

Why Pass the Vista Ridge Resolution and Why Now?

Prepared for the San Antonio City Council, September 2019 by

The Vista Ridge Resolution Coalition: *(in alphabetical order)*

Alamo Sierra Club
Bexar County Green Party
Environmental Stewardship
Farm and Ranch Freedom Alliance
Homeowner-Taxpayer Association of Bexar County
Joshua Initiative
LULAC Concilio Zapatista 4383
League of Independent Voters of Texas (LIV)
San Antonio Making Bureaucracies Accountable (SAMBA)
Simsboro Aquifer Water Defense Fund (SAWDF)

The proposed Resolution ([Attachment A](#)) has three goals:

1. Clarifying the policymaking role of San Antonio Water System (SAWS) and its need for more openness and transparency;
2. Carrying out an independent review of the Vista Ridge Project to assess risk and develop lessons learned; and
3. Providing for the open and expeditious replacement of outgoing SAWS Board members.

Below are major areas of concern and the requested actions.

1. The Vista Ridge Project was rushed through City Council's review process and carries hidden risks and liabilities that could seriously harm the City, SAWS' ratepayers, and a critically important Texas water resource.

The vetting process of the Vista Ridge Project by the City Manager and City Council reflects a serious failure to conduct the appropriate due diligence. For example, two years ago, the Greater Edwards Aquifer Alliance (GEAA) shared the attached legal critique of the Vista Ridge Water Transport and Purchase Agreement and the contract amendments (collectively, the "Vista Ridge WTPA"). (See the critique and cover letter from GEAA as [Attachment B](#). Please note today we are referring to the issues in this letter that remain unresolved. Eminent domain issues are resolved.) Yet our understanding is that the findings of the critique are largely unknown to Council and the general public despite significant issues being raised. At a minimum, they have never been officially considered.

The critique demonstrates that the Vista Ridge contract does not protect SAWS, SAWS ratepayers, or the City of San Antonio, from significant risks. The author of the work is a pre-eminent environmental attorney (Eric Allmon of Frederick, Perales, Allmon and Rockwell, PC). The critique raised a number of concerns, including:

- a. SAWS' wholesale water rates are subject to Public Utility Commission of Texas (PUCT) oversight and can be challenged by the private interests that own the Vista Ridge project in the future. While SAWS told the Council that water rates are fixed over the thirty year life of the WTPA, that is not wholly accurate, and the rates could be increased by the PUCT given adequate grounds. A known "regulatory risk" that would be grounds for increasing rates would be reductions in allowable pumping, discussed further below.
- b. The Vista Ridge WTPA lists groundwater leases that cannot be relied upon for Vista Ridge water.
- c. The amendments to the Vista Ridge WTPA have put ratepayers and the City of San Antonio at risk.

Action Requested:

- City Council members should carefully review the critique of the WTPA and satisfy themselves as to the validity of Mr. Allmon's conclusions. Should Council conclude that even a portion of the critique is valid, that alone would be ample reason for Council to call for an independent review of Vista Ridge and act expeditiously to enact the reforms proposed in the Vista Ridge Resolution.

2. The best information available provides credible evidence that the Vista Ridge project constitutes a serious risk to the central portion of the Carrizo-Wilcox Aquifer (Aquifer), especially its Simsboro formation (Simsboro).

Post Oak Savannah Groundwater Conservation District (POSGCD) has issued production permits for Vista Ridge far in excess of what its groundwater management plan estimates as being available. The best available information indicates that the permitted pumping will lead to drawdowns of the Aquifer beyond the desired future conditions and will either have to be severely curtailed or lead to permanent damage to the Aquifer, or both.

In 2015, a study was commissioned on the effects of Vista Ridge on the Aquifer. The study was conducted by former Edwards Aquifer Authority Board Member and San Antonio-based groundwater hydrologist, George Rice, who has studied the Aquifer professionally for 20 years. The Rice study on the effects of Vista Ridge on Burleson, Milam, and neighboring counties, concluded:

[The] Vista Ridge water supply project would drop water levels and hydraulic (water) pressure hundreds of feet in the Simsboro and Carrizo aquifers [i.e., the two sources of Vista Ridge water]. The state's model also predicts that Vista Ridge pumping would reduce contributions of groundwater to stream flow in the Colorado and Brazos rivers as pumping increases.

