

**Joint Legislative Committee on Performance  
Evaluation and Expenditure Review (PEER)**

Report to  
the Mississippi Legislature



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## **A Review of the Harrison County Utility Authority**

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Following the devastation of Hurricane Katrina in 2005, Governor Barbour created a commission to study and offer recommendations for the Mississippi Gulf Coast's recovery. One of those recommendations was to create an entity to manage sewer, water, storm water, and other utility services across the six Gulf Coast counties (Hancock, Harrison, Jackson, Pearl River, Stone, and George). Congress appropriated approximately \$5 billion to Mississippi for aiding the recovery effort and the Governor directed that a portion of these funds be used for utility infrastructure in the Gulf Coast counties.

The Gulf Coast Region Utility Act, passed during the 2006 Regular Session of the Legislature, created a regional utility authority and six countywide utility authorities, including the Harrison County Utility Authority (HCUA). The act gave to each utility authority the legal authority to oversee water and wastewater services in the respective counties.

The Harrison County Utility Authority funds its operations and debt service by assessing each member city and the county an amount in relation to the usage of water and sewer by citizens within its boundaries. Approved in 2007, the Mississippi Gulf Region Water and Wastewater Plan identified water and wastewater infrastructure needs and proposed utility infrastructure projects for the Gulf Coast counties. Based on the plan's population projections, the HCUA is constructing utility infrastructure capacity for a population level that Harrison County will not likely reach until far beyond the year 2025.

From May 31, 2007, through October 31, 2010, the HCUA has expended approximately \$122 million on Community Development Block Grant (CDBG) projects. Of this amount, approximately \$81 million, or sixty-six percent, was expended on construction, with the remaining approximately \$41 million expended on land, engineering services, and administrative services associated with the CDBG projects. The HCUA board approved a water tank site for one project without considering less costly alternatives, may have passed fifty-six motions without the statutorily required unanimous approval of board members, and has not periodically sought legal counsel for non-CDBG matters through a competitive process.

December 14, 2010

## **PEER: The Mississippi Legislature's Oversight Agency**

The Mississippi Legislature created the Joint Legislative Committee on Performance Evaluation and Expenditure Review (PEER Committee) by statute in 1973. A joint committee, the PEER Committee is composed of seven members of the House of Representatives appointed by the Speaker and seven members of the Senate appointed by the Lieutenant Governor. Appointments are made for four-year terms, with one Senator and one Representative appointed from each of the U. S. Congressional Districts and three at-large members appointed from each house. Committee officers are elected by the membership, with officers alternating annually between the two houses. All Committee actions by statute require a majority vote of four Representatives and four Senators voting in the affirmative.

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PEER provides a variety of services to the Legislature, including program evaluations, economy and efficiency reviews, financial audits, limited scope evaluations, fiscal notes, special investigations, briefings to individual legislators, testimony, and other governmental research and assistance. The Committee identifies inefficiency or ineffectiveness or a failure to accomplish legislative objectives, and makes recommendations for redefinition, redirection, redistribution and/or restructuring of Mississippi government. As directed by and subject to the prior approval of the PEER Committee, the Committee's professional staff executes audit and evaluation projects obtaining information and developing options for consideration by the Committee. The PEER Committee releases reports to the Legislature, Governor, Lieutenant Governor, and the agency examined.

The Committee assigns top priority to written requests from individual legislators and legislative committees. The Committee also considers PEER staff proposals and written requests from state officials and others.

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December 14, 2010

Honorable Haley Barbour, Governor  
Honorable Phil Bryant, Lieutenant Governor  
Honorable Billy McCoy, Speaker of the House  
Members of the Mississippi State Legislature

On December 14, 2010, the PEER Committee authorized release of the report entitled **A Review of the Harrison County Utility Authority.**

  
Senator Nolan Mettetal, Chair

**This report does not recommend increased funding or additional staff.**



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# A Review of the Harrison County Utility Authority

## Executive Summary

### Introduction

#### Problem Statement

Following the devastation of Hurricane Katrina in 2005, Governor Barbour created a commission to study and offer recommendations for the Mississippi Gulf Coast's recovery. One of those recommendations was to create an entity to manage sewer, water, storm water, and other utility services across the six Gulf Coast counties (Hancock, Harrison, Jackson, Pearl River, Stone, and George). Congress appropriated approximately \$5 billion to Mississippi for aiding the recovery effort and the Governor directed that a portion of these funds be used for utility infrastructure in the Gulf Coast counties.

The Gulf Coast Region Utility Act, passed during the 2006 Regular Session of the Legislature, created a regional utility authority and the six countywide utility authorities, including the Harrison County Utility Authority (HCUA). The act gave to each utility authority the legal authority to oversee water and wastewater services in the respective counties.

Soon thereafter, the Mississippi Gulf Region Water and Wastewater Plan (MGRWWP) was authorized by a contract between the Mississippi Department of Environmental Quality and the Mississippi Engineering Group. The purpose of the plan was to identify immediate water and wastewater infrastructure needs, project water and wastewater infrastructure needs over the next twenty-five years, and promote economic development in the six Gulf Coast counties.

Recently legislators raised concerns regarding the Harrison County Utility Authority's operations and expenditures relative to Community Development Block Grant funds received from the U. S. Department of Housing and Urban Development through the Mississippi Development Authority--specifically, the percentage of those funds spent on consulting services such as engineering and legal fees.

## Scope and Purpose

In conducting this review, the PEER Committee sought to address the following:

- how county utility authorities were created;
- how the HCUA obtains funds to operate and pay its debt service;
- how the HCUA manages and administers Community Development Block Grant projects;
- the role of the Mississippi Gulf Region Water and Wastewater Plan; and,
- the amount HCUA has expended on Community Development Block Grant projects, including the amount for consulting services.

### **The Harrison County Utility Authority and the Mississippi Gulf Region Water and Wastewater Plan**

The Harrison County Utility Authority funds its operations and debt service by assessing each member city and the county an amount in relation to the usage of water and sewer by citizens within each member's boundaries. The HCUA contracts with an engineering firm, legal counsel, and an administrator for the management and administration of Community Development Block Grant projects.

The Mississippi Gulf Region Water and Wastewater Plan proposed utility infrastructure projects to be paid for with Community Development Block Grant funds. While other studies projected slow to moderate growth (between 2% to 27%) in Harrison County from 2000 to 2020, the MGRWWP projected explosive growth (64%) for the same period. Since the MGRWWP population projections were a factor in justifying the construction of water tanks and wastewater facilities, Harrison County now has utility infrastructure sufficient to serve a population level that most likely will not materialize in the near future.

### **The Harrison County Utility Authority's Expenditures for Community Development Block Grant Projects Since 2006**

The HCUA is overseeing twenty-five major Community Development Block Grant projects valued at approximately \$235 million. The projects consist of nine water systems with seventy-five miles of water mains, thirteen elevated water tanks and fourteen water wells, sixteen sewer

projects with sixty-five miles of transmission lines, twenty-nine wastewater pump stations, and five wastewater treatment facilities.

From May 31, 2007, through October 31, 2010, the HCUA has expended approximately \$122 million on Community Development Block Grant projects. Of this amount, \$81 million, or sixty-six percent, was expended on construction, with the remaining \$41 million expended on land, engineering services, and administrative services associated with the Community Development Block Grant projects.

While reviewing HCUA's expenditure records, PEER noted the following issues:

- Regarding the Broadwater Water Systems and Wastewater Transmission Improvement project, the HCUA board did not seek less costly alternative sites outside the Broadwater property for the water tank and transmission line routes. The HCUA board eventually approved selection of a site on the Broadwater property for the cost of approximately \$500,000 for half an acre.
- The HCUA board did not act consistently when addressing board actions requiring unanimous approval under MISS. CODE ANN. Section 49-17-729 (1972). As a result, as many as fifty-six of the board's actions could be called into question.
- Without issuing a request for proposals, the HCUA board has paid approximately \$666,000 in legal fees from October 1, 2005, through September 30, 2010, to contract attorneys for legal counsel regarding non-Community Development Block Grant matters. Although PEER does not question the legality of such expenditures, by not procuring legal services in a competitive manner, the board cannot ensure its citizens that it has obtained quality legal advice at the most economical price.

## Recommendations

1. The Harrison County legislative delegation should consider assisting the HCUA board in obtaining relief from the unanimous vote requirement for all actions affecting rates, bonds, or capital improvements by seeking to amend MISS. CODE ANN. Section 49-17-729 (2) (1972) to require unanimous approval only for matters affecting rates, the issuance of bonds, the initial approval of capital improvements, and subsequent material alteration of capital improvements. All other votes should be by majority vote of the board.

Further, the HCUA board should define, by rule, what constitutes a material alteration of a capital improvement.

2. In the future, the HCUA board should require that viable alternative sites be considered when selecting facility locations (for example, wastewater treatment plants and water tank sites).

Following the board's deliberative process in the selection of a facility's final location, the board should spread on its minutes an analysis of locations considered, including, but not limited to, cost elements, cost-benefit analyses of considered locations, service requirements, engineering analysis and requirements, and other pertinent factors resulting in selection of a facility's final location.

3. As a matter of good public policy, the HCUA board should periodically (for example, every four years) conduct a review and selection process for legal services. Such a review would provide the board with information necessary to determine a cost-effective manner to obtain legal services for the authority and fulfill the board's fiduciary duty to customers of the authority to obtain quality legal advice in as an efficient and cost effective manner as possible.

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# A Review of the Harrison County Utility Authority

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## Introduction

### Authority

The PEER Committee reviewed the Harrison County Utility Authority (HCUA). PEER conducted the review pursuant to the authority granted by MISS. CODE ANN. Section 5-3-51 et seq. (1972).

### Problem Statement

Following the devastation of Hurricane Katrina in 2005, Governor Barbour created a commission to study and offer recommendations for the Mississippi Gulf Coast's recovery. One of those recommendations was to create an entity to manage sewer, water, storm water, and other utility services across the six Gulf Coast counties (Hancock, Harrison, Jackson, Pearl River, Stone, and George). Congress appropriated approximately \$5 billion to Mississippi for aiding the recovery effort and the Governor directed that a portion of these funds be used for utility infrastructure in the Gulf Coast counties.

