



Control Number: 50543



Item Number: 32

Addendum StartPage: 0

DOCKET NO. 50543

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2020 DEC 16 PM 2:37
BEFORE THE
PUBLIC UTILITY COMMISSION
FILING CLERK

**APPLICATION OF SP UTILITY
COMPANY, INC. TO AMEND ITS
CERTIFICATE OF CONVENIENCE
AND NECESSITY AND FOR DUAL
CERTIFICATION WITH DREW T.
SPENCER D/B/A CYPRESSWOOD
ESTATES IN MONTGOMERY
COUNTY**

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PUBLIC UTILITY COMMISSION

OF TEXAS

SP UTILITY COMPANY, INC.'s RESPONSE TO ORDER NO. 9

COMES NOW, SP Utility Company, Inc. ("SP Utility") and submits this Response to the Order No. 9 and would respectfully show the following:

I. BACKGROUND

On February 12, 2020, SP Utility filed an application to amend its water Certificate of Convenience and Necessity ("CCN") No. 12978 and for dual certification with Drew T. Spencer d/b/a Cypresswood Estates Water System in Montgomery County, Texas. On October 5, 2020, the Commission Administrative Law Judge ("ALJ") issued Order No. 6 finding the application to be administratively complete, requiring notice, and establishing a procedural schedule. On November 24, 2020, San Jacinto River Authority ("SJRA") filed a Motion to Intervene and Request for Hearing also claiming lack of notice. Thereafter, SP Utility filed responses to SJRA on December 2, 2020 and a reply to Staff of the Public Utility Commission of Texas' ("Commission Staff") Recommendation on Sufficiency of Notice and Proposed Procedural Schedule on December 7, 2020. The ALJ issued Order No. 9 on December 9, 2020 requesting clarification. Therefore SP Utility has replied timely.

II. CLARIFICATION OF APPLICATION AND NOTICE

It is unclear to SP Utility whether the ALJ's request for clarification goes to the issue of SJRA's intervention or sufficiency of notice. Complicating matters, this docket has a confusing procedural history. Either way, SJRA is not a proper intervenor in this case with a justiciable

interest. While as a political subdivision, SJRA is a retail public utility by definition, it is not a retail public utility that provides public water service for compensation within 2 miles of the requested CCN area. Furthermore, SJRA clearly received actual and/or constructive notice of this proceeding.¹

The ALJ notes correctly that question 19 of the SP Utility's Application contains a reference to an attached list of neighboring utilities within 2 miles. This list, included as an attachment to the Application, identified SJRA and 14 other entities. Commission Staff required submittal of this list by SP Utility's consultant Bret Fenner. As explained more fully below, Commission Staff's list was wrong at the time originally provided to Applicant, and it is still wrong now. When Applicant pointed out the inaccuracy, it was told this was the way "TCEQ always did it," and Applicant could either accept the list as provided or appeal. Applicant is a small business whose owner has spent almost two years seeking authorization to serve the Cypresswood Estates and Garden West customers, and has spent more than twice the cost of the system to do so. SP Utility had no choice but to accept Commission Staff's notice list, notwithstanding its errors. Regardless, an inaccurate notice list does not confer standing on SJRA where its justiciable interest is otherwise lacking.

After SP Utility provided proof of submittal of its plans and specifications to TCEQ as required by Order No. 5, Commission Staff filed its *first* Second Supplemental Recommendation on Administrative Completeness of the Application and Proposed Procedural Schedule recommending that the Application be declared administratively complete and that Applicant proceed to notice all the entities identified on Ms. Garcia's October 2, 2020 memo.² When Applicant reviewed the list and saw a number of inaccuracies, counsel for SP Utility contacted Commission Staff beginning on October 6. Through an email exchange, attached hereto as Attachment A, SP Utility pointed out that SJRA did not provide retail water service within 2 miles.³ There were additional problems as well – utilities such as Coastal Water Authority, Montgomery County MUD 159 and Green Tree Park MUD were on the list but inactive and do not currently

¹ 16 TAC § 24.235(b)(2).