(See media release as [Attachment C](#), the entire 13-page study as [Attachment D](#).)

Rice also applied the state's model to show drawdowns in the Simsboro from Vista Ridge alone would be as great as 400 feet by 2060 in the areas of Burleson and Lee counties nearest the Vista Ridge well-field, with significant drawdowns as far south as Fayette and Colorado counties.

In 2016, Rice conducted a supplemental study in light of the additional 81,000 acre-feet per year requested for three additional "mega-permits" in the Simsboro by the Lost Pines Groundwater Conservation District (LPGCD), which shares the Aquifer with POSGCD.^[1]

Rice reiterated his conclusions from the 2015 Report. He further found that Vista Ridge pumping in the Simsboro, plus the additional Simsboro pumping annually in LPGCD, will cause the Simsboro Desired Future Conditions^[2] to be exceeded in 2020 in LPGCD and before 2030 in POSGCD (Read press release [Attachment E](#), and full 15-page study [Attachment F](#).)

Since the Rice studies:

- LCRA has applied for another mega-permit for Simsboro water in Bastrop County, for an additional 25,000 AFY, further increasing the probability that the aquifer will be rapidly drawn down and damaged.
- Milam County rancher and respected journalist, Dr. Curtis Chubb, has surfaced a U.S. Army Corps of Engineers Environmental Impact Statement that found the

^[1] These requests comprise Simsboro permits for: Forestar Real Estate Group for 28,500 acre-feet/year; End Op, now "Recharge" for 46,000 acre-feet/year, and LCRA for 6,500 acre-feet/year, which when added to the approximately 35,000 acre-feet Vista Ridge will pump from the Simsboro equals 116,000 acre-feet/year of additional pumping in the Simsboro over and above "baseline" pumping.

^[2] "Desired future conditions" (DFCs) are defined in Title 31, Part 10, §356.10 (6) of the Texas Administrative Code as "*the desired, quantified condition of groundwater resources (such as water levels, spring flows, or volumes) ... as defined by participating groundwater conservation districts ... as part of the joint planning process.*" In effect, DFCs are the management goals for the aquifers and are used to establish the "modeled available groundwater" (MAG), which is the basis for groundwater permitting in Texas. The official Simsboro DFC by 2060 for POSGCD are 300 feet of drawdown and by 2070 are 240 feet of drawdown in LPGCD. The official Simsboro DFC by 2060 are 237 and 300 feet of drawdown in the Simsboro in LPGCD and POSGCD, respectively. Of note is that Vista Ridge's 50,000 acre-ft/yr *alone* already greatly exceeds the existing MAG for POSGCD, without consideration of the impacts of an additional 81,000 acre-ft/yr of pumping

Simsboro would require 40 years to mostly recover, and 100 years to fully recover, from pumping an average 7,500 acre-feet per year for just 26 years. (See US Army Corps of Engineers, Three Oaks Mine, Draft Environmental Impact Statement, August 2002, Section 3.2.3.5, Residual Adverse Effects; page 3.2-57, <https://tinyurl.com/y44gwwhs>)^[3] See [Attachment G](#) for copy of Section 3.2.3.5.

Yet Vista Ridge will pump **five times as much water per year** from the Simsboro, and San Antonio is investing in it as if it will continue for many decades. It is thus probable that Vista Ridge's pumping will be curtailed, but not before damage is done that will take centuries to repair.

All of the above indicate that Vista Ridge will irreversibly damage the Aquifer, at the expense of those currently reliant upon it, as well as the future generations that will suffer from the profligate use of this precious, virtually irreplaceable resource.

