

Bryan W. Shaw, Ph.D., P.E., *Chairman*  
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Richard A. Hyde, P.E., *Executive Director*



## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

July 11, 2016

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

Re: Docket No. 2016-0162-WR  
New Braunfels Utilities  
Water Rights Permit No. 12469

Dear Ms. Bohac:

Attached for filing please find an original and seven copies of the Executive Director's Response to Hearing Requests and Response to GBRA's Plea to the Jurisdiction in the above referenced matter. Please feel free to contact me at [dinniah.tadema@tceq.texas.gov](mailto:dinniah.tadema@tceq.texas.gov) or (512) 239-0617 if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Dinniah C. Tadema".

Dinniah C. Tadema  
Staff Attorney  
Environmental Law Division Enclosure

cc: Mailing List

**TCEQ DOCKET NO. 2016-0162-WR**

<b>APPLICATION BY NEW</b>	<b>§</b>	<b>BEFORE THE</b>
<b>BRAUNFELS UTILITIES</b>	<b>§</b>	<b>TEXAS COMMISSION ON</b>
<b>PERMIT NO. 12469</b>	<b>§</b>	<b>ENVIRONMENTAL QUALITY</b>

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**EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUESTS AND  
RESPONSE TO GBRA'S PLEA TO THE JURISDICTION**

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The Executive Director of the Texas Commission on Environmental Quality (TCEQ or Commission) respectfully submits this response to hearing requests filed in the application by New Braunfels Utilities (NBU) for new Water Use Permit No. 12469. Hearing requests were filed by the Lower Colorado River Authority (LCRA); Carowest Land, Ltd. (Carowest); and the Guadalupe-Blanco River Authority (GBRA). The Executive Director also respectfully submits this response to GBRA's Plea to the Jurisdiction.

The Executive Director respectfully recommends that the Commission grant Carowest and GBRA's hearing requests, deny LCRA's hearing request, and deny GBRA's Plea to the Jurisdiction.

Staff has prepared a map showing the location of GBRA's water rights and the location of Carowest's property based on information from the Comal Appraisal District. LCRA's hearing request is not based on its location. Staff's map is attached as Attachment A.

**I. BACKGROUND**

New Braunfels Utilities (NBU) has applied for a water use permit to authorize the diversion and use of its historic and future surface water based and groundwater based return flows located on two unnamed tributaries of the Guadalupe River, and the Guadalupe River, Guadalupe River Basin for subsequent municipal, industrial, and agricultural purposes within the Guadalupe River Basin in Comal, DeWitt, Gonzales, Guadalupe, and Victoria Counties.<sup>1</sup> NBU owns and operates three wastewater treatment plants authorized under TPDES Permit Nos. 10232-001, 10232-002, 10232-003.

NBU also seeks to authorize the use of the bed and banks of the two unnamed tributaries, Lake Dunlap, and the Guadalupe River to convey the return flows for subsequent diversion from Lake Dunlap on the Guadalupe River.

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<sup>1</sup> The Executive Director does not support granting NBU's request to authorize the portion of NBU's discharged return flows that originate from surface water. The Executive Director supports granting NBU's request to authorize the portion of NBU's return flows that originate from groundwater.

NBU also seeks to authorize an exempt interbasin transfer for the authorized water to that portion of Guadalupe County within the San Antonio River Basin for municipal, industrial, agricultural purposes.

## **II. PROCEDURAL HISTORY**

The Commission received this application on June 9, 2009. The application was declared administratively complete on November 20, 2009. Notice of the application was mailed by the Commission's Chief Clerk on July 2, 2015 to water right holders of record in the Guadalupe River Basin. The notice for this application was published in the New Braunfels Herald-Zeitung on July 12, 2015.

The hearing request period for this application closed on August 11, 2015. Three hearing requests for a contested case hearing were timely received.

## **III. LEGAL AUTHORITY**

Pursuant to 30 Texas Administrative Code Section 55.251(a), the following may request a contested case hearing on water rights applications: 1) the Commission; 2) the Executive Director; 3) the applicant; and 4) affected persons when authorized by law. Affected persons are authorized to submit hearing requests for water rights applications under Texas Water Code Section 11.132(a). The Commission, on the request of any affected person shall hold a hearing on a water rights application. The procedures for determining whether a hearing requestor is an affected person and whether the hearing request is valid are set forth in 30 Texas Administrative Code Sections 55.250-55.256, which apply to water rights applications such as this one that were declared administratively complete after September 1, 1999.