The Gulf Coast Region Utility Act, passed during the 2006 Regular Session of the Legislature, created a regional utility authority and the six countywide utility authorities, including the Harrison County Utility Authority. The act gave to each utility authority the legal authority to oversee water and wastewater services in the respective counties.

Soon thereafter, the Mississippi Gulf Region Water and Wastewater Plan (MGRWWP) was authorized by a contract between the Mississippi Department of Environmental Quality (DEQ) and the Mississippi Engineering Group. The purpose of the plan was to identify immediate water and wastewater infrastructure needs, project water and wastewater infrastructure needs over the next twenty-five years, and promote economic development in the six Gulf Coast counties.

Recently legislators raised concerns regarding the Harrison County Utility Authority's operations and expenditures relative to Community Development Block Grants received from the U. S. Department of Housing and Urban

Development through the Mississippi Development Authority--specifically, the percentage of those funds spent on consulting services such as engineering and legal fees.

## Scope and Purpose

In conducting this review, the PEER Committee sought to address the following:

- how county utility authorities were created;
- how the HCUA obtains funds to operate and pay its debt service;
- how the HCUA manages and administers Community Development Block Grant (CDBG) projects;
- the role of the Mississippi Gulf Region Water and Wastewater Plan; and,
- the amount HCUA has expended on CDBG projects, including the amount for consulting services.

## Method

In conducting this review, PEER:

- reviewed *After Katrina: Building Back Better Than Ever*, a report to Governor Haley Barbour from the Governor's Commission on Recovery, Rebuilding, and Renewal;
- reviewed the *Mississippi Gulf Region Water and Wastewater Plan*;
- reviewed applicable state laws;
- reviewed financial and administrative records of the HCUA; and,
- interviewed HCUA staff, contractors, and interested parties.

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## Background

On December 31, 2005, the Governor's Commission on Recovery, Rebuilding and Renewal released a report entitled *After Katrina: Building Back Better Than Ever* that contained dozens of recommendations. As noted on page 1, the report recommended creation of a regional utility authority to manage sewer, water, storm water, and other utility services across the six Gulf Coast counties of Hancock, Harrison, Jackson, Pearl River, Stone, and George.

To aid in Mississippi's long-term recovery, the U. S. Congress appropriated approximately \$5 billion to Mississippi through the U. S. Department of Housing and Urban Development. The Governor directed that a portion of these funds be used to fund water, wastewater, and storm water infrastructure improvements in the counties name above. These projects were funded through Community Development Block Grants (CDBG) overseen by the Mississippi Development Authority.

To use the CDBG funds for utility infrastructure projects for the Gulf Coast, the state needed entities to manage and administer the construction projects and a plan for what types of projects to build and where to build them. The two major steps in implementing this process were:

- creation of a regional utility authority and six county utility authorities; and,
- creation of the Mississippi Gulf Region Water and Wastewater Plan.

The following chapters contain a discussion of these two driving forces, issues with the HCUA's expenditures for CDBG projects since the authority's creation in 2006, and recommendations.

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# Gulf Coast Utility Authorities and the Mississippi Gulf Region Water and Wastewater Plan

The Harrison County Utility Authority (HCUA) was one of the entities created by the 2006 Mississippi Gulf Coast Region Utility Act. HCUA funds its operations and debt service by assessing each member city and the county an amount in relation to the usage of water and sewer by citizens within its boundaries. Approved in 2007, the Mississippi Gulf Region Water and Wastewater Plan identified water and wastewater infrastructure needs in the Gulf Coast counties. Based on the plan's population projections, the HCUA is constructing utility infrastructure capacity for a population level that Harrison County will not likely reach until far beyond the year 2025.

## Gulf Coast Utility Authorities and the Harrison County Utility Authority

### Creation of the Gulf Coast Region Utility Board and County Utility Authorities

*During the 2006 Regular Session, the Legislature passed the Mississippi Gulf Coast Region Utility Act, which created the Mississippi Gulf Coast Region Utility Board and the county utility authorities in each of the six Gulf Coast counties.*

After the report of the Governor's Commission on Recovery, Rebuilding and Renewal, the Legislature found there was "a need for consolidation of water, wastewater and storm water services in order to reduce costs, promote resilience in the event of a disaster, improve the quality of the natural environment, and improve the planning and delivery of quality water, wastewater and storm water services" within the six Gulf Coast counties (MISS. CODE ANN. Section 49-17-703).

During the 2006 Regular Session, the Legislature passed Senate Bill 2943, known as the Mississippi Gulf Coast Region Utility Act, which was signed by the Governor on April 18, 2006. The bill was later codified as MISS. CODE ANN. Section 49-17-701 (1972) et seq.

The act created the:

- Mississippi Gulf Coast Region Utility Board;
- George County Utility Authority;
- Pearl River County Utility Authority;
- Stone County Utility Authority;
- Harrison County Utility Authority;
- Jackson County Utility Authority; and
- Hancock County Utility Authority.



According to MISS. CODE ANN. Section 49-17-707 (1972), the Mississippi Gulf Coast Region Utility Board was intended to serve:

*. . .as a forum for the Gulf Coast Region to collaborate and cooperate regarding water, wastewater and storm water issues; to assist in the efficient management of water, wastewater and storm water resources; to develop recommendations pertaining to water, wastewater and storm water systems; and to provide assistance, funding and guidance to the county authorities to assist in the identification of the best means to meet all present and future water, wastewater and storm water needs in the Gulf Coast Region.*

The Mississippi Gulf Coast Region Utility Board is scheduled to be repealed effective July 1, 2011.

Although the specific language creating each county utility authority varies slightly, the general purpose of each authority is the planning, acquisition, construction, maintenance, operation, and coordination of water, wastewater, and storm water systems in order to ensure delivery of these services to citizens residing within the boundaries of each county. PEER notes that the language creating the Jackson County Utility Authority omits the term “storm water” and the language creating the Harrison County Utility Authority (HCUA) includes the term “solid waste,” since the HCUA is a continuance of the corporate existence of the Harrison County Wastewater and Solid Waste Management District. As noted on page 1, the Harrison County Utility Authority is the focus of this report.

The statutorily required composition of the board of directors differs for each county utility authority. For the HCUA, the board of directors is composed of the mayors of Biloxi, Gulfport, D’Iberville, Long Beach, Pass Christian, and two directors appointed by the Harrison County Board of Supervisors from the unincorporated area of the county (in practice, two of the supervisors serve as directors of the utility authority representing the unincorporated area). This report refers to the Harrison County municipalities and unincorporated areas of the county that are represented on the board as “members” of the utility authority.

## **Funding for Operations of the Harrison County Utility Authority**

***The Harrison County Utility Authority funds its operations and debt service by assessing each member city and the county an amount in relation to the usage of water and sewer by citizens within each member's boundaries.***

The HCUA funds administrative costs, operations costs, and debt service by assessing each member of the authority an amount in relation to the usage of water and sewer by citizens within each member's boundaries. Each member decides whether to pay the assessment from the proceeds of water and sewer collections from citizens or from other member resources.

For example, if one city member accounts for fifteen percent of the sewer flow of the entire authority, that city is assessed fifteen percent of the authority's administrative cost. The city chooses whether to fund this assessment from water and sewer collections or from other city resources.

The HCUA assesses the operational cost of each wastewater treatment facility to members based on each member's usage of the plant. For example, if wastewater from two members flows to the same facility with one member accounting for eighty percent of the flow and the other member accounting for twenty percent of the flow, the facility's operational cost is assessed to the two members based on the eighty/twenty flow.

The HCUA's debt service is allocated to a wastewater treatment facility based on the debt associated with each facility. The allocation is assessed to members according to each member's usage of the facility in a manner similar to the operational cost assessment.

## **Management and Administration of HCUA's CDBG Projects**

***The HCUA contracts with an engineering firm, legal counsel, and an administrator for the management and administration of CDBG projects.***

In accordance with CDBG guidelines, the HCUA hired an engineering firm to serve as the authority's project manager over each CDBG project. The project manager's role is to oversee the engineering and technical issues associated with the design, planning, and construction of each CDBG project. As allowed by CDBG guidelines, the HCUA used CDBG funds to pay the project manager firm's approximately \$3.1 million contract.

The HCUA also sought and received proposals for legal counsel required for the CDBG projects. The legal counsel represents the board in all legal matters relating to the CDBG projects and plays an important role in the

acquisition of easements and property acquisition for the CDBG projects. As of October 31, 2010, approximately \$1.7 million had been expended for legal services related to CDBG projects.

Also as allowed under CDBG guidelines, the HCUA hired a CDBG administrator to receive and process invoices and expenses associated with each CDBG project. The CDBG administrator presents the HCUA board with a “request for cash” to cover expenses associated with the CDBG projects for the board’s approval. Once approved, the CDBG administrator submits the expenses to the Mississippi Development Authority for payment from CDBG funds. As allowed by CDBG guidelines, the HCUA used CDBG funds to pay the administrator’s contract for approximately \$3.6 million.

### **Outstanding Bonds of the Harrison County Utility Authority**

***Due to the loss of tax revenue following Hurricane Katrina, the HCUA refinanced its outstanding bonds in November 2006 to provide member agencies with relief from debt service payments.***

The HCUA issues revenue bonds to finance a portion of the construction or improvement costs of some of the authority’s wastewater treatment facilities and to comply with certain requirements of the Federal Water Pollution Control Act. The authority’s revenue bonds are payable from revenue derived by HCUA from the operation of its wastewater treatment system. HCUA has entered into agreements with member agencies to provide payment in exchange for the authority’s operation of the wastewater treatment system. Such payments are derived from charges levied by members on users of the wastewater treatment system and a special ad valorem tax in connection with the issued bonds.

