

DOCKET NO. 2016-0162-WR

**IN THE MATTER OF THE
APPLICATION BY NEW
BRAUNFELS UTILITIES FOR
WATER USE PERMIT NO. 12469**

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**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

**APPLICANT NEW BRAUNFELS UTILITIES’
RESPONSE TO REQUESTS FOR CONTESTED CASE HEARING**

New Braunfels Utilities (“NBU”) files this response to requests submitted to the Texas Commission on Environmental Quality (the “TCEQ” or the “Commission”) for a contested case hearing on the above-referenced application. For the reasons outlined herein, applicable statutes, administrative rules, and TCEQ policy all require that all hearing requests in this matter be denied. In the alternative, the nature of this case requires that the Commission employ a rarely used measure—but one expressly provided to TCEQ by the Texas Legislature—of limiting the scope of issues referred to the State Office of Administrative Hearings (“SOAH”) for contested case hearing to only the criteria provided in Section 11.042(b) of the Texas Water Code. In support of its position on this matter, NBU respectfully shows the Commissioners the following:

I. INTRODUCTION AND BACKGROUND

NBU has submitted an application to the TCEQ for a water use permit that, if issued, would authorize NBU to divert and reuse return flows that NBU discharges from three wastewater treatment plants within the Guadalupe River Basin pursuant to three existing Texas Pollutant Discharge Elimination System (“TPDES”) permits (the “Application”). By this Application, NBU seeks authorization to divert and reuse the portion of its return flows that NBU originally produces from its own groundwater

wells.¹ NBU seeks authorization, pursuant to Texas Water Code Section 11.042(b), to divert and reuse not to exceed 9,408 acre-feet of NBU’s existing and future groundwater-based return flows per year at a maximum diversion rate not to exceed 41.55 cubic feet per second (“cfs”) for municipal, industrial, and agricultural purposes in Comal, DeWitt, Gonzales, Guadalupe, and Victoria Counties in the Guadalupe River Basin and in that portion of Guadalupe County within the San Antonio River Basin.²

II. PROCEDURAL HISTORY

On June 9, 2009, NBU filed Application No. 12469 with the TCEQ. Upon request by TCEQ staff, NBU provided additional fees and information to TCEQ staff on October 16, October 27, October 29, and December 16, 2009. The Executive Director’s staff declared the Application administratively complete and filed the Application with the Office of the Chief Clerk on November 20, 2009. At the request of the Executive Director’s staff, NBU provided additional technical information to staff on December 4, 2014, which included an accounting plan developed by NBU’s engineering consultants in collaboration with TCEQ’s Water Rights Permitting and Availability technical staff. On July 2, 2015, staff filed draft Water Use Permit No. 12469 (the “Draft Permit”) with

¹ The Application originally included a request for both conveyance and diversion of surface water-based return flows, and diversion and reuse of groundwater-based return flows originating from NBU’s three wastewater treatment plants. The Executive Director has decided to authorize NBU to divert and reuse only that portion of NBU’s discharged return flows that originate from groundwater. Thus, NBU is now pursuing authorization only for the diversion and reuse of groundwater-based return flows. TCEQ’s review of NBU’s Application is, therefore, exclusively under Texas Water Code Section 11.042(b), relating to bed and banks authorizations for diversion and reuse of groundwater-based return flows.

² Similarly, because the Application originally concerned state water, it also requested an exempt interbasin transfer under Section 11.085 of the Texas Water Code. For the same reasons that NBU’s Application is no longer subject to Section 11.042(c), it is also no longer subject to Section 11.085. Specifically, the Application does not concern state water, which is the subject of Section 11.085. Tex. Water Code Ann. § 11.085(a) (West Supp. 2015).

the Office of the Chief Clerk along with a request for consideration of the Draft Permit to be placed on the Commission's regular agenda meeting.

Mailed notice was issued on July 2, 2015, and notice of the Application was published in the *New Braunfels Herald-Zeitung* on July 12, 2015. Four hearing requests were filed: two by Carowest Land Ltd. ("Carowest"), one by the Lower Colorado River Authority ("LCRA"), and one by the Guadalupe-Blanco River Authority ("GBRA"). On June 29, 2016, NBU received notice that the above-referenced matter would be considered by the Commission at the August 3, 2016 agenda. NBU submits this response to requests submitted to the TCEQ for a contested case hearing on the Application, pursuant to Title 30, Section 55.254 of the Texas Administrative Code.³

III. EVALUATION OF HEARING REQUESTS GENERALLY

As explained in Section IV.A below, there is no statute or rule that provides an opportunity for a contested case hearing on NBU's Application. The only contested case hearing authorizations in the Texas Water Code and TCEQ's rules apply to applications that concern state water. NBU's Application does not concern state water and is, therefore, not subject to those statutes and rules. Nevertheless, in support of NBU's alternative arguments herein, NBU respectfully offers the following explanation of the rules relating to hearing request processing and affected person determinations generally.

Under TCEQ's rules, for applications subject to contested case hearings, a contested case hearing can only be requested by 1) the Commissioner, 2) the Executive

³ Provisions of Title 30 of the Texas Administrative Code are referred to herein as "TCEQ's rules."

Director, 3) the Applicant, and 4) any “affected persons, when authorized by law.”⁴ Neither the Commissioners, the Executive Director, nor NBU has requested a contested case hearing in this matter. Therefore, if the Commission determines that hearing provisions applicable to state water also apply to NBU’s Application, the only hearing requests that were submitted were those made by entities claiming to be affected persons.

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.⁵ An interest common to members of the general public does not qualify as a personal justiciable interest.⁶ Accordingly, a request for a contested case hearing must include a brief, but specific, description of the person’s location and distance relative to the activity that is the subject of the Application.⁷ In addition, the person must do more than just provide a conclusory statement in the request that he or she will be harmed by the proposed change. The person must explain briefly, but specifically, how and why he or she will be affected by the activity proposed in the Application.⁸

When determining whether an individual or entity is an affected person, all relevant factors are considered by the Commission, including: 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

⁴ 30 Tex. Admin. Code § 55.251(a) (2016).

⁵ *Id.* § 55.103.

⁶ *Id.*

⁷ *Id.* § 55.251(c)(2).

⁸ *Id.*

regulated; 4) the likely impact of the regulated activity on the health, safety, and use of property of the person; 5) the 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.⁹

Under Section 55.254(f) of TCEQ's rules, a person who filed a hearing request may submit a reply to the following responses no later than nine days before the scheduled Commission meeting wherein the hearing requests will be considered.¹⁰ Under Section 55.254(f), such a reply may contain additional information responsive to the information contained in the correspondence issued by the Office of the Chief Clerk pursuant to Section 55.254(d).

Considering the inadequacies of the hearing requests submitted in this matter, as discussed in more detail below, NBU anticipates that some hearing requestors may attempt to use Section 55.254(f) as a means of curing the substantive defects of their original hearing requests by raising additional issues in an effort to influence the determination of their affected person status. Such a result, if allowed, would render the administrative deadline for submitting hearing requests required by Section 55.251(d) utterly meaningless. Indeed, the only reasonable interpretation of Section 55.254(f) in the context of Section 55.251(d) is that the former section provides requestors with the opportunity to clarify the information originally contained in their timely request, but it does not allow the requestors to raise new issues—*e.g.*, new claimed water rights, uses of water, or impacts attributable to the Application.

⁹ *Id.* § 55.256(c) (2016).

¹⁰ 30 Tex. Admin. Code § 55.254(f).

Any other interpretation of Section 55.254(f) would encourage prospective hearing requestors to deliberately submit a “bare-bones” hearing request and subsequently submit additional, substantial evidence with replies filed pursuant to Section 55.254(f), thereby depriving the applicant, the Executive Director, and the Office of Public Interest Counsel an opportunity to review and respond to the additional claims.¹¹ More than that, such an interpretation would essentially transform the responses filed by the applicant, the Executive Director, and the Office of Public Interest Counsel under Section 55.254(e) into instructions for how a failed hearing requestor can cure his deficiencies. Such an inequitable result cannot possibly have been the Commission’s intent when it adopted Section 55.254(f). Accordingly, if any of the hearing requestors submit substantial evidence in addition to that submitted prior to the deadline for submitting a hearing request in this matter, the Commissioners should decline to consider it.

IV. ANALYSIS OF HEARING REQUESTS ON NBU’S APPLICATION

For the reasons explained in this section below, there is no legal authorization for a contested case hearing on NBU’s Application because all legal authorizations for contested case hearings on water rights permit applications are specifically applicable only to applications that concern state water.¹² Even if there was a statute or rule that provided for a contested case hearing on the Application, each of the hearing requests submitted in this case fails to meet TCEQ’s rules for valid hearing requests. Accordingly, all of the hearing requests should be denied.

¹¹ See *id* § 55.254(e) (providing the applicant, the Executive Director, and the Public Interest Counsel an opportunity to respond to the hearing requests).

¹² See Tex. Water Code §§ 11.085(e), .1273, .132 (respectively authorizing contested case hearings for interbasin transfer permitting, water management plans, and permits to use state water).

A. NBU's Response to the Hearing Requests Generally

As explained below, there is no statute that authorizes the TCEQ to conduct a contested case hearing on the Application because the Application exclusively concerns privately owned groundwater-based return flows and not state water. But even if there was a statutory authorization for a contested case hearing, all of the hearing requestors have, respectively, failed to explain how they are affected persons as they are required to do under Sections 55.251 and 55.256 of the TCEQ's rules. Indeed, because the Application only concerns privately owned groundwater-based return flows, the hearing requestors could not demonstrate that they are affected, because none of them owns any water right that was granted based on the use and availability of NBU's groundwater-based return flows.¹³

For purposes of determining affected person status, it is not enough for a requestor to simply make a conclusory statement—as each has done here—that he or she will be adversely affected by the proposed activity. Applicable regulations require a description of how and why the requestor believes he or she will be affected in a manner not common to members of the general public.¹⁴ TCEQ's rules, therefore, require a requestor to make an affirmative demonstration that he or she will be affected, which all hearing requestors have failed to do.

Correspondingly, regardless of whether an evidentiary hearing is held, TCEQ has the discretion when deciding whether to grant a hearing request to consider the merits

¹³ Tex. Water Code Ann. § 11.042(b) (West 2008).

¹⁴ 30 Tex. Admin. Code §§ 55.251(c)(2), 55.256(a).

of the underlying activity and whether that activity will affect the requestors.¹⁵ When evaluating the validity of hearing requests, the Commission must consider substantial evidence submitted in support of the Application and developed by the Executive Director's staff during its review of the Application, as well as evidence submitted by hearing requestors—if any requestor has submitted such—to refute or challenge the Application and Executive Director's review of the evidence submitted therewith.¹⁶

1. Applications for bed and banks authorizations to divert and reuse privately owned groundwater do not involve state water and must be processed exclusively under Section 11.042(b) of the Texas Water Code.

Ten years ago, the TCEQ instructed that applications for bed and banks authorizations to divert and reuse groundwater-based return flows are evaluated exclusively under Section 11.042(b) of the Texas Water Code and not under statutes and rules applicable to state water.¹⁷ Moreover, in that same proceeding, the TCEQ held that “as a matter of law with regard to bed and banks authorization applications that request authorization to divert and reuse return flows derived exclusively from privately owned groundwater that, based on Water Code Section 11.042(b), such applications **do not**

¹⁵ “TCEQ enjoys the discretion to weigh and resolve matters that may go to the merits of the underlying application, including the likely impact of the regulated activity . . . will have on the health, safety, and use of property by the hearing requestor and on the use of natural resources. . . . TCEQ’s inquiry into these and other factors may include reference to the permit application, attached expert reports, the analysis and opinions of professionals on its staff, and any reports, opinions, and data it has before it. . . . And importantly, the existence of substantial evidence in the record supporting TCEQ’s decision is a factor—often a dispositive factor—in determining whether TCEQ abused its discretion.” *Sierra Club v. Tex. Comm’n on Env’tl. Quality*, 455 S.W.3d 214, 223-24 (Tex. App.—Austin 2014, pet. denied).

¹⁶ *See id.* at 224 (TCEQ’s review of a hearing request is proper, so long as “the hearing requestor [is] afforded its regulatory rights to express his dissatisfaction with the proposed license and the agency [does] not refuse to consider the evidence offered in support of that dissatisfaction.”).

¹⁷ An Interim Order concerning the Motion to Overturn filed by the City of Bryan and the City of College Station regarding the Executive Director’s decisions to return Application Nos. 5912 and 5913 pursuant to 30 Texas Administrative Code Section 281.18 without prejudice to their re-submission; TCEQ Docket Nos. 2006-1832-WR and 2006-1831-WR..[sic] [hereinafter Bryan-College Station Order] (attached hereto as Exhibit A).

involve state water.¹⁸ The Commission made that holding in response to a petition by the cities of Bryan, Texas and College Station, Texas concerning those cities' applications for a bed and banks authorization. The Commission, however, did not limit its holdings to just those applications. Rather, the Commission ordered that the Bryan-College Station Order applies "to bed and banks authorization applications that involve exclusively groundwater-based return flows."¹⁹

In 2012, the Texas Supreme Court observed in *Edwards Aquifer Authority v. Day* that, while Edwards Aquifer groundwater certainly could become state water when discharged in lieu of a bed and banks authorization,²⁰ the law specifically allows for groundwater produced from the Edwards Aquifer to "be transported through a natural watercourse without becoming state water."²¹ In the wake of the *Day* decision, the TCEQ has reiterated its interpretation of Section 11.042(b) on several occasions. Most recently, the TCEQ has affirmed its position in matters concerning applications by the Brazos River Authority and the City of Pearland.

In the matter concerning the Brazos River Authority's application for a system operation permit, the Commission acknowledged at its January 20, 2016 open meeting that a discharger of groundwater-based return flows retains a right to obtain a bed and banks authorization for the groundwater-based return flows at any future point

¹⁸ *Id.* at 2 (emphasis added).

¹⁹ *Id.* at 3.

²⁰ In the *Day* case, the Supreme Court did not consider any issues relating to groundwater-based return flows or indirect reuse. The case involved questions relating only to untreated groundwater produced from the Edwards Aquifer. The Court's opinion does not explain or specify whether the dictum cited above was intended to refer to groundwater-based return flows—*i.e.* discharges of wastewater return flows originally sourced from groundwater. *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 818, 822-23 (Tex. 2012).

²¹ 369 S.W.3d at 822-23.

subsequent to the initial discharge. Commissioner Niermann phrased that concept as follows:

I think the *Day* case speaks to that, that such waters change characteristics and can become -- or do become, generally speaking, State waters again.

Coming back around, I think, to the point you were making, is that just because somebody who has developed groundwater or pumped groundwater and made it their own, they have a property interest in it, just because that's discharged into surface waters, it doesn't automatically change the characteristic. If that person wants to indirectly reuse that water downstream, they certainly have the right to apply for a bed and banks permit to do so.²²

In other words, an entity that discharges groundwater-based return flows does not relinquish ownership interest in future discharges of those groundwater-based return flows if the entity has not yet applied for or obtained a bed and banks authorization. That statement is also consistent with the action taken by the TCEQ in 2011 when it granted an application by the City of Lubbock for, *inter alia*, a groundwater-based return flow bed and banks authorization.²³

In the City of Pearland matter, the Commission again provided insight on the subject during the June 8, 2016 public meeting. During that meeting, and in keeping with the Bryan-College Station Order, Chairman Shaw explained that there are separate processes for bed and banks authorization applications for groundwater-based return flows versus the processes for surface water-based return flows. Chairman Shaw stated that the Commission has issued directives "specifically recognizing that we have held that groundwater return flows remain the property of that owner of that groundwater,

²² Transcript of January 20, 2016 TCEQ Public Meeting at 5:11-22 (attached hereto as Exhibit B).

²³ An Order Granting the Application by City of Lubbock for Amendment to Water Use Permit No. 3985 SOAH Docket No. 582-11-3522; TCEQ Docket No. 2010-0837-WR at 3, 5.

and that in order to request use downstream, that simply requires a request of a bed and banks transfer so we can take into account the losses associated with that and ensure that we're protecting surface water rights."²⁴

Following the Executive Director's technical review, NBU's Application now concerns groundwater-based return flows exclusively. The Commission, therefore, will process the Application exclusively under Section 11.042(b) of the Texas Water Code and not under any other provision in statute or rules relating to state water.²⁵ Section 11.042(b) provides, in its entirety, the following:

A person who wishes to discharge and then subsequently divert and reuse the person's existing return flows derived from privately owned groundwater must obtain prior authorization from the commission for the diversion and the reuse of these return flows. The authorization may allow for the diversion and reuse by the discharger of existing return flows, less carriage losses, and shall be subject to special conditions if necessary to protect an existing water right that was granted based on the use or availability of these return flows. Special conditions may also be provided to help maintain instream uses and freshwater inflows to bays and estuaries. A person wishing to divert and reuse future increases of return flows derived from privately owned groundwater must obtain authorization to reuse increases in return flows before the increase.²⁶

Section 11.042(b) does not, itself, provide an opportunity for a contested case hearing.²⁷

Likewise, TCEQ's administrative rule regarding notice of applications submitted under Section 11.042(b) appears to reflect the absence of an opportunity for a contested case hearing in the statute. The wording of Section 295.161(b) of TCEQ's rules does not

²⁴ Transcript of June 8, 2016 TCEQ Public Meeting at 3:24-4:5 (attached hereto as Exhibit C).

²⁵ *See id.*; *see* Bryan-College Station Order, *supra* note 17, at 1.

²⁶ Tex. Water Code § 11.042(b).

²⁷ *Id.*

function to alert diverters of record between the discharge and diversion points of an opportunity for a contested case hearing to protect those diverters' interests.²⁸ In fact, the rule does the opposite. It serves to protect NBU's interest in its private property that will flow by interjacent users' diversion points.²⁹ That is consistent with the fact that the only conceivable impact NBU's activity under a bed and banks authorization could have on the Guadalupe River between its discharge locations and the proposed diversion point is that there will be **more water** in the river than would otherwise occur. If there is any possible adverse impact, such impact could only possibly occur downstream of the proposed diversion point. Yet, TCEQ's rules do not even require that downstream water rights owners be provided notice of NBU's Application because it **does not concern state water**.³⁰ No other provision applicable to groundwater-based bed and banks authorizations provides an opportunity for a contested case hearing.³¹

NBU's Application, by virtue of the fact that it originally requested authorizations related to state water under Sections 11.042(c), was subject to notice and hearing at the time it was originally filed and during the TCEQ staff's review. However, the Application now effectively only requests an authorization to divert and reuse groundwater-based return flows under Section 11.042(b) of the Texas Water Code. Because applications and

²⁸ *Id.* 30 Tex. Admin. Code § 295.161(b) (“[T]he commission . . . shall send notice to each diverter of record on the watercourse between the proposed point of discharge and the proposed point of diversion. The notice shall set forth the approximate time that deliveries of such water will occur, the legal consequences that could result from the unlawful diversion and taking of such water in transit, and other details the commission considers appropriate.”).

²⁹ In other words, it is the potential unlawful activity of interjacent water diverters—not NBU—that could possibly injure downstream water rights.

³⁰ Tex. Water Code § 11.042(b); Bryan-College Station Order, *supra* note 17, at 2; *cf.* 30 Tex. Admin. Code § 295.161(a) (requiring notice to every water right holder of record downstream of the discharge point for bed and banks authorization applications that do not involve groundwater-based effluent or other groundwater).

³¹ *See, e.g.*, 30 Tex. Admin. Code § 297.16(b).

draft permits that contemplate only diversion and reuse of groundwater-based return flows under Section 11.042(b) are processed exclusively under that statute—and not under any other statute or rule relating to state water—there is no longer any legal authorization for a contested case hearing on the Application.

Nevertheless, if the Commission decides that the Application is subject to being referred to SOAH for a contested case hearing under some other statute or rule, the issues that may be deliberated by SOAH under Section 11.042(b) are narrow. They are as follows:

1. did NBU's Application properly account for carriage losses for the requested diversion and reuse of groundwater-based return flows;
2. were any existing water rights in the Guadalupe River Basin "granted based on the use or availability" of NBU's groundwater-based return flows, and, if so, does the Draft Permit include special conditions necessary to protect such water rights; and
3. does the Draft Permit include special conditions necessary to help maintain instream uses and freshwater inflows to bays and estuaries?³²

None of the hearing requests raise any issues related to any of these points. While some of the hearing requestors identified interests related to water rights and state water in the Guadalupe River Basin, none of the interests claimed are in any way related or relevant to NBU's request to divert and reuse its privately owned groundwater-based return flows within the bed and banks of the Guadalupe River and its tributaries, and to subsequently divert and reuse them. No requestor claimed that the Application failed to properly account for carriage losses. Nor has any hearing requestor claimed that any water right was "granted based on the use and availability" of NBU's discharge of

³² See *id.*

privately owned groundwater-based return flows. No hearing requestor has suggested that the Draft Permit does not include special conditions sufficient to protect any such water right or instream uses and freshwater inflows to bays and estuaries. As such, the interests claimed are simply not justiciable—*i.e.* they cannot be adjudicated by the TCEQ under Section 11.042(b).

2. The three hearing requestors are not affected persons based on the criteria in TCEQ's rules for determining affected person status.

The requestors, whose individual requests are evaluated more fully in the next section, appear to assert that their riparian and adjudicated water rights will be adversely affected by the proposed diversion and reuse of NBU's historic and future groundwater-based return flows. In addition to TCEQ's Water Availability Modeling ("WAM"),³³ NBU performed its own WAM and provided a supplemental analysis of TCEQ's WAM.³⁴ Using conservative values, all modeling performed by TCEQ's staff and NBU confirms that impacts to water rights in the river basin, if any occur at all, are extremely minimal. Based, in part, on the modeling, TCEQ's staff supported granting the Draft Permit.³⁵

The entirety of the evidentiary record before the Commission supports a finding that no interest will be impacted if the Commission denies the hearing requests and issues the requested authorization.³⁶ None of the hearing requestors provided any

³³ Technical memoranda explaining TCEQ staff's modeling analysis is attached hereto as Exhibit D.

³⁴ A technical memorandum submitted by NBU's technical consultant to TCEQ's water rights permitting staff in support of the Application is attached hereto as Exhibit E.

³⁵ Exhibit D, Water Availability Analysis Addendum, at 2.

³⁶ See *Sierra Club*, 455 S.W.3d at 223-24 (TCEQ's analysis may include the permit Application, attached expert reports, the analysis and opinions of professionals on its staff, and any reports, opinions, and data it has before it); see also *Tex. Comm'n on Env'tl. Quality v. City of Aledo*, No. 03-13-0013-CV, 2015 WL 4196408, at *4 (Tex. App.—Austin July 8, 2015, no pet.) (mem. op.) ("That burden of

modeling or other data to rebut these findings, demonstrated the projected loss of reliability in their water right, or otherwise indicated how they would be impacted.³⁷ As is evident from TCEQ staff's technical memoranda, staff did not determine that any special condition was necessary to protect any water right granted "based on the use and availability" of NBU's groundwater-based return flows as provided under Texas Water Code Section 11.042(b). Nevertheless, staff included in the Draft Permit several special conditions, including a requirement of an accounting plan, which will further serve to ensure that all interests in the basin are not adversely impacted by the proposed activity.

Moreover, as explained in the attached sworn affidavit of Mr. Tony Smith, P.E., NBU's consultant who participated in the development of NBU's Application, technical analyses and materials supporting the Application, and the TCEQ's technical review of the Application, the Application does not seek authorization to, nor does it contemplate that NBU will, convey, divert, or use any water to which the requestors are entitled, to the extent the requestors are actually entitled to any water in this segment of the Guadalupe River.³⁸ According to Mr. Smith, the source of all water sought for diversion is NBU's privately owned groundwater-based return flows, which are not subject to the Texas Water Code's state water appropriation priority system. TCEQ's staff has also acknowledged that the Draft Permit will only authorize NBU to divert its own groundwater-based return flows and not any surface water-based return flows.³⁹

offering evidence to support a showing on any given factor must necessarily rest on the person seeking to be admitted as a party.").

³⁷ See *City of Aledo*, 2015 WL 4196408, at *4-5 (In the absence of any evidence offered by an individual to support a showing of affectedness, it is proper for the TCEQ to deny the hearing request.); see also 30 Tex. Admin. Code § 55.251(c) (A hearing requestor *must* explain *how and why* the requestor believes he or she will be affected.).

³⁸ Mr. Smith's sworn affidavit is attached hereto as Exhibit F.

³⁹ Exhibit D Water Availability Analysis Addendum at 4.

Importantly, both Mr. Smith and TCEQ’s water availability staff concluded that issuance of the Draft Permit will not significantly impact any water rights in the Guadalupe River Basin.

Two of the requestors, either by virtue of adjudicated or riparian rights, are entitled only to state water—*i.e.* the ordinary flow of the Guadalupe River.⁴⁰ The water sought for diversion pursuant to the Application is not part of the ordinary flow of the Guadalupe River. It is water that, but for the efforts of NBU, would not be found in the Guadalupe River.⁴¹ As explained in Section IV.A.1 above, the TCEQ has consistently determined that groundwater-based return flows are the private property of the owner of the groundwater, and thus do not constitute state water. Moreover, TCEQ has included provisions in the Draft Permit explicitly limiting NBU’s diversions to only water that NBU actually discharges, and TCEQ has required—and approved—an accounting plan to ensure compliance with these provisions. Therefore, there can be no impact to the hearing requestors’ use of water to which they are entitled in the Guadalupe River, if they use any such water.

Finally, some requestors will not be affected because the proposed diversion will occur downstream of their alleged water rights. The water rights cited by Carowest and

⁴⁰ Tex. Water Code § 11.021.

⁴¹ GBRA appears to dispute that the groundwater-based return flows discharged by NBU would never occur in the Guadalupe River Basin but for NBU’s efforts to develop and discharge them. NBU is legally permitted to withdraw water through groundwater wells from the Edwards and Trinity Aquifers. As a public water supplier, it is virtually guaranteed that NBU will continue to produce groundwater under its groundwater permits for the foreseeable future. It is difficult to imagine how the groundwater produced by NBU from its groundwater wells would somehow discharge out of Comal or San Marcos Springs subsequent to NBU’s withdrawal of that water from the Edwards and Trinity Aquifers. Any groundwater legally produced by NBU will not enter into surface water resources in the Guadalupe Basin without NBU’s efforts to put it there. There is, perhaps, no more fundamental rule of law in Texas than that groundwater percolating under NBU’s property and captured by NBU is the private property of NBU. *Coyote Lake Ranch, LLC v. City of Lubbock*, No. 14-0572, 2016 WL 3176683, at *8 (Tex. 2016); *Day*, 369 S.W.3d at 828-29; *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, at 76-77 (Tex. 1999); *Hous. & T.C. Ry. Co. v. East*, 98 Tex. 146, 150-51 (Tex. 1904).