² Second Supplemental Recommendation on Administrative Completeness of the Application and Proposed Procedural Schedule (Oct. 2, 2020).

³ See Attachment A, email from Helen Gilbert to Taylor Denison (Oct. 6-9, 2020).

provide service or never provided retail water service.⁴ Other entities, like the Port of Houston Authority, are not water providers at all and not even located in Montgomery County but nonetheless were not removed by Commission Staff. As a consequence of this exchange, Commission Staff filed its *second* Second Supplemental Recommendation on Administrative Completeness of the Application and Proposed Procedural Schedule on October 9, 2020 revising the list of neighboring utilities stating that certain entities were “inadvertently” left off, but not otherwise fixing the problem.⁵ Again, Applicant and Applicant’s consultant have been told repeatedly that districts always require notice notwithstanding their location and inability to serve (due to lack of nearby infrastructure) and that the erroneous list would not be further amended. Indeed in over 30 years of practice before the Commission and predecessor agencies, Applicant’s consultant has never known the number of entities listed on the notice list to be reduced, only increased, even if those entities were inactive utilities no longer providing service.

As counsel for SP Utility stated in the email exchange shown in Attachment A, 16 Tex. Admin. Code (“TAC”) § 24.235(b)(1)(A) does not require notification of *all* districts, just districts that also provide the same utility service (i.e., water) and whose boundaries are within two miles from the outer boundary of the requested area (i.e., Cypresswood Estates Subdivision):

(b) After reviewing and, if necessary, modifying the proposed notice, the commission will provide the notice to the applicant for publication and/or mailing.

(1) For applications for a new CCN or a CCN amendment, the applicant shall mail the notice to the following:

(A) cities, districts, and neighboring retail public utilities ***providing the same utility service whose corporate boundaries or certificated service area are located within two miles from the outer boundary of the requested area.***

(B) the county judge of each county that is wholly or partially included in the requested area; and

(C) each groundwater conservation district that is wholly or partially included in the requested area.⁶

⁴ *Id.*

⁵ Second Supplemental Recommendation on Administrative Completeness of the Application and Proposed Procedural Schedule (Oct. 9, 2020).

⁶ 16 TAC § 24.235(b)(1)(A).

The phrase “providing the same utility service whose corporate boundaries or CCN is located within. . .” qualifies all three types of entities - cities, districts, and retail public utilities alike. The word “providing” is temporal and requires active and ongoing service within two miles of the proposed CCN. There is no special carve out requiring notice to be sent to every special law district; rather, notice is sent only to those systems located within 2 miles of the proposed CCN that also provide retail water service as proposed by SP Utility. As discussed in the email exchange, to read the 2 mile restriction to only apply cities and retail public utilities but not districts would eviscerate the rule and is not reasonable rule construction.⁷

According to Texas Commission on Environmental Quality’s (“TCEQ”) Drinking Water Watch and list of active public water supply (“PWS”) systems, SJRA has 2 PWS sites, one in Harris County and one in Montgomery County. The Montgomery County PWS is a small 0.6 gpm well and not within 2 miles of SP Utility’s requested CCN area (current Cypresswood Estates and Garden West CCN boundaries). As the attached site plan shows, this PWS site is (1) located at the SJRA’s offices at the dam on Lake Conroe (1577 Dam Site Rd.) 3.5 miles from Garden West and 20 miles from Cypresswood Estates, (2) used to service the SJRA office only, and (3) does **not** provide potable water service for compensation in Montgomery County.⁸ To read § 24.235(b)(1)(A) to require notice of SJRA due to its six-county river basin and no competing PWS site or nearby infrastructure capable of serving Cypresswood Estates and Garden West would improperly read the 2 mile limit out of the rule. The common sense purpose of the notice rule is to require notification to those entities within 2 miles that actually have the infrastructure, ability and willingness to serve and avoid the construction of stand-alone systems for regionalization purposes. Not only does the vast distance from SP Utility’s proposed CCN area and SJRA’s closest PWS location show that SJRA is not uniquely affected by the Application in such a way as to confer it justiciable interest and standing, it also demonstrates that there is no possible way SJRA could provide water service to the Cypresswood Estates and Garden West customers even if it wanted to.

