Commission Report 1 (Feb. 8, 1972) (application from CCMA for a new discharge permit).
[13] *Id.* 4-5.
[14] TWQB, Minutes of the Meeting of February 17, 1972, at 3; TWQB, Minutes of the Meeting of March 15, 1972, at 6.
[15] TWQB, Minutes of the Meeting of March 15, 1972, at 6; Cibolo Creek Mun. Auth. v. City of Universal City, 568 S.W.2d 699, 700-01 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.).

Board finds that a regional system is necessary and desirable to protect the waters of this portion of Cibolo Creek, which is within a standard metropolitan statistical area as defined by the Texas Water Code, Section 21.201 through 21.204."[16] TWQB also instructed board staff to look into the evidence and report back regarding whether the discharge would meet stream standards.[17]

TWQB conducted a water survey on Cibolo Creek from just downstream of the Edwards Aquifer recharge zone to where the creek meets the San Antonio River in June 1974.[18] The survey report indicated that the creek's flow below the recharge zone was composed almost entirely of effluent from Schertz, Universal City, and Randolph Air Force Base and that dissolved oxygen problems and high standing crops of phytoplankton commonly occurred.[19] The report also noted that CCMA planned to divert all flow from the Universal City plant once a new plant in Schertz was completed.[20] In February 1978, the Texas Water Development Board, successor of TWQB, adopted what is known today as title 30, chapter 351, subchapter F of the Texas Administrative Code.[21] This subchapter contains the rules that define the Cibolo Creek regional area as "[t]hat portion of the Cibolo Creek Watershed lying in the vicinity of the cities of Cibolo, Schertz, Universal City, Selma, Bracken, and Randolph Air Force Base."[22] CCMA is designated as the regional wastewater system developer in the Cibolo Creek regional area, and the TCEQ can only grant new or amended permits "pertaining to discharges of domestic wastewater effluent within the Cibolo Creek regional area" to CCMA.[23] Comparing the March 1972 order with chapter 351, the Texas Water Development Board essentially incorporated the order into its rules.

CCMA's questions regarding the proposed permit suggest that if a facility's service area overlaps its own service area, then chapter 351 applies. (Assuming what CCMA refers to as its service area is the Cibolo Creek regional area as that area is defined in chapter 351, the ED disagrees that the service area's location is the appropriate method for determining if chapter 351 applies.) As stated above, one of the purposes of the regionalization policy is "to prevent pollution and maintain and enhance the quality of the water in the state."[24] Section 26.084(a) lists the ways in which the TCEQ can fulfill this purpose once it designates a regional area and system, including "requiring any person discharging or proposing to discharge waste *into* or adjacent to the water in the state in" the regional area to use the regional system, and refusing to grant a discharge permit to anyone who seeks to discharge waste "*in* [a

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[16] Order 1 (Mar. 15, 1972). The ED located the order as part of the attachments for the March 15, 1972, agenda. While the order is not signed, the ED believes it is the final order because TWQB had ordered that the order be redrafted when it originally considered CCMA's application at the February 17, 1972, agenda. Because the order the ED found as part of the attachments for the February 17 agenda is different in appearance from the March 15 order, the ED believes the March 15 order is the redrafted, and final, version.

[17] TWQB, Minutes of the Meeting of March 15, 1972, at 6.

[18] TWQB, Intensive Surface Water Monitoring Survey for Segment 1902: Cibolo Creek, Report No. IMS 38, at 2, 4.

[19] *Id.* at 2, 4.

[20] *Id.* at 4.

[21] 3 TEX. REG. 595 (Feb. 14, 1978).

[22] 30 TEX. ADMIN. CODE § 351.61(2) (West 2016).

[23] *Id.* § 351.62, .65.

[24] TEX. WATER CODE § 26.081(a) (Vernon 2008).

regional area]."[25] Looking at the rules, title 30, section 351.65 of the Texas Administrative Code requires the TCEQ to issue new and amended discharge permits only to CCMA for discharges "*within* the Cibolo Creek regional area." These laws discuss regulating discharges that occur *in* a regional area. Therefore, the location of the discharge point is what determines if chapter 351 applies, not the location of the proposed service area.

In chapter 351, subchapter F, the water in the state that is being protected is Cibolo Creek in the vicinity of the cities and areas listed in section 351.61(2), which is at least part of Mid Cibolo Creek, Segment No. 1913 of the San Antonio River Basin. Green Valley SUD intends to discharge into Santa Clara Creek, not Mid Cibolo Creek. Therefore, chapter 351, subchapter F does not apply to this application. This position is further supported by the regional area's history related above, which shows that the regional system was intended to replace Schertz's and Universal City's wastewater treatment facilities, which were causing the portion of Cibolo Creek just below the Edwards Aquifer recharge zone to experience water quality issues. This is reflected in the 1972 draft order, which lists "protecting this portion of Cibolo Creek" as a reason for establishing the Cibolo Creek regional area.[26] The ED notes that discharging into Santa Clara Creek will protect the regional area by keeping Green Valley SUD's effluent from entering Mid Cibolo Creek and, thereby, the regional area.

Comment 2

CCMA commented that the application is incomplete because Green Valley SUD did not provide justification for the proposed facility and a cost analysis of expenditures that includes the cost of connecting to the City of Marion's wastewater treatment facility versus the cost of the proposed facility in response to question 1(c)(*1*) in Domestic Technical Report 1.1. Green Valley SUD was required to provide this information because Marion said it could provide the district with service. The City of Cibolo asked whether Marion's facility should have been considered in furtherance of the TCEQ's regionalization policy, as the facility is located about three miles from the proposed facility. It also asked whether the City of Santa Clara should be served by Marion's facility instead of the proposed facility, as Santa Clara is located over four miles from the proposed facility. It would require five to six million dollars' worth of pipeline for the proposed facility to serve Santa Clara.

Response 2

Question 1(c) in Domestic Technical Report 1.1 of the TCEQ's domestic wastewater discharge permit application asks a series of questions related to regionalization. For example, the application asks whether any portion of the applicant's proposed service area is located in an incorporated city. If so, the applicant must provide correspondence from the city that shows whether the city is willing to provide the applicant with service. In its application, Green Valley SUD indicated that part of its service area would be within the cities of Marion and Santa Clara. With regard to Marion, Green Valley SUD did contact Marion as required and provided the

[25] *Id.* § 26.084(a)(1)-(2) (emphasis added).
[26] Order 1 (Mar. 15, 1972).

city's response as part of the application. The letter dated March 2, 2015, from the Honorable Glenn Hild, the city's mayor, indicated that Marion supported Green Valley SUD's efforts to develop a collection system and wastewater treatment facility. The letter did not indicate that Marion could accept all the proposed flows in the Green Valley SUD application but rather stated it could accommodate Green Valley SUD's immediate needs only until the district has a collection system and treatment plant in place. Because the letter did not indicate that Marion could provide long-term service for any of the proposed flows, the applicant was not asked to provide a cost-benefit analysis for connecting to the plant.

The ED is not aware of any legal requirement for customers in the City of Santa Clara to connect to Marion's facility rather than Green Valley SUD's facility based on the fact that Marion's facility is closer, nor is the ED aware of any desire on Marion's part to take on Santa Clara's residents as customers. Marion's letter to Green Valley SUD suggests otherwise, as Marion expressed its support for Green Valley SUD's proposed system and listed Santa Clara as one of the cities that would be served by that system. The cost for customers in Santa Clara to connect to the proposed facility is not part of this application process.