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." 30 Tex. Admin. Code § 55.256(a). An interest "common to members of the general public does not qualify as a personal justiciable interest." 30 Tex. Admin. Code § 55.256(a).

Governmental entities with authority under state law over issues contemplated by the application may be considered affected persons. 30 Tex. Admin. Code § 55.256(b).

To determine whether a hearing requestor is an affected person, all relevant factors must be considered. 30 Tex. Admin. Code § 55.256(c). These factors include but are not limited to the following:

- 1) whether the interest claimed is one protected by the law under which the application will be considered;
- 2) distance restrictions or other limitations imposed by law on the affected interest;

- 3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- 4) 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 the 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.

30 Tex. Admin. Code § 55.256(c).

In addition, the hearing request must substantially comply with the four requirements set forth in 30 Texas Administrative Code Section 55.251(c):

- 1) Give the name, address, and daytime telephone number of the person who files the request. If the request is made by a group or association, the request must identify one person by name, address, daytime telephone number and, where possible, fax number, who shall be responsible for receiving all official communications and documents for the group;
- 2) Identify the person's personal justiciable interest affected by the application including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the activity that is the subject of the application and how and why the requestor believes he or she will be affected by the activity in a manner not common to members of the general public;
- 3) Request a contested case hearing; and
- 4) Provide any other information specified in the public notice of application.

The request for a contested case hearing must be filed with the Commission's Chief Clerk during the public comment period. 30 Tex. Admin. Code § 55.251(d).

The Commission must grant a request for a contested case hearing made by an affected person if the request complies with the requirements of 30 Texas Administrative Code Section 55.251; is timely filed with the Chief Clerk; and is pursuant to a right to hearing authorized by law. 30 Tex. Admin. Code § 55.255(b)(2).

#### **IV. HEARING REQUESTS AND RECOMMENDATION**

A total of three hearing requests were timely filed by LCRA, Carowest, and GBRA. An outline of each hearing request and the Executive Director's recommendation on each request follows. All of the hearing requestors substantially complied with the procedural requirements of Section 55.251. However, LCRA failed to show how it is an affected person.

##### ***A. Recommendation to Grant Hearing Requests***

Carowest Land, Ltd.

Carowest states that it owns land and residential property adjacent to the Guadalupe River in Comal County that is downstream of one or more of NBU's discharge points and upstream of NBU's proposed diversion point. Carowest asserts that members of the Weston family and their guests occupy and use the residential portion of the property and that pursuant to Texas Water Code Section 11.142, have exercised their right to divert water from the Guadalupe River for domestic, livestock, and wildlife purposes. Carowest further states that NBU has failed to recognize Carowest's use of water pursuant to its domestic, livestock and wildlife exemptions.

Based on the factors in 30 Texas Administrative Code Section 55.256(c)(1) and (c)(3), Carowest is an affected person. Carowest's property is downstream of the three discharge points and in close proximity to two discharge points in the draft permit. Carowest's use of water for domestic, livestock, and wildlife purposes is an interest protected by the law under 30 Texas Administrative Code Section 297.21. In addition, a reasonable relationship could exist between Carowest's use of water from the Guadalupe River for domestic, livestock, and wildlife purposes and the issuance of the draft permit. Therefore, the Executive Director recommends granting Carowest's hearing request.

#### Guadalupe-Blanco River Authority

GBRA asserts that it has water rights located upstream, at, and downstream of Lake Dunlap, the location from which NBU proposes to divert water under this application. GBRA alleges that its water rights at and downstream of Lake Dunlap would be adversely impacted on the basis that if the draft permit is granted NBU would be taking state water to which GBRA is or will be entitled to under its water rights. GBRA also asserts that Canyon Reservoir would also be adversely impacted because GBRA would have to pass more inflows through Canyon Reservoir to compensate for the reduction in supplies available under downstream senior water rights and/or GBRA might have to release additional water from storage in Canyon Reservoir if and to the extent there was any additional stored water that could be released. GBRA further alleges that since the draft permit for this application does not assign a priority date to the groundwater based return flows nor are they subject to priority calls from senior water rights any water taken from the Guadalupe River outside the priority system would impair GBRA's rights and the supply of water to GBRA's customers.

Based on the factors in 30 Texas Administrative Code Section 55.256(c)(1) and (c)(3) through (c)(5), GBRA is an affected person. GBRA owns water rights at and downstream of Lake Dunlap, the location from which NBU proposes to divert water under its application. GBRA's water rights are protected by the law under which the application will be considered. A reasonable relationship also exists between GBRA's water rights and the issuance of the permit. In addition, GBRA's water rights and its use of water may be affected by this application; therefore, its hearing request should be granted.

