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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

January 12, 2015

Bridget Bohac, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

**RE: GUADALUPE-BLANCO RIVER AUTHORITY
TCEQ DOCKET NO. 2014-1658-WR**

Dear Ms. Bohac:

Enclosed for filing is the Office of Public Interest Counsel's Response to Hearing Requests in the above-entitled matter.

Sincerely,


Eli Martinez, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2014-1658-WR

APPLICATION OF THE	§	BEFORE THE
GUADALUPE-BLANCO RIVER	§	TEXAS COMMISSION ON
AUTHORITY FOR WATER	§	ENVIRONMENTAL QUALITY
RIGHTS PERMIT NO. 12378	§	

THE OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO HEARING REQUESTS

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

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) and files this Response to Hearing Requests in the above-referenced matter. OPIC recommends granting the requests for a contested case hearing filed by: the Upper Guadalupe River Authority (UGRA), the Texas Chapter of the Coastal Conservation Association (CCA Texas), Kerr County, the National Wildlife Federation (NWF), City of Kerrville, the Texas Parks and Wildlife Department (TPWD), and the Aransas Project (TAP). In support of its recommendation OPIC respectfully submits the following:

I. INTRODUCTION

The Guadalupe-Blanco River Authority (GBRA or Applicant) seeks authorization to divert and use not to exceed 75,000 acre-feet of water per year from the unappropriated flows of the Guadalupe River, Guadalupe River Basin, at a maximum diversion rate of 500 cfs (224,415.588 gpm) for use for municipal and industrial purposes within GBRA's statutory district which consists of Hays, Comal, Guadalupe Caldwell, Gonzales, DeWitt, Victoria, Kendall, Refugio and Calhoun Counties in the San Antonio, Colorado, and Lavaca River Basins, and the Colorado-Lavaca, Lavaca-Guadalupe, and San Antonio-Nueces Coastal Basins.

Applicant also seeks authorization to construct one or more off-channel reservoirs in Gonzales County with a combined maximum storage capacity of 125,000 acre-feet, and to store water in the off-channel reservoir(s) for subsequent diversion and use for municipal and industrial purposes within GBRA's statutory district.

GBRA's application and a portion of the fees were received on August 22, 2008. Additional information and fees were received on December 11, 2008, August 11, October 29, and December 18, 2009, February 12, 2010, June 2 and July 1, 2013. The application was declared administratively complete and accepted for filing on December 23, 2009. On July 29, 2013, the TCEQ Chief Clerk mailed notice to all navigation districts in the Guadalupe-Blanco Basin as well as all holders of certified filings, permits and claims of water rights. Applicant published notice of the application in 6 newspapers on July 31-August 6, 2013. The deadline to request a contested case hearing was September 5, 2013, thirty days after publication of the notice.¹

II. REQUIREMENTS OF APPLICABLE LAW

A. Requirements to Obtain Affected Person Status

This application was declared administratively complete after September 1, 1999, and is subject to Chapter 55, Subchapter G, sections 55.250 - 55.256. According to these rules, an "affected person" must submit a timely contested case hearing request in writing and in

¹ 30 TAC Section 295.171: A request for contested case hearing on an application for a water use permit or amendment made by the applicant, the executive director, or an affected person who objects to the application must be made in writing, must comply with the requirements of Chapter 55, Subchapter G, of this title (relating to Requests for Reconsideration and Contested Case Hearings; Public Comment), and specifically §55.251 of this title (relating to Requests for Contested Case Hearing, Public Comment), and must be submitted to the commission within 30 days after the publication of the notice of application. The commission may extend the time allowed for submitting a request for contested case hearing.

compliance with Commission requirements for making a request.² In addition, the request must identify the person's personal justiciable interest affected by the application, including a brief, specific explanation regarding "the requestor's location and distance relative to the activity that is the subject of the application and how and why the requestor believes he or she will be affected by the activity in a manner not common to the members of the general public."³

An "affected person" is one "who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application" in a manner not common to members of the general public.⁴ Relevant factors considered in determining a person's affected person status include:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health, safety, and use of the property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.⁵

A contested case hearing should be granted if an affected person's hearing request meets all requirements of applicable law. A request for hearing shall be granted if the request is made

² 30 TEX. ADMIN. CODE ("TAC") §§ 55.251 *et seq.* and 30 TAC § 295.171.