This fact poses not only serious ethical issues, but significant practical and financial issues for the City of San Antonio. POSGCD's rules authorize it to curtail groundwater pumping, although the triggers for such cutbacks are ambiguous and inevitably will lead to costly and contentious legal actions. SAWS apparently believes that it will not be subject to such curtailments; SAWS attorney and lobbyist, Steve Kosub, at the Texas Water Conservation Association Groundwater Committee meeting on September 7, 2018, was heard to say that **SAWS will not be bound by POSGCD's uniform curtailment rules in the event the Simsboro Aquifer is degraded by permitted pumping**. There is no legal basis for such a belief, however. The City of San Antonio is thus investing significant time, money, and political capital in a water resource that poses significant risk of not being reliable in the long-term.

Actions Requested:

- Meet with representatives of the Vista Ridge Resolution Coalition to discuss the impacts on intergenerational equity, the livelihoods and sustainability of the affected communities, downstream water users along the Colorado and Brazos Rivers, San Antonio's policies and commitments to sustainability and being a "good neighbor," and the health of one of central Texas' most important aquifers.

^[3]The 2002 Draft EIS was finalized in May, 2003, and included this abstract: from the military engineer at USACE who signed off on the final: "This final EIS has been prepared in an abbreviated format: the final EIS must be used in conjunction with the Draft EIS report which was issued August 23, 2002. The Draft EIS and the final EIS together comprise the complete EIS." (emphasis added) The final EIS in fact included no changes to Section 3.2.3.5, Residual Adverse Effects, as it appeared in the draft EIS. It should also be noted that the information in Section 3.2.3.5 apparently was derived from information provided to the Texas Railroad Commission by Alcoa as the applicant for the Three Oaks Mine Permit. Final Environmental Impact Statement, May 2003, <https://play.google.com/books/reader?id=HDY0AQAAMAAJ&hl=en&pg=GBS.SA2->

- Assess the risks that regulatory and/or legal action will require POSGCD to reduce the permitted pumping for Vista Ridge, and thus (i) force SAWS to seek replacement water supplies from elsewhere to meet its needs and (ii) cause the Vista Ridge operators to go before the PUCT and obtain rate increases to service their debts and meet their contractual obligations.
- Assess the moral and ethical implications for San Antonio should Vista Ridge pumping lead to large-scale and irreversible damage to a major aquifer; and, subsequently, adopt a binding “Sustainable Water Supply Management” policy that commits San Antonio, in meeting its water supply needs, to neither promote nor contribute to the unsustainable use of surface, ground or rainfall runoff waters.

3. The financials of Vista Ridge require public clarification, and may require action to address illegal use of public funds.

One of the more troubling aspects of Vista Ridge’s financials is the missing \$120 million Bridge Loan. This loan was taken out by Abengoa to purchase materials for the construction of the pipeline. The information available indicates that Abengoa never purchased these materials. Rather, in the sale of the project to Garney Construction, this \$120 million was added to the purchase price.

On the face of it, Abengoa seems to have paid itself an additional \$120 million for organizing the Vista Ridge project, in addition to the estimated \$65 million that Garney paid to Abengoa to purchase an 80% stake in the project. Abengoa retains a 20% stake in the project. If this were a private business matter, it would be of no concern. However, SAWS accepted this \$120 million debt as part of the project price, **so that SAWS ratepayers assume the burden of its repayment.** Yet the \$120 million appears to have been entirely for Abengoa’s private profits, with no benefit to the ratepayers. As explained in the Allmon critique (Attachment B, Number 1, page 3):

“The ‘Bridge Loan’ borrowed on July 20, 2015 by then Project Company Abengoa for Vista Ridge was apparently included in the liabilities assumed by Garney as a part of this amendment to the Contract. It was never explained how this money was spent or why it was rolled into the cost of the project for SAWS ratepayers. Not only has the missing \$120 million been hidden from ratepayers, it has also never been explained whether this is in fact legal, given the Texas Constitution’s prohibition on gratuitous gifts of public money for private purpose.”