## ***B. Recommendation to Deny Hearing Requests***

### Lower Colorado River Authority

LCRA asserts that it has a personal justiciable interest based on LCRA's ownership interest in Certificate of Adjudication No. 18-3824. NBU's proposed application is for a bed and banks permit to transport NBU's surface water-based and groundwater-based effluent from its wastewater treatment plants. LCRA argues that pursuant to a long term lease in effect through March 20, 2037, LCRA has a right to require NBU to transfer to LCRA the water rights in Certificate of Adjudication No. 18-3824. Certificate of Adjudication No. 18-3824 authorizes NBU to use 5,658 acre-feet/year from the Guadalupe River for municipal, industrial, and other uses, and 18-3824 is identified in NBU's application as a source of some of the surface water-based effluent that NBU seeks to authorize in this pending permit application.

Based on the applicable factors in 30 Texas Administrative Code Section 55.256(c), LCRA is not an affected person. The Executive Director recommends denying LCRA's hearing requests because it failed to show how its concerns are not common to members of the general public. LCRA's claim that its contractual right to require NBU to transfer to LCRA the water rights in Certificate of Adjudication No. 18-3824 after March 30, 2037 is not an interest that is protected by the law under which the application will be considered. LCRA has failed to show how its interests will be impacted by the issuance of the draft permit and failed to show the relationship between LCRA's interest and the issuance of the permit. An agreement between LCRA and NBU whereby LCRA can require NBU to transfer a surface water right to LCRA is too tenuous an interest and insufficient to establish that LCRA is an affected person. Therefore, LCRA's hearing request should be denied.

## **V. GBRA'S PLEA TO THE JURISDICTION**

In addition to its Request for a Contested Case Hearing, GBRA also filed a Plea to the Jurisdiction. In its Plea to the Jurisdiction, GBRA asserts that the TCEQ lacks jurisdiction to consider NBU's application; therefore, the Commission should dismiss the application.

GBRA alleges the TCEQ lacks jurisdiction for the following reasons: 1) water in the Edwards Aquifer is a tributary to the Guadalupe River stream system, and the Commission lacks jurisdiction to grant bed and banks authorization for sewage effluent derived from Edwards Aquifer water or from surface waters of the Guadalupe Rivers and its tributaries; 2) the Commission lacks jurisdiction to authorize the use of treated wastewater derived from groundwater pumped from the Edwards Aquifer anywhere outside the boundaries of the Edwards Aquifer Authority; 3) the Commission lacks jurisdiction to grant NBU's application because the notice fails to state that it is an application to appropriate state water; 4) the Commission lacks jurisdiction to issue NBU's bed and banks application because TCEQ's notice misrepresents GBRA's position regarding NBU's application; and 5)

the Commission lacks jurisdiction to issue the permit because NBU has no right of access to divert water from GBRA's Lake Dunlap.

***A. TCEQ has sole authority to issue bed and banks permits; and therefore, has jurisdiction over NBU's application.***

GBRA's allegation that the TCEQ lacks jurisdiction to issue a bed and banks authorization for sewage effluent derived from Edwards Aquifer water or from surface waters of the Guadalupe River and its tributaries is incorrect. The TCEQ has exclusive jurisdiction over bed and banks permitting. Under Texas Water Code Section 11.042, the Texas Legislature has given the TCEQ sole authority to determine whether to grant or deny bed and banks permitting applications pending before the Commission.

GBRA's allegation that Section 1.34(a) of the Edward Aquifer Authority Act divests the Commission of jurisdiction to authorize the use of treated wastewater derived from groundwater pumped from the Edwards Aquifer anywhere outside the boundaries of the Edwards Aquifer Authority is incorrect. Under Texas Water Code Section 11.042, the Commission has been given exclusive authority to issue bed and banks permits. Even if the Edwards Aquifer Authority Act is relevant to this application, the Edwards Aquifer Authority Act does not divest the Commission of its jurisdiction over bed and banks applications.

***B. Notice for NBU's application is sufficient for jurisdictional purposes.***

GBRA's argument that NBU's bed and banks request is a request to appropriate state water that was deficiently noticed is also incorrect. The notice for this application clearly states that NBU "seeks to authorize the diversion and use of its historic and future surface water based and groundwater based return flows, originating from its three wastewater treatment plants."

