In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-20-00167-CV

CITY OF SCHERTZ, TEXAS, AND CIBOLO CREEK MUNICIPAL AUTHORITY, APPELLANTS

V.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY AND GREEN VALLEY SPECIAL UTILITY DISTRICT, APPELLEES

On Appeal from the 98th District Court
Travis County, Texas
Trial Court No. D-1-GN-18-006040, Honorable Jan Soifer, Presiding

August 26, 2022

OPINION

Before QUINN, C.J., and PARKER and DOSS, JJ.

"One man's *waste* is another man's treasure." The question before the Court is essentially this: how close must a proposed wastewater treatment plant's discharge point be to the cities in the Cibolo Creek Regional Area,[1] as defined by regulation, before it is

[1] *See* 30 TEX. ADMIN. CODE § 351.61(2) (defining 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.").

considered to be "in the vicinity"? Appellants, Cibolo Creek Municipal Authority (CCMA) and the City of Schertz, appeal from the trial court's judgment affirming the Texas Commission on Environmental Quality's findings against them on this question and that permitted a competitor to build a wastewater treatment facility that would discharge treated wastewater effluent into Santa Clara Creek, located in Guadalupe County, Texas. We affirm.

Background

In 1971, CCMA was created by the Texas Legislature to provide sewerage service to the cities of Schertz and Universal City. The following year, the Texas Water Quality Board (TWQB)[2] issued an order granting CCMA a permit to discharge treated effluent into Cibolo Creek. In 1978, CCMA was designated as the regional provider in place of the San Antonio River Authority for the area "in the vicinity of the cities of Cibolo, Schertz, Universal City, Selma, Bracken, and Randolph Air Force Base [RAFB]." 30 TEX. ADMIN. CODE § 351.61.

CCMA is a competitor to Green Valley Special Utility District. In 2004, Green Valley received a certificate of convenience and necessity (CCN) from the Commission to provide wastewater service, as an exclusive provider, within a designated area of its water service.[3] Green Valley's CCN area is comprised of approximately 76,000 acres

[2] The Texas Water Quality Board was the predecessor agency to the Texas Commission on Environmental Quality.

[3] CCNs are granted by the Public Utility Commission (PUC) for water and sewer utility services. *See* TEX. WATER CODE ANN. § 13.241. CCN certification is an authorization granted by the PUC to a retail public utility to be the exclusive provider of retail water and/or wastewater service within a defined geographic area unless the CCN holder is dually certified with another entity.

spanning the Santa Clara Creek Watershed, including the cities of Marion, Santa Clara, and portions of the extraterritorial jurisdictions of the cities of Schertz and Cibolo.[4] Green Valley's board began planning for the construction of a centralized wastewater treatment facility within its CCN area to meet the demands of future population growth[5] and anticipated residential developments in the Santa Clara Creek Watershed. Before construction could commence, however, Green Valley needed to obtain a Texas Pollutant Discharge Elimination System permit (TPDES).[6]

In April 2015, Green Valley filed its application for a TPDES permit and proposed a location for a wastewater treatment facility. The plant's treated wastewater would discharge into Santa Clara Creek and travel approximately 4.5 miles before entering Cibolo Creek at a juncture approximately 6.5 miles downstream from the nearest upstream corporate limits of cities in CCMA's region (Cibolo, Schertz, Selma, Universal City, Bracken, and Randolph Air Force Base). The location of Green Valley's proposed facility was determined with an effort of optimizing the use of the topography, with wastewater traveling downhill to reduce construction costs of building a delivery system

[4] The extraterritorial jurisdiction of a municipality is the unincorporated area that is contiguous to the corporate boundaries of the municipality. *See* TEX. LOC. GOV'T CODE ANN. § 42.021.

[5] Green Valley expects the population within its CCN to grow by seven percent per year.

[6] A TPDES permit is an authorization issued by the Commission granting permission to the holder to construct a plant to treat domestic wastewater and discharge it into state waters. The permit establishes the plant's location, the watercourse where the facility may discharge the treated wastewater, the amount of wastewater that may be treated and discharged on a daily basis, and limitations on the quality of the treated effluent discharged into the watercourse. *See* TEX. WATER CODE ANN. § 26.029. Due to the pendency of Green Valley's application process and subsequent appeals, its original permit granted by the Commission was renewed. *See id.* at § 26.028(d). Green Valley's *Motion to Dismiss Appeal for Mootness* filed January 22, 2021 has been carried with this appeal and is hereby denied.

and maintenance costs. Its proposed plant is more than five miles from a new facility proposed by CCMA.