LCRA⁴² are between NBU's points of discharge and the diversion point. As such, the requestors will, if anything, be benefitted from the addition of groundwater-based return flows into the ordinary flow of waters to which they are entitled and will not be impacted when such waters are diverted downstream of their rights, assuming they have any such rights.

Even those water rights downstream of NBU's proposed diversion point will not be affected. Downstream diversions would only be the beneficiary of the surcharge to the Guadalupe River resulting from NBU's discharge of its groundwater-based return flows, as this would alleviate some portion of the normal streamflow losses that occur in the Guadalupe River. Moreover, whatever return flow NBU does not capture and divert pursuant to the Draft Permit—if it is issued—would remain in the Guadalupe River downstream of NBU's proposed diversion point. Thus, there is no way that downstream water rights can be adversely impacted by the Application. NBU is adding non-native, developed, groundwater-based return flows to the Guadalupe River, which provides a benefit to existing water rights holders by virtue of this addition given the practicalities of operating diversion works and, at worst, a neutral effect if NBU diverts as much as it discharges because the water diverted is not water to which the downstream rights holders are otherwise entitled.

Among the non-exclusive criteria that TCEQ uses to determine whether a hearing requestor is an affected person with standing to request a contested case hearing is the likely impact of the regulated activity on use of the impacted natural resource by the

⁴² As explained in Section IV.B.2 below, LCRA's claim of water rights in the Guadalupe Basin is highly dubious.

person claiming affectedness.⁴³ As only surface water rights are claimed by the requestors, and because the modeling analysis performed by both NBU and the Executive Director’s staff demonstrates that the impact will be minimal—if any impact occurs at all—none of the requestors can demonstrate an impact on the natural resources they use that warrants a determination that the requestor is an affected person.⁴⁴

Based on the information and facts provided in the hearing requests, the requestors cannot be affected by issuance of the Executive Director’s Draft Permit. The water to be diverted and reused by NBU is the private property of NBU alone. For that reason, the Application is not subject to referral to a contested case hearing. Moreover, none of the hearing requestors has identified a single interest relevant to any issue or criterion in Section 11.042(b) of the Texas Water Code. Accordingly, there is no justiciable interest or controversy in this matter under Section 11.042(b). Accordingly, all hearing requests should be denied.

B. Response to Individual Hearing Requests

For the reasons outlined in this section, each of the three hearing requestors in this matter has failed to substantially comply with the requirements in TCEQ’s rules for valid hearing requests. Moreover, none of the hearing requestors have identified any personal justiciable interest that is not common to members of the general public or that

⁴³ 30 Tex. Admin. Code § 55.256.

⁴⁴ The same is true regardless of whether there is some statutory rule that allows an owner of an appropriative right to divert state water to have standing in this matter, or whether there is some statute or rule that makes ownership of such a right—as opposed to a water right specifically “granted based on the use and availability” of NBU’s return flows—a relevant issue in this proceeding. As explained herein, no such statute exists.

could possibly be affected by NBU's Application. Accordingly, all hearing requests should be denied.

1. Carowest has failed to substantially comply with TCEQ's requirements for hearing requests and has not identified a personal justiciable interest in this proceeding.

Jim Mathews submitted two substantively identical hearing request letters on the Application on behalf of Carowest Land, Ltd. According to the request, the Carowest is "associated with" the Weston family. The requests were received by the Chief Clerk via letter on August 11, 2015 and e-filed August 14, 2015.

Carowest's two requests both fail to substantially comply with the requirements of Section 55.251(c)(2) of TCEQ's rules, which requires Carowest to identify its personal justiciable interest affected by the Application and to briefly, but specifically, describe its location and distance relative to NBU's proposed activities in the Application. As a threshold issue, NBU cannot discern from the hearing request who owns the property referenced in Carowest's requests, who is correspondingly vested with a property interest, and where the property is located relative to the activities requested by NBU.

The first paragraph of Carowest's requests states the *Weston family* owns land adjacent to the Guadalupe River and references the Weston family's use of the Guadalupe River for domestic and livestock and wildlife purposes in the second paragraph. The second paragraph, however, contradicts the first paragraph by stating that *Carowest* owns the land and residential property adjacent to the Guadalupe River that is periodically used by the Weston family and their guests and references Carowest's domestic, livestock, and wildlife use of the Guadalupe River. Consequently, the "vested property interest" that Carowest claims could be affected by the Application cannot be ascertained in the request. Further, the hearing request simply states that

Carowest “owns land and residential property . . . that is downstream of one or more of NBU’s discharge points” without stating specifically where such property is located, and without stating at all where such property is located relative to NBU’s requested diversion point. Thus, Carowest has substantially failed to comply with the requirements of Section 55.251(c)(2).

Carowest additionally fails to comply with Section 55.251(c)(2) of TCEQ’s rules, which requires Carowest to briefly—but specifically—describe how and why the Application will affect Carowest in a manner that is not common to the interests of members of the general public. While it indicates the property referenced in the request is adjacent to the Guadalupe River and references the Weston family’s use of the Guadalupe River for domestic, livestock, and wildlife purposes, there is no “brief, but specific, written statement explaining in plain language” how or why the Application will affect any justiciable interest that it may have.⁴⁵ In fact, Carowest utterly failed to include any kind of written statement to that effect, brief, specific, plainly stated, or otherwise.⁴⁶ The request only makes the conclusory assertion that Carowest has “a vested property interest recognized and protected by Texas Water Code § 11.142 and 30 TAC § 297.21 that could be adversely affected if the TCEQ were to grant the requested authorization to NBU.” As discussed at length in Section IV.A above, TCEQ’s rules require Carowest to do more than simply make a conclusory statement that it is adversely affected.

Carowest additionally describes its general concerns about the development of the accounting plan for its alleged failure to account for domestic, livestock, and wildlife

⁴⁵ 30 Tex. Admin. Code § 55.251(c)(2).

⁴⁶ *See id.*

exemptions between NBU's discharge points and requested point of diversion. Carowest's hearing request further alleges that the Draft Permit would, if issued, authorize NBU to modify the accounting plan after the permit is granted without notice or due process protections. However, there is no requirement in Section 11.042(b) that NBU account for water rights subject to the domestic and livestock exemption.⁴⁷ Moreover, Carowest's hearing request factually misstates the nature of the Draft Permit because the Draft Permit specifically requires that NBU's bed and banks authorization permit be amended upon any modification to the accounting plan that changes a term or condition of the permit.

Notwithstanding the technical shortcomings of Carowest's request, Carowest cannot be adversely affected by the activity that is the subject of the Application. The Application does not seek, nor does it contemplate, authorization for NBU to convey, divert, or use state water native to the Guadalupe or San Antonio River Basins. The source of all water sought for diversion is NBU's return flows resulting from its use of privately owned groundwater. Riparian users have the right to use the normal flow of the river subject to a standard of reasonable use.⁴⁸ Riparians can only divert the normal flow of streams for domestic, livestock, and wildlife purposes.⁴⁹ Therefore, as described above, because NBU seeks to divert only water derived from privately-owned groundwater sources and not from the normal flow of the Guadalupe River, NBU's activities will in no way interfere with Carowest's right to use the normal flow of the Guadalupe River.

⁴⁷ Tex. Water Code § 11.042(b).

⁴⁸ *Cummins v. Travis Cnty. Water Control & Improvement Dist. No. 17*, 175 S.W.3d 34, 45-47 (Tex. App.—Austin 2005); see *Motl v. Boyd*, 286 S.W. 458, 470 (1926).

⁴⁹ *Cummins*, 175 S.W.3d at 45-47; see *In re Adjudication of Water Rights of Upper Guadalupe Segment of Guadalupe Riv. Basin*, 642 S.W.3d 438, 439 (Tex. 1982).

Moreover, NBU has independently discovered that NBU's requested diversion point is ***downstream*** of Carowest's alleged property interest.⁵⁰ As explained above, the only conceivable impact the authorized activity could have at Carowest's claimed diversion point is for there to be more water flowing in the Guadalupe River than would have occurred in lieu of NBU's discharges. The notice owed to Carowest under TCEQ's rules serves to protect NBU's interests by putting Carowest on notice of "the legal consequences that could result from [Carowest's] unlawful diversion and taking of such water in transit[.]"⁵¹ NBU's diversion of such water in transit below Carowest's diversion point could not possibly impact water availability at Carowest's property location.

Because Carowest does not identify any personal justiciable interest affected by the Application that is not common to members of the general public, Carowest is not an affected person using the relevant factors under TCEQ rules, including those factors enumerated in Section 55.256. Additionally, evidence submitted by NBU in support of its Application, and generated by the TCEQ's staff during its review of the same, affirmatively demonstrates that Carowest will not be affected by the proposed activity. Relevant administrative notice provisions presume the same. As such, Carowest's hearing request should be denied.

2. LCRA has failed to substantially comply with TCEQ's requirements for hearing requests and has not identified a personal justiciable interest in this proceeding.

Phil Wilson submitted a request for a contested case hearing on the Application on behalf of LCRA. The hearing request was received in the Chief Clerk's office on August 11, 2015. In its request, LCRA states that the basis for its request is to preserve its

⁵⁰ A fact that Carowest failed to explain as required by Section 55.251(c)(2) of TCEQ's rules.

⁵¹ 30 Tex. Admin. Code § 295.161(b).

legal rights under an agreement with NBU that entitles LCRA to require NBU to transfer to LCRA the surface water rights in Certificate of Adjudication No. 18-3824, as amended (“CA No. 18-3824”), which is identified in the Application as a source of a portion of the surface water-based return flows NBU initially sought in its Application. LCRA, however, has no such interest in NBU’s water rights. Further, a listing of all water rights maintained by the TCEQ on its website indicates that LCRA does not own any water right in the Guadalupe River Basin.⁵²

First and foremost, LCRA has no legal interest whatsoever in the claimed water rights. To be granted a contested case hearing, LCRA must identify a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the Application.⁵³ LCRA has not done so because it has not identified any valid legal interest at all in the Guadalupe River Basin, including CA No. 18-3824.

The Water Right in which LCRA claims an interest was adjudicated under the Water Rights Adjudication Act of 1967 (the “Adjudication Act”)⁵⁴ from Certified Filing No. 135. The Adjudication Act required any person claiming a water right on a stream segment to file a sworn statement with the Texas Water Commission (“TWC”) identifying that right.⁵⁵ Once the TWC made a determination on such a right, the district courts across Texas adjudicated and resolved all disputes related to every water right

⁵² Data on Water Rights and Water Use, Water Rights Data Files, *available at* https://www.tceq.texas.gov/permitting/water_rights/wr-permitting/wr_databases.html [hereinafter Water Rights Database].

⁵³ 30 Tex. Admin. Code §§ 55.251(c)(2), .256(a).

⁵⁴ Tex. Water Code §§ 11.301-.341.

⁵⁵ *Id.* § 11.307; *see* 30 Tex. Admin. Code § 86.12(d)(4).

claim in the State.⁵⁶ The district courts then issued “final decrees” formally recognizing every water right in Texas that existed at the time of adjudication.⁵⁷ With respect to final decrees and adjudication of claims, the Adjudication Act provides as follows:

(d) The final decree in every water right adjudication is *final and conclusive* as to all existing *and prior rights* and claims to the water rights in the adjudicated stream or segment of a stream. The decree is binding on all claimants to water rights outside the adjudicated stream or segment of a stream.

(e) Except for domestic and livestock purposes or rights subsequently acquired by permit, a water right *is not recognized* in the adjudicated stream or segment of a stream *unless the right is included in the final decree of the court.*⁵⁸

As such, any claim of ownership must have been raised during the adjudication process. The Adjudication Act is clear that LCRA forfeited ***any right*** it had to CA No. 18-3824 more than three decades ago when it failed to file a claim with the Comal County District Court.

Although the lease referenced in LCRA’s hearing request, and discussed in more detail below, was executed prior to adjudication of water rights in the Lower Guadalupe River Segment of the Guadalupe River Basin, LCRA apparently chose not to file a claim with the TWC to protect its alleged interest in Certified Filing No. 135—the predecessor right to CA No. 18-3824. LCRA likewise chose not to file an appearance, exception, or any objection to the adjudication of NBU’s water right by the District Court of Victoria County. Therefore, TWC determined—and the district court confirmed—that NBU is the sole owner of CA No. 18-3824; no other rights, including LCRA’s claimed rights, were

⁵⁶ See *Upper Guadalupe River Segment of Guadalupe River Basin*, 625 S.W.2d 353, 362 (Tex. App.—San Antonio 1981), *aff’d*, 642 S.W.2d 438 (Tex. 1982).

⁵⁷ Tex. Water Code § 11.322.

⁵⁸ *Id.* (emphasis added)

recognized.⁵⁹ Thus, the granting of CA No. 18-3824 on July 16, 1985 solely to NBU superseded any rights previously associated with CA No. 18-3824.⁶⁰

But even if LCRA had filed a sworn statement or claim with TWC, it would have failed because LCRA expressly quitclaimed to NBU any legal interest it had in CA 18-3824 in 1978. LCRA refers in its hearing request to a long-term lease whereby LCRA may, at its option, require NBU to, upon the termination of the lease in 2037, transfer water rights LCRA owned at the time the lease was entered into. However, LCRA failed to fully disclose the nature of its water rights interests under the lease terms. In truth, LCRA did not own any such water rights at the time it entered into the lease.

The water rights associated with CA No. 18-3824 are historically derived from Certified Filing No. 135, which LCRA owned prior to 1978. However, on February 6, 1978, LCRA quitclaimed the rights associated with Certified Filing No. 135 to NBU whereby LCRA disclaimed all right or title to the water rights.⁶¹ The Quitclaim Assignment provided as follows:

LCRA . . . does by these presents BARGAIN, SELL, RELEASE AND FOREVER QUITCLAIM unto the said NEW BRAUNFELS UTILITIES, its successors and assigns, all of its right, title and interest in and to the following water rights:

BEING all of the water rights of [LCRA] in the Comal River, contiguous to and riparian with the “Comal Plant” of the [LCRA], in the City of New Braunfels, Comal County, Texas;

AND BEING the same water rights more fully described in and registered with the Texas Water Commission of the

⁵⁹ Excerpts from the Final Determination that ultimately resulted in the issuance of CA No. 18-3824 are attached hereto as Exhibit G.

⁶⁰ *Id.* § 11.322(d)-(e).

⁶¹ A copy of the Quitclaim Assignment of Water Rights by LCRA to NBU is attached hereto as Exhibit H.

Department of Water Resources, under Certified Filing No. 135, presently shown in the name of [LCRA].

Stated simply, on February 6, 1978, LCRA gave to NBU, without reservation, all of its interest in the water right that would eventually become CA No. 18-3824.

On June 20, 1978, NBU and LCRA executed a lease of real property, which again purported to transfer and assign to NBU any rights held by LCRA under Certified Filing No. 135. Of course, LCRA owned no such rights at the time of the execution of that lease because LCRA, through the Quitclaim Assignment, had already effectuated an unrestricted transfer of all such water rights to NBU. LCRA ceased to have any interest in the water right on the date of the Quitclaim Assignment. Consequently, whatever interest LCRA had in the water rights was transferred in its entirety to NBU via the Quitclaim Assignment six months prior to execution of the lease. The lease LCRA now relies on to make its spurious claim of a justiciable interest could not possibly give LCRA such an interest because LCRA did not own the claimed water right when it purported to retain a reversionary interest in the water right. LCRA had no right that could revert to LCRA.

LCRA further confirmed its abandonment of its water right interest when it failed to participate in the adjudication of Certified Filing No. 135. The associated final determination, district court decree, and certificate of adjudication issued exclusively to NBU extinguished any interest LCRA may have had to the water right in its entirety. Furthermore, CA No. 18-3824 has been amended several times, and none of those amendments reinstate any interest LCRA may have once held in CA No. 18-3824. LCRA did not protest any of those amendments. Nor did it, in LCRA's words, "seek a seat at the table to preserve its legal right" as it is attempting to do in this matter.

The Commission need not take NBU's word on this point. The Comal County District Court recently granted NBU's motion for summary judgment in a quiet title action on this exact issue.⁶² The 207th Judicial District Court of Comal County issued a judgment finding that NBU has complete and unconditional title to CA No. 18-3824, and LCRA has no vested reversionary interest therein.⁶³ Notably, in pleadings related thereto, LCRA explicitly recognized that NBU is the owner of CA No. 18-3824.⁶⁴

Additionally, LCRA's hearing request is invalid because LCRA has no right to bring the request. Under Section 55.256 of TCEQ's rules, a governmental entity, including local governments and public agencies, may be considered affected persons but only when the entity has authority under state law over issues contemplated by the Application. LCRA has no such authority. In fact, the Comal County District Court found that LCRA's general manager and individual members of its Board of Directors acted *ultra vires* in even attempting to base a hearing request on any legal interest in CA No. 18-3824. In other words, a district court in the State of Texas has held that LCRA has no authority to even assert any vested interest in the water rights held under CA No. 18-3824, as amended. Thus, the District Court Judgment confirms that LCRA has no statutory authority whatsoever to assert a claim relating to its ownership of NBU's water right. Because that is the only basis for LCRA's claimed justiciable interest, because LCRA owns no other water right in the Guadalupe River Basin according to TCEQ's

⁶² *New Braunfels Util. v. Lower Colo. River Auth.*, No. C2015-1358B [hereinafter District Court Judgment] (LCRA has appealed the portion of the District Court Judgment denying LCRA's plea to the jurisdiction).

⁶³ A copy of the District Court Judgment, *supra* note 62, is attached hereto as Exhibit I.

⁶⁴ Excerpts from LCRA's district court filing are attached hereto as Exhibit J.

active water rights database,⁶⁵ and because LCRA has no jurisdiction to manage water supply in the Guadalupe River Basin, LCRA has absolutely no authority to intervene in this matter and cannot be considered an affected person.⁶⁶

Assuming, *arguendo*, that LCRA does have some interest in CA No. 18-3824—which it clearly does not—the hearing request should nevertheless be denied because LCRA has failed to substantially comply with the technical requirements of Section 55.251(c)(2) of TCEQ’s rules. First, Section 55.251(c)(2) requires LCRA to briefly—but specifically—describe how and why the requests made in the Application will affect LCRA in a manner that is not common to the interests of members of the general public. LCRA’s request is devoid of any description of how its alleged rights will be impacted. In fact, LCRA failed to allege that its alleged rights will be impacted at all. LCRA merely states it wants a seat at the table to preserve its legal rights, yet it fails to explain with any degree of specificity how such “legal rights” might be jeopardized. Again, conclusory statements that a party will be affected are insufficient to satisfy the requirements of Section 55.251(c).

Second, under the same rule, LCRA must briefly, but specifically, describe its location and distance relative to the activity that is the subject of the Application. Although LCRA provides its address, it fails to explain its distance relative to NBU’s proposed diversion. LCRA’s hearing request is not in substantial compliance with TCEQ’s rules for that reason as well.

Regardless, as explained above, even if LCRA could demonstrate a legitimate interest in state water in the Guadalupe River basin—which it cannot—LCRA still would

⁶⁵ Water Rights Database, *supra* note 52.

⁶⁶ 30 Tex. Admin. Code § 55.256(b)-(c).

be unable to demonstrate that it is adversely affected by the activity that is the subject of the Application. The Draft Permit—if issued—would not authorize NBU to convey, divert or use state water in the Guadalupe River Basin.⁶⁷ The source of all water sought for diversion is NBU’s return flows resulting from use of NBU’s privately owned groundwater by NBU and its customers. Therefore, because NBU seeks to divert only return flows originally produced from privately owned groundwater sources, and not state water, NBU’s activities could not possibly interfere with LCRA’s alleged water right interests.

LCRA’s alleged interest in the water rights associated with the Application is irrelevant under the applicable law, which is confined to Section 11.042(b) of the Texas Water Code. As explained above, the Application that now requests only a bed and banks authorization for privately owned groundwater-based return flows does not concern state water.⁶⁸ Moreover, LCRA owns no other water right in the Guadalupe River Basin. Consequently, LCRA has no interest that can be affected by the Application.

Because LCRA has no interest in the Guadalupe River Basin that is personal, justiciable, or otherwise, LCRA is not an affected person using the relevant factors for such a determination under TCEQ’s rules. Additionally, LCRA has failed to substantially comply with the hearing request requirements. Therefore, the hearing request by LCRA should be denied.

⁶⁷ Or the Colorado River Basin, for that matter.

⁶⁸ Bryan-College Station Order, *supra* note 17; *see* Tex. Water Code § 11.042(b).

3. GBRA has failed to substantially comply with TCEQ's requirements for hearing requests and has not identified a personal justiciable interest in this proceeding.

Molly Cagle submitted a hearing request on the Application in a written pleading submitted on behalf of GBRA. The hearing request was received in the Chief Clerk's Office on August 11, 2015.

In its request, GBRA describes its basis for requesting a hearing as the interference with GBRA's water rights located at and downstream of Lake Dunlap because NBU would divert state water to which GBRA is entitled pursuant to those water rights. GBRA asserts it would then be required to release more inflows from Canyon Reservoir to compensate for the reduction in water supplies available under downstream senior water rights. All of GBRA's claimed interests relate exclusively to state water.

As previously explained herein, the Application does not seek authorization to convey, divert, or use state water. The Executive Director's Draft Permit, if issued, would not authorize NBU to divert any water other than NBU's privately owned groundwater-based return flows. Any existing water right holder will still have access to the ordinary flow of the Guadalupe River as authorized in his or her water right.⁶⁹ The Draft Permit only allows NBU to divert the return flows that it actually discharges, less carriage losses, in accordance with special conditions included therein. There is simply no provision in the Draft Permit that would authorize NBU to divert state water.

GBRA only makes broad, unsubstantiated claims that its ability to meet water supply requirements will somehow be impaired. As discussed in detail above, TCEQ can consider all evidence before it to evaluate the merits of the underlying application when

⁶⁹ See Tex. Water Code §§ 11.021, .121.

determining whether a person is an affected person.⁷⁰ GBRA has provided no evidence whatsoever to contradict or even challenge NBU and TCEQ staff's modeling efforts. GBRA has, therefore, failed to demonstrate how its water rights can possibly be impacted by NBU's diversion and reuse of NBU's privately owned groundwater-based return flows. As such, GBRA has not identified any justiciable interest as it was required to under TCEQ's rules.⁷¹

In addition to the issues identified above, GBRA also raises a general concern with the authorization to divert future groundwater-based return flows and implies that the Draft Permit authorizes NBU to divert more than 9,408 acre-feet of return flows. For the following two reasons, that assertion cannot be the basis for GBRA's affected person status.

First, GBRA mischaracterizes the process by which NBU could divert more than 9,408 acre-feet of return flows. The Draft Permit specifies that NBU can only divert those groundwater-based return flows that are actually discharged, and, more importantly, any modification to the accounting plan that changes the permit terms—which would include the amount of return flows to be diverted—must be in the form of an amendment to the permit. Therefore, any diversion over the 9,408 acre-feet specified in the Draft Permit is first subject to a permit amendment, and thus public participation. As such, the Draft Permit does not authorize NBU to unilaterally increase its diversion as GBRA seems to suggest. Therefore, this assertion is factually inaccurate.

Second, even if diversion over 9,408 acre-feet of groundwater-based return flows is allowed, GBRA provides no specific explanation regarding why it believes its interests

⁷⁰ *Sierra Club*, 455 S.W.3d at 223-24.

⁷¹ 30 Tex. Admin. Code § 55.251(c)(2).

will be affected by the Application, if granted, in a manner not common for members of the general public, nor has GBRA rebutted the modeling proving minimal effects from the proposed diversion. The request fails on this point, therefore, because it is not substantially compliant with the procedural requirements to request a hearing.⁷²

Finally, GBRA raises another general concern that the diversion does not have a priority date and is not subject to priority calls from senior water rights, which GBRA claims would “impair GBRA’s rights and the supply of water to GBRA’s customers.” Again, GBRA provides its conclusory assertion that it will be affected by NBU’s authorization to divert NBU’s privately owned groundwater-based return flows from the Guadalupe River without explaining how or why the claimed result will occur due to issuance of the Draft Permit. GBRA has offered no “substantial evidence” to support or substantiate its claim.⁷³ Moreover, all water NBU now seeks to divert under the Application is return flows from NBU’s use of privately owned groundwater, not state water to which water rights holders within the priority system for surface water are entitled.

Because GBRA’s request does not identify any personal justiciable interest affected by the Application, GBRA is not an affected person using the relevant factors for such a determination under TCEQ’s rules. Therefore, this hearing request by GBRA should be denied.

⁷² 30 Tex. Admin. Code § 55.251(c).

⁷³ See *Sierra Club*, 455 S.W.3d at 223-24.

V. OTHER ISSUES

A. Referral of Limited Issues for Non-HB 801 Applications

If the Commission decides to refer this matter to SOAH for a contested case hearing, the Legislature has expressly authorized the Commission to limit the issues that can be considered by SOAH to the three issues addressed in Section 11.042(b) of the Texas Water Code as identified in Section IV.A.1 above. In light of the recent comments of the Commissioners regarding private ownership and reuse of groundwater-based return flows, it is appropriate—if not necessary—for the Commission to exercise its authority under Section 2003.047(e) of the Texas Government Code to ensure an efficient contested case hearing process that does not tax public resources any more than necessary to evaluate the limited statutory criteria under which the TCEQ must evaluate NBU’s Application.

In 1999, the Texas Legislature passed House Bill 801 (“HB 801”), which *inter alia* established new “environmental permitting procedures” by which TCEQ processes public comments and hearing requests and conducts contested case hearings on certain types of permit applications.⁷⁴ Among its various provisions, HB 801 created Subchapter M of Chapter 5 of the Texas Water Code (“Subchapter M”), which “establishes procedures for providing public notice, an opportunity for public comment, and an opportunity for public hearing under [the Administrative Procedure Act] regarding commission actions relating to a permit issued under Chapter 26 and 27 of [the Water Code] or Chapter 361, Health and Safety Code.”⁷⁵ Such permits are commonly referred

⁷⁴ Act of May 30, 1999, 76th Leg., R.S., ch. 1350, § 2, 1999 Tex. Gen. Laws 4570 (codified as Tex. Water Code §§ 5.552-556) [hereinafter HB 801]. A copy of HB 801 is attached to this filing as Exhibit K.

⁷⁵ *Id.*; Tex. Water Code § 5.551(a).

to as “HB 801 permits.” Subchapter M—by its own terms—does not apply to applications, like NBU’s, submitted to the TCEQ under Chapter 11 of the Water Code.⁷⁶

HB 801 also amended Section 2003.047 of the Texas Government Code—part of SOAH’s enabling statute,⁷⁷ which generally applies to all matters referred to SOAH by the TCEQ.⁷⁸ In addition to directives for administrative actions by SOAH, Section 2003.047 also includes directives to which the TCEQ must adhere. Unlike the Legislature’s express restriction of the applicability of Subchapter M to so-called environmental permitting procedures, the amended Section 2003.047 is not similarly limited and appears to apply to any permitting matter referred to SOAH by the TCEQ.⁷⁹ Section 2003.047(e), as amended by HB 801, provides, in its entirety, the following:

In referring a matter for hearing, the commission shall provide to the administrative law judge a list of disputed issues. The commission shall specify the date by which the administrative law judge is expected to complete the proceeding and provide a proposal for decision to the commission. The administrative law judge may extend the proceeding if the administrative law judge determines that failure to grant an extension would deprive a party of due process or another constitutional right. The administrative law judge shall establish a docket control order designed to complete the proceeding by the date specified by the commission.⁸⁰

⁷⁶ Tex. Water Code § 5.551(a).