Comment 3

CCMA and the City of Cibolo asked for the TCEQ's regionalization policy. CCMA and the cities of Cibolo and Schertz commented that the proposed facility may violate state law and the TCEQ's regionalization policy because other facilities may have the capacity to provide service in the area. The cities commented that the other facilities include both the commenting city and CCMA. The cities and CCMA commented that the TCEQ is required to adhere to its regionalization policy under sections 26.003, 26.0282, and 26.081 of the Texas Water Code.

Response 3

The TCEQ's regionalization policy comes from section 26.081 of the Texas Water Code, which implements "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." The idea of encouraging and promoting regional systems is also found in section 26.003 of the Texas Water Code. Section 26.0282 of the Texas Water Code further provides that, "[i]n considering the issuance, amendment, or renewal of a permit to discharge waste, the commission may deny or alter the terms and conditions of the proposed permit, amendment, or renewal based on consideration of need, including the expected volume and quality of the influent and the availability of existing or proposed areawide or regional waste collection, treatment, and disposal systems not designated as such by commission order . . . . This section is expressly directed to the control and treatment of conventional pollutants normally found in domestic wastewater."

To exercise this policy, question 1(c) in Domestic Technical Report 1.1 of the TCEQ's domestic wastewater discharge permit application requires the applicant for a new permit to provide information concerning other wastewater treatment facilities

that exist near the applicant's proposed facility. In addition to the municipality information that was discussed in Response 2, the applicant is required to state whether its proposed service area is located within another utility's certificate of convenience and necessity (CCN) area. The applicant must also review a three-mile area surrounding the proposed facility to determine if there is a wastewater treatment facility or sewer collection lines within that area.

As noted above, Green Valley SUD complied with the regionalization requirements in the application with respect to the City of Marion. Green Valley SUD listed one other city located in its proposed service area, the City of Santa Clara, and provided a letter from Santa Clara in which the city supported Green Valley SUD's proposed system. Please see Response 5 for additional information regarding Green Valley SUD's response to question 1(c)(*1*). For question 1(c)(*2*) and (*3*), respectively, the district indicated its proposed service area does not overlap another CCN area, and there are no wastewater treatment facilities or collection systems located within three miles of the proposed facility.

It was noted at the public meeting held on March 29, 2016, that the cities of Cibolo and Schertz and CCMA have discussed sharing a regional system with Green Valley SUD in the past. The Executive Director encourages continued discussion amongst the respective parties if they are all agreeable to it.

Comment 4

The cities of Cibolo and Schertz commented that Green Valley SUD either has not provided a map in response to question 4 of Domestic Technical Report 1.0 or has provided an insufficient map, titled Green Valley SUD Wastewater System Regional Planning Santa Clara Creek Watershed, because the map does not sufficiently depict the district's planned service area. It is unclear whether the district's entire sewer CCN area will also be the district's service area. Schertz asked whether the district has completely described the service area and whether the area includes all the district's sewer CCN area. It also asked whether the service area includes area within the corporate limits of the cities of Schertz, Cibolo, Santa Clara, Marion, Universal City, Selma, and Garden Ridge and any portion of Joint Base San Antonio. Cibolo also asked whether the service area includes area within Cibolo's corporate limits.

Response 4

As stated in the comment, Green Valley SUD provided a map titled Green Valley SUD Wastewater System Regional Planning Santa Clara Creek Watershed as part of its application. From this map, it was the ED's understanding that Green Valley SUD planned to serve its sewer CCN area with the proposed facility. The district has confirmed this understanding on two occasions. First, based on its review of the draft permit, Green Valley SUD provided a letter dated August 31, 2015, which commented on two parts of the permit. One of those comments regarded why Green Valley SUD believes it needs a Final phase of 5.0 MGD in its permit. In that comment, Green Valley SUD explained that it needs "assurance that the 5.0 mgd phase can be obtained for orderly growth of their CCN No. 20973." It also noted that its CCN area encompasses 76,257.23 acres and provided Exhibit-1, Green Valley SUD Land Use Map, which

TCEQ Docket No. 2016-1876-MWD

APPLICATION BY GREEN VALLEY	**§**	**BEFORE THE TEXAS**
SPECIAL UTILITY DISTRICT (SUD)	**§**	
FOR NEW TEXAS POLLUTANT	**§**	**COMMISSION ON**
DISCHARGE ELIMINATION SYSTEM	**§**	
(TPDES) PERMIT NO. WQ0015360001	**§**	**ENVIRONMENTAL QUALITY**

EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUESTS AND REQUEST FOR RECONSIDERATION

The Executive Director (ED) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this Response to Hearing Requests and Request for Reconsideration on Green Valley SUD's application for new TPDES Permit No. WQ0015360001. Cibolo Creek Municipal Authority (CCMA), the City of Cibolo, and the City of Schertz filed hearing requests. Otto Radtke filed a request for reconsideration.

Attached for Commission consideration is a satellite map of the facility area (Attachment A).

I. FACILITY DESCRIPTION

Green Valley SUD applied to the TCEQ for new TPDES Permit No. WQ0015360001 to authorize the discharge of treated domestic wastewater effluent at an annual average flow not to exceed 5,000,000 gallons per day. The wastewater treatment facility will be located at 3930 Linne Road, in Guadalupe County, Texas 78155. The treated effluent will be discharged to Santa Clara Creek, then to Lower Cibolo Creek in Segment No. 1902 of the San Antonio River Basin. The designated uses for Segment No. 1902 are high aquatic life use and primary contact recreation.

II. BACKGROUND

The TCEQ received the application on April 1, 2015, and declared it administratively complete on May 18, 2015. The Notice of Receipt and Intent to Obtain a Water Quality Permit was published on June 11, 2015, in the *Seguin Gazette*. ED staff completed the technical review of the application on August 13, 2015, and prepared a draft permit. The Notice of Application and Preliminary Decision for a Water Quality Permit was published on October 27, 2015, in the *Seguin Gazette*. The Notice of Public Meeting was published on February 25, 2016, in the *Seguin Gazette*. A public meeting was held on March 29, 2016, which was also the day the public comment period ended. The ED filed its Response to Public Comment (RTC) on September 16, 2016. The hearing request and request for reconsideration period ended on October 24, 2016.

III. THE EVALUATION PROCESS FOR HEARING REQUESTS

House Bill 801 established statutory procedures for public participation in certain environmental permitting proceedings. For those applications declared administratively complete on or after September 1, 1999, it established new procedures for providing public notice and public comment and for the Commission's consideration of hearing requests. The application in this case was declared administratively complete on May 18, 2015. Therefore, it is subject to the House Bill 801 requirements. The Commission implemented House Bill 801 by adopting procedural rules in title 30, chapters 39, 50, and 55 of the Texas Administrative Code.

A. Response to Requests

"The ED, the public interest counsel, and the applicant may submit written responses to [hearing] requests . . . ."[1]

According to section 55.209(e), responses to hearing requests must specifically address the following:

(1) Whether the requestor is an affected person
(2) Which issues raised in the hearing request are disputed
(3) Whether the dispute involves questions of fact or law
(4) Whether the issues were raised during the public comment period
(5) Whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the Chief Clerk prior to the filing of the ED's RTC
(6) Whether the issues are relevant and material to the decision on the application
(7) A maximum expected duration for the contested case hearing

B. Hearing Request Requirements

For the Commission to consider a hearing request, the Commission must first determine whether the request meets certain requirements. As noted in section 55.201(c), "A request for a contested case hearing by an affected person must be in writing, must be filed with the chief clerk within the time provided . . . , [and] may not be based on an issue that was raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the ED's Response to Comment."

