

TCEQ DOCKET NO. 2023-0386-MWD

APPLICATION OF THE VANTAGE	§	
AUSTIN, LLC FOR NEW TEXAS	§	BEFORE THE TEXAS COMMISSION
POLLUTION DISCHARGE	§	
ELIMINATION SYSTEM PERMIT	§	ON ENVIRONMENTAL QUALITY
NO. WQ0016132001	§	

**JONAH WATER SPECIAL UTILITY DISTRICT’S REPLY TO
THE VANTAGE AUSTIN, LLC, OFFICE OF PUBLIC INTEREST COUNSEL AND
THE EXECUTIVE DIRECTOR’S RESPONSES TO HEARING REQUESTS**

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW, Jonah Water Special Utility District (“Jonah” or the “District”) and files this its Reply to The Vantage Austin, LLC (“Vantage”), Office of Public Interest Counsel (“OPIC”), and Executive Director’s (“ED”) Responses to Hearing Requests and, in support thereof, would respectfully show the following:

I. INTRODUCTION

The District filed a timely request for contested case hearing with the Texas Commission on Environmental Quality (“TCEQ”) on September 22, 2022. On April 3, 2023, Vantage, OPIC and the ED filed responses to the hearing requests. The District agrees with the conclusions reached by the ED and OPIC regarding the District’s status as an affected person under applicable TCEQ rules and the list of issues identified for consideration at a contested case hearing. Therefore, this Reply addresses only the analysis filed by the Vantage.

II. REPLY TO THE VANTAGE AUSTIN, LLC

A. Jonah’s hearing request is valid.

Vantage asserts that because Jonah did not again submit or reassert its request for a hearing after the ED’s Response to Comments was filed, this somehow makes Jonah’s request invalid. However, Vantage’s argument is without merit. 30 Tex. Admin. Code (“TAC”) Section 55.201(a) requires that a request for a contested case hearing must be filed **no later than** 30 days after the chief clerk mails (or otherwise transmits) the executive director’s decision and response to comments (“RTC”). (emphasis added). Vantage focuses on the word “after” to assert that the

request must be filed after the RTC is filed. However, one has to look no further than the next subsection of TCEQ's rules for additional clarification. Specifically, 30 TAC § 55.201(c) provides:

“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provided by subsection (a) of this section, may not be based on an issue that was raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's Response to Comment, and, for applications filed on or after September 1, 2015, must be based only on the requestor's timely comments.”

Based on this language, the request must be based only on the requestor's timely comments that were not withdrawn prior to the ED's filing of the RTC, but nowhere does the rule prohibit the hearing request from being submitted before the ED's RTC is filed. In this case, Jonah submitted the timely comments and the hearing request on September 22, 2022, well before their respective deadlines for these filings, and Jonah has not withdrawn any comments that form the basis of its hearing request. Therefore, Jonah's hearing request is timely and valid.

B. Jonah has standing to contest this permit.

Vantage takes a stream of consciousness approach to attacking Jonah's standing, including arguments regarding the timing of Jonah's request, the location of Jonah's facilities, affected person status, and regionalization. The timing of the hearing request is addressed above. The remaining items are addressed below.

1. The location of the proposed facility will impact Jonah's CCN Territory and Jonah's District boundaries.

Vantage's Exhibit B is deceiving with regard to the proposed facility's proximity to and impact on Jonah's water CCN territory and District boundaries.¹ The exhibit shows a close-up view of the proposed wastewater treatment plant's ("WWTP") location in relation to the development intended for service and shows that a portion of the tributary that will carry the wastewater effluent crosses over Jonah's district boundary. However, this does not provide sufficient reference regarding the location of the WWTP to Jonah's water CCN territory or District boundaries. A clearer reflection of the relative relationship of the proposed site to Jonah's water

¹ Jonah is the holder of Certificate of Convenience and Necessity ("CCN") No. 10970, for providing water service within its CCN territory.

CCN territory and District boundaries can be seen in Exhibit A to this pleading. As reflected therein, the proposed WWTP will be located entirely within Jonah's water CCN territory and nearly adjacent to Jonah's District boundaries. The area is also adjacent to the Weir Water Works CCN boundary that will be discussed in more detail in Sections 2 and 3, below.