⁷⁷ HB 801, *supra* note 74, at 4575-77.

⁷⁸ *Id.*; Tex. Gov’t Code Ann. § 2003.047 (West 2016).

⁷⁹ Tex. Gov’t Code § 2003.047.

⁸⁰ *Id.* § 2003.047(e).

Section 2003.047 was originally enacted in 1995.⁸¹ Section 2003.047 as it existed prior to the enactment of HB 801 also was not restricted to any particular category of permitting action referred to SOAH for contested case hearing.⁸² The prior version of Section 2003.047(e) provided as follows:

When the office receives jurisdiction of a proceeding, the commission shall provide to the administrative law judge a list of issues or areas that must be addressed. In addition, the commission may identify and provide to the administrative law judge at any time additional issues or areas that must be addressed.⁸³

In other words, TCEQ was already charged by the Legislature with referring lists of issues to SOAH prior to HB 801's distinction of categories of permits.

HB 801 changed Section 2003.047 in two ways. First, where the prior version of the statute allowed the TCEQ to provide a minimum list of issues "that must be addressed[,]” the amended version changed that minimum into a ceiling.⁸⁴ In other words, the amended statute allows the TCEQ to limit the disputed issues that SOAH may consider during a referred contested case hearing as opposed to providing a minimum list of issues that must be considered.⁸⁵ Second, HB 801 added to Section 2003.047(e) an authorization that did not previously exist for the TCEQ to limit the duration of contested case hearings.⁸⁶

⁸¹ Act of May 2, 1995, 74th Leg., R.S., ch. 106, § 1, 1995 Tex. Gen. Laws 898 (codified at Tex. Gov't Code § 2003.047).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ HB 801, *supra* note 74, at 4575; Tex. Gov't Code § 2003.047(e).

⁸⁶ HB 801, *supra* note 74, at 4575; Tex. Gov't Code § 2003.047(e).

Again, the Legislature did not amend Section 2003.047(e) to restrict the disputed issues provision to any particular category of permitting actions. No other statute restricts application of the disputed issues provision of Section 2003.047(e) to any category of permit, including permits issued under Chapter 11 of the Texas Water Code. The Legislature’s express inclusion of such a limitation in Subchapter M of Chapter 5 of the Texas Water Code stands in contrast to the Legislature’s decision to not include such a limitation in Section 2003.047(e).⁸⁷ The Texas Supreme Court has articulated the following fundamental canon of statutory construction: “[w]e presume that the Legislature chooses a statute’s language with care, including each word for a purpose, *while purposefully omitting words not chosen.*”⁸⁸

Moreover, while courts have discretion to employ extra-statutory construction aids, such as legislative history or captions, preambles, and emergency provisions,⁸⁹ the Texas Supreme Court has frequently repeated for decades that it derives intent from the plain meaning of the text of a statute in light of the statute as a whole,⁹⁰ and that extraneous construction aids are generally disfavored and only used when application of the plain meaning of the statute would lead to absurd results.⁹¹ “Only when statutory

⁸⁷ *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011).

⁸⁸ *Id.* (emphasis added).

⁸⁹ Tex. Gov’t Code § 311.023.

⁹⁰ *Janvey v. Golf Channel, Inc.*, No. 15-1489, 2016 WL 1268188, at *8 (Tex., April 1, 2016); *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 866 (Tex. 1999) (“There are sound reasons we begin with the plain language of a statute before resorting to rules of construction. For one, it is a fair assumption that the Legislature tries to say what it means, and therefore the words it chooses should be the surest guide to legislative intent. Also, ordinary citizens should be able to rely on the plain language of a statute to mean what it says. Moreover, when we stray from the plain language of a statute, we risk encroaching on the Legislature’s function to decide what the law should be.”) (internal footnote omitted); *Morrison v. Chan*, 699, S.W.2d 205, 208 (Tex. 1985).

⁹¹ *MCI Sales and Serv., Inc. v. Hinton*, 329 S.W.3d 475, 500-01 (Tex. 2010); *Nat’l Liab. & Fire Ins. Co. v. Allen*, 15 S.W.3d 525, 527 (Tex. 2000).

text is susceptible of more than one reasonable interpretation is it appropriate to look beyond its language for assistance in determining legislative intent.”⁹²

The text of Section 2003.047(e), in the context of the entirety of Section 2003.047, cannot reasonably be construed to apply only to environmental permitting procedures. The rest of the statute demonstrates the Legislature’s deliberate intent to have subsection (e) apply universally to all matters referred by TCEQ to SOAH. In 2015, the Legislature again amended Section 2003.047 through Senate Bill 709 (“SB 709”) by adding subsections (e-1) through (e-5).⁹³ Unlike the provisions added to subsection (e) through HB 801, the Legislature in SB 709 expressly and specifically restricted the applicability of subsections (e-1) through (e-5) to only those matters referred by TCEQ under Subchapter M, which applies only to environmental permitting procedures and does not include permitting under Texas Water Code Chapter 11.⁹⁴ SB 709 added no such restriction to subsection (e). If the Legislature had intended to restrict the disputed issues or hearing duration provisions of Section 2003.047(e) to only those same environmental permitting procedures under Subchapter M, it could have expressly provided for such restriction in either HB 801 or SB 709.⁹⁵ The Legislature intentionally omitted that restriction.⁹⁶

⁹² *Tex. Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430 (Tex. 2012).

⁹³ Act of May 1, 2015, 84th Leg., R.S., ch. 116, 2015 Tex. Gen. Laws 1117 (codified at Tex. Gov’t Code § 2003.47(e-1)-(e-5)) [hereinafter SB 709].

⁹⁴ Tex. Gov’t Code § 2003.047(e-1)-(e-2), (e-5) (applying those subsections only to matters referred under Section 5.556 and 5.557, Water Code).

⁹⁵ To further set apart Section 2003.047(e) from the environmental permitting procedures-specific statutes, SB 709 established a separate duration limitation provision in subsection (e-2) and judge-initiated duration extension provision in subsection (e-3). Presumably, if the duration limitation and extension provisions in subsection (e) were intended to apply only to environmental permitting procedures referred under Water Code Sections 5.556 and 5.557, the Legislature would have struck those provisions from subsection (e) and replaced them entirely in subsection (e-2). It appears,

The Commission has rarely—if ever—chosen to exercise its authority under Section 2003.047(e) in proceedings on permits under Chapter 11 of the Texas Water Code. In light of the Commission’s policy statements during open meeting agenda items relating to the Brazos River Authority and City of Pearland applications, however, exercising the authority specifically conferred by the Legislature to limit the issues to be considered under Section 11.042(b) for groundwater-based return flow bed and banks applications is an appropriate means to achieve the goals that Chairman Shaw articulated in the City of Pearland matter as follows:

the ALJs will be able to evaluate and lead this process in keeping with the decisions we made, specifically recognizing that we have held that groundwater return flows remain the property of that owner of groundwater, and that in order to request use downstream, that that simply requires the request of a bed and banks transfer so we can take into account the losses associated with that and ensure that we’re protecting surface water rights.⁹⁷

The limitation of issues will also ensure that SOAH’s proceeding will adhere to the holding in the Bryan-College Station Order that applications concerning diversion and reuse of privately owned groundwater-based return flows should only be evaluated under the provisions of Section 11.042(b) and not any other statute or rule that applies to regulation of state water.⁹⁸ If the Commission decides to refer any of the hearing requests submitted in this matter to SOAH for a contested case hearing, then the issues to be considered by SOAH should be limited to the three issues enumerated in Section

however, that the duration and extension provisions in Section 2003.047(e) now apply *only to non-801 permits*.

⁹⁶ See *Combs*, 340 S.W.3d at 439.

⁹⁷ Exhibit C, at 3:22-4:5.

⁹⁸ Bryan-College Station Order, *supra* note 17, at 2-3.

IV.A.1 hereinabove pursuant to Section 2003.047(e) of the Texas Government Code and Section 11.042(b) of the Texas Water Code.

To further ensure that SOAH's proceeding does not unreasonably tax public resources, the Commission may also, under Section 2003.047, limit the duration of the contested case hearing. In the HB 801 permit context, the Legislature recently enacted a new provision in Section 2003.047 to require that all HB 801 permit hearings conclude no later than the 180th day following the preliminary hearing.⁹⁹ Considering the narrow scope of the issues that SOAH may consider under Section 11.042(b) in this matter, if the Commission decides to refer this matter to SOAH, a duration limitation of 180 days from the date of the preliminary hearing will be sufficient to allow SOAH to evaluate the Application and the Executive Director's Draft Permit. Certainly, if the Legislature considers a 180-day hearing duration to be sufficient to evaluate a full suite of issues under multiple statutory and administrative regulations in an HB 801 permit hearing, the same duration will be sufficient to fully vet a limited number of issues under a single statute—Section 11.042(b).

B. Response to “Plea to the Jurisdiction”

Concurrent with its hearing request, GBRA submitted a plea to TCEQ's jurisdiction to grant indirect reuse permits under Section 11.042(b) of the Texas Water Code for diversion and reuse of groundwater specifically produced from the Edwards Aquifer. There is no procedure or opportunity in TCEQ's rules that allows a person to file, or the TCEQ to consider and rule on, a “plea to the jurisdiction” at this stage of TCEQ's review of the Application. Accordingly, TCEQ may simply disregard the “plea to the jurisdiction” portion of GBRA's hearing request. Notwithstanding the erroneous

⁹⁹ SB 709, *supra* note 93, at 1.

nature of GBRA’s misguided “plea to the jurisdiction,” NBU respectfully offers the following response to that portion of GBRA’s hearing request.¹⁰⁰ If the TCEQ decides to make a ruling on the “plea to the jurisdiction,” TCEQ should deny the plea for the following reasons.

1. TCEQ has exclusive jurisdiction to grant a bed and banks authorization to authorize diversion and reuse of groundwater-based return flows originally produced from the Edwards Aquifer.

GBRA asserts the TCEQ lacks jurisdiction to grant a bed and banks authorization to divert and reuse Edwards Aquifer-derived return flows in the Guadalupe River and to authorize use of such water anywhere outside of the boundaries of the Edwards Aquifer Authority (“EAA”).¹⁰¹ GBRA’s argument seems to be based on provisions in the Edwards Aquifer Authority Act (“EAA Act”) relating to reuse and place of use,¹⁰² although GBRA’s plea fails to explain how the limitations in the EAA Act relate to Section 11.042(b) of the Texas Water Code and the associated administrative rules under which NBU’s Application was filed with, and processed by, TCEQ. Likewise, GBRA also fails to explain how the EAA Act precludes TCEQ’s jurisdiction, or what entity GBRA believes does have jurisdiction over such matters. In fact, GBRA’s plea only provides a

¹⁰⁰ Section 80.105 of the TCEQ’s rules leaves a determination of whether the TCEQ has jurisdiction in a particular matter to the judge at the preliminary hearing and after notice of hearing has been issued. 30 Tex. Admin. Code § 80.105. In an instance where the Commission denies all hearing requests, questions of jurisdiction may properly be raised on judicial appeal. *See id.* §§ 55.255(e).

¹⁰¹ GBRA also asserts the TCEQ lacks jurisdiction to grant a bed and banks authorization to convey surface waters of the Guadalupe River and its tributaries. Because the Draft Permit would only authorize the use of the bed and banks of the Guadalupe River for groundwater-based return flows, this assertion will not be addressed herein.

¹⁰² Section 1.03(19) of the Edwards Aquifer Authority Act states: “Reuse’ means authorized use for one or more beneficial purposes of use of water that remains unconsumed after the water is used for the original purpose of use and before the water is discharged or otherwise allowed to flow into a watercourse, lake, or other body of state-owned-water.” Section 1.34(a) provides that “[w]ater withdrawn from the aquifer must be used within the boundaries of the authority.”

restatement of EAA Act provisions and some related history with the bare assertion that TCEQ lacks jurisdiction.

To the extent GBRA is asserting that jurisdiction over the Application properly belongs with the EAA, the plea to the jurisdiction should be denied. The EAA Act only grants the EAA jurisdiction over groundwater withdrawn from the Edwards Aquifer and the place of use of such groundwater.¹⁰³ That jurisdiction does not extend to wastewater return flows originally derived from Edwards Aquifer groundwater, generally, or wastewater return flows that are reused, specifically. In 2012, the Texas Supreme Court specifically recognized that the proper means for an owner of Edwards Aquifer-sourced groundwater to obtain a bed and banks authorization for diversion and reuse of that groundwater is to request such authorization under Section 11.042(b).¹⁰⁴

The Legislature, acting under authority of the Texas Constitution, vested the TCEQ with general jurisdiction over water and water rights¹⁰⁵ and exclusive jurisdiction over reuse of wastewater return flows.¹⁰⁶ Section 11.042(b) of the Texas Water Code explicitly grants TCEQ exclusive jurisdiction over indirect reuse of return flows derived from groundwater by requiring that prior authorization must be obtained from TCEQ in

¹⁰³ EAA Act Section 1.08(b) provides that EAA’s “powers regarding underground water apply only to underground water within or withdrawn from the aquifer . . . [and that this] *subsection is not intended to allow the authority to regulate surface water*” (emphasis added).

¹⁰⁴ *Day*, 369 S.W.3d at 822 (analyzing the dichotomy in Texas law of groundwater and surface water regulation in the context of a discharge of untreated Edwards Aquifer-sourced groundwater into a state watercourse).

¹⁰⁵ The State’s enactment of Article XVI, Section 59 of the Texas Constitution made clear that the Legislature is responsible for the regulation of natural resources, including groundwater. *Sipriano*, 1 S.W.3d at 78. In fulfilling this responsibility, the Legislature granted TCEQ “general jurisdiction over water and water rights” and the state’s water quality program along with the power to perform any acts “necessary and convenient to the exercise of its jurisdiction and powers as provided by [the Texas Water Code] and other laws.” Tex. Water Code §§ 5.013(a), 5.102(a).

¹⁰⁶ Tex. Water Code § 11.042.

order for a person to discharge, subsequently divert, and reuse the person’s “existing return flows derived from privately owned groundwater.”¹⁰⁷

The Austin Court of Appeals has recently acknowledged TCEQ’s jurisdiction over water rights and reuse of groundwater-based return flows in a case concerning a water use application factually parallel to NBU’s in which GBRA raised similar arguments.¹⁰⁸ GBRA does not and cannot identify any contrary authority—statutory or otherwise—that supersedes TCEQ’s jurisdiction to issue bed and banks authorizations under Section 11.042(b) for the diversion and reuse of Edwards Aquifer groundwater-based return flows.¹⁰⁹

2. The notice for NBU’s Application accurately states the nature of the authorization sought by NBU and is thus not deficient.

GBRA also asserts that the TCEQ lacks jurisdiction on the basis that the notice of the Application is allegedly deficient because it does not state that NBU’s Application is

¹⁰⁷ Accordingly, the TCEQ has issued permits for diversion and reuse of groundwater-based return flows originally produced from the Edwards Aquifer. The San Antonio River Authority owns Water Use Permit No. 5917, as amended by Permit No. 5917A, which authorizes diversion and reuse of groundwater-based return flows produced from the Edwards Aquifer.

¹⁰⁸ The San Antonio Water System (“SAWS”) has also requested a bed and banks authorization under Texas Water Code Section 11.042(b) to divert and reuse its Edwards Aquifer groundwater-based return flows in the San Antonio and Guadalupe Rivers. Under the Expedited Declaratory Judgment Act, GBRA sought, among other matters, a declaration that SAWS’s reuse of Edwards Aquifer groundwater in this manner is inconsistent with those provisions of the EAA Act cited herein.

Various entities, including TCEQ and NBU, intervened in that matter and filed pleas to the jurisdiction to assert, in part, TCEQ’s exclusive jurisdiction over indirect reuse of groundwater-based return flows, including return flows derived from Edwards Aquifer groundwater. The trial court granted the pleas to the jurisdiction and dismissed GBRA’s suit. The Third Court of Appeals affirmed and stated: “[GBRA] seeks to achieve those assurances by pursuing a judicial determination regarding whether [SAWS’s] desire to reuse discharged water and its requested permit are inconsistent with the [EAA Act]. Moreover, [GBRA] is asking that this determination be made before the Commission has had an opportunity to fully consider and rule on [GBRA’s] request in an administrative hearing.” *Guadalupe-Blanco River Auth. v. Tex. Att’y Gen.*, 2015 WL 868871, at *4 (Tex. App.—Austin 2015, pet. denied). On May 27, 2016, the Texas Supreme Court denied GBRA’s petition for review.

¹⁰⁹ GBRA cites to archaic, judicially invalidated administrative rules adopted nearly a quarter century ago by a predecessor agency of the TCEQ and notes that neither the TCEQ, nor any of its predecessors, “has ever disavowed any of the relevant findings.” No agency has needed to disavow the invalid findings because the courts and the Legislature have roundly repudiated them.

an application to appropriate state water. First, deficiency of public notice issued under Section 11.132 is not a jurisdictional issue. The Texas Supreme Court has held that the Legislature is presumed to have intended that notice provisions are not jurisdictional except by clear legislative intent to the contrary.¹¹⁰ The public notice statute for applications under Chapter 11 of the Texas Water Code is not expressly jurisdictional.¹¹¹ Consequently, GBRA's argument that notice deficiencies implicate TCEQ's jurisdiction to consider the Application is simply wrong.¹¹²

Nevertheless, the notice is not deficient. As explained at length in Section IV hereinabove, NBU is only seeking to divert and reuse groundwater-based return flows under Section 11.042(b) of the Texas Water Code. TCEQ long ago established that applications under Section 11.042(b) do not concern state water.¹¹³ As such, NBU is seeking to divert only water it already owns and is not seeking to appropriate state water. Therefore, the notice does not mischaracterize the Application or the Draft Permit.

3. The notice for NBU's Application satisfies all notice requirements and is thus not deficient.

GBRA claims TCEQ lacks jurisdiction on the grounds that the notice of NBU's Application allegedly misrepresents GBRA's position on the Application because the notice states GBRA consented to the Application. Without citation to any particular notice requirement and violation thereof, GBRA baselessly asserts that "the

¹¹⁰ *City of DeSoto v. White*, 288 S.W.3d 389, 395 (Tex. 2009); see also *Tex. Comm'n on Env'tl. Quality vs. Denbury Onshore, LLC*, 03-11-00891-CV, 2014 WL 3055912, at *9 (Tex. App.—Austin July 3, 2014, no pet.) (mem. op.) (applying legal principles articulated in *White* to TCEQ permitting notice).

¹¹¹ Tex. Water Code § 11.132.

¹¹² *White*, 288 S.W.3d at 395; see *Denbury Onshore*, 2014 WL 3055912, at *9.

¹¹³ Bryan-College Station Order, *supra* note 17, at 2.

fundamental error in the notice published by NBU so misleads the public that it renders the notice ineffective.” GBRA does not assert that the notice fails to meet any of the applicable notice requirements specified by statute or TCEQ’s rules. For the same reasons articulated in Section V.B.2 above, GBRA’s jurisdictional claim based on an alleged notice deficiency is improper and should be disregarded or denied.¹¹⁴

Again, however, the notice is not deficient for the following reasons. First, GBRA did consent to NBU’s Application. At the time of notice issuance, that fact was uncontroverted. GBRA conveniently waited until after public notice was issued to “withdraw” its consent. By waiting until after the notice was issued to file its consent withdrawal, GBRA tacitly admitted that the notice was absolutely correct at the time it was issued. The notice did not misrepresent that GBRA consented to the Application.¹¹⁵

Secondly, TCEQ’s rules do not provide that an alleged misrepresentation of permit terms in a public notice can result in a dismissal of an application. Based on the language employed by GBRA, NBU assumes GBRA is attempting to assert Section 305.66 of TCEQ’s rules, which allows persons who are adversely affected by material misrepresentations or omissions in an application or hearing process to petition TCEQ to suspend or revoke a permit, if such permit is granted. Specifically, Section 305.66(a)(4) provides that good cause to suspend or revoke a permit includes “the permittee’s failure in the application or hearing process to disclose fully all relevant facts, or the permittee’s misrepresentations of relevant facts at any time.” Section 305.66(d) goes on to provide that “[a] person affected by the issuance of a permit or

¹¹⁴ *White*, 288 S.W.3d at 395; *see Denbury Onshore*, 2014 WL 3055912, at *9.

¹¹⁵ Prior to notice issuance, GBRA mailed a letter to NBU indicating that GBRA intended to protest NBU’s Application. However, that letter did not constitute a withdrawal of consent because it was not filed with TCEQ. If any entity is to blame for failure to notify the public of GBRA’s withdrawal prior to notice issuance, it is GBRA.

other order of the commission may initiate proceedings for revocation or suspension by forwarding a petition to the executive director to be filed with the commission.” However, pursuant to Section 305.66(g), before TCEQ can deny, suspend, or revoke a permit, it must find that “a violation or violations are significant and that the permit holder or applicant has not made a substantial attempt to correct the violations.”

Section 305.66 cannot deprive TCEQ of jurisdiction over the Application. First, Section 305.66(d) contemplates that a permit or some other binding order must be issued for a claim under this section to be initiated, which has not yet occurred in this case. Thus, the appropriate time to raise a violation of Section 305.66 is after the permit is granted because only then will a person truly be affected within the meaning of that section.

Second, GBRA has not been affected. GBRA has only provided mere conjecture about how the wording of the notice precluded others—but apparently not GBRA—from protesting the Application and Draft Permit. This assertion is not substantiated by any evidence. Additionally, the only time a court has ever addressed the applicability of Section 305.66 was in reference to a situation in which a potential party did not receive notice altogether because of an alleged act or omission in the application that was the cause of the party not receiving the notice, not a minor defect in the notice.¹¹⁶ Thus, jurisdiction cannot be denied based on Section 305.66.

In addition, Title 30, Chapters 39, 50, and 295 of the Texas Administrative Code also provide various notice requirements applicable to applications submitted under

¹¹⁶ *Denbury Onshore*, 2014 WL 3055912, at *2, *5.

Chapter 11 of the Texas Water Code.¹¹⁷ However, not a single rule contained therein requires the notice to contain an accurate summary of a river authority's consent to the underlying application. Once again, GBRA does not identify any such requirement.

To the extent GBRA is claiming that its due process rights have been violated due to the allegedly defective notice—an argument that is certainly not readily discernible from the hearing request—GBRA's argument fails when evaluated against well-established Texas law. A fundamental tenant of due process is that notice must be reasonably calculated to apprise interested parties of a potential action that could affect their rights and afford such parties the opportunity to present objections to such actions; the notice must “reasonably convey the required information.”¹¹⁸ Courts have held that, for TCEQ permitting processes, this due process requirement means that the applicant must provide the public with notice that affords individuals who may be affected by an action on the permit a meaningful opportunity to express concerns and objections, and to participate in the permitting process by requesting a contested case hearing on the permit application.¹¹⁹

According to the Third Court of Appeals, a notice that alerts a potentially affected party of the risks to its interests is sufficient, and factual mistakes within the notice do

¹¹⁷ None of those provisions, however, apply to NBU's Application pursuant to the general rule articulated by the Commission in the Bryan-College Station Order that NBU's Application is only to be processed under Setion 11.042(b).

¹¹⁸ *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

¹¹⁹ *United Copper Indus., Inc. v. Grissom*, 17 S.W.3d 797, 802 (Tex. App.—Austin 2000, pet. dism'd as moot).

not render the notice deficient.¹²⁰ Correspondingly, a potentially affected party's "reliance on the information set forth in the notice itself is misplaced."¹²¹

In *Chocolate Bayou Water Co. and Sand Supply v. Texas Natural Resource Conservation Commission*, recitation of permit terms in a public notice of an amendment to an existing water right differed materially from the terms of the amended permit that was ultimately granted.¹²² Two holders of senior water rights that failed to timely contest the amendment argued to the court that they chose not to intervene in the contested case hearing on the permit based on their understanding that the public notice incorrectly described the permit that was ultimately issued.¹²³ The water rights holders argued that their due process rights had been violated as a result of the material difference between the notice given and the permit issued.¹²⁴ Yet, the court determined that the notice was not deficient because it met the fundamental requirement to notify potentially affected parties that their rights **may be** impacted.¹²⁵ Moreover, the court explained that "[i]t is clear from the limited amount of information that must be included in a notice statement that the notice itself is not intended to fully apprise potentially affected parties of the specifics of the proposed permit. Those specifics are found in the Application and its supplemental materials, all of which are available to the public."¹²⁶

¹²⁰ *Chocolate Bayou Water Co. & Sand Supply v. Tex. Nat. Res. Conservation Comm'n*, 124 S.W.3d 844, 851 (Tex. App.—Austin 2003, pet. denied).

¹²¹ *Id.*

¹²² *Id.* at 848.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 851.

¹²⁶ *Chocolate Bayou*, 124 S.W.3d at 851.

Therefore, the minor misstatement on a non-substantive matter in the notice of the Draft Permit does not impact the efficacy of the notice. Just as in the *Chocolate Bayou* case, GBRA does not allege that the notice violated any of the specifically enumerated requirements. As evidenced by its participation in negotiations with NBU and its hearing request, GBRA undeniably received notice that afforded it a meaningful opportunity to express concerns and objections and to participate in the permitting process.

To the extent GBRA is asserting that others' due process rights have been violated because of the misstatement in the notice, such assertions are invalid. GBRA lacks standing to assert due process violations on behalf of anyone else.¹²⁷ Further, all persons entitled to receive notice of the Application had available to them all of the materials in the record that would indicate GBRA's position on the Application, including NBU's request to the TCEQ that the notice and Draft Permit be held while NBU negotiated with GBRA on the Application.

4. NBU is not required to obtain GBRA's consent for diversion point access on Lake Dunlap.

Finally, GBRA asserts that the TCEQ lacks jurisdiction because NBU has no right of access to divert water from Lake Dunlap as GBRA has withdrawn its conditional consent to such access. GBRA again fails to cite any authority to support its claim. Rather, GBRA appears to base its claim exclusively on GBRA's own assumption that some continuing consent is needed to allow the Application to proceed. There is no such requirement in any applicable statutory or administrative regulation. NBU assumes

¹²⁷ *McDaniel v. Tex. Natural Res. Conservation Comm'n*, 982 S.W.2d 650, 654 (Tex. App.—Austin 1998, pet. denied) (holding that a person who received notice on an application “does not have standing to assert the interest of a third party who allegedly was never given notice” (citing *Smith v. Hous. Chem. Serv., Inc.*, 872 S.W.2d 252, 273 (Tex. App.—Austin 1994, writ denied))).