According to section 55.201(d), a hearing request must substantially comply with the following:

(1) Give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request. If the requestor is a group or association, the request must identify one person by name, address, daytime telephone number, and, where possible, fax number who shall be responsible for receiving all official communications and

[1] 30 TEX. ADMIN. CODE § 55.209(d) (West 2016).

comments for the group or association.

(2) Identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes they will be adversely affected by the proposed facility or activity in a manner not common to members of the general public.

(3) Request a contested case hearing.

(4) List all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the ED's responses to comment that the requestor disputes and the factual basis of the dispute and list any disputed issues of law or policy.

(5) Provide any other information specified in the public notice of application.

C. Requirement that the Requestor Be an Affected Person

To grant a contested case hearing, the Commission must determine that a requestor is an affected person. The factors to consider in making this determination are found in section 55.203 and are as follows:

(1) For any application, an affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest.

(2) Governmental entities, including local governments and public agencies, with authority under state law over issues raised by the application may be considered affected persons.

(3) In determining whether a person is an affected person, all factors shall be considered, including, but not limited to, the following:

- (a) Whether the interest claimed is one protected by the law under which the application will be considered
- (b) Distance restrictions or other limitations imposed by law on the affected interest
- (c) Whether a reasonable relationship exists between the interest claimed and the activity regulated
- (d) Likely impact of the regulated activity on the person's health, safety, and use of their property
- (e) Likely impact of the regulated activity on the person's use of the impacted natural resource
- (f) For governmental entities, their statutory authority over or interest in the issues relevant to the application
- (g) To the extent consistent with case law, the merits of the underlying application and supporting documentation in the

TCEQ's administrative record, including whether the application meets the permit issuance requirements; the ED's analysis and opinions; and any other expert reports, affidavits, opinions, or data submitted by the ED, applicant, or hearing requestor

D. Referral to the State Office of Administrative Hearings (SOAH)

Section 50.115(b) details how the Commission refers a matter to SOAH: "When the commission grants a request for a contested case hearing, the commission shall issue an order specifying the number and scope of the issues to be referred to SOAH for a hearing." Section 50.115(c) further states, "The commission may not refer an issue to SOAH for a contested case hearing unless the commission determines that the issue: (1) involves a disputed question of fact or a mixed question of law and fact; (2) was raised during the public comment period . . . ; and (3) is relevant and material to the decision on the application."

IV. HEARING REQUEST ANALYSIS

A. Whether the Hearing Requests Comply with Section 55.201(c) and (d)

CCMA and the cities of Cibolo and Schertz submitted timely hearing requests[2] that raised issues presented during the public comment period that have not been withdrawn. They provided their representatives' addresses, telephone numbers, and fax numbers and requested a contested case hearing. They identified themselves as persons with what they believed to be personal justiciable interests affected by the application, which will be discussed in greater detail below, and provided lists of disputed issues of fact that were raised during the public comment period. The ED concludes that the hearing requests substantially comply with the section 55.201(c) and (d) requirements.

B. Whether the Requestors Meet the Affected Person Requirements

1. CCMA

Looking at the map in attachment A, it appears that the facility site, outfall, and beginning of the discharge route will be located within CCMA's boundary. As a municipal utility district, CCMA is tasked with the responsibility of protecting and preserving the purity and sanitary condition of water within the state.[3] CCMA did raise water quality issues in its hearing requests that relate to this responsibility, such as concerns regarding whether the proposed permit violates the antidegradation policy; whether the effluent will maintain the policy's water quality standards; and whether the effluent could have negative impacts on human health, livestock, and agriculture. Considering the factors listed in section 55.203(c) that are used to determine affected person status, CCMA's boundary in relation to the facility site, outfall, and discharge

[2] The dates on which each requestor filed its requests are as follows: CCMA - June 24, 2015, November 12, 2015, and October 24, 2016; City of Cibolo - August 31, 2015, November 12, 2015, and October 24, 2016; and City of Schertz - November 12, 2015, and October 24, 2016.
[3] TEX. WATER CODE ANN. § 54.012(7) (Vernon 2008).

route and its concerns regarding the proposed facility's discharges suggest that CCMA has a personal justiciable interest not in common with members of the general public, as CCMA has statutory authority over or interest in water quality issues that are relevant to the application.[4] Therefore, CCMA has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application not common to members of the general public and is an affected person.[5]

The ED recommends that the Commission find that CCMA is an affected person.

2. City of Cibolo

Comparing the maps submitted by Green Valley SUD that depict the local cities' extraterritorial jurisdictions (ETJs) with Attachment A, it appears that the proposed facility site, outfall, and beginning of the discharge route are located in the City of Cibolo's ETJ.[6] The purpose of an ETJ is "to promote and protect the general health, safety, and welfare of persons residing in and adjacent to the municipalities."[7] Cibolo did raise water quality issues in its hearing requests that relate to this purpose, such as concerns regarding whether the proposed permit violates the antidegradation policy; whether the effluent will maintain the policy's water quality standards; and whether the effluent could have negative impacts on human health. Considering the factors listed in section 55.203(c) used to determine affected person status, Cibolo's ETJ in relation to the facility site, outfall, and discharge route and its concerns regarding the proposed facility's discharges suggest that Cibolo has a personal justiciable interest not in common with members of the general public, as Cibolo has statutory authority over or interest in water quality issues that are relevant to the application.[8] Therefore, Cibolo has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application not common to members of the general public and is an affected person.[9]

The ED recommends that the Commission find that the City of Cibolo is an affected person.

3. City of Schertz

Looking at the map in attachment A, the proposed facility site, outfall, and discharge route are not located in or adjacent to the City of Schertz. Comparing maps submitted by Green Valley SUD that depict the local cities' ETJs with attachment A, the

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[4] *See* 30 TEX. ADMIN. CODE § 55.203(c)(7) (listing a governmental entity's statutory authority over or interest in the issues relevant to the application as a factor the Commission shall consider when determining if a person is an affected person).

[5] *Id.* § 55.203(a); *see also id.* § 55.211(c)(2) (addressing hearing requests from affected persons that will be granted).

[6] *E.g.*, GVSUD Wastewater System Regional Planning, Santa Clara Creek Watershed (map that Green Valley SUD provided with its application).

[7] TEX. LOCAL GOV'T CODE ANN. § 42.001 (Vernon 2008).

[8] *See* 30 TEX. ADMIN. CODE § 55.203(c)(7) (listing a governmental entity's statutory authority over or interest in the issues relevant to the application as a factor the Commission shall consider when determining if a person is an affected person).