⁷ *State v. Schumake*, 199 S.W.3d 279, 287 (Tex. 2006) (observing rule of statutory construction of giving effect to all words and not treating any statutory language as surplusage).

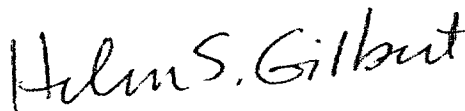
⁸ See Attachment B, site plan; 16 TAC § 24.3(31).

III. PRAYER

WHEREFORE, PREMISES CONSIDERED, SP Utility Company, Inc. respectfully prays that the Commission declares notice sufficient, denies SJRA's Motion to Intervene and Request for Hearing and issues a revised procedural schedule.

Respectfully submitted,

Helen S. Gilbert
State Bar No. 00786263
Randall B. Wilburn
State Bar No. 24033342
GILBERT WILBURN PLLC
7000 N. MoPac Expwy, Suite 200
Austin, Texas 78731
Telephone: (512) 494-5341
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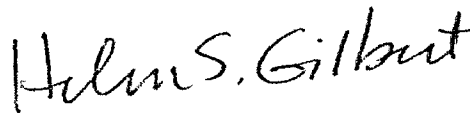
By: _____

Helen S. Gilbert

**ATTORNEYS FOR SP UTILITY
COMPANY, INC.**

CERTIFICATE OF SERVICE

I hereby certify that I have or will serve a true and correct copy of the foregoing document via hand delivery, facsimile, electronic mail, overnight mail, U.S. mail, or Certified Mail Return Receipt Requested on all parties on the 16th of December 2020.



Helen S. Gilbert

Docket No. 50543
Attachment A

From: Helen Gilbert hgilbert@gwtlaw.com
Subject: Re: Docket No. 50543/SP Utility/Spencer Terrace Water System
Date: October 9, 2020 at 12:14 PM
To: Denison, Taylor Taylor.Denison@puc.texas.gov
Cc: Armstrong, Heath Heath.Armstrong@puc.texas.gov, Randall Wilburn rbw@gwtlaw.com

HG

Shelley B. Young, P.E.
WaterEngineers, Inc.
17230 Huffmeister Rd.
Cypress, TX ~ 77429
tel: 281-373-0500
fax: 281-373-1113
www.waterengineers.com

On Oct 9, 2020, at 10:44 AM, Denison, Taylor <Taylor.Denison@puc.texas.gov> wrote:

Helen,

Our mapping expert would be happy to talk to your engineer regarding some of those concerns. Please give me his phone number and I'll put them in touch.

Regarding some of your other concerns, we require notice to entities that have the ability to provide water service without notifying the PUC, regardless of whether or not they are currently providing that service. It's my understanding that the two mile radius is not constricted to the specific PWS sites, but the district's boundaries in general. Because the notice we are recommending here is consistent with what we recommend in every other CCN docket, we won't be amending the list in this instance. Instead, you can either file a motion to reconsider the order regarding notice, or you can include your arguments in your proof of notice filing if you do not notice the entities we recommended.

Thanks,
Taylor

<image004.png>

Taylor P. Denison

Attorney – Legal Division

Public Utility Commission of Texas

W: (512) 936-7203 | taylor.denison@puc.texas.gov

From: Helen Gilbert <hgilbert@gwtlaw.com>
Sent: Thursday, October 8, 2020 5:53 PM
To: Denison, Taylor <Taylor.Denison@puc.texas.gov>
Cc: Armstrong, Heath <Heath.Armstrong@puc.texas.gov>; Randall Wilburn <rbw@gwtlaw.com>
Subject: Re: Docket No. 50543/SP Utility/Spencer Terrace Water System

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Taylor,

Docket No. 50543
Attachment A

Thanks for your email and the revised list.