Due to damages from Hurricane Katrina, the utility authority’s members experienced severe losses of revenue from their tax base. In an effort to provide relief from debt service payments, HCUA completed a restructuring of its debt in November 2006. The restructured debt consists of Series 2006A bonds in the amount of \$113,825,000 maturing July 1, 2033, and Series 2006B bonds in the amount of \$11,845,000 maturing July 1, 2014. The proceeds of these bonds were used to retire the authority’s outstanding bonds at September 30, 2006; provide funds to pay interest on the new bonds from date of issuance to July 1, 2008; provide funds for a debt service reserve fund; pay the authority’s 2006 promissory note dated March 31, 2006; and pay for the issuance of the new bonds.

For the fiscal year ended September 30, 2010, the authority’s debt service payment was approximately \$4.9 million. For the current fiscal year (ending September 30, 2011), debt service payments will increase to

approximately \$8.2 million. After the current fiscal year, the impact of scheduled debt service payments on user rates should be minimal, with debt service payments scheduled to increase slowly through the remaining life of the bonds (with a maturity date of July 1, 2033) to approximately \$8.5 million annually.

## Mississippi Gulf Region Water and Wastewater Plan

### Creation of the Mississippi Gulf Region Water and Wastewater Plan

*The Mississippi Gulf Region Water and Wastewater Plan's purpose was to identify and prioritize the water, wastewater, and storm water infrastructure needs in the six Gulf Coast counties and propose utility infrastructure projects to be paid for with CDBG grants.*

In 2006, Governor Barbour directed the Mississippi Department of Environmental Quality (DEQ) to be in charge of developing a plan to identify water, wastewater, and storm water infrastructure needs in the Gulf Coast counties. On April 10, 2006, the DEQ signed a \$3.7 million contract with the Mississippi Engineering Group, Inc., to develop the Mississippi Gulf Region Water and Wastewater Plan (MGRWWP).

The MGRWWP's goal was to identify and prioritize the water, wastewater, and storm water infrastructure needs in the six Gulf Coast counties. The plan projected housing and population growth patterns, which would signal projected need, that were expected to occur in the next five years, ten years, and twenty-five years. Plan developers also sought input from the coastal county utility authorities, public officials, state and regional agencies, and private citizens.

Based on this input as well as analysis of the region's infrastructure needs, the MGRWWP recommended a list of proposed projects estimated to cost a total of approximately \$630 million. The proposed projects were intended to support then-current growth patterns, projected growth patterns, and to promote economic development.

DEQ approved the MGRWWP and the recommended projects contained in the plan. After DEQ's approval, utility authorities pursued and received approval for CDBG funding for the projects recommended in the MGRWWP.

## **How MGRWWP's Growth Projections Affected the CDBG Grant Amounts for HCUA's Utility Infrastructure Projects**

*While other studies projected slow to moderate growth (between 2% to 27%) in Harrison County from 2000 to 2020, the MGRWWP projected explosive growth (64%) for the same period. Since these population projections were a factor in justifying the construction of water tanks and wastewater facilities, Harrison County now has utility infrastructure sufficient to serve a population level that most likely will not materialize in the near future.*

According to the MGRWWP, the plan's goal was to provide new or enhanced utility infrastructure and place new facilities out of harm's way. The plan further states that the placement and size of new facilities is directly impacted by projections of where new centers of housing and population will occur. The plan also states that:

*The improvements are intended to support existing and future growth patterns, particularly as realized through new housing construction, and to promote economic development.*

The MGRWWP estimated a high population growth in Harrison County, which was a contributing factor in justifying the approximately \$235 million in grants for the construction of twenty-five major CDBG projects in Harrison County (see page 11).

### ***Estimated Population Growth Prior to Katrina***

*Prior to Hurricane Katrina, population studies projected slow to moderate growth for Harrison County.*

Prior to Hurricane Katrina, population studies projected slow to moderate growth in Harrison County's population. The U. S. Census Bureau estimated that Harrison County's population grew a modest two percent from April 2000 through July 2005. Also prior to Katrina, at least two studies projected Harrison County would continue to have modest population increases through 2020.

In 2001, the Harrison County Wastewater and Solid Waste Management District (the predecessor organization to the HCUA) commissioned a long-range master plan for the county's wastewater infrastructure. An international engineering, consulting, and construction company, in conjunction with two engineering firms on the Mississippi Gulf Coast, conducted the study. This study projected that Harrison County's 2010 population would increase ten percent over 2000 census levels and the county's 2020 population would increase twenty-one percent over 2000 levels.

In a report prepared prior to Hurricane Katrina and dated August 2005, the Board of Trustees of Institutions of Higher Learning's (IHL's) Center for Policy Research and Planning projected that Harrison County's 2010 population would increase four percent over the 2000 census population. The center also projected that Harrison County's population would grow a total of eight percent from the 2000 census level through 2020.

### ***Katrina's Estimated Effect on Harrison County's Population***

*Studies differed in estimating Hurricane Katrina's effect on Harrison County's population. While IHL's Center for Policy Research and Planning estimated that Harrison County's population in 2025 would be five percent above 2000 census levels, the Mississippi Gulf Region Water and Wastewater Plan projected that the county's 2025 population would be seventy-six percent higher than 2000 census levels.*

Following Hurricane Katrina, considerable uncertainty existed regarding the storm's effect on the Gulf Coast's population. Specifically, authorities were uncertain whether a population migration to inland counties would continue in the years after Hurricane Katrina or whether a significant number of persons would return to the coastal counties.

Estimates of the hurricane's immediate effect on Harrison County's population loss varied. In June 2006, the Census Bureau estimated that as of January 1, 2006, Harrison County had lost eighteen percent of its population from the 2000 census population. In March 2007, the Census Bureau revised its estimate of Harrison County's population loss as of July 1, 2006, to nine percent from the 2000 census population.

Estimates of Katrina's effect on Harrison's County's future population also varied:

- In September 2008, IHL's Center for Policy Research and Planning projected that Harrison County's population in 2015 would be 1% lower than the 2000 census population. The center also projected that the county's population in 2025 would be approximately 5% above the 2000 census population.
- In a report prepared for the Harrison County Board of Supervisors, the 2030 Harrison County Comprehensive Plan, which was adopted in July 2008, projected that the county's 2015 population would increase sixteen percent over 2000 census levels and the 2020 population would be twenty-seven percent higher than the 2000 census level.
- Of all of the growth estimates, the MGRWWP projected the highest and most optimistic growth for Harrison County. By 2010, the plan projected that Harrison County's population, including temporary residents

living in condominiums and visitors in hotel rooms, would increase by thirty-four percent over the 2000 census levels; that by 2020, the county's population would increase by sixty-four percent, and by 2025, the county's population would increase by seventy-six percent.

Exhibit 1, below, recaps the post-Katrina population projections noted above, with additional dates and population projections. The percentage increases represent estimated growth over the 2000 U. S. Census Bureau's population.

Thus while IHL and the Harrison County Comprehensive Plan projected slow to moderate growth (between 2% to 27%) between 2000 and 2020, the MGRWWP projected explosive growth in Harrison County (64% for the same period).

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**Exhibit 1: Post-Katrina Projections of Population Increases for Harrison County for 2010, 2015, 2020, and 2025**

Estimating Organization	2000 Census	2010 Projection and % Increase or Decrease	2015 Projection and % Increase or Decrease	2020 Projection and % Increase or Decrease	2025 Projection and % Increase or Decrease
Mississippi Population Projections 2015, 2020, 2025*	189,601	Not given	-1% 188,335	+2% 194,060	+5% 198,716
2030 Harrison County Comprehensive Plan**	189,601	+2% 193,187	+16% 220,695	+27% 241,318	Not given
MGRWWP***	189,601	+34% 254,206	+51% 286,609	+64% 311,454	+76% 332,788

NOTE: The percentage increases represent estimated growth over the 2000 U. S. Census Bureau's population.

SOURCES:

\*Board of Trustees of Institutions of Higher Learning's Office of Policy Research and Planning, September 2008;

\*\*The 2030 Harrison County Comprehensive Plan (Harrison County Board of Supervisors), adopted July 2008; and,

\*\*\*The Mississippi Gulf Region Water and Wastewater Plan, January 2007.

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Presumably based on the MGRWWP's growth projection, the Harrison County Utility Authority received CDBG funds for twenty-five major projects at a budget of approximately \$235 million. (See the following chapter for details of the HCUA's utility infrastructure projects built with CDBG funds.) HCUA estimates that in 2015, all of the authority's wastewater treatment facilities, including those built with CDBG funds, will be operating at fifty-two percent of permit capacity. Since the MGRWWP population projections served as an important factor in justifying the construction of the water tanks and wastewater facilities, Harrison County now has utility infrastructure to serve a population level that, according to the IHL projections, most likely will not materialize in the near future.

Although the economic downturn has been a contributing factor in the rate of recovery and growth and PEER acknowledges the benefit of hindsight, it would appear that the MGRWWP's projected population increases were far too optimistic. Strong growth in Harrison County may yet occur, but the U. S. Census Bureau, in data released in March 2010, estimated that the county's population as of July 2009 was approximately 181,000 (about four percent below the 2000 census population), which stands in stark contrast to the MGRWWP's projected increase for 2010 of thirty-four percent above the 2000 census level, which was approximately 189,000.

A reasonable question could be raised regarding whether some of the CDBG funds used for utility infrastructure projects in Harrison County could have been utilized in a more effective and efficient manner for other areas of the Gulf Coast rather than for building wastewater treatment capacity for a population level that Harrison County will not likely reach until far beyond the year 2025.



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## The Harrison County Utility Authority's Expenditures for CDBG Projects Since 2006

From May 31, 2007, through October 31, 2010, the HCUA has expended approximately \$122 million on CDBG projects. Of this amount, \$81 million, or sixty-six percent, was expended on construction, with the remaining \$41 million expended on land, engineering services, and administrative services associated with the CDBG projects. The HCUA board approved a water tank site for one project without considering less costly alternatives, may have passed fifty-six motions without the statutorily required unanimous approval of board members, and has not periodically sought legal counsel through a competitive process.