[9] *Id.* § 55.203(a); *see also id.* § 55.211(c)(2) (addressing hearing requests from affected persons that will be granted).

proposed facility site, outfall, and discharge route are also not located in Schertz's ETJ.[10] Therefore, the proposed facility and its discharges do not have the potential to impact Schertz or its citizens. Schertz's other arguments regarding its affected party status related to the overlap between its corporate boundary and Green Valley SUD's proposed service area, which occur in the northwestern part of the service area.[11] Generally, arguments regarding who should provide service in what area are arguments that should be made in a certificate of convenience and necessity (CCN) case.[12] As the proposed service area is Green Valley SUD's Sewer CCN No. 20973 area, it has already been decided that Green Valley SUD is the entity that shall provide retail sewer service within the proposed service area. Schertz did raise the overlap issue as a regionalization issue, arguing it is affected because Green Valley SUD should have requested service from the city under the application requirements. However, Schertz did not have a wastewater treatment facility when Green Valley SUD filed its application, so Schertz would have had no capacity to offer Green Valley SUD. The city also raised regionalization as an issue in the context of the regional service area established under title 30, chapter 351, subchapter F of the Texas Administrative Code. However, Green Valley SUD's discharge does not fall under the section 351.65 prohibition against issuing permits for discharges within the regional service area to any entity other than CCMA because the proposed facility will not be discharging within the regional service area.[13] Based on the information in the hearing requests, the ED cannot identify a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application not common to members of the general public that would make Schertz an affected person.[14] Therefore, Schertz has not met the section 55.203 requirements.

The ED recommends that the Commission find that the City of Schertz is not an affected person.

C. Whether Issues Raised Are Referable to SOAH for a Contested Case Hearing

The ED analyzed the issues raised in the hearing requests it has recommended granting in accordance with the regulatory criteria and provides the following recommendations regarding whether the issues can be referred to SOAH if the Commission grants the hearing requests. All issues were raised during the public comment period, and none of the issues were withdrawn. All identified issues are considered disputed unless otherwise noted. The ED has also listed the relevant RTC responses.

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[10] *E.g.*, GVSUD Wastewater System Regional Planning, Santa Clara Creek Watershed (map that Green Valley SUD provided with its application).
[11] *Id.*
[12] TEX. WATER CODE ANN. § 13.246(c) (Vernon Supp. 2015).
[13] For additional information regarding this issue, please see Response 1 in the RTC.
[14] 30 TEX. ADMIN. CODE § 55.203(a); *see also id.* § 55.211(c)(2) (addressing hearing requests from affected persons that will be granted).

1. Whether title 30, chapter 351, subchapter F of the Texas Administrative Code prohibits the TCEQ from issuing the proposed permit. (Response 1)

This is a mixed issue of fact and law. If it can be shown that title 30, chapter 351, subchapter F of the Texas Administrative Code prohibits the TCEQ from issuing the proposed permit, that information would be relevant and material to a decision on the application. The ED recommends referring this issue to SOAH if the Commission grants the hearing requests.

2. Whether Green Valley SUD was legally required to provide additional information regarding the feasibility of obtaining wastewater treatment service from the cities of Cibolo, Marion, Santa Clara, and Schertz beyond what it provided in response to question 1(C)(1) of Domestic Technical Report 1.1 before the TCEQ could grant its application. (Responses 2, 3, and 5)

This is a mixed issue of fact and law. If it can be shown that Green Valley SUD was legally required to provide additional information regarding the feasibility of obtaining wastewater treatment service about any of the four cities in the application, that information would be relevant and material to a decision on the application. The ED recommends referring this issue to SOAH if the Commission grants the hearing requests.

3. Whether Green Valley SUD was legally required to provide any information regarding the feasibility of obtaining wastewater treatment service from CCMA beyond what it provided in response to question 1(C) of Domestic Technical Report 1.1 before the TCEQ could grants its application. (Response 6)

This is a mixed issue of fact and law. If it can be shown that Green Valley SUD was legally required to provide any information regarding the feasibility of obtaining wastewater treatment service from CCMA in the application, that information would be relevant and material to a decision on the application. The ED recommends referring this issue to SOAH if the Commission grants the hearing requests.

4. Whether the proposed permit is sufficient to prevent nuisance odors. (Response 7)

This is an issue of fact. If it can be shown that the proposed permit is not sufficient to prevent nuisance odors, that information would be relevant and material to a decision on the application. The ED recommends referring this issue to SOAH if the Commission grants the hearing requests.

5. Whether Green Valley SUD has demonstrated that it needs the Final phase of the proposed permit. (Response 8)

This is a mixed issue of fact and law. If it can be shown that Green Valley SUD has not demonstrated that it needs the Final phase of the proposed permit, that information would be relevant and material to a decision on the application. The ED recommends referring this issue to SOAH if the Commission grants the hearing requests.

ATTACHMENT
B

Senate Committee Meeting on HB 2035 (70th Leg., R.S. 1987)

28:50

Parmer: Now I am going to go back to the start of the order of business, members, and lay out HB 2035 and recognize its House Sponsor, Representative Hinojosa.

Hinojosa: Thank you Mr. Chairman and Committee Members. HB 2035 deals with a problem that is not only unique to South Texas, but is probably in many municipalities throughout the State where they continue to grow they run into a problem of a water supply corporations have been given a certification over a certain area to provide water services. Unfortunately as the city grows, many times the water supply corporations are unable to provide the necessary services, necessary water to the new residents as the territory that is being annexed by the city. And many times they cannot work out their differences, and they end up in court. What this bill does, it allows for the city to provide water in those areas, and provides a procedure where the water supply corporation and the city can work out their differences and at the same time have the water supply corporation compensated for any bond indebtedness that it may have or for any other property that it may lose because the City going into the certified area and provided water.

That is basically what this bill does Mr. Chairman and Committee Members. And I have an amendment basically to exempt your retail public utilities. I would be glad to answer any questions that anyone might have.

Parmer: Are there any questions for Mr. Hinjosa? Senator Barrientos?

Barrientos: Um, I want to point out the amendment. I want to ask you to go over that again.

Hinjosa: Let me be more specific, Senator Barrientos. The City of McAllen, for example, is one of the fastest growing cities in the State of Texas, and as we continues to grow, we run into problems in that where a certain water supply corporation has been given a certification in large area to provide water services. However, they do not have the capability to

provide those water services. So that we have many people who have homes without water. And some of those homes, when they catch fire, there's no water to put out the fire. Because of the inability of the water supply corporation to provide that water. And the City of McAllen has the ability, has the capital to provide those water services, but because that area has been certified to the water supply corporation, City of McAllen cannot go in there and lay the water lines and provide the water services. Consequently, usually you have to file a lawsuit and end up with the Court through long proceedings that can take 3 or 4 or 5 years. I'll give you an example, it took me 5 years to get water in an area that was certified to the water, to Sharlett Water Supply Corporation.

Barrientos: Why?

Hinojosa: Because that area was certified to the Sharlett Water Supply Corporation.

Barrientos: And the City had the ability to provide that water?

Hinojosa: That is correct.

Barrientos: But did not do it.

Hinojosa: They couldn't. Because by law that area is certified to the water supply corporation and not the City of McAllen.

Barrientos: Only by law. . .

Hinojosa: And the water supply corporation refused to allow the City of McAllen to go in there and provide those services. So the City of McAllen had to file a lawsuit. And, what this bill does, it has been worked out, it is an agreement. It's an agreed bill between the municipalities and the water supply corporation association to put in place a procedures to work out this type of problem. And now in those areas where the City is certified to provide water to the same areas as the water supply corporation it provides for proper, proper compensation to the water supply corporation for any amount of indebtedness that they might have.

Barrientos: Do you foresee, in any way shape or form any more amendments coming to this bill?

Hiniojosa: I hope not, but you know it is kind of hard to predict what is going to happen up here.

Barrientos: I understand things go bonkers in the last week, but in your considered opinion will there be any coming?

Hinojosa: No sir.

Barrientos: Alright, do you want to lay this out?

Hinojosa: Please.

Parmer: Senator, you have an amendment? Senator Barrientos sends up committee amendment number one. He will explain the amendment.

Barrientos: What he just said Mr. Chairman, you want to do it again?