³ 30 TAC § 55.251(c)(2).

⁴ 30 TAC § 55.256(a). "This standard does not require parties to show that they will ultimately prevail on the merits; it simply requires them to show that they will potentially suffer harm or have a justiciable interest that will be affected." *United Copper v. TNRCC*, 17 S.W.3d 797, 803 (Tex.App. - Austin 2000).

⁵ 30 TAC § 55.256(c).

by the applicant or the executive director.⁶ The Commission may also refer an application to the State Office of Administrative Hearings if the Commission determines that a hearing would be in the public interest.⁷

A group or association may request a contested case hearing only if the group or association meets all of the following requirements:

- (1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;
- (2) the interests the group or association seeks to protect are germane to the organization's purpose; and
- (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.⁸

B. Requirements for a Water Use Permit

Section 11.022 of the Texas Water Code (TWC) provides that “the right to the use of state water may be acquired by appropriation in the manner and for the purposes provided in this chapter.” Section 11.134(b) provides in pertinent part that the Commission shall grant an application to use state water only if:

- (2) unappropriated water is available in the source of supply;
- (3) the proposed appropriation:
 - (A) is intended for a beneficial use
 - (B) does not impair existing water rights or vested riparian rights;
 - (C) is not detrimental to the public welfare;
 - (D) considers the assessments performed under Sections 11.147(d) and (e) and Sections 11.150, 11.151, and 11.152;
 - (E) addresses a water supply need in a manner that is consistent with the state water plan and the relevant approved regional water plan for any area in which the proposed appropriation is located, unless the commission determines that conditions warrant waiver of this requirement; . . .

⁶ 30 TAC § 55.255(b)1

⁷ 30 TAC § 55.255(c).

⁸ 30 TAC § 55.252(a).

Section 11.147(d) of the Water Code also requires the Commission to consider the effect of a proposed permit on existing instream uses and water quality.

III. DISCUSSION

A. Determination of Affected Persons

a. Guadalupe River Chapter of Trout Unlimited (GRTU)

On June 20, 2013, Richard Lowerre, on behalf of the Guadalupe River Chapter of Trout Unlimited (GRTU), submitted a hearing request in this matter. Mr. Lowerre indicates that GRTU is a non-profit, conservation organization whose mission is to “conserve, protect, and restore North America’s trout and salmon fisheries and their watersheds for the benefit of future generations.” GRTU is concerned about protecting water releases from Canyon Lake, which in turn will protect and enhance trout fishery and the habitat for fish and wildlife downstream of Canyon Dam.

While OPIC finds that the interests GRTU seeks to protect are germane to the organization's purpose, their hearing request did not identify one or more members of the group or association would otherwise have standing to request a hearing in their own right as required by 30 TAC §55.252(a)(1). At this time, OPIC therefore cannot recommend that the Commission grant GRTU’s hearing request. However, 30 TAC §55.252(b) authorizes OPIC to request an explanation of how a group or association meets the requirements of subsection §55.252(a). If GRTU provides such an explanation by the reply deadline of January 26, 2015, OPIC may reconsider its recommendation.

b. Upper Guadalupe River Authority (UGRA)

On August 29 and August 30, 2013, Raymond Buck, on behalf of the Upper Guadalupe River Authority (UGRA), submitted a hearing request in this matter. The UGRA is a “conservation and reclamation district of the State of Texas that is granted by its enabling legislation the right, power, privilege, function, and authority to control, develop, store and preserve the waters of the Guadalupe River and its tributaries within Kerr County, Texas.” UGRA holds Water Rights Permit No. 5394A and is concerned that GBRA’s proposed permit may negatively impact UGRA’s water right under circumstances where water rights holders upstream of Canyon Reservoir would be required to pass water for Canyon Reservoir.