GBRA intended to rely on Section 295.12 of TCEQ's rules relating to applications for a permit to appropriate state water for storage in another's reservoir. Such an argument, however, is based on an incorrect interpretation of relevant law.

NBU is not required to obtain consent from GBRA for diversion point access from Lake Dunlap because the rule requiring such consent does not apply to the Application and because the rule is not a prerequisite to permit issuance. As discussed at length in this briefing, NBU is not seeking authorization to divert state water, and NBU's Application—as one subject solely to Section 11.042(b) of the Texas Water code—concerns neither state water,¹²⁸ nor surface water-based return flows.¹²⁹ NBU originally sought authorization under Texas Water Code 11.042(c) for its surface water-based return flows sourced from state water native to the Guadalupe River Basin. In accordance with Section 295.12 of TCEQ's rules, NBU submitted a consent letter from GBRA in support of the Application.¹³⁰

Because NBU is no longer seeking diversion of surface water-based return flows, the application requirements of Section 295.12 are no longer applicable.¹³¹ Consent is no longer required pursuant to that provision. NBU now seeks a bed and banks authorization only under Texas Water Code Section 11.042(b) to divert and reuse its groundwater-based return flows. The application requirements for such applications are listed in Section 295.112 of the TCEQ's rules.¹³² Unlike Section 295.12, administrative

¹²⁸ Bryan-College Station Order, *supra* note 17, at 2.

¹²⁹ See Tex. Water Code § 11.042(b)-(c).

¹³⁰ See 30 Tex. Admin. Code § 295.12.

¹³¹ See the discussion in Section IV.B.2, above, regarding processing of groundwater-based return flow bed and banks authorizations exclusively under Section 11.042 and not under any other statute or rule relating to the regulation of state water.

¹³² 30 Tex. Admin. Code § 295.112.

requirements under Section 295.112 do not require consent by a reservoir owner for diversion point access as a prerequisite for obtaining a groundwater-based return flows bed and banks authorization.¹³³ Following TCEQ's issuance of the bed and banks authorization, it will be up to NBU as the permittee to secure all legal rights necessary to exercise its authorization.

Moreover, the consent requirement in Section 295.12 is merely an administrative application submission requirement. When NBU's Application still concerned state water and was, therefore, still subject to Section 295.12, TCEQ's water rights permitting staff properly declared NBU's Application administratively complete, in part, because the Application was accompanied by a consent letter in accordance with Section 295.12. This process has now moved beyond staff's administrative review.

VI. CONCLUSION

For the foregoing reasons, NBU respectfully recommends that TCEQ deny each of the hearing requests submitted in this matter because (1) no law affords any person a right to contested case hearing on the Application and (2) none of the requests identifies any relevant justiciable interest that can be considered or remedied by the Commission through a contested case hearing under Section 11.042(b) of the Texas Water Code. Alternatively, if the Commission decides that any of the hearing requests should be granted and referred to a contested case hearing before SOAH, the Commission should exercise its authority under Section 2003.047(e) of the Texas Government Code by limiting the issues to be considered by SOAH during a contested case hearing to those three outlined in Section IV.A.1, above, under Texas Water Code Section 11.042(b). Further, considering the limited scope of issues eligible to be referred under Section

¹³³ *Id.*

11.042(b), it is appropriate for the Commission to also limit the duration of the hearing pursuant to its authority under Section 2003.048(e) of the Texas Government Code to not exceed 180 days from the date of the preliminary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that an original and seven true and correct copies of the foregoing Applicant New Braunfels Utilities' Response to Requests for Contested Case Hearing were filed with the Office of the Chief Clerk and that a true and correct copy of the same was served on all individuals indicated on the service list included below on this 11th day of July, 2016.

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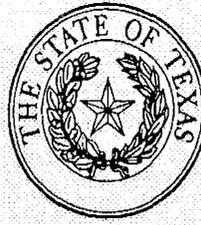
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Exhibit A

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN INTERIM ORDER concerning the Motion to Overturn filed by the City of Bryan and the City of College Station regarding the Executive Director's decisions to return Application Nos. 5912 and 5913 pursuant to 30 Texas Administrative Code Section 281.18 without prejudice to their re-submission; TCEQ Docket Nos. 2006-1832-WR and 2006-1831-WR..

On December 13, 2006, the Texas Commission on Environmental Quality (the "Commission") considered during its open meeting the Motion to Overturn (the "Motion") filed by the City of Bryan and the City of College Station (Cities) requesting the Commission overturn the Executive Director's September 21, 2006, decisions to return Application Nos. 5912 and 5913 pursuant to 30 Texas Administrative Code Section 281.18 without prejudice to their re-submission. In his letters dated September 21, 2006, the Executive Director stated that he was returning the applications because the Cities had not submitted certain specific information with regard to quantified targets for water savings, including goals for water loss programs and municipal use, and evidence indicating official adoption of water conservation plans that included these specified minimum requirements. The Commission also considered all related filings, the oral argument of the Cities, the Executive Director, and the Office of Public Interest Counsel, and answers to the Commission's questions during the public meeting

After such consideration and subsequent deliberation in open meeting, the Commission determined that it has the jurisdiction and authority to act on the Cities' request to reverse the Executive Director's decisions that the Cities' applications were not administratively complete under the general powers in Chapter 5 of the Water Code, and in particular, under Section 5.221 of the Water Code. The Commission also determined as a matter of law with regard to bed and banks authorization applications that request authorization to divert and reuse return flows derived exclusively from privately owned groundwater that, based on Water Code Section 11.042(b), such applications do not involve state water.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY that:

1. The Commission has jurisdiction under the general powers in Chapter 5 of the Water Code, particularly, Section 5.221 of Chapter 5, to consider and act on the Cities' Motion to Overturn;
2. The Commission determines as a matter of law that the Cities' applications do not involve state water based on Section 11.042(b) of the Water Code, which provides the criteria for the owner of privately owned groundwater to retain ownership of groundwater after discharge into a state watercourse;
- 3.. The Executive Director is directed to process the Cities' applications solely under Section 11.042(b) and the Commission's bed and banks authorization rules and not under statutes and rules applicable to state water;
4. The Cities' applications are remanded to the Executive Director for administrative and technical review; and

5. This Order is confined to bed and banks authorization applications that involve exclusively groundwater-based return flows.

Issue Date: **DEC 20 2006**

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

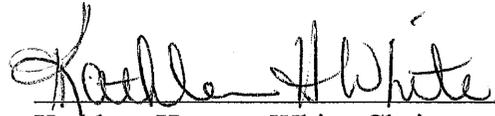

Kathleen Hartnett White, Chairman

Exhibit B

BEFORE THE
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
OPEN MEETING OF
WEDNESDAY, JANUARY 20, 2016
EXCERPTED TRANSCRIPT OF
AGENDA ITEM NO. 1
(Transcribed from TCEQ Webcast)
(Transcription from Time Code 1:36:35 to 1:51:30)

1 (Beginning of requested excerpt)

2 COMM. BAKER: No. I think final -- and
3 then the final -- the final issue that I heard discussed
4 over and over today was the question of reuse and how
5 that is to be addressed going forward.

6 And I think the underlying -- I'm going
7 to go back, Chairman, to what you originally said. The
8 underlying theme of where I am on this is exactly where
9 you are -- and you, Commissioner -- on the rights that
10 exist or could exist in the future through a bed and
11 banks permit have to be protected. And if groundwater,
12 as the Day case would say, is to be treated as State
13 water once it enters into a river -- or becomes surface
14 water and, in turn, becoming State water, the
15 discharger -- whether that -- if that new right is then
16 given to BRA, the discharger has to have the ability, in
17 my mind, to go in and request a bed and banks permit at
18 some point in the future and be able to get that -- get
19 that piece back.

20 In the meantime, however, if it's water
21 that's going into -- becoming State water, why would
22 we -- I guess the question is why would we not make that
23 available for appropriation up until the time the
24 discharger actually applies for a bed and banks permit?
25 Does that make sense?

1 CHAIRMAN SHAW: I think that's the point
2 that I'm with as well from the standpoint of I think
3 we've been directed through SB1 to look at using that
4 water, and I think the Day case sort of limits when that
5 water is available for re-appropriation in that it's in
6 the -- in the watercourse, as you sort of put it, why
7 would you not reuse that water if it's just -- if it's
8 not going to be used?

9 I mean, obviously you have to meet all
10 those demands, and part of what I think we're -- we're
11 all agreeing to but haven't talked about is, for
12 example, that the SB3, the e-flows, are being met.
13 Those are paramount. Those are built in. Those are
14 being taken care of.

15 So once all those requirements are met,
16 it seems to be good policy for those return flows and/or
17 discharges of groundwater-based -- groundwater-based
18 discharges to be available for appropriation to be used
19 in keeping -- so long as they are proven to be
20 protective, et cetera, et cetera.

21 And so from the standpoint of what you're
22 talking about, I think the Day case certainly limits
23 that once that bed and banks is there, then that ability
24 to be appropriated ceases; and, therefore, in order to
25 maintain and protect that, we should provide that, as

1 you're pointing out, whoever used that water or owned
2 that water, depending on the case there, groundwater and
3 surface water, they have the opportunity to apply for a
4 bed and banks. And once that's occurred, then that
5 would take that water out of the realm of those waters
6 that are available for re-appropriation.

7 COMM. NIERMANN: Yeah. No objection to
8 anything that y'all just said. You know, I think -- you
9 know, what we all appreciate is that Texas has a very
10 unique system for water rights, generally, but in
11 particular how return flows are treated, how groundwater
12 or groundwater-based effluent that's discharged to
13 surface water is treated, and the authorities have been
14 dynamic. The statutes have been dynamic. The case law
15 has been dynamic. And I think it's fair to say that the
16 Commission practice about how those have been approached
17 is dynamic -- or has been dynamic.

18 Post-Senate Bill 1, my understanding of
19 the authorities is consistent with where the ALJs came
20 out and as articulated by the lawyer from Parks and
21 Wildlife, you know, I see water rights that belong to a
22 particular person, whether they be a property interest
23 in groundwater or an appropriative right in surface
24 water and State waters, that if there will be indirect
25 use downstream of those waters, that that is an

1 authorization appropriate under 11.042, bed and banks
2 permit -- or bed and banks authorization. But when we
3 start talking about water of others, we're now in the
4 realm of 11.046. And I think I'm restating what the
5 lawyer from Parks and Wildlife had to say on this point.

6 So those provisions fit together. They
7 make sense together. The piece that I puzzled over a
8 little bit is what to do about groundwater -- or
9 groundwater-based effluent discharged by others into
10 surface waters, and certainly 11.046 does not speak to
11 that, but I think the Day case speaks to that, that such
12 waters change characteristics and can become -- or do
13 become, generally speaking, State waters again.

14 Coming back around, I think, to the point
15 that you were making, is that just because somebody who
16 has developed groundwater or pumped groundwater and made
17 it their own, they have a property interest in it, just
18 because that's discharged into surface waters, it
19 doesn't automatically change the characteristic. If
20 that person wants to indirectly reuse that water
21 downstream, they certainly have the right to apply for a
22 bed and banks permit to do so.

23 So that's my understanding of sort of the
24 paradigm that we're operating under now post-Senate
25 Bill 1. And I think -- so let me make this point. To

1 the extent that BRA is seeking to appropriate the water
2 of others, I think we need those conditions that protect
3 the rights of those other folks to come back later
4 and -- and indirectly reuse their water. In other
5 words, the water right is contingent on future bed and
6 banks permits.

7 All right. So that's my understanding of
8 sort of where the law is. Now, how does this map up
9 with BRA's application? Another question. I think what
10 BRA has provided us is a model that shows an aggregate
11 number of -- you know, quantifying the aggregate of the
12 return flows, including, possibly, groundwater-based
13 effluent that BRA may have a property interest in,
14 groundwater-based effluent of others, surface waters
15 that BRA has appropriated and is discharging, and also
16 surface waters or State waters -- appropriate State
17 waters of others. So there's -- there's really kind of
18 a matrix there with four boxes, and what we have is a
19 number that's all rolled up into a single aggregate
20 number.

21 I'm not yet quite satisfied -- and I
22 would like to have a little bit of discussion about
23 whether -- whether it's appropriate -- if my
24 interpretation of the law is correct, and if my
25 colleagues agree with me -- whether it's appropriate to

1 issue a permit -- a new appropriative right for all of
2 those waters. You know, should some of those waters be
3 authorized under a bed and banks permit rather than a
4 new appropriation?

5 That's teeing up the issue. I wish I had
6 a solution for you right now. I have some ideas, but
7 I'd like y'all to chime in if you --

8 CHAIRMAN SHAW: And I'd like to see how
9 your ideas line up with this, and that is -- I agree
10 with what you said, and I think with regard to the
11 appropriate mechanism for authorizing the indirect
12 reuse, the use downstream with regard to those, those
13 waters that are someone else's water discharge. In
14 other words, those groundwater based that are non-BRA
15 and any discharges that are non-BRA from the standpoint
16 of surface water, I think those are -- as we discussed,
17 I think SB1 brings those available for an appropriation,
18 and I think that's what we're dealing with primarily
19 within this permit application, is that system operation
20 permit would allow them to capture some and, therefore,
21 make some of those waters to be available, and I think
22 that's appropriate.

23 The point you brought up there last is
24 with regard to those return flows and/or
25 groundwater-based discharges that BRA has an interest

1 in. I think the appropriate vehicle for that is a bed
2 and banks as opposed to a new appropriation for those.
3 I think that is likely something that, if we all agree
4 on, would be best handled by probably a very limited
5 remand so that we can determine what's in the record --
6 and by "we," I mean the ALJs, and particularly -- or
7 specifically a party or two -- to be able to identify
8 what those -- what we know in the record as well as
9 being able to determine, then, what level of those are
10 appropriate for -- of the application is appropriate for
11 making available through an appropriation today. Can
12 those groundwater based and surface water that are
13 appropriate for a bed and banks transfer -- is that
14 going to require a new effort from BRA to attain those?

15 Because I think, just as I've stated and
16 I think we've agreed, someone else -- a third party that
17 owns an interest or has that interest in the groundwater
18 based or the surface water return flows, that's
19 something we should protect and something that's
20 preferential, and there's a mechanism for them to do
21 that, the bed and banks process.

22 I think the same thing is true from BRA's
23 interest in waters that were from their interests, those
24 surface based -- surface water-based return flows and
25 groundwater-based discharges. The appropriate mechanism

1 is not for a new allocation but, instead, for there to
2 be a bed and banks request for a reuse downstream.

3 Is that lining up with what you're
4 thinking, Commissioner?

5 COMM. NIERMANN: It is, yeah.

6 CHAIRMAN SHAW: And Commissioner Baker?

7 COMM. BAKER: And then similarly for new
8 appropriations under 11.046(c) and 11.121, the similar
9 analysis of the record would have to be done. Correct?

10 CHAIRMAN SHAW: Can you repeat that? I'm
11 sorry. I was --

12 COMM. BAKER: So the -- that for a new
13 appropriation under -- for other waters with surface or
14 groundwater effluent, 11 -- to satisfy 11 -- or for
15 11.046(c) and 11.121, that a similar analysis of the
16 record -- so in that limited remand, asking the ALJs
17 to -- under the -- you know, be able to pull out what
18 that right number is to satisfy that new appropriated
19 right. Correct?

20 COMM. NIERMANN: That's how I view it.
21 And I guess, you know, the way that I view it is some
22 part of the number that BRA has already provided and
23 that the ALJs have already determined that there's water
24 available in the system, some part of that may already
25 belong to BRA and would have to be subtracted out of

1 what's already been determined to be available.

2 COMM. BAKER: So the question is: Does
3 that information -- is that in the record?

4 COMM. NIERMANN: Is it in -- well, yeah.

5 COMM. BAKER: And --

6 COMM. NIERMANN: I'm loath to reopen the
7 record.

8 COMM. BAKER: Yes.

9 COMM. NIERMANN: And I do not intend to
10 reopen the record on this. And -- and I'm also
11 sensitive on the issue of remand, that -- that we
12 need -- we do need to get to the end of this process
13 eventually, and I'm in favor of a limited remand, not
14 reopening the record, because, you know, I think this is
15 an important question that needs to be answered, and so
16 I would hope that there is sufficient evidence in the
17 existing record to answer that question.

18 COMM. BAKER: And I would add two
19 conditions to that second piece. One, that we would
20 require sufficient accounting to protect BRA from
21 diverting more than the other entities' return flows,
22 and then, two, that we would limit BRA's appropriative
23 rights once another discharger obtains an indirect reuse
24 bed and banks authorization under 11.042 that lessens
25 the availability of the return flows of the others.

1 Does that make sense?

2 So that would protect -- it would ensure
3 they're not going beyond what's available, and then,
4 two, that there would be -- that in the future if
5 somebody -- if a discharger exercises that right to go
6 get a bed and banks permit, that their -- the
7 corresponding appropriative right that BRA has would be
8 reduced to account for that. Correct?

9 COMM. NIERMANN: I think that's right,
10 yeah.

11 COMM. BAKER: Which is the spirit, I
12 think, of what we talked about earlier.

13 COMM. NIERMANN: Right. I think that's
14 right. Not saying that this regulation applies or
15 doesn't apply in the case, but it's a principle that's
16 captured at 30 TAC 297.42(g), that we -- that we need to
17 be sensitive to potentially interruptible return flows.

18 And I understand that there are some
19 difficulties that we may have as an agency in terms of
20 our modeling data, but I think it's sort of -- the legal
21 analysis should lead and that our modeling approach
22 conform to that.

23 CHAIRMAN SHAW: Okay.

24 (End of requested excerpt)

25

C E R T I F I C A T E

STATE OF TEXAS)

COUNTY OF TRAVIS)

I, Steven Stogel, Certified Shorthand Reporter in and for the State of Texas, do hereby certify that the above-mentioned matter transcribed from Webcast audio recordings provided to me.

I FURTHER CERTIFY THAT the proceedings of such were reported by me or to the best of my ability and that the foregoing pages are a full, true and correct transcription of the audio recording, as understood by me.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 6th day of July 2016.



Steven Stogel
Certified Shorthand Reporter
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Exhibit C

BEFORE THE
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
OPEN MEETING OF
WEDNESDAY, JUNE 8, 2016
EXCERPTED TRANSCRIPT OF
AGENDA ITEM NO. 2
(Transcribed from TCEQ Webcast)
(Transcription from Time Code 9:28 TO 13:30)

1 (Beginning of requested excerpt)

2 MR. ROYALL: The second item this morning
3 is another non-HB 801 hearing request. It's the
4 application of the City of Pearland for Water Use Permit
5 No. 13071. And once again, the parties have been
6 notified -- excuse me -- that the Commission will not
7 take oral argument but may ask questions.

8 And we have a number of individuals. We
9 have Ed McCarthy with the City of Houston, Mr. Myron
10 Hess with the National Wildlife Federation, and Ashley
11 Acevedo, I believe, with the City of Pearland here if
12 the Commission has questions on this item.

13 CHAIRMAN SHAW: Thank you. Let me -- I
14 appreciate that. Colleagues, I'm trying to make sure
15 that I've got my points lined up, so bear with me a
16 moment to make sure I'm clear on what I want to make
17 here.

18 I think I'll start with some of the more
19 obvious -- I think that it's appropriate in this matter
20 for us to grant the hearing request of the National
21 Wildlife Federation. I think that's a good place to
22 start. Colleagues, what are your thoughts in general on
23 this application, as I'm looking through my notes here?

24 COMM. NIERMANN: They identified a member
25 of NWF that would be an affected person, and so I come

1 out the same way.

2 MR. ROYALL: Chairmen, Commissioner, I
3 should mention for the record that the City of Houston
4 withdrew its request for a contested case hearing by a
5 letter dated June 3, and thus the only hearing request
6 is the National Wildlife Federation.

7 CHAIRMAN SHAW: Thank you. That might
8 explain why I'm looking madly through my notes to find
9 what I missed, because I wasn't seeing some things that
10 I was expecting to see in the latest documents.

11 So with regard to the hearing, I think we
12 seem to be in agreement -- Commissioner Baker, as
13 well -- that the National Wildlife Federation be
14 appropriate to send over. I think it's an interesting
15 item in that it does deal with issues that we dealt with
16 previously when we dealt with another matter, and
17 specifically the BRA item where we provided some
18 directives with regard to our view of sort of the nature
19 of who owns groundwater return flows versus what the
20 processes are for surface water return flows.

21 And I think sending this over will be
22 appropriate, and I trust that the ALJs will be able to
23 evaluate and lead this process in keeping with the
24 decisions we made, specifically recognizing that we have
25 held that groundwater return flows remain the property

1 of that owner of that groundwater, and that in order to
2 request use downstream, that that simply requires the
3 request of a bed and banks transfer so we can take into
4 account the losses associated with that and ensure that
5 we're protecting surface water rights.

6 This application came in prior to our
7 decision, and it doesn't necessarily -- or doesn't
8 delineate clearly -- there are some percentages given,
9 but I think that will be one of the issues that needs to
10 be ferreted out, is how this application can be
11 considered in light of the directive that we've had
12 about the surface water versus the groundwater. And I
13 may not be saying that clearly, but I hope that it's --
14 I just want to make sure that it's obvious that I would
15 expect that this would be evaluated in light of the
16 previous decisions that we've made.

17 And I don't know if you have other
18 comments you'd like to share on that, colleagues.

19 COMM. BAKER: No. I think that captures
20 my feeling as well, Chairman.

21 CHAIRMAN SHAW: Great. So --

22 COMM. NIERMANN: I don't have anything
23 else to add.

24 CHAIRMAN SHAW: Great. Unless there's
25 further discussion, I would entertain a motion that

1 would grant the hearing request of the National Wildlife
2 Federation.

3 COMM. BAKER: Chairman Shaw, Commissioner
4 Niermann, I move that we grant the hearing request of
5 the National Wildlife Federation and direct the Chief
6 Clerk to refer the application to the State Office of
7 Administrative Hearings to conduct a contested case
8 hearing.

9 COMM. NIERMANN: Second.

10 CHAIRMAN SHAW: A motion has been made
11 and seconded. All in favor?

12 COMM. BAKER: Aye.

13 COMM. NIERMANN: Aye.

14 CHAIRMAN SHAW: The motion carries.

15 Thank you.

16 (End of requested excerpt)

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C E R T I F I C A T E

STATE OF TEXAS)

COUNTY OF TRAVIS)

I, Steven Stogel, Certified Shorthand Reporter in and for the State of Texas, do hereby certify that the above-mentioned matter transcribed from Webcast audio recordings provided to me.

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IN WITNESS WHEREOF, I have hereunto set my hand and seal this 6th day of July 2016.



Steven Stogel
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Exhibit D

affected by the diversion of the groundwater based return flows, although the impact was minimal. The difference in reliability without the diversion of the groundwater based return flows and with the diversion of the groundwater based return flows ranged from 0.03% to 1.05%. The results of the analysis indicate that although the reliabilities of some rights were negatively affected as a result of this application, the effects are minimal.

NBU submitted an accounting plan (*New Braunfels Accounting Plan*) that accounts for the amount of discharged return flows, adjusted for the portion of those return flows originating from groundwater, and the amount of divertible return flows. Staff reviewed the accounting plan and found it adequate. In addition, the permit would be subject to the requirements and orders of the South Texas Watermaster. The Watermaster actively manages water rights on a daily basis and protects senior water rights in times of shortage, based on their priority dates. Therefore, staff's opinion is that any possible impacts on existing basin water rights, should those impacts be determined to exist, would be mitigated by South Texas Watermaster operations and the accounting plan.

Conclusion

TWC 11.042(b) specifically allows for the use of waters of the state for the conveyance of groundwater-based return flows. NBU's groundwater based return flows would not be considered to be part of the natural flow of the Guadalupe River. Pursuant to TWC 11.042(b), the only limitations on the amount of groundwater based return flows NBU could reuse are for losses, environmental interests, and protection of any water rights that were granted based on the use or availability of those return flows. Therefore, staff can support granting NBU's request to reuse that portion of NBU's discharges that originate from groundwater, up to a maximum of 9,408 acre-feet subject to NBU's accounting plan.

Staff found no impacts to other water rights and therefore no changes to staff's previous conclusion dated June 30, 2014; however staff recommends the following modifications to Draft Permit No. 12469:

Special Condition 5D should be deleted because it is no longer applicable to the amended application.

1. In lieu of Special Condition 5.C: Diversions authorized by this permit are dependent upon potentially interruptible return flows or discharges and are conditioned on the availability of those discharges. The right to divert the discharged return flows is subject to revocation if discharges become permanently unavailable for diversion and may be subject to reduction if the return flows are not available in quantities and qualities sufficient to fully satisfy the permit. Should the discharges become permanently unavailable for diversion, Permittee shall immediately cease diversion under this permit and either apply to amend the permit, or voluntarily forfeit the permit. If Permittee does not amend or forfeit the permit, the Commission may begin proceedings to cancel this permit.

2. In lieu of Special Condition 5.E: Permittee shall only divert and use return flows pursuant to Paragraph 1. USE and Paragraph 3. DIVERSION in accordance with the most recently approved accounting plan (*New Braunfels Accounting Plan*). Permittee shall maintain the plan in electronic format and make the data available to the South Texas Watermaster upon request. Any modifications to the accounting plan shall be approved by the Executive Director. Any modification to the accounting plan that changes the permit terms must be in the form of an amendment to the permit. Should Permittee fail to maintain the accounting plan or notify the Executive Director of any modifications to the plan, Permittee shall immediately cease diversion of discharged return flows, and either apply to amend the permit, or voluntarily forfeit the permit. If Permittee fails to amend the accounting plan or forfeit the permit, the Commission may begin proceedings to cancel the permit. Permittee shall immediately notify the Executive Director upon modification of the accounting plan and provide copies of the appropriate documents effectuating such changes.
3. In lieu of Special Condition 5.F: The *New Braunfels Utilities Accounting Plan* may be modified at any time by the Watermaster or other Executive Director staff if any modifications are deemed necessary.
4. In lieu of Special Condition 5.G: Prior to diversion of any groundwater based return flows in excess of the combined discharge amount currently authorized by TPDES permits 10232-001, 10232-002 and 10232-003, Permittee shall apply for and be granted the right to reuse those return flows. Permittee must amend the *New Braunfels Accounting Plan* to include these future return flows prior to diverting said return flows.

HYDROLOGY UNIT ANALYSIS FACT SHEET

Applicant: New Braunfels Utilities Basin: Guadalupe River Basin
 Water Right: 12469 County: Guadalupe
 Stream: Guadalupe River Requested Amount: 9,408 acre-feet

Changes to gsarun3.dat:

** NBU 12469 Groundwater based Return flows**

CI381901	35	33	42	38	44	36
CI	43	37	38	41	39	43
CINORTHK	154	136	153	148	163	166
CI	178	173	165	169	166	178
CISOUTHK	211	199	231	226	231	227
CI	247	237	248	259	257	276

** IF/WR/ Records

**

**New Braunfels Utilities, App. No. 12469,

IF384301 82306 IFNBUR11010102

NBU_IF1

**groundwater based return flows

WR548801 0. MUN111010102 1

12469_GW

NBU

TS	ADD	1989	400	368	426	412	438	429	468	447	451	469
462	497											

IF384301 0 IFNBUR11010102

NBU_IF2

IF384301 82306 IFNBUR20091120

NBU_IF3

The application was declared administratively complete on November 20, 2009.