Parmer: No

Barrientos: Section only applies in case where the retail public utility that is authorized to serve in the certificated area that is annexed or incorporated by the municipality is not a public water supply.

Parmer: Is there objection to adoption of the amendment? The Chair hears none. The amendment is adopted. Members are there any other questions for Representative Hinojosa? Senator Armbrister?

Armbrister: Representative Hinojosa, isn't there now, or hasn't there recently been a 5th Circuit Federal Court Opinion on the cities' authority to annex rural water corporations as you are proposing to do, and they ruled against this?

Hinojosa: I am not aware of that, Senator Armbrister. I do know that most of the rural water supply corporations are non-profit and receive federal funds to expand their capabilities. So that may have been a factor. So what

happens is they have to be compensated for bond indebtedness to any debt that they might have to the federal government. I would imagine that if the cities could annex the water supply corporation it would be the main reason, and the federal monies that are involved in the investment of the water supply corporation.

Armbrister: As I understand, I am trying to get the whole gist of your bill. If you've got a rural water supply corporation out there, and the City annexes that area, what happens in effect to that rural water supply corporation?

Hinojosa: Well, the problem is that many times the area that is annexed even though it is certified to the water supply corporation, it's not being supplied with water because the water supply corporation does not have the capability of doing so. So that area that is annexed goes without water, and basically stops the growth of that particular city. And then the city goes to try and negotiate with the water supply corporation, and quite frankly, you have a lot of rural water supply corporations who do not wish to negotiate or cooperate with the municipality in trying to resolve this problem. And they end up in court. And what this bill does it tries to provide for an orderly, logical procedure for them to work out their differences and for the water supply corporation to get compensated for any of its debt or any of its property through a neutral party, and that is the Water Commission.

Parmer: Mr. Hinojosa, I think, as I understand it, this is a bill that you and Senator Uribe have been working on to try and deal with, in part, the Colonias problem down in your part of the State. Is that, is that correct?

Hinojosa: That's correct, Senator Parmer.

Parmer: These are the areas, I don't know how many of the Committee members have been to South Texas and have visited some of these developments where there is no water, there are no streets, there is no sewage, and people are trying to bring their kids up in probably the most abject conditions that exist in the State of Texas today, and I have had opportunity to, opportunity, if that is the right word, to make that trip, and I commend you for your effort in trying to deal with what is really a serious problem in the Texas.

?????? Senator, the Natural Resources Committee did have a hearing on this. We did not go down there, but we did go over, very thoroughly, and it is certainly a problem.

Parmer: Are there um, any other questions set for Representative Hinojosa?

End 37:00

ATTACHMENT
C

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August 31, 2015

Ms. Bridget Bohac (MC 105)
Chief Clerk
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78767-3087

Re: Green Valley Special Utility District
Application for TPDES Permit No. WQ0015360001

Dear Ms. Bohac:

The City of Cibolo ("*City*"), my client, hereby submits this letter to the Texas Commission on Environmental Quality ("*TCEQ*"), providing its formal comments and requesting a public meeting and a contested case hearing regarding Green Valley Special Utility District's ("*GVSUD*") application ("*Application*") for a new Texas Pollutant Discharge Elimination System ("*TPDES*") permit, referenced above.

Again, I represent the City regarding the Application, and I request that the TCEQ send all correspondence regarding this matter to me at:

Lloyd Gosselink Rochelle & Townsend, P.C.
Attn: David Klein
816 Congress Avenue, Suite 1900
Austin, Texas 78701
dklein@lglawfirm.com
512-322-5818 (phone)
512-472-0532 (fax)

I. PUBLIC COMMENTS

The City requests that the TCEQ halt processing the Application because GVSUD has not provided all of the information required in TCEQ Application Form – TCEQ-10053. In its Application, GVSUD requests authorization from the TCEQ to discharge treated wastewater at a volume not to exceed a daily average flow of 5,000,000 gallons per day. The proposed wastewater treatment facility is to be located in Guadalupe County, and the wastewater will be discharged from the plant site to Santa Clara Creek, and from there, to Lower Cibolo Creek.

Lower Cibolo Creek is Segment No. 1902 in the San Antonio River Basin. The designated uses for Segment 1902 are primary contact recreation 1 and high aquatic life uses. Segment 1902 is currently listed on the TCEQ's 303(d) inventory of impaired and threatened waters for bacteria.

After a careful review of the Application, the City believes that the Application has substantive deficiencies, which are more specifically described below:

1. In Domestic Technical Report 1.0, Section 4 (page 3 of such report), TCEQ requires the applicant to provide a map showing the "boundaries of the area served by the treatment facility." However, it is uncertain whether GVSUD has provided such map. If the map provided by GVSUD in the Application to address this requirement is the map entitled "GVSUD Wastewater System Regional Planning Santa Clara Creek Watershed," ("***Vicinity Map***") attached hereto as Exhibit 1, then it is unclear what are GVSUD's service area boundaries; otherwise, no service area map has been provided. The Vicinity Map depicts the sewer certificate of convenience and necessity ("***CCN***") service area boundaries, corporate limits, and extraterritorial jurisdiction boundaries ("***ETJ***") of numerous entities and the boundaries of the Santa Clara watershed, but many of these areas appear to overlap. The Vicinity Map does not indicate whether GVSUD's entire sewer CCN service area is also the service area of the proposed facility. Again, *see* Exhibit 1.

2. In Domestic Technical Report 1.1, Section 1.C.1 (page 21 of such report), GVSUD indicates that the proposed service area is only within the corporate limits of the Cities of Santa Clara and Marion. However, as noted in the prior comment, the proposed service area for GVSUD's proposed wastewater treatment plant is not clear. If the proposed service area is GVSUD's sewer CCN boundaries, those CCN boundaries overlap with land within the City's corporate limits, as shown on the map attached as Exhibit 2. If the proposed service area is all of Santa Clara Creek within GVSUD's sewer CCN area, it appears from the Vicinity Map that Cibolo is included, though the map is not clear. If the City is within the proposed service area for this wastewater treatment plant, then GVSUD should have included the City in GVSUD's responses to these questions and should have requested service from Cibolo Creek Municipal Authority ("***CCMA***"), the City's wholesale wastewater service provider, in order to meet the Commission's regionalization requirements. In addition, on August 20, 2015, the City also provided notice to GVSUD under Texas Water Code ("***TWC***") §13.255 that the City intends to provide retail sewer service in those portions of the City's corporate limits that overlap with the service area of GVSUD's sewer CCN No. 20973. *See* Exhibit 2. As a result, GVSUD will have even less need for a wastewater facility to serve its sewer CCN service area.

The City also has concerns about the proposed facility because areas annexed by the City as well as areas within the City's ETJ and areas subject to annexation agreements with the City are within extremely close proximity to the proposed facility location. GVSUD has no history of operating a wastewater facility, and the City's residents and residents within the City's ETJ can

expect to be affected by nuisance odors from a facility of the size proposed by GVSUD. Any sewage spills can be expected to create hazards to the health and welfare of residents in the area, including residents of the City and the City's ETJ.