The HCUA is overseeing twenty-five major CDBG projects valued at approximately \$235 million. The projects consist of nine water systems with seventy-five miles of water mains, thirteen elevated water tanks and fourteen water wells, sixteen sewer projects with sixty-five miles of transmission lines, twenty-nine wastewater pump stations, and five wastewater treatment facilities. Appendix A, page 27, lists all projects, including minor projects, of the HCUA's CDBG projects, the project budget amounts, and the total amount spent by project as of October 31, 2010. Exhibit 2, page 14, shows the amounts spent from May 31, 2007, through October 31, 2010, by expenditure category.

While reviewing HCUA's expenditure records, PEER noted the following issues:

- Regarding the Broadwater Water Systems and Wastewater Transmission Improvement project, the HCUA board did not seek alternative sites for the water tank outside the Broadwater property, which would have been less costly, when considering alternative routes for transmission lines. HCUA paid over \$500,000 for the half-acre water tank site.
- The HCUA board did not act consistently when addressing board actions requiring unanimous approval under MISS. CODE ANN. Section 49-17-729 (1972). As a result, as many as fifty-six of the board's actions could be called into question.
- Without issuing a request for proposals, the HCUA board has paid approximately \$666,000 in legal fees from October 1, 2005, through September 30, 2010, to contract attorneys for legal counsel regarding non-CDBG matters. Although PEER does not question the legality of such expenditures, by not procuring legal services in a competitive manner, the board cannot ensure its citizens that it

has obtained quality legal advice at the most economical price.

This chapter contains discussions of these issues.

**Exhibit 2: Expenditures by Category for HCUA CDBG Projects, May 31, 2007, through September 30, 2010**

<b>Expenditure Category</b>	<b>Amount Expended</b>
Construction	\$ 80,539,975
Site Acquisition	12,440,877
Engineering Design	11,354,869
Construction Phase Engineering	8,203,327
Construction Project Administration	2,837,719
Construction Phase Project Manager	2,090,474
Legal	1,706,271
Initial Phase Engineering	732,315
Appraisal	404,100
Initial Phase Project Administration	383,536
Material Testing	364,594
Supervisory Control and Data Acquisition	300,297
Initial Project Manager	279,887
Review Appraisal	171,400
Other*	17,207
<b>Total</b>	<b>\$121,826,848</b>

\*Administration equipment and Single Audit work.

SOURCE: Harrison County Utility Authority records.

## Project Site Selected Without Considering Less Costly Alternatives

*After DEQ rejected the initial Biloxi Broadwater Water Systems and Wastewater Transmission Improvement project plans because the land for the project infrastructure exceeded the project budget, the HCUA board did not seek less costly alternative sites outside the Broadwater property for the water tank and transmission line routes. The HCUA board eventually approved selection of a site on the Broadwater property for the cost of approximately \$500,000 for half an acre.*

As shown in the list in Appendix A on page 27, the HCUA's CDBG projects included the Biloxi Broadwater Wastewater Transmission and Water System Improvement projects (hereafter referred to as the Broadwater projects).

## Original Estimated Costs and Justification of the Broadwater Projects

*The MGRWWP recommended that the Broadwater Projects be included in the CDBG projects, with a total budget of \$5 million.*

Prior to Hurricane Katrina, the city of Biloxi had hired an engineering firm to perform a water and sewer model analysis for the peninsula of the city of Biloxi. The engineering firm's analysis indicated a need to improve water and sewer service in the Broadwater Resort/Presidential Casino area (hereafter referred to as the Broadwater property). Following Hurricane Katrina, the Broadwater projects were included in the MGRWWP as recommended projects.

The Broadwater projects' estimated cost for the water portion was approximately \$3 million and the wastewater transmission improvement portion's estimated cost was approximately \$2 million. The MGRWWP recommended the Broadwater water system improvement project with the following language:

*Much of the US 90 corridor experienced massive hurricane damage, including the Broadwater area. This area is projected to experience higher-density development as recovery efforts continue. In order to support this development water infrastructure improvements, including a 1.0 million gallon elevated storage tank and associated transmission mains, are needed in the Broadwater area.*

The MGRWWP recommended the Broadwater wastewater system improvement project using very similar language:

*Much of the US 90 corridor experienced massive hurricane damage, including the*

*Broadwater area. This area is projected to experience higher-density development as recovery efforts continue. In order to support this development wastewater infrastructure improvements are needed including a pump station and transmission main to transport flow from the Broadwater area to the West Biloxi WWTF.*

## **Sites Considered for the Broadwater Projects' Water Tank and Transmission Line Routes**

*Three sites for the Broadwater Projects' water tank were considered on the Broadwater property, but other viable and less costly alternative sites were not considered.*

Initial plans for the Broadwater projects sited the water tank at a location on the Broadwater property near Highway 90. This area was zoned for casinos and the Department of Environmental Quality rejected the initial site because the price of the land for the project infrastructure exceeded the project budget. Another site considered was also on the Broadwater property (zoned high-density residential development [for condominiums]), but was determined to be unacceptable because it was the previous location of an electrical substation, with the possibility of contamination. The third site, which was the one selected by project engineers, was south of the second site but still located on the Broadwater property. It was selected at a cost of approximately \$500,000 for half an acre.

The HCUA board did not direct engineers to consider less expensive sites in the area for the water tank. PEER spoke with Biloxi city officials concerning whether alternative water tank sites and transmission line routes off the Broadwater property that might have had lower associated land and construction costs were considered. The officials stated that other sites and routes were considered, but were rejected for various reasons and that the final locations of the water tank and transmission lines were deemed superior to all alternatives. Subsequently, PEER requested from project engineers a list of alternative water tank sites and alternative transmission line routes considered and copies of any cost-benefit analysis of each site or route. Project engineers could not locate any cost-benefit analysis documentation. Also, no records exist of any sites being considered that were outside the Broadwater property.

Less costly sites for the water tank might have been available and, according to industry sources, could have been suitable for providing water services to the Broadwater area. Had a less costly site been chosen for the

water tank, it is possible that less costly routes for the transmission lines could also have been found.

### **Effect of the Lack of Consideration of Less Costly Sites**

*The lack of consideration of viable but less costly alternative sites could create the appearance that the water tank and transmission lines were placed on the Broadwater property to enhance its future development by providing water lines and fire protection.*

While PEER does not allege any unethical or illegal activities in determining the site of the Broadwater water tank or transmission lines, the lack of cost-benefit analysis or consideration of alternative sites for the water tank off the Broadwater property could present the appearance that the Broadwater sites were selected in order for that area to receive benefit from as much infrastructure as possible. PEER notes that fire hydrants were placed every 500 feet along all water transmission lines and that the water transmission line transverses the old Broadwater golf course, which is now zoned for low-density residential use. Such conditions might lead citizens to surmise that the water tank and the transmission lines were placed in the location selected in order to enhance future development of the property by providing water lines and fire protection.

Although PEER found no evidence that the lines were sited for such a purpose, the lack of consideration of alternative sites for the water tank and associated transmission lines off the Broadwater property in a less costly area is troubling. As shown in Appendix A, page 27, the budgets for the Broadwater projects total approximately \$6.8 million, with approximately \$2.4 million spent as of October 31, 2010. Had a less costly water tank site and transmission line route been found, the overall cost of the project could have been reduced and the funds might have been available for other uses.

## HCUA Board Motions Requiring Unanimous Approval

*The Harrison County Utility Authority board did not act consistently when addressing board actions requiring unanimous approval under MISS. CODE ANN. Section 49-17-729 (1972) and did not request an Attorney General's opinion seeking guidelines for addressing matters requiring unanimous approval. As a result, as many as fifty-six of the board's actions could be called into question.*

### Statutory Requirements Regarding HCUA's Actions on Capital Improvements

*MISS. CODE ANN. Section 49-17-729 (1972) requires that the Harrison County Utility Authority unanimously approve all actions affecting rates, bonds, or capital improvements.*

Subsection 2 of MISS. CODE ANN. Section 49-17-729 (1972) reads in full as follows:

*All business of the Harrison County Utility Authority shall be transacted as provided in Section 49-17-741, except that all actions affecting rates, bonds or capital improvements must be by unanimous vote of all members of the board.*

MISS. CODE ANN. Section 49-17-741 (1972) addresses the board's election of a president, vice president, posting of bonds, the board's payment of a per diem and actual expenses, what constitutes a quorum, and requiring a majority vote of the total membership of the board to conduct business. In addition to these requirements, actions affecting rates, bonds, or capital improvements must be by unanimous vote of all members of the board. Three questions arise from this CODE section:

- What does "capital improvement" mean?
- What does "unanimous" mean?
- Are unanimous votes needed only when the capital improvements are to be paid with bonds?

#### ***Interpretation of Terms Within the Statute***

##### **What does "capital improvement" mean?**

Although definitions of "capital improvement" vary, the general consensus is that capital improvement includes activities such as plant construction and installing water and sewer lines.

MISS. CODE ANN. Section 49-17-729 (1972) does not define the term *capital improvement* and this term is not used in the federal statute and regulations governing the CDBG program. However, several definitions of capital

improvement are found from courts, in legislation, and in accounting/finance.

Although courts in Mississippi have not defined capital improvement, the courts have defined the terms “capital” and “improvements.” In *Southern Package Co. v. State Tax Commission*, 13 So 2d 435 (Miss., 1944), “capital” was defined as “a business’s tangibles, the aggregate of its property and assets of all kinds.” In *Winkle v. Windsor Windows and Doors*, 983 So 2d 1055 (Miss., 2008), “improvement” is defined as “a valuable addition to property.”

In Mississippi, two programs authorized in statute provide a definition of “capital improvement.” MISS. CODE ANN. Section 37-47-5 (1972), a provision making funds available for capital improvements of schools, includes building, repairing, enlarging, or remodeling school buildings and related facilities, but excludes the cost of the acquisition of land. MISS. CODE ANN. Section 57-1-301 (1972) establishes a loan program for local governments that wish to make capital improvements and defines “capital improvements” to include construction or repair of water and sewer facilities.

