

Marisa Weber

From: PUBCOMMENT-OCC
Sent: Tuesday, August 11, 2015 4:46 PM
To: PUBCOMMENT-WWW-WRAS; PUBCOMMENT-ELD; PUBCOMMENT-OCC2;
PUBCOMMENT-OPIC
Subject: FW: Public comment on Permit Number WRPERM 12469
Attachments: GBRA's Hearing Request and Plea to the Jurisdiction.pdf

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Sent: Tuesday, August 11, 2015 4:34 PM
To: DoNot Reply
Subject: Public comment on Permit Number WRPERM 12469

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70824*

REGULATED ENTY NAME 11812469001 DP1 WRPERM 12469

RN NUMBER: RN105761977

PERMIT NUMBER: WRPERM 12469

DOCKET NUMBER:

COUNTY: GUADALUPE

PRINCIPAL NAME: NEW BRAUNFELS UTILITIES

CN NUMBER: CN600522957

FROM

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COMMENTS: GBRA's Hearing Request and Plea to the Jurisdiction

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APPLICATION NO. 12469

APPLICATION OF
NEW BRAUNFELS UTILITIES
FOR PERMIT TO APPROPRIATE
STATE WATER

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BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

**GUADALUPE-BLANCO RIVER AUTHORITY'S
PLEA TO THE JURISDICTION AND REQUEST FOR CONTESTED CASE HEARING**

TO THE HONORABLE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW, the Guadalupe-Blanco River Authority ("GBRA") and asks the Texas Commission on Environmental Quality ("TCEQ") to dismiss the above-referenced application (the "Application" or "NBU's Application") of New Braunfels Utilities ("NBU") or, in the alternative, to grant GBRA a contested case hearing on the Application. GBRA's request for dismissal of the Application is framed as a Plea to the Jurisdiction, appropriate because the Commission for any one of several independent reasons does not have authority as a matter of law to grant NBU's Application. The first reason addressed in the Plea is that the Commission does not have authority to authorize the so-called "indirect reuse" of treated wastewater derived from groundwater pumped from the Edwards Aquifer or surface waters from the Guadalupe River and its tributaries. Because the facts and law supporting the Plea to the Commission's jurisdiction are so integrally tied to the substance of the Application, GBRA first addresses the Application and why GBRA has standing to oppose the Application, and then presents the grounds for dismissal in support of the Plea.

I. REQUEST FOR CONTESTED CASE HEARING

Subject to its Plea to the Jurisdiction, Guadalupe-Blanco River Authority ("GBRA") requests a contested case hearing on the Application.

Throughout its Application, NBU requests a permit to appropriate State water.¹ Because unappropriated water is available from the Guadalupe River at NBU's proposed point of diversion (at the perimeter of GBRA's Lake Dunlap) only a small percentage of the time, however, it is doubtful that the Commission could find, as required by law, that there is sufficient unappropriated water available for the proposed appropriation. If the Commission could make that finding and decide to grant the Application, the water appropriation permit would carry with it a new priority date to insure that all other water right holders would be protected under the first-in-time is first-in-right prior appropriation doctrine.

¹ See e.g., Application Cover-"Texas Commission on Environmental Quality-Application for Permit to **Appropriate** State Water - New Braunfels Utilities"; "Supplement to Application for Permit to **Appropriate** State Water"; "As illustrated by this Application, NBU seeks authorization to **appropriate**, divert and use NBU historical Return Flows. . . .; By this Application, NBU seeks authorization to **appropriate**, divert and use NBU historical Return Flows ; and "Under Texas Water Code §11.134(b)(3)(E), an **appropriation** of water must address...

But notwithstanding the fact that NBU in its Application repeatedly requests a permit to appropriate State water, the published notice of NBU's Application does not include the word "appropriate" anywhere. As explained in more detail below, NBU's Application seeks to circumvent Texas water law and appropriate – out of priority – a significant amount of State water (an amount equal to the amount of treated wastewater discharged by NBU just upstream of Lake Dunlap) by calling that proposed appropriation of State water a "reuse" of the discharged treated wastewater. This is water that GBRA and its customers need and to which GBRA is entitled under its senior water rights. In essence, NBU is attempting to elbow its way to the front of the line ahead of GBRA's senior water rights. Thus, the Application uniquely harms GBRA and its customers.