Water Availability Review and No Injury Analysis

Resource Protection staff recommends the following Special Condition be included in the permit, if granted:

Permittee shall only divert authorized return flows under this permit when streamflow exceeds the following values at USGS Gage No. 08169792 (Guadalupe River at Seguin):

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Season	Winter			Spring			Summer			Fall		
Subsistence Flow	118	118	118	118	118	118	118	118	118	101	101	101

Staff reviewed NBU's request to reuse its return flows by determining the availability of return flows originating from surface water and then evaluating whether NBU's reuse of return flows, irrespective of the source, would affect senior water rights. First, staff reviewed water rights in the Guadalupe River Basin to determine whether any existing water rights were explicitly granted based on NBU's return flows and determined that, based on available commission records, no water rights were explicitly granted based on these return flows.

The Water Rights Analysis Package (WRAP) simulates management of the water resources of a river basin. TCEQ uses WRAP in the evaluation of water right permit applications using priority-based water allocation. WRAP is a generalized simulation model for application to any river basin, and input datasets must be developed for the particular river basin of concern. The TCEQ developed water availability models (WAMs) for Texas' river basins that include geographical information, water right information, naturalized flows, evaporation rates, and specific management assumptions. Hydrology staff operates WRAP to evaluate water rights applications to determine water availability and to ensure that senior water rights are protected.

In order to evaluate whether reuse of that portion of the return flows originating from groundwater would affect other water rights that may have been granted based on the use or availability of this portion of the return flows, and to determine availability of return flows originating from surface water, staff used the Full Authorization Simulation of the Guadalupe WAM in which all water rights use their authorized amounts and return flows are not included. The period of record for the Guadalupe WAM is 1934 through 1989.

Staff first modified the Guadalupe WAM to include the historically discharged

groundwater-based return flows from NBU's three treatment plants. NBU submitted discharge information for the period 2004 through 2008. However, staff used more current TCEQ data (through 2012), calculated the minimum monthly discharge for each month for each treatment plant and used 35% of that value to represent the portion of NBU's return flows that were based on groundwater. Staff first performed a simulation without NBU's diversion of groundwater-based return flows and calculated the volume reliabilities of all basin water rights. Volume reliability is defined as the percentage of the total target demand for each water right that is actually supplied. Next, staff performed a simulation using the modified version of the WAM dataset described above and included NBU's diversion of the groundwater-based return flows, assuming that those diversions had the most senior priority date in the basin. Staff then compared results for the two simulations.

The analysis indicates that 115 water rights would be negatively affected by diversion of the groundwater-based portion of the historically discharged return flows, although the impact was minimal. The difference in volume reliability without the diversion of the groundwater-based return flows and with the diversion of groundwater-based return flows ranged from 0.01% to 1.39%. The results of the analysis indicate that although the volume reliabilities of some rights were negatively affected as a result of this application, the effects are minimal.

NBU submitted an accounting plan (*New Braunfels Accounting Plan*) that accounts for the amount of discharged return flows, adjusted for the portion of those return flows originating from groundwater, and the amount of divertible return flows. Staff reviewed the accounting plan and found it adequate. In addition, the permit would be subject to the requirements and orders of the South Texas Watermaster. The Watermaster actively manages water rights on a daily basis and protects senior water rights in times of shortage, based on their priority dates. Therefore, staff's opinion is that any possible impacts on existing basin water rights, should those impacts be determined to exist, would be mitigated by South Texas Watermaster operations and the accounting plan.

Staff then used the modified Guadalupe WAM, which included discharges and diversion of groundwater-based return flows, and added the historically discharged surface water-based return flows from NBU's three treatment plants. Staff calculated the monthly discharge amount as discussed above and used 65% of that value to represent the portion of NBU's return flows that were based on surface water. Staff then modeled diversion of these return flows at a priority date of November 20, 2009. The simulation results indicate that 100 percent and at least 75 percent of the surface water-based return flows were not available in any year of the period of record and that at least 75 percent of the monthly demand would be met in 17 percent of the months. Staff then iteratively reduced the amount of diverted surface water to determine whether any portion of NBU's surface water-based return flows was available and found that the simulation results were unchanged.

Reviews of requests for interbasin transfers are conducted in accordance with §11.085 of the Texas Water Code and TCEQ rules regarding IBTs. NBU's request for an interbasin transfer is exempt under TWC §11.085 (v)(4). Therefore, staff did not perform a review under TWC §11.085.

Conclusion

TWC 11.042(b) specifically allows for the use of waters of the state for the conveyance of groundwater-based return flows. NBU's groundwater-based return flows would not be considered to be part of the natural flow of the Guadalupe River. Pursuant to TWC 11.042(b), the only limitations on the amount of groundwater-based return flows NBU could reuse are for losses, environmental interests, and protection of any water rights that were granted based on the use or availability of those return flows. Therefore, staff can support granting NBU's request to reuse that portion of NBU's discharges that originate from groundwater.

Based on the simulation results, staff cannot support granting an authorization to reuse that portion of NBU's historically discharged return flows that originate from surface water. Regarding reuse of return flows that may be discharged in the future as a result of authorized increases in discharges from the three treatment plants, NBU can apply to reuse those return flows when the increased discharges are authorized under the respective TPDES permits.

The maximum amount of the authorization should be limited to 3293 acre-feet per year (35% of the combined discharge amount under the three TPDES permits). Staff recommends that the following special conditions be included in the permit:

1. Diversions authorized by this permit are dependent upon potentially interruptible return flows or discharges and are conditioned on the availability of those discharges. The right to divert the discharged return flows is subject to revocation if discharges become permanently unavailable for diversion and may be subject to reduction if the return flows are not available in quantities and qualities sufficient to fully satisfy the permit. Should the discharges become permanently unavailable for diversion, Permittee shall immediately cease diversion under this permit and either apply to amend the permit, or voluntarily forfeit the permit. If Permittee does not amend or forfeit the permit, the Commission may begin proceedings to cancel this permit.
2. Permittee shall only divert 35% of the daily return flows that are actually discharged.
3. Permittee shall only divert and use return flows pursuant to Paragraph 1. USE and Paragraph 3. DIVERSION in accordance with the most recently approved accounting plan (*New Braunfels Accounting Plan*). Permittee shall maintain the

The maximum amount of the authorization should be limited to 3293 acre-feet per year (35% of the combined discharge amount under the three TPDES permits). Staff recommends that the following special conditions be included in the permit:

1. Diversions authorized by this permit are dependent upon potentially interruptible return flows or discharges and are conditioned on the availability of those discharges. The right to divert the discharged return flows is subject to revocation if discharges become permanently unavailable for diversion and may be subject to reduction if the return flows are not available in quantities and qualities sufficient to fully satisfy the permit. Should the discharges become permanently unavailable for diversion, Permittee shall immediately cease diversion under this permit and either apply to amend the permit, or voluntarily forfeit the permit. If Permittee does not amend or forfeit the permit, the Commission may begin proceedings to cancel this permit.
2. Permittee shall only divert 35% of the daily return flows that are actually discharged.
3. Permittee shall only divert and use return flows pursuant to Paragraph 1. USE and Paragraph 3. DIVERSION in accordance with the most recently approved accounting plan (*New Braunfels Accounting Plan*). Permittee shall maintain the plan in electronic format and make the data available to the South Texas Watermaster upon request. Any modifications to the accounting plan shall be approved by the Executive Director. Any modification to the accounting plan that changes the permit terms must be in the form of an amendment to the permit. Should Permittee fail to maintain the accounting plan or notify the Executive Director of any modifications to the plan, Permittee shall immediately cease diversion of discharged return flows, and either apply to amend the permit, or voluntarily forfeit the permit. If Permittee fails to amend the accounting plan or forfeit the permit, the Commission may begin proceedings to cancel the permit. Permittee shall immediately notify the Executive Director upon modification of the accounting plan and provide copies of the appropriate documents effectuating such changes.
4. The *New Braunfels Utilities Accounting Plan* may be modified at any time by the Watermaster or other Executive Director staff if any modifications are deemed necessary.
5. Prior to diversion of any return flows in excess of 35% of the combined amount currently authorized by TPDES permits 10232-001, 10232-002 and 10232-003, Permittee shall apply for and be granted the right to reuse those return flows. Permittee must amend the accounting plan to include these future return flows prior to diverting said return flows.

HYDROLOGY UNIT ANALYSIS FACT SHEET

Applicant: New Braunfels Utilities
Water Right: 12469
Stream: Guadalupe River

Basin: Guadalupe
County: Guadalupe
Requested Amount: 9408 acre-feet/year

Modification to *.dis file:-

**City of New Braunfels, App. No. 12469

FDNORTHK CP06

WPNORTHK 1.54

FDSOUTHK CP06

WPSOUTHK 3.01

**Modification to *.dat file:-

UCIFNBUR 7254 6552 7254 7020 7254 7020 = 82306

UC 7254 7254 7020 6209 6008 6209

**

** NBU 12469

CPNORTHK 383001 6 none 0.0000

CPSOUTHK 383001 6 none 0.0000

**

** NBU 12469 Groundwater based Return flows***

CI381901 12 12 15 13 15 13

CI 15 13 13 14 14 15

CINORTHK 54 48 54 52 57 58

CI 62 61 58 59 58 62

CISOUTHK 74 70 81 79 81 79

CI 86 83 87 91 90 97

**

** NBU 12469 Surface water based Return flows***

CI381901 23 21 27 25 29 23

CI 28 24 25 27 25 28

CINORTHK 100 88 99 96 106 108

CI 116 112 107 110 108 116

CISOUTHK 137 129 150 147 150 148

CI 161 154 161 168 167 179**

**New Braunfels Utilities, App. No. 12469,

IF384301 82306 IFNBUR11010102

NBU_IF1

**groundwater based return flows

WR548801 0. MUN111010102 1 12469_GW NBU

TS ADD 1989 140 130 150 144 153 150 163 157 158 164 162 174

IF384301 0 IFNBUR11010102 NBU_IF2

IF384301 82306 IFNBUR20091120 NBU_IF3

WR548801 0. MUN120091120 1 12469_SW NBU

TS ADD 1989 260 238 276 168 285 279 305 290 293 305 300 323

Remarks: Resource Protection staff recommended instream flow requirements for this application.

Texas Commission on Environmental Quality

INTEROFFICE MEMORANDUM

To: Sarah Henderson, Project Manager Date: June 26, 2014
Water Rights Permitting Team
Water Rights Permitting & Availability Section

Through: *CL* Chris Loft, Team Leader
blb Resource Protection Team
Water Rights Permitting & Availability Section

From: *RH* Robert Hansen, Senior Aquatic Scientist
blb Resource Protection Team
Water Rights Permitting & Availability Section

Subject: New Braunfels Utilities
WRPERM 12469
Application No. 12469 for a Water Use Permit
CN600522957
Guadalupe River
Guadalupe River Basin
Guadalupe County

Environmental reviews of water right applications are conducted in accordance with §11.042, §11.147, §11.1491, §11.150, and §11.152 of the Texas Water Code and with Texas Commission on Environmental Quality (TCEQ) administrative rules which include 30 Texas Administrative Code (TAC) §297.53 through §297.56. These statutes and rules require the TCEQ to consider the possible impacts of the granting of a water right on fish and wildlife habitat, water quality, and instream uses associated with the affected body of water. Possible impacts to bays and estuaries are also addressed.

ENVIRONMENTAL ANALYSIS

Application Summary: New Braunfels Utilities (NBU) seeks authorization to use the bed and banks of the Guadalupe River and its tributaries to discharge and transport 8.4 million gallons/day (MGD), approximately 9,408 acre-feet of water per year of historical and future groundwater and surface water return flows authorized by TPDES Permit Nos. WQ0010232001 (South Kuehler Wastewater Treatment Facility), WQ0010232002 (Gruene Road Wastewater Treatment Facility), and WQ0010232003 (North Kuehler Wastewater Treatment Facility). The Gruene Wastewater Treatment Facility discharges directly to the Guadalupe River approximately 5 miles upstream of Lake Dunlap and the two Kuehler Wastewater Treatment Facilities discharge to an unnamed tributary of the Guadalupe River approximately 0.5 mile from Lake Dunlap. NBU also seeks to divert

and use the historical and future groundwater and surface water return flows from anywhere along the perimeter of Lake Dunlap, Guadalupe River, Guadalupe River Basin for municipal, industrial and agricultural purposes.

INSTREAM USES

Aquatic and Riparian Habitats: Major land uses within Guadalupe County include farming and ranching, mining, and oil and gas production. The northwestern portion of the county is part of the Blackland Prairie and much of the land in the county is considered prime farmland. According to the *Handbook of Texas Online*, Guadalupe County soils vary from dark, calcareous clays in the northwest to fine, sandy loam in the Upper Coastal Plain portion of the county. These soils support grasses, mesquite, and scrub brush in the drier regions of the county and water-tolerant hardwoods and conifers near the creeks and rivers. The Guadalupe River was developed in the 1920s and 1930s as a source of hydroelectric power. Lake Dunlap and Lake McQueeney were impounded downstream of New Braunfels and provide many recreational opportunities. Photos provided by the applicant depict the proposed diversion reach along the perimeter of Lake Dunlap.

Lake Dunlap impounds the Guadalupe River downstream of the confluence with the Comal River. According to a 2005 report by Texas Parks and Wildlife Department (TPWD), Lake Dunlap is a 410-acre impoundment constructed in 1928 for water supply, hydroelectric generation, and recreation. Substrate in the upper portion of the lake is composed primarily of rock and gravel, while substrate in the middle and lower portions of the reservoir is composed of clays, sand, and silt. The fish community includes gizzard shad (*Dorosoma cepedianum*), bluegill (*Lepomis macrochirus*), largemouth bass (*Micropterus salmoides*), Guadalupe bass (*Micropterus treculii*), spotted bass (*Micropterus punctulatus*), white crappie (*Pomoxis annularis*), black crappie (*Pomoxis nigromaculatus*), redear sunfish (*Lepomis microlophus*) and channel catfish (*Ictalurus punctatus*) (TPWD 2005). The shoreline is comprised of bulkheads and cutbanks and the littoral habitat includes native aquatic plant species such as American lotus (*Nelumbo lutea*), spatterdock (*Nuphar luteum*), and water willow (*Justicia Americana*) (TPWD 2005).

The Texas Commission on Environmental Quality (TCEQ) regulates bed and banks authorizations to convey groundwater and surface water based effluent under the authority of Texas Water Code §11.042. That provision allows the commission to place special conditions in the authorization to “maintain instream uses and freshwater inflows to bays and estuaries.” On August 8, 2012, TCEQ adopted environmental flow standards for the Guadalupe and San Antonio Rivers, their associated tributaries, and San Antonio Bay. By rule, these environmental flow standards are considered adequate to support a sound ecological environment. This review is conducted in accordance with §11.042 of the Texas Water Code, and although this is not a new appropriation of water, will utilize TCEQ administrative rules which include 30 Texas Administrative Code (TAC) §298 Subchapter E (Guadalupe, San Antonio, Mission, and Aransas Rivers, and

Mission, Copano, Aransas, and San Antonio Bays) to provide consistency in water rights administration. The nearest stream gage to the proposed diversion reach in 30 TAC §298.380(c) is United States Geological Survey (USGS) Gage No. 08173900 – Guadalupe River at Gonzales. However, USGS Gage No. 08169792 – Guadalupe River at Seguin is located upstream of USGS Gage No. 08173900 and closer to the proposed diversion reach. Therefore, a drainage area adjustment was used to determine the appropriate environmental flow values for the Guadalupe River near Seguin. The resulting environmental flows for this segment of the Guadalupe River are shown in the following table:

Environmental flow values (cfs) at Gage No. 08169792 – Guadalupe River at Seguin, TX.

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Season	Winter			Spring			Summer			Fall		
Subsistence Flow	118	118	118	118	118	118	118	118	118	101	101	101

Diversions of water under this permit shall be authorized when streamflows exceed the above values at USGS Gage No. 08169792 (Guadalupe River at Seguin).

Recreational Uses: There are numerous recreational opportunities on the Guadalupe River and Lake Dunlap including boating, water skiing, jet skiing, and fishing. Sections of the upper, middle, and lower reaches of the river are suitable for canoeing. The lower Guadalupe River has numerous sand bars that lend themselves to camping and day use. The proposed addition of bed and banks authorization and a diversion reach should not adversely impact recreational uses.

Water Quality: Based on the *Atlas of Texas Surface Waters* (TCEQ 2004), Lake Dunlap is part of Segment No. 1804 (Guadalupe River Below Comal River). According to the *Texas Surface Water Quality Standards*, Title 30 of the Texas Administrative Code, Chapter 307, designated uses for this segment include high aquatic life use, contact recreation, public water supply, and aquifer protection (TCEQ 2010). According to the *Texas Integrated Report for Clean Water Act Sections 305(b) and 303(d)* (TCEQ 2010), all designated uses are fully supporting. The addition of bed and banks authorization and a diversion reach should not adversely impact water quality.

Coastal Zone Management Review: Freshwater inflows are important for maintaining the historical productivity of bays and estuaries along the Gulf Coast. As an individual event, the reuse of return flows should have minimal impacts to the bays and estuaries of the Guadalupe River Basin.

SUMMARY

New Braunfels Utilities (NBU) seeks authorization to use the bed and banks of the Guadalupe River and its tributaries to discharge and transport 8.4 MGD, approximately 9,408 acre-feet of water per year of historical and future groundwater and surface water return flows authorized by TPDES Permit Nos. WQ0010232001, WQ0010232002, and WQ0010232003. NBU also seeks to divert and use the historical and future groundwater and surface water return flows from anywhere along the perimeter of Lake Dunlap, Guadalupe River, Guadalupe River Basin for municipal, industrial and agricultural purposes.

Resource Protection staff recommends the following Special Conditions be included in the permit, if granted:

1. Diversions of return flows shall be authorized when streamflow exceeds the following values at USGS Gage No. 08169792 (Guadalupe River at Seguin):

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Season	Winter			Spring			Summer			Fall		
Subsistence Flow	118	118	118	118	118	118	118	118	118	101	101	101

2. In order to minimize entrainment and impingement of aquatic organisms, the permittee shall install screens on any new or modified diversion structure(s) with a mesh size no greater than 0.25 inches and a maximum flow-through screen velocity of 0.5 feet per second.

This instream use assessment was conducted using current TCEQ operation procedures and policies and available data and information. Authorizations granted to the permittee by the water rights permit shall comply with all rules of the Texas Commission on Environmental Quality, and other applicable State and Federal authorizations.

LITERATURE CITED

TCEQ. 2004. Atlas of Texas Surface Waters: Maps of the Classified Segments of Texas Rivers and Coastal Basins. Publication No. GI-316. Texas Commission on Environmental Quality. Austin, Texas.

TCEQ. 2010. Texas Integrated Report for Clean Water Act Sections 305(b) and 303(d). Texas Commission on Environmental Quality.

TCEQ. 2010. Texas Surface Water Quality Standards §307.1 – 307.10. Texas Commission on Environmental Quality.

TPWD. 2005. Statewide freshwater fisheries monitoring and management program 2005 Survey Report. Prepared by John Findeisen and Todd Neahr. Inland Fisheries Division, District I-E, Mathis, Texas.

Vivian Elizabeth Smyrl. "GUADALUPE COUNTY", *Handbook of Texas Online* (<http://www.tshaonline.org/handbook/online/articles/hcg12>), accessed February 25, 2013. Published by the Texas State Historical Association.

Texas Commission on Environmental Quality

INTEROFFICE MEMORANDUM

To: Sarah Henderson, Project Manager
Water Rights Permitting Team
Water Rights Permitting & Availability Section
Date: June 26, 2014

Thru: *dl* Chris Loft, Team Leader
6/26/14 Resource Protection Team
Water Rights Permitting & Availability Section

JA
6/26/14 Jennifer Allis, Senior Water Conservation Specialist
Resource Protection Team
Water Rights Permitting & Availability Section

From: Kristin Wang, Senior Water Conservation Specialist
KW
6/26/14 Resource Protection Team
Water Rights Permitting & Availability Section

Subject: New Braunfels Utilities
WRPERM 12469
CN600522957
Application No. 12469 for a Water Use Permit
Water Conservation Review

New Braunfels Utilities (NBU) has applied for a Water Use Permit for authorization to appropriate, divert, and use up to 9,408 acre-feet of NBU historic and future surface water-based return flows and groundwater-based return flows, irrespective of their source, discharged pursuant to their Texas Pollutant Discharge Elimination System (TPDES) permits, for municipal, industrial, and agricultural purposes. NBU also seeks to use the bed and banks of the Guadalupe River and its tributaries to convey NBU return flows from the wastewater treatment plant outfalls associated with the TPDES permits to the proposed diversion(s) anywhere along the perimeter of Lake Dunlap, located on the Guadalupe River, Guadalupe River Basin, Guadalupe County.

Pursuant to Texas Water Code (TWC), Section 11.085(v)(4), NBU also seeks authorization for an exempt interbasin transfer of NBU return flows from that portion of Guadalupe County located in the Guadalupe River Basin to that portion of said County located in the adjoining San Antonio River Basin, for municipal, industrial, and agricultural purposes.

An application to divert return flows from a stream results in a new source of water for the applicant. Therefore, for the purposes of a conservation review under 30 Texas Administrative Code (TAC) Section 295.9, staff believes that it meets the definition of an application to appropriate water and requires a technical review. This does not mean

that TCEQ would or would not consider this application to be an “appropriation” of water in other contexts. Although this review evaluates the entire NBU water system, this review is specifically triggered by the portion of this application that pertains to surface water return flows.

The applicant is required to provide evidence that the amount of water appropriated will be beneficially used, i.e., effectively managed and not wasted pursuant to TWC Section 11.134(b)(3)(A). Also, the applicant must provide evidence that reasonable diligence will be used to avoid waste and achieve water conservation pursuant to TWC Section 11.134(b)(4). To provide that evidence, the applicant must submit a water conservation plan in accordance with 30 TAC Chapter 288. In applications where a new appropriation of water is requested, the review includes an analysis of whether the requested appropriation is reasonable and necessary for the proposed uses in accordance with TWC Section 11.134 and 30 TAC Section 297.50.

The purpose of this review is to:

- (1) determine whether reasonable water conservation goals have been set;
- (2) determine whether the proposed strategies can achieve the stated goals;
- (3) determine whether there is a substantiated need for the water and whether the amount to be appropriated is reasonable for the proposed use; and
- (4) determine whether the water conservation plan addresses a water supply need in a manner that is consistent with the state water plan and the relevant approved regional water plan.

If these criteria are met, then staff considers this sufficient evidence to conclude that the applicant will avoid waste and achieve water conservation. This review forms a basis for permit conditions and limitations as provided by TWC Section 11.134.

The water conservation and drought contingency plans submitted by New Braunfels Utilities were reviewed by staff and found to be administratively complete per 30 TAC Chapter 288 for municipal uses. In the 2014 water conservation plan, NBU states that with continued public education/awareness, city ordinances, meter replacement and repair, more water-conserving plumbing fixtures replacement, and a cost based water rate structure they anticipate a water use reduction of 1 gallon per capita per day (gpcd) per year. Therefore, NBU provides the following specific and quantified five and ten-year goals for gpcd:

2015 - 156 gpcd
2020 - 151 gpcd
2025 - 146 gpcd

Additionally, NBU’s current goal for unaccounted water loss is 6.5%. NBU currently tracks this on a monthly and a rolling 12-month average. NBU will continue to maintain this goal in order to minimize the unaccounted water loss.

Staff has determined that NBU's programs and strategies appear to be reasonable for achieving the goals for reduction in per capita water use within its service area.

Staff conducted an analysis of the needs for water. According to the approved 2011 South Central Texas Regional Water Plan, New Braunfels will have a projected water need of 13,920 acre-feet by the year 2060.

The 2011 water plan includes the Recycled Water Programs water management strategy as a way to generate the recommended new supplies for Region L and lists NBU as one of the water utility districts with an available or projected supply of recycled water. The request for authorization to appropriate, divert, and use up to 9,408 acre-feet of NBU historic and future surface water-based return flows and groundwater-based return flows can help to meet the projected needs in the Region L water planning area. The application is consistent with the approved 2011 South Central Texas (L) Regional Water Plan and 2012 State Water Plan.

Staff recommends the following water conservation language be included in the permit if surface water based return flows are granted:

Permittee shall implement water conservation plans that provide for the utilization of those practices, techniques, and technologies that reduce or maintain the consumption of water, prevent or reduce the loss or waste of water, maintain or improve the efficiency in the use of water, increase the recycling and reuse of water, or prevent the pollution of water, so that a water supply is made available for future or alternative uses. Such plans shall include a requirement that in every water supply contract entered into, on or after the effective date of this permit, including any contract extension or renewal, that each successive wholesale customer develop and implement conservation measures. If the customer intends to resell the water, then the contract for resale of the water shall have water conservation requirements so that each successive customer in the resale of the water will be required to implement water conservation measures.

In addition, staff recommends that, if surface water based return flows are granted, the following special condition should be included in the permit:

Ninety days prior to the diversion of water, for industrial and/or agricultural uses, the applicant must submit a water conservation plan to TCEQ to comply with 30 TAC Sections 288.3 and/or 288.4, accordingly.

Exhibit E



MEMORANDUM

4801 Southwest Parkway, Parkway 2, Suite 150, Austin, Texas 78735, USA
T +1 512 326 5659 F +1 512 326 5723 W www.rpsgroup.com

TO: Roger Biggers (NBU); Sara Thornton (LGRT)
FROM: J. Michael Pinckney, P.E. (RPS), Tony L. Smith, P.E. (RPS)
SUBJECT: WAM Analysis of Groundwater-based Indirect Reuse for NBU
DATE: September 26, 2014

Permit 12469, as presently drafted, when granted will authorize diversion of up to 3,293 ac-ft per year of groundwater based effluent. The 3,293 ac-ft per year represents 35% of the total permitted WWTP discharge capacity of 9,408 ac-ft per year, which is estimated to represent the groundwater based effluent. Indirect reuse permits which authorize diversion and use of groundwater based effluent have no priority date and are considered to be senior to the entire river basin in which they are granted, while surface water based effluent has a priority date junior to the basin concurrent with the water right application's administrative completion date. Thus availability of groundwater based effluent for diversion is not subject to depletion by senior water rights, while availability of surface water based effluent is subject to depletion by senior water rights.

During the TCEQ's technical review, it was identified that none of NBU's surface water based effluent was available for diversion. The TCEQ modeled the permit application by first adding the groundwater based return flows to the Guadalupe WAM using CI records.