The Commission is obligated to adhere to its regionalization policy in considering discharge permit applications. (*See* TWC § 26.003, 26.0282, and 26.081. Under 30 Texas Administrative Code ("*TAC*") § 351.62, CCMA is the designated provider of sewer service in the area. As a purchaser of wholesale wastewater services from CCMA, and a named city under 30 TAC § 351.62, the City is a part of the same CCMA regional system that should remain the wastewater service provider in the area. The City has concerns that the construction of this wastewater treatment facility violates state law and the Commission's regionalization policy, as CCMA or other existing wastewater treatment facilities may have the capacity to provide wastewater service to this area. The City agrees with CCMA's letter to the Chief Clerk dated June 24, 2015, that CCMA is the governmental entity designated to provide wastewater treatment services in the region, and the City fully supports CCMA's arguments addressing 30 TAC § 351.62 and incorporates those arguments into this letter.)

For the above reasons, the City recommends that the Commission discontinue processing the Application.

II. REQUEST FOR PUBLIC MEETING

The City requests a public meeting regarding the Application in light of the issues raised in Sections I and III of this letter. Title 30 TAC § 55.154(c) provides that "[a]t any time, the executive director or Office of Public Assistance may hold public meetings," and that "[t]he executive director or Office of Public Assistance shall hold a public meeting if: (1) the executive director determines that there is a substantial or significant degree of public interest in an application..." Under 30 TAC § 55.150, this opportunity to request a public meeting under 30 TAC § 55.154(c) applies to applications for a new TPDES permit, such as the Application. Accordingly, the City, as a retail wastewater services provider and customer of CCMA, and for the benefit of its citizens, has a substantial and significant degree of public interest in the Application. The City is willing to work with the TCEQ and GVSUD to determine a location for such public meeting.

III. REQUEST FOR A CONTESTED CASE HEARING

The City hereby requests a contested case hearing regarding the Application, as the City is negatively impacted by this Application in a manner that is under the jurisdiction of the TCEQ and that is unique from the general public. Specifically, GVSUD's application fails to adhere to the applicable laws of TWC, Chapter 26, and TCEQ regulations regarding regionalization, and the City is a customer of the current regional provider, CCMA.

CCMA is the TCEQ-designated regional wastewater services provider "in that area of Cibolo Creek Watershed, in the vicinity of the cities of Cibolo, Schertz, Universal City, Selma, Bracken, and Randolph Air Force Base." 30 TAC § 351.62. Further, the TCEQ's regulations provide that "all future permits and amendments to existing permits pertaining to discharges of domestic wastewater effluent within the Cibolo Creek regional area shall be issued only to the Authority." 30 TAC § 351.65. The City is a wholesale wastewater service customer of CCMA under a certain "Contract for Sewerage Service," dated February 14, 1985, in part placing obligations on the City to pay for its pro-rata share of CCMA's facilities and enabling the City to provide retail wastewater services to its customers. As noted in Section I of this letter, GVSUD's proposed service area for this Application includes portions of the City's corporate limits and/or ETJ, and the City opposes the Application because CCMA is the regional provider of wholesale wastewater services to this area.

In addition to the TCEQ's own regulations, the TWC recognizes the importance of regionalization as a method to improve and protect water quality. *See* Tex. Water Code § 26.081(a),(c) (West 1985) ("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 . . . ."). Accordingly, the TCEQ is obligated to adhere to its regionalization policy in considering discharge permit applications. *See* Tex. Water Code § 26.003, 26.0282, and 26.081. Therefore, the City opposes the construction of GVSUD's proposed wastewater treatment plant because it will violate state law and the Commission's regionalization policy, as CCMA may have the capacity to provide wastewater service to this area.

The City reserves its right to supplement these public comments and this request for a contested case hearing as it learns more about the Application- information that may become apparent with conducting a public meeting for the Application. The City appreciates your consideration of these public comments and requests for a public meeting and contested case hearing.

If you have any questions regarding this matter, please contact me at (512) 322-5818.

Sincerely,

David Klein

cc: Office of Public Assistance
Firoj Vahora, TCEQ
Mr. Robert T. Herrera, City Manager, City of Cibolo
Mr. Pat Allen, General Manager, GVSUD

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REVIEWED
OCT 25 2016
By

October 24, 2016

Ms. Bridget Bohac (MC 105)
Chief Clerk
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78767-3087

VIA HAND DELIVERY

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
2016 OCT 24 PM 3:40
CHIEF CLERKS OFFICE

Re: City of Cibolo's Request for Contested Case Hearing on Green Valley Special Utility District
Draft TPDES Permit No. WQ0015360001

Dear Ms. Bohac:

On behalf of my client, the City of Cibolo ("***City***"), I hereby submit this letter as a request for a contested case hearing in the above-referenced matter. This letter supplements and reasserts the requests for a contested case hearing already submitted in City's August 31, 2015 and November 12, 2015 letters to the Texas Commission on Environmental Quality ("***TCEQ***"), which are based upon the public comments provided in those letters, as well as the City's public comments made at the March 29, 2016 public meeting on the Application. For the TCEQ's reference and convenience, the City attaches its August 31, 2015 letter ("***First Protest***") and November 12, 2015 letter ("***Second Protest***") hereto as Exhibit A (the First Protest is an attachment to the Second Protest).

I. INTRODUCTION AND REQUEST FOR CONTESTED CASE HEARING

On April 1, 2015, Green Valley Special Utility District ("***GVSUD***") submitted an application ("***Application***") to the TCEQ for a new Texas Pollutant Discharge Elimination System ("***TPDES***") permit, referenced above. The draft permit issued by the Executive Director ("***Draft Permit***") in this matter would authorize GVSUD to discharge treated domestic wastewater at a daily average flow not to exceed 5.0 million gallons per day ("***MGD***") in the final phase. The proposed wastewater treatment facility is to be located in Guadalupe County, and the wastewater will be discharged from the plant site to Santa Clara Creek, and from there, to Lower Cibolo Creek. Lower Cibolo Creek is Segment No. 1902 in the San Antonio River Basin. The designated uses for Segment 1902 are primary contact recreation and high aquatic life uses. Segment 1902 is currently listed on the TCEQ's 303(d) inventory of impaired and threatened waters for bacteria. The Application was deemed administratively complete on May 18, 2015.

As noted in the First and Second Protests, the City requests a contested case hearing on the Application and resulting Draft Permit under 30 Texas Administrative Code ("***TAC***") § 55.201 because the City is an "affected person" within the meaning of 30 Texas Administrative Code

("*TAC*") §§ 55.103 and 55.203. Under TCEQ rules, for an entity other than the Commissioners, Executive Director, and Applicant to have standing to challenge a Commission action, it must demonstrate that it is an "affected person" under the standards set forth in 30 TAC § 55.203.[1] Under such rule, an affected person is one who has a personal justiciable interest not common to members of the general public that is related to a legal right, duty, privilege, power, or economic interest affected by the Draft Permit.[2] All relevant factors must be considered by the Commission in determining affected person status, including: (1) whether the interest claimed is one protected by the law under which the Application will be considered; (2) distance restrictions or other limitations imposed by law on the affected interest; (3) whether a reasonable relationship exists between the interest claimed and the activity regulated; (4) the likely impact of the regulated activity on the health, safety, and use of property of the person; (5) the likely impact of the regulated activity on use of the impacted natural resource by the person; and (6) whether the requestor submitted comments on the application that were not withdrawn; and (7) *for governmental entities, their statutory authority over or interest in the issues relevant to the Application.*[3] Additionally, the Commission may consider: (1) the merits of the Application, including whether the Application meets the requirements for permit issuance; (2) the Executive Director's (the "ED") analysis and opinions; and (3) other expert reports, affidavits, opinions, and data.[4] Here, the City is an "affected person," negatively impacted by this Application and Draft Permit in a manner that is under the jurisdiction of the TCEQ and that is unique from the general public for the reasons set forth in the City's First and Second Protests, which are reaffirmed and supplemented with this filing.