2. Jonah is an affected person in accordance with TCEQ Rules.

As explained in its hearing request, Jonah is an affected person under TCEQ rules. In an attempt to distract the Commission and exclude Jonah from this proceeding, Vantage focuses on factors that are not determinative regarding affected person status and, thus, standing in this case, and discounts those factors that are relevant. Vantage equates standing for this matter with having a wastewater treatment plant or sewer CCN. However, standing to contest a wastewater discharge permit is not dependent on either of these two factors. Instead, to grant a contested case hearing, the commission must determine, pursuant to 30 TAC § 55.203, that a requestor is an affected person based on the following criteria:

- (a) 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 public does not qualify as a personal justiciable interest.
- (b) Governmental entities, including local governments and public agencies with authority under state law over issues raised by the application, may be considered affected persons.
- (c) In determining whether a person is an affected person, all factors shall be considered, including, but not limited to, the following:
 - (1) whether the interest claimed is one protected by the law under which the application will be considered;
 - (2) distance restrictions or other limitations imposed by law on the affected interest;
 - (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
 - (4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;
 - (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
 - (6) whether the requester timely submitted comments on the application which were not withdrawn; and
 - (7) for governmental entities, their statutory authority over or interest in the issues relevant to the application.
- (d) In making this determination, the commission may also consider, to the extent consistent with case law:
 - (1) the merits of the underlying application and supporting

- documentation in the commission's administrative record, including whether the application meets the requirements for permit issuance;
- (2) the analysis and opinions of the ED; and
 - (3) any other expert reports, affidavits, opinions, or data submitted by the ED, the applicant, or hearing requestor.
- (e) In determining whether a person is an affected person for the purpose of granting a hearing request for an application filed before September 1, 2015, the commission may also consider the factors in subsection (d) of this section to the extent consistent with case law.²

In its analysis of the requirements for standing, Vantage relies on criteria in 30 TAC § 55.203(b) that allows a governmental entity to be an affected person if it has “*authority under state law over issues raised by the Application,*” arguing that Jonah has no such authority. However, the proposed facility is within Jonah’s water CCN boundary and if the permit is approved, effluent will flow through Jonah’s District boundaries.³ One of the sources of raw water Jonah uses to serve its customers is Lake Granger (the “Lake”) which is fed by the San Gabriel River (the “River”), one of the tributaries that will receive effluent from the proposed facility. As can be seen on the map attached hereto as Exhibit A, the River bisects Jonah’s CCN territory and District boundaries, running nearly parallel with Highway 29. Because the effluent that would flow from this proposed facility will flow through the District and Jonah’s water CCN territory and into the body of water that Jonah uses as its water source, this effluent could negatively impact the water quality of both the River and the Lake, a significant issue over which Jonah has legal authority. Furthermore, Jonah’s duty to provide fresh, clean, potable water meeting all of the state and federal water quality standards, makes Jonah’s interest in the quality of its source water an interest that is not common to the general public.

Moreover, 30 TAC § 55.203(c)(7) requires that the governmental entity have “statutory authority over *or interest in the issues relevant to the application.*”⁴ This language makes clear that the governmental entity can establish affected person status based in part on an “interest in issues relevant to that application” and not just those over which it has legal authority. As articulated above, the District has a substantial interest in issues relevant to the application. The

² *Id.* at 30 TAC § 55.203(d).

³ Both the ED and OPIC acknowledge that the area is within Jonah’s CCN territory. *See* ED’s Response to Hearing Requests at 8.

⁴ 30 TAC§ 55.203(c)(7) emphasis added.

proposed facility is entirely surrounded by Jonah's water CCN, adjacent to the Weir Water Works system CCN boundary that Jonah is in the process of purchasing, and, as noted above, all effluent is proposed to be discharged into water bodies that flow through Jonah's District boundaries and into its water source. Given this information, both water quality and regionalization issues, discussed in more detail below, are two of many issues in which Jonah has an interest that are relevant to the application.

Finally, in accordance with 30 TAC § 55.203(d), in making a determination regarding affected person status, the commission may also consider the analysis and opinions of the ED. In this case, the ED found that Jonah is an affected person.⁵ The ED's Response to Hearing Requests points to the fact that the proposed facility is both within Jonah's service area and within 2.41 miles of its service lines, that Jonah has raised issues regarding protection of water quality in the Lake, its raw water source, and regionalization concerns. The ED relies on these factors to assert that Jonah will be personally affected by the application in a way not common to the general public. Therefore, the ED recommends that the Commission find that Jonah is an affected person under 30 TAC§ 55.203.