CCMA/Schertz and Cibolo opposed Green Valley's application, contending Green Valley's plant was located within its exclusive regional area per section 351.65 of Title 30 of the Texas Administrative Code. CCMA proposed that Green Valley forego construction of its facility and utilize CCMA's planned facility instead. Rather than the topographical advantages afforded to Green Valley's planned location, CCMA's proposal would require construction of a system of trunk mains and lift stations to transport wastewater.[7] And rather than Green Valley managing its own facility and collecting its fees, CCMA's proposal would require an upfront payment for one-third of the cost of the new CCMA plant, payment of a wholesale treatment rate, and collection of impact fees from land developers on CCMA's behalf. Green Valley would also have no managerial or operational control, meaning CCMA would have the authority to determine when, if ever, Green Valley could demonstrate it had a legitimate need for additional volume.

The Commission ordered seven issues to be referred to an Administrative Law Judge (ALJ) at the State Office of Administrative Hearings. Evidentiary hearings took place in September 2017; the record was closed in December 2017. The ALJ found in CCMA/Schertz's favor and issued a Proposal for Decision recommending that the Commission deny Green Valley's TPDES application.

[7] Green Valley's cost for building a connectivity system from its proposed site to CCMA's plant would be substantial. The system would require boring beneath Cibolo Creek and the use of two lift stations to pump sewage up the gradient, or ridge separating the Santa Clara Creek and Cibolo Creek, to CCMA's new plant. Wastewater treatment managers typically strive to minimize the use of any lift stations in their systems because utilizing gravity to move sewage is much cheaper, lift stations are expensive, and they are prone to overflows and high maintenance costs.

Notwithstanding the ALJ's findings, the Commission issued a final order granting Green Valley's application in July 2018. CCMA/Schertz appealed the Commission's order to the 98th District Court of Travis County. In April 2020, the district court affirmed the Commission's order. Thereafter, CCMA/Schertz sought an appeal in the Third Court of Appeals in Austin; it was transferred to this Court.[8]

Regulations

The pertinent provisions of the Texas Administrative Code at issue in CCMA/Schertz's appeal are stated in relevant part:

30 TEX. ADMIN. CODE § 351.61:

> The following words and terms, when used in these §§ 351.61-351.66 of this title (relating to Cibolo Creek), shall have the following meanings, unless the context indicates otherwise:
>
> (1) Authority—The [CCMA]
>
> (2) Regional Area—That 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.

30 TEX. ADMIN. CODE § 351.62:

> The Cibolo Creek Municipal Authority is designated the governmental entity to develop a regional sewage system in that area of Cibolo Creek Watershed, in the vicinity of the cities of Cibolo, Schertz, Universal City, Selma, Bracken, and Randolph Air Force Base.

30 TEX. ADMIN. CODE § 351.65:

> All future permits and amendments to existing permits pertaining to discharges of domestic wastewater effluent within the Cibolo Creek regional area shall be issued only to the authority.

[8] *See* TEX. GOV'T CODE ANN. § 73.001. Because this appeal was transferred from the Third Court of Appeals, we are obligated to apply its precedent in the event of a conflict between the precedents of that court and this Court. *See* TEX. R. APP. P. 41.3.

Standard of Review

Our review of the Commission's final order is governed by section 2001.174 of the Texas Government Code. *See* TEX. GOV'T CODE ANN. § 2001.174. *See also Wood v. Tex. Comm'n Env't Quality,* No. 13-13-00189-CV, 2015 Tex. App. LEXIS 2139, at *7–8 (Tex. App.—Austin Mar. 5, 2015, no pet.) (mem. op., not designated for publication). That standard requires that we reverse or remand a case for further proceedings only if substantial rights of appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions:

> (A) violate constitutional or statutory provisions,
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> (B) exceed the agency's statutory authority,
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> (C) were made through unlawful procedure,
>
> (D) are affected by other error of law,
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> (E) are not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or
>
> (F) are arbitrary or capricious or characterized by abuse of discretion of clearly unwarranted exercise of discretion.

TEX. GOV'T CODE ANN. § 2001.174(2)(A)–(F).