II. GUADALUPE-BLANCO RIVER AUTHORITY

The name, mailing address, daytime phone number, and fax number of GBRA are as follows:

GBRA
Attn: Bill West, General Manager
933 East Court Street
Seguin, Texas 78155-5872
(830) 379-5822
(830) 379-9718 (fax)

GBRA is a governmental agency and body politic and corporate, created in 1933 by special act of the Legislature for the purposes of Section 59 of Article 16 of the Constitution of the State of Texas,² including (i) the control, storing, preservation, and distribution of storm and flood waters, the waters of rivers and streams, including the Guadalupe and Blanco Rivers and their tributaries, for irrigation, power, and all other useful purposes, (ii) the reclamation and irrigation of arid, semi-arid and other lands needing irrigation, (iii) the reclamation and drainage of overflowed lands, and other lands needing drainage, (iv) the conservation and development of the forests, water and hydro-electric power of the State of Texas, (v) the navigation of inland waters, and (vi) the preservation and conservation of all such natural resources of the State. GBRA stewards the water resources in its ten-county statutory district, which consists of Kendall, Comal, Hays, Caldwell, Guadalupe, Gonzales, DeWitt, Victoria, Calhoun, and Refugio counties.

III. GBRA HAS A PERSONAL JUSTICIABLE INTEREST AFFECTED BY THE APPLICATION

As set forth below, GBRA is an affected person as defined by Title 30, Section 55.256 of the Texas Administrative Code. GBRA has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by NBU's application. GBRA's interests are not common to the general public.

² GBRA's Enabling Legislation is *available* at <http://www.gbra.org/documents/about/GBRAEnablingAct.pdf>.

1. GBRA's Water Rights

Since GBRA's creation over 80 years ago, it has focused on economic development and protection of natural resources and the environment in its ten-county statutory district. One of GBRA's most important functions is to provide adequate water supplies to meet the growing demands of citizens, industries, and businesses within its district. To be adequate, a water supply must be "firm," meaning that the supply must be reliable each and every day throughout a drought at least as severe as the most-severe drought of record in the region.

Water rights currently held or being sought by GBRA include the following:

- (a) GBRA owns Certificate of Adjudication No. 18-2074, as amended, authorizing GBRA to maintain Canyon Dam and Reservoir, store inflows in the Reservoir with priority dates of March 19, 1956 and June 14, 1999, and divert and use from the Reservoir an average of 90,000 acre-feet of stored water annually for municipal, industrial, and agricultural purposes. Under the Certificate, GBRA is authorized to use the bed and banks of the Guadalupe River to deliver the stored water for diversion from the River downstream of Canyon Reservoir.
- (b) GBRA owns Certificates of Adjudication Nos. 18-5488 and 18-5172 authorizing GBRA to maintain six dams and reservoirs on the Guadalupe River located downstream of Canyon Reservoir and impound inflows in the reservoirs, all with early priority dates. The six reservoirs, beginning with the most upstream reservoir, are known as Lake Dunlap, Lake McQueeney, Lake Placid, Lake Nolte, Lake Gonzales, and Lake Wood. The Certificates further authorize GBRA to divert water from the reservoirs at a rate of diversion up to 1,300 cfs at the dams for Lakes Dunlap, McQueeney, Placid and Nolte, 1,250 cfs at the dam for Lake Gonzales, and 1,270 cfs at the dam for Lake Wood, and use the head created by the dams to generate hydroelectric power.
- (c) GBRA owns jointly with Union Carbide Corporation, a subsidiary of The Dow Chemical Company, the following six Certificates of Adjudication: Certificates of Adjudication Nos. 18-5173, 18-5174, 18-5175, 18-5176, 18-5177, and 18-5178. GBRA also owns Certificate of Adjudication No. 18-3863B. Together, these seven Certificates of Adjudication authorize diversion of 175,501 acre-feet of water per year from the run-of-river flow of the Guadalupe River with priority dates ranging from February 3, 1941 to January 7, 1952. The water is diverted from the Guadalupe River by gravity-flow diversion works located downstream of the confluence of Guadalupe and San Antonio Rivers, and just upstream of GBRA's Saltwater Barrier and Diversion Dam authorized under GBRA's Certificate of Adjudication No. 18-5484. After diversion from the Guadalupe River, the water is conveyed via GBRA's Canal System in Calhoun County and used for municipal, industrial, agricultural, mining, and stock raising purposes. To firm up the supply of water available from the run-of-river flow of the Guadalupe River, the seven Certificates of Adjudication identified above also authorize the construction of up to 150,000 acre-feet of off-channel storage in

Calhoun, Refugio, and Victoria Counties and the storage of water diverted under the Certificates in such off-channel storage. GBRA received authorization in 2014 from the TCEQ to construct this off-channel storage and is currently pursuing the financing and construction of the initial phase of the project, which GBRA believes will result in a firm supply of approximately 100,000 acre-feet of water per year utilizing the GBRA Canal System and the seven Certificates of Adjudication identified above.

- (d) On August 22, 2008, GBRA submitted an application to appropriate State water for its proposed mid-basin project to be located in Gonzales County. GBRA's mid-basin application requests authorization to appropriate, divert and use for municipal and industrial purposes up to 75,000 acre-feet of water annually from the unappropriated flows of the Guadalupe River at a rate of diversion up to 500 cfs. The application further requests authorization to construct up to 125,000 acre-feet of off-channel storage in Gonzales County and to firm up the run-of-river supply by storing the water in the off-channel storage. The point of diversion from the Guadalupe River will be located in Gonzales County within the segment of the Guadalupe River downstream of the confluence of the Guadalupe and San Marcos Rivers.

TCEQ assigned Application Number 12378 to GBRA's mid-basin application. GBRA's Application No. 12378 was submitted approximately nine months before NBU submitted its Application No. 12469. TCEQ issued notice of GBRA's Application No. 12378 over two years ago, on August 1, 2013. A contested case hearing on GBRA's application is underway before the State Office of Administrative Hearings in SOAH Docket No. 2014-1658-WR.

- (e) On August 5, 2009, GBRA submitted an application to appropriate State water to increase the supply of water to the GBRA Canal System in Calhoun County. By the application, GBRA seeks authorization to appropriate, divert and use for municipal and industrial purposes up to an additional 189,484 acre-feet of water in any year from the unappropriated flows of the Guadalupe River at a rate of diversion not to exceed 500 cfs. The water will be diverted from the Guadalupe River in Calhoun County, Texas, at a point upstream of GBRA's Saltwater Barrier and Diversion Dam authorized under Certificate of Adjudication No. 18-5484. GBRA proposes to utilize the existing gravity-flow diversion facilities that are part of GBRA's Calhoun Canal System to divert water requested by this application in addition to the 175,501 acre-feet of water authorized to be diverted annually under the existing Certificates of Adjudication discussed under (c), above. The application further requests authorization to construct up to an additional 200,000 acre-feet of off-channel storage in Calhoun and Victoria Counties and to firm up the run-of-river supply by storing the water in the off-channel storage.

Thus, GBRA's water rights are located upstream of, at, and downstream of Lake Dunlap, from which NBU proposes to divert water under its Application.

2. GBRA Would Be Adversely Affected By NBU's Proposed Activity, If Authorized, In a Manner Not Common to Members of the General Public

By NBU's Application as it has been construed by the TCEQ staff and defined by the published notice of the Application, 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 located on two unnamed tributaries of the Guadalupe River and the Guadalupe River, Guadalupe River Basin for subsequent municipal, industrial and agricultural purposes in Comal, DeWitt, Gonzales, Guadalupe and Victoria Counties." NBU also "seeks to authorize the use of the bed and banks of the two unnamed tributaries of the Guadalupe River, Lake Dunlap, and the Guadalupe River to convey the return flows for subsequent diversion from Lake Dunlap on the Guadalupe River."

NBU indicates that the return flows, totaling up to 9,408 acre-feet of water per year, are discharged at a combined rate of 41.55 cfs (18,646 mgd) at three points in Comal County. NBU estimates the discharged return flows are currently 65% surface water diverted from the Guadalupe River and its tributaries and 35% groundwater derived solely or principally from the Edwards Aquifer, although such percentages may change in the future.

The TCEQ staff correctly rejected NBU's request to "indirectly reuse" any surface water derived effluent. Thus, the draft permit prepared by the TCEQ staff would grant bed and banks authorization only for discharged treated wastewater derived from groundwater, consisting solely or principally of water pumped from Edwards Aquifer.³

Even with the limits proposed by the TCEQ staff in the draft permit, GBRA's existing and applied for water rights at and downstream of Lake Dunlap would be adversely impacted because NBU, if the draft permit were granted, would then take State water to which GBRA is or will be entitled under those water rights. Canyon Reservoir also would 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 release additional water from storage in Canyon Reservoir if and to the extent there was any additional stored water that could be released.

Moreover, the amount of NBU's potential diversions is not insignificant. The draft permit would authorize NBU to divert 9,408 acre-feet of its groundwater based return flows *plus* "any future groundwater based return flows." The authorized diversion rate is 41.55 cfs, which equates to nearly 30,000 acre-feet per year. Thus, the draft permit on its face appears to authorize NBU to divert up to approximately 30,000 acre-feet per year of State water if NBU were to discharge that amount of treated wastewater derived from groundwater. Most significantly, the draft permit provides that "[t]he groundwater based return flows authorized to be conveyed via the bed and banks of a State watercourse in this permit do not have a priority date and are not subject to priority calls from senior water rights." Any water taken from the

³ The Notice of Application (as does the Application itself) addresses reuse of surface water derived effluent, thus potentially leaving that issue in play notwithstanding the TCEQ staff's draft permit.

flows of the Guadalupe River outside the priority system, particularly during dry conditions, would impair GBRA's rights and the supply of water to GBRA's customers.

As expressly found by TCEQ's Water Rights Permitting Team, *only* analyzing the 9,408 acre-feet per year diversion, "76 water rights would be negatively affected by the diversion of the groundwater based return flows, although the impact was minimal."⁴ In a report submitted as a supplement to the Application, NBU's consultants confirmed that there will be an "impact from indirect reuse of these discharges to other water rights in the river basin," then characterizing the impacts as "minimal."⁵ These findings alone support GBRA's request for a contested case hearing. And GBRA disagrees that the adverse impacts would be minimal. The nature and degree of the acknowledged impacts is tied to factual issues ripe for a contested case hearing such as assumed losses, accounting procedures, and location of diversion.

As discussed below in GBRA's Plea to the Jurisdiction, GBRA has several independent jurisdictional objections to NBU's proposed "indirect reuse" of its treated wastewater that call for dismissal of the Application. If a hearing is held on the Application with respect to treated wastewater derived from any particular source of water (e.g., groundwater from the Trinity Aquifer), however, GBRA reserves the right to raise any and all possible objections including, without limitation, the fact that NBU's proposed diversions of water from Lake Dunlap do not constitute reuse of its treated effluent at all because the treated effluent before discharge and the water diverted from Lake Dunlap are not fungible, and because the requested use of bed and banks for "conveyance" is a sham in that NBU simply wants to use the State's watercourses and GBRA's Lake Dunlap to mix and dilute NBU's discharged wastewater with the waters flowing in the Guadalupe River and stored in Lake Dunlap, and to further treat and polish the mixed and diluted waters. No one has a right to use the State's rivers and lakes as sewage dilution and treatment facilities. If NBU wants to legitimately reuse its treated wastewater, it should do so directly, before the treated wastewater is discharged.

IV. GBRA'S PLEA TO THE JURISDICTION

GBRA asserts that the Commission lacks jurisdiction to consider NBU's Application for various reasons, including those reasons summarized below. The Commission should therefore dismiss NBU's Application.

⁴ TCEQ, Interoffice Memorandum from Christine Peters, Senior Hydrologist, Water Rights Permitting & Availability Section to Sarah Henderson, Project Manager, Water Rights Permitting Team, dated Feb. 12, 2015.

⁵ RPS Memorandum, "*WAM Analysis of Groundwater-based Indirect Reuse for NBU*," dated Sept. 26, 2014.

1. The Commission lacks jurisdiction to grant bed and banks authorization to convey treated wastewater derived from groundwater pumped from the Edwards Aquifer or from surface waters of the Guadalupe River and its tributaries⁶

Bed and banks authorizations under Water Code § 11.042(b) for sewage effluent derived from privately-owned groundwater are based on the presumption or determination that the effluent is “developed waters” that TCEQ should have jurisdiction to exclude from the state-water priority system. *See Guelker v. Hidalgo Cnty. WCID No. 6, 269 S.W.2d 551, 555 (Tex. Civ. App.—San Antonio 1954, writ ref’d n.r.e.)* (noting that “developed or captured waters” fall outside the state-supervised prior appropriation system for surface water). “Developed waters are new waters added to a stream or other source of water supply by reason of artificial work.” Hutchins, *The Texas Law of Water Rights, 1961 at 541.*⁷ A “careful use of the term would exclude water tributary to a stream” which, while perhaps facilitated in reaching the stream by artificial works, “would reach the stream eventually irrespective of them. Such water is not new water; the time of its arrival is simply hastened.” *Id.*

Water in the Edwards Aquifer is truly tributary to the Guadalupe River stream system, and thus the Commission lacks jurisdiction to grant bed and banks authorization for sewage effluent derived from Edwards water. This water would not be *new* to the surface water system and therefore is not properly deemed developed water. In SB 1477 (1993), the Legislature found the Edwards Aquifer to be a body of water unlike any other in Texas – “a unique and complex hydrologic system” and “a distinctive natural resource in this state.” Accordingly, to regulate withdrawals and water use, the Legislature created the Edwards Aquifer Authority (“EAA”), a “special regional management district” and provided for “the application of management mechanisms consistent with our legal system and appropriate to the aquifer system.” Under the EAA Act, the Legislature restricted reuse of water from the Edwards. The definition of “reuse” found at Section 1.03(19) of the EAA Act makes clear that any reuse of Edwards water must occur before the unconsumed water returns to a body of state-owned water:

“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.* (emphasis added).

⁶ TCEQ staff has recommended not granting NBU’s request to reuse surface water derived effluent. But the Notice of Application may keep that issue alive. Sewage effluent derived from surface water diverted from a stream or its tributaries of course cannot be developed waters in that stream system, and the Commission therefore lacks jurisdiction to grant bed and banks authorization for that effluent as well. The Commission’s definition of “reuse” applicable to surface waters, found at 30 TAC § 297.1(44), confirms this conclusion:

Reuse—The 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 that water is either disposed of or discharged or otherwise allowed to flow into a watercourse, lake, or other body of state-owned water.* (emphasis added).

⁷ Hutchins cites to and quotes the definition of developed water found in the then-existing rules of the Texas Board of Water Engineers, a predecessor of TCEQ:

“Developed Water is water that in its natural state does not augment a water supply, but that is added to a water supply or is otherwise made available for use by means of artificial works.”

Under NBU's Application for bed and banks authorization under Water Code § 11.042(b), NBU's unconsumed Edwards water would not be reused "before the water is discharged or otherwise allowed to flow into a watercourse, lake, or other body of state-owned water," as required by Section 1.03(19) of the EAA Act. Thus, the Commission in this proceeding must address the limitation on reuse imposed by the EAA Act. NBU invited the Commission to construe the EAA Act – "In seeking this authorization, NBU requests the Commission to consider any and all appropriate legal theories available, including those related to unappropriated return flows associated with TPDES Permits."⁸ The limitation on reuse imposed by the EAA Act exists as a reflection of the fact that NBU's Edwards-derived return flows, despite being derived from groundwater, in fact are the very same waters that make up the flows of the Guadalupe River system.

As the legislature has confirmed, the Edwards Aquifer is unique. EAA Act § 1.06. The Edwards is so highly interconnected with the Guadalupe River system that there is no doubt that water in the Edwards is truly tributary to the Guadalupe River system and, therefore, that Edwards-derived effluent discharged into the Guadalupe River and its tributaries is not "developed water."⁹ Water in the Edwards Aquifer would reach the Guadalupe River quickly and naturally via Comal and San Marcos Springs if NBU did not perform the artificial acts of pumping the water out of the Aquifer and then discharging the remaining effluent. In fact, the Edwards is so interconnected with surface streams that in rules adopted in 1992 (17 Tex. Reg. 6601 (September 25, 1992)), the Texas Water Commission ("TWC"), a predecessor of TCEQ, concluded that the Edwards Aquifer "exhibits all of the characteristics of an underground river," 17 Tex. Reg. at 6605, including the following specific findings:

"Through its 'recharge zone,' the Edwards Aquifer captures and diverts flows of major surface streams in the upper portion of the Nueces and San Antonio River Basins. These surface streams provide approximately 80% of the 'recharge' to the aquifer. Water 'recharging' the aquifer continues to flow downgradient, generally moving west to east to northeast, through the confined and known boundaries of the aquifer, eventually erupting at several springs." *Id.* at 6606.

"These springs include the state's two largest natural springs at New Braunfels and San Marcos." *Id.* at 6603.

It is estimated that spring flow from Comal and San Marcos Springs alone provides 21 to 32% of the total annual flow, and up to 70% of the total flow during droughts, of the Guadalupe River at Victoria." *Id.*

"The water in the aquifer can move very easily where the size and number of solution openings are large and connected with few restrictions. Movement rates of more than 2,100 feet per day have been measured over short distances. As a comparison, a

⁸ Supplement to Application at p. 4.

⁹ There may be other groundwater in Texas that TCEQ finds, in a Water Code section 11.042(b) proceeding, to be sufficiently tributary to a surface stream to require a determination that effluent derived from the groundwater is not developed water and, therefore, that all reuse of the effluent must occur before discharge. In the EAA Act, the legislature has decided that issue and removed it from TCEQ's jurisdiction with respect Edwards water.

movement rate of one foot per day is generally considered very fast in other aquifers in Texas.” *Id.* at 6605.

The 1992 TWC Edwards rules were struck down by summary judgment by a Travis County district court on the ground that the TWC was without authority to declare the water in the Edwards to be state water. While the appeal from this judgment was pending, the 1993 legislature passed SB 1477, creating the EAA and declaring the Edwards not to be an underground river but, rather, a body of water unlike any other in Texas. In response to the passage of the EAA Act, the TWC repealed its Edwards rules.

What is important here is that the fact findings set forth in the preamble to the TWC 1992 Edwards rules were before the legislature in 1993 when it passed the EAA Act, and, since then, neither the TWC nor any of its successors (including TCEQ) has ever disavowed any of the relevant findings. Those findings explain, in detail, the hydrologic interconnection between the Edwards and surface streams.

2. The Commission lacks jurisdiction to authorize use of treated wastewater derived from groundwater pumped from the Edwards Aquifer anywhere outside the boundaries of the EAA.

NBU’s Application also seeks authorization from the Commission to use Edwards-derived treated wastewater outside the boundaries of the EAA in violation of the EAA Act. The legislature expressly limited where Edwards water may be used. Section 1.34(a) provides that “[w]ater withdrawn from the aquifer must be used within the boundaries of the authority.” EAA Act § 1.34(a). With this restriction, the Legislature plainly recognized the significant shortage of firm water within the boundaries of the EAA.

NBU’s Application nevertheless seeks to use Edwards-derived treated wastewater throughout the Guadalupe River Basin in Comal, Guadalupe, Gonzales, DeWitt, and Victoria Counties and in the portion of Guadalupe County located in the San Antonio River Basin – including areas well beyond the boundaries of the EAA.

3. The Commission lacks jurisdiction to grant NBU’s Application because the notice of the Application is deficient in that it fails to state that NBU’s Application is in fact fundamentally an application to appropriate State water which, if granted, would carry a new priority date.

The fundamental request in the Application is for a water right to appropriate State water. Under Texas law, a water appropriation permit comes with a new priority date, a date junior to all other water rights granted in the basin. The bed & banks request in the Application is ancillary to and inextricably intertwined with the request for appropriative water right—and yet, now the ancillary request has somehow become the Application’s *sole* request. If NBU wants bed & banks authorization, and that alone, **that is what it must apply for, by an application clearly seeking only that authorization.**

4. The Commission lacks jurisdiction to grant NBU's Application because the notice of the Application is deficient in that it materially misrepresents GBRA's position regarding NBU's Application.

The published notice of NBU's Application states:

The Guadalupe-Blanco River Authority owns Certificate of Adjudication No. 18-5488 authorizing Lake Dunlap and *has provided consent to this application.* (emphasis added).

As explained below, this statement is wrong. NBU was fully aware at the time it published the notice that this statement is wrong. Prior to publication, on May 6, 2015, NBU's counsel requested that TCEQ hold the draft notice and permit and not send those items to the Chief Clerk *because* "NBU is currently negotiating with [GBRA] regarding both this permit application and GBRA's Mid-Basin Project."¹⁰ In fact, GBRA had informed NBU in no uncertain terms that it **opposes** NBU's Application.

It is correct that in 2009, at the request of NBU and in response to a request from TCEQ staff, GBRA gave a conditional consent to NBU **to a proposed diversion along the perimeter of the Lake Dunlap**. It is wrong and entirely misleading to characterize the limited and conditional consent provided by GBRA as "consent to the application." Including that representation in a public notice falsely advises all interested persons in the basin that the holder of the largest and most senior water rights in the basin, the person most affected by the Application, has no concern with it. Nothing could be further from the truth – GBRA certainly opposes the Application insofar as NBU asks for authorization to divert any water from Lake Dunlap outside the priority system. Furthermore, given that the TCEQ staff has apparently concluded, as GBRA suspected it would, that there is insufficient unappropriated water available to support the proposed appropriation, GBRA hereby withdraws its limited, conditional consent to a diversion from the perimeter of Lake Dunlap.

GBRA believes that the fundamental error in the notice published by NBU so misleads the public that it renders the notice ineffective. The flaw should not be brushed aside by the Commission. At the very least, the Commission should issue, and NBU should be required to publish, a revised notice of NBU's Application either (1) without reference to GBRA; or (2) with a statement that GBRA previously consented to a diversion on the perimeter of Lake Dunlap at a precise location to be mutually agreed upon, but that such consent has been withdrawn; or (3) with a clear statement that GBRA opposes NBU's Application.

5. The Commission lacks jurisdiction to grant NBU's Application because NBU has no right of access to divert water from GBRA's Lake Dunlap

As discussed above, based on GBRA's review of the Application and opposition to the Application, GBRA withdraws its conditional consent to a diversion point along the perimeter of Lake Dunlap. Accordingly, assuming GBRA's continuing consent is needed to allow the

¹⁰ Letter from Sara R. Thornton, Lloyd Gosselink, to Sarah Henderson, TCEQ, dated May 6, 2015.

Application to proceed, the Commission should now dismiss the Application on jurisdictional grounds.

V. PRAYER

GBRA respectfully requests that the Commission grant GBRA's Plea to the Jurisdiction and dismiss NBU's Application. Subject to GBRA's Plea to the Jurisdiction, GBRA requests that the Commission hold a contested case hearing on NBU's Application and that GBRA be admitted as a party to the hearing.

Respectfully submitted,

By: 

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70826*

August 11, 2015

Ms. Bridget Bohac
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Texas Commission on Environmental Quality
P.O. Box 13087
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SEP 15 2015
By *HP*

CHIEF CLERK'S OFFICE
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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Re: Request for Contested Case Hearing on New Braunfels Utilities'
Application for WRPERM 12469

Dear Ms. Bohac:

We represent Carowest Land, Ltd., ("Carowest"), a limited partnership associated with the Weston family, which owns land adjacent to the Guadalupe River in Comal County, Texas. New Braunfels Utilities ("NBU") has filed an application seeking authority to divert and use its historic and future surface water based and groundwater based return flows, and to authorize "the use of the bed and banks of two unnamed tributaries of the Guadalupe River, Lake Dunlap, and the Guadalupe River to convey the return flows" for subsequent reuse. For the reasons discussed below, granting the requested authorization has the potential to adversely affect the legal rights of Carowest. Accordingly, we request a contested case hearing on NBU's application.

Carowest 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. Members of the Weston family and their guests periodically occupy and use the residential portion of the property. Members of the Weston family and their guests have the right, pursuant to Texas Water Code §11.142 and 30 TAC §297.2, to divert and use water from the Guadalupe River for domestic and livestock and wildlife purposes and have previously exercised these rights.

The notice of NBU's application states that NBU has asserted that there are no channel losses between its discharge and diversion points, suggesting NBU's belief that it will be entitled to divert the same amount that it discharges. The draft permit further provides that diversions will be subject to an accounting plan. The accounting plan

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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. Accordingly, Carowest has a personal justiciable interest that could be affected in a manner not common to members of the general public, and its request for a contested case hearing should be granted.

Correspondence may be directed to me as legal counsel for Carowest in this matter. Please let me know if you need any additional information.

Sincerely,

A handwritten signature in black ink, appearing to read "Jim Mathews". The signature is written in a cursive style with a large, sweeping initial "J".

Jim Mathews

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AUG 14 2015

TCEQ MAIL CENTER
BC

Bridget Bohac
MC-105
P.O. Box 13087
Austin TX 78711-3087

Mathews & Freeland LLP
8140 N. Mopac Expy., Ste. 2-260
Austin, TX 78759

48



Sarah Powell <sarah@mandf.com>

TCEQ Confirmation: Your public comment on Permit Number WRPERM 12469 was received.

1 message

donotreply@tceq.texas.gov <donotreply@tceq.texas.gov>
To: sarah@mandf.com

Tue, Aug 11, 2015 at 4:15 PM

REGULATED ENTITY NAME 11812469001 DP1 WRPERM 12469

RN NUMBER: RN105761977

PERMIT NUMBER: WRPERM 12469

DOCKET NUMBER:

COUNTY: GUADALUPE

PRINCIPAL NAME: NEW BRAUNFELS UTILITIES

CN NUMBER: CN600522957

FROM

NAME: Jim Mathews

E-MAIL: sarah@mandf.com

COMPANY: Mathews&Freeland L.L.P.

ADDRESS: 8140 N MOPAC EXPY Westpark II, Suite 260
AUSTIN TX 78759-8837

PHONE: 5124047800

FAX: 5124047800

COMMENTS: See attached Carowest's Request for Contested Case Hearing

Based on TCEQ rule Section 1.10(h), the TCEQ General Counsel has waived the filing requirements of Section 1.10(c) to allow the filing of comments, requests, or withdrawals using this online system. The General Counsel also has waived the requirements of Section 1.10(e) so that the time of filing your electronic comments or requests is the time this online system receives your comments or requests. Comments or requests are considered timely if received by 5:00 p.m. CST on the due date.

CHIEF OF ENVS OFFICE
2015 AUG 11 4:10:50
sarah@mandf.com

201508111609.pdf
93K

Marisa Weber

From: PUBCOMMENT-OCC
Sent: Tuesday, August 11, 2015 4:19 PM
To: PUBCOMMENT-WWW-WRAS; PUBCOMMENT-ELD; PUBCOMMENT-OCC2;
PUBCOMMENT-OPIC
Subject: FW: Public comment on Permit Number WRPERM 12469
Attachments: 201508111609.pdf

H

From: sarah@mandf.com [<mailto:sarah@mandf.com>]
Sent: Tuesday, August 11, 2015 4:15 PM
To: DoNot Reply
Subject: Public comment on Permit Number WRPERM 12469

*WR
7002le*

REGULATED ENTY NAME 11812469001 DP1 WRPERM 12469

RN NUMBER: RN105761977

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AUSTIN TX 78759-8837

PHONE: 5124047800

FAX: 5124047800

COMMENTS: See attached Carowest's Request for Contested Case Hearing

MW

MATHEWS & FREELAND, L.L.P.

ATTORNEYS AT LAW

JIM MATHEWS
JOE FREELAND

Westpark II, Suite 260
8140 North Mopac Expressway
AUSTIN, TEXAS 78759

(512) 404-7800
FAX: (512) 703-2785

August 11, 2015

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

Re: Request for Contested Case Hearing on New Braunfels Utilities'
Application for WRPERM 12469

Dear Ms. Bohac:

We represent Carowest Land, Ltd., ("Carowest"), a limited partnership associated with the Weston family, which owns land adjacent to the Guadalupe River in Comal County, Texas. New Braunfels Utilities ("NBU") has filed an application seeking authority to divert and use its historic and future surface water based and groundwater based return flows, and to authorize "the use of the bed and banks of two unnamed tributaries of the Guadalupe River, Lake Dunlap, and the Guadalupe River to convey the return flows" for subsequent reuse. For the reasons discussed below, granting the requested authorization has the potential to adversely affect the legal rights of Carowest. Accordingly, we request a contested case hearing on NBU's application.

Carowest 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. Members of the Weston family and their guests periodically occupy and use the residential portion of the property. Members of the Weston family and their guests have the right, pursuant to Texas Water Code §11.142 and 30 TAC §297.2, to divert and use water from the Guadalupe River for domestic and livestock and wildlife purposes and have previously exercised these rights.