Actions Requested:

- **Pass the Vista Ridge Resolution calling for an Independent Managerial, Legal, and Financial Review of the Vista Ridge Project:** The current mayor and several council members have raised questions and objections related to potential risks, liabilities and decisions taken during Project deliberations. Yet, to our knowledge, the City has never considered commissioning an independent review of the Project; something that ideally would have been done before SAWS Board and City Council approved the contract. There are two compelling reasons for such an independent review to be carried out now: (i) the sheer magnitude and expense of the Project, combined with its potential liabilities and risks still demand an unbiased, third party review [See Sections 5-8 of the Resolution]; and (ii) the City will increasingly become involved in public-private partnerships in the future and should learn from the Vista Ridge lessons, experiences and any mistakes. If mistakes were made during the review and approval process (e.g., a lack of appropriate due diligence), the City should then adopt guidelines to avoid repeating these errors.
- **Make the independent review – both in terms of process and its results – open to the public.** Such transparency is needed to ensure all concerned actors and stakeholders, including SAWS, may be informed and provide information and/or put forth counterarguments – legal, financial and hydrologic – as appropriate.

Note that the San Antonio City Charter authorizes City Council to conduct investigations, subpoena witnesses, and compel production of evidence (see Article V, Section 48).

4. SAWS is acting, both in its commercial and political capacities, without proper transparency or oversight by the City Council.

SAWS has taken aggressive actions, both in its commercial actions and in the political arena, without consulting its stakeholders (i.e. SAWS ratepayers) or seeking City Council Approval.

For example, SAWS is pursuing a major policy shift to become a regional water supplier. This shift would have inevitable impacts on SAWS structure, management, functions, and costs, and so it carries direct implications for its current ratepayers and for the City of San Antonio. A decision of this nature should be made only following (i) City Council's approval for SAWS to explore the idea of becoming a regional water supplier; (ii) SAWS carrying out a study to ascertain the feasibility of such a move, to include among other things, identifying its potential market; evaluating the costs, benefits and tradeoffs of implementing such a policy; identifying the risks (including environmental and social) associated with such a change; and providing a clear and costed risk mitigation strategy for managing these risks; (iii) SAWS presenting the study for public comment, and then to City Council, along with its specific recommendations on the extent that SAWS might pursue a role as a regional water supplier; (iv) an independent appraisal of SAWS proposal (including review and comment by the Regional Water Planning

Group), to be presented for public comment and to City Council; and (v) City Council's review and approval, or rejection.

Similarly, SAWS has repeatedly pursued legislative agendas that are at odds with the interests of its ratepayers and the City. House Bill 1806, which was a priority bill of the SAWS lobby team in the 2019 session, was promulgated without discussion or approval of City Council. HB 1806 would have allowed SAWS to sell Edwards Aquifer water at wholesale prices for use in any county adjacent to Bexar County, i.e., beyond the currently prescribed zones of the Edwards Aquifer Authority.

Notably, in seeking approval of the Vista Ridge project, SAWS argued that Vista Ridge would allow pumping pressure to be reduced on the Edwards Aquifer. Instead, in HB 1806, it is now seeking to continue pumping and selling Edwards water – outside its service area—and use Vista Ridge water—the state's most expensive groundwater that comes from 142 miles away and costs 5 to 6 times more than wholesale Edwards water – for its own ratepayers.

Fortunately, while HB 1806 passed the Legislature, it was vetoed by Governor Abbott. See veto letter as [Attachment H](#).

We know of no other Texas public utility that operates its own lobby arm without approval from its governing authority, in this case San Antonio City Council. Actions such as this increase the risk of litigation, a risk exacerbated by the fact that SAWS has gone back on its word to Bureson County authorities. During the negotiations of the Vista Ridge project, both SAWS CEO Robert Puente and SAWS Trustee Reed Williams assured the local authorities that SAWS would do nothing to undermine local control and management of the Aquifer. Since making that promise, SAWS has sought to undermine local control through the introduction of bills in the State Legislature (e.g., HB 2378 in 85th Legislature).