Under the substantial evidence rule identified in (E), appellate courts review the evidence as a whole to determine if reasonable minds could have reached the same conclusion as the agency. *Citizens Against Landfill Location v. Tex. Comm'n on Env't Quality*, 169 S.W.3d 258, 264 (Tex. App.—Austin 2005, pet. denied). In so doing, a court may not substitute its judgment for that of the agency and may only consider the record on which the agency based its decision. *Id.* Because substantial evidence means more than a mere scintilla, the record evidence may preponderate against the agency's

decision but nonetheless meet the substantial evidence rule. *Id.* *See City of Dallas v. Stewart*, 361 S.W.3d 562, 566 (Tex. 2012). "We presume the agency's findings, inferences, conclusions, and decisions are supported by substantial evidence, and the burden is on the contestant to demonstrate otherwise." *Jenkins v. Crosby Indep. Sch. Dist.*, 537 S.W.3d 142, 149 (Tex. App.—Austin 2017, no pet.).

We interpret statutes following traditional principles of statutory construction. *See TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 438 (Tex. 2011) (citing *Rodriguez v. Service Lloyds Ins.*, 997 S.W.2d 248, 254 (Tex. 1999)). Our primary objective in construing an agency's rule is to ascertain and give effect to the agency's intent in adopting the rule. *AEP Tex. Commercial & Indus. Retail Ltd. P'ship v. Public Util. Comm'n*, 436 S.W.3d 890, 906 (Tex. App.—Austin 2014, no pet.) (citing *TGS-NOPEC*, 340 S.W.3d at 439). *See Rodriguez*, 997 S.W.2d at 254. "We determine that intent from the plain meaning of the words chosen when it is possible to do so, using any definitions provided." *Texas Dep't of Protective & Regulatory Servs. v. Mega Child Care*, 145 S.W.3d 170, 176 (Tex. 2004) (citing TEX. GOV'T CODE ANN. § 311.011(b)).

If there is vagueness, ambiguity, or room for policy determination in a regulation, "we normally defer to the agency's interpretation unless it is plainly erroneous or inconsistent" with the rule's language. *TGS-NOPEC*, 340 S.W.3d at 438. While an administrative agency's interpretation of its own rules is entitled to great weight and deference; *see Cities of Dickinson, Friendswood, La Marque, League City, Lewisville & Texas City v. Public Util. Comm'n*, 284 S.W.3d 449, 452 (Tex. App.—Austin 2009, no pet.), "[w]e defer only to the extent that the agency's interpretation is reasonable." *TGS-*

NOPEC, 340 S.W.3d at 438. No deference is due where an agency's interpretation fails to follow the clear, unambiguous language of its own regulations. *Id*.

Analysis

We note at the outset that CCMA/Schertz's brief makes no argument of how their substantial rights have been prejudiced on account of the Commission's findings and conclusions. We decline to offer our own speculation to fill this void. This failure militates against reversal of the district court's judgment even if the Commission's findings and conclusions are unsupported. *See* TEX. GOV'T CODE ANN. § 2001.174. *See also Dyer v. Tex. Comm'n on Env't Quality*, 2022 Tex. LEXIS 524, at *28–29 (Tex. 2022) ("Under Section 2001.174(2) of the APA . . . not only must the agency's challenged 'findings, inferences, conclusions, or decisions' be faulty as a matter of law[,] they must also prejudice the substantial rights of the appellant.").

In any event, we nevertheless undertake a review of whether the Commission erred in its findings, inferences, conclusions, or decisions. Our analysis thus focuses upon what the Texas Administrative Code says. Section 351.65 prohibits issuance of permits and permit amendments "pertaining to discharges of domestic wastewater effluent within the Cibolo Creek regional area" unless they are issued to CCMA. For determining whether the permit issued to Green Valley violates section 351.65, we must assess whether Green Valley's proposed discharge of domestic wastewater effluent would be within CCMA's defined regional area. That regional area is defined as "that 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." 30 TEX. ADMIN. CODE § 351.61(2).

"[I]t is settled that every word in a statute is presumed to have been used for a purpose; and a cardinal rule of statutory construction is that each sentence, clause and word is to be given effect if reasonable and possible." *El Paso Educ. Initiative, Inc. v. Amex Props.*, LLC, 602 S.W.3d 521, 532 n.52 (Tex. 2020). Giving meaning to each clause, we hold that nothing in any regulation reserves the entirety of the Cibolo Creek Watershed for CCMA's exclusive use. Section 351.61(2)'s limiting language to "that portion" of the Cibolo Creek Watershed[9] expresses the intention that CCMA's regional area is limited to only the portion of the watershed that is "lying in the vicinity of the [named] cities [and RAFB]." *Id*.

On appeal, CCMA/Schertz assert that Green Valley's proposed facility would discharge effluent within the Cibolo Creek Watershed because its point of discharge in Santa Clara Creek is a part of the Cibolo Creek Watershed. The Commission's findings of fact confirm that at least part of Santa Clara Creek is within the Cibolo Creek Watershed. Assuming, *arguendo,* that CCMA/Schertz's argument is correct, we review the record for whether Green Valley's proposed discharge of domestic wastewater

[9] Throughout the proceedings below, CCMA/Schertz and its experts claimed that CCMA's regional area included the entirety of the Cibolo Creek Watershed. Such an interpretation is contrary to section 351.61(2), which limit CCMA's regional area to "that portion" of the Cibolo Creek Watershed within the vicinity of the cities and RAFB. A court must not interpret a statute in a manner that renders any part of a statute meaningless or superfluous. *Freestone Power Generation, LLC v. Tex. Comm'n on Env't Quality*, 564 S.W.3d 1, 11 (Tex. App.—Austin 2017), *aff'd*, *State Comm'n on Env't Quality v. Brazos Valley Energy, LLC*, 582 S.W.3d 277 (Tex. 2019).

effluent would occur in "that portion" of the watershed "lying in the vicinity of" the named cities and RAFB. 30 TEX. ADMIN. CODE § 351.61(2).

The Commission's findings of fact state that the discharge of effluent into Santa Clara Creek is located "within the corporate limits or extraterritorial jurisdiction of [the city of] Cibolo,"[10] but finds that the proposed outfall will discharge effluent outside the Cibolo Creek regional area. At first glance, these findings appear to be in conflict with one another. CCMA/Schertz argue that if the discharge area is within the Cibolo city limits, it must be necessarily "in the vicinity of" the Cibolo Creek regional area as defined in sections 351.61 and 351.65. However, in a section titled "Explanation of Changes," the Commission's order clarifies its reason for the seemingly conflicting findings:

> The Commission determined that the [ALJ] misinterpreted [section] 351.62(2) by interpreting the phrase "in the vicinity of" as requiring the proposed discharge to be in the vicinity of one of the listed cities or the air force base in the regional area definition . . . . The phrase "in the vicinity of," as used in the definition, serves as a signal to look at the listed communities and air force base as a whole to determine which part of Cibolo Creek watershed constitutes the "regional area." Based on the proper interpretation of § 351.62(2), the Commission determined that there is sufficient evidence in the record to conclude that Green Valley's proposed discharge will not be located within the "regional area."

(alterations and ellipsis added). In other words, the Commission reasons that the regulation defines the regional area as being in the vicinity of <u>all</u> the listed cities and the air force base; a discharge point in Cibolo would not meet the regulation's definition unless the discharge point was also in the vicinity of the region's other communities and RAFB.

[10] The Commission explained that due to conflicting evidence regarding whether the proposed discharge would be in the City of Cibolo's corporate limits or extraterritorial jurisdiction, the Commission's findings included both.

We hold that the Commission did not err in its findings that Green Valley's proposed discharge point is not within the Cibolo Creek regional area as defined by section 351.61(2). Under CCMA/Schertz's proposed reading, discharge of effluent would occur within the regional area if it occurred in the vicinity of the air force base or any one of the cities, including the City of Cibolo. But the plain language of section 351.61(2) does not use the disjunctive word, "or." Rather, the section defines the regional area as that 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." *Id*. (emphasis added).

When interpreting statutes, our Supreme Court has held for nearly eighty years that the terms "and" and "or" are not synonymous except in certain instances:

> Ordinarily the words 'and' and 'or,' are in no sense interchangeable terms, but, on the contrary, are used in the structure of language for purposes entirely variant, the former being strictly of a conjunctive, the latter, of a disjunctive, nature. Nevertheless, in order to effectuate the intention of the parties to an instrument, a testator, or a legislature, as the case may be, the word 'and' is sometimes construed to mean 'or.' This construction, however, is never resorted to except for strong reasons and the words should never be so construed unless the context favors the conversion; as here it must be done in order to effectuate the manifest intention of the user; and where not to do so would render the meaning ambiguous, or result in an absurdity; or would be tantamount to a refusal to correct a mistake.