The notice of NBU's application states that NBU has asserted that there are no channel losses between its discharge and diversion points, suggesting NBU's belief that it will be entitled to divert the same amount that it discharges. The draft permit further provides that diversions will be subject to an accounting plan. The accounting plan

submitted by NBU fails to recognize any diversions and use of water pursuant to the domestic and livestock and wildlife exemptions of Carowest between NBU's points of discharge and its point of diversion. Moreover, the draft permit contains a special provision that would allow the accounting plan, and thus NBU's authorized diversions, to be modified after the permit is granted without notice or due process protections.

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. Accordingly, Carowest has a personal justiciable interest that could be affected in a manner not common to members of the general public, and its request for a contested case hearing should be granted.

Correspondence may be directed to me as legal counsel for Carowest in this matter. Please let me know if you need any additional information.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jim Mathews". The signature is written in black ink and is positioned above the printed name.

Jim Mathews

Marisa Weber

From: PUBCOMMENT-OCC
Sent: Tuesday, August 11, 2015 11:20 AM
To: PUBCOMMENT-WWW-WRAS; PUBCOMMENT-ELD; PUBCOMMENT-OCC2;
PUBCOMMENT-OPIC
Subject: FW: Public comment on Permit Number WRPERM 12469
Attachments: LCRA_CCHRequest_NBU_WateUseApp.No._12469_8-10-2015.pdf

H

From: Lyn.Clancy@lcra.org [mailto:Lyn.Clancy@lcra.org]
Sent: Tuesday, August 11, 2015 11:17 AM
To: DoNot Reply
Subject: Public comment on Permit Number WRPERM 12469

MUR
70826

REGULATED ENTY NAME 11812469001 DP1 WRPERM 12469

RN NUMBER: RN105761977

PERMIT NUMBER: WRPERM 12469

DOCKET NUMBER:

COUNTY: GUADALUPE

PRINCIPAL NAME: NEW BRAUNFELS UTILITIES

CN NUMBER: CN600522957

FROM

NAME: MS Lyn Clancy (Phil Wilson)

E-MAIL: Lyn.Clancy@lcra.org

COMPANY: Lower Colorado River Authority

ADDRESS: PO BOX 220 H429
AUSTIN TX 78767-0220

PHONE: 5125783378

FAX: 5125784010

COMMENTS: Please see attached PDF file.

Mu



August 10, 2015

Via Hand Delivery

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

**RE: Water Rights Application No. 12469;
Application of New Braunfels Utilities for Water Use Permit No. 12469**

Dear Ms. Bohac:

I am writing on behalf of the Lower Colorado River Authority (LCRA) regarding the above-referenced proposed Water Use Permit No. 12469 in the Guadalupe and San Antonio River Basins.

For the reasons set forth below, LCRA requests a contested case hearing on this application. LCRA submits the following information in compliance with the Commission's rules:

- (1) Contact Information:
Lower Colorado River Authority
Attn: John Hofmann, Executive Vice President
Lyn Clancy, Managing Associate General Counsel
3700 Lake Austin Blvd.
Austin, Texas 78703
Phone: (512) 578-3200
Facsimile: (512) 578-4010
- (2) The Applicant's name is New Braunfels Utilities and the water use application number is 12469.
- (3) LCRA has a personal justiciable interest in the application not common to the general public because LCRA has an ownership interest in the surface water right that is part of the application filed by New Braunfels Utilities' (NBU). NBU's proposed application for a bed and banks permit to transport both surface water-based and groundwater-based effluent from several wastewater treatment plants on the Guadalupe River specifically references a surface water right in which LCRA has an ownership interest. Specifically, pursuant to a long term lease of land and other assets that is in effect through March 20, 2037, upon termination of the lease, LCRA has a right to require NBU to transfer to

Ms. Bridget Bohac
August 10, 2015
Page 2

LCRA the water rights that are reflected in Certificate of Adjudication No. 18-3824, as amended. Certificate of Adjudication No. 18-3824B, which authorizes NBU to use 5,658 acre-feet/year for municipal, industrial and other uses from the Guadalupe River, is specifically identified in the application as a source of some of the surface water-based effluent to which NBU now seeks rights.

Although the draft permit does not grant NBU the rights to reuse surface water-based effluent as requested, LCRA must nevertheless seek a seat at the table to preserve its legal rights under its agreement with NBU should these water supplies become a contested issue during any hearing on this application. LCRA believes, based on available information and unresolved legal issues related to indirect reuse proposed by NBU, that NBU's application may ultimately require an amendment to Certificate of Adjudication No. 18-3824B or otherwise adversely impact LCRA's interests in the water right.

- (4) For the reasons set forth above, LCRA requests a contested case hearing.

If you have any questions, please contact John Hofmann, Executive Vice President, Water, at (512) 730-7083 or Lyn Clancy, Managing Associate General Counsel and Senior Water Policy Advisor at (512) 578-3378.

Sincerely,



Phil Wilson
General Manager

cc: Kim Wilson, TCEQ
Sarah Henderson, TCEQ