The accounting and finance professions offer definitions that vary from narrow to broad in scope. A common element in all definitions is an improvement to capital assets that increases or extends an asset’s useful life. The Government Accounting Standards Board (GASB) Statement 34 defines a capital asset to include, but not be limited to, land, land improvements, easements, and infrastructure. A broader definition of capital improvement includes the acquisition of land or interests in land.

While the federal statute and regulations governing the CDBG program do not use the term capital improvement, 24 CFR 570.201 does allow grantees to use CDBG funds for the acquisition of real property, including easements, and the acquisition, construction, and installation of public improvements or facilities. Although “public improvements” and “public facilities” are not defined, these terms are broadly interpreted to include improvement and facilities that are publicly owned or traditionally provided by the government and include water and sewer lines.

Based on a review of Mississippi case law, statutes, and definitions, PEER finds that a reasonable person would view capital improvements to include the construction of a facility, such as a wastewater treatment facility, the construction of water and sewer transmission lines, and change orders to facilities or transmission lines. A broader interpretation of the definitions would also include land acquisitions or interests, such as easements in land.

### What does “unanimous” mean?

In PEER’s opinion, the requirement in MISS. CODE ANN. 49-17-729 (2) (1972) for a unanimous vote on matters regarding rates, bonds, or capital improvements requires that all members vote on motions regarding these matters. Abstentions or absences would count against the unanimity requirement and would defeat any measure requiring a unanimous vote.

Although the definition of the term *unanimous* may appear to be obvious, certain conditions and situations must be considered that cause the definition of the term to be called into question. For example, does unanimous mean all seven board members comprising the board or only the board members present for a particular vote?

Some jurisdictions outside of Mississippi hold that in cases where members were not present, or when they abstained from voting, the board vote did consist of all persons present and voting and therefore the unanimity requirement was met. However, in Mississippi, courts apply the plain meaning of the statute to determine whether a vote requirement set in law is met and courts have noted it is the province of the Legislature to make less restrictive requirements, as it has done in several instances.

Although attendance of all members may seem a high standard and difficult to achieve at all meetings involving bonds, rates, or capital improvements, MISS. CODE ANN. Section 49-17-729 (1) (1972) states:

*Each director may appoint a delegate to represent him at a meeting of the board.*

Therefore, if a board member (i. e., director) is unable to attend a meeting, he or she has the authority to appoint a delegate to attend the meeting and vote on matters. Therefore, the statute’s requirement of unanimous votes for bonds, rates, or capital improvements is not overly burdensome. PEER notes delegates attended and voted in numerous HCUA board meetings from July 1, 2006, through September 30, 2010.

In PEER’s opinion, the clear, unambiguous phrasing of MISS. CODE ANN. Section 49-17-729 (2) (1972) requiring a unanimous vote of all members of the board for matters relating to rates, bonds, or capital improvements would require that all members vote in favor of a measure. Abstentions or absences would count against the unanimity requirement and would defeat any measure that requires a unanimous vote.



**Are unanimous votes needed only when the capital improvements are to be paid with bonds?**

In PEER's opinion, MISS. CODE ANN. Section 49-17-729 (2) (1972) clearly requires unanimous votes for matters regarding all capital improvements and not only when capital improvements are financed through bonds.

Some personnel associated with the HCUA have interpreted MISS. CODE ANN. Section 49-17-729 (2) (1972) to require unanimous board approval only for capital improvements that are to be paid for with bond proceeds. PEER notes that in MISS. CODE ANN. Section 49-17-729 (1972), the three items requiring unanimous approval are set off with identical punctuation (i. e., commas). (See above for MISS. CODE ANN. Section 49-17-729 [1972]). PEER acknowledges that Mississippi courts uniformly hold that the punctuation of a statute will not control the determination of the plain meaning of a statute. However, a carefully punctuated statute may afford some guide as to the legislative meaning.

For MISS. CODE ANN. Section 49-17-729 (1972), any reading that would make a unanimous vote on capital improvements contingent on the use of bonds to fund such an improvement would effectively read the term "capital improvements" out of the statute, as any matter requiring the use of bonds would be covered by the limitation on bonds being issued only upon a unanimous vote. Additionally, since capital improvements can be and are financed through other forms of revenue, such as grants or self-generated revenue, a reasonable person would conclude the Legislature foresaw that some capital improvements could be funded without bonds and intended that these votes be unanimous, as well as any votes on bonded capital improvements.

**Inconsistency in HCUA's Previous Actions Regarding Unanimous Approval**

*During the last three years, the HCUA board has handled matters requiring unanimous approval in an inconsistent manner. On some occasions, the HCUA board has required all members to be present for motions regarding rates, bonds, or capital improvements and on other occasions passed motions regarding rates, bonds, or capital improvements with members absent, abstaining, or voting nay.*

Certain actions of the HCUA board indicate that on some occasions, the board has operated under the position that attendance of all members was necessary to achieve a unanimous vote. On other occasions, motions on matters requiring unanimous approval were passed with members absent, abstaining, or voting nay.

The PEER Committee noted the following instances in the authority's board minutes in which votes on matters

requiring unanimous approval were not held due to members being absent or an absent member's vote was recorded later in the meeting to achieve unanimous approval:

- January 18, 2007--Two board members were absent and an agenda item regarding bonds was tabled due to a lack of unanimous attendance.
- June 5, 2008--A roll call vote for a motion dealing with refunding bonds noted one member absent. The member arrived later in the meeting and was asked to record his vote regarding the motion. The minutes note the motion passed unanimously.
- July 9, 2009--A motion to take an item regarding \$20 million in new bonds "off the table" was approved, but one member was absent. HCUA legal counsel noted the authority's statute is restrictive on voting on bonds and a unanimous vote is required. The board subsequently voted to table the item again.

These actions demonstrate that on certain occasions the board has required the presence of all members to achieve a unanimous vote. Therefore, one would conclude that the presence of all members would be required on all occasions requiring unanimous approval.

Given Mississippi's statutory requirement for unanimous approval of capital improvements, some actions of the board regarding facilities and change orders could be called into question, as discussed in the following sections.

## **Board Actions Called Into Question for Lack of Unanimous Vote**

### ***Motions Passed by the HCUA Board Without the Statutorily Required Unanimous Approval***

*Based on a review of HCUA's board minutes from July 1, 2006, through September 30, 2010, PEER noted passage of fifty-six motions that under MISS. CODE ANN. Section 49-17-729 (2) (1972) required unanimous board approval, but were passed with members absent, abstaining, or voting nay. The approved motions involved final facility locations, construction bids, engineering designs, and change orders.*

PEER reviewed HCUA board minutes from July 1, 2006, through September 30, 2010, and noted fifty-six motions that under MISS. CODE ANN. Section 49-17-729 (2) (1972) required unanimous board approval but were passed with members absent, abstaining, or voting nay. The approved motions involved facility locations, construction bids, engineering designs, change orders, and purchase of private utility systems.

At the HCUA board meeting on March 19, 2009, the minutes show that a motion to approve a Resolution of Offer of Just Compensation for the purchase of a private

water and wastewater system was approved with a member absent. CDBG funds were used for the \$4.75 million purchase of the private water and wastewater system. The minutes note that the purchase was approved by the company administering the CDBG funds for HCUA.

Appendix B, page 29, provides a detailed listing of each board action that could be called into question, including a description of the action and what prevented a unanimous vote.

In addition to the items noted in Appendix B, PEER noted numerous other occasions involving the acquisition of land through purchases, easements, or eminent domain resolutions that did not have unanimous approval due to members being absent or voting nay. In one instance, a motion to empower the HCUA to enter into a \$1.38 million contract, the appraised value of the property for the D'Iberville WWTF, passed with three members voting nay.

PEER did not detail these instances due to the uncertainty of land acquisitions qualifying as a capital improvement under MISS. CODE ANN. Section 49-17-729 (2) (1972). However, PEER notes these board actions could be called into question should property acquisitions be included as a capital improvement.

#### ***HCUA Board's Motion to Seek an Attorney General's Opinion***

*At the July 9, 2009, HCUA board meeting, a motion to seek an Attorney General's opinion on the question of what constitutes a unanimous vote failed to receive a second and no vote was taken.*

At the July 9, 2009, HCUA board meeting, a motion was made by a board member to seek an Attorney General's opinion regarding what constitutes a unanimous vote. However, the motion did not receive a second and therefore, the board did not vote on the motion.

In addition to an Attorney General's opinion regarding what constitutes a unanimous vote, seeking an opinion on the definition of capital improvement would also have been prudent. Had the HCUA board sought an Attorney General's opinion on these matters, the board would have had clearer operating guidelines and board actions would not be called into question.

## Effect of the HCUA Board's Inconsistency Regarding Unanimous Votes

*Seeking an Attorney General's opinion regarding what constitutes "unanimous approval" and a "capital improvement" would have provided the board with legal guidelines and clarification. Without such guidance and clarification, as many as fifty-six actions of the board may be called into question.*

Given the uncertainty regarding what constitutes "unanimous approval" and the board's inconsistent action in approving motions involving items requiring unanimous approval, the motion to seek an Attorney General's opinion was well justified and could have provided the board guidance on this question. Seeking an Attorney General's opinion regarding what constitutes a "capital improvement" would have provided the board with further clarification. Without such guidance and clarification, as many as fifty-six actions of the board may be called into question.

PEER acknowledges that the requirement in MISS. CODE ANN. Section 49-17-729 (2) (1972) for a unanimous vote of all members of the board for all actions affecting rates, bonds, or capital improvement creates a high standard for conducting HCUA business affairs that policymakers should consider addressing by seeking to amend MISS. CODE ANN. Section 49-17-729 (2) (1972) to limit the scope of matters requiring a unanimous vote.

### **HCUA's Procurement of Counsel for Non-CDBG Legal Matters**

*Without issuing a request for proposals, the HCUA board has paid approximately \$666,000 in legal fees from October 1, 2005, through September 30, 2010, to contract attorneys for legal counsel regarding non-CDBG matters. Although PEER does not question the legality of such expenditures, by not procuring legal services in a competitive manner, the board cannot ensure its citizens that it has obtained quality legal advice at the most economical price.*

From October 1, 2005, through September 30, 2010, the HCUA paid approximately \$666,000 in legal fees for legal services, not including legal fees associated with bond refinancing and CDBG grants. Although PEER does not question the quality of the legal services provided or the legality of the expenditures, the question arises as to why the HCUA board did not continue with its preliminary efforts for a request for proposals (RFP) for legal services.

In December 2007, the HCUA board voted unanimously to issue an RFP for general services. An RFP was prepared seeking legal services with a closing date of February 6,

2008. However, at the January 2008 board meeting, the board, in a four-to-three vote, rescinded the RFP.

PEER does not question the legality of the authority's legal expenditures nor does PEER question the board's authority to rescind the RFP. However, the question arises as to the board's reasoning for rescinding the RFP. The January 2008 minutes are silent regarding the rationale for the board's decision.

Seeking an RFP for legal services on a periodic basis (for example, every four years) would provide the board with information necessary to determine a cost-effective manner to obtain legal services for the authority. Given that the annual average cost of legal services for the last five fiscal years, excluding CDBG matters and bond refinancing, was approximately \$133,000, a viable option could have been to hire an attorney as a full-time staff member.

The HCUA board requires legal counsel in dealing with authority matters. However, the board has a fiduciary duty to customers of the authority to obtain quality legal advice in as an efficient and cost effective manner as possible.

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## Recommendations

1. The Harrison County legislative delegation should consider assisting the HCUA board in obtaining relief from the unanimous vote requirement for all actions affecting rates, bonds, or capital improvements by seeking to amend MISS. CODE ANN. Section 49-17-729 (2) (1972) to require unanimous approval only for matters affecting rates, the issuance of bonds, the initial approval of capital improvements, and subsequent material alteration of capital improvements. All other votes should be by majority vote of the board. Further, the HCUA board should define, by rule, what constitutes a material alteration of a capital improvement.
2. In the future, the HCUA board should require that viable alternative sites be considered when selecting facility locations (for example, wastewater treatment plants and water tank sites).  
  
Following the board's deliberative process in the selection of a facility's final location, the board should spread on its minutes an analysis of locations considered, including, but not limited to, cost elements, cost-benefit analyses of considered locations, service requirements, engineering analysis and requirements, and other pertinent factors resulting in selection of a facility's final location.
3. As a matter of good public policy, the HCUA board should periodically (for example, every four years) conduct a review and selection process for legal services. Such a review would provide the board with information necessary to determine a cost-effective manner to obtain legal services for the authority and fulfill the board's fiduciary duty to customers of the authority to obtain quality legal advice in as an efficient and cost effective manner as possible.

## Appendix A: Harrison County Utility Authority's CDBG Projects, Project Budgets, and Expenditures, as of October 31, 2010

CDBG Project	Total Project Budget	Total Project Expenditures
RiverBend/Robinwood Forest (Emergency)	\$ 9,764,356	\$ 9,193,471
RiverBend/Robinwood Forest	4,349,321	2,307,372
South Woolmarket (Emergency)	3,249,606	1,283,663
South Woolmarket	28,676,922	9,916,615
Biloxi Broadwater Wastewater System Improvements (Sewer)	3,233,710	1,364,250
Biloxi Broadwater Water System Improvements (Water)	3,581,159	1,076,073
Central Harrison County Regional Water Supply	9,846,165	6,215,402
East Harrison County Regional Water Supply	28,145,310	15,346,963
Gulfport VA Area Water Supply Improvements	3,315,278	1,042,894
Long Beach Water System Improvements	2,714,586	1,442,216
Long Beach Water System Improvements (A)	1,567,651	0
North Gulfport/Lyman Regional Water Supply	15,704,432	4,920,834
Pass Christian Water System Improvements	3,423,163	1,704,431
South Gulfport Regional Water Supply	1,559,642	1,387,472
West Harrison County Regional Water Supply	20,192,019	11,015,704
Demonstration Project – Pipes on Beaches	6,911	9,348
Delisle Water and Wastewater Treatment Facility and Long Beach/Pass Christian Transmission System	22,554,811	9,288,562
D'Iberville Waterfront Wastewater Transmission System Improvements	6,202,694	4,329,062
D'Iberville Water and Wastewater Treatment Facility	24,332,607	12,946,012
East Central Harrison County Regional Water and Wastewater Treatment Facility	18,189,633	13,987,743

Gulfport VA Area Wastewater Transmission System Improvements	2,148,733	1,256,818
Long Beach Wastewater System Improvements	4,041,398	3,417,724
Pass Christian Wastewater System Improvements	2,144,591	1,218,539
South Gulfport Regional Transmission System	7,760,252	2,999,901
West Gulfport Regional Interceptor	2,728,993	828,618
West Gulfport Regional Transmission System	3,866,311	1,881,711
Delisle Transmission Lines	1,307,345	1,445,450
Long Beach Water System Improvements (B)	768,324	0
<b>Total</b>	<b>\$235,375,923</b>	<b>\$121,826,848</b>

SOURCE: PEER review of HCUA records.



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## Appendix B: HCUA Board Actions That Did Not Receive Unanimous Approval as Required by MISS. CODE ANN. Section 49-17-729 (2) (1972)

### HCUA Board Capital Improvement Motions Passed with At Least One Member Abstaining or Voting Nay

- November 15, 2007: A resolution requesting the HCUA Executive Director be authorized to request MDEQ to apply for CDBG funds under the Gulf Region Disaster Recovery Grants for acquisition of certain regional water and sewer facilities in the amount of \$4,494,788 and a resolution to authorize the HCUA Executive Director to request MDEQ to apply for CDBG funds under the Gulf Region Disaster Recovery Grants for acquisition of public and private sewer collection and water distribution systems in the amount of \$20 million. Motion passed with two members voting nay and one member absent.
- March 19, 2009: Motion to move forward with the S19 Project - South Woolmarket as recommended by the Design Engineering Firm passed with one member voting nay and one member absent.
- May 7, 2009: Motion to proceed with the engineering for W15 project passed with two members voting nay.
- August 19, 2009: Motion to award bid for the S20 - D'Iberville WWTF to the low bidder passed with one member voting nay.
- November 5, 2009: Motion to accept low bid of \$18.1 million for construction of S19 - South Woolmarket passed with one member abstaining.
- November 19, 2009: Motion to approve change orders resulting in a \$446,775 increase for S20 - D'Iberville WWTF passed with one member voting nay.
- January 21, 2010: Motion to approve a change order resulting in a \$65,990 increase for S20 - D'Iberville WWTF passed with one member absent and one member voting nay.
- February 18, 2010: Motion to approve a change order resulting in a \$820,434 increase relating to S16 passed with one member voting nay.
- Motion to approve a change order resulting in a \$227,952 increase relating to W14 passed with one member voting nay.
- Motion to approve a change order resulting in a \$1,512,737 increase relating to W15 passed with one member voting nay.

- Motion to approve a change order resulting in a \$633,493 increase relating to S14 passed with one member voting nay.
- March 18, 2010: Motion to approve a change order resulting in a \$47,157 increase relating to S19 passed with one member voting nay.
- April 15, 2010: Motion to approve a change order resulting in a \$154,840 increase relating to S21 passed with one member voting nay.
- May 20, 2010: Motion to approve a change order resulting in a \$36,462 increase relating to S20 passed with one member voting nay.
- Motion to approve a change order resulting in a \$235,767 increase relating to S11 passed with one member voting nay.
- June 3, 2010: Motion to approve a change order resulting in a \$1,270,951 increase relating to W18 passed with one member absent and another member voting nay.
- Motion to authorize HCUA Executive Director to sign a Clear Site Certification for S19 – South Woolmarket WWTF and a work order authorizing the contractor to install a force main from the WWTP south to Eagle Point Lagoon, excluding a parcel of land passed with one member absent and one member voting nay.
- August 19, 2010: Motion to approve a change order resulting in a \$433,108 increase relating to S19 passed with one member voting nay.

## **HCUA Board Capital Improvement Motions Passed with At Least One Member**

### **Absent**

- September 7, 2006: Motion to amend engineering contract to include the expansion and hazard mitigation of the D'Iberville WWTF to include the design, bidding and construction administration of the project passed with one member absent.
- January 17, 2008: Motion to amend letter to MDEQ by increasing requested amount to \$30 million for acquisition of collection systems and the acquisition of certain regional water and sewer facilities at a cost of \$4,494,788 passed with two members absent.
- February 21, 2008: Motion to accept "Site B" for the location of the S19 - South Woolmarket WWTF passed with one member absent.
- March 6, 2008: Motion to award the construction contract for Three Rivers/South Swan Interceptor Phase I passed with two members absent.
- April 3, 2008: Motion to approve conceptual design for Project S13a – Pass Christian wastewater system improvements, pumpstation and force main and Project W14a – Long Beach 28<sup>th</sup> Street Improvements passed with one member absent.

- April 16, 2008: Motion to accept the Conceptual Design Report for S19E – South Woolmarket Emergency Project passed with two members absent.
- Motion to accept the Conceptual Design Report for W12 Pass Christian Water System Improvements Project passed with two members absent.
- Motion to accept the Conceptual Design Report for S22 - D'Iberville Waterfront Wastewater Improvement Project passed with two members absent.
- Motion to accept the Final Design Contracts for W12 and S19 passed with one member absent.
- May 1, 2008: Motion to approve the Final Design Engineering Contracts for S14, S18, S20, S22, W11, and W15 passed with two members absent.
- Motion to approve Conceptual Engineering Design for CDBG projects S13, W14a, S16, and W17 passed with two members absent.
- May 15, 2008: Motion to approve the Final Engineering Contracts for CDBG Project S13a passed with one member absent.
- Motion to accept the conceptual design for S14 passed with one member absent.
- June 5, 2008: Motion to approve the conceptual plans for Projects S18, S21, and W11 passed with one member absent.
- June 19, 2008: Motion to approve the Conceptual Design for CDBG Project S17 “Gulfport VA Area Wastewater Systems Improvements” passed with one member absent.
- Motion to accept the Final Design Contract for W18, Eastern Harrison County Regional Water Supply Project in the amount of \$1,097,147 contingent upon approval by MDEQ passed with one member absent.
- Motion to accept the Final Design Contract for W16, Gulfport VA Area Water Supply Improvements in the amount \$121,905 contingent upon approval by MDEQ passed with one member absent.
- July 24, 2008: Motion to approve the Final Design Contracts for the S21 Project, Harrison/Biloxi Broadwater Wastewater System Improvements contingent on MDEQ approval passed with one member absent.
- Motion to approve the Conceptual Plans for S11, S12, and W14B passed with one member absent.
- September 25, 2008: Motion to approve a \$33,600 change order for the Gulfport South WWTF passed with one member absent.

