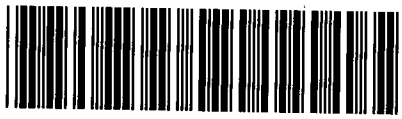

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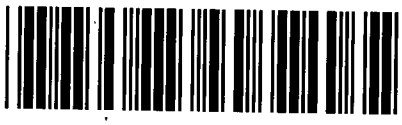

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SOAH DOCKET NO. 473-16-5379.WS
PUC DOCKET NO. 45956

APPLICATION OF THE CITY OF SCHERTZ 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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APPLICATION OF THE CITY OF SCHERTZ 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**

GREEN VALLEY SUD'S RESPONSE TO CITY OF SCHERTZ'S MOTION FOR PARTIAL SUMMARY DECISION

Green Valley Special Utility District ("Green Valley" or "GVSUD") files this its Response to the City of Schertz's Motion for Partial Summary Decision. This Response is timely filed pursuant to SOAH Order No. 5. In support of its Response, Green Valley respectfully submits as follows:

I. SUMMARY OF RESPONSE

Green Valley respectfully submits that Schertz's Motion was filed untimely less than ten working days prior to the scheduled March 28, 2017 hearing on the merits that was agreed to by the parties more than six months ago. As a result, Green Valley has been unfairly burdened with responding to the late-filed Motion when it would be preparing for hearing. Schertz's Motion should be denied on this basis alone. Alternatively, Green Valley responds as follows, and requests that the Administrative Law Judge ("ALJ") consider the Motion after Schertz's witnesses have been subjected to cross-examination and a full evidentiary record has been developed.

Schertz's Motion as to Preliminary Issue No. 8 fails on both of Schertz's asserted grounds. Schertz's first ground appears to be that "property" must inexplicably be limited to physical infrastructure located inside the area sought to be decertified. This position requires that Schertz

disregard the referred issues, applicable law, and the Docket No. 45702 ALJs' rejection of a nearly identical motion for partial summary decision submitted by Schertz's counsel in that docket on behalf of the City of Cibolo. Schertz has failed to provide factual or legal basis for its position regarding what constitutes "property" for purposes of Texas Water Code § 13.255. The only alleged legal basis provided by Schertz is a recent decision by the Public Utility Commission that: (1) has not been reduced to an order, (2) is subject to rehearing once an order is issued; and (3) involves a different statute and a different assignment of the burden of proof. In this docket, Schertz has the burden to establish as a matter of law that Green Valley has not identified any property that will be rendered useless or valueless. Schertz has failed to meet its burden. In contrast, Green Valley presents uncontroverted expert testimony regarding the identification of property and, herein, provides legal support undermining Schertz's bald assertions regarding the nature of Green Valley's property.

Schertz's second ground for summary decision is 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 ("CCMA"), 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 unequivocally has jurisdiction to interpret the statute on which Schertz relies, is currently deciding that very issue in a pending proceeding. In that proceeding, the TCEQ Executive Director has recommended rejection of the identical argument Schertz makes here.[1] Notably, the TCEQ commissioners determined that Schertz did not have

[1] *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*

standing to make the very arguments regarding "regionalization" that it asserts here. Accordingly, no weight should be given to Schertz's "regionalization" theory in this proceeding. The Commission should reject Schertz's invitation to interfere with a pending proceeding before the TCEQ.

Both of Schertz's asserted grounds for summary decision should be rejected and its Motion should be denied as to Preliminary Issue No. 8.[2] Further, because Issue No. 8 impacts resolution of Issue No. 10 for which Schertz 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.

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."[3] 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.[4] 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.[5] Based on these longstanding standards, Schertz's Motion fails as a matter of law.

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

(pending).

[2] Green Valley does not oppose Schertz's Motion as to Preliminary Issue No. 9.

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

[4] *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).

[5] *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).

A. Granting Schertz's Motion Would Contravene the Commission's Intent to Develop a Full Evidentiary Record.

Summarily disposing of the core issue in this proceeding would be inconsistent with the Commission's Preliminary Order. The Commission's Preliminary Order in this proceeding directed SOAH to develop a full evidentiary record consistent with the reasons set forth in a related proceeding, also involving Green Valley.[6] In the related proceeding (Docket No. 45702), the Commission referred the case to SOAH 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."[7] In that proceeding, 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.[8] Because there has been no proposal for decision or Commission determination regarding the issues of first impression presented by both this proceeding and Docket No. 45702, the Commission directives would be frustrated by consideration of the Motion at this juncture. Compliance with the Commission's directives therefore supports denial of Schertz's Motion or, at the very least, deferral of consideration of the Motion prior to the

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[6] Preliminary Order at 2 (Sep. 12, 2016) (stating that the proceeding should be handled consistent with the Commission's decision in PUC Docket No. 45702, *Application of 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*, Supplemental Preliminary Order at 2 (July 20, 2016)).