We agree that SJRA is considered a district but according to TCEQ's Tx. Drinking Water Watch site, none of its 4 PWS site are not within 2 miles of either Cypresswood Estates or Garden West. The closest 2 SJRA PWS are located at/near the SJRA's offices at the dam on Lake Conroe (1577 Dam Site Rd.) and one well just serves their office, they do not sell water from it and is 3.5 miles from Garden West and 20 miles northeast of Cypresswood Estates. The other PWSes are at the intake on Lake Houston which is in an entirely different county, Harris Co., at over 50-70 miles away and at the Woodlands, also more than 2 miles away. So I do not understand your comment that there is an "overlap with the requested area in this docket."

Similarly, the database shows Coastal Water Authority has PWSes but they are inactive and at Trinity River and Lake Houston or both in Harris Co. and do not sell retail water. Gulf Coast WASTE Disposal Authority has no PWS showing in the database. Harris Co. Flood Control Dist. has an inactive PWS near Bush Intercontinental in Harris Co., again, not even in the same county. Port of Houston has no PWS shown and N. Harris Co. Regional Water Authority, buys treated water from Houston, is a wholesale provider of same to various districts but all within Harris Co.

Therefore, with respect to any district are you saying that you include the entire river basin for a district like SJRA because they don't have a certificated area? As you know, they operate in 6 counties. Does that mean that they would have to be included for any facility in Waller, Walker, Grimes, SJ or Liberty county even if they are more than 2 miles away from the subject facility? This interpretation of the rule would eviscerate the two-mile limitation and the part about providing the same service (i.e., Port of Houston). That reading would apply a geographic limit to the cities and retail public utilities but not districts - yet all 3 are included in the rule. I think the rule clearly intends to place a geographic limit on *all* these entities to avoid the very scenario of unnecessary notice to those who don't have a stake in the subject matter. Including districts miles away and with nothing to do with drinking water because it was "TCEQ policy" that has been in place in the past is not a reason to misapply the rule.

As to the remaining entities to be noticed, I think we are in agreement except Undine (CCN 13260) isn't anywhere close to the 2 areas (more like 6.63 miles away). Is this perhaps a newly required/renamed CCN? Also, neither Green Tree Park MUD nor MCMUD 159 list addresses or contact information in the database although they seem like they might be close to CWE. Is this something our engineer can clarify with staff directly?

Please advise, thanks,

Helen

<image003.jpg>

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Docket No. 50543
Attachment A

On Oct 7, 2020, at 1:50 PM, Denison, Taylor <Taylor.Denison@puc.texas.gov> wrote:

Helen,

I've spoken with our mapping expert and I have some additional information that may be helpful. With regard to your question below, those entities, particularly SJRA, are considered districts in the TCEQ database. All water districts with either an active or inactive 'Activity Status' are to be included in the notice list if they show a retail water function or a special law function. SJRA is an active district with special law function, and in addition, they hold two associated public water systems, and overlap with the requested area in this docket. Therefore, notice is required. The TCEQ database page for SJRA can be found here: <https://www14.tceq.texas.gov/iwud/dist/index.cfm?fuseaction=DetailDistrict&ID=12796&command=list&name=SAN%20JACINTO%20RIVER%20AUTHORITY>

With regard to the mapping data, ours is a little different than the mapping you provided from your engineers. We do not draw a circle two miles from the outer boundary, but rather draw two miles from the exact requested service area. Your engineers can download the data on this web viewer by clicking on the 'i' information button up at the top: <https://tceq.maps.arcgis.com/apps/webappviewer/index.html?id=04bbf8b322b34d8abaea7b06996d3775>

We will be filing a revised memo in this docket, with a revised list of entities to whom notice should be provided. The reason for this is that there have been a few changes in TCEQ's published Water District layer since our mapping experts did the initial overlap and notice check in this docket. We will be filing a revised notice list in the docket to account for those changes. The revised list is attached for your reference.

Let me know if you have any additional questions.