Bd. of Ins. Comm'rs v. Guardian Life Ins. Co., 142 Tex. 630, 635, 180 S.W.2d 906, 908–09 (1944). *See also Premier Learning Acad., Inc. v. Tex. Educ. Agency*, 521 S.W.3d 439, 446 (Tex. App.—Austin 2017) (holding that statute's use of the term "and" among list of conditions requires that all conditions must be met); Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS § 12, 116 (2002) ("Under the conjunctive/disjunctive canon, and combines items while or creates alternatives. . . . With

a conjunctive list, all . . . things are required—while with the disjunctive list, at least one of the [things] is required, but any one . . . satisfies the requirement.").

We find nothing ambiguous in the language defining the Cibolo Creek regional area, nor do we think the context requires reading-in the word "or" to effect the drafter's true intentions. The record establishes that in the early 1970s, CCMA was created to improve water quality issues in Cibolo Creek immediately below the Edwards Aquifer recharge zone due to two waste dischargers, Universal City and the San Antonio River Authority Salitrillo facility. A 1972 draft order listed "protecting this portion of Cibolo Creek" as a reason for establishing the Cibolo Creek regional area as defined. On the other hand, Santa Clara Creek, where Green Valley will discharge effluent, sits on the other side of a ridge that separates Cibolo Creek. The cities of Marion and Santa Clara are in the Santa Clara Creek Watershed and are not included among the cities in the defined regional area.

Moreover, when discussing the provisions defining the Cibolo Creek regional area, the Commission referred to a map depicting Cibolo Creek and Santa Clara Creek, as well as section 351.61(2)'s named cities and RAFB. The Commission noted that the discharge from Green Valley's proposed facility would follow the same portion of Santa Clara Creek as that used by the City of Marion, which is not a part of the Cibolo Creek regional area. The treated effluent does not join Cibolo Creek until approximately 6.5 miles downstream from the nearest corporate limits of the cities or RAFB. This provides support behind the logic that section 351.61(2) intended to limit the regional area to the vicinity of all five cities and RAFB, not just a singular city on the list.

We hold that the Commission was not unreasonable in implicitly finding that Green Valley's proposed discharge of domestic wastewater effluent will not occur in "that portion of the Cibolo Creek Watershed lying in the vicinity of" the named cities and RAFB. *See Jenkins*, 537 S.W.3d at 149. "Vicinity" is defined as "The quality of the state of being near: NEARNESS, PROPINQUITY, PROXIMITY." WEBSTER'S THIRD INTERNATIONAL DICTIONARY 2550 (3RD Ed. 1976). Evidence shows that the process of trying to pinpoint an area within the "vicinity" of the cities is not a precise process; as one expert described, it is incapable of being defined by metes and bounds.[11] While "close" may count in horseshoes and hand grenades, defining "vicinity" in litigation under these circumstances affords the Commission substantial discretion to make a reasonable determination based on the available evidence. We find that substantial evidence of record supports the Commission's findings, and we find reasonable the Commission's determination that section 351.65 does not prohibit Green Valley's proposed facility for discharging wastewater into Santa Clara Creek.

CCMA/Schertz also contend that by granting Green Valley a TPDES permit, the Commission is violating its policy promoting regionalization of waste treatment services in Texas.[12] We disagree. Under the Commission's policy on regionalization, it presumes its policies are met if there is not an existing plant within three miles of a proposed plant.[13]

[11] Another expert described the term as "vague."

[12] The Commission regional policy "declares that it is necessary to the health, safety, and welfare of the people of this state to implement the state policy to encourage and promote the development and use of regional and area-wide waste collection, treatment, and disposal systems to serve the waste disposal needs of the citizens of the state and to prevent pollution and maintain and enhance the quality of the water in the state."

[13] CCMA/Schertz do not challenge the Commission policy based on its three-mile rule.

Here, none of the cities in the regional area possess a wastewater treatment plant within the area; CCMA's proposed plant is more than five miles from Green Valley's proposed facility.

CCMA/Schertz's claims about regionalization also ring hollow in light of the other evidence. CCMA did not propose to promote regionalization by, say, building a plant to service Green Valley's entire CCN. Instead, CCMA/Schertz proposes that Green Valley build an expensive system of trunk mains and lift stations to deliver a portion of the wastewater to CCMA. CCMA then desires Green Valley (who will have no control over how the facility is operated) to pay one-third of the operating costs of the facility. The Commission has the authority to take this evidence into account. Having considered the entire record, we find there is substantial evidence of record that the Commission's determination that issuance of a TDPES permit to Green Valley will promote regionalization and is reasonable.

Conclusion

The district court correctly upheld the Commission's final order. We affirm the judgment of the district court.

Lawrence M. Doss
Justice

Parker, J., concurs in the result.