3. Jonah's opposition to the application is in furtherance of the State's Regionalization Policy.

As a special utility district that provides water service within its District boundaries, and in this case within additional area under its water CCN, Jonah has authority over regionalization concerns. To further the State's policy regarding regionalization, Jonah has undergone the process to acquire and operate the small water systems that are within its certificated area. For example, Jonah and Foster Consolidated Investments, LLC ("Foster") previously entered into an Asset Purchase and Sale Agreement for the sale of (1) the Chaparral III water system, also known as the McShepherd system (PWS No. 2460047); (2) the Green Acres Water Supply system (PWS No. 2460054); and (3) the Walburg system (PWS No. 2460016), effective June 12, 2015. Additionally, Jonah is in the process of acquiring the Weir Water Works system (PWS No. 2460017) and, by contract, has begun operating the Weir Water Works system for Foster. This process ensures consistency in operations by qualified staff, maintenance of equipment, and continuous and adequate service to the area. For reference, the Weir Water Works CCN territory is located in the

⁵ See also Office of Public Interest Counsel's Response to Requests for Hearing at 7, wherein OPIC found that Jonah qualifies as an affected person under 30 TAC § 55.203(c).

area marked on the map attached hereto as Exhibit A and located just south of the Vantage Austin Area.

Additionally, Jonah provides wholesale wastewater service to an area south of the proposed facility. As a special utility district, Jonah's creation documents grant it all of the rights, powers, privileges, authority, and functions conferred by and shall be subject to all of the duties imposed by, the rules and regulations of the Texas Water Code ("TWC") and the general laws of the State of Texas relating to special utility districts. In accordance with TWC § 65.201(b)(2) these powers include the authority to collect, transport, process, dispose of, store, and control domestic, industrial, or communal wastes whether in fluid, solid, or composite state. A certificate of convenience and necessity is not required for the provision of water or wastewater service within the district's boundaries and thus Vantage's reference to a wastewater CCN is not relevant to whether Jonah may provide wastewater service within its district boundaries.

III. CONCLUSION AND PRAYER

Jonah submitted timely comments and a timely hearing request and has not withdrawn any comments making Jonah's pending hearing request valid. Given the proximity of the proposed facility to Jonah's water CCN territory and District boundaries, the probable impact of this proposed facility on water quality and water bodies used by Jonah in its provision of water service, and the State's policy regarding regionalization, Jonah has demonstrated that it is an affected person under TCEQ rules.

WHEREFORE, PREMISES CONSIDERED, Jonah Water Special Utility District hereby prays that the Texas Commission on Environmental Quality grants the District's hearing request.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have served or will serve a true and correct copy of the foregoing document on all parties of record on this 17th day of April 2023, as follows:

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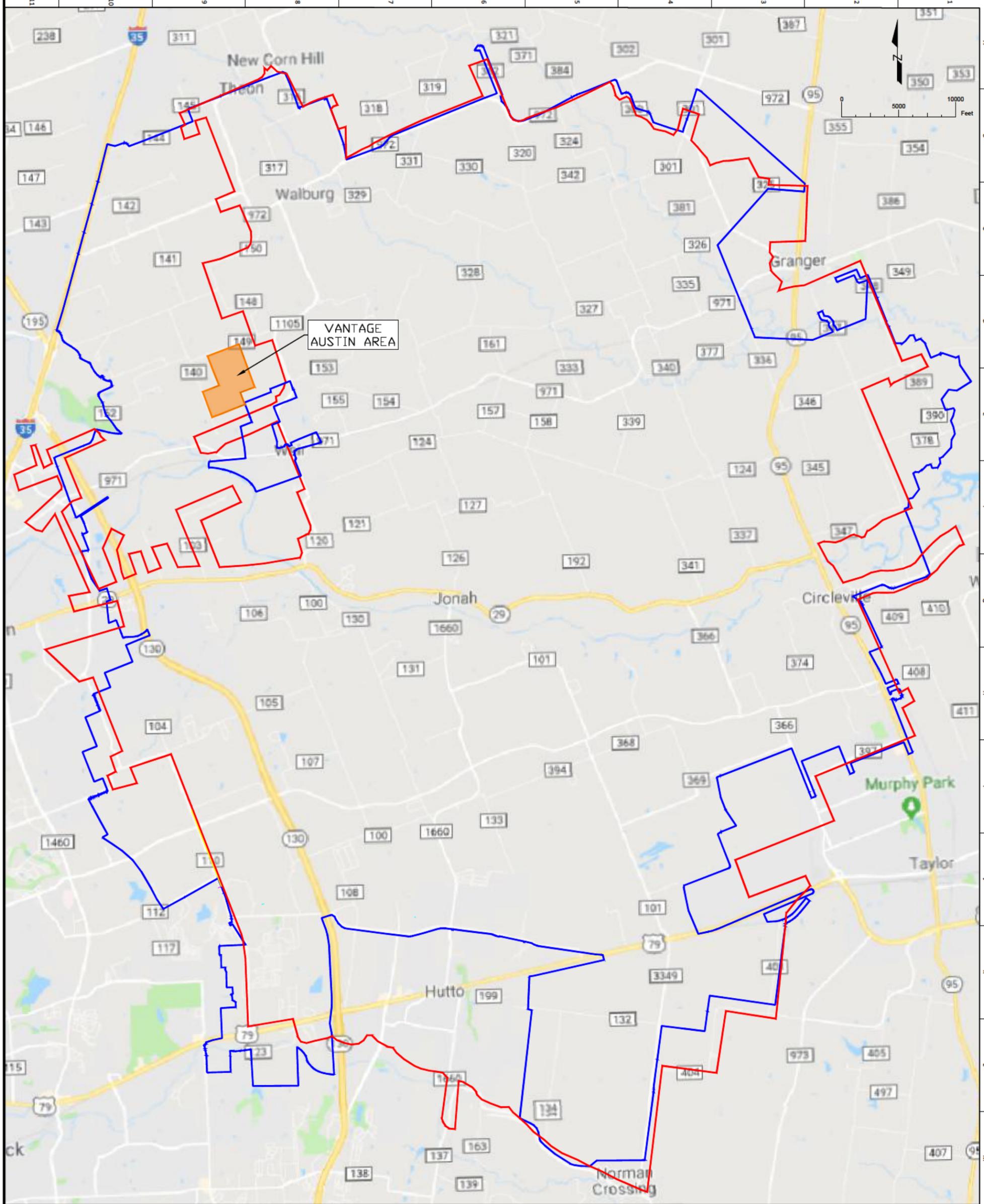
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NOTES:

- INFORMATION USED TO CREATE JONAH'S CCN BOUNDARY WAS ACQUIRED FROM THE PUBLIC UTILITY COMMISSION OF TEXAS' (P.U.C.) WEBSITE ON APRIL 6, 2022
- INFORMATION USED TO CREATE JONAH'S S.U.D. BOUNDARY WAS ACQUIRED FROM THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY'S (T.C.E.Q.) WEBSITE ON APRIL 7, 2022
- LINE LOCATIONS ARE FOR REPRESENTATION ONLY, CONTACT APPLICABLE UTILITY PROVIDER FOR FIELD LOCATIONS
- THIS PRODUCT IS FOR INFORMATIONAL PURPOSES ONLY. IT DOES NOT REPRESENT AN ON-THE-GROUND SURVEY AND REPRESENTS ONLY THE APPROXIMATE RELATIVE LOCATION OF THE INFRASTRUCTURE.
- JONAH WATER S.U.D. NOR ITS REPRESENTATIVES SHALL BE LIABLE TO ANY PERSON OR ENTITY WITH RESPECT TO ANY LIABILITY, LOSS, OR DAMAGE CAUSES OR ALLEGED TO BE CAUSED DIRECTLY OR INDIRECTLY BY USE OF THIS MAP.

-  JONAH WATER'S CCN BOUNDARY (WATER)
-  JONAH WATER'S DISTRICT BOUNDARY
-  VANTAGE AUSTIN DEVELOPMENT AREA (DERIVED FROM EXHIBITS PROVIDED IN TCEQ DOCKET NO. 2023-0386-MWD)

REVISION DESCRIPTION	DATE	BY	CKD