GBRA's argument that the Commission lacks jurisdiction because the notice materially misrepresents GBRA's position regarding NBU's application is also incorrect. In its consent to NBU to use the perimeter of Lake Dunlap, GBRA states, "On behalf of the Guadalupe-Blanco River Authority, and consistent with the terms and conditions of this letter, I hereby consent to a proposed diversion(s) along the perimeter of Lake Dunlap provided that such proposed diversion point(s) will be mutually agreed to by GBRA and NBU." See Attachment B. The notice states, "The Guadalupe-Blanco River Authority owns Certificate of Adjudication No. 18-5488 authorizing Lake Dunlap and has provided consent to this application." The withdrawal of GBRA's consent does not take away TCEQ's jurisdiction over the application, change the nature of NBU's application, nor render the notice ineffective.

***C. NBU's right to access Lake Dunlap is not necessary for TCEQ to obtain jurisdiction over NBU's water use permit application.***

Finally, GRBA's claim that the Commission lacks jurisdiction because NBU has no right of access to divert water from GBRA's Lake Dunlap is also incorrect. GBRA gave NBU consent to a diversion point along the perimeter of the Lake Dunlap. However, NBU's access to Lake Dunlap is not necessary for TCEQ to have jurisdiction over this application. Even though GBRA withdrew its consent, NBU may obtain access to use Lake Dunlap through a condemnation proceeding.

TCEQ has jurisdiction over NBU's application to obtain a water use permit; therefore, GBRA's Plea to the Jurisdiction should be denied.

## VI. CONCLUSION

The Executive Director respectfully recommends that the Commission grant Carowest and GBRA's hearing requests, deny LCRA's hearing request, and deny GBRA's Plea to the Jurisdiction.

Respectfully submitted,

TEXAS COMMISSION ON ENVIRONMENTAL  
QUALITY

Richard A. Hyde, P.E.  
Executive Director

Robert Martinez, Director  
Environmental Law Division

By 

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### Certificate of Service

I hereby certify that on this 11th day of July, 2016, a true and correct copy of the Executive Director's Response to Hearing Requests and Response to GBRA's Plea to the Jurisdiction was filed with the Chief Clerk of the Texas Commission on Environmental Quality and sent to the persons on the attached Mailing List.



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Dinniah Tadema, Staff Attorney  
Environmental Law Division

**MAILING LIST  
NEW BRAUNFELS UTILITIES  
DOCKET NO. 2016-0162-WR  
WRPERM 12469**

**APPLICANT:**

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**ALTERNATIVE DISPUTE**

**RESOLUTION:**

Via electronic mail:

Kyle Lucas  
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**THE CHIEF CLERK:**

Via e-filing:

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**REQUESTER(S):**

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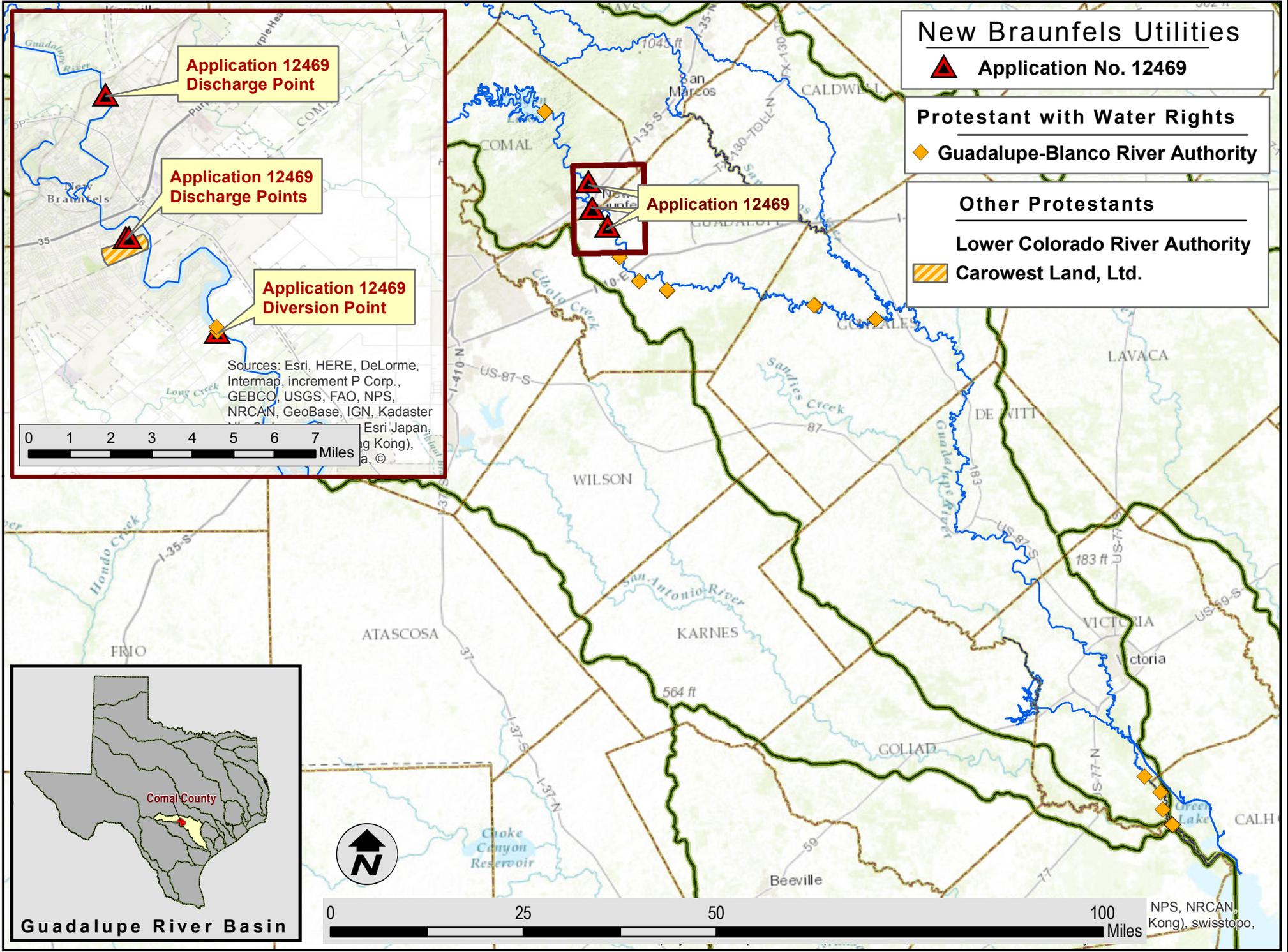
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**INTERESTED PERSON:**