II. THE CITY IS AN AFFECTED PERSON

The City is an affected person within the meaning of the TCEQ rules because the City has unique justiciable interests that are adversely affected by the Application and Draft Permit, as proposed. As noted in the First and Second Protest letters, which are reasserted and supplemented with this letter, the City requests a contested case hearing in this matter because the Application (1) failed to justify a need for the 5.0MGD WWTP pursuant to Texas Water Code ("*TWC*") §§ 26.003, 26.0282, and 26.081, with the final phase not being needed until the year 2045; (2) failed to complete a general regionalization feasibility analysis with the City as required by TWC §§ 26.003, 26.0282, and 26.081, implemented through Domestic Technical Report 1.1- Section 1.3, as well as omitting the City from the list of municipalities who are within the area to be served by the proposed WWTP, and not contacting the City to determine if GVSUD could connect to the City's system; (3) violates the TCEQ's regionalization rules in 30 TAC Chapter 351, Subchapter F; (4) violates the TCEQ's antidegradation policy and will not maintain its water quality stream standards; (5) failed to identify a sludge hauler; and (6) proposes a WWTP that will generate nuisance odor issues.

These aforementioned failures and violations constitute justiciable interests for the City, as they impact the City in a manner unique from the rest of the general public. First, the City has a justiciable interest by virtue of its authority as a home rule municipality to operate a utility system inside or outside its corporate limits under Tex. Loc. Gov't Code § 402.001(b). Here, the

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[1] 30 TEX. ADMIN. CODE § 55.203.

[2] *Id.* § 55.203.

[3] *Id.* § 55.203(c) (emphasis added).

[4] *Id.* § 55.203(d).

Application not only contemplates approval to treat and discharge wastewater from a service area that is partially within the City's corporate limits and extra-territorial jurisdiction (***"ETJ"***), but it also aims to construct the proposed WWTP within the corporate limits of the City as well. The proposed service area also includes land in that has been decertificated and is subject to CCN decertification under TWC §§ 13.254 and 13.255, respectively. The City has a wastewater system and it is already contracted to receive wastewater collection, transportation, treatment, and discharge services from the TCEQ-designated regional provider, Cibolo Creek Municipal Authority (***"CCMA"***); and, this Application infringes upon CCMA's TCEQ-designated sewerage system service area, which impacts CCMA, as well as the rates and fees that the City must pay CCMA. Given the unique connections and impacts on the City by the Application and draft permit, which are more specifically discussed below, the City is entitled to a contested case hearing on these issues.

A. Violations of State and TCEQ Regionalization Policies

GVSUD's Application fails to adhere to the laws regarding regionalization in TWC Chapter 26, as well as the TCEQ's own regulations in 30 TAC, Chapter 351, Subchapter F, designating CCMA as the regional wastewater services provider for the maintenance and protection of water quality in waters of the state in the Cibolo Creek Watershed. As such, granting the Draft Permit would (1) violate TWC, Chapter 26 for failing to consider the City, ***a city included in the proposed service area of the Application***, in the general regionalization analysis contemplated by Domestic Technical Report 1.1(c), and (2) interfere with the City's authority to provide utility service and affect the City as a customer of the TCEQ-designated regional entity under 30 TAC Chapter 351, Subchapter F, the Cibolo Creek Municipal Authority (***"CCMA"***).

First, although it is not completely clear in the Application, GVSUD appears to intend to use the proposed WWTP to serve the entire boundaries of its sewer certificate of convenience and necessity (***"CCN"***). Such ambiguity allowed GVSUD to perform an incomplete regionalization analysis that was limited to just the Cities of Santa Clara and Marion. As noted above, a portion of GVSUD's sewer CCN overlaps with the corporate boundaries and ETJ of the City, thus affecting the City. Further, the proposed WWTP is located within the corporate limits of the City. This affects the City in a number of ways. First, GVSUD did not provide evidence that it requested service from the City or evidence of a cost analysis to connect to the regional wastewater system, as required by the TCEQ in a TPDES Application. As the TCEQ is well aware, TPDES permit applicants must perform a feasibility analysis if the service area is within the corporate limits of another entity. Based on this analysis, TCEQ may deny or alter a TPDES permit. GVSUD should have included the City in its responses for Domestic Technical Report 1.1, Section 1.C.1, and should have requested service from the City. There is no evidence in the Application that GVSUD requested service from the City, or that GVSUD provided a cost analysis of connecting to the City's system to prove that a regional option was not feasible. The City thus disputes Response Nos. 2 and 3 that the regionalization analysis was sufficient and that another entity in the region could not provide service. Nothing in relevant law, as the Executive Director's Response to Public Comment (***"RPC"***) suggests, waives such a requirement or allows the Executive Director to perform such an analysis in this situation. In fact, TCEQ is obligated to adhere to its regionalization policy in considering discharge permit applications.[5] As a result, the City was not considered in a proper regionalization analysis.

[5] TEX. WATER CODE § § 26.003, 26.0282, and 26.081.

Second, under 30 TAC § 351.62, CCMA is the designated provider of sewer treatment services in at least a portion of the area that GVSUD intends to serve with the proposed WWTP. To be clear, CCMA is ***the*** designated regional entity with the exclusive authority to provide a regional sewerage system in the Cibolo Creek Watershed in the vicinity of the City under 30 TAC § 351.62, and the City owns and operates a wastewater system that interconnects with CCMA's wastewater system.[6] GVSUD's sewer CCN boundaries are within CCMA's regional service area. As a purchaser of wholesale wastewater services from CCMA, by contract, the City is a part of the same CCMA regional system that is the wastewater service provider in the service area contemplated by the Application, and thus, would be affected by any authorization contrary to § 351.62. Additionally, the City has the statutory authority as a home rule municipality to operate a utility system inside or outside its corporate limits,[7] and the City exercises this authority through its wholesale wastewater service contract with CCMA. Moreover, as explained in the First and Second Protests, the City has provided notice to GVSUD under Texas Water Code § 13.255 that it intends to decertify portions of GVSUD's sewer CCN that are within the corporate limits of the City. Most notably, however, § 351.65 specifically limits the availability of TPDES permits within this region to CCMA; and, thus, the TCEQ's rules expressly preclude issuing the Draft Permit to GVSUD- at least to the extent it would serve within CCMA's regional area.

The Executive Director's RPC erroneously suggests that the location of the discharge is the relevant measure to determine the applicability of the regionalization regulations in Chapter 351. However, a TPDES permit does not only authorize a discharge; it also authorizes the construction and operation of a wastewater treatment facility that will service the area specified by the Application. For the reasons described above and in the First and Second Protests, such an authorization impedes the authority of the regional wastewater provider and the City as a customer thereof. Nevertheless, even if the RPC is correct in that the location of the discharge is relevant, the Draft Permit would still authorize discharging effluent into the CCMA's regional area, which is defined by regulation as "that area of Cibolo Creek Watershed, in the vicinity of the cities of Cibolo, Schertz, Universal City, Selma, Bracken, and Randolph Air Force Base."[8] Further, the City disagrees with the discussion in the Responses analyzing the discharge into stream segments, rather than into watersheds, as the proposed discharge is into the Santa Clara Creek, which is within a subshed of the Cibolo Creek Watershed, CCMA's TCEQ-defined regional area.

