

Bryan W. Shaw, Ph.D., P.E., *Chairman*
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Vic McWherter, Public Interest Counsel

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

July 11, 2016

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

**RE: NEW BRAUNFELS UTILITIES
TCEQ DOCKET NO. 2016-0162-WR**

Dear Ms. Bohac:

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

Sincerely,

A handwritten signature in cursive script that reads "Pranjal".

Pranjal M. Mehta, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2016-0162-WR

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

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**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO REQUESTS FOR HEARING AND A PLEA TO THE JURISDICTION**

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality ("the Commission" or TCEQ) and files this Response to Requests for Hearing and a Plea to the Jurisdiction in the above-referenced matter.

I. INTRODUCTION

New Braunfels Utilities (NBU or Applicant) submitted its application to appropriate, divert and use 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. The Applicant further 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, and agricultural purposes.

The Applicant estimates the discharged return flows are currently 65% surface water and 35% groundwater, although such percentages may change in the future. The Applicant states there are no channel losses between the discharge and diversion points. NBU's application states 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. The proposed diversion point will be located at any point along the perimeter of Lake Dunlap, approximately nine miles northwest of Seguin and 4.5 miles southeast of New Braunfels.

The application and partial fees were received on June 9, 2009. Additional information and fees were received on October 16, October 27, and October 29, and December 16, 2009. The application was declared administratively complete on November 20, 2009.

The TCEQ Executive Director (ED) has completed the technical review of the application and prepared a draft permit. The draft permit, if granted, would only authorize the use of the groundwater based return flows and would contain special conditions including, but not limited to, streamflow restrictions and maintenance of an accounting plan.

Notice of the application was mailed on July 2, 2015. Notice was published in the *New Braunfels Herald – Zeitung* on July 12, 2015. The period for commenting and requesting a contested case hearing ended 30 days thereafter.¹

The Commission received timely requests for a contested case hearing from Guadalupe Blanco River Authority (GBRA), Carowest Land, Ltd. and Lower Colorado River Authority (LCRA). A hearing request filed by GBRA also makes a plea to the jurisdiction. OPIC recommends that the Commission grant the hearing requests submitted by GBRA, Carowest Land, Ltd. and LCRA.

¹ 30 TEX. ADMIN. CODE (TAC) §§ 1.7, 55.251(d), 295.171.

II. APPLICABLE LAW

Section 11.022 of the Texas Water Code (TWC) provides that “the right to the use of state water may be acquired by appropriation in the manner and for the purposes provided in this chapter.” Further, no person may appropriate any state water or begin construction of any work designed for storage, taking, or diversion of water without first obtaining a permit to make the appropriation. TWC § 11.121.

Authorizations to use the bed and banks of a watercourse to convey water are subject to different requirements under section 11.042, depending on the source of the conveyed water.

Section 11.042(b) provides:

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.

TWC § 11.042(b).² Thus, a bed and banks authorization (1) must include conditions that protect existing water rights granted based on the use or availability of the return flows, and (2) may include conditions to help maintain instream uses and freshwater inflows to bays and estuaries.

TWC § 11.042(b); 30 TAC § 297.16(a).

A. Requirements for Contested Case Hearing Requests

This application was declared administratively complete on November 20, 2009. As the application was declared administratively complete after September 1, 1999 and was not filed

under Texas Water Code, §§11.036, 11.041, or 12.013, it is subject to the requirements of Title 30, Chapter 55, Subchapter G, sections 55.250-55.256 of the Texas Administrative Code (TAC).³ Under those provisions, a contested case hearing may be requested by the Commission, the ED, the applicant, and affected persons.⁴ A hearing requestor must make their request as specified in the notice of the application.⁵ The hearing request must be submitted to the Commission within 30 days after the publication of the notice of application.⁶

A hearing request must “substantially comply” with the requirements of 30 TAC § 55.251(c). A request should “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.”⁷

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.”⁸ 30 TAC § 55.256(c) provides relevant factors to be considered in determining whether a person is affected. These factors include, but are not limited to:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health, safety, and use of property of the person;

³ 30 TAC § 55.250.

⁴ 30 TAC § 55.251(a).

⁵ 30 TAC § 55.251(c)(4).

⁶ 30 TAC § 295.171.

⁷ 30 TAC § 55.251(b), (c).

⁸ 30 TAC § 55.256(a).

- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.⁹

The Commission shall grant a request for a contested case hearing if (1) the request is made by the applicant, or (2) the request is made by an affected person, timely filed with the chief clerk, and made pursuant to a right to hearing authorized by law.¹⁰

III. DISCUSSION

A. Plea to the jurisdiction

GBRA asserts that the Commission lacks jurisdiction to consider NBU's application for various reasons, including: 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 tributaries. 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. 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. 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. 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.

⁹ 30 TAC § 55.256(c).

¹⁰ 30 TAC § 55.255(b).