** NBU 12469 Groundwater based Return flows**

CI381901	12	12	15	13	15	13
CI	15	13	13	14	14	15
CINORTHK	54	48	54	52	57	58
CI	62	61	58	59	58	62
CISOUTHK	74	70	81	79	81	79
CI	86	83	87	91	90	97

After groundwater based return flow availability was modeled, surface water based return flows were modeled by the TCEQ. Surface water based return flows are added to the model via the following CI records. The total volume of return flow modeled in the WAM is 5,267 ac-ft, which represents the minimum monthly effluent discharge reported from 2008-2012.

** NBU 12469 Surface water based Return flows**

CI381901	23	21	27	25	29	23
CI	28	24	25	27	25	28
CINORTHK	100	88	99	96	106	108
CI	116	112	107	110	108	116
CISOUTHK	137	129	150	147	150	148
CI	161	154	161	168	167	179

TCEQ modeled the diversion of groundwater based effluent authorized by the granting of permit 12469 as follows:

```

**New Braunfels Utilities, App. No. 12469,
IF384301 82306 IFNBUR11010102 NBU_IF1
**groundwater based return flows
TS ADD 1989 140 130 150 144 153 150 163 157 158 164
162 174
IF384301 0 IFNBUR11010102 NBU_IF2
IF384301 82306 IFNBUR20091120 NBU_IF3

```

Modeling of the surface water based effluent is as follows:

```

WR548801 0. MUN120091120 1 12469_SW NBU
TS ADD 1989 260 238 276 168 285 279 305 290 293 305
300 323

```

The IF requirement modeled with the diversion of the return flows represents a SB3 environmental flow requirement at USGS Gage No. 08173900 Guadalupe River at Gonzales, adjusted by drainage area ratio to USGS Gage No. 08169792 Guadalupe River at Seguin.

To identify the impact of the reuse of groundwater based effluent on existing water rights in the WAM, TCEQ identified the reliability of all water rights in the basin when the groundwater based effluent is added to the model but not diverted, to the reliability of all water rights in the basin when the groundwater based effluent is added to the model and diverted at a senior priority date. Per the TCEQ's technical memoranda and information provided by TCEQ, minimal impacts (<5%) to volume reliability were identified.

RPS has evaluated the possibility of authorizing up to 9,408 ac-ft per year of groundwater based return flows by modeling a scenario wherein 100% of the monthly minimum NBU WWTP discharges using the same methodology employed by the TCEQ during its technical review of permit application 12469.

```

** Assume NBU 12469 100% Groundwater based Return flows***
CI381901 35 33 42 38 44 36
CI 43 37 38 41 39 43
CINORTHK 154 136 153 148 163 166
CI 178 173 165 169 166 178
CISOUTHK 211 199 231 226 231 227
CI 247 237 248 259 257 276

```

RPS utilized the same IF requirement as previously identified by TCEQ for its model analysis, revising the diversion target for the groundwater based effluent diversion right (TS record).

```

**New Braunfels Utilities, App. No. 12469,
IF384301 82306 IFNBUR11010102 NBU_IF1
**groundwater based return flows
WR548801 0. MUN111010102 1 12469_GW NBU

```

TS	ADD	1989	400	368	426	412	438	429	468	447	451	469
462	497											
IF384301		0	IFNBUR11010102					NBU_IF2				
IF384301	82306		IFNBUR20091120					NBU_IF3				

It is important to note that while the draft permit authorizes diversion of the groundwater portion of the total permitted discharge of 9,408 ac-ft, in its analysis TCEQ makes the conservative assumption that only NBU's minimum monthly historical effluent discharges (5,267 ac-ft per year) are to be modeled in the WAM to evaluate the permit application, reliabilities, and potential impacts on existing rights.

Analysis of the volumetric reliability of all water rights in the river basin demonstrates that assuming that 100% of NBU's historical discharges are groundwater based, the impact from indirect reuse of these discharges to other water rights in the river basin is minimal (<5%). Based on these results, it is feasible to request that the draft permit authorize diversion of up to 9,408 ac-ft per year of groundwater based effluent.

Thank you for your kind attention. We look forward to hearing from you.

Regards,

J. Michael Pinckney, P.E.
Project Manager
RPS

Tony L. Smith, P.E.
Manager – Water and Environmental Division
RPS

Exhibit F

AFFIDAVIT OF TONY SMITH

STATE OF TEXAS §
 §
COUNTY OF TRAVIS §

Before me, the undersigned notary, on this day personally appeared Tony Smith, the affiant, whose identity is known to me. After I administered an oath, affiant testified as follows:

1. “My name is Tony Smith. I am over 18 years of age, of sound mind, and capable of making this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct.

2. I am a Senior Project Manager at Carollo Engineers. I am a licensed professional engineer in the State of Texas. My license number is 92620 I have nearly 20 years of experience related to water resources planning, water availability, water rights, and environmental flow studies in Texas. My work during my career has included development of statistical analyses, models, workplans, water management plans, data processing tools, hydrological analyses, and GIS analyses. My particular specialties are in the areas of surface water hydrology, water resources planning and management, environmental flow regime analyses, water availability modeling, modeling of rivers, lakes, and estuaries, statistical analysis, and data analysis for marine and aquatic systems. In my professional career, I have advised numerous clients on water rights applications submitted to the Texas Commission on Environmental Quality, or “TCEQ.” I have worked on over 23 separate water rights applications.

3. During the TCEQ’s technical review of an application by New Braunfels Utilities, which is commonly known by its acronym—“NBU,” for Water Use Permit No. 12469, or what I will refer to simply as “the Application,” I was the Manager of the Water and Environmental Division of the Austin office of the RPS Engineering Group. NBU retained RPS to develop the Application and provide technical supporting information and materials to TCEQ during TCEQ’s technical review of the Application. As the Manager of the Water and Environmental Division at RPS, I was personally involved in the development of some of the technical materials submitted to the TCEQ, including the final Water Availability Modeling, or “WAM,” analysis that supports the draft permit developed by the Executive Director for the Application. I generally supervised the other technical work done in support of the Application. I am thoroughly familiar with the Application, supporting technical information, the draft permit, and both NBU’s and the TCEQ’s technical work for the same. Both TCEQ’s and NBU’s modeling was based on conservative assumptions.

4. The final WAM analysis that I performed along with another professional engineer who was the project manager for the Application at RPS at the time, is documented in a memorandum submitted to the TCEQ water rights permitting staff on or about September 26, 2014. It is attached to this affidavit, and I incorporate the facts stated in the memo into this sworn affidavit as if those facts were fully set forth in this affidavit.

5. NBU originally requested in the Application an authorization from TCEQ to, primarily, do three things. First, NBU requested authorization to divert and reuse groundwater-based return flows that NBU discharges from three wastewater treatment plants in the Guadalupe River Basin. Second, NBU requested authorization to convey and subsequently divert surface water-based return flows from those same wastewater treatment plants. Third, NBU requested an exempt interbasin transfer, which would be required for NBU to use the surface water-based return flows in portions of NBU's service area outside of the Guadalupe River Basin.

6. Following an initial WAM analysis, the TCEQ's water rights permitting staff determined that NBU's surface water-based return flows are unavailable for NBU's diversion and use. Consequently, both TCEQ staff and RPS staff reformulated their respective WAM analyses to only determine the impact that NBU's diversion and reuse of its groundwater-based return flows would have on the Guadalupe River Basin. At this time, the Application does not seek authorization concerning surface water-based return flows. Therefore, the interbasin transfer authorization originally requested is also no longer necessary.

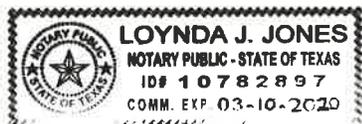
7. Both the TCEQ and RPS determined that modeled impacts of NBU's proposed diversion and reuse of its groundwater-based return flows to reliability of state water for permitted appropriative water rights in the Guadalupe River Basin would be less than approximately five percent, which is generally accepted to be within a "margin of error" in WAM modeling and is, therefore, considered to be a minimal impact for purposes of issuing bed and banks authorizations. In other words, the WAM predicts that the proposed diversion and reuse of groundwater-based return flows by NBU will not impact the exercise of appropriative water rights in the Guadalupe River Basin.

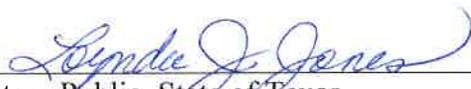
8. In my professional career, I have developed an understanding of TCEQ's rules, the statutes TCEQ is charged with enforcing, and Texas law as it generally relates to water resources management. I understand that, under Texas law—including Texas Water Code Section 11.042(b), NBU's groundwater-based return flows originally produced from the Edwards and Trinity Aquifers are NBU's private property and are not subject to the priority system for appropriative state water rights."



Tony Smith

SUBSCRIBED AND SWORN TO before me this 8th day of July, 2016.





Notary Public, State of Texas

My commission expires: 3/10/20



MEMORANDUM

4801 Southwest Parkway, Parkway 2, Suite 150, Austin, Texas 78735, USA
T +1 512 326 5659 F +1 512 326 5723 W www.rpsgroup.com

TO: Roger Biggers (NBU); Sara Thornton (LGRT)
FROM: J. Michael Pinckney, P.E. (RPS), Tony L. Smith, P.E. (RPS)
SUBJECT: WAM Analysis of Groundwater-based Indirect Reuse for NBU
DATE: September 26, 2014

Permit 12469, as presently drafted, when granted will authorize diversion of up to 3,293 ac-ft per year of groundwater based effluent. The 3,293 ac-ft per year represents 35% of the total permitted WWTP discharge capacity of 9,408 ac-ft per year, which is estimated to represent the groundwater based effluent. Indirect reuse permits which authorize diversion and use of groundwater based effluent have no priority date and are considered to be senior to the entire river basin in which they are granted, while surface water based effluent has a priority date junior to the basin concurrent with the water right application's administrative completion date. Thus availability of groundwater based effluent for diversion is not subject to depletion by senior water rights, while availability of surface water based effluent is subject to depletion by senior water rights.

During the TCEQ's technical review, it was identified that none of NBU's surface water based effluent was available for diversion. The TCEQ modeled the permit application by first adding the groundwater based return flows to the Guadalupe WAM using CI records.

** NBU 12469 Groundwater based Return flows**

CI381901	12	12	15	13	15	13
CI	15	13	13	14	14	15
CINORTHK	54	48	54	52	57	58
CI	62	61	58	59	58	62
CISOUTHK	74	70	81	79	81	79
CI	86	83	87	91	90	97

After groundwater based return flow availability was modeled, surface water based return flows were modeled by the TCEQ. Surface water based return flows are added to the model via the following CI records. The total volume of return flow modeled in the WAM is 5,267 ac-ft, which represents the minimum monthly effluent discharge reported from 2008-2012.

** NBU 12469 Surface water based Return flows**

CI381901	23	21	27	25	29	23
CI	28	24	25	27	25	28
CINORTHK	100	88	99	96	106	108
CI	116	112	107	110	108	116
CISOUTHK	137	129	150	147	150	148
CI	161	154	161	168	167	179

TCEQ modeled the diversion of groundwater based effluent authorized by the granting of permit 12469 as follows:

```

**New Braunfels Utilities, App. No. 12469,
IF384301 82306 IFNBUR11010102 NBU_IF1
**groundwater based return flows
TS ADD 1989 140 130 150 144 153 150 163 157 158 164
162 174
IF384301 0 IFNBUR11010102 NBU_IF2
IF384301 82306 IFNBUR20091120 NBU_IF3

```

Modeling of the surface water based effluent is as follows:

```

WR548801 0. MUN120091120 1 12469_SW NBU
TS ADD 1989 260 238 276 168 285 279 305 290 293 305
300 323

```

The IF requirement modeled with the diversion of the return flows represents a SB3 environmental flow requirement at USGS Gage No. 08173900 Guadalupe River at Gonzales, adjusted by drainage area ratio to USGS Gage No. 08169792 Guadalupe River at Seguin.

To identify the impact of the reuse of groundwater based effluent on existing water rights in the WAM, TCEQ identified the reliability of all water rights in the basin when the groundwater based effluent is added to the model but not diverted, to the reliability of all water rights in the basin when the groundwater based effluent is added to the model and diverted at a senior priority date. Per the TCEQ's technical memoranda and information provided by TCEQ, minimal impacts (<5%) to volume reliability were identified.

RPS has evaluated the possibility of authorizing up to 9,408 ac-ft per year of groundwater based return flows by modeling a scenario wherein 100% of the monthly minimum NBU WWTP discharges using the same methodology employed by the TCEQ during its technical review of permit application 12469.

```

** Assume NBU 12469 100% Groundwater based Return flows***
CI381901 35 33 42 38 44 36
CI 43 37 38 41 39 43
CINORTHK 154 136 153 148 163 166
CI 178 173 165 169 166 178
CISOUTHK 211 199 231 226 231 227
CI 247 237 248 259 257 276

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RPS utilized the same IF requirement as previously identified by TCEQ for its model analysis, revising the diversion target for the groundwater based effluent diversion right (TS record).

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**New Braunfels Utilities, App. No. 12469,
IF384301 82306 IFNBUR11010102 NBU_IF1
**groundwater based return flows
WR548801 0. MUN111010102 1 12469_GW NBU

```

TS	ADD	1989	400	368	426	412	438	429	468	447	451	469
462	497											
IF384301		0	IFNBUR11010102					NBU_IF2				
IF384301	82306		IFNBUR20091120					NBU_IF3				

It is important to note that while the draft permit authorizes diversion of the groundwater portion of the total permitted discharge of 9,408 ac-ft, in its analysis TCEQ makes the conservative assumption that only NBU's minimum monthly historical effluent discharges (5,267 ac-ft per year) are to be modeled in the WAM to evaluate the permit application, reliabilities, and potential impacts on existing rights.

Analysis of the volumetric reliability of all water rights in the river basin demonstrates that assuming that 100% of NBU's historical discharges are groundwater based, the impact from indirect reuse of these discharges to other water rights in the river basin is minimal (<5%). Based on these results, it is feasible to request that the draft permit authorize diversion of up to 9,408 ac-ft per year of groundwater based effluent.

Thank you for your kind attention. We look forward to hearing from you.

Regards,

J. Michael Pinckney, P.E.
Project Manager
RPS

Tony L. Smith, P.E.
Manager – Water and Environmental Division
RPS

Exhibit G

TEXAS WATER COMMISSION



3 6238 00009 2357


 NOTICE OF FINAL DETERMINATION OF ALL CLAIMS
 OF WATER RIGHTS IN THE LOWER GUADALUPE RIVER SEGMENT
 OF THE GUADALUPE RIVER BASIN

Notice is given pursuant to Texas Water Commission Rule No. 275.18(c) [formerly Commission Rule No. 155.08.02.035(c)] that on October 13, 1982, the Texas Water Commission adopted a Final Determination of Claims of Water Rights in the Lower Guadalupe River Segment of the Guadalupe River Basin. The Lower Guadalupe River Segment, which includes portions of Comal, Guadalupe, Gonzales, Caldwell, Bastrop, Fayette, Lavaca, Wilson, Karnes, DeWitt, Goliad, Victoria, Calhoun and Refugio Counties, Texas, consists of the Guadalupe River and its tributaries from Canyon Dam to the Gulf of Mexico, excluding the watersheds of the Blanco and San Marcos Rivers and excluding the San Antonio River Basin. This segment also includes that portion of the Lavaca-Guadalupe Coastal Basin located north of Seadrift in western Calhoun County, Texas, being bounded on the east by State Highway No. 185.

The final determination and all evidence presented to or considered by the Commission will be open for public inspection during normal office hours at the offices of the Commission in the Stephen F. Austin State Office Building, Austin, Texas. One copy of the final determination is being furnished without charge by first-class mail to each person on the official mailing list for the Lower Guadalupe River Segment. Any person may order a copy of the final determination by writing to Permits Division, Texas Department of Water Resources, P.O. Box 13087, Austin, Texas 78711. Each request must be accompanied by check or money order in the amount of \$5.00.

As provided by Section 11.316, Texas Water Code, and Commission Rule No. 275.18(d) [formerly Commission Rule No. 155.08.02.035(d)], any affected party may apply to the Commission for a rehearing. Applications for rehearing must be filed with the Commission by January 7, 1983 and any reply to an application for rehearing must be filed with the Commission by January 25, 1983. Pursuant to Section 11.316, Texas Water Code, and Commission Rule No. 275.18(d), applications for rehearing which in the opinion of the Commission are without merit may be denied without notice to other parties, but if any application for rehearing is granted, the Commission will give notice to all persons on the official mailing list for the Lower Guadalupe River Segment and to all other claimants and holders of water rights in the Guadalupe River Basin. The Commission will take action on applications for rehearing at 10:00 a.m. on February 8, 1983, in Room 118 of the Stephen F. Austin State Office Building, 1700 North Congress, Austin, Texas.



Mary Ann Hefner
 Mary Ann Hefner, Chief Clerk
 TEXAS WATER COMMISSION

Date: December 3, 1982

 RECEIVED
 TEXAS DEPT. OF WATER RESOURCES
 AUSTIN, TEXAS

IN THE MATTER OF THE	X	BEFORE THE TEXAS
ADJUDICATION OF THE	X	WATER COMMISSION
LOWER GUADALUPE RIVER	X	
SEGMENT OF THE GUADALUPE	X	
RIVER BASIN	X	

FINAL DETERMINATION

The Texas Water Commission hereby makes its Final Determination of Claims of Water Rights in the Lower Guadalupe River Segment of the Guadalupe River Basin pursuant to Section 11.315, Texas Water Code.* This adjudication is authorized by the Water Rights Adjudication Act of 1967, Title 2, Subtitle B, Chapter 11, Subchapter G of the Texas Water Code. Jurisdiction was established at the initial public hearing in Seguin, Texas, on May 1, 1978, and evidence was received at subsequent public hearings. A preliminary determination was entered by the Commission on April 15, 1980. Hearings on contests to the preliminary determination were held on October 28 and November 12, 1980. A proposed final determination was issued on December 31, 1981. Exceptions to the proposed final determination were considered by the Commission on February 4, August 24, and October 13, 1982. The Commission has considered the record of these proceedings, including the examiner's report, the investigation report, the appendix to the investigation report, the written statement of facts and documents admitted into evidence, the contests, the proposed final determination, exceptions, briefs and oral argument in making its final determination.

INTRODUCTION

1. The Lower Guadalupe River Segment consists of the Guadalupe River and its tributaries from Canyon Dam to the Gulf of Mexico but excluding the watersheds of the Blanco and San Marcos Rivers and excluding the San Antonio River Basin;

*All statutory references are to the Texas Water Code Ann. (Supp. 1981) unless otherwise noted.

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declarations of intent, the Commission determines that the following are relevant:

1889 Tex. Gen. Laws, Ch. 88, §§4-8, 9 H. Gammel,
Laws of Texas 1128 (1898);

1895 Tex. Gen. Laws, Ch. 21, §§5-7, 10 H. Gammel,
Laws of Texas 751 (1898); and

1913 Tex. Gen. Laws, Ch. 171, §§5-14.

FAILURE TO FILE AND SUBSTANTIATE CLAIMS

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13. Sections 11.303 and 11.307 require all claimants of water rights except for domestic or livestock purposes to file a statement of the claim of right with the Commission. The Commission finds that the failure to file a sworn statement extinguishes and bars any claim of water right under Section 11.303.

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As a basic premise, those parties to the adjudication proceeding asserting water rights under Sections 11.303 and 11.307 have an affirmative obligation to produce credible evidence to substantiate the nature and extent of their claims. The Commission finds that any party whose claim was not substantiated by credible evidence cannot be recognized a water right under this determination.

FINAL DECREE OF COURT

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14. The recognition of water rights in this adjudication shall be final and conclusive as to all existing and prior rights and claims to the water rights in the Lower Guadalupe River Segment of the Guadalupe River Basin upon the final decree of the court. A water right will not exist in the Lower Guadalupe River Segment of the Guadalupe River Basin unless included in the final decree of the court or created under a permit issued by the Commission subsequent to the final decree of the court. [Section 11.322.]

ORDER

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS WATER COMMISSION THAT:

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and

1. As its final determination of claims of water rights in the Lower Guadalupe River Segment of the Guadalupe River Basin, the Commission makes findings of fact and conclusions of law defining the nature and extent of the claims of each

respective party as hereinafter enumerated. The parties are indexed alphabetically and set out in the determination in numerical order of diversion point, or by tract number when there is no diversion point.

2. The rights to use the water of the State of Texas in the Lower Guadalupe River Segment of the Guadalupe River Basin based on the findings of fact indicated, with the annual quantities, purposes of use, rates of diversion, time priorities and the conditions stated, are set forth below following the alphabetical index.

3. The following action is taken on the exceptions to the proposed final determination:

(a) The exceptions of the Indianola Company concerning the water rights claims of Margarett Sautter, et al and the Guadalupe-Blanco River Authority (GBRA), Union Carbide Corporation (Carbide) and the West Side Calhoun County Navigation District (District) are granted in part and overruled in part;

(b) The exceptions of the GBRA and Central Power and Light Company concerning Canyon Reservoir (Permit No. 1886, as amended) and the Coletto Creek Power Project (Permits Nos. 1614E and 3459) are in all things overruled;

(c) The exceptions of the GBRA concerning the hydroelectric system on the Guadalupe River (Permits Nos. 21 and 1096, and Certified Filing No. 528) are in all things overruled; and

(d) The exceptions of the GBRA, Carbide and the District concerning the Calhoun County Irrigation System (Permits Nos. 1319, 1362, 1375, 1375B and 1614, all as amended, and Permits Nos. 1564, 1592 and 2120) are granted in part and overruled in part.

NAME
ABERCROMBIE, JOSEPH
ACNE BRICK COMPANY
ATNSWORTH, A. G.,
ATNSWORTH, A. G.,
ATNSWORTH, A. G.,
ATNSWORTH, ALICE
ATNSWORTH, ALICE
ATNSWORTH, ALICE
ANDERSON, CLARENCE
ANDREWS, WILLIAM
BERGER, CHARLES B.
BAD SCHLOSS, INC.
BIG RAG, LTD.
BISHOP, W. P.
BLOOD, KATHERINE
BLUMBERG, ROLAND K.
BLUMBERG, ROLAND K.
BOND, TAY W., TRUS
BOOTHE, JACK H.
BOOTHE, ROBERT RAG
BRADEN, JOHN, JR.
BRADEN, JOHN, JR.
BRADEN, JOHN, JR.
BRADEN, JOHN, SR.
BRADEN, JOHN, SR.
BRANLETTE, J. D.,
BRELSFORD, DON V.
BREITZKE, ROBERT L.B.
BUHEL, FRED T.
CAMP WAGNECKE, INC.
CANNAN, CAROLYN A.
CANNAN, CAROLYN A.
CANNAN, G. C., SR.
CANNAN, G. C., SR.
CANNAN, J. W.
CENTRAL POWER & LI
CENTRAL POWER & LI
CHRISTIAN, HENRY E.
CLOUD, TED P., JR.
COMMUNITY WATER LI
COPPEDGE, RALPH A.
COWAN, SALLY C.
CROWLEY, ELMER T.
COX, CAROLYN ANN
CUERO, CITY OF
CUMBLE, DR. E. W.
DAVIS, DR. JOHN C.
DELEON, BERNICE
DELEON, ED F., EST
DELEON, ROBERT E.
DENMAN, JUDGE L. G.
DITZ, JESSIE, JR.
DIETZEL, LAWRENCE
DITTMAR, RAY E. A.
DRAMBERGER, LEDNA
DUBOSE, GEORGE D.
DUNCAN, DAN L.
DASLEY, JAY M.
E. L. JORDAN, DENEM
ELLISON, WAYNE W.
EHLINGER, MICHAEL
EYLANDER, ROBERT E.

- The most acreage within certified filing area T-0130 irrigated with State water in any calendar year since the certified filing was filed was 1/4 of an acre in 1976 through 1978. (1 SP 285, 286)
- Since the certified filing was filed, State water has been diverted for irrigation purposes within T-0130 at authorized diversion point D-0210 on the Guadalupe River by a stationary pump at a maximum effective diversion rate of 0.07 cfs (30 gpm) using a sprinkler type distribution system. (1 SP 283, 284, 288-290)
- The maximum amount of State water diverted and used for irrigation purposes within T-0130 in any calendar year since the certified filing was filed was 3 acre-feet of water in the 1980's. (1 SP 290)
- There was insufficient evidence presented to show justification for the lack of development to the full extent of the declaration and an intention to increase the use of State water under the certified filing in the foreseeable future. (1 SP 293)

CONCLUSION:

Claimants are recognized a right under Certified Filing No. 732 to divert and use not to exceed 3 acre-feet of water per year for the irrigation of 1/4 of an acre of land within certified filing area T-0130 in the Juan Veramendi Grant, Comal County, at a maximum total diversion rate of 0.07 cfs (30 gpm) with a priority date of June 30, 1914.

DIVERSION POINT NO: 0220
TRACT NO: 0140

OWNERSHIP: Arlon B. Krueger Estate

IR: 21
APP: 2
V SP 298-310

SECTION 11.307 CLAIM: Claimant asserts a right under §11.303 Claim No. 174 and Certified Filing No. 732 to divert and use 3 acre-feet of water per year from the Guadalupe River for the irrigation of 1/4 acre of land at a maximum diversion rate of 0.07 cfs (30 gpm) with a priority date of June 30, 1914. (Exh. 46)

FINDINGS:

- Claimant is the owner of §11.303 Claim No. 174 which asserts a riparian right to divert and use water for irrigation purposes and declared a maximum diversion and use in any calendar year during the period 1963-1967, inclusive, of 1.3 acre-feet of water from the Guadalupe River at a maximum diversion rate of 0.07 cfs (30 gpm) for the irrigation of an unspecified quantity of land. The date of first beneficial use of water within the claim area was declared to be June, 1942. (Exh. 47)
- Claimant does not own any of the land on which Certified Filing No. 732 was originally filed. (Exh. 45; 1 SP 300)
- Claimant is the owner of claim area T-0140 which is located in Comal County in the Juan Martin de Veramendi Grant, Abstract No. 2, The Juan Martin de Veramendi Grant, Abstract No. 2, is a Title Class Grant with a granting date of November 10, 1841, T-0140 and Abstract No. 2 about the Guadalupe River. (1 SP 300, 301)
- There was no evidence presented of an express grant from the sovereign of a right to divert and use public water from the Juan Martin de Veramendi Grant for irrigation purposes.
- The first use of State water for irrigation purposes within T-0140 was in December, 1965. (Exh. 47; 1 SP 302)
- The most acreage within T-0140 irrigated with State water in any calendar year during the period 1963-1967, inclusive, was 2 acres, being within T-0140, in Abstract No. 2, in 1965. (1 SP 300, 409)
- During the period 1963-1967, inclusive, State water was diverted for the purpose of irrigation within T-0140 at diversion point D-0220 on the Guadalupe River by means of a stationary pump at a maximum effective diversion rate of 0.07 cfs (30 gpm) using a sprinkler type distribution system. (1 SP 300, 305, 307, 308)
- The maximum amount of State water diverted and used for irrigation purposes within T-0140 in any calendar year during the period 1963-1967, inclusive, was 2 acre-feet of water in 1965. (1 SP 305, 307-409)
- All of claimant's diversion and use of water is for domestic purposes (watering of a yard) and therefore is not regulated by the State of Texas.