Motion to approve the Final Engineering Design Services Contract for the S19 project passed with one member absent.

Motion to approve the Construction Phase Engineering Contract for the S19E – South Woolmarket Emergency Project contingent on DEQ approval passed with one member absent.

October 2, 2008: Motion to award a \$1.2 million construction contract for the Flat Branch Gravity Sewer Interceptor passed with one member absent.

March 9, 2009: Motion to approve a Resolution of Offer of Just Compensation for the purchase of a private water and wastewater system passed with one member absent. (The approximately \$4.75 million purchase was CDBG funded).

Motion to approve a new routing for W19 and S21 Biloxi Broadwater Water and Sewer Improvements lines to areas east and north of the original locations, contingent on staying with the budget and with approvals from Biloxi City Engineer, DEQ, and the HCUA Executive Director passed with one member absent.

July 9, 2009: Motion to approve a \$547,252 change order for the Long Beach/Pass Christian WWTP passed with one member absent.

October 1, 2009: Motion to approve a work order resulting in a \$135,000 decrease passed with one member absent.

Motion to approve a work order resulting in a \$118,165 increase passed with one member absent.

December 17, 2009: Motion to approve a work order resulting in a \$43,000 increase passed with one member absent.

Motion to approve a work order resulting in a \$112,000 decrease passed with one member absent.

January 21, 2010: Motion to approve a work order resulting in a \$43,767 increase passed with one member absent.

Motion to approve a construction contract modification resulting in a \$424,365 increase passed with one member absent.

Motion to approve a work order resulting in a \$67,797 increase passed with one member absent.

February 4, 2010: Motion to approve a work order for constructing a half million gallon tank instead of a million gallon tank that resulted in a \$588,000 decrease passed with one member absent.

May 6, 2010: Motion to approve a work order resulting in a \$133,285 increase passed with three members absent.

June 3, 2010: Motion to approve a work order resulting in a \$12,238 decrease passed with three members absent.

Motion to approve a work order resulting in a \$6,320 decrease passed with one member absent.

July 15, 2010: Motion to amend construction plans for S21 that results in an increase of \$76,791 passed with one member absent.

SOURCE: PEER review of HCUA board minutes from July 1, 2006, through September 30, 2010.

# Agency Response

## Harrison County Utility Authority

A. J. Holloway, Mayor, City of Biloxi  
Russell Quave, Mayor, City of D'Iberville  
George Schloegel, Mayor, City of Gulfport

Board of Directors  
  
Executive Director  
Kamran Pahlavan, P.E.

Billy Skellie, Jr., Mayor, City of Long Beach  
Chipper McDermott, Mayor, City of Pass Christian  
Kim B. Savant, Supervisor, Harrison County  
Marlin Ladner, Supervisor, Harrison County

December 17, 2010



Joint Committee on Performance Evaluation and Expenditure Review  
P.O. Box 1204  
Jackson, Mississippi 39215-1204

Re: Review of the Harrison County Utility Authority

Dear Chairman Mettetal, Honorable Members of the PEER Committee and Dr. Arinder:

This letter is the response of the Harrison County Utility Authority (“HCUA”) to the draft copy “A Review of the Harrison County Utility Authority” provided to the HCUA by your office on December 2, 2010. The HCUA Board appreciates the opportunity to make this response, and it is hoped that the information in this letter will help in understanding some of the questions raised in the draft provided to us. In this letter “You” refers to your office and the Honorable Legislators who are members of the PEER Committee, and “Us” refers to the HCUA and its Board Members.

We respectfully disagree with the PEER Committee’s interpretation of the law creating the Harrison County Utility Authority, The Mississippi Gulf Region Utility Act contained in the draft review, as it varies from the common sense interpretation of the law the HCUA and its predecessor (The Harrison County Wastewater and Solid Waste Management District) have followed since 1982.

We appreciate the PEER Committee’s understanding and courtesies extended to us by your staff.

Regarding the recommendations contained in the draft of the Review, we want you to know that all of your recommendations are being acted upon, as follows:

Based on your recommendations, we plan to:

1. With respect to the issue of necessity of unanimous votes of the HCUA Board regarding issues enumerated in the Mississippi Gulf Region Utility Act (§49-17-729(2), Miss. Code of 1972) and with respect to other ancillary matters particularized in your recommendations, we are in compliance with the provisions of the Mississippi Gulf Region Utility Act as further stated herein below. We will conduct the business of the HCUA using the practical common sense interpretation of the law that has been used since 1982, as outlined below, and we welcome the opportunity to meet with our Harrison County Legislative delegation at any time.

2. Require that viable alternative sites be considered when selecting any locations (for example, wastewater treatment plants and water tank sites); we believe that we are currently following this policy, and we plan to continue doing so and specifically to document such processes of analysis and include such documentation as part of our official minutes or otherwise make such documentation available to the public.
3. Periodically conduct a review and selection process for legal services. We believe we are currently following this policy, having considered legal services alternatives in 2007 and determined that the most cost effective alternative at that time, considering all the factors known to the Board, was to have the same attorney firm that is handling CDBG project services also perform non-CDBG general legal services, (as the same are often interrelated) and we plan to continue ongoing active evaluation of this procurement of legal services, as well as other professional services, a practice which we believe we are currently following.

The following background information is, we believe, necessary for an understanding of the operation of the HCUA.

1. The language giving veto power (requiring unanimous vote in certain situations) was originally contained in the Harrison County Wastewater Management Act (Senate Bill 2833, Chapter 885, Local and Private Laws, 1982) (the "Act"). An explanation of the history and intent of this provision of the Act is included in the letter of Hon. Gerald Blessey, a former legislator and former Mayor of the City of Biloxi, who drafted the language of the Act in question, and is attached as Exhibit 1. (*Note: It is respectfully suggested that you read Exhibit 1 at this point before reading further.*) We had consistently applied the unanimity or veto provisions of the predecessor Act as stated in Mr. Blessey's letter, so when the language of the predecessor Act was carried forward into the Mississippi Gulf Region Utility Act, we continued the same interpretation of the Act set out in Exhibit 1. We believe this interpretation and application (that the veto power or unanimity requirement should be applied to situations where: (1) an ultimate decision is made to set rates, *i.e.*, establish an annual budget; (2) a decision is made to adopt a capital project; and (3) a decision is made to issue bonds of the HCUA, but not to the day to day collateral decisions which may be ancillary to such issues) is both legal and makes good common sense. We believe it is an interpretation that has allowed us to fulfill our environmental mission, when a strained and artificial construction of the statute which might require a unanimous vote on every issue considered by us would have had the paralyzing effect of rendering such achievement impossible. Moreover, once the required unanimous vote is in place to adopt a project, because the HCUA Board Members have to follow general laws pertaining to public purchasing, eminent domain, and ethics in government, (for example) the public is protected and enabled to see major capital projects move to completion, bonds issued, and rates set after open debate in public meetings.

The minutes of the Board adopting the Mississippi Gulf Region Master Plan projects are attached as Exhibit 2. Once adoption of those capital projects was determined by unanimous vote, the Board has interpreted the statute as not requiring a unanimous vote on every decision which might conceivably pertain to the capital project the adoption of which has been fixed and is in place by such unanimous vote. Once Board Members unanimously agree on the adoption of a major capital project, for which an overall budget with contingencies has been adopted, it would not be in the public interest that Board Members be required to agree unanimously on such matters as eminent domain resolutions for particular parcels of property on which easements of other interests may be required, motions determining who will be the engineers or other professionals who render services pertaining to the project, actions determining who the contractor will be that perform the work, or how change orders accomplished within the requirement of the public contracting law (and within the overall budget) are adopted or implemented.

The Attorney General of Mississippi has rendered his opinion affirming the interpretation of this unanimous vote language consistent with the interpretation described in Mayor Blessey's letter (Exhibit 1). A copy of that Attorney General's opinion is attached hereto as Exhibit 3.

The courts have long held that a statute must be interpreted in what Justice Scalia has termed a "holistic endeavor," "because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."<sup>1</sup> "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."<sup>2</sup> As Justice Breyer explained, dissenting in *FCC v. NextWaver Personal Communications, Inc.* 537 U.S. 293, 311 (2003), "[i]t is dangerous...in any case of interpretive difficulty to rely exclusively on the literal meaning of a statute's words divorced from consideration of a statute's purpose."

"[H]owever well...rules may serve at times to decipher legislative intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislature policy."<sup>3</sup>

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<sup>1</sup> *United Savings Ass'n v. Timbers of Inwood Forest Associates*, 484 U.S. 365, 771 (1988).

<sup>2</sup> *United States v. Boisdore's Heirs*, 49 U.S. (8 How.) 113, 122 (1850). The same idea was recently expressed (reading of text must be determined by statutory context and purpose) – see *Brotherhood of Locomotive Engineers v. Atchison, T. & S.F.R.R.*, 516 U.S. 152, 157 (1996).

<sup>3</sup> *SEC v. Joiner*, 320 U.S. 344, 350-51 (1943).



Courts recognize that particular wording of a statute may have been borrowed from another statute under which such wording had an accepted meaning.<sup>4</sup> See the explanation contained in former Biloxi Mayor Gerald Blessey's attached letter as to the interpretation of the original statute from its inception. Thus "affecting could mean acting upon or having an effect upon; or influencing,<sup>5</sup> or it could mean the effect, consequence, result or outcome produced by a particular action.<sup>6</sup> As Judge Learned Hand observed, "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."<sup>7</sup> Thus the ordinary meaning of a particular mandatory or non-mandatory phrase or word, such as "shall" or "must" (as opposed to "may") can be trumped by context.<sup>8</sup> Significantly the context of both the original Harrison County Wastewater Management Act<sup>9</sup> and the Mississippi Gulf Region Utility Act<sup>10</sup> include broad policy goals and invest the agencies they create (the Harrison County Wastewater District and the Harrison County Utility Authority, respectively) with plenary powers to accomplish their respective stated missions. In the case of the Harrison County Wastewater Management Act, ("Wastewater Act") one of the primary goals was *that protection of the water in the Mississippi Sound can best be accomplished through the establishment of regional wastewater management districts to provide for the planning and financing of adequate collection and treatment facilities...to obtain such facilities...and to promote the development and operation of adequate wastewater collection and treatment facilities...public bodies [The Harrison County Wastewater Management District]...may be created with authority to cause and assist in compliance with the standards of water quality established by the Mississippi Air and Water Pollution Control Law, appearing as Section 49-17-1 et seq., Mississippi Code of 1972 and by the Federal Water Pollution Control Act, appearing as 33 U.S.C. 1251...."*<sup>11</sup> The Board of Directors is vested in the original Wastewater Act with "all powers" conferred upon the District;<sup>12</sup> and with copious distinct enumerated

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<sup>4</sup> See *Carolene Products Co. v. United States*, 323 U.S. 18 (1944). In the matter to be considered in this response, the interpretation by the Board of the unanimous vote language in the former statute should be given consideration, as the identical language appears in the Mississippi Gulf Region Utility Act.

<sup>5</sup> *Funk and Wagnalls Standard College Dictionary* Harcourt Brace and World. New York, 1957, 24.

<sup>6</sup> *Id.*, 421.

<sup>7</sup> *Cabell v. Markham* 148 F.2d 737, 739 (2<sup>nd</sup> Cir. 1945).

<sup>8</sup> See, e.g. *Moore v. Illinois Central Railroad* 312 U.S. 630, 635 (1941)

<sup>9</sup> Senate Bill 2833, Chapter 885, Local and Private Laws, 1982 Regular Mississippi Legislative Session.

<sup>10</sup> Section 49-17-701 *et seq.*, Miss. Code of 1972.

<sup>11</sup> Section 1, Harrison County Wastewater Management Act. See *Lepre v. D'Iberville Water and Sewer District* 376 So.2d 191 (Miss. 1979) for authority that courts recognize that water and sewer are important governmental functions.

<sup>12</sup> *Ibid.*, Section 5.

powers to assure that its legislative purpose can be achieved as a functioning entity of government.<sup>13</sup> The Mississippi Legislature granted the District created by the original Wastewater Act rulemaking powers so as to enable the attainment of the broad policy goals of the original Wastewater Act.<sup>14</sup>

In similar fashion, the Mississippi Gulf Region Utility Act incorporates board policy goals and grants expansive powers to the Board of Directors of the Harrison County Utility Authority so that those aims can be accomplished.<sup>15</sup> Section 49-17-747, Mississippi Code of 1972 contains language enabling actions of the Harrison County Utility Authority without the need for unanimous vote even those actions would otherwise have required a unanimous vote by the original Wastewater Act, as it allows the county authority to enter into contracts between public agencies or persons and the county authority (which contracts do not require unanimous vote). Section 49-17-747, which enables such contracts, states that the Authority may “do and perform all acts and things necessary...including the fixing...of rates”.<sup>16</sup> Section 765 (Section 49-17-765) authorizes the Board of Directors of the county utility authority to appoint a trustee and take other action with respect to bonds of the authority, an action which does not require a unanimous vote for the exercise of such power.<sup>17</sup> Similarly, the Mississippi Gulf Region Utility Act allows the Boards of county authorities to take action regarding capital projects without requiring that such must be done by unanimous vote. Examples include the power “to exercise general supervision over the design, construction, operation and maintenance of water, wastewater and stormwater systems;”<sup>18</sup> the power “to adopt rules and regulations regarding the design and construction...[of such systems].”<sup>19</sup> Such powers and responsibility to be exercised without the necessity of a unanimous vote requirement, are mandatory.<sup>20</sup> To interpret the statute in a way rigidly requiring that these actions must have a unanimous vote when they are clearly mandated by the Legislature with no requirement for unanimous vote accompanying such mandate would effectively paralyze the Board with respect to its ability to comply with the stated purposes of the

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<sup>13</sup> Ibid., Sections 5 and 6.

<sup>14</sup> Ibid., Section 7

<sup>15</sup> Section 49-17-703, 745, 727, 729, 743 747 Note that the language of Section 747 seems to negate the need for a unanimous vote (which is not required for entry into contracts between public agencies or persons and the county authority for provision of water, wastewater and storm water services by the county authority) by which contracts “the county authority is hereby authorized to do and perform any and all acts...”

<sup>16</sup> Section 49-17-747(11), Miss. Code of 1972.

<sup>17</sup> Section 49-17-765, Miss. Code of 1972

<sup>18</sup> Section 49-17-745(1), Miss. Code of 1972; this power would include approving change orders according to Law, awarding contracts, selecting engineers, etc.

<sup>19</sup> Id., (2); (7).

<sup>20</sup> Section 49-17-745(1), (2) and (7), supra, all begin with the mandate “the county authority shall...” (Emphasis added). That this required action is necessarily determined by majority vote (even though it could be argued that such action would clearly “affect” capital projects) is obvious from the context of the language of the section (745). It does not make sense that such a legislative mandate would be ordered without specific language also mandating a unanimous vote, if that was what the Legislature intended.

legislation.<sup>21</sup> Reasoning that a state of paralysis was certainly not the intent of the Legislature, the Harrison County Utility Authority Board has continued the custom and usage of the interpretation as described in the letter of former Biloxi Mayor Gerald Blessey. For over 28 years the statutory language requiring unanimous vote has been consistently applied as outlined in Exhibit 1. The public has enjoyed the benefit of this common sense interpretation, and has come to rely on management of the essential functions performed by the Harrison County Utility Authority being achieved and made possible on the basis of this proven application. As Justice Oliver Wendell Holmes observed, “The life of the law has not been logic; it has been experience.”<sup>22</sup> In this case, the interpretation we have followed is both logical and has been proven by successful experience.

The HCUA has been audited annually by independent certified public accountants, and its practices have been consistently approved. The Community Development Block Grant projects have been monitored by an independent contractor (the CDBG Administrator), the Mississippi Department of Environmental Quality, The Mississippi Development Authority, the Office of Inspector General of HUD, and their legality has not been found to be irregular in any respect. We have made a diligent effort to accomplish the mission to construct infrastructure that will serve our county for the next 25 years and beyond, and we intend to comply with all the laws pertaining to our activities and believe that we have done so in a practical and common sense manner that at once preserved the intended protection of the veto language and allowed us to function within the law to accomplish our mission.

2. The selection of sites for water and wastewater projects in Harrison County was essentially determined in the Mississippi Gulf Region Water and Wastewater Plan (“The Plan”) through conceptual plans undertaken by the engineers contracting with the Mississippi Department of Environmental Quality (“MDEQ”), Mississippi Engineering Group (“MSEG”). The situation on the Gulf Coast after Hurricane Katrina made it difficult for the cities and county to address master planning needed for recovery from the devastation caused by the storm. The Mississippi Development Authority delegated planning and administration of water and sewer projects to the MDEQ, which in turn contracted with MSEG to assist in these functions.

MSEG performed 80% of the work involved in conceptual planning for all projects in Harrison County, with 20% of assistance provided by local engineering firms hired by the HCUA.

In several instances attempts were made by the HCUA to persuade the MDEQ to deviate from the Plan, but adherence to the plan generally was the rule insisted on by the MDEQ. While this statement does not imply that the HCUA’s relationship with MDEQ was and is unsatisfactory, the HCUA has in many respects been subordinate

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<sup>21</sup> Board members could not comply with the Legislature mandate regarding such votes related to capital projects and also comply with the Mississippi Ethics in Government Law, which requires abstentions in certain circumstances in order to protect the public.

<sup>22</sup> Holmes, *The Common Law* (1881).

to MDEQ's directives. We believe the project sites were properly analyzed and a public hearing process was followed to allow for public comment. However, had the HCUA been allowed more discretion in how to spend the grant, select and prioritize the projects, and locate the project sites, there would have undoubtedly been instances in which projects would have been reconfigured from the way they appeared in the Plan.

As this was a singular opportunity to receive grant money to pay for water and wastewater by the HCUA Board, and as the terms of the grant agreement give most of the discretion to the state rather than to the HCUA, the HCUA Board felt constrained to follow the guidelines given to us.

In the future we plan to comply with the PEER Review recommendation concerning site analysis, as stated above.

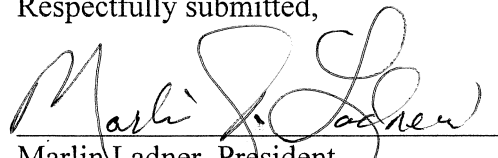
3. As stated above, we plan to evaluate the procurement of legal and other professional services closely in the future.

### CONCLUSION

We thank the PEER Committee and its staff for the opportunity to make this response and stand ready to respond to any other inquiries which will help us function more efficiently to benefit the public.

We are actively attempting to complete all of our projects within budget, and on time. These projects have not been without controversy, as money has been involved. The actions of the HCUA Board have been regular and legal in all respects. The public will not be well served by a process which may act as a catalyst to provoke expensive and burdensome challenges to the HCUA's actions when the practical interpretation of the law has in fact been applied in accordance with the intent of the Original Act.

Respectfully submitted,

  
Marlin Ladner, President  
Supervisor, Harrison County, Mississippi

*Exhibits 1 through 3 to this response are available upon request from PEER Committee offices, P. O. Box 1204, Jackson, MS 39215-1204.*

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