Actions Requested:

- Pass the Vista Ridge Resolution *Clarifying the Policymaking Role of San Antonio Water System and Its Need for More Openness and Transparency*. [See Section 4 of the Resolution]
- Clarify to SAWS Board of Trustees that prior City Council approval will be required before SAWS could take steps to become a regional water supplier (i.e., adding a line of business for selling water and/or sewage services outside of San Antonio's corporate limits and its ETJ, and beyond Bexar County)

5. SAWS Board members are not being replaced in a timely fashion, resulting in term-expired individuals remaining on the Board in contravention of SAWS' governing ordinance.

Under Paragraph 32B of the 1992 Ordinance establishing SAWS (Ordinance No. 75686), Mr. Heriberto “Berto” Guerra, the SAWS Board of Trustees Chairperson, concluded his second term on the SAWS Board as of May 31, 2018. The Ordinance prohibits any individual from serving more than two terms, and thus Mr. Guerra is ineligible for re-appointment to the Board and should have been replaced in 2018.

Similarly, Trustee Patricia Merritt also ended her first term on May 31, 2018 and should have either been reappointed or replaced.

The Board has taken a number of important decisions since Guerra’s and Merritt’s terms ended, such as awarding many millions of dollars of contracts and approving the selection of EPCOR USA as the operator for the multi-billion dollar Vista Ridge project.

A recent decision taken with votes by these term-expired individuals has been controversial. Specifically, at their board meeting on July 2, 2019, the SAWS Trustees passed a 5% raise and \$100,000 bonus to CEO Robert Puente without providing full disclosure of the criteria and performance ratings upon which Puente’s raise and bonus were based. The City is paying two consultant firms \$193,000 to evaluate the CEO’s performance, but leaving ratepayers in the dark about what we are paying for.^[4] Guerra and Merritt both voted in favor of the raise and bonus, despite the fact that they should have been replaced over a year before this vote.

Actions Requested:

- Replace Mr. Guerra and appoint a new chairman of the Board. Ms. Merritt should be replaced or reappointed; if she is reappointed, her last term should end on May 31, 2022, consistent with the expiration date of her first term.
- Set a transparent process for appointments, allowing enough time for new applicants to step forward. The Council should publicize these vacancies in accordance with Article 32 of the Ordinance 75686. [See Section 10, Resolution.]

6. SAWS has a history of neglecting or slow-rolling requests for Public Information. This violates the public trust.

When members of the public ask for information related to SAWS policies or documentation supporting SAWS actions, they are often told such information isn’t available or is subject to

^[4] A recent Rivard Report (August 6, 2019 “[What San Antonio’s Top Utility Officials Make, and What It Says About Energy and Water.](#)”) has revealed that SAWS CEO, Robert Puente is, by far, the highest paid public water utility CEO in the U.S. at \$496,520 yearly salary and three times more than any of the Texas Triangle public water utility CEOs, if you include Mr. Puente’s \$100,000 per year bonus. SAWS Trustees gave no pay comparisons to any other water utilities to justify these excesses. (Note: Dallas and Houston water officials have told us they do not give bonuses or merit raises to their water utility CEOs. We believe the same is true for Austin but have filed an Open Records Request to verify this information.)

“exceptions” from disclosure. SAWS frequently appeals to the Attorney General to deny the request.

The default position in all cases should be disclosure unless there is a compelling reason – not just an arguable legal technicality – to support its secrecy. Just because an exception to disclosure applies does not mean that SAWS or the City have to claim it.

Transparency and open information are necessary to ensure that public entities do not take action based on misrepresentations or obfuscations, as had occurred in the project.

Action Requested:

- Pass the Resolution to affirm transparency of SAWS’ operations. [See Section 9 of the Vista Ridge Resolution.]

BACKGROUND OF THE DRAFT RESOLUTION

The Draft Resolution ([Attachment A](#)) is based on close reading of Section 32 of Ordinance 75686 – the Ordinance that created SAWS in 1992 and that envisioned City Council’s active involvement in public utility policy matters. Section 32 of the ordinance (“Management of the System”) lays out the powers and duties the SAWS Board of Trustees has over management of the system. Subsection R is of particular importance in this regard:

“The Board shall prepare and administer, and may amend from time to time, a master plan for the System (the Master Plan), addressing the water resource and capital improvement projects required to accommodate the projected growth and development of the service area of the System. The Master Plan (and any amendment thereof) shall be approved by the Board and *submitted for consideration and approval by the City Council in accordance with the applicable provisions of the City’s Home Rule Charter then in effect.*”
(Emphasis added).