CONCLUSIONS:

- No right is recognized under §11.303 Claim No. 174 since claim area T-0140 is in a Mexican land grant which was issued without an express grant from the sovereign of a right to divert and use public water for irrigation purposes.
- Claimant may continue to divert and use a reasonable amount of water for domestic purposes.

DIVERSION POINT NO: 0240
TRACT NO: None

OWNERSHIP: City of New Braunfels

IR: 27
APP: 2
V SP 318-338

SECTION 11.307 CLAIM: Claimant asserts a right under Certified Filing No. 411 to divert and use an unspecified amount of water per year from the Comal Springs for municipal purposes with a priority date of June 27, 1914. (Exh. 570)

FINDINGS:

- Claimant is the owner of Certified Filing No. 411 which declared an intention to divert and use an unspecified amount of water per year from two wells dug at the headwaters of the Comal River at a maximum diversion rate of 3.56 cfs (1600 gpm) for municipal purposes for the City of New Braunfels, Comal County. (Exhs. 571, 572)
- The appropriation affidavit which was recorded as Certified Filing No. 411 was filed with the County Clerk of Comal County on June 27, 1914. The construction of diversion facilities authorized under the certified filing was commenced in 1886 and the wells were dug in 1912. (Exh. 571)
- The wells which were claimed under Certified Filing No. 411 were from 4 to 9 feet deep. (Exh. 571)
- Claimant used these shallow wells until 1942 when deep wells were dug close to D-0240. Prior to that time, all water diverted and used by claimant at authorized diversion point D-0240 was surface water taken from the Comal Springs after the water reached ground level. (Exhs. 575A, 575B)
- The maximum amount of State water diverted and used for municipal purposes in any calendar year since the certified filing was filed was 1289 acre-feet in 1942. (Exh. 575A; V SP 345, 347)
- The Comal Springs form the major source of supply for the Comal River, a major tributary of the Guadalupe River.

- The flow of the Comal Springs is of sufficient magnitude to be of use to downstream users of water on the Comal River and the Guadalupe River. 20.
- The Juan Martin de Veramendi Survey, Abstract No. 2, patent is silent regarding the right to use water from the Comal Springs, merely grant a right of ownership to the land around the spring. (Exh. 518) 21.

CONCLUSION:

Claimant is recognized a right under Certified Filing No. 411 to divert and use not to exceed 1289 acre-feet of water per year from the headwaters of the Comal River at diversion point D-0240 for the municipal purposes of the City of New Braunfels, Comal County, at a maximum diversion rate of 3.56 cfs (1600 gpm) with a priority date of June 27, 1914.

DIVERSION POINTS NOS: 0250, 0260, 0270, 0280 and 0300
TRACT NO: 0160

OWNERSHIP: New Braunfels Utilities

IR: 28
APP: 2
V SP 127-256; Content Volume 1 SP 77-101

SECTION 11.307 CLAIM: Claimant asserts a right under Certified Filing No. 135 and §11.303 Claims Nos. 1551 and 2470 to impound water in an unspecified capacity reservoir on the Comal River and to divert and use therefrom 20 acre-feet of water per year for the irrigation of 200 acres of land, 8000 acre-feet of water per year for municipal and domestic purposes; and the entire flow of the Comal River for hydroelectric generation at a maximum diversion rate of 400 cfs (180,000 gpm) with a priority date of June 1, 1914. (Exh. 519)

FINDINGS:

- Claimant is the owner of Certified Filing No. 135 which declared an intention to annually divert and use an unspecified quantity of water from the Comal River at a rate equaling the entire flow of the Comal River for milling, manufacturing, municipal, firefighting and hydroelectric power generation and the irrigation of 500 acres of land out of an 1800 acre tract located in the Juan Martin de Veramendi Surveys Nos. 1 and 2, Comal County. (Exhs. 511, 512, 513)
- The appropriation affidavit which was recorded as Certified Filing No. 135 was filed with the County Clerk of Comal County on June 1, 1914. The construction of diversion facilities authorized under the certified filing commenced in 1864. (Exhs. 511, 513)
- Claimant is the owner of §11.303 Claim No. 1551 which asserts a riparian right, a prescriptive right, a right under Certified Filing No. 135 and rights under Article 8280-107, Vernon's Texas Statutes, to divert and use water for industrial (steam plant cooling) purposes and declared a maximum diversion and use in any calendar year during the period 1963-1967, inclusive, of 137,057 acre-feet of water from the Comal River (all water diverted through the plant and returned to the Comal River) at a maximum diversion rate of 196.06 cfs (88,000 gpm). The date of first beneficial use of water within the claim area was declared to be prior to 1924. (Exh. 514)
- Claimant is also the owner of §11.303 Claim No. 2470 which was filed concerning the same steam generating plant as that claimed by §11.303 Claim No. 1551. Claim No. 2470 was filed by the owner of the plant, while Claim No. 1551 was filed by the lessee who operated the plant. Claim No. 2470 asserts a right under Certified Filing No. 135, a riparian right and a prescriptive right to divert and use water for industrial purposes and declared a maximum diversion and use in any calendar year during the period 1963-1967, inclusive, of 136,771 acre-feet of water from the Comal River at a maximum diversion rate of 200 cfs (89,000 gpm). The date of first beneficial use of water within the claim area was declared to be before 1870. A small diversion dam on the Comal River was also claimed. (Exh. 515)
- The Juan Martin de Veramendi Grants did not contain any express grant from the sovereign of a right to divert and use public water from the Comal River for industrial or irrigation purposes. (Exh. 518)
- Certified filing area T-0160 is a large tract of land located both within and outside the city limits of New Braunfels. The City of New Braunfels owns only a portion of T-0160, with the rest of the tract being owned by many undetermined owners. (V SP 143)
- The City of New Braunfels or New Braunfels Utilities owns and irrigates a tract of land within T-0160 known as Landa Park. (V SP 158, 159)
- The maximum amount of land irrigated by the City of New Braunfels or New Braunfels Utilities in any calendar year is 500 acres located within Landa Park. (V SP 209)
- No evidence was presented to show that diversion points were used to divert water for irrigation purposes.
- The maximum amount of State water diverted and used for irrigation purposes within T-0160 in any calendar year since the certified filing was filed was 200 acre-feet of water in 1919. (Exh. 531)
- Claimant's predecessors-in-title also used water for industrial purposes (steam electric power generation) from 1928 until 1976. (Exh. 531; V SP 176, 177)
- Water used for industrial purposes was diverted at a maximum diversion rate of 200 cfs (90,000 gpm) from the man-made channel off the Comal River at diversion point D-0270. This water was used for cooling purposes at the steam electric generating plant either by a once-through cooling operation or by use in cooling towers and sprayers. (V SP 148, 172, 190)
- The maximum amount of State water diverted and used for industrial purposes was 141,438 acre-feet of water in 1972. (Exh. 531; V SP 170-172)
- The maximum amount of State water diverted and consumptively used for industrial purposes was 3658 acre-feet of water during 1972. (Exh. 531; V SP 170, 212)
- Claimant's predecessors-in-title also maintained a hydroelectric power generating station on the man-made channel off the Comal River. (V SP 146, 151, 178)
- The hydroelectric turbines were located in a dam at D-0280 and had a maximum flow capacity of 345 cfs in 1947. The maximum amount of water diverted and used during any calendar year for hydroelectric power generating purposes was 124,870 acre-feet of water in 1947. (V SP 151, 176, 199, 216)
- Claimant uses this dam to regulate the amount of water impounded in the man-made channel off the Comal River. The maximum amount of water impounded behind this structure is 150 acre-feet. (V SP 215, 217, 218)
- A point designated as D-0250 on page number 2 of Exhibit No. 7 is used as a gate to let water flow from the Comal River into the man-made channel. (V SP 145, 147)
- Claimant maintains a small diversion dam in the man-made channel downstream of D-0250. This structure does not impound water when the channel is full. The dam was built in 1956 to keep water impounded behind the hydroelectric dam. (V SP 145, 149, 150)

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- Only D-0260, D-0280 and D-0300 were authorized diversion points under Certified Filing No. 135. D-0260 and D-0300 have not been used since the certified filing was filed. The use of unauthorized diversion points D-0250 and D-0270 would cause no harm to downstream users of water. (V SF 145-151)
- Claimant intends to continue irrigating the 500 acre tract within T-0160 known as Landa Park and further intends to replace the turbines in the dam at D-0280 and begin generating hydroelectric power. (V SF 223, 225, 228)
- The Comal Springs arise and the Comal River terminates entirely within the Juan Martin de Veramendi Survey, Abstract No. 2. The water from the Comal Springs flows down both the old channel and the new man-made channel of the Comal River approximately three miles until the Comal River conflues with the Guadalupe River. (Contest SF 79-81)
- According to U.S.G.S. gage records, the average flow of the Comal River is 297 cfs. (Exhs. 823, 824; Contest SF 81)
- The Comal River has three tributaries but during low flow conditions the major source of water in the Comal River is spring water. (Contest SF 82, 83)
- Claimant owns no land located with Abstract No. 2 according to the records of the Texas Department of Water Resources. (Contest SF 84)
- Various claimants have claimed the right to divert and use water from the Comal River during the adjudication process. (Contest SF 85)
- Claimant contends that under Spanish and Mexican civil law, a spring which arises and terminates within one grant is subject to private ownership. (Contest SF 90)
- The Report of the Director of the Texas Department of Water Resources contains that:
 - All waters in New Spain (including Texas) were owned in common and were to be used by all the public;
 - An express grant of title to the water had to be made by the sovereign for the water from a large spring to be privately owned;
 - Only non-perennial or small springs were subject to private ownership if they arose and terminated within one land grant;
 - A primary tributary of a navigable river is owned by the public because the public right to navigate a watercourse could not be interfered with; and
 - Spring water that significantly contributes to the flow of a perennial navigable river is public water. (Contest SF 92-98)
- The flow of the Comal Springs is of sufficient magnitude to be of use to downstream users of water on the Comal River and the Guadalupe River. (V SF 161, 179)
- The Juan Martin de Veramendi Survey, Abstract No. 2, is silent regarding the right to use water from the Comal Springs, merely granting a right of ownership to the land around the spring. (Exh. 518)
- The Guadalupe River is a navigable river under §21,001(1) of the Texas Natural Resources Code.

CONCLUSIONS:

- Claimant is recognized a right under Certified Filing No. 135 to impound water in a 150 acre-foot capacity reservoir at D-0280 on a man-made channel off the Comal River in the Juan Martin de Veramendi Grant, Abstract No. 2, Comal County, and to divert from diversion point D-0270 not to exceed 141,438 acre-feet of water per year and use consumptively 5650 acre-feet of water per year for industrial purposes at a maximum total diversion rate of 200 cfs (80,000 gpm) with a priority date of June 1, 1914. All water diverted but not consumptively used must be returned to the man-made channel on the Comal River.
- Claimant is recognized a right under Certified Filing No. 135 to annually divert 124,870 acre-feet of water through the dam at D-0280 at a maximum rate not to exceed 145 cfs for hydroelectric power generating purposes.
- Claimant is recognized a right under Certified Filing No. 135 to irrigate 500 acres of land within T-0160, the 500 acres consisting of Landa Park, with an amount of water not to exceed 200 acre-feet per year. No diversion point is recognized for this particular diversion and use of water.
- Claimant is recognized a right under Certified Filing No. 135 to use D-0250 as a point of diversion of water from the Comal River into the man-made channel.
- No further rights under Certified Filing No. 135 are recognized other than those above.
- The water of the Comal Springs which flows down the Comal River is public water because (a) it forms the major source of supply for the Comal River and the spring flow is of sufficient magnitude to be of use to downstream users, (b) the Comal River is a primary tributary of the Guadalupe River, a navigable watercourse, and (c) all water in New Spain was owned in common and unless water flowing from a large spring was expressly granted by the sovereign, it was owned by the public.
- No right is recognized under §§11,303 Claims Nos. 142 and 1420 since T-0160 is in a Mexican land grant which was issued without an express grant from the sovereign of a right to divert and use public water for irrigation or any other non-exempt beneficial purposes.

DIVERSION POINTS NOS: 0284 and 0286

TRACT NO: None

OWNERSHIP: Homestead Corporation

IR: None

APP: 21

V SF 138; V SF 44-53

SECTION 11.307 CLAIM: Claimant asserts a right under Permit No. 3178 to impound 5 acre-feet of water in two reservoirs located on unnamed tributaries of Dry Comal Creek and to use these reservoirs for recreational purposes only, with a priority date of April 14, 1976. (Exh. 487)

FINDINGS:

- Claimant is the owner of Permit No. 3178 which authorizes the impoundment of 5 acre-feet of water in two reservoirs on unnamed tributaries of Dry Comal Creek (one reservoir impounding 3 acre-feet of water and the other reservoir impounding 4 acre-feet of water) and the use of the impounded water for recreational purposes only with no right of diversion from the reservoirs. (Exh. 488)
- Application No. 3656 for the permit was accepted for filing by the Texas Water Rights Commission on September 20, 1976 and issued on December 14, 1976.

- Claimant maintains an authorized 5 acre-foot capacity reservoir at D-0284 on an unnamed tributary of Dry Comal Creek in the Rafael Garza Survey, Abstract No. 138, Comal County. (Exhs. 488, 490; V SF 47, 48, 51)
- Claimant maintains an authorized 4 acre-foot capacity reservoir at D-0286 on an unnamed tributary of Dry Comal Creek in the Juan Francisco Zepeda Survey, Abstract No. 685, Comal County. (Exhs. 488, 490; V SF 47, 48, 51, 52)
- Claimant uses both reservoirs for recreational purposes (water hazards in a golf course) and does not divert any water from these reservoirs. (V SF 51, 52)

CONCLUSION:

Claimant is recognized a right under Permit No. 3178 to impound water in a 5 acre-foot capacity reservoir at D-0284 on an unnamed tributary of Dry Comal Creek in the Rafael Garza Survey, Abstract No. 138, Comal County, and to impound water in a 4 acre-foot capacity reservoir at D-0286 on an unnamed tributary of Dry Comal Creek in the Juan Francisco Zepeda Survey, Abstract No. 685, Comal County, and to use the impounded waters for recreational purposes only with no right of diversion from the impoundments.

DIVERSION POINT NO: 0290
TRACT NO: 0270

OWNERSHIP: City of New Braunfels

IR: 10

APP: 2

V SF 116-119

SECTION 11.307 CLAIM: None.

FINDINGS:

- Claimant is the owner of §11,303 claim No. 142 which asserts a riparian right to divert and use water from the Comal River for irrigation and municipal purposes and declared that no water was diverted and used in any calendar year during the period 1963-1967, inclusive. The date of first beneficial use of water within the claim area was declared to be 1954. (Exh. 566)
- Claimant is the owner of claim area T-0170 which is located in the Juan Martin de Veramendi Survey, Abstract No. 2, Comal County. The Juan Martin de Veramendi Survey is a Title Class Grant with a granting date of November 10, 1831. T-0170 abuts and Abstract No. 2 crosses the Comal River. (Exhs. 5, 7; V SF 329, 332)
- The Juan Martin de Veramendi Grant, Abstract No. 2, did not contain any express grant from the sovereign of a right to divert and use public water from the Comal River for irrigation purposes. (Exh. 518)
- Claimant does not make any claim of a water right under §11,303 claim No. 142 because no State water was diverted and used for non-exempt beneficial purposes during the period 1963-1967, inclusive. (V SF 334, 335)

CONCLUSIONS:

- Claimant is recognized no rights under §11,303 claim No. 142 because no State water was diverted and used for a non-exempt beneficial purpose during the period 1963-1967, inclusive.
- Claimant is recognized no rights under §11,303 claim No. 142 since claim area T-0170 is in a Mexican land grant which was issued without an express grant from the sovereign of a right to divert and use public water for irrigation purposes.

DIVERSION POINT NO: 0310
TRACT NO: 0180

OWNERSHIP: City of New Braunfels

IR: 31

APP: 2

V SF 316-328

SECTION 11.307 CLAIM: Claimant asserts a right under Permit No. 2465 to divert 100 acre-feet of water per year from the old channel of the Comal River at a maximum diversion rate of 1.0 cfs (450 gpm) for the irrigation of 50 acres of land with a priority date of June 30, 1969. (Exh. 567)

FINDINGS:

- Claimant is the owner of Permit No. 2465 which authorizes the diversion and use of 100 acre-feet of water per year from the Comal River at a maximum diversion rate of 1.0 cfs (450 gpm) for the irrigation of 50 acres of land out of an 88 acre tract located in the J. M. Veramendi Two League Survey, Abstract No. 2, Comal County. (Exh. 563)
- Application No. 2693 was accepted for filing by the Texas Water Rights Commission on June 30, 1969, and issued on October 9, 1969. (Exh. 563)
- Claimant maintains an unauthorized 8 acre-foot capacity off-channel reservoir in the Juan Martin de Veramendi Two League, Abstract No. 2, Comal County. This off-channel reservoir was shown in the original permit application engineering drawings but was not authorized under the permit.
- Claimant's use of the 8 acre-foot capacity off-channel reservoir as a secondary pumping pool will not harm downstream users of water or result in a greater amount of State water being diverted and used. (V SF 332, 333)
- The most acreage within permit area T-0180 irrigated with State water in any calendar year since the permit was issued was 50 acres; being all the greens and fairways in the municipal golf course, in 1974. (Exh. 581; V SF 350, 352)
- Since the permit was issued, State water has been diverted for irrigation purposes within T-0180 at authorized diversion point D-0310 on the old channel of the Comal River by means of a stationary pump at a maximum effective diversion rate of 1.0 cfs (450 gpm) using a sprinkler type distribution system. (V SF 341, 343, 348, 350)
- The maximum amount of State water diverted and used in any calendar year since the permit was issued was 167 acre-feet of water for irrigation purposes within T-0180, in 1974. (Exh. 581; V SF 342)

CONCLUSION:

Claimant is recognized a right under Permit No. 2465 to impound water in an 8 acre-foot capacity off-channel reservoir in the Juan Martin de Veramendi Two League Survey, Abstract No. 2, Comal County, and to divert and use not to exceed 100 acre-feet of water per year from diversion point D-0310 on the Comal River for the irrigation of 50 acres of land within permit area T-0180 in the Juan Martin de Veramendi Two League, Abstract No. 2, Comal County, at a maximum diversion rate of 1.0 cfs (450 gpm) with a priority date of June 30, 1969.

The Chief Clerk of the Commission is directed to forward a copy of the final determination and notice thereof by first-class mail to each person on the official mailing list for the Lower Guadalupe River Segment and is further directed to forward a copy of the notice of the final determination to each claimant of water rights located within the Guadalupe River Basin. Applications for rehearing and replies thereto may be filed with the Commission as provided in the notice of final determination. The date, time and place for Commission action on any applications for rehearing will be set out in the notice of the final determination.

Executed and entered of record, this the 13th day of October, 1982.

TEXAS WATER COMMISSION

Lee B. M. Biggart
Lee B. M. Biggart, Chairman

Felix McDonald
Felix McDonald, Commissioner

John D. Stover
John D. Stover, Commissioner

ATTEST:

Mary Ann Hefner
Mary Ann Hefner, Chief Clerk

Exhibit H

QUITCLAIM ASSIGNMENT OF WATER RIGHTS
LOWER COLORADO RIVER AUTHORITY TO NEW BRAUNFELS UTILITIES

THE STATE OF TEXAS §
COUNTY OF COMAL § KNOW ALL MEN BY THESE PRESENTS: C-1551
C-2470 8

THAT LOWER COLORADO RIVER AUTHORITY (LCRA), an agency of CF-135
the State of Texas, for and in consideration of the sum of ONE
AND NO/100 (\$1.00) DOLLARS in hand paid by NEW BRAUNFELS
UTILITIES, a municipally owned corporation, Grantee, the
receipt of which is hereby acknowledged, does by these presents
BARGAIN, SELL, RELEASE AND FOREVER QUITCLAIM unto the said
NEW BRAUNFELS UTILITIES, its successors and assigns, all of
its right, title and interest in and to the following water
rights:

BEING all of the water rights of the Grantor
herein in the Comal River, contiguous to and
riparian with the "Comal Plant" of the Lower
Colorado River Authority (LCRA), in the City
of New Braunfels, Comal County, Texas;

AND BEING the same water rights more fully
described in and registered with the Texas
Water Commission of the Department of Water
Resources, under Certified Filing No. 135,
presently shown in the name of Lower Colorado
River Authority.

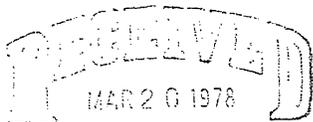
TO HAVE AND TO HOLD the said water rights, together with
all and singular, the privileges and appurtenances thereto in
any manner belonging, unto the said Grantee, its successors
and assigns, forever, so that neither the LOWER COLORADO
RIVER AUTHORITY (LCRA), nor its successors or assigns, shall
at any time hereafter have, claim or demand any right or title
to the aforesaid water rights, privileges or appurtenances,
or any part thereof.

THIS CONVEYANCE is executed and delivered by the under-
signed pursuant to direction of the Board of Directors of
Lower Colorado River Authority.

EXECUTED this the 6th day of February, 1978.

LOWER COLORADO RIVER AUTHORITY

By: Charles F. Herring
Charles F. Herring
General Manager



Central Records

Texas Dept. of Water Resources

THE STATE OF TEXAS §
COUNTY OF ~~COMAL~~ TRAVIS §

BEFORE ME, the undersigned authority, on this day personally appeared CHARLES F. HERRING, General Manager of Lower Colorado River Authority, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same as the act and deed of Lower Colorado River Authority, for the purposes and consideration therein expressed, and in the capacity therein stated.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, this the 6th day of February, 1978.

Margaret R. Williams
Notary Public, ~~Comal~~ County, Texas
TRAVIS

My commission expires 5-31-79.

Exhibit I

Plea to the Jurisdiction.¹ The Court, having read, examined and considered the parties' respective motions, pleas, responses, the evidence, the pleadings, and the arguments of counsel, is of the opinion that the Motion for Summary Judgment to Quiet Title should be GRANTED and that summary judgment should be entered in favor of Plaintiff on its claim to quiet title against the LCRA General Manager and the Members of the LCRA Board of Directors along with their respective successors (in their official capacities). Further, the Court, having read, examined and considered the parties' respective motions, pleas, responses, the evidence, the pleadings, and the arguments of counsel, is of the opinion that the LCRA Manager's and Directors' Plea to the Jurisdiction should be DENIED.²

Accordingly, IT IS THEREFORE ORDERED that the LCRA Manager's and Directors' Plea to the Jurisdiction is hereby DENIED. IT IS ALSO ORDERED that the New Braunfels Utilities' Motion for Summary Judgment to Quiet Title be and is hereby GRANTED.

In furtherance thereof, IT IS DECLARED, ADJUDGED and DECREED that pursuant to Chapter 11 *et seq.* of the Texas Water Code, upon the May 25, 1984 final judgment of the Victoria County District Court in Cause No 84-2-32534C, New Braunfels Utilities obtained full complete and unconditional title to all then-existing presently-vested interests in and to all water rights held under Texas Water Commission Certified Filing No. 135.

As well, IT IS DECLARED, ADJUDGED and DECREED that the LCRA General Manager and the Members of the LCRA Board of Directors along with their respective successors (in their official capacities) acting on behalf of the Lower Colorado River Authority have no presently-vested current or future interest(s) in and to any of the water rights held under Texas Water Commission Certificate of Adjudication No. 18-3824, including any and all amendments thereto. Specifically, IT IS DECLARED, ADJUDGED and DECREED that the LCRA General Manager and the Members of the LCRA Board of Directors along with their respective successors (in their official

¹ A Plea to the Jurisdiction by LCRA (proper) was granted, as agreed, and previously entered in favor of LCRA by separate written order.

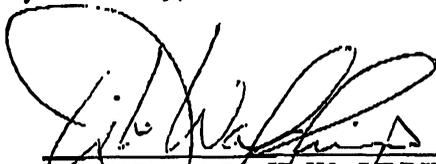
² Accord *Tex. Parks & Wildlife Dep't v. Sawyer Trust*, 354 S.W.3d 384, 394 (Tex. 2011) *citing State v. Lain*, 162 Tex. 549, 349 S.W.2d 579, 582 (Tex. 1961).

capacities) acting on behalf of the Lower Colorado River Authority hold no vested reversionary interest in any and all water rights held under Texas Water Commission Certificate of Adjudication No. 18-3824, including any and all amendments thereto.

Thus, IT IS ALSO DECLARED, ADJUDGED and DECREED that, on or about the 10th day of August, 2015, the LCRA General Manager and the Members of the LCRA Board of Directors (in their official capacities), on behalf of the Lower Colorado River Authority, acted outside of or beyond their authority³ by asserting a claim to or an interest in the water rights held under Texas Water Commission Certificate of Adjudication No. 18-3824 and all amendments thereto, *i.e., that "LCRA has an ownership interest in the surface water right that is part of the application filed by New Braunfels Utilities (NBU)"*⁴, as the basis for requesting a contested case hearing before the Texas Commission of Environmental Quality regarding Water Use Permit No. 12469. IT IS FURTHER DECLARED, ADJUDGED and DECREED that the LCRA General Manager and the Members of the LCRA Board of Directors along with their respective successors (in their official capacities), on behalf of the Lower Colorado River Authority, have no authority to assert any vested interest in the water rights held under Texas Water Commission Certificate of Adjudication No. 18-3824 and all amendments thereto.

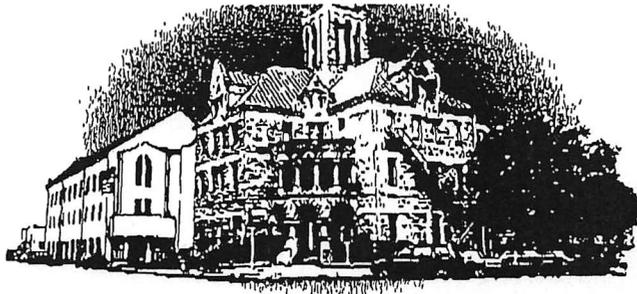
Accordingly, IT IS DECLARED, ADJUDGED and DECREED that title to all water rights held under Texas Water Commission Certificate of Adjudication No. 18-3824 and all amendments thereto is quieted in New Braunfels Utilities against any and all claims by the LCRA General Manager and the Members of the LCRA Board of Directors along with their respective successors (in their official capacities) acting on behalf of the Lower Colorado River Authority.

IT IS SO ORDERED on this the 22 day of January, 2016.


HONORABLE DIB WALDRIP
PRESIDING JUDGE

³ See *City of El Paso v. Heinrich*, 284 S.W.3d 366, 370-74 (Tex. 2009).