[7] PUC Docket No. 45702, *Application of 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*, Supplemental Preliminary Order at 2 (July 20, 2016)(emphasis added).

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

development of a complete record on this core issue. Ruling on the Motion, by contrast, could result in unnecessary delay of the proceeding.[9]

Finally, Schertz does not seek summary decision on Issue No. 10. The resolution of Issue No. 8 necessarily impacts Issue No. 10. Therefore, both issues are best taken up together after a full hearing on the merits.

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

Preliminary Issue No. 8 asks the parties to determine "what *property*, if any, will be rendered useless or valueless to Green Valley by the decertification sought by Schertz in this proceeding."[10] Thus, the core issue in this phase of the proceeding is "property."

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

The issue before the ALJ is whether GVSUD "property" will be rendered useless or valueless if decertification is granted. Without offering any explanation or legal basis for doing so, Schertz would have the ALJ limit consideration of Green Valley's property interests to "infrastructure." Similarly, and again, without explanation. Neither Preliminary Issue No. 8 nor Texas Water Code § 13.255 use the word "infrastructure" and Schertz'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.

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[9] Green Valley foresees that if the ALJ considers Schertz'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.

[10] Preliminary Order at 4 (Jul. 20, 2016). Green Valley notes that the Preliminary Order refers in numerous places to TWC § 13.254, which provision is inapplicable to Schertz's Application. Green Valley assumes that the Commission intended to reference TWC § 13.255.

But Schertz does not stop there; it seeks to further restrict Preliminary Issue No. 8 to infrastructure "within the Decertificated Land."[11] As with its presumptuous and unexplained theory that the only "property" at issue is "infrastructure," Schertz offers no reference to facts, statutory authority or Commission precedent to support its proffered limitation on "property." This is because there are no facts, statutory authority or Commission precedent supporting its theory.

Schertz's attempts to characterize the Preliminary Issue No. 8 inquiry as "infrastructure" that is "within" the area it seeks to decertify is a tautology, requiring the ALJ to (1) accept that "property" is "infrastructure" that is "within" the decertified area; and (2) infrastructure within the decertified area is the only type of property interest that exists. In Docket No. 45702, the ALJs correctly rejected the identical argument that Schertz raises here, determining that, "for the Commission to fulfill its duties under TWC § 13.255, 'property' must be construed broadly enough to include items the statute lists as compensable if other requirements ... are met."[12] Schertz'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. 8.

Schertz's reliance on the Commission's purported decision in Docket No. 45848 is misplaced.[13] As an initial matter, the Docket No. 45848 proceeding involved a different statutory scheme under TWC § 13.254, in which decertification had already taken place, and in which the party whose sewer CCN was subject to partial decertifcation had the burden of proof to establish the identify of property that had already been rendered useless or valueless as the result of the prior

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

[12] Docket No. 45702, SOAH Order No. 7 at 8-9 (Dec. 9, 2016).

[13] Schertz Motion at 9 (citing PUC Docket No. 45848, *City of Celina's Notice of Intent to Provide Water and Sewer Service to Area Decertified from Aqua Texas, Inc. In Denton County.*

decertification. Second, there is no final order in Docket No. 45848. The legal basis for the Commission's purported actions in that proceeding can only be the basis of speculation at this point. Moreover, once a Commission order is issued, it will be subject to rehearing and possible reconsideration. Thus, relying on what to date is only a Commission discussion and nothing more would be an improper basis for granting Schertz's Motion.

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

In contrast to Schertz's position, Green Valley has offered competent evidence (contested only by Schertz'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 Schertz 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 Schertz's intended decertification of approximately 405 acres of Green Valley's wastewater CCN. Mr. Korman's opinions as to what constitutes property have been accepted in similar proceedings addressing property to rendered useless or valueless following decertification.[14] 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 July 15, 2016 per the Commission's directive in Order No. 2 in this Docket,[15] identified the property that will be rendered useless or valueless.[16] Mr. Korman went through a comprehensive and detailed process of

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[14] Joshua Korman Direct Testimony at page 5, lines 4-12 (referencing Mr. Korman's testimony in PUC Docket No. 45848 on behalf of Aqua Texas, Inc. and his testimony in PUC Docket No. 45702 on behalf of Green Valley).

[15] Order No. 2 at 1 (June 21, 2016).