For the foregoing reasons, the City disputes RPC Response Nos. 1, 2, 3, 5, and 6. Specifically, the City disputes that the relevant determination of Chapter 351 applicability is the location of the discharge as provided in Response 1; the characterization of the regional area as a function of the stream segments rather than the Cibolo Creek Watershed as provided in Response 1; that the discharge is outside of the regional area as provided in Response 1; that GVSUD adequately and completely performed a regionalization analysis as provided in Responses 2, 3, 5, and 6; that the City has the burden to demonstrate that the Executive Director may supplement GVSUD's analysis

[6] *Id.* § 351.62. Additionally, the City agrees with CCMA's letter to the Chief Clerk dated June 24, 2015, that CCMA is the governmental entity designated to provide wastewater treatment services in the region, and the City fully supports CCMA's arguments addressing 30 TAC § 351.62 and incorporates those arguments into this letter as well.

[7] TEX. LOCAL GOVT. CODE § 402.001(b).

[8] 30 TEX. ADMIN. CODE § 351.62.

of other available regional providers as suggested in Response 5; that no other entity in the region has the capacity to provide service as stated in Response 5 and 6; that CCMA should not have been considered in the regionalization analysis as suggested in Response 6.

B. Violation of Stream Standards and Antidegradation Policy

The proposed WWTP is to be located in Guadalupe County, and the wastewater will be discharged from the plant site to Santa Clara Creek, and from there, to Lower Cibolo Creek. The City, with its authority to operate a utility system inside and outside of its corporate limits, is also an affected person because of the impact to water quality in the relevant stream segments authorized in the Draft Permit. As described above Lower Cibolo Creek is Segment No. 1902 in the San Antonio River Basin. The designated uses for Segment 1902 are primary contact recreation and high aquatic life uses. Segment 1902 is currently listed on the TCEQ's 303(d) inventory of impaired and threatened waters for bacteria. The City is concerned that the proposed discharge will not maintain the current stream standard and will violate TCEQ's antidegradation policy. Additionally, because Segment 1902 is an impaired water body on the TCEQ's 303(d) list for bacteria, the proposed discharge has the potential to downgrade the segment's water quality in violation of statutory and regulatory antidegradation requirements and stream standards. Given the concerns explained in the First and Second Protests and hereinafter regarding the operation of the facility, the City is still concerned that these water quality parameters will not be met given the total flow of the proposed WWTP and existing stream conditions.

The City therefore disputes RPC Response Nos. 10 and 18. More specifically, the City disputes that water quality will be protected and that flow from the proposed Facility will not reach Segment 1902.

C. Failure to Demonstrate Need

The City is also affected because GVSUD has failed to demonstrate a need for the proposed 5.0 MGD facility, which affects the City's regional provider, water quality, and authority to provide retail service within its corporate boundaries. A proper regionalization analysis considering all relevant entities would have identified the overlap with the City's corporate boundaries, the overlap with the City of Schertz's corporate boundaries, and the proximity and capacity of CCMA to do the very thing it was created to do, which is operate a regional wastewater system in this area. A proper analysis would have revealed that the proposed facility is not needed as requested, given the availability and capacity of CCMA as well as the location of the City (and the city of Schertz), so the Draft Permit is unwarranted. By granting it, GVSUD is enabled to interfere with the regional authority and with the City's authority as a home-rule city to enter into such a wholesale contract with CCMA, and subjects the City to an increased flow of treated effluent that has the potential to exacerbate existing water quality concerns.

For purposes of demonstrating need, GVSUD was allowed to consider the full scope of its CCN, a consideration that was seemingly overlooked for purposes of determining the scope of the regionalization analysis. Putting the regional option aside, the Application only supports a need for a 2.5 MGD facility, and even that would not occur until 2020. The updated growth projections cited by the RPC – at best – advocate for a 5.0MGD WWTP in 2045, but they still do not account for the

service areas that have been and will be decertified from the proposed service area through the sewer CCN decertification proceedings. To date, GVSUD still has not considered the effects of the decertification of a large landowner from GVSUD's sewer CCN or the City and the City of Schertz's applications to decertify that portion of GVSUD's sewer CCN within each city's respective corporate limits. Moreover, the RPC does not demonstrate that "assurance" for purposes of development is a legally justifiable reason to issue a Draft Permit for a design flow that will not be designed or even needed until well after the permit term expires. Response 8 is therefore improper on those grounds as well.

Therefore, the City disputes RPC Response Nos. 6 and 8. The City disputes that GVSUD adequately and completely performed a regionalization analysis as provided in Responses 6; disputes that the analysis performed confirms the need as suggested in Response 6; that GVSUD has adequately demonstrated need as provided in Response 8; asserts that the lack of consideration of the service areas to be decertified through ongoing Texas Water Code § 13.255 proceedings should have been considered in Response 8; and disputes that the Executive Director can issue a permit with a final design phase that will not be needed or constructed during the term of the permit as an "assurance" for growth of the area as provided in Response 8.

D. Application Deficiencies – Deficiencies should be Considered and the Draft Permit Denied (or Remanded) Accordingly

Pursuant to the authority granted to the TCEQ in 30 TAC § 55.203(d), the City again reiterates its comments from its First and Second Protests relating to the permit deficiencies and incorporates those comments into this letter. Aside from the above, the Application still has not been amended to specify the anticipated sludge disposal method and provide sludge disposal site information or to specify a method of transportation, hauler name, and hauler registration number. GVSUD also has not amended the Application to comply with the TCEQ's requirement to provide a copy of the contractual agreements demonstrating that the receiving facility will accept the sludge. Most importantly, GVSUD still has not identified an operator of its proposed Facility. This continued failure indicates that GVSUD's operation of the Facility will not comply with federal and state requirements, and, given the proximity to the City, threatens water quality, nuisance odors, and the integrity of human health and the environment within the corporate limits and ETJ of the City.

As such, the City disputes RPC Response Nos. 9, 11, 12, and 13. Specifically, the City disputes that, in this instance, a sludge disposal and transport information does not need to be provided as provided in Response 9; that GVSUD does not need to provide the name of the operator at this time as provided in Response 11; that the capability of an operator is an irrelevant consideration for a new TPDES permit as provided in Response 12; and that human health and the environment will be protected by granting the permit, especially under these permit limits, as provided in Response 13.

III. CONCLUSION

For the reasons set forth in this letter and the City's First and Second Protests, the City requests a contested case hearing on the Draft Permit with the City named as a party. This request substantially complies with the requirements of a contested case hearing request per 30 TAC §

55.201. Apart from the wholly deficient regionalization analysis that has been inappropriately excused by the RPC, the ongoing concerns that the Draft Permit will not provide sufficient protection of water quality, the failure to demonstrate need for the permit at all, much less and 5.0 MGD permit at this time, and the remaining numerous deficiencies with the Application, the City is an affected person under its right to provide utility service as a home rule city and its contract with the TCEQ-designated regional provider. The City appreciates your consideration of this request for a contested case hearing.

If you have any questions regarding this matter, please contact me at (512) 322-5818. Again, all official communication should be directed to my attention at the following:

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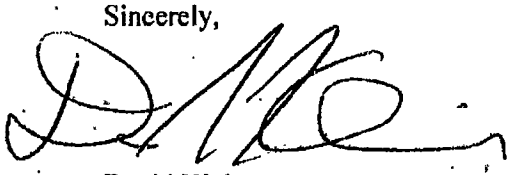
Sincerely,



David Klein

cc: TCEQ Executive Director
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