GBRA's plea to the jurisdiction is predicated on assumptions and issues of fact that are not yet fully developed. At this point in the process without more of a record, OPIC cannot conclude whether the Commission should grant GBRA's plea to the jurisdiction and dismiss NBU's application. While OPIC recommends denial of the plea at this point, arguments concerning jurisdiction may be raised again later in any proceedings on this application.

B. Hearing Requests

GBRA

GBRA in its hearing request lists five water rights currently held or being sought by GBRA. The hearing request states that 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. The hearing request also claims that this Application uniquely harms GBRA and its customers.

The Commission may grant an application only when the proposed use will not impair existing water rights.¹¹ Therefore, GBRA's interest in protecting its existing water rights from adverse impacts is addressed by the law under which the application will be considered.¹² Furthermore, a reasonable relationship exists between the interest claimed and the activity regulated, as GBRA states that it holds multiple water rights at and downstream of Lake Dunlap which would be adversely impacted by NBU's proposed permit.¹³ Therefore, OPIC finds that GBRA has a personal justiciable interest not common to the general public and recommends that

¹¹ TWC § 11.042(b).

¹² 30 TAC § 55.256(c)(1).

¹³ 30 TAC § 55.256(c)(3); *see also United Copper v. Grissom*, 17 S.W.3d 797, 803 (Tex.App.-Austin 2000) (citing *Heat Energy Advanced Tech., Inc. v. W. Dallas Coal. for Envt'l Justice*, 962 S.W.2d 288 (Tex.App.-Austin 1998, pet. denied)) (stating that the affected person standard "does not require parties to show that they will ultimately prevail on the merits; it simply requires them to show that they will *potentially suffer harm* or have a justiciable interest that will be affected.") (emphasis added).

the Commission find GBRA an affected person and its hearing request be referred for a contested case hearing.

Carowest Land, Ltd.

Carowest Land, Ltd. (Carowest) states that it is “a limited partnership associated with the Weston family, which owns land adjacent to the Guadalupe River in Comal County, Texas” and further describes this land as being located downstream of one or more of NBU’s discharge points and upstream of NBU’s proposed diversion point.¹⁴ The hearing request also states that members of the Weston family and their guests periodically occupy and use the residential portion of this property. The request further states that Carowest and the Weston family have the right, pursuant to TWC § 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. Carowest asserts these rights may be adversely affected if the TCEQ were to grant the requested authorization to NBU. Specifically, Carowest asserts that the accounting plan referenced by the draft permit fails to recognize water uses such as Carowest’s for domestic and livestock and wildlife purposes. The Commission may grant an application only when the proposed use will not impair existing water rights.¹⁵ Therefore, Carowest’s interest in the potential adverse effects to existing water rights is protected by the law under which the application will be considered.¹⁶ Furthermore, a reasonable relationship exists between the interest claimed and the activity regulated. Therefore, OPIC finds that Carowest has a personal justiciable interest not common to the general public. OPIC recommends the Commission find that Carowest is an affected person and grant its request for a contested case hearing.

¹⁴ The request is somewhat ambiguous as to property ownership and the specific relationship between Carowest and the Weston family. Nevertheless, Carowest has provided a sufficient basis for finding that Carowest is an affected person.

¹⁵ TWC § 11.042(b).

¹⁶ 30 TAC § 55.256(c)(1).

LCRA

LCRA in its hearing request states that LCRA has an ownership interest in the surface water right that is part of the application filed by NBU. The hearing request also states that pursuant to a long term lease that is in effect through March 20, 2037, upon termination of the lease, LCRA has a right to require NBU to transfer to LCRA the water rights in Certificate of Adjudication No. 18-3824, as amended. The hearing request acknowledges that the draft permit does not grant NBU the rights to reuse surface-water-based effluent as requested. However, LCRA requests that its hearing request be granted to preserve its legal rights under its agreement with NBU, considering that these surface-water-based water supplies might become a contested issue during any hearing on this application. The hearing request further claims 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.

The Commission may grant an application only when the proposed use will not impair existing water rights.¹⁷ Therefore, LCRA's interest in the potential adverse effects to its existing water right is protected by the law under which the application will be considered.¹⁸ Furthermore, a reasonable relationship exists between the interest claimed and the activity regulated, as LCRA states 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. Considering the available information and issues related to this application, OPIC finds that LCRA has a personal justiciable interest not common to the general public and recommends that its hearing request be referred for a contested case hearing.

¹⁷ TWC § 11.042(b).

¹⁸ 30 TAC § 55.256(c)(1).

IV. CONCLUSION

For the reasons set forth above, OPIC respectfully recommends that the Commission refer this matter to the State Office of Administrative Hearings and grant the contested case hearing request of GBRA, Carowest Land, Ltd. and LCRA.

Respectfully submitted,

Vic McWherter
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CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2016 the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Requests for Hearing and a Plea to the Jurisdiction were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.

Pranjal
Pranjal M. Mehta

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

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