[16] Joshua Korman Direct Testimony at page 8, lines 6-9; 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.

identifying GVSUD property, and relied on the *Uniform Standards of Professional Appraisal Practice*, 2016-2017 Edition, where applicable, in his property identification.[17] 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.[18] In short, the *only* competent testimony on property identification is that of Green Valley's witnesses.

While Schertz'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. 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.

3. 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: 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 Schertz, will result in monetary compensation in an amount "adequate and just to compensate the retail public utility for such property"[19] Compensation for lost property resulting from decertification must be adequate to prevent an unlawful regulatory taking,

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[17] Joshua Korman Direct Testimony. at pages 9-16.

[18] Schertz'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.

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

damaging, or destruction of property for public use.[20] 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 405 acres that Schertz 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 Schertz desires to appropriate. 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 which is the subject of ownership, corporeal or incorporeal, *tangible or intangible*, visible or invisible, real or personal."[21]

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."[22]

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[20] *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)).

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

[22] 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).

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."[23]

2. The language in TWC § 13.255 originated through H.B. 2035 in 1987[24] 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 the certified area and providing water.*"[25] 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.[26]

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*,

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[23] 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).

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

[25] *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.

[26] Stephen Blackhurst Direct Testimony at page 6, lines 14-19; page 12, lines 7-20; page 15, lines 9-16.

2016-2017 Edition.[27] Those standards show that there are methods of valuing all types of property whether tangible, intangible, real, or personal.[28]

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."[29] 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, *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.[30]

Taken as a whole, this statutory and common law authority demonstrate that Schertz's attempts to limit the term "property" to physical "infrastructure" located "within" the area sought

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

[28] *Id.*

[29] TWC §13.255(g).

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

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.[31] All evidence favorable to the nonmovant must be taken as true.[32] Schertz'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.[33] Given these well-established summary decision standards, the only appropriate course is for the ALJ to deny Schertz's Motion in the *same* manner and on the *same* grounds that the ALJs in Docket No. 45702 denied the *same* motion brought against Green Valley in Docket No. 45702.[34]

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

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

[33] *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).

[34] Docket No. 45702, SOAH Order No. 7 (Dec. 9, 2016).

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

Schertz'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. Schertz inexplicably omits relevant facts regarding its theory. First, Schertz 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.[35]

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

Third, the TCEQ has specifically referred the issue of whether CCMA is the exclusive provider of sewer services in the regional area to SOAH for a contested case hearing.[36] In so doing, the TCEQ Commissioners *denied party status to Schertz* on the ground that it was not an affected person.[37] Schertz's attempt to assert its regionalization theory should be rejected, not only because

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[35] TCEQ Docket No. 2016-1876-MWD, SOAH Docket No. 582-17-1850, *In re Green Valley Special Utility District* (pending).

[36] *Id.*, Interim Order at 3 (Dec. 15, 2016).

[37] *Id.* at 1-2.

the matter is currently pending before the TCEQ, but also because Schertz does not have standing to assert such a claim at the TCEQ. Even if Schertz had standing, its invitation to the ALJ 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"[38] must be rejected when: (1) the only statements from the TCEQ reject Schertz's arguments; and (2) another agency is currently litigating the precise issue. What Schertz is essentially asking the ALJ to do is interfere with a pending agency proceeding. Should the ALJ accept Schertz'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, Schertz's Motion should be rejected.

Finally, under Schertz's theory, Schertz could not meet responsibilities required under the single sewer CCN its application seeks as the new certificated retail sewer public utility for the subject area 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 Schertz's regionalization theories on this issue is simply incorrect.

IV. SCHERTZ'S MOTION AS TO PRELIMINARY ISSUE NO. 9

Finally, Green Valley agrees that the ALJ may grant Schertz's Motion as to Preliminary Issue No. 9 and hereby stipulates that Schertz 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 Schertz's Motion for Partial Summary

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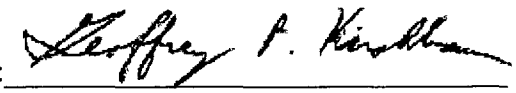
[38] Schertz Motion at 6.

Decision on all grounds as to Preliminary Issue No. 8; (2) grant Schertz's Motion as to Preliminary Issue No. 9; and (3) grant all other relief to which Green Valley shows itself to be entitled.

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

I hereby CERTIFY that on March 16, 2017, 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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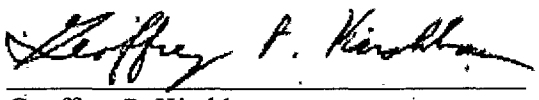
Austin, Texas 78711-3326

ATTORNEY FOR COMMISSION STAFF



Geoffrey P. Kirshbaum

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 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 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