Below is a brief explanation for the reasons behind each section of the resolution:

Section 2: It is inconsistent for the City Council to approve the System’s master plan, yet allow the SAWS Board to make unilateral amendments to that plan that have major, system-wide policy impacts. The unilateral amendments included an attempt to abrogate key provisions of the Edwards Aquifer settlement agreement, which drew an embarrassing Gubernatorial veto of the SAWS-promoted House Bill 1806. It is inconsistent for the City Council to approve the System’s master plan, yet leave major system-wide policy decisions (e.g. whether to become a regional water supplier) entirely to the SAWS Board. Therefore, the Resolution provides that

‘the City Council shall oversee, as part of its regular order of business, the actions of SAWS related to planning of local and regional water supply and conveyance...as well as comprehensive planning for sanitary wastewater, fire suppression water, stormwater, and water conservation ...”

Section 3: Section 32(H) of the SAWS enabling ordinance states that the City Attorney “shall be the chief legal advisor of the Board.” Therefore, the Resolution provides that City Attorney “shall direct all legal activities” conducted by SAWS staff.

Section 4: Article V, Section 46 of the San Antonio City Charter lays out the powers and duties of the City Manager. Subsection (9) states that he or she shall “[p]erform such other duties as may be prescribed by this Charter or *which may be required of him by ordinance or resolution of the council.*” (Emphasis added). To our knowledge, SAWS stands alone among other major Texas public utilities in its current propensity to lobby to change state policy independent of City Council direction. The Resolution thus calls for SAWS’ legislative agenda to be approved by both its Board and the City Council.

Sections 5-8: These sections all go to a primary goal of the resolution – an independent, managerial, legal, and financial review of the Project, followed by a publicly available report that includes recommendations as to how the City should proceed. The report would also be available for public comment in *at least two public hearings.*

The San Antonio City Charter allows the City Council to conduct investigations, subpoena witnesses, and compel production of evidence. Article V, Section 48 states:

“The council, the city manager, or any person or committee authorized by either or both of them, shall have power to inquire into the conduct of any department, agency or office of the city, and for that purpose shall have power to administer oaths. The council, on its own initiative, or upon request of the city manager, shall have power to subpoena witnesses, compel the production of books, papers and other evidence material to such inquiry.

The council shall provide by ordinance for penalties for contempt for refusal on the part of officers or employees of city departments, agencies, or offices, to obey such subpoenas, or to produce evidence.”

Section 9: Because of the problem of lack of openness and transparency at SAWS, the Resolution calls for new City policies that support maximum disclosure within the law..

Section 10: Because of the failure to replace term-limited Board members, the Resolution calls for the City to publicize upcoming vacancies on the SAWS Board.

QUESTIONS AND ANSWERS

What is the cost for an independent review by an Inspector General?

The management review would cost in the ballpark of \$150,000.

The legal and financial review may cost in the ballpark of \$2 million.

While not cheap, these sums are easily justifiable when dealing with a multi-billion dollar project that greatly increases water rates and carries significant risks for approximately 1.5 million San Antonio residents.

What is the timeline?

We estimate the managerial review to take less than a year. The legal and financial review could take 2-3 years. However, if at any time during the process the Inspector General finds breaches of contract or the public trust, the review would support the Council in taking immediate action to remedy such matters.

What if there are severe liabilities? What do we do?

The answer to this question depends on the liabilities that are identified. The report from the Inspector General, described in Section 7, will include recommendations as to how the City Council should handle any identified legal and financial liabilities

SAWS claims the Vista Ridge Project is a done deal and cannot be stopped. Why look at it now?

We are not advocating for the City to abandon the Project. We are, however, seeking an independent review of the Project because of the risk it brings to the City and the Source Aquifers. It's time for the Council to get a thorough and independent look under the hood, and if necessary determine how to better manage or modify the project in order to minimize those risks.