Via U.S. mail:

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Austin, Texas 78701-4423

# **ATTACHMENT A**



# **ATTACHMENT B**



October 26, 2009

Mr. Bill West, General Manager  
Guadalupe-Blanco River Authority  
933 East Court Street  
Seguin, Texas 78155-5872

Re: Consent to proposed diversion along the perimeter of Lake Dunlap

Dear Mr. West

As we have discussed previously, New Braunfels Utilities ("NBU") filed an indirect reuse application (the "Application") with the Texas Commission on Environmental Quality ("TCEQ") earlier this year. By the Application, NBU requested authorization to appropriate, divert and use NBU's historical and future return flows ("NBU Return Flows") associated with its three wastewater treatment plants, for municipal, industrial and agricultural uses. In addition, NBU requested in the Application to use the bed and banks of the Guadalupe River and its tributaries to convey NBU Return Flows from these wastewater treatment plant outfalls to proposed diversion(s) anywhere along the perimeter of Lake Dunlap. NBU has not finally determined its long-term reuse strategy, thus it requested the perimeter of Lake Dunlap as the proposed diversion location in order to allow for as many diversion and use alternatives as possible.

On September 28, 2009, NBU received a request for information from TCEQ, requesting that NBU "[p]rovide consent from Guadalupe-Blanco River Authority for diversion from the perimeter of Lake Dunlap." Therefore, by this letter, NBU requests the consent from the Guadalupe-Blanco River Authority to divert from the perimeter of Lake Dunlap. If existing diversion facilities are not available or not used, NBU understands that it would need to acquire the appropriate property interest from GBRA necessary to build and utilize such facilities. By countersigning this letter below, GBRA consents to NBU's request in the Application for proposed diversion(s) anywhere along the perimeter of Lake Dunlap, but NBU understands that it would be required to secure additional authorization, including acquiring appropriate real property interests from GBRA, in order to construct and maintain such diversion infrastructure.

If you would like to see the Application as filed, a copy can be provided to you. I appreciate your consideration of this important matter. Should you have any questions regarding this request, do not hesitate to contact me at your earliest convenience.

Sincerely,

Roger R. Biggers, P.E.  
Executive Director of Water Services

On behalf of the Guadalupe-Blanco River Authority, and consistent with the terms and conditions of this letter, I hereby consent to a proposed diversion(s) along the perimeter of Lake Dunlap provided that such proposed diversion point(s) will be mutually agreed to by GBRA and NBU.

  
\_\_\_\_\_  
Bill West, General Manager  
Guadalupe-Blanco River Authority

10/26/09  
\_\_\_\_\_  
Date