UGRA has statutory authority over the interests it raises,⁹ as well as an inherent interest in protecting Water Rights Permit No. 5394A from impairment. As an existing water rights holder, UGRA has a personal justiciable interests under Texas Water Code §11.134(b)(3)(B). OPIC therefore recommends that UGRA be determined an affected person and that their hearing request be referred for a contested case hearing.

c. Texas Chapter of the Coastal Conservation Association (CCA Texas)

On August 30 and September 4, 2013, Robin Melvin, on behalf of the Texas Chapter of the Coastal Conservation Association (CCA Texas), submitted a hearing request in this matter. The request indicates that CCA Texas is a non-profit marine conservation organization comprised of more than fifty thousand recreational anglers and coastal outdoor enthusiasts. CCA Texas’s objective is to “conserve, promote, and enhance the present and future availability of...costal resources for the benefit and enjoyment of the general public.” CCA Texas identifies a member, Mr. Bart Reese, as an individual who has standing to request a hearing. Mr. Reese

⁹ 30 TAC §55.256(c)(6).

owns a home on Hynes Bay—a part of San Antonio Bay—where he regularly fishes. Mr. Reese is concerned the proposed permit could negatively impact waters of the bay by decreasing inflows and degrading aquatic life.

Mr. Reese has a right to use the bay for recreational purposes.¹⁰ The Commission must consider issues regarding water availability,¹¹ the protection of in stream uses,¹² and the protection of public welfare¹³ in its determination of whether to grant the application. The proposed permit may threaten flow availability downstream and negatively affect Mr. Reese's use of the water in the river.¹⁴ OPIC therefore recommends that the request of CCA be granted and the matter referred to SOAH for a contested case hearing.

d. San Antonio Water System (SAWS)

On August 30 and September 3, 2013, Jim Mathews, on behalf of San Antonio Water System (SAWS) submitted a hearing request in this matter. SAWS owns and operates a water supply and distribution system providing retail water service to approximately 460,000 customers in San Antonio and the surrounding areas. SAWS is concerned that the proposed permit may negatively impact a potential future application by SAWS to authorize conveyance of groundwater-based return flows through state watercourses for subsequent diversion and reuse downstream from GBRA's diversion point.

¹⁰ 30 TAC § 55.256(c)(3).

¹¹ See TWC § 11.134(b); 30 TAC §297.42.

¹² TWC § 11.147(d).

¹³ TWC 11.134(b)(3)(C)

¹⁴ 30 TAC § 55.256(c)(4), (5).

SAWS is also concerned that its private groundwater resources could be impaired if the district court's judgment in *Texas Aransas Project v. Shaw* is upheld. In such a scenario, any additional water permitted in response to GBRA's application could further reduce inflows into San Antonio Bay and potentially shift the burden of meeting the needs of the Whooping Crane to other parties and water resources, including SAWS' groundwater based return flows.

Because SAWS' concerns are based on theoretical plans and outcomes, OPIC cannot find that the issues raised are ripe for purposes of standing. SAWS does not have a current application to convey return flows through state watercourses before the Commission, and the district court's judgment in *Texas Aransas Project v. Shaw* is stayed pending appeal. Without a contemporaneous basis for determining that SAWS is affected during the pendency of this application, OPIC cannot recommend that the Commission grants its request for hearing.

e. Kerr County

On September 4, 2013, Robert Henneke, on behalf of Kerr County, submitted a hearing request in this matter. Kerr County is responsible for planning future water demands in Kerr County and planning for regional water supplies. Kerr County is concerned that the proposed permit may negatively impact the memorandum of understanding that the County entered into with GBRA that commits GBRA "to support and assist Kerr County in obtaining permits to divert water from the Guadalupe River or its tributaries at one or more diversion points within Kerr County for use within the County, up to a total diversion of not to exceed 6,000 acre-feet per year."

Kerr County has statutory authority over the interests it raises,¹⁵ as well as an inherent interest in protecting its agreement with GBRA from impairment. OPIC therefore recommends that Kerr County be determined an affected person and that their hearing request be referred for a contested case hearing.

f. National Wildlife Federation (NWF)

On September 2, 2013, Myron Hess, on behalf of the National Wildlife Federation (NWF), submitted a hearing request in this matter. NWF indicates that it is a national, non-profit organization dedicated to protecting the ecosystems that are most critical to native wildlife in America. NWF's members are dedicated to protecting fish and wildlife resources and the right of people to use and enjoy those resources. NWF is concerned that the proposed permit could adversely affect the Guadalupe River and San Antonio Bay, and the fish and wildlife resources they support, by disrupting essential freshwater inflows to the estuary system. NWF notes a lack of controls and the proper implementation of environmental flows in the proposed permit.

NWF identifies Wesley Blevins—owner of Chunky Monkey Seafood—as a member who has standing in their own right to request a hearing. Mr. Blevins catches and sells shrimp and other organisms from San Antonio Bay and is concerned about potential impacts on his business and personal interests related to the Bay.

OPIC finds that the interests NWF seeks to protect are germane to the organization's purpose. Further, Mr. Blevins is a member who has standing in his own right to request a hearing. The Commission must consider issues regarding water availability,¹⁶ the protection of

¹⁵ 30 TAC §55.256(c)(6).

¹⁶ See TWC § 11.134(b); 30 TAC §297.42.

in stream uses,¹⁷ and the protection of public welfare¹⁸ in its determination of whether to grant the application. A reasonable relationship exists between Mr. Blevins' interests in San Antonio Bay and the proposed diversions requested by GBRA. OPIC therefore recommends that the hearing request of NWF be granted.

g. City of Kerrville

On September 5 and September 6, 2013, Sara Thornton, on behalf of the City of Kerrville (Kerrville), submitted a hearing request in this matter. Kerrville indicates that they possess several water rights, including Permits Nos. 3505, 3635, and 5394B, as well as Certificates of Adjudication Nos. 18-1996, 18-2002, and 18-2026. Kerrville is concerned that GBRA's proposed permit may interfere with a special condition in Permit 5394A subordinating some of GBRA's water rights to Kerrville and GBRA.

As an existing water rights holder, Kerrville has a personal justiciable interests under Texas Water Code §11.134(b)(3)(B). OPIC therefore recommends that Kerrville be determined an affected person and that their hearing request be referred for a contested case hearing.

h. New Braunfels Utilities

On September 5 and September 6, 2013, Sara Thornton, on behalf of New Braunfels Utilities (NBU), submitted a hearing request in this matter. NBU indicates that they possess several water rights, including Certificates of Adjudication Nos. 18-323, 18-3824, and 18-3830. NBU is concerned that GBRA's proposed permit may interfere with special conditions contained

¹⁷ TWC § 11.147(d).

¹⁸ TWC 11.134(b)(3)(C)

in their Certificates of Adjudication that subordinate GBRA's previously existing water rights upstream of NBU's diversion point on the Guadalupe River.

As an existing water rights holder, NBU has a personal justiciable interests under Texas Water Code §11.134(b)(3)(B). OPIC therefore recommends that NBU be determined an affected person and that their hearing request be referred for a contested case hearing.

i. Texas Parks and Wildlife Department (TPWD)

On September 5, 2013, Colette Barron Bradsbury, on behalf of Texas Parks and Wildlife (TPWD), submitted a hearing request in this matter. Under Texas Water Code §11.147, the TCEQ, in making a final decision on any application to store, take or divert water, shall consider all information, evidence and testimony presented by TPWD). The request indicates that TPWD's statutory obligation and ability to protect fish and wildlife resources of the state may be affected by the actions proposed under the GBRA application and their potential to affect environmental flows in the Guadalupe River and the terrestrial wildlife habitat and resources located in the area of the proposed Gonzales County off-channel reservoirs.

TPWD is concerned about the draft permit's failure to identify the specific location, size and configuration of the proposed off-channel reservoirs, the lack of special conditions relative to protection of wildlife and habitat impacted by the proposed off-channel reservoirs, and the failure of flow standards to address non-instream wildlife and habitat.

Although the Texas legislature enacted laws prohibiting a state agency—except a river authority—from filing a request for a contested case hearing or request for reconsideration or from being considered an affected person or named a party, these rules and regulation only apply

to permit applications received by the commission on or after September 1, 2011.¹⁹ As stated, this application was received by the Commission on August 22, 2008. Because TPWD has a statutory interest over the concerns it raises,²⁰ OPIC recommends that TPWD be considered an affected person and its request referred for a contested case hearing.

j. Aransas Project (TAP)

On September 5 and September 9, 2013, James Blackburn, on behalf of the Aransas Project (TAP), submitted a hearing request in this matter. TAP is an association that advocates for adequate freshwater inflow into the bays, marshes, and the habitat of the Whooping Crane, and to protect the health of the bays, fisheries, and Whooping Cranes.

TAP identifies Al and Diane Johnson, as well as Debra Corpora as members of their association and individuals entitled to a hearing in their own right. Al and Diane Johnson own a ranch where they have constructed a building known as "The Crane House," which they rent to tourists, photographers, and birdwatchers. A major draw to visitors who frequent the Crane House is the presence of Whooping Cranes. The Johnsons are concerned that the proposed permit may negatively impact freshwater inflows to the bays and therefore negatively impact their property, income, and the Whooping Crane habitat.

Debra Corpora is another member of TAP identified as a person entitled to a hearing in their own right. Ms. Corpora visits the Aransas Bird and Nature Club 8 to 10 times a year to see Whooping Cranes and conduct bird surveys. Ms. Corpora also takes bout tours and mentors

¹⁹ See 30 TAC §§55.103, 55.201, 55.203, 55.256, and 80.109.

²⁰ 30 TAC §55.256(c)(6).

young birdwatchers at the refuge. Ms. Corpora is concerned the proposed permit could negatively impact freshwater inflows to the bay and therefore negatively impact the health and habitat of the Whooping Cranes.

The Johnsons and Ms. Corpora have a right to use the bay for recreational purposes.²¹ The Commission must consider issues regarding water availability,²² the protection of in stream uses,²³ and the protection of public welfare²⁴ in its determination of whether to grant the application. The proposed permit may threaten flow availability downstream and negatively affect the requestors' use of the water in the river.²⁵ OPIC therefore recommends that the request of TAP be granted and the matter referred to SOAH for a contested case hearing.

IV. CONCLUSION

OPIC respectfully recommends that the Commission grant the hearing requests of the following requesters: the Upper Guadalupe River Authority (UGRA), the Texas Chapter of the Coastal Conservation Association (CCA Texas), Kerr County, the National Wildlife Federation (NWF), City of Kerrville, the Texas Parks and Wildlife Department (TPWD), and the Aransas Project (TAP). If the information requested of the Guadalupe River Chapter of Trout Unlimited (GRTU) is submitted by January 26, 2015, OPIC may also recommend granting their hearing request. Based on the foregoing, OPIC respectfully requests that the Commission refer this

²¹ 30 TAC § 55.256(c)(3).

²² See TWC § 11.134(b); 30 TAC §297.42.

²³ TWC § 11.147(d).

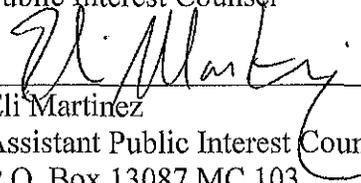
²⁴ TWC 11.134(b)(3)(C)

²⁵ 30 TAC § 55.256(c)(4), (5).

matter to SOAH for a contested case hearing.

Respectfully submitted,

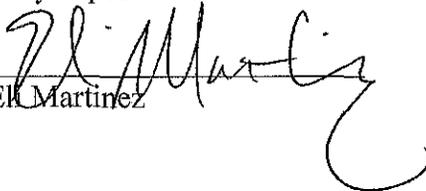
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CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2015, the original and seven true and correct copies of the Office of the Public Counsel's Response to Hearing Requests were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.



Eli Martinez

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TCEQ DOCKET NO. 2014-1658-WR

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