Thanks,
Taylor

<image004.png> **Taylor P. Denison**
Attorney – Legal Division
Public Utility Commission of Texas
W: (512) 936-7203 | taylor.denison@puc.texas.gov

From: Helen Gilbert <hgilbert@ewtxlaw.com>

Docket No. 50543
Attachment A

Sent: Tuesday, October 6, 2020 4:03 PM
To: Denison, Taylor <Taylor.Denison@puc.texas.gov>
Subject: Re: Docket No. 50543/SP Utility/Spencer Terrace Water System

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Ok, thanks. We certainly want to understand why sec. 24.235 should be read to require notice to entities that do not provide the same utility service as applicant. For efficient discussion, maybe you could point me to the rule or policy that requires it?

Thanks,

Helen
<image003.jpg>

Confidentiality notice: Unless otherwise indicated or obvious from the nature of the transmittal, this email message is intended only for the use of the individual or entity to whom it is addressed and may contain information that is privileged and confidential or that constitutes work product and is exempt from disclosure under applicable law.

On Oct 6, 2020, at 4:00 PM, Denison, Taylor
<Taylor.Denison@puc.texas.gov> wrote:

Helen,

I've discussed this with Patty, Heath, and our mapping experts, and we'll be revising the list of entities, which I should have ready for you by tomorrow. Our latest TCEQ districts layer is from July 2020, which was after our mapping expert did the original notice list.

Once I have that revised list for you, we can discuss more of the details if you'd like, including how the two miles from the outer boundary is calculated, and why entities such as the water authorities and districts are still required to be noticed.

Thanks,
Taylor

<image001.png> **Taylor P. Denison**
Attorney – Legal Division
Public Utility Commission of Texas
W: (512) 936-7203 | taylor.denison@puc.texas.gov

Docket No. 50543
Attachment A

From: Denison, Taylor
Sent: Tuesday, October 6, 2020 1:51 PM
To: 'Helen Gilbert' <hgilbert@gwtlaw.com>
Subject: RE: Docket No. 50543/SP Utility/Spencer Terrace Water System

Thanks Helen,

Let me discuss with Patty, Heath, and our mapping experts and get back with you shortly.

Thanks!
Taylor

<image001.png> **Taylor P. Denison**
Attorney – Legal Division
Public Utility Commission of Texas
W: (512) 936-7203 | taylor.denison@puc.texas.gov

From: Helen Gilbert <hgilbert@gwtlaw.com>
Sent: Tuesday, October 6, 2020 1:41 PM
To: Denison, Taylor <Taylor.Denison@puc.texas.gov>
Subject: Docket No. 50543/SP Utility/Spencer Terrace Water System

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Taylor,

According to our engineer, here are the water CCNs w/in 2 miles of the Cypresswood Estates and Garden West CCN areas. Maps are included below:

Cypresswood Estates

H-M-W SUD CCN 13042
Harris County MUD 542
Bauer Landing WCID
Aqua Texas CCN 13203
Aqua Texas CCN 11157
Clear Creek Forest WCID 1
Quadvest LP CCN 11612

Montgomery County Judge
Lone Star Groundwater Conservation District

FM 2854 Tract

Docket No. 50543
Attachment A

City of Conroe CCN No. 10339
Montgomery County MUD 132
Montgomery County MUD 42
Montgomery County MUD 142
Montgomery County MUD 107
Aqua Texas CCN 11157
Woodland Oaks Utility Co. CCN 12947
Nerro Supply CCN 12252
Crystal Springs Water Co. CCN 11373
MSEC Enterprises CCN 12887
C & R Water Supply CCN 13098

Montgomery County Judge
Lone Star Groundwater Conservation District



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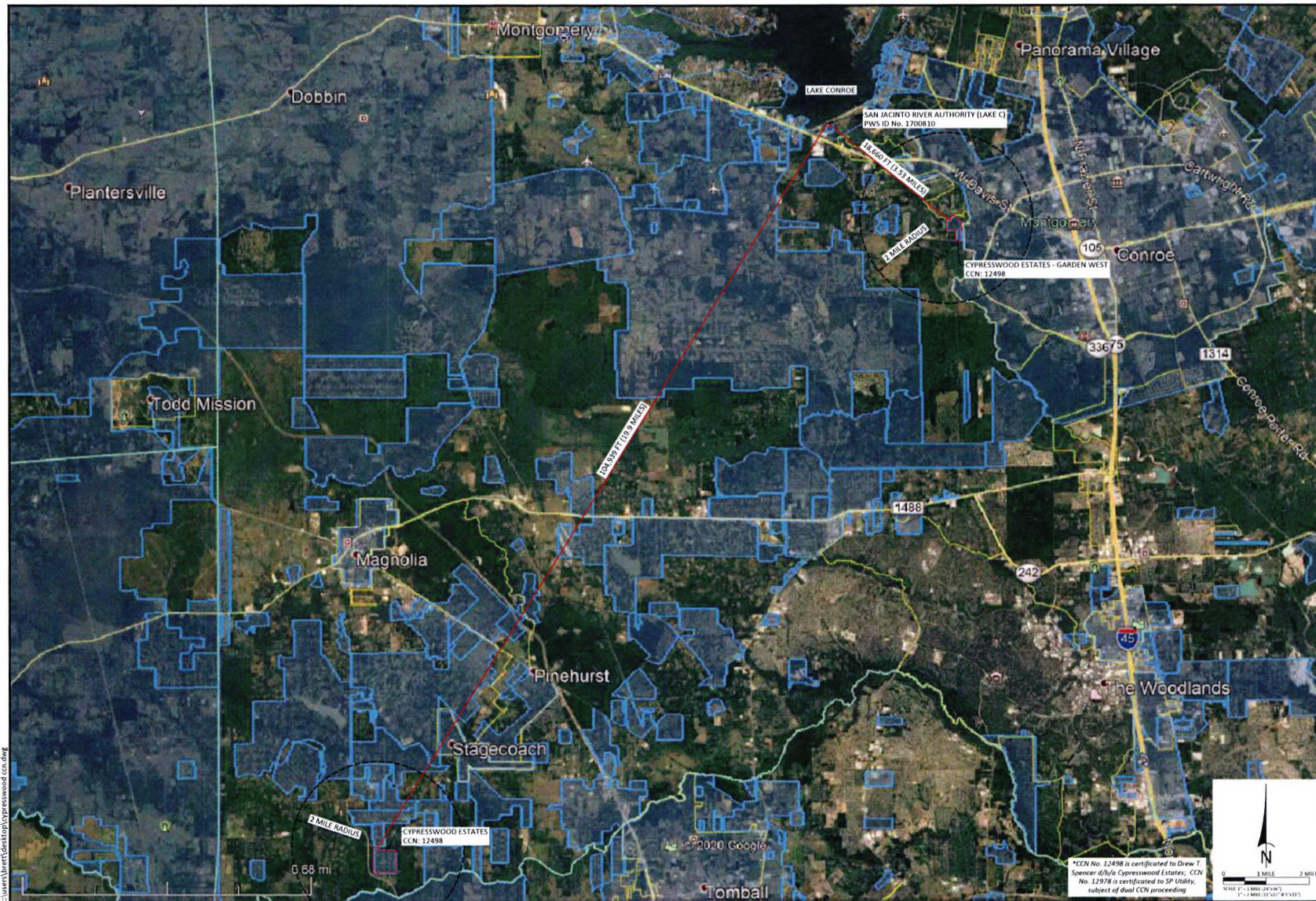
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REVISION	DATE
DESCRIPTION	M/D/YY

WATERENGINEERS INC. Water & Wastewater Treatment Consultants TEXAS BOARD OF PROFESSIONAL ENGINEERING FIRM No. 2586 17330 HUFFMASTER ROAD CYPRESS, TEXAS 77429 TEL: 281-373-0000 FAX: 281-373-1113	CYPRESSWOOD ESTATES CCN: 12498
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SHEET NAME:	
SERVICE AREA	

DRAWN BY:	BIR
CHECKED BY:	DRY
PROJECT No.:	
DATE:	12/16/2020
SHEET No.:	01 OF 01

*CCN No. 12498 is certified to Draw & Engineer all/c/o Cypresswood Estates; CCN No. 12978 is certified to SP Utility, subject of dual CCN proceeding

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