⁴ See Exh. H to NBU's Motion for Summary Judgment. [*Emphasts added*].



STEVE THOMAS
Court Administrator
Comal, Hays and
Caldwell Counties

SAVANNAH L. MAURER
Court Coordinator

KIMBERLY A. McMAHON
Asst. Coordinator

JOHN CALENTINE
Bailliff

NICK REININGER
Bailliff

COMAL COUNTY
OFFICE OF COURT ADMINISTRATION
22ND, 207TH, 274TH, 433RD
JUDICIAL DISTRICTS

FAX TRANSMITTAL

DATE: January 22, 2016

TO: Mr. G. Alan Waldrop

FAX #(512) 474-9888

TO: Mr. James Rader

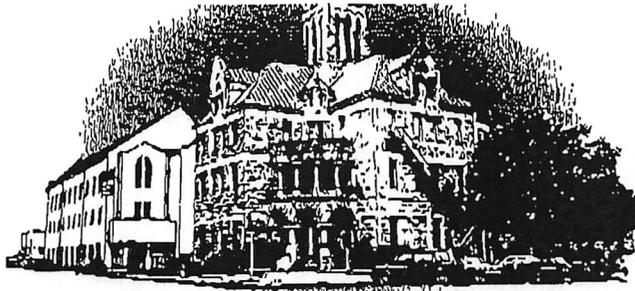
FAX #(512) 473-1010

FROM: Savannah Maurer — District Court Administrator

TOTAL NUMBER OF PAGES: Seven

MESSAGE

STEVE THOMAS
Court Administrator
Comal, Hays and
Caldwell Counties



COMAL COUNTY
OFFICE OF COURT ADMINISTRATION
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NICK REININGER
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January 22, 2016

Mr. G. Alan Waldrop
Attorney at Law
810 W. 10th Street
Austin, TX 78701

FAX #(512) 474-9888
and FIRST CLASS MAIL

Mr. James Rader
Attorney at Law
P.O. Box 220
Austin, TX 78767-0220

FAX #(512) 473-1010
and FIRST CLASS MAIL

RE: Cause No. C2015-1358B; New Braunfels Utilities vs. Lower Colorado River Authority, et al.; In the 207th Judicial District Court of Comal County, Texas

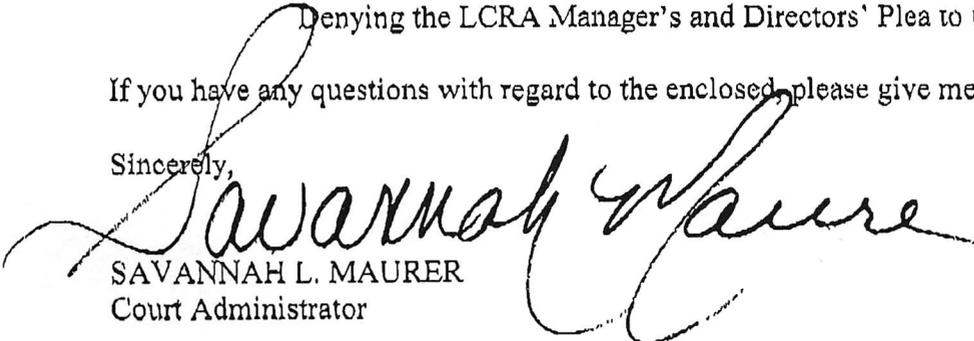
Counsel:

Enclosed herewith please find copies of the following documents which have been signed by Judge Dib Waldrip with regard to the above-referenced and entitled cause:

- 1) Order Granting LCRA's Plea to the Jurisdiction and Motion to Dismiss; and
- 2) Order Granting New Braunfels Utilities' Motion for Summary Judgment and Order Denying the LCRA Manager's and Directors' Plea to the Jurisdiction.

If you have any questions with regard to the enclosed, please give me a call.

Sincerely,


SAVANNAH L. MAURER
Court Administrator

Enclosures

Exhibit J

Despite over 37 years of agreeing to the terms of the Lease arrangement, NBU alleges that its ownership of the water rights is absolute and that LCRA has no claim to them. LCRA does not dispute that NBU is the current, record holder of such water rights. NBU relies on several documents to support its contentions, but NBU does not disclose all of the relevant documents and omits essential facts to justify its position. LCRA contends that all of the agreements must be considered and that the agreements are still in force and provide for the option for such rights to revert to LCRA in the future. Over the decades, the Lease has been updated multiple times; the reverter clause has always been included as a condition of the Lease. Notwithstanding that the water rights received a different designation in the process of adjudication of all water rights in Texas, these are the same water rights that NBU has acknowledged, before and since. To succeed on its claim, NBU must prove that it would be inequitable for LCRA to eventually exercise its option, should the Lease terminate. For this court to remove that option, would itself be an inequitable deprivation of a valuable contract right.

II. SUMMARY JUDGMENT EVIDENCE

In support of this Response, and to demonstrate that there is evidence raising an issue of fact on the elements of quiet title, LCRA refers the Court to the true and correct copies of the following documents attached to this response as summary judgment evidence:

1. The Memorandum of Agreement (MOA), attached as **Exhibit D-1**.
2. The 1987 Restated Lease Indenture attached as **Exhibit D-2**.
3. The 1998 First Modification of Lease Indenture attached as **Exhibit D-3**.
4. The 2010 Second Modification of Lease Indenture attached as **Exhibit D-4**.
5. The sublease approved by LCRA, leasing the subject property to Wurstfest attached as **Exhibit D-5**.

Exhibit K

CHAPTER 1350

H.B. No. 801

AN ACT

relating to public participation in certain environmental permitting procedures of the Texas Natural Resource Conservation Commission.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. Section 5.115(a), Water Code, is amended to read as follows:

(a) For the purpose of an administrative hearing held by or for the commission involving a contested case, "affected person," or "person affected," or "person who may be affected" means a person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing. An interest common to members of the general public does not qualify as a personal justiciable interest. ~~[The commission is not required to hold a hearing if the commission determines that the basis of a person's request for a hearing as an affected person is not reasonable or is not supported by competent evidence.]~~ The commission shall adopt rules specifying factors which must be considered in determining whether a person is an affected person in any contested case arising under the air, waste, or water programs within the commission's jurisdiction and whether an affected association is entitled to standing in contested case hearings.

SECTION 2. Chapter 5, Water Code, is amended by adding Subchapter M to read as follows:

SUBCHAPTER M. ENVIRONMENTAL PERMITTING PROCEDURES

Sec. 5.551. PERMITTING PROCEDURES; APPLICABILITY. (a) This subchapter establishes procedures for providing public notice, an opportunity for public comment, and an opportunity for public hearing under Subchapters C-H, Chapter 2001, Government Code, regarding commission actions relating to a permit issued under Chapter 26 or 27 of this code or Chapter 361, Health and Safety Code. This subchapter is procedural and does not expand or restrict the types of commission actions for which public notice, an opportunity for public comment, and an opportunity for public hearing are provided under Chapter 26 or 27 of this code or Chapter 361, Health and Safety Code.

(b) The commission by rule shall provide for additional notice, opportunity for public comment, or opportunity for hearing to the extent necessary to satisfy a requirement for United States Environmental Protection Agency authorization of a state permit program.

(c) In this subchapter, "permit" means a permit, approval, registration, or other form of authorization required by law for a person to engage in an action.

Sec. 5.552. NOTICE OF INTENT TO OBTAIN PERMIT. (a) The executive director shall determine when an application is administratively complete.

(b) Not later than the 30th day after the date the executive director determines the application to be administratively complete:

(1) the applicant shall publish notice of intent to obtain a permit at least once in the newspaper of largest circulation in the county in which the facility to which the application relates is located or proposed to be located; and

(2) the chief clerk of the commission shall mail notice of intent to obtain a permit to:

(A) the state senator and representative who represent the general area in which the facility is located or proposed to be located;

(B) the mayor and health authorities of the municipality in which the facility is located or proposed to be located;

(C) the county judge and health authorities of the county in which the facility is located or proposed to be located; and

(D) the river authority in which the facility is located or proposed to be located if the application is under Chapter 26, Water Code.

(c) *The commission by rule shall establish the form and content of the notice. The notice must include:*

- (1) *the location and nature of the proposed activity;*
- (2) *the location at which a copy of the application is available for review and copying as provided by Subsection (e);*
- (3) *a description, including a telephone number, of the manner in which a person may contact the commission for further information;*
- (4) *a description, including a telephone number, of the manner in which a person may contact the applicant for further information;*
- (5) *a description of the procedural rights and obligations of the public, printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice;*
- (6) *a description of the procedure by which a person may be placed on a mailing list in order to receive additional information about the application;*
- (7) *the time and location of any public meeting to be held under Subsection (f); and*
- (8) *any other information the commission by rule requires.*

(d) *In addition to providing notice under Subsection (b)(1), the applicant shall comply with any applicable public notice requirements under Chapters 26 and 27 of this code, Chapter 361, Health and Safety Code, and rules adopted under those chapters.*

(e) *The applicant shall make a copy of the application available for review and copying at a public place in the county in which the facility is located or proposed to be located.*

(f) *The applicant, in cooperation with the executive director, may hold a public meeting in the county in which the facility is located or proposed to be located in order to inform the public about the application and obtain public input.*

Sec. 5.553. PRELIMINARY DECISION; NOTICE AND PUBLIC COMMENT. (a) *The executive director shall conduct a technical review of and issue a preliminary decision on the application.*

(b) *The applicant shall publish notice of the preliminary decision in a newspaper.*

(c) *The commission by rule shall establish the form and content of the notice, the manner of publication, and the duration of the public comment period. The notice must include:*

- (1) *the information required by Sections 5.552(c)(1)–(5);*
- (2) *a summary of the preliminary decision;*
- (3) *the location at which a copy of the preliminary decision is available for review and copying as provided by Subsection (e);*
- (4) *a description of the manner in which comments regarding the preliminary decision may be submitted; and*
- (5) *any other information the commission by rule requires.*

(d) *In addition to providing notice under this section, the applicant shall comply with any applicable public notice requirements under Chapters 26 and 27 of this code, Chapter 361, Health and Safety Code, and rules adopted under those chapters.*

(e) *The applicant shall make a copy of the preliminary decision available for review and copying at a public place in the county in which the facility is located or proposed to be located.*

Sec. 5.554. PUBLIC MEETING. *During the public comment period, the executive director may hold one or more public meetings in the county in which the facility is located or proposed to be located. The executive director shall hold a public meeting:*

- (1) *on the request of a member of the legislature who represents the general area in which the facility is located or proposed to be located; or*
- (2) *if the executive director determines that there is substantial public interest in the proposed activity.*

Sec. 5.555. RESPONSE TO PUBLIC COMMENTS. (a) The executive director, in accordance with procedures provided by commission rule, shall file with the chief clerk of the commission a response to each relevant and material public comment on the preliminary decision filed during the public comment period.

(b) The chief clerk of the commission shall transmit the executive director's decision, the executive director's response to public comments, and instructions for requesting that the commission reconsider the executive director's decision or hold a contested case hearing to:

- (1) the applicant;*
- (2) any person who submitted comments during the public comment period; and*
- (3) any person who requested to be on the mailing list for the permit action.*

Sec. 5.556. REQUEST FOR RECONSIDERATION OR CONTESTED CASE HEARING. (a) A person may request that the commission reconsider the executive director's decision or hold a contested case hearing. A request must be filed with the commission during the period provided by commission rule.

(b) The commission shall act on a request during the period provided by commission rule.

(c) The commission may not grant a request for a contested case hearing unless the commission determines that the request was filed by an affected person as defined by Section 5.115.

(d) The commission may not refer an issue to the State Office of Administrative Hearings for a hearing unless the commission determines that the issue:

- (1) involves a disputed question of fact;*
- (2) was raised during the public comment period; and*
- (3) is relevant and material to the decision on the application.*

(e) If the commission grants a request for a contested case hearing it shall:

(1) limit the number and scope of the issues to be referred to the State Office of Administrative Hearings for a hearing; and

(2) consistent with the nature and number of the issues to be considered at the hearing, specify the maximum expected duration of the hearing.

(f) This section does not preclude the commission from holding a hearing if it determines that the public interest warrants doing so.

SECTION 3. Subchapter B, Chapter 26, Water Code, is amended by adding Section 26.0286 to read as follows:

Sec. 26.0286. PROCEDURES APPLICABLE TO PERMITS FOR CERTAIN CONCENTRATED ANIMAL FEEDING OPERATIONS. (a) In this section, "sole-source surface drinking water supply" means a body of surface water that:

(1) is designated as a public water supply in rules adopted by the commission under Section 26.023; and

(2) is the single source of supply of a public water supply system, exclusive of emergency water interconnections.

(b) The commission shall process an application for authorization to construct or operate a concentrated animal feeding operation as a specific permit under Section 26.028 subject to the procedures provided by Subchapter M, Chapter 5, if the concentrated animal feeding operation is located or proposed to be located:

(1) in the watershed of a sole-source surface drinking water supply; and

(2) sufficiently close, as determined by the commission by rule, to an intake of a public water supply system in the sole-source surface drinking water supply that contaminants discharged from the concentrated animal feeding operation could potentially affect the public drinking water supply.

SECTION 4. Section 361.088, Health and Safety Code, is amended by amending Subsection (c) and by adding Subsections (e) and (f) to read as follows:

(c) *Except as provided by Subsection (e), before [Before] a permit is issued, amended, extended, or renewed, the commission shall provide an opportunity for a hearing to the applicant and persons affected. The commission may also hold a hearing on its own motion.*

(e) *After complying with Sections 5.552–5.555, Water Code, the commission, without providing an opportunity for a contested case hearing, may act on an application to renew a permit for:*

- (1) *storage of hazardous waste in containers, tanks, or other closed vessels if the waste:*
 - (A) *was generated on-site; and*
 - (B) *does not include waste generated from other waste transported to the site; and*
- (2) *processing of hazardous waste if:*
 - (A) *the waste was generated on-site;*
 - (B) *the waste does not include waste generated from other waste transported to the site; and*
 - (C) *the processing does not include thermal processing.*

(f) *Notwithstanding Subsection (e), if the commission determines that an applicant's compliance history for the preceding five years raises an issue regarding the applicant's ability to comply with a material term of its permit, the commission shall provide an opportunity to request a contested case hearing.*

SECTION 5. Section 382.056, Health and Safety Code, is amended by amending Subsections (a), (b), (d), and (e) and adding Subsections (f)–(p) to read as follows:

(a) An applicant for a permit under Section 382.0518 or ~~[382.054 or]~~ a permit renewal review under Section 382.055 shall publish notice of intent to obtain the permit or permit review *not later than the 30th day after the date the commission determines the application to be administratively complete.* The commission by rule shall ~~may~~ require an applicant for a federal operating permit under Section 382.054 to publish notice of intent to obtain a permit or permit review consistent with federal requirements and with the requirements of *Subsection (b) [this section].* The applicant shall publish the notice at least once in a newspaper of general circulation in the municipality in which the facility or federal source is located or is proposed to be located or in the municipality nearest to the location or proposed location of the facility or federal source. If the elementary or middle school nearest to the facility or proposed facility provides a bilingual education program as required by Subchapter B, Chapter 29, Education Code, the applicant shall also publish the notice at least once in an additional publication of general circulation in the municipality or county in which the facility is located or proposed to be located that is published in the language taught in the bilingual education program. This requirement is waived if such a publication does not exist or if the publisher refuses to publish the notice. The commission by rule shall prescribe *the form and content of the notice and when notice must be published.* ~~The commission [and] may require publication of additional notice. The commission by rule shall prescribe alternative procedures for publication of the notice in a newspaper if the applicant is a small business stationary source as defined by Section 382.0365 and will not have a significant effect on air quality. The alternative procedures must be cost-effective while ensuring adequate notice.~~ Notice required to be published under this section shall only be required to be published in the United States.

(b) The notice must include:

- (1) a description of the location or proposed location of the facility or federal source;
- (2) *the location at which a copy of the application is available for review and copying as provided by Subsection (d) [a statement that a person who may be affected by emissions of air contaminants from the facility, proposed facility, or federal source is entitled to request a hearing from the commission];*
- (3) a description, *including a telephone number,* of the manner in which the commission may be contacted for further information; ~~[and]~~
- (4) a description, *including a telephone number,* of the manner in which the applicant may be contacted for further information;

(5) a description of the procedural rights and obligations of the public, printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice, that includes a statement that a person who may be affected by emissions of air contaminants from the facility, proposed facility, or federal source is entitled to request a hearing from the commission;

(6) a description of the procedure by which a person may be placed on a mailing list in order to receive additional information about the application;

(7) the time and location of any public meeting to be held under Subsection (e); and

(8) any other information the commission by rule requires.

(d) The applicant shall make a copy of the application available for review and copying at a public place in the county in which the facility or federal source is located or proposed to be located.

(e) The applicant, in cooperation with the executive director, may hold a public meeting in the county in which the facility or federal source is located or proposed to be located in order to inform the public about the application and obtain public input.

(f) The executive director shall conduct a technical review of and issue a preliminary decision on the application.

(g) If, in response to the notice published under Subsection (a) for a permit under Section 382.0518 or a permit renewal review under Section 382.055, a person requests during the period provided by commission rule that the commission hold a public hearing and the request is not withdrawn before the date the preliminary decision is issued, the applicant shall publish notice of the preliminary decision in a newspaper, and the commission shall seek public comment on the preliminary decision. The commission shall consider the request for public hearing under the procedures provided by Subsections (i)–(n). The commission may not seek further public comment or hold a public hearing under the procedures provided by Subsections (i)–(n) in response to a request for a public hearing on ~~[Except as provided by Section 382.0561 or Subsection (e), the commission or its delegate shall hold a public hearing on the permit application or permit renewal application before granting the permit or renewal if a person who may be affected by the emissions, or a member of the legislature from the general area in which the facility or proposed facility is located, requests a hearing within the period set by commission rule. The commission shall not hold a hearing if the basis of a request by a person who may be affected is determined to be unreasonable. Reasons for which a request for a hearing on a permit amendment, modification, or renewal shall be considered to be unreasonable include, but are not limited to,~~ an amendment, modification, or renewal that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted.

(h) If, in response to the notice published under Subsection (a) for a permit under Section 382.054, a person requests during the public comment period provided by commission rule that the commission hold a public hearing, the commission shall consider the request under the procedures provided by Section 382.0561 and not under the procedures provided by Subsections (i)–(n).

(i) The commission by rule shall establish the form and content of the notice, the manner of publication, and the duration of the public comment period. The notice must include:

(1) the information required by Subsection (b);

(2) a summary of the preliminary decision;

(3) the location at which a copy of the preliminary decision is available for review and copying as provided by Subsection (j);

(4) a description of the manner in which comments regarding the preliminary decision may be submitted; and

(5) any other information the commission by rule requires.

(j) The applicant shall make a copy of the preliminary decision available for review and copying at a public place in the county in which the facility is located or proposed to be located.

(k) During the public comment period, the executive director may hold one or more public meetings in the county in which the facility is located or proposed to be located. The executive director shall hold a public meeting:

(1) on the request of a member of the legislature who represents the general area in which the facility is located or proposed to be located; or

(2) if the executive director determines that there is substantial public interest in the proposed activity.

(l) The executive director, in accordance with procedures adopted by the commission by rule, shall file with the chief clerk of the commission a response to each relevant and material public comment on the preliminary decision filed during the public comment period.

(m) The chief clerk of the commission shall transmit the executive director's decision, the executive director's response to public comments, and instructions for requesting that the commission reconsider the executive director's decision or hold a contested case hearing to:

(1) the applicant;

(2) any person who submitted comments during the public comment period;

(3) any person who requested to be on the mailing list for the permit action; and

(4) any person who timely filed a request for a public hearing in response to the notice published under Subsection (a).

(n) Except as provided by Section 382.0561, the commission shall consider a request that the commission reconsider the executive director's decision or hold a public hearing in accordance with the procedures provided by Section 5.556, Water Code.

(o) ~~(e)~~ Notwithstanding other provisions of this chapter, the commission may hold a hearing on a permit amendment, modification, or renewal if the commission ~~board~~ determines that the application involves a facility for which the applicant's compliance history contains violations which are unresolved and which constitute a recurring pattern of egregious conduct which demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations.

(p) The commission by rule shall provide for additional notice, opportunity for public comment, or opportunity for public hearing to the extent necessary to satisfy a requirement to obtain or maintain delegation or approval of a federal program.

SECTION 6. Section 2003.047, Government Code, is amended by amending Subsections (e)–(j) and adding Subsections (k)–(o) to read as follows:

(e) ~~In referring a matter for hearing [When the office receives jurisdiction of a proceeding],~~ the commission shall provide to the administrative law judge a list of *disputed* issues. ~~The commission shall specify the date by which the administrative law judge is expected to complete the proceeding and provide a proposal for decision to the commission. The administrative law judge may extend the proceeding if the administrative law judge determines that failure to grant an extension would deprive a party of due process or another constitutional right. The administrative law judge shall establish a docket control order designed to complete the proceeding by the date specified by the commission.~~

(f) ~~Except as otherwise provided by this subsection, the scope of the hearing is limited to the issues referred by the commission. On the request of a party, the administrative law judge may consider an issue that was not referred by the commission if the administrative law judge determines that:~~

(1) the issue is material;

(2) the issue is supported by evidence; and

(3) there are good reasons for the failure to supply available information regarding the issue during the public comment period.

(g) ~~The scope of permissible discovery is limited to:~~

(1) any matter reasonably calculated to lead to the discovery of admissible evidence regarding any issue referred to the administrative law judge by the commission or that the administrative law judge has agreed to consider; and

(2) *the production of documents:*

(A) *reviewed or relied on in preparing application materials or selecting the site of the proposed facility; or*

(B) *relating to the ownership of the applicant or the owner or operator of the facility or proposed facility.*

(h) *The commission by rule shall:*

(1) *provide for subpoenas and commissions for depositions; and*

(2) *require that discovery be conducted in accordance with the Texas Rules of Civil Procedure, except that the commission by rule shall determine the level of discovery under Rule 190, Texas Rules of Civil Procedure, appropriate for each type of case considered by the commission, taking into account the nature and complexity of the case.*

(i) ~~[or areas that must be addressed. In addition, the commission may identify and provide to the administrative law judge at any time additional issues or areas that must be addressed.~~

~~[(4)]~~ The office and the commission jointly shall adopt rules providing for certification to the commission of an issue that involves an ultimate finding of compliance with or satisfaction of a statutory standard the determination of which is committed to the discretion or judgment of the commission by law. The rules must address, at a minimum, the issues that are appropriate for certification and the procedure to be used in certifying the issue. Each agency shall publish the jointly adopted rules.

(j) ~~[(g)]~~ An administrative law judge hearing a case on behalf of the commission, on the judge's own motion or on motion of a party and after notice and an opportunity for a hearing, may impose appropriate sanctions as provided by Subsection (k) ~~[(h)]~~ against a party or its representative for:

(1) filing a motion or pleading that is groundless and brought:

(A) in bad faith;

(B) for the purpose of harassment; or

(C) for any other improper purpose, such as to cause unnecessary delay or needless increase in the cost of the proceeding;

(2) abuse of the discovery process in seeking, making, or resisting discovery; or

(3) failure to obey an order of the administrative law judge or the commission.

(k) ~~[(h)]~~ A sanction imposed under Subsection (j) ~~[(g)]~~ may include, as appropriate and justified, issuance of an order:

(1) disallowing further discovery of any kind or of a particular kind by the offending party;

(2) charging all or any part of the expenses of discovery against the offending party or its representatives;

(3) holding that designated facts be considered admitted for purposes of the proceeding;

(4) refusing to allow the offending party to support or oppose a designated claim or defense or prohibiting the party from introducing designated matters in evidence;

(5) disallowing in whole or in part requests for relief by the offending party and excluding evidence in support of those requests; and

(6) striking pleadings or testimony, or both, in whole or in part.

(l) ~~[(4)(1)]~~ After hearing evidence and receiving legal argument, an administrative law judge shall make findings of fact, conclusions of law, and any ultimate findings required by statute, all of which shall be separately stated. The administrative law judge shall make a proposal for decision to the commission and shall serve the proposal for decision on all parties. An opportunity shall be given to each party to file exceptions to the proposal for decision and briefs related to the issues addressed in the proposal for decision. The commission shall consider and act on the proposal for decision.

(m) ~~[(2)]~~ Except as provided in Section 361.0832, Health and Safety Code, the commission shall consider the proposal for decision prepared by the administrative law judge, the

exceptions of the parties, and the briefs and argument of the parties. The commission may amend the proposal for decision, including any finding of fact, but any such amendment thereto and order shall be based solely on the record made before the administrative law judge. Any such amendment by the commission shall be accompanied by an explanation of the basis of the amendment. The commission may also refer the matter back to the administrative law judge to reconsider any findings and conclusions set forth in the proposal for decision or take additional evidence or to make additional findings of fact or conclusions of law. The commission shall serve a copy of the commission's order, including its finding of facts and conclusions of law, on each party.

(n) [(3)] The provisions of Chapter 2001[,] shall apply to contested case hearings for the commission to the extent not inconsistent with this section.

(o) [(4)] An administrative law judge hearing a case on behalf of the commission may not, without the agreement of all parties, issue an order referring the case to an alternative dispute resolution procedure if the commission has already conducted an unsuccessful alternative dispute resolution procedure. If the commission has not already conducted an alternative dispute resolution procedure, the administrative law judge shall consider the commission's recommendation in determining whether to issue an order referring the case to the procedure.

SECTION 7. (a) This Act takes effect September 1, 1999.

(b) The changes in law made by this Act apply only to an application to issue, amend, or renew a permit that is declared to be administratively complete on or after the effective date of this Act. An application to issue, amend, or renew a permit that was declared to be administratively complete before the effective date of this Act is governed by the former law, and that law is continued in effect for that purpose.

(c) The changes in law made by Section 5 of this Act do not expand or restrict the types of actions of the Texas Natural Resource Conservation Commission for which public notice, an opportunity for public comment, and an opportunity for public hearing under Subchapters C-H, Chapter 2001, Government Code, are provided under Chapter 382, Health and Safety Code.

SECTION 8. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

Passed by the House on April 27, 1999, by a non-record vote; the House refused to concur in Senate amendments to H.B. No. 801 on May 27, 1999, and requested the appointment of a conference committee to consider the differences between the two houses; the House adopted the conference committee report on H.B. No. 801 on May 30, 1999, by a non-record vote; passed by the Senate, with amendments, on May 26, 1999, by a viva-voce vote; at the request of the House, the Senate appointed a conference committee to consider the differences between the two houses; the Senate adopted the conference committee report on H.B. No. 801 on May 30, 1999, by a viva-voce vote.

Approved June 19, 1999.

Effective September 1, 1999.

CHAPTER 1351

H.B. No. 819

AN ACT

relating to an objection to the mediation of certain proceedings on the basis of family violence.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. Section 6.602, Family Code, is amended by adding Subsection (d) to read as follows: