

**TCEQ DOCKET NO. 2016-0469-WR  
APPLICATION NO. 12510**

<b>APPLICATION OF MONTGOMERY COUNTY MUDS 8 &amp; 9 FOR BED AND BANKS CONVEYANCE AND DIVERSION AUTHORIZATION</b>	<b>§ § § § § §</b>	<b>BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY</b>
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**APPLICANT MONTGOMERY COUNTY MUDS 8 & 9's  
RESPONSE TO REQUESTS FOR CONTESTED CASE HEARING**

TO THE HONORABLE COMMISSIONERS:

Montgomery County Municipal Utility District No. 8 and Montgomery County Municipal Utility District No. 9 submit this response to objections and requests for a contested case hearing regarding their Application No. 12510 to convey in a state watercourse and divert private groundwater-based discharges. MUDs 8&9 respectfully show the Commissioners of the Texas Commission on Environmental Quality the following.

**1. BACKGROUND**

Montgomery County Municipal Utility District No. 8 and Montgomery County Municipal Utility District No. 9 (together "MUDs 8&9" or "the MUDs") provide water and wastewater service to more than 6,000 people on the Walden Peninsula at Lake Conroe. When MUDs 8&9 submitted their application to the Texas Commission on Environmental Quality ("TCEQ"), the MUDs' sole source of water supply was groundwater pumped from the Gulf Coast Aquifer, within the Lone Star Groundwater Conservation District. MUDs 8&9 submitted the application because they had an urgent need to reduce pumpage from their wells.

Lone Star Groundwater Conservation District, in coordination with the San Jacinto River Authority ("SJRA"), passed rules that required the MUDs to reduce, before the end of 2015, authorized pumpage from the Gulf Coast Aquifer to 70% of the amount they had used

in 2009.<sup>1</sup> The reductions were dramatic and permanent. Reductions applied county-wide to all large-volume groundwater users. MUDs 8&9 and many others were required to identify in great detail their *alternative* sources of water in a groundwater reduction plan, subject to administrative penalties and other enforcement measures. Representatives of the groundwater district also warned that further reductions would be imposed “sooner rather than later.”

One of the entities protesting the MUDs 8&9 application, SJRA, controls the only viable supply of municipal surface water in Montgomery County--the permitted yield of Lake Conroe.<sup>2</sup> SJRA would not make lake water available to groundwater users that did not join the authority’s county-wide groundwater reduction program offered concurrently with imposition of the pumpage cut-backs. SJRA program participants are bound contractually in a collective through which some participants “over-convert” their water supply to a new SJRA treated surface water system while other participants “under-convert” and may never receive treated surface water. Participants in the collective pay SJRA rates for treated surface water they do receive and also pay SJRA pumpage fees on their groundwater use.<sup>3</sup>

City of Houston, the other entity requesting a hearing, owns the balance of permitted rights for Lake Conroe and agreed with SJRA that the city also, and specifically, would not sell raw surface water from Lake Conroe to any other entity that was subject to the groundwater district’s reduction rules – effectively any municipal water supplier in Montgomery County – unless SJRA consented.<sup>4</sup> It would be difficult to overstate the discord that existed, and still exists today in some quarters of Montgomery County, over

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<sup>1</sup> The groundwater district’s current rules are available at <http://lonestargcd.org/rules-by-laws-plans/>.

<sup>2</sup> Certificate of Adjudication No. 10-4963 for Lake Conroe is issued to SJRA and Houston, and is a matter of record with the agency. SJRA also contracts to reserve or use part of Houston’s share in the lake.

<sup>3</sup> The SJRA Groundwater Reduction Program Contract is available at <http://www.sjra.net/grp/docs/>.

<sup>4</sup> Section 2.2.2. of an MOU to Finalize an Untreated Water Supply Agreement Between Houston and SJRA, executed by at least Houston, provides that “Houston may [sell water reserved in Lake Conroe]; provided, however, that absent the written consent of SJRA, Houston agrees *not to* [sell water reserved in Lake Conroe] *to a person or entity . . . subject to a groundwater reduction mandate imposed by the Lone Star Groundwater Conservation District . . .*” (Emphasis added.)

both the groundwater district's rules and the conditions that existed for contracting with SJRA for alternative water supply.<sup>5</sup>

MUDS 8&9 declined to join the SJRA program, as did a relatively small number of other utilities in Montgomery County. To comply with the groundwater district's limitations on pumpage from the Gulf Coast Aquifer, the MUDs filed Application No. 12510 for diverting and reusing their own groundwater-based effluent discharged to the West Fork San Jacinto River at Lake Conroe pursuant to TPDES Permit No. WQ0011371001. For additional alternative supply, MUDs 8&9 contracted in 2010 with the City of Huntsville to purchase water that Huntsville will discharge and convey from upstream of Lake Conroe, through the West Fork San Jacinto River, to the same MUDs' diversion point.

On August 25, 2011, Huntsville submitted its Application No. 12754 for bed and banks conveyance of discharged wastewater sourced from groundwater and surface water that has been transferred for use from outside the San Jacinto River Basin. Huntsville received a first request for additional information regarding its application on January 21, 2016. The City timely responded, and the application remains pending at TCEQ, awaiting a declaration of administrative completeness.

Operating under reduction deadlines, the MUDs continued to pursue their bed and banks project, not only through permitting at TCEQ but also through financing, regional planning, development and submittal of a groundwater reduction plan, a successful tax bond election, preliminary design of facilities, and negotiation with SJRA and Houston. Delays in permitting made it necessary for MUDs 8&9 also to pursue deep and relatively unexplored groundwater in the Catahoula Aquifer which also is under the groundwater district's jurisdiction and that was, at the time, reported to be brackish and unsuitable for use without additional treatment. The MUDs' Catahoula wells are being produced successfully, and the MUDs remained in compliance at the groundwater district while it awaited resolution of its bed and banks project. Groundwater pumpage continues to be the

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<sup>5</sup> As one example, a lawsuit was filed by City of Conroe in 2015 challenging the groundwater districts rules as a damaging and taking private property rights in groundwater. See Docket No. 15-08-08942, 284<sup>th</sup> Judicial District, Montgomery County, Texas.

MUDs' sole source of water supply, pending approval of Application No. 12510 and at some time in the future also Huntsville's application. As required in the draft permit to support diversions, but also for the important benefits of conjunctive use, the MUDs' will continue to use groundwater under their remaining pumpage rights.

## **2. PROCEDURAL HISTORY**

MUDs 8&9 submitted Application No. 12150 on October 2, 2009. The application was declared administratively complete on April 12, 2010. After agency technical review and preparing a draft permit, the TCEQ mailed notice of the application to nine downstream water right holders of record in the San Jacinto River Basin on March 23, 2011. SJRA and the City of Houston requested a contested case hearing. SJRA's groundwater reduction program customer group also submitted a letter of objection, although the authority for that objection was later disputed by at least one member of that group.

A series of letters to the Executive Director followed public notice of the application, both substantive and procedural. SJRA asked the Executive Director to direct his professional staff to reconsider the draft permit, by correspondence dated May 9, 2011. MUDs 8&9 responded on June 27, 2011, urging that the Executive Director stand behind the draft permit, and the technical memoranda that supported it. To the MUDs' knowledge, he did stand behind the draft permit because the draft permit has not been changed since it was recommended. On September 6, 2011, SJRA urged the Executive Director to suspend processing the Draft Permit. By correspondence dated September 27, 2011, MUDs 8&9 again asked to move the application forward quickly, citing their urgent need for alternative water supply.<sup>6</sup> MUDs 8&9 have continued to negotiate earnestly for resolution of their differences with SJRA and Houston, but have not yet reached agreement.

## **3. CONSIDERATIONS FOR GRANTING A CONTESTED CASE HEARING TO REQUESTORS**

The purpose for first considering standing to request a contested case hearing is to ensure that there is a real controversy between the parties that will actually be determined

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<sup>6</sup> These letters are grouped as Exhibit 1.

by the judicial declaration sought.<sup>7</sup> The legislature has defined an “affected person” as one who has a personal *justiciable* interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing.<sup>8</sup> Where opposition to a permit may smokescreen other competing interests, the inquiry into justiciability becomes particularly significant. For example, although it is a real controversy between MUDs 8&9 and SJRA, the Commission will not determine here whether the MUDs *should* have joined the SJRA groundwater reduction program.

In reviewing requests for hearing, the Commission considers the likely impact of the regulated activity on the health, safety, and use of property by the requestor and on the use of natural resources.<sup>9</sup> The Austin Court of Appeals sustained the Commission’s discretion in *Tex. Comm’n on Env’tl. Quality v. Sierra Club*, 455 S.W. 3d 228, 234 (Tex. App.–Austin, 2014), a case in which the Commissioners denied hearing requests and granted a controversial permit for low-level radioactive waste, explaining that:

“In making a decision regarding affected-person status, TCEQ enjoys the discretion to weigh and resolve matters that may go to the merits of the underlying application, including the likely impact the regulated activity . . . will have on the health, safety, and use of property by the hearing requestor or the use of natural resources.”

*Sierra Club*, at p. 235. The Commission may review the administrative record to evaluate whether the concerns raised to support standing have been addressed during review of the application and reflected in various conditions of the draft permit. The Commission can rely on the analysis and opinion of its professional staff and other data it has before it in the record.

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<sup>7</sup> *Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993).

<sup>8</sup> Water Code § 5.115(a). *See also* TCEQ Rules § 55.256(a).

<sup>9</sup> *See also* TCEQ Rules § 55.256(c).

#### **4. CONSIDERATION OF STANDING RELATIVE TO MATTERS JUSTICIABLE UNDER THE PROVISIONS OF WATER CODE § 11.042**

The TCEQ's jurisdiction for the MUD 8&9 application is addressed in the following provisions of Water Code § 11.042(b) (Delivering Water Down Bed and Banks).<sup>10</sup>

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.

There is no exception in § 11.042, applicable to groundwater or surface water, for conveyance in watercourses that were altered by impoundment. Nor does the state relinquish its controlling interest in a watercourse when it authorizes impoundment. To the contrary, the state continues to protect a right of conveyance after it is issued.<sup>11</sup> No specific authority was granted in the water rights for Lake Conroe that would disallow the passage of water through the reservoir. The water right does require that a suitable outlet be maintained in the dam to allow free passage of water that the owners are not entitled to divert and impound, presumably including water that that is conveyed pursuant to a bed and banks permit issued by the Commission.<sup>12</sup>

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<sup>10</sup> References to sections of the "Water Code" or to "Section 11.042(b)" are to sections of TEX. WATER CODE ANN. References to "TCEQ Rules" are to the rules of the TCEQ at Title 30, TEX. ADMIN. CODE.

<sup>11</sup> Water Code § 11.091 states that, "[n]o person may willfully take, divert, appropriate, or interfere with the delivery of conserved or stored water under Section 11.042 of this code."

<sup>12</sup> See also TCEQ Rules § 297.94 (Duties of Others Along the Stream), discussed further in Section 4, stating that:

"If stored waters are released from a reservoir and are designated for use or storage downstream by a specified user legally entitled to receive the water, it shall be unlawful for any other person to divert, store, appropriate, use, or otherwise interfere with the passage of the waters that are designated for downstream use or storage. Each owner or operator of a reservoir and dam on the

The clarity of TCEQ policy relevant to bed and banks reuse of private groundwater has continued to evolve in recent years, *consistently with* the MUDs' application and the draft permit that the Executive Director's professional staff recommended in 2011. Recent actions affecting authority to convey, divert, and use private groundwater, have emphasized exclusively the statutory standards of Water Code § 11.042(b).

Relevant to those standards, no one questions that the MUDs already have authority to discharge water. There is no room for dispute that all of the MUDs' discharges are groundwater, as groundwater is the sole source of the MUD's municipal water supply. The staff's Hydrology Review Memorandum determines affirmatively that "[t]he bed and banks of Lake Conroe meet the definition of a watercourse, and the water impounded in Lake Conroe is state water." Any other finding would run contrary to the TCEQ's water rights regulatory framework.<sup>13</sup>

The Commission iterated its recognition of a discharger's right to secure private groundwater through bed and banks permitting of discharged flow as recently as August 3, 2016, referring New Braunfels Utilities' ("NBU") Application No. 12469 to hearing with express reference to the narrow standards in § 11.042(b) and in various rulings regarding the Brazos River Authority's request for system operation.<sup>14</sup> The MUDs 8&9 application has an additional features in common with NBU's application for diversion of groundwater from Lake Dunlap, but the MUDs' application and draft permit are uncomplicated by comparison to both dockets.

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stream between the point of release and the point of designation shall permit the free passage through the reservoir and dam of all such released waters in transit."

<sup>13</sup> Court cases as far back as *Diversion Lake Club v. Heath*, 126 Tex. 129, 86 S.W. 2d 441 (1935) explored artificial lakes created by damming a state watercourse and inundating privately-owned land with state water and have found in favor of the state's and the public's continuing interest. The *Heath* court, for example, held that the water in a lake formed by navigable waters from a river impounded over privately owned lands is still state water. "[The appropriation permit] gave . . . no right to interfere with the public in their use of the river and its waters for navigation, fishing, and other lawful purposes further than interference necessarily resulted from the construction and maintenance of the dams and lakes in such manner as reasonably to accomplish the purpose of the appropriation."

<sup>14</sup> NBU's Application No. 12469 is assigned TCEQ Docket No. 2016-0162-WR. The Brazos River Authority application is assigned TCEQ Docket No. 2005-1490-WR.

The justiciable controversies that can support a hearing request under § 11.042 (b) are appropriately narrow to respect private property rights in groundwater. In this case, they are the following.

- (1) Were water rights of the parties requesting hearing “granted based on the use or availability” of the applicant’s groundwater-based discharges, and, if so, are special conditions in the permit adequate to protect those water rights?
- (2) Do the circumstances of the proposed diversion warrant imposition of environmental conditions?
- (3) Is the authorization to divert water under the permit adequately limited to availability of actual discharges, after taking any carriage losses into consideration?

The first two of these questions are more easily disposed than the third, because the answers either support the draft permit without contest by the requestors or because the draft permit directly answers them. SJRA’s objections regarding the third question, which also is fully addressed in the draft permit through the condition that the MUDs’ diversions depend on the availability of discharges, are addressed below in Section 5, relative to the individual appearances of the requestors.

Neither of the requestors has claimed that any water rights, including their own, were granted based on the MUDs’ groundwater discharges. MUDs 8&9 were formed, and their discharges permitted, significantly after water rights for the reservoir were granted. In any event, the Executive Director made an express determination that no special conditions to protect water rights were justified, even after making every assumption against the MUDs for purposes of technical review and going beyond the standards of § 11.042(b) to consider whether the MUDs groundwater benefitted other water rights by making them more reliable.<sup>15</sup>

The Executive Director’s Hydrology Review Memorandum, explains that agency protocols considered the MUDs’ discharges too “extremely small” compared to overall flow to warrant removal when flow was otherwise “naturalized” for basin availability models.

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<sup>15</sup> The Executive Director’s Hydrology Review Memorandum dated December 6, 2010, is Exhibit 2.

For that reason, they thought it possible that the MUDs' return flows were still embedded in the water availability modeling when one water right was granted. However, the Executive Director determined that the right would not be impacted because the reduction of volume reliability was 0.04% and within the accuracy of the USGS stream gages.

The Executive Director also determined that no environmental flow conditions were required in the draft permit, only intake screening. Any impacts to aquatic and riparian habitat and freshwater inflows to the receiving bays and estuaries that might occur would be "minimal." Considering that the MUDs' discharge and diversion are located upstream of the Lake Conroe dam, the MUDs would be in a poor position to dedicate a portion of their groundwater to downstream environmental uses in any event. Instream flow or bay and estuary limitations would more likely go to SJRA's and Houston's lake supply. The water rights for Lake Conroe include no requirement for minimum environmental flow releases.

After technical review, and without subsequent changes, the Executive Director concluded the following.

[Section] 11.042(b) specifically allows for the use of waters of the state for the conveyance of groundwater based return flows. The bed and banks of Lake Conroe meet the definition of a watercourse, and the water impounded in Lake Conroe is state water. The MUDs' groundwater based return flows are not part of the natural inflows to the reservoir and therefore cannot impact the flows which were the basis of the Lake Conroe authorization.

Pursuant to [Section] 11.042(b), the only limitations on the amount of return flows the MUDs 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 the MUDs' request to divert current and future groundwater based return flows provided the permit includes [certain special conditions, all of which were included.]

Considering the clear issues of inquiry pursuant under § 11.042(b), the simplicity of the MUDs 8&9 project, and the Executive Director's affirmative technical review and the permit conditions (both those discussed in this Section and in Section 5), this matter comes as far within the standards of *Sierra Club* for denying requests for contested case hearing and granting a permit on an existing record as a new water permit can come. As discussed below in Section 5, the record supports that it is highly unlikely that exercise of the permit,

as recommended and if issued, will have any actual impact on the requestors that may be addressed in this proceeding.

## 5. EVALUATION OF HEARING REQUESTS

TCEQ Rules § 55.251(c)(2) requires each requestor to briefly, but specifically, describe *how and why* the requests made in the application will affect its justiciable interests in a manner that is not common to members of the general public. Conclusory statements that a party will be affected are insufficient to satisfy the requirements of § 55.251. The MUDs understand that the Executive Director's response to hearing requests also will evaluate whether the requests were timely submitted under the rules and procedures in effect at the time. TCEQ mailed notice of the application to nine downstream water right holders of record in the San Jacinto River Basin on March 23, 2011. Houston's request was stamped received by the Chief Clerk on April 26, 2016. SJRA's request for hearing was not stamped received by the Chief Clerk until April 28, 2011. The objection of Mr. Mike Mooney was not stamped received by the Chief Clerk until April 29, 2016.

The responses below establish further that it is highly *unlikely* that conveying and reusing the MUDs' groundwater will have *any* impact on the health and safety of the hearing requestors. It also is highly *unlikely* that passing groundwater through the lake for diversion will have *any* recognizable impact on the use of natural resources. Following *Sierra Club*, the Commission should weigh these considerations as it considers whether the requestors are parties with interests that are *affected and justiciable in this proceeding* and, if they do, whether the Executive Director's review and the draft permit adequately address their relevant concerns.

### San Jacinto River Authority

SJRA's request for hearing should be denied because it fails to show any justiciable interest that is not adequately resolved in the draft permit. If a request for hearing is granted to any other party, however, MUDs 8&9 have no objection to SJRA participating.

SJRA's letter raises six issues to justify standing, but those issues fall within only three categories. None of SJRA's claims are sufficient to sustain a request for contested case

hearing considering the permissible inquiries under § 11.042(b), the MUDs 8&9 application, the scope of the Executive Director's technical review, and the terms of the draft permit.

First, SJRA objects that the Draft Permit does not affirmatively require that the MUDs have obtained real property interests from them, for diversion of water. Governmental entities, however, are not required to prove that they already have secured real property for intake or other facilities, or land for a reservoir, as a condition of obtaining a water right.<sup>16</sup> MUDs 8&9 are conservation and reclamation districts, bodies politic and corporate and governmental agencies of the State of Texas created under the provisions of Section 59 of Article XVI of the Texas Constitution, and operating pursuant to Chapters 49 and 54, Texas Water Code. The MUDs may use their powers of eminent domain to acquire any interests in real property necessary for their project, if that becomes necessary. The Executive Director agrees, as evidenced by the draft permit and by the Executive Director's pleadings recently filed in proceedings on NBU's application regarding, among other things, diversion of conveyed flows from Lake Dunlap.

It also should go without saying that the TCEQ's authorization to divert water never *creates* a right in the permittee to use other people's land for the purpose of constructing intake facilities. It is not necessary that water permits actually disclaim that fact. Nevertheless, the Executive Director included two special conditions in the draft permit specifically to reject the contention that SJRA and Houston could overrule the Commission's jurisdiction to approve bed and banks permits by withholding their consent to use the state watercourse that they impounded but also to acknowledge that any real property interests necessary for the MUDs' diversions would need to be acquired separately.

SPECIAL CONDITIONS 5.D. To the extent that the exercise of the authority granted in Paragraph 3.DIVERSION, requires an easement or agreement for installation of diversion works upon the land of another, Permittees shall, *prior to*

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<sup>16</sup> See, e.g., TCEQ Rules § 295.10 (Proposed Installation or Reservoir) in which additional procedural requirements for an application apply only when the applicant does *not* have the power of condemnation. (Emphasis added).

*the diversion and use of the groundwater-based return flows, submit a signed document showing that such easement or agreement exists. (Emphasis added.)*

SPECIAL CONDITIONS 5.E. To the extent that Special Condition 5.D of this Permit requires submission of an easement or agreement, the exercise of rights under Paragraph 3. DIVERSION is conditioned upon the continued effectiveness of such easement or agreement. Upon expiration of the easement or agreement, Permittees shall immediately cease diversion of the water and either apply to amend the permit or voluntarily forfeit the permit. If Permittees fail to acquire and maintain the easement or agreement, or forfeit the permit, the Commission may begin proceedings to cancel the permit. The Permittees shall immediately notify the Commission upon amendment or expiration of the easement or agreement and provide copies of appropriate documents effectuating such changes.

MUDS 8&9 are not aware of similar provisions in any other water rights, and they confirmed as examples that there are no similar provisions in the draft bed and banks conveyance permit recently recommended by the Executive Director for NBU regarding diversion from Lake Dunlap, or in the draft bed and banks permit for City of Conroe's Application No. 12788 to divert return flows from a reach downstream of Lake Conroe. However, MUDs 8&9 did not object to the conditions.

The second category for SJRA objections is that the Draft Permit does not address the impact of diversions on existing uses of Lake Conroe such as or including recreational uses and navigation. The request also does not suggest, however, in what way any of those uses *would* be impacted. Certainly the MUDs reuse of groundwater will not diminish the availability of water necessary for recreation or navigation. Moreover, even though Resource Protection Staff did affirmatively find that there would be no impact to recreation, potential impacts to recreation and navigation are not issues that arise under Water Code § 11.042(b) and should not be considered in this proceeding.

SJRA may be referring to impacts from construction and operation of the MUDs' intake at a point in the future, but construction impacts are not relevant to Section 11.042(b). This draft permit includes standard and appropriate authorization language for authorizing diversion at or near the perimeter of a lake. But in any event, and again, MUDs

8&9 cannot begin construction anywhere before they have obtained a right to use specific land on which to put facilities, which they can do through condemnation if necessary.<sup>17</sup>

Finally, SJRA objects that the Draft Permit does not require the MUDs “to secure the right to store water in Lake Conroe” or acknowledge that the MUDs will “consume available storage in Lake Conroe.” Passing water through an impounded watercourse does not require an acquisition of storage and no de facto storage of conveyed water can be presumed. Considering that SJRA and Houston cannot store water that the MUDs convey by permit in the first place, it follows that the MUDs need not or cannot be required to recover their discharged and conveyed water *from* SJRA’s and Houston’s lake supply.

TCEQ Rules relevant to bed and banks conveyance of water released from upstream storage establish that pass-through and storage are two separate concepts. Section 297.94 explains that:

“If stored waters are released from a reservoir and are designated for use or storage downstream by a specified user legally entitled to receive the water, it shall be unlawful for any other person to divert, store, appropriate, use, or otherwise interfere with the passage of the waters that are designated for downstream use or storage. Each owner or operator of a reservoir and dam on the stream between the point of release and the point of designation shall permit the free passage through the reservoir and dam of all such released waters in transit.”

TCEQ Rules § 297.94 (Duties of Others Along the Stream)(emphasis added).<sup>18</sup>

Free passage – it would be unreasonable to assume that state policy affords private groundwater in a watercourse less protection than it affords surface water. Clearly state law and policy both favor the movement of water to places of authorized use, not

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<sup>17</sup> As part of further investigating the feasibility of its project, the MUDs have made progress toward finding an intake location that should be acceptable to SJRA and Houston by agreement, as evidenced in the TCEQ’s records. The MUDs invited a TCEQ reconnaissance investigation in 2012 that found a site for a proposed surface water intake location appeared to meet all the requirements of TCEQ Rules Ch. 290, Subchapter D. The MUDs also pursued and obtained in 2013, from the TCEQ’s Water Supply Division, an exception to the usual restrictive zones for a public water intake that would further minimize any potential impact on recreation and navigation uses of Lake Conroe by the public. TCEQ letters describing review of potential intake locations are together Exhibit 3.

<sup>18</sup> See also Texas Water Code § 11.091, explaining that *no person* may willfully take or interfere with the delivery of conserved or stored water under Section 11.042 (Conveyance by Banks and Bed).

impediments to it. Not only can the MUDs pass private water *to* a point within the banks of reservoir, they can require SJRA and Houston to pass their water through the dam that creates the impoundment, although they have not requested that authorization. If the Commission were to deny the MUDs the right to pass their private groundwater in Lake Conroe, with appropriate provisions to protect against over-diversion, they would be allowing SJRA and Houston to take the MUDs' property without compensation.

The only reasonable arguments about storage simply are a function of protecting the lake supply from over-diversion of the conveyed groundwater, substantially no different than the TCEQ protests its unimpounded watercourses. The draft permit and accounting plan strike an appropriate balance between avoiding unintentional diversion of water from the lake supply and also avoiding interference with the right to pass water through a reservoir to the point of diversion.

The third and only remaining issue that could support affected party status under § 11.042(b) is whether the authorization to divert water under the draft permit for MUDs 8&9 is adequately limited to the actual availability of discharges. Daily or "24-hour" accounting of discharges and diversions is specified as part of the MUDs' application.<sup>19</sup> No party has identified any disagreement with 24-hour accounting. If daily accounting does not constitute compliance with bed and banks permitting, it is difficult to imagine how TCEQ *would* be able to implement and manage its statutory directive or rules like § 297.94.

Consistently with Water Code § 11.042(b), the draft permit expressly makes the MUDs' diversion authority *dependent* and *conditioned* on the availability of discharges. Actual availability is a function of three variables: measuring actual discharge, considering carriage losses, and controlling the amount of diversion on a reasonable timestep. During each day of 24-hour accounting, the actual discharge and diversion tally will dictate any adjustments to pump rates that are necessary for permit compliance the next day. One of the MUDs' written responses to the Executive Director's requests for additional

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<sup>19</sup> The MUDs' supplemental statement states that: "Diversion without storage of water in the reservoir would be determined by coordinating discharge and diversion on a 24-hour cycle."

information during technical review explained that Dr. Robert J. Brandes had been retained by year-2010 to review the MUDs' proposed reuse operation. His review confirmed that 24-hour volumes of effluent discharged would vary little from day to day and that the pumping adjustments required by the MUDs to keep their discharges and their diversions in sync would not be significant.

In order to comply with the draft permit's condition that diversion is dependent on the actual availability of discharges, the MUDs cannot divert additional water during an accounting period based on an *under*-diversion of its discharges in a previous accounting period. To mitigate for operational practicalities, pump performance, meter inaccuracy, or even human error under the 24-hour accounting period, the MUDs will make up any discovered *over*-diversion during the next accounting period. The MUDs' meters and pumps, will be maintained and operated in accordance with TCEQ specifications. It was Dr. Brandes opinion, reported in the MUDs' response, that there was no possibility that the MUDs' project would affect Lake Conroe's water supply capability.

The MUDs also applied a full share of daily lake evaporation to all of its discharges, calculated at a high evaporation rate, to accommodate losses. The Executive Director approved this approach. SJRA and Houston are independently familiar with evaporation rates at the reservoir and neither request for hearing suggests that the MUDs' approach to losses is inadequate.

On any given day the amount of water that may be impounded under permit for Lake Conroe is 430,260 acre-feet. Expressed in gallons that amount rounds to 140,200,800,000 (one hundred forty billion, two hundred million, eight hundred thousand).<sup>20</sup> On that same day, the MUDs' maximum permitted discharge in gallons is 900,000 (nine hundred thousand).<sup>21</sup>

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<sup>20</sup> See Convertunits.com for expressing acre-feet of water in gallons and Mathcats.com for how to say "really big numbers."

<sup>21</sup> The MUD's actual discharges and diversions will be far less than the maximum. When the application was filed, the MUDs' maximum historical discharge was estimated to be 400,000 gallons per day.

This comparison is NOT offered to imply that the diversion limitations in the draft permit and the accounting plan are not important to the integrity of bed and banks permitting decisions and to the MUDs for permit compliance. The comparison does underscore, however, that the impact of any imperfection, accidental or otherwise, that may exist in the MUDs' approach to a 24-hour accounting cycle, and addressing losses, will be *imperceptible*. The comparison also is relevant to the *Sierra Club* factor for considering the likely impact of the regulated activity on the health, safety, and use of property by the requestor and on the use of natural resources.

In practice, the conservatism of the MUD's approach to accounting and losses will benefit the lake very slightly under normal circumstances. However, 24-hour accounting will not allow the MUDs to recover *any* water that they discharge at *low* lake levels. MUDs 8&9's intake in proximity to new treatment facilities within the districts by physical reality will not be located at the deepest parts of Lake Conroe. If lake levels fall below the MUDs' intake facilities, the MUDs will cease their bed and banks diversions but *not* their discharges of groundwater-based return flows as their well pumpage continues. When you consider those contributions to be additional mitigation, they are mitigation when the lake needs it the most.

Again, the draft permit as recommended, does not authorize MUDs 8&9 to divert discharges that are not actually available under a daily accounting plan, and therefore the authorized diversions will not interfere with SJRA's and Houston's reasonably interpreted storage interests in Lake Conroe. Nevertheless, MUDs 8&9 recognize that the craft of developing and approving accounting procedures for bed and banks conveyance of groundwater also has evolved during the years since the MUDs' application was filed. Believing it to be within the authority requested in the MUDs 8&9 application and within the authorizations currently recommended in the draft permit by the Executive Director, the MUDs would not object to an order of the Commission that would grant the permit with an additional Special Condition to the effect that:

Prior to diversion and use of the groundwater-based return flows, Permittees shall update and maintain their accounting plan, subject to approval by the

Executive Director, as necessary to show that the MUDs are not authorized to divert additional water during a 24-hour accounting period based on an *under*-diversion of their discharges in a previous accounting period, and that the MUDs must make up any discovered *over*-diversion during the next 24-hour accounting period. The owners of Certificate of Adjudication No. 10-4963 shall be given an opportunity to review and comment on such changes to the accounting plan that may be required by this condition before the Executive Director approves those changes.

Believing it also to be within the authority requested in the MUDs 8&9 application and within the authorizations currently recommended in the draft permit by the Executive Director, the MUDs would not object to an order of the Commission that would grant the permit with an additional Special Condition to state that:

Diversions under this permit are limited to the amount of water actually discharged after accounting losses.

This Special Condition is included the draft permit that the Executive Director more recently prepared for NBU's Application No. 12469.

#### City of Houston

The City of Houston's request does not dispute any of the terms of the draft permit or satisfaction of the standards of Texas Water Code § 11.042(b). It raises only generalities about the City's water rights and supply and the quality of life of Houston's citizens. The City claims that the MUDs' application to reuse groundwater may injure those interests, but it does not say why or how. Conclusory statements that a party will be affected are insufficient to satisfy the requirements of 30 Texas Administrative Code § 55.251(c).

Similarly to SJRA, Houston does object that the MUDs have no consent or agreements for use of Lake Conroe or waterfront properties needed for the MUDs to construct and operate diversion and transmission works. As discussed above, although true, that is not a justiciable controversy under Water Code § 11.042(b) or grounds for requesting a contested case hearing, and MUDs 8&9 have the right of eminent domain.

Because Houston failed to substantially comply with the requirements in TCEQ's rules for valid hearing requests and because Houston failed to establish any justiciable interest in

this matter, Houston's hearing request should be denied. If, instead, the Commission finds Houston's request for hearing to be adequate, MUDs 8&9 urge the Commission to deny Houston's request for hearing under the *Sierra Club* considerations and for the same reasons discussed above with regard to the request by SJRA. SJRA's and Houston's interests in this matter are not distinguishable in any relevant regard, even though their requests are different.

If a request for hearing is granted to any other party, MUDs 8&9 have no objection to Houston's participation. Although listed in the agency's notice for this matter as an individual having withdrawn his request for hearing, the MUDs understand August Campbell's appearance in this matter to be a part of Houston's request for hearing as a former employee of the city.

#### SJRA Groundwater Reduction Program Review Committee

Attachments to the notice for the Commissioners' agenda indicate that the objection of Mr. Mike Mooney has been withdrawn. The MUDs, however, note for the record that the appearance of Mr. Mooney did not meet the procedural requirements for a valid request for contested case hearing. It also does not show that Mr. Mooney is a person affected by the MUDs' application in ways that are not common to the general public, and his letter does not raise any interests that are justiciable in this proceeding. Mr. Mooney states that he submits his letter as a member of the GRP Review Committee. MUDs 8&9 have no doubt that staff of the SJRA arranged preparation of the letter to rally more community pressure against the MUDs' decision not to join SJRA's groundwater reduction program. The letter is not on letterhead, and provides no address for Mr. Mooney, but was faxed to the Chief Clerk by SJRA's legal counsel. Notice of this response to Mr. Rochelle is sufficient to provide notice to Mr. Mooney and the GRP Review Committee if notice remains necessary after Mr. Mooney's withdrawal.

Mr. Mooney purports to write as a member of SJRA's GRP Review Committee, and he asks that the letter be considered an "expression of the Review Committee's formal protest of the Application." The letter does not expressly request contested case hearing. Mr.

Mooney does not suggest that his appearance was *authorized* by the GRP Review Committee. At least one major participant in SJRA's committee, the City of Conroe, contacted the Chief Clerk promptly to dispute the letter.<sup>22</sup> Conroe's letter states that:

The City of Conroe is unaware of any authorization given by the Review Committee to support the protest filed by Mr. Mooney in the committee's name. The City of Conroe representative on the committee has reported that the committee has taken no action to his knowledge to authorize the protest.

The MUDs 8&9 do not believe that the GRP Review Committee to be a "person" within the meaning of statute and law for standing to protest a water rights application, much less an "affected person" under those standards. "GRP Review Committee" is a name given to representatives of SJRA customers in SJRA's groundwater reduction program contract. Contract information available on the SJRA website and cited previously describes the committee's role. They work with the staff of SJRA, and they speak *to* SJRA on behalf of the customers, for example. They have the right to cause SJRA to engage an independent rate analyst. SJRA pays the expenses of the committee.

The standards for organizational standing are not met in Mr. Mooney's letter. For an organization to be granted a contested case hearing, its request must meet the following specified requirements: (1) at least one member of the group or association must have standing to request a hearing his or her own right; (2) the interests the group or association seeks to protect are germane to the group's purpose; and (3) neither the claim asserted nor the relief sought would require the presence of the individual members. Participation as a party-protestant in this matter would not be germane to the purposes of a committee established under SJRA contract for services. And, Mr. Mooney does not raise any issues that are not common to the general public, or any that are not completely derivative of SJRA.

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<sup>22</sup> Correspondence from the City of Conroe to the TCEQ's Chief Clerk is a matter of record with the agency and also is appended here as Exhibit 4. Mr. Marcus Winberry is a signatory on behalf of Conroe. Although Mr. Winberry is identified on the Chief Clerk's mailing list as having withdrawn a request for hearing, no request for hearing was made by Mr. Winberry on behalf of the City of Conroe.

Again, notice of hearing before the Commission reflects that Mr. Mooney's letter of objection has been withdrawn. If that is not the case, then MUDS 8&9 ask that the Commission deny any request for hearing by Mr. Mooney or the GRP Review Committee that may exist. MUDs 8&9 also do object to their participation in any hearing that may be granted to another party.

#### **6. LIMITATION OF ISSUES AND DURATION IS WARRANTED IF REQUESTORS ARE GRANTED A HEARING**

If the Commission decides to refer this matter to the State Office of Administrative Hearings ("SOAH") for a contested case hearing, the Commission should also limit the issues that can be considered to the questions arising under Water Code § 11.042 (b). MUDs 8&9 should not, for example, be required to defend their eminent domain authority in a TCEQ proceeding, or otherwise go outside the specific factors the legislature provided for in § 11.042(b). Where, as here, the parties have vastly different financial resources and the applicants remain at risk of losing their groundwater rights by attrition, the public interest justifies the Commission taking steps that will provide those applicants the most efficient process possible. MUDs 8&9 believe that 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.<sup>23</sup>

#### **7. ADDITIONAL REFERRAL FOR ALTERNATIVE DISPUTE RESOLUTION**

The MUDs believe that no real controversies that are capable of being adjudicated under Texas Water Code § 11.042 exist with regard to their application, and that the draft permit should be issued as recommended. However, if the Commission nevertheless find that either SJRA or Houston are affected parties with justiciable interests within the meaning of those terms in rule and statute, MUDs 8&9 request that the matter also be referred for alternative dispute resolution under the jurisdiction of the TCEQ.

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<sup>23</sup> This duration limitation was identified by analogy to environmental permitting proceedings. However, Government Code § 2003.047(e) is not limited to environmental permitting by its terms, and would be useful here.

MUDs 8&9 request that alternative dispute resolution be scheduled for a time before SOAH convenes in preliminary hearing, so that the parties can resolve or at least narrow their issues with the draft permit and with regard to accounting procedures. The full participation of the Executive Director and the Office of Public Interest Counsel in that process will be critical, as will the Commission's designation of disputed issues requested above.

## 8. CONCLUSION

For the foregoing reasons, MUDs 8&9 respectfully request that the Commission (1) deny all hearing requests in this matter, and (2) affirmatively grant the recommended draft permit, providing if necessary to avoid contested case hearing, for additional special conditions in the draft permit to the effect that:

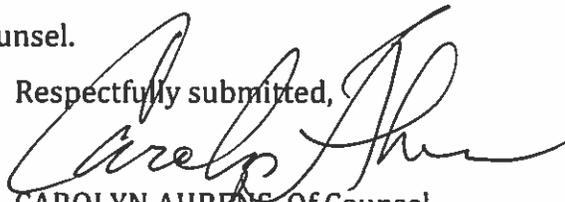
Prior to diversion and use of the groundwater-based return flows, Permittees shall update and maintain their accounting plan, subject to approval by the Executive Director, as necessary to show that the MUDs are not authorized to divert additional water during a 24-hour accounting period based on an *under*-diversion of their discharges in a previous accounting period, and that the MUDs must make up any discovered *over*-diversion during the next 24-hour accounting period. The owners of Certificate of Adjudication No. 10-4963 shall be given an opportunity to review and comment on such changes to the accounting plan that may be required by this condition before the Executive Director approves those changes.

And

Diversions under this permit are limited to the amount of water actually discharged after accounting losses.

Alternatively, if the Commission does refer this matter to hearing, MUDs 8&9 ask that (1) the Commission limit the issues for and duration of hearing at SOAH; and (2) also refer this matter for Alternative Dispute Resolution at the Commission, prior to preliminary hearing at SOAH, with the full participation of the Executive Director and the Office of Public Interest Counsel.

Respectfully submitted,



CAROLYN AHRENS, Of Counsel  
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ATTORNEYS FOR MONTGOMERY COUNTY MUDS NO. 8&9

**CERTIFICATE OF SERVICE**

I hereby certify that on August 29, 2016, Montgomery MUDs 8 & 9's Response to Requests for Contested Case Hearing was served by electronic filing with the Chief Clerk of the Texas Commission on Environmental Quality. In addition, a true and correct copy was served by hand delivery, electronic mail, or by first-class mail to all persons on the attached Mailing List.

A handwritten signature in black ink, appearing to read 'Carolyn Ahrens', written over a horizontal line.

Carolyn Ahrens

**MAILING LIST**  
**MOTGOMERY COUNTY MUNICIPAL UTILITY DISTRICT NOS. 8 & 9**  
**DOCKET NO. 2016-0469-WR; WRPERM 12510**

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**TCEQ DOCKET NO. 2016-0469-WR  
APPLICATION NO. 12510**

<b>APPLICATION OF MONTGOMERY COUNTY MUDS 8 &amp; 9 FOR BED AND BANKS CONVEYANCE AND DIVERSION AUTHORIZATION</b>	<b>§ § § § § §</b>	<b>BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY</b>
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**APPLICANT MONTGOMERY COUNTY MUDS 8 & 9's  
RESPONSE TO REQUESTS FOR CONTESTED CASE HEARING**

# **EXHIBIT 1**

Mr. Rochelle's Direct Line: (512) 322-5810  
mrochelle@lglawfirm.com

May 9, 2011

Mr. Mark Vickery  
Executive Director  
Texas Commission on Environmental Quality  
P. O. Box 13087  
Austin, Texas 78767-3087

**VIA FIRST CLASS MAIL**

RE: Application No. 12510 of Montgomery County Municipal Utility District No. 8  
and Montgomery County Municipal Utility District No. 9 (1197-19)

Dear Mark:

This letter is in follow-up to my December 22, 2009 correspondence regarding the above-referenced application (the "Application") filed by Montgomery County Municipal Utility District No. 8 and Montgomery County Municipal Utility District No. 9 ("Applicants") and in response to a draft permit recently prepared by TCEQ staff ("Draft Permit"). On April 28, 2011, my client, the San Jacinto River Authority ("SJRA"), filed a timely protest and request for a contested case hearing regarding the Application and Draft Permit based on significant concerns that the Draft Permit, if issued as currently framed, will impair the existing water rights of SJRA and the City of Houston (the "City"). The issuance of the Draft Permit also represents a major policy change regarding how TCEQ issues permits in response to applications that seek the right to pass water through, store water in, and/or divert flows from another's impoundment, and is detrimental to the public welfare. This letter addresses SJRA's concerns regarding the Draft Permit, for your consideration.

*The proposed project cannot be implemented without the use of Lake Conroe.*

The Application seeks a bed and banks authorization to convey groundwater-based effluent through and to divert such effluent from Lake Conroe. SJRA is the owner and operator, jointly with the City, of Lake Conroe, authorized by Certificate of Adjudication (COA) No. 10-4963. The Applicants certainly have the right to seek authorization to transport and reuse, by use of the bed and banks of a *state watercourse*, their privately-owned, groundwater-based return flows, pursuant to compliance with Texas Water Code § 11.042(b). Although the Draft Permit purports in several instances to authorize the Applicants to use the bed and banks of the "West Fork San Jacinto River" to transport their water, neither the Applicants' existing discharge points nor their proposed diversion point(s) are physically located on the "West Fork San Jacinto River." Rather, these points, and the area between these points, are located wholly on and within

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Lake Conroe, whose submerged lands (i.e., not the "bed and banks" of the West Fork San Jacinto River) are owned by SJRA, for the benefit of SJRA and the City. But for the storage capacity made available by SJRA and the City in Lake Conroe, the Applicants could not physically deliver their return flows from their existing discharge points to their proposed diversion point(s). Indeed, as reflected in the attached drawings prepared by the Applicants, their return flows are discharged from the south side of a peninsula that is located on the southwest portion of Lake Conroe. Although neither the Application nor the Draft Permit specify the actual diversion point(s) from Lake Conroe, the Applicants may very well choose to divert their return flows at points that are not even *downstream* from their discharge points, including a point *upstream* of the discharge points. Any transport and subsequent diversion of the Applicants' return flows is simply not possible without the use of Lake Conroe and its storage capacity – in which the Applicants have no right or ownership interest.

If the Application were truly for the use of the bed and banks of the "West Fork San Jacinto River", the Applicants would be forced to locate their diversion point(s) downstream of their discharge points and would also need to construct some type of sump or other storage in order to physically enable them to withdraw their return flows, at least during low flow conditions. A reliable raw water supply and its associated intake structure cannot be created without some sump or storage from which to divert flows. Clearly, then, the Applicants are taking advantage of Lake Conroe's storage in order to make this project feasible.

Additionally and more importantly, this project will cause a certain amount of Lake Conroe's storage capacity to be displaced *at all times*. While the Applicants claim their return flows are discharged daily into and then simultaneously diverted from Lake Conroe, the fact is that some portion of the Lake's storage capacity will be *continuously and perpetually* utilized by the Applicants in order to store and then divert their return flows. In lieu of constructing their own sump or storage for diverting these return flows, or pursuing a direct reuse project, the Applicants seek to utilize and adversely impact Lake Conroe's storage capacity, at the expense of SJRA, the City, and their customers. SJRA's customers impacted by the Applicants' project include over 130 separate water supply systems in Montgomery County that are participants in SJRA's countywide Groundwater Reduction Plan ("GRP") and represent a population of approximately 325,000 people. Based on the terms of the water supply contract between each GRP participant and SJRA, the GRP participants pay reservation fees on approximately 92,000 acre-feet of permitted water rights in Lake Conroe, which represents virtually the entire firm yield of the Lake. Thus, an impact on Lake Conroe's storage capacity impairs the financial stake such GRP participants have in Lake Conroe and its reliability. If this weren't bad enough, the use of Lake Conroe's storage capacity as proposed allows for the treatment (i.e., dilution) of the Applicants' effluent through the unauthorized use of the state waters impounded by SJRA and the City in Lake Conroe.

Under the guise of a "bed and banks" authorization for the transportation of groundwater-based effluent, the Draft Permit effectively, and inappropriately, authorizes the use of *the storage space in Lake Conroe* (i.e., some or all of the 430,260 acre-feet of "storage space" or

“impoundment” authorized in Certificate of Adjudication No. 10-4963) to “transport” the Applicants’ return flows until diverted at some undefined point(s) on the perimeter of Lake Conroe. Through utilizing and impacting Lake Conroe and its storage capacity, in which they have no ownership interest, the Applicants are able to locate their diversion point(s) at points that may not even be downstream from the existing discharge points, permanently use actual storage capacity in Lake Conroe without authorization, avoid the expense and challenge of creating storage to actually divert their return flows, and gain the water quality benefits of dilution. Thus, the proposed project is economically and physically impractical for the Applicants without the use of Lake Conroe’s available storage capacity and SJRA does not support the Draft Permit because it fails to acknowledge this impact.

*The Draft Permit improperly authorizes the use of SJRA’s real property interests.*

Again, although the Draft Permit purports in several instances to authorize the Applicants to use the bed and banks of the “West Fork San Jacinto River” to transport their water, the area between the existing discharge points and the proposed diversion point(s), will be located wholly on and within Lake Conroe, whose submerged lands are owned by SJRA, for the benefit of SJRA and the City. The Applicants hold no property interest in such lands, so the Draft Permit improperly authorizes the use of SJRA and the City’s real property interests. The Draft Permit also appears to authorize the Applicants to utilize the real property owned by SJRA and the City to divert their return flows from undefined intake structure(s) on the shore of Lake Conroe. Worse, the Draft Permit suggests that the Applicants, and not SJRA, the City or TCEQ, have the discretion to determine whether any real property interest in Lake Conroe is necessary for the installation of such intake structure(s). See, Special Conditions 5.D and 5.E. of the Draft Permit.

For more than 60 years, SJRA and the City have invested significant financial, operational, and managerial resources to acquire and maintain the real property necessary to construct, operate, and maintain Lake Conroe as a water resource for their customers. Thus, the Draft Permit authorizes an invasion of both the property rights and the water rights held by SJRA and the City pursuant to COA No. 10-4963 and their ownership of the submerged lands and the storage space of Lake Conroe. Further, the decision regarding whether to allow intake structure(s) along the perimeter of Lake Conroe, which may also be a hazard to navigation, is an exercise of governmental discretion by SJRA and the City, as owners, operators and stewards of the public safety on the Lake. The existence of the Applicants’ intake structure may also impair the recreational uses of Lake Conroe (i.e., swimming, boating, fishing), which is authorized by COA No. 10-4963, and present a safety risk to those that use the Lake for recreational purposes. Pursuant to TCEQ regulations at 30 TAC 290.41(e)(2)(c), there must be a “restricted zone” radius of 200 feet from any raw water intake, within which recreational activities and trespassing are prohibited. The attached drawings, prepared by the Applicants, identify the location of this “restricted zone” in relation to the Applicants’ possible intake point(s). The presence of the Applicants’ intake structure(s) allows the Applicants to regulate the use of a portion of Lake Conroe, usurping the rights and responsibilities of SJRA and the City and wrongfully delegating such regulatory authority in the Applicants. Finally, by authorizing the diversion from and the

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use of the storage space of Lake Conroe to transport, deliver, and treat (ie, dilute) the Applicant's return flow, the Draft Permit is authorizing the use of the state water lawfully appropriated to SJRA and the City, and thus creating a need for consent from SJRA and the City.

Without a legal interest in Lake Conroe, it is improper for the Draft Permit to authorize the Applicants to construct raw water intake(s), providing the Applicants with some authority over a portion of a water body they do not own or operate. Without any conditions addressing fresh water inflows or low flow conditions, the Draft Permit, for all intents and purposes, provides the Applicants with a superior water right to Lake Conroe, as the Applicants will certainly assert that their interests in the Lake have priority over other diversions under all drought conditions down to and including a lake level within the original bed and banks of the West Fork San Jacinto River. If the Applicants were actually discharging and diverting historical return flows through a traditional bed and banks authorization involving a state watercourse, they would be required to adhere to certain low flow conditions and other conditions necessary to protect historical rights and the environment. SJRA does not support the Draft Permit because it fails to require the Applicants to obtain a legal interest in Lake Conroe for the transport of return flows through and the diversion of return flows from the Lake, and for the impact such diversions will have on the Lake and its authorized uses.

*The Applicants should be required to obtain SJRA's consent.*

Based on the impacts outlined above, before the Applicants can utilize the real property owned by SJRA and the City, utilize the storage space of Lake Conroe, or divert return flows from Lake Conroe, the Applicants must be required to obtain consent for such actions from SJRA and the City. This is consistent with requirements in other similar water rights issued by TCEQ. Consent to use another's reservoir is necessary because of the impacts such use may have on the operations and maintenance of the reservoir as well as the water rights held by the owners of the reservoir. Water right applicants that seek to flow water through, store water in, or divert water from a reservoir in which they do not have an ownership, water right, or other property interest will always adversely impact the water rights, property rights and/or operations of the reservoir.

TCEQ has historically required applicants seeking to use another's impoundment to deliver water to diversion facilities to secure the owner's consent. Such consent has been required pursuant to 30 TAC § 295.12, which provides that an application for a permit that seeks to store water in and/or divert and use water from another's reservoir requires evidence of the consent from the lawful owner of the reservoir. As it relates to the necessity of securing the lawful right to pass water through or divert water from another's reservoir, Texas Water Code § 11.042(b) provides no reduced requirement for groundwater-based return flows than would be applicable to any other water sources.

TCEQ should require the Applicants to secure the consent of SJRA and the City for the use of Lake Conroe's submerged lands and storage capacity to deliver these return flows to their

proposed intake structure(s). TCEQ could require this consent pursuant to 30 TAC § 295.112(b)(8), which provides that an application for a bed and banks conveyance of groundwater-based return flows pursuant to Texas Water Code § 11 042(b) must include "any other information the executive director may need to complete an analysis of the application." This requirement would be in the form of a special condition, as follows:

"The Permittees' authorization to use the bed and banks of Lake Conroe, including the authorization to divert and use the return flows as authorized herein, shall not be exercised until such time as an agreement between the Permittees and the owners of Lake Conroe has been executed."

*The use of eminent domain is improper and unavailable to the Applicants.*

In addition to using the storage capacity and the submerged lands of Lake Conroe, the Applicants' proposed intake structure(s) will necessarily be located within the body of Lake Conroe and therefore outside of their corporate boundaries. Thus, the Applicants must secure, outside of their boundaries, several different interests in Lake Conroe to make their project feasible. The Applicants have mischaracterized their ability to acquire such real property by claiming a right to use eminent domain. However, they cannot rely on eminent domain to obtain the authority to use the storage space in Lake Conroe, or to use the submerged lands of Lake Conroe, or to place intake structure(s) in Lake Conroe. Because the Applicants are subject to the limitations of Chapters 49 and 54 of the Texas Water Code, the necessary consent for storing and diverting return flows from Lake Conroe cannot be secured through the use of the Applicants' eminent domain powers.

Texas Water Code § 54.209 provides that Chapter 54 districts (including the Applicants) cannot exercise the power of eminent domain outside of their boundaries for acquisition of a water treatment plant site. Additionally, Texas Water Code § 49.222 provides some additional authorization for districts like the Applicants to utilize eminent domain, but this section 1) does not expressly apply to public property like Lake Conroe, and 2) provides that the power of eminent domain otherwise granted to districts like the Applicants "may not be used for the condemnation of land for the purpose of acquiring...water rights."

Both SJRA and the City are political subdivisions of the State and benefit from governmental immunity from suit under Texas law. A recent case between Oncor Electric Delivery Company LLC and the Dallas Area Rapid Transit addressed the use of an eminent domain action by one political subdivision against another. *See, Dallas Area Rapid Transit v. Oncor*, 331 S.W.3d 91 (Tex.App.-Dallas, 2010). In this matter, the Court concluded that an entity's governmental immunity rights should be applied to eminent domain actions and that such rights are not waived simply by the Legislature's grant of eminent domain power to another. Texas Water Code § 49.218 provides general authority to districts like the Applicants "to acquire" either public or private property by "gift, grant, or purchase", but this section does not authorize the use of eminent domain. That authority is found and limited by exclusively

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Texas Water Code §§ 54.209 and 49.222, neither of which authorizes condemnation of public property nor provides the express waiver of immunity upon which the Applicants can rely. Thus, the Legislature has provided no express waiver of governmental immunity that would allow the Applicants to bring an eminent domain action against SJRA or the City for the interests they require for their project, and without such waiver, such action will not be allowed.

Even if the Applicants were authorized to use eminent domain for their project, such use is simply ill suited for this matter. SJRA and the City have, literally, hundreds of millions of dollars of invested capital in Lake Conroe. The use of eminent domain procedures to establish the value of that investment, particularly for the storage space of the Lake, is simply not appropriate. Eminent domain actions are based on concepts of fair market value of impacted property, not on the sunken investment costs in a reservoir, its operation and maintenance costs, or the value or collateral damages resulting from an impairment of use of another's water right and storage impoundment. The actual consent from Lake Conroe's owners is necessary in light of the impacts the Applicants' proposed project will have on the real property interests, water rights and storage rights of SJRA and the City. For this reason alone, the change in policy proposed by your staff in this matter fails to appropriately protect senior and superior water rights and should be rejected.

*The new policy inappropriately abdicates the Commission's statutory responsibility.*

The Applicants' reliance on its ability to condemn the real property interests of SJRA and the City, and your staff's apparent acquiescence to same as suggested by the Draft Permit, not only represent an incorrect interpretation of Texas law, they represent a new policy with regard to the use of another's reservoir in a manner that inappropriately abdicates TCEQ's statutory responsibilities under Texas Water Code § 12.081. Through this provision, the Legislature has affirmatively charged the agency with a continuing right of supervision over all Chapter 54 and Chapter 49 districts, including the Applicants and SJRA. Thus, instead of ensuring that all districts subject to its oversight are acting in accordance with their rights, responsibilities, and limitations, by requiring the consent that has historically been required of applicants seeking to pass water through, store water in, or divert water from another's reservoir, the new policy effectively, and inappropriately, defers such issues to the courts. This is surely not what the Legislature intended when it granted TCEQ these supervisory rights.

*The Draft Permit should be revised.*

The Draft Permit allows the Applicants to utilize Lake Conroe and the real property interests of SJRA and the City without 1) acknowledging that this authorization will consume available storage in and the use of the submerged lands of Lake Conroe, thereby adversely impacting the reliability of the holders of water rights in Lake Conroe, 2) requiring the Applicants to secure a water right interest in Lake Conroe for the use of the storage space in the Lake or the submerged lands of the Lake, 3) affirmatively requiring any real property interest as a condition precedent to the diversion of return flows from Lake Conroe, 4) addressing the

Mr. Mark Vickery  
May 9, 2011  
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impact the proposed diversions will have on Lake Conroe and its existing uses, including recreational uses, 5) addressing the impact the proposed diversions will have on navigation within Lake Conroe, and 6) requiring the consent of SJRA and the City for the use of and diversion from Lake Conroe. It is inappropriate for TCEQ to issue permits that adversely impact existing water rights or effectively grant new and practically superior water rights while ignoring the real property interests of reservoir owners or the holders of water rights in such reservoirs. TCEQ should ensure that such interests are not impacted or indirectly appropriated to third parties, recognizing the significant demands placed on such resources, as well as the significant expense to construct, operate and maintain reservoirs. The Draft Permit, by authorizing the use of Lake Conroe's storage capacity and even leaving it up to the Applicants to determine whether any real property interests must be secured and, if so, the type and adequacy of such interests, suggests a troubling new policy for TCEQ that will have significant negative implications to reservoir owners across the State. TCEQ's prior policy, which simply required consent prior to use of another's reservoir for storing and/or transporting water, was well understood and honored both the real property and water right interests of reservoir owners. SJRA requests that you direct your staff to reconsider the Draft Permit in light of these facts and the implications of this new policy.

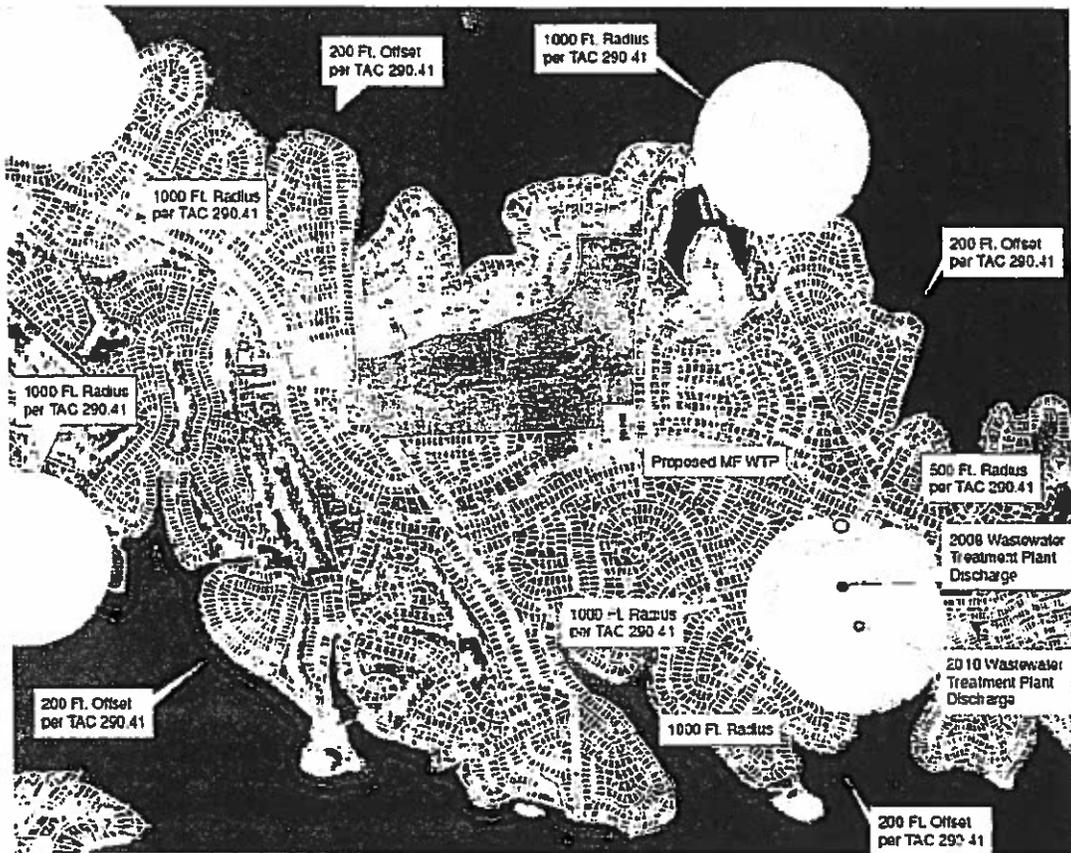
Thank you for your assistance in this important matter. If you or your staff have questions concerning this letter, or I may be of service to you, please feel free to call me at your earliest convenience.

Sincerely,

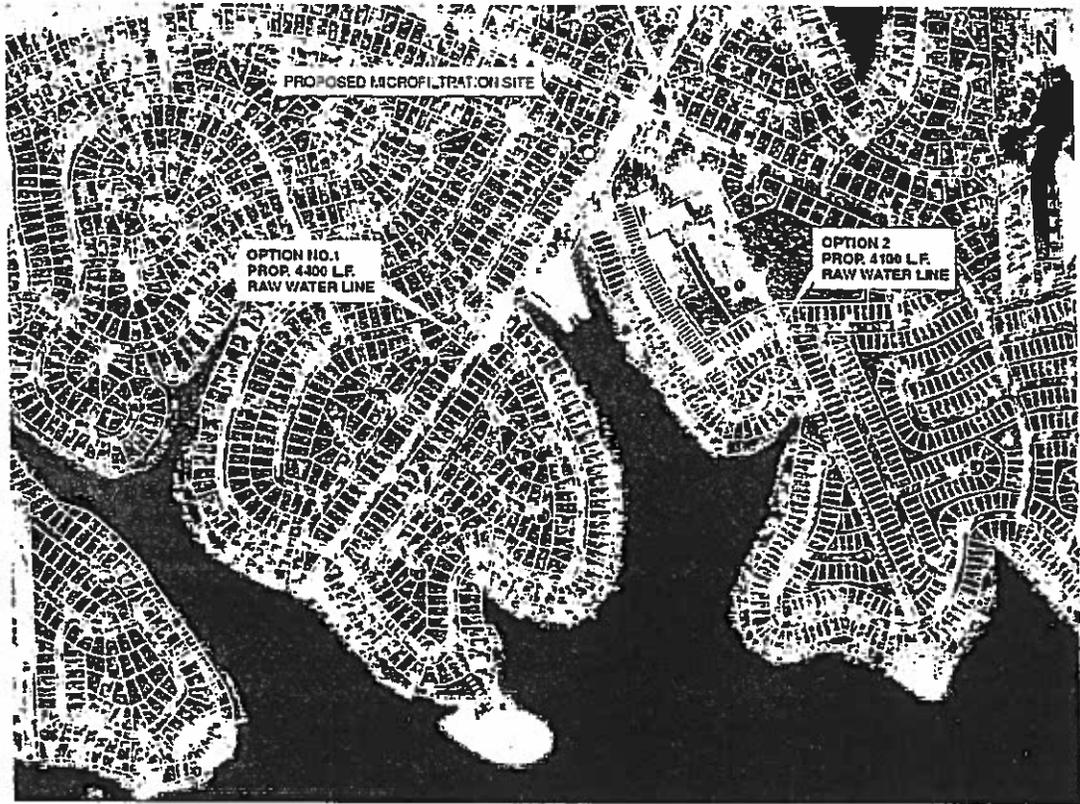
  
Martin C. Rochelle

Enclosures

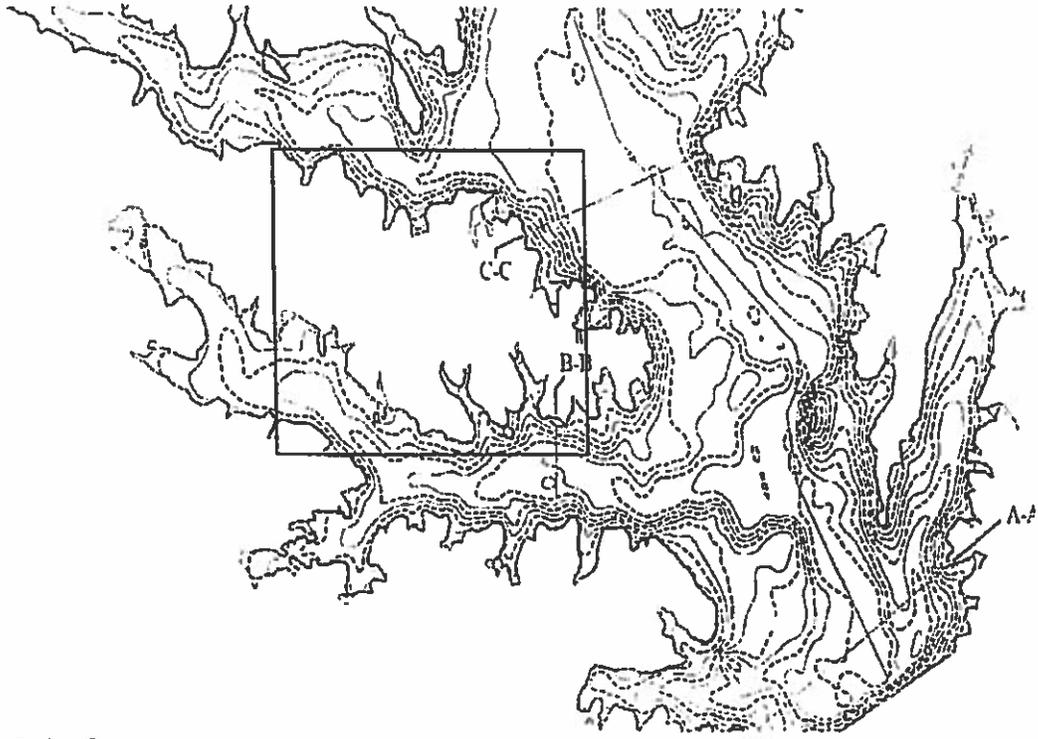
cc: Ms. Linda Brookins  
Ms. Kellye Rila  
Mr. Craig Mikes  
Mr. James Aldredge  
Mr. Ed McCarthy  
Mr. Reed Eichelberger  
Mr. Jace Houston  
Mr. Ron Kelling  
Mr. Mike Page  
Ms. Michelle Smith



Location of Wastewater Treatment Plant discharge points and buffer zone requirements.



Proposed options for diversion points from Lake Conroe.



Lake Conroe.

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June 27, 2011

*Via Hand Delivery and Email*

Mr. Mark Vickery, Executive Director  
Texas Commission on Environmental Quality  
P.O. Box 13807  
Austin, Texas 78767-3087

**RE: Montgomery County Municipal Utility Districts Nos. 8&9's Water Rights  
Application No. 12510 for Conveyance of Groundwater through a State  
Watercourse**

Dear Mark:

Montgomery County Municipal Utility Districts Nos. 8&9 ("MUDs 8&9") write in response to correspondence from the San Jacinto River Authority ("SJRA") addressed to you and dated May 9, 2011, and to political pressure that SJRA has attempted to impose with regard to MUDs 8&9's Water Rights Application No. 12510 for bed and banks reuse of MUDs 8&9's groundwater. MUDs 8&9 did not learn of the SJRA correspondence until May 25, 2011. We also understand that the City of Houston ("Houston") joined SJRA in a meeting with you and members of your senior staff based on the correspondence and asked you to revise the draft permit previously recommended by your technical and legal staff for water rights. MUDs 8&9 object to SJRA's and Houston's tactics in this matter, and we greatly appreciate that you have asked to meet with representatives of MUDs 8&9.

SJRA and Houston propose that the Executive Director overrule the technical and legal staff that have evaluated MUDs' 8&9 application and instead recommend making the Commission on Environmental Quality's ("TCEQ") authorization to convey water in the Lake Conroe watercourse contingent on SJRA's and Houston's consent. If for *any* reason they simply don't "agree" to the conveyance of the MUDs' water in the watercourse, SJRA and Houston contend, the conveyance cannot proceed. In effect, SJRA and Houston are asking the Executive Director to abandon the state's interest in its watercourses, in the guise of giving an on-channel reservoir owner absolute veto authority over the agency's exercise of statutory duties under the Texas Water Code to authorize conveyance based on legislated criteria. The Executive Director should by no means be complacent in this matter from a mistaken belief that SJRA and Houston would

wield such absolute control over a state watercourse responsibly or fairly, or in any way that is consistent with sound water rights principles.

Indeed, SJRA's opposition to the draft permit approved by the Executive Director's technical and legal staff is indicative of SJRA's unveiled intent to use any means available to force MUDs 8&9 to sign an SJRA contract that includes penalties for "late-joining" an SJRA collective for reductions in groundwater use. SJRA's and Houston's actions to monopolize water supply in Montgomery County and the context of the MUDs' application are discussed below in this response. SJRA and Houston also aim to take, by default, MUDs 8&9's groundwater-based discharges to the watercourse by blocking the MUDs' right to access them for continued use. SJRA would take the MUDs' water without compensation, and then sell that water to the very collective into which SJRA seeks to bind the MUDs. This is not exaggeration or bravado on MUDs 8&9's part, but is common knowledge in Montgomery County and substantiated by SJRA's own words and actions.

The justifications that SJRA offers in its May 9, 2011, letter are utterly meritless and contrary to statute, rule, policy, and even reason. In summary of the discussion that follows in this response:

- Under the Water Code and all known practices and policies of the TCEQ, SJRA and Houston have no right whatsoever to MUDs 8&9's groundwater discharges that are the subject of the pending application for bed and banks conveyance and reuse. It is undisputed, even by SJRA, that the water rights for Lake Conroe were *not* granted in reliance on the MUDs' groundwater discharges.
- Nevertheless, SJRA has expressed its desire to take the MUDs' groundwater discharges by default, use the steady flow of discharged water to "firm up" the Lake Conroe water rights, and then sell the MUDs' water to SJRA's customers. It is not the MUDs that seek to use SJRA and Houston property, it is SJRA and Houston that propose to take the MUDs' property. SJRA and Houston are in effect asking the Executive Director to become complicit in a governmental taking of private property without compensation.
- SJRA's justifications ask the Executive Director to disavow the state's continuing interest in its watercourses statewide. The Executive Director's technical staff has determined unequivocally that Lake Conroe, built on-channel, on the West Fork San Jacinto River by permission of the state, is a state watercourse and that the water impounded there is state water. It is the state's interest on which the MUDs application relies, not any interest that belongs to SJRA or Houston.
- SJRA's theory of its absolute ownership of an otherwise state watercourse, based on ownership of submerged lands, is incompatible with statute, rule, and policy. It is the same theory that SJRA would use to exclude boaters and fisherman from Lake Conroe. It is the same theory that SJRA would use to veto the Executive Director's permitting of effluent discharges unless the permittee agrees to pay SJRA for the distance between the discharge point and the original channel of the river. Applying fundamental water law principles: (1) SJRA and Houston have only a usufructuary right in water – a right to use the water subject to the state's continuing interests; and (2) ownership of submerged lands does not entitle SJRA to exclude the state from a state watercourse. (SJRA has

advised the MUDs that Houston does not own any of the submerged lands of Lake Conroe; however, MUDs 8&9 understand that Houston seeks to share in any water or revenue gained from the MUDs.)

- SJRA's and Houston's water rights for Lake Conroe were granted in the first place subject to the TCEQ's continuing right to grant conveyance authorization through the reservoir to others consistently with the Water Code. That the authorization to impound or use water is subject to the agency's authority under the Water Code is stated on SJRA's and Houston's certificate of adjudication, and most likely every certificate of adjudication.
- SJRA's premise that a pass-through of water constitutes storage of that water is not compatible with the TCEQ's Rules. In the only known TCEQ policy addressing this issue, related to released waters, it would be *unlawful* for SJRA and Houston to store water that is released from a place of storage and designated for downstream use. According to TCEQ Rules, "[e]ach owner or operator of a reservoir and dam on the stream between the point of release and the point of designation shall permit the free passage through the reservoir and dam of all such released waters in transit."
- SJRA's assertion that the pass-through is nevertheless some sort of meaningful and permanent occupation of storage-in-fact is a fabrication. Sound engineering would not recognize the MUDs' proposed conveyance project to cost SJRA a drop of water in storage. In fact, the MUDs' discharges can be a net benefit to the firm yield of the reservoir even with the MUDs' project in operation. Placement of the MUDs' intake as depicted on the maps that SJRA attached to its letter would be at a level above the low-flow outlet of the dam, for example. The MUDs' discharges would continue to shore up the water supply in Lake Conroe for SJRA's plan participants whenever the lake level prevented the MUDs physically from diverting their discharges for their own use.
- MUDs 8&9 have proposed 24-hour accounting to ensure that they do not divert more water than they are entitled to based on the amount of actual discharges. The Executive Director's technical staff determined specific to the MUDs' application that an accounting plan "will mitigate any possible impacts on existing basin water rights." If SJRA and Houston have any legitimate problem with the staff-approved accounting plan, the MUDs remain amenable to adjusting the accounting procedure. Otherwise, the plan can properly be addressed in contested case hearing.
- SJRA's assertion that the current draft permit is somehow inconsistent with TCEQ policy particularly is disingenuous considering that SJRA itself has a permit for bed and banks conveyance of the Woodlands' return flows for diversion from Lake Houston. Despite whatever agreement SJRA in fact may have with Houston for that diversion, there is no condition in the SJRA permit that requires that an agreement exist or that it be maintained.
- SJRA's assertion that the MUDs did not identify diversion points is false. The MUDs submitted diversion point information sheets to the TCEQ as part of their application and have previously discussed location considerations with SJRA staff. The MUDs have on

more than one occasion asked SJRA staff for input regarding the location of intake facilities and have been advised that SJRA has no particular concerns on that issue. Intake facilities are, of course, common on reservoirs, and health and safety issues would be regulated by TCEQ, not controlled by the MUDs.

- Other issues raised by SJRA in its May 9, 2011, letter regarding establishment of an intake or giving the MUDs “control” over part of the lake by operation of the TCEQ’s rules are simply diversionary. The Executive Director’s water rights staff specifically considered recreational interests when evaluating the MUDs’ application and recommending that it be granted. Staff determined that “no adverse impact” would be expected to occur to recreational interests.
- SJRA’s attempt to withhold the use of real property for an intake site in order to extort concessions will fail in the face of the MUDs’ rights of eminent domain. That’s why political subdivisions are given the power of condemnation for exercise when the public interest requires it. Also, SJRA is incorrect that the current draft permit itself grants the right to use SJRA real property. The draft permit wisely avoids doing so and also avoids making the TCEQ the arbiter of the exercise of condemnation authority, as that is a matter for the courts. Imagine what SJRA’s proposition would mean if it was applied to the TCEQ granting a right to construct a reservoir. Should the permit owner have to acquire all of the property in the desired footprint of a reservoir before applying for a permit? Should the TCEQ confirm that each acquisition is fully sufficient (be it by lease, easement, deed, or condemned interest) as a prerequisite to permitting? The implications of SJRA’s argument are profound and the discussion below points out that they are dangerous for the agency and the water supply community.
- It also is ironic that, if SJRA were to prevail in denying an intake point on the lake, the MUDs still would have a right to their discharged water and could identify a beneficial use downstream of the dam. Then, SJRA would be required to pass the MUDs discharges downstream and would lose the net benefit of those discharges for their customers when lake levels are low. SJRA would, in this sense, perhaps capture another paying customer (penny wise) but lose a net benefit to the reservoir and actually cost its existing plan participants water when it is needed most.
- SJRA’s implication on pages 2 and 3 of its letter that the MUDs’ reuse will be unreliable or “impractical” without Lake Conroe “storage” is not responsible. SJRA is aware that the MUDs will continue to use groundwater in a balanced, conjunctive supply system that allows them to suspend diversions as necessary to accommodate low lake levels. If SJRA does operate the lake at very low levels for an extended period of time, MUDs 8&9 still will have a water supply. In this regard, however, SJRA inconsistently claims in other forums that it will maintain acceptable lake levels.

At the end of its May 9, 2011, letter, SJRA proposes inserting a condition in the draft permit that denies bed and banks conveyance without SJRA “agreement.” The condition would empower SJRA to extract the very things that it seeks—either all of the MUDs’ discharged groundwater by default or a substantial amount of the water (why not 75%?) by “agreement” and whatever

monetary price it takes to ensure that the MUDs can never provide a water supply at a more reasonable price than SJRA's monopoly contract price. If SJRA can make the project infeasible, or break the MUDs' resolve, it will have perfected its monopoly in the form of the SJRA groundwater-use reduction collective.

MUDs 8&9 have tried diligently for over two years to work with SJRA and Houston toward an accommodation on the MUDs' project. The MUDs have respected SJRA and given SJRA every benefit of the doubt. For a time, the MUDs thought that SJRA might become willing to entertain discussions based on sound engineering and operational principles after it was secure that its "plan" had reached critical mass—perhaps not with all of the participants that SJRA had hoped for but with enough participants for whom the collective was the only or the best choice. MUDs 8&9 have been willing even to cede a reasonable amount of their water in order to avoid the cost of litigation, but you cannot reason with an entity that has goals such as SJRA's in this matter, and particularly not when the applicable groundwater district deadlines discussed below make even *delay* so potent a weapon. Those deadlines will not allow the MUDs to tolerate delay any longer.

MUDs 8&9 are prepared to show in a compelled-service action against both SJRA and Houston pursuant to Water Code § 11.041 that the contract by which SJRA binds Houston not to sell water to large-volume groundwater users in Montgomery County without SJRA consent is void as against public policy to the extent it may prevent the sale of raw water by that city to MUDs 8&9. For so long as SJRA is able in some way to block the MUDs' access to their groundwater discharges, then surely SJRA and Houston have a duty under Water Code § 11.041 to provide raw surface water and access to the MUDs, at a reasonable price to be determined by the TCEQ after consideration of the MUDs' contribution of groundwater discharges and net benefit to the reservoir. The TCEQ's compelled service jurisdiction recognizes, after all, that reservoir owners who create a monopoly on water are subject to the TCEQ determining the fair and reasonable terms and price under which a non-contracting party may receive water from them.

There is something in the SJRA letter with which the MUDs do agree. That is, that exercise of the TCEQ's oversight authority pursuant to Water Code § 12.081 would be warranted. What TCEQ would see is a river authority acting with significant public financial resources but without the temperament of a public entity as it crafts a water supply monopoly and abuses the public interest and the rights of other political subdivisions in the process. If indeed, the Executive Director can suggest a more equitable solution that better serves the public interest than litigation on multiple fronts, the MUDs welcome that discussion.

*The Executive Director must understand some background regarding MUDs 8&9's water supply in order to consider this dispute in proper context.*

MUDs 8&9 are adjacent political subdivisions located on the Walden Peninsula on Lake Conroe, in Montgomery County. Together, MUDs 8&9 serve approximately 3000 water connections. If projections regarding build-out prove true, water demands within the MUDs' current boundaries would peak at about 3,000 acre-feet per year in 2035 and remain relatively steady thereafter. Their maximum permitted discharge is less than a million gallons per day, and they currently

discharge somewhat over half a million gallons per day. If Lake Conroe were full at permitted capacity on any given day, it would contain 135 billion gallons of water.

MUDs 8&9's sole source of water is groundwater pumped from the Gulf Coast aquifer, as is the case for much of Montgomery County despite proximity to Lake Conroe. However, MUDs 8&9 have been working to secure significant additional water resources for their residents' future water supply in compliance with the regulations of Lone Star Groundwater Conservation District ("LSGCD") applicable to large-volume groundwater users. Groundwater district rules finally adopted in 2010 limit future groundwater use from the Gulf Coast aquifer to 70% of 2009 demands. MUDs 8&9 and other groundwater users were required to submit certifiable groundwater reduction plans by April 1, 2011, and must complete construction of new water supply facilities for achieving actual reduction within 4 years thereafter, to be fully compliant by 2016. MUDs 8&9 participated actively in the Region H water supply planning process, and bed and banks reuse of groundwater is a recommended water management strategy for the MUDs. MUDs 8&9's application to the TCEQ for bed and banks conveyance authority was submitted on October 2, 2009.

The full story of SJRA's attempts to totally dominate water supply alternatives in Montgomery County as part of the limitations on groundwater use cannot be known without the opportunity for discovery in litigation. Some facts are nevertheless apparent and documented:

- Acting in self-interest as a water supplier, SJRA has interjected itself into a regulatory process that limits local groundwater use in a manner that creates a demand for historically unused water in Lake Conroe, which SJRA partially owns and controls for all relevant purposes. A "Regulatory Study and Facilities Implementation Plan for Lone Star Groundwater Conservation District and San Jacinto River Authority" was published in 2006. Although the actual need for reduction in groundwater use is located most immediately in the area of SJRA's own groundwater supply to serve the Woodlands, SJRA promoted countywide limitations. The 2006 study recognizes in its words that countywide reduction may "dilute" a real focus on areas where drawdown problems exist and potentially increase implementation costs for many groundwater users as they secure replacement water supplies. Indeed, that is the case. The 2006 report is available at [www.lonestargcd.org/publications.html](http://www.lonestargcd.org/publications.html).
- SJRA and Houston are the sole appropriators of surface water in any significant amount in Montgomery County. By contract executed while groundwater use was being limited, SJRA gained virtual control over the Houston supply as well. In that contract, Houston agreed not to sell water from Lake Conroe to any entity that is subject to Lone Star Groundwater Conservation District's reduction mandates (SJRA's potential customers), unless San Jacinto River Authority "consents." SJRA has indicated in correspondence to Senator Nichols that it foresees no circumstance in which it would consent to a sale of water by Houston.
- That letter to Senator Nichols, from SJRA dated February 9, 2010, also mentions the MUDs' water reuse project. In the letter, SJRA discloses its position that: "[I]t is essential to not permit fragmentation of the plan by certain users . . .". However, it

should not be forgotten that the legislature had previously declined to give SJRA control of Montgomery County water supply through mandates, for reasons that included some local concerns and a lack of uniform comfort within the legislative delegation. (SB 2489, 2009 Regular Session).

- In the absence of legislative authority, SJRA set about to create its water collective through contracts. However, SJRA withheld its proposed contract from most of the public, including MUDs 8&9, until the eleventh hour and then gave potential participants only a few months in which to sign. Anyone not signing by SJRA's deadline, would be subject to arbitrary penalties under the contract. There was, indeed, widespread community dissatisfaction with the proposed contract but too little time to address the issues adequately or advance alternatives. MUDs 8&9 raised a number of issues with the extremely lengthy and complicated contract by correspondence on March 1, 2010. SJRA did not reply to that letter. There has been a continuing unrest in some communities about whether some plan participants were coerced by a lack of alternatives or misled into signing.
- As MUDs 8&9 and other water suppliers urged Lone Star Groundwater Conservation District to postpone its deadlines until the viability of pumpage from the deeper Catahoula Aquifer as an alternative water source could be explored, SJRA actively opposed any postponement. A modest postponement that was granted was insufficient, putting a number of large-volume groundwater users at significant financial and regulatory risk in pursuing that alternative supply.
- In an extreme demonstration of hubris, SJRA has said in various terms that it will not tolerate any municipal water supply provider in the county having a water supply that is less expensive than the monopoly price that SJRA will charge participants for treated water and continued groundwater production through its contract. For example, an SJRA letter dated March 10, 2011, stated that SJRA would not take an action related to MUDs' 8&9's reuse project which could allow MUDs 8&9 to comply with the groundwater district regulations "at a lower cost of compliance . . . when compared to the costs of the [SJRA plan participants], simply because of the proximity to Lake Conroe."
- SJRA approved an April 28, 2011, letter to the TCEQ regarding the MUDs' bed and banks conveyance application that purported to be on behalf of an SJRA customer committee and misrepresented that the customer committee approved a formal protest of the MUDs' application. A letter to the TCEQ Chief Clerk in response from the City of Conroe, now one of SJRA's largest customers, disputes that the letter speaks for all of the customer review committee members.
- MUDs 8&9 submitted a groundwater reduction plan in compliance with the rules of the Lone Star Groundwater Conservation District and by that district's April 1, 2011, deadline. On April 25, 2011<sup>1</sup>, SJRA solicited the same customer committee to submit a letter to the Lone Star Conservation Groundwater District urging that the district reject MUDs 8&9's submittal. The letter that SJRA drafted and widely circulated in the

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<sup>1</sup> Date reference corrected on June 27, 2011.

community argued both that the parts of the MUDs' submittal that called for water reuse should be rejected because the MUDs' conveyance permit is not yet final and that the other parts of the submittal that projected use of supplemental groundwater should be rejected "unless and until a comprehensive and scientific study and demonstration project is completed on the Catahoula [a]quifer." Again, it was SJRA's own hand that led the groundwater district to its timetable regarding the Catahoula aquifer and largely SJRA that has delayed the MUDs' permitting process while the MUDs pursued an agreement to avoid litigation.

The inevitable, and intentional, result of SJRA persuading the groundwater district to deny groundwater reduction plans based on bed and banks reuse or deep groundwater, would be that there *can* be no municipal water sources in Montgomery County that do not come from or through SJRA. SJRA's proposed "rejection" of groundwater conservation plans based on reuse and deep groundwater would not only have left no alternative for MUDs 8&9, but also would have left no alternative for any other municipal water supplier of any size that has so far not joined the SJRA collective, including the City of Montgomery, City of Shenandoah, City of Dobbin, City of Plantersville, City of Panorama Village, Montgomery County Utility Districts Nos. 3&4, Stanley Lake Municipal Utility District, and Porter Special Utility District, among others. SJRA was not dissuaded in its tactics by the fact that any large-volume groundwater user whose plan was insufficient on April 1, 2011, is exposed to stiff regulatory penalties and fines by the groundwater district. (Despite SJRA's efforts, SJRA's customer committee declined to formalize the letter and MUDs' 8&9's groundwater reduction plan was certified by the groundwater district earlier this month as timely submitted and adequate.)

Although SJRA and Houston may claim a right as downstream water rights holders to force a contested case hearing to explore whether or not their rights were granted in reliance on MUDs 8&9 return flow (they were not) and whether or not the proposed accounting plan sufficiently limits diversions to discharges less carriage losses (it does), SJRA's May 9, 2011, letter to short-circuit due process on the MUDs' pending application, should be seen for what it is – one more bullet point in SJRA's strategy to force the MUDs into its collective at a monopoly price.

SJRA's attempt in its May 9, 2011, letter to justify the "consent condition" that SJRA and Houston seek in a revised draft permit for conveyance of MUDs 8&9's groundwater in a state watercourse are addressed in detail below.

*Under the Water Code and all known practices and policies of the TCEQ, SJRA and Houston have no right whatsoever to MUDs 8&9 groundwater discharges that are the subject of application for conveyance in a state watercourse.*

Texas Water Code § 11.042 (b) (Delivering Water Down Banks and Beds) provides for special conditions "if necessary to protect *an existing water right that was granted based on the use or availability of these return flows.*" The water rights for Lake Conroe were not granted in reliance on MUDs 8&9's groundwater discharges. The Executive Director's staff has determined that they were not.

The Executive Director's technical staff completed a memorandum analyzing pertinent water rights issues dated December 6, 2010. In that memorandum, the Executive Director determined that the MUDs' use of their groundwater discharges "does not constitute an impact" on any downstream water rights, including those for Lake Conroe. The MUDs' return flows are not part of the natural inflows to Lake Conroe, the technical analysis explains, and therefore cannot impact the basis on which water rights for the reservoir were issued. SJRA also has admitted the truth of this. In SJRA's words to Senator Nichols "It is not now, and never has been, the position of the Authority that the discharges into Lake Conroe constitute part of its permitted yield."

*SJRA and Houston nevertheless propose to take the MUDs' discharges and the MUDs' contract water without compensation and to make the TCEQ complicit in that taking.*

If, despite the language of Texas Water Code § 11.042 (b) and the Executive Director's staff's technical determination, SJRA and Houston are successful in convincing the Executive Director to act contrary to his statutory duties, SJRA will be one step closer to not only forcing MUDs 8&9 to join the SJRA plan but also to SJRA's secondary goal of enjoying the MUDs 8&9's property without compensation.

SJRA and Houston want the *benefit* of the MUDs 8&9's discharges to offset the storage capacity that has been lost to sediment as Lake Conroe has sat largely unused for municipal water supply purposes. (It is well known from regional planning that SJRA and Houston no longer have a firm yield to support their full diversion authority from Lake Conroe.) In SJRA's words, "wastewater discharges derived from groundwater help to make the permitted yield of Lake Conroe more firm" and therefore it would be a "disservice" to the SJRA "plan" to support reuse by entities that have not joined the plan.

MUDs 8&9 have suggested to SJRA that it hold up a mirror to its often-repeated allegation that the MUDs are somehow attempting to use SJRA and Houston property without paying for it. It is *SJRA* that seeks to take the MUDs' water without paying for it, and to use the MUDs' groundwater rights, wells, pumping investment, distribution and discharge facilities to function just as supplemental, off-channel storage would to "firm-up" SJRA's diversion amount.

*SJRA's and Houston's proposed condition is a direct attack on the state's and the public's continuing interest in state watercourses.*

To SJRA's ends, its letter mischaracterizes SJRA's and Houston's interests in Lake Conroe. It is a perversion of reasoning to claim that the MUDs' water supply project "depends" on SJRA and Houston rights in Lake Conroe. What MUDs' project depends on is the state's continuing interest in its watercourses and the TCEQ's clear statutory authority to permit conveyance in those watercourses, which has not been obliterated by allowing construction of the reservoir.

For the Executive Director to entertain SJRA's arguments on pages 1 through 3 of the May 9, 2011, letter, he will need to concede that there no longer *is* any length of state watercourse between the headwaters and the dams of every on-channel reservoir in the State. No other interpretation of the SJRA letter is possible as SJRA admits there that *if Lake Conroe is a state watercourse*, then "Applicants certainly have the right to seek authority to transport and reuse . . . their private groundwater-based return flows." For the Executive Director to give up the state's

continuing state watercourse interest in on-channel reservoirs would be contrary to the public interest, contrary to law, and contrary to the agency's own rules. The Executive Director's technical staff clearly disagrees with SJRA, as again, they have stated unequivocally that Lake Conroe is a state watercourse.

It is fundamental in Texas water law that the grant of an appropriative right gives the owner thereof a usufructuary interest in water – a right of use – for limited purposes and subject to the state's continuing interest. That reserved interest necessarily includes the state's right to authorize bed and banks conveyances pursuant to the Water Code. The water right that SJRA and Houston hold for Lake Conroe even states, as do all other certificates of adjudication, that it is *issued* subject to the agency's continuing right of supervision of State water resources consistent with the public policy of the state as set forth in the Water Code. Texas Water Code § 11.091 explains that *no person* may willfully take or interfere with the delivery of conserved or stored water under Section 11.042 (Conveyance by Banks and Bed). The Lake Conroe water right *also* states on its face that it is subject to superior rights.

The water rights for Lake Conroe do not grant the permit owners an express right to exclude bed and banks conveyances by declining to “consent” to them. There is no reservoir-owner exception to the Water Code § 11.091 prohibition that *no person* may interfere with bed and banks conveyance, nor is there an exception in Water Code § 11.042 that suspends the TCEQ's duty to authorize bed and banks conveyance of groundwater in a state watercourse under legislated criteria when conveyance travels in or through a reservoir that is constructed on that state watercourse.

SJRA's sole basis for excluding the state and the public including MUDs 8&9 from Lake Conroe is ownership of land submerged by the reservoir. This is the same basis that SJRA would use to exclude boaters, fisherman, and swimmers from the lake, or to charge for boating, fishing and swimming on the basis of the cost of building the dam and constructing the reservoir. When SJRA says “But for Lake Conroe, the MUDs could not physically deliver their return flows from their existing discharge points to their proposed diversion points” (page 2), consider similar statements that “But for Lake Conroe, you could not boat from Point A to Point B”, and “But for Lake Conroe, you could not fish there.”

Court cases going as far back as *Diversion Lake Club v. Heath*, 126 Tex. 129, 86 S.W. 2d 441 (1935) have explored artificial lakes created by damming a state watercourse and inundating privately-owned land with state water and have found in favor of the state's and the public's continuing interest. The *Heath* court, for example, held that the water in a lake formed by navigable waters from a river impounded over privately owned lands is still state water. “[The appropriation permit] gave . . . no right to interfere with the public in their use of the river and its waters for navigation, fishing, and other lawful purposes further than interference necessarily resulted from the construction and maintenance of the dams and lakes in such manner as reasonably to accomplish the purpose of the appropriation.”

It is the case that, even without Lake Conroe, the MUDs would discharge water to a watercourse, albeit probably from a different point; they would have a right to a permit under the Water Code to convey the discharged water for continued use; they would have a right to sell their return

flows downstream; and they would have a right to receive contract water from upstream, also subject to a conveyance permit. Yes, the construction of Lake Conroe changed the configuration of the watercourse. However, it is irresponsible to suggest that the MUDs should spend public money to build needless piping infrastructure as if the watercourse was still as it was before the on-channel reservoir was constructed in order to use their discharged water, or that it should have to pick up contract water before the headwaters of the reservoir and pipe it around the on-channel lake to a point of use.

SJRA's implication that both MUDs 8&9's discharge point and its diversion point must be on the original channel of the West Fork San Jacinto River in order to be permissible by the TCEQ is, frankly, absurd. We are aware of no case in which the Executive Director has taken the position that effluent return flows within the reach of an on-channel reservoir must be piped for discharge to a point on or at the depth of the original, submerged channel of a river. To the contrary, discharges to the watercourses of this State at or near the perimeter of on-channel reservoirs are authorized so long as the State's water quality and environmental regulations are satisfied. Nor can a reservoir owner legitimately demand either consent or payment for the distance between a discharge point and the original channel of the river, as a prerequisite to the TCEQ authorizing the disposal of wastewater. The best that can be said of SJRA's point is that, *if* the MUDs built needless infrastructure to the original channel, they could indeed build physical intake facilities in the middle of the lake on the state-owned portion of the river bed without acquiring a real property interest for that purpose from SJRA.

*SJRA's assertion that the MUDs did not identify intake points is false, and their related claims are diversionary.*

The MUDs submitted diversion point information sheets to the TCEQ as a part of their application materials. These locations were identified based on the most favorable bathymetry in reasonable proximity to the MUDs' inland property for construction of treatment facilities and in careful consideration of the TCEQ's regulations for intakes including the required zones. SJRA's attempt to argue that the location of an intake may vary wildly simply fails. The MUDs are where they are and the MUDs water treatment facilities will be located within their boundaries. MUDs 8&9 also previously discussed location considerations with SJRA staff. The MUDs have on more than one occasion asked SJRA staff for input regarding the location of intake facilities and have been advised that SJRA has no particular concerns on that issue. Intake facilities are, of course, ubiquitous and common on reservoirs, and health and safety issues associated with reservoir intakes are regulated by TCEQ, not arbitrarily controlled by the MUDs.

It is, of course, true that the MUDs' intake facilities have not yet been finally designed. The MUDs could construct an open-water intake or they could use a floating intake, with a profile not unlike a floating dock or buoy. The exact extent of use of real property, then, also is not yet known. However, it will be minimal and as unobtrusive as reasonable while still serving the public interest for water supply.

The Executive Director's technical staff was satisfied with the information that MUDs 8&9 provided with regard to diversion location and performed a purposeful evaluation of the possible

impacts on recreation. Quoting from the staff's 2010 technical memorandum on this issue: "Resource Protection staff does not expect adverse impacts to the recreational uses of Lake Conroe." It should be pointed out, however, that placement of a permanent intake or a discharge location above the original channel of the river (perhaps as SJRA and Houston would have it) might not be the best choice for recreational considerations.

*SJRA's premise that pass-through of water constitutes storage is incompatible with adopted TCEQ policy.*

In the only known TCEQ policy addressing this issue, it is unlawful for an intervening water rights holder to store or interfere with the passage of water that is released from a place of storage and designated for conveyance and use. As a general proposition, then, the pass-through of water does not constitute storage. "Each owner or operator of a reservoir and dam on the stream between the point of release and the point of designation shall permit the free passage through the reservoir and dam of all such released waters in transit." 31 Tex. Admin. Code § 297.94 (Duties of Others Along the Stream). SJRA conveniently ignores this rule, for example in its argument on page 4. SJRA cites only Rules § 295.12 (Storage in Another's Reservoir).

The Executive Director's legal staff satisfied itself that Rule § 295.12 did *not* apply to require SJRA and Houston's consent to conveyance of MUDs 8&9's groundwater-based discharges through the Lake Conroe watercourse. Indeed, the history of that rule shows that it was not meant to address a bed and banks conveyance of private water *through* an on-channel reservoir. Perhaps if MUDs 8&9 were to commence diversions before they commenced equivalent discharges, they would be diverting water *from the reservoir* and the rule would apply. Or perhaps it would apply if MUDs 8&9 continued diverting for some time after they ceased discharging on an argument that they were recouping previously stored discharges. Indeed, the current draft permit clearly requires the MUDs to stop diversions if their discharges cease. The accounting plan is intended to avoid any diversion *of* water that has been impounded by SJRA and Houston in the reservoir for those entities' use and it would be inappropriate to assume that MUDs 8&9 would violate that plan.

The current draft permit is not the departure from previous policy that the SJRA letter paints it to be. If there is any case of direct precedent for a challenge on these issues, it has not been brought to our attention in the year and a half that the MUDs' application has been pending at the agency. If there are cases of direct precedent where consent has been withheld and challenged, the MUDs ask that those cases be identified for examination. MUDs 8&9 have reviewed SJRA's own Permit No. 5809 for conveying return flows from the Woodlands for diversion by SJRA from Lake Houston, in which the City of Houston owns storage. That permit was issued in 2004, with no conditions requiring any sort of agreement between the conveyor/diverter and the owner of the reservoir—certainly none that were specific to the new conveyance authority that SJRA was granted in that case. To the extent that such an agreement may somewhere exist, there is no requirement on the face of the SJRA conveyance permit that the agreement be maintained for the conveyance authorization to remain effective.

A search of the TCEQ's permitting files for SJRA's Permit No. 5809 also reveals no discussion regarding consent whatsoever, not even as a check-off, nor any suggestion that the new

conveyance of return flows would create an occupation of storage. SJRA has indicated to the MUDs that SJRA pays no pass-through fee for its conveyance through Lake Houston. The fact that SJRA had a pre-existing intake facility on the lake (or even other diversion authority from the lake) is not dispositive in any way of the point at issue in SJRA's letter that a new conveyance constitutes an occupation of storage. (Conveyance and reuse under Permit No. 5809 does not include "conditions addressing fresh water inflows or low flow conditions" as if Lake Houston didn't exist, leaving SJRA's page 4 arguments disingenuous on that issue as well.)

In cases where there is, in fact, an agreement between the parties related to pass-through (perhaps stemming from the happy situation of reaching a reasonable accommodation to avoid litigation), recitation of such agreement in a permit would be appropriate as a product of that agreement itself. Permit No. 5778 for the pass-through of water in Lake Lewisville is an example of this situation. In that case, the permit reflects an agreement whereby the permittee would (1) not store water in the lake, (2) institute 24-hour accounting as reflecting a "no-storage" operational parameter, and (3) pay a two-cents per thousand gallon pass-through fee. MUDs 8&9 have offered to pay a similar fee, acknowledging that SJRA would probably expend some staff resources to monitor the MUD's accounting plan and check their meters. It is our understanding that SJRA does not pay fees to Houston based on the passage of return flows through Lake Houston.

*SJRA's idea that a pass-through is nevertheless some sort of permanent occupation of storage-in-fact that adversely impacts the SJRA water supply on these facts is a fabrication.*

Sound engineering would not recognize the MUDs' proposed conveyance project to cost SJRA a drop of water in storage. SJRA states that "...this project will cause a certain amount of Lake Conroe's storage capacity to be displaced *at all times*" and that "... some portion of the Lake's storage capacity will be *continuously and perpetually* utilized by the Applicants in order to store and then divert their return flows." The SJRA further contends that such impact on the storage capacity of Lake Conroe "impairs" the reliability of the reservoir as a firm water supply for SJRA and its customers. Dr. Robert J. Brandes, P.E., an expert in hydrology, advises that these statements simply are not true.

First of all, the MUDs propose to divert conveyed water from Lake Conroe at the same rate and in the same amount as the water is discharged into the lake, set on a one-day time step. Except for minor adjustments in the daily diversion rate to ensure compliance with the measured discharge rate from a day earlier, the conveyance of the MUDs' groundwater-based discharges through the Lake Conroe watercourse will remain relatively steady, and the daily level of the watercourse will be essentially unchanged with none of SJRA's and Houston's stored water or capacity in Lake Conroe displaced as a result of the proposed bed and banks permit. Because sometimes the daily discharge rate will be slightly increased from the previous day and at other times the daily discharge rate will be slightly decreased, the effect of the daily adjustments in the effluent diversion rates will be offset and insignificant. In essence, the MUDs will divert water from the watercourse in the exact same fashion as they discharge into the lake, with no recognizable change in lake level or storage.

Even if you accept for a moment and for the sake of argument that the storage capacity in Lake Conroe would be displaced by the MUDs conveyance of a day's volume of effluent through Lake Conroe, the volume of storage displacement would be de minimus, equal to only 0.00066 percent of the conservation storage capacity of the lake (2.76 ac-ft/day ÷ 416,228 ac-ft). Furthermore, and again for the sake of argument, even if storage capacity were displaced for a day of discharge, that capacity would *not* be *continuously and perpetually* utilized as SJRA contends because of physical limitations on the MUDs' ability to divert effluent from Lake Conroe. Keep in mind, that the discharges occur every day even when the MUDs diversions do not.

When the level of the reservoir falls below the lowest elevation of the MUDs' intake, no effluent can physically be diverted from Lake Conroe by the MUDs under the proposed bed and banks permit, but the MUDs will continue to discharge to the watercourse. So long as the MUDs are using their discharges to the watercourse at the perimeter of the reservoir, the inflows of those discharges that the MUDs cannot physically divert will be available for SJRA to impound in Lake Conroe and will contribute directly to the firm yield of the reservoir. The volume of effluent discharged into Lake Conroe without diversion would very likely be substantially greater than the one-day volume of effluent that SJRA is concerned about with regard to displaced storage capacity in the lake. Hence, it is very likely that the proposed bed and banks permit actually will positively impact SJRA in terms of increased firm water from Lake Conroe, particularly when compared to the impact of a direct reuse project. Certainly this net benefit will be a factor in pricing the value of diversions by the MUDs if those diversions were accounted to SJRA's and Houston's water rights in a compelled service action.

With regard to the MUDs' bed and banks application, however, it is most significant that MUDs 8&9's rigorous 24-hour accounting will ensure that they do not divert more water than they are entitled to based on the amount of actual discharges. The Executive Director's technical staff have accepted 24-hour accounting as a reasonable operational time step, and also determined that the accounting plan will mitigate any possible impact that the MUDs' project may have on other water rights, including those of SJRA and Houston. To the extent that SJRA or Houston has a reasonable basis to assert that a different operational time step is warranted, MUDs 8&9 would be most interested in knowing what time step either would suggest.

*SJRA's intent to withhold the use of real property for an intake site when that intake facility will have no recognizable impact on SJRA operations or water rights is a threat intended to extract concessions of water and money from MUDs 8&9.*

MUDs 8&9's conveyance application does not ask the TCEQ to grant them real property interests in land, and the current Draft Permit does not do so. SJRA's statement that "the Draft Permit improperly authorizes the Applicant to utilize . . . real property" is another mischaracterization of the Executive Director's water rights technical and legal staff's efforts. MUDs 8&9 have never disputed that, in addition to securing water rights authorizations from the TCEQ, it must follow other legal procedures for securing any real property interests necessary to support physical facilities. SJRA's statement on page 5 of the May 9, 2011, letter that "*the necessary consent* for storing and diverting return flows from Lake Conroe cannot be secured through the use of the Applicant's eminent domain powers" is incomprehensible. The MUDs are not aware of any basis for condemning *consent*, and there certainly is no need for it. Perhaps

SJRA's point that its consent can't be acquired even for a paramount interest is another argument why giving SJRA and Houston an absolutely arbitrary power would be contrary to the public interest.

The real property interests suitable for the MUDs' intake and associated pipes should be made available to the MUDs at fair market value. If not, the MUDs can secure the necessary real property at fair market value through exercise of its eminent domain powers as a political subdivision. MUDs 8&9's upstream water supplier has municipal eminent domain power, as well. It is inappropriate for SJRA to ask the Executive Director to judge the scope of those powers, however, as that is a matter for the courts.

MUDs 8&9 have consulted an eminent domain specialist and are advised that the weight of the law would be on the MUDs' side of any dispute presented on these facts. As confirmed by the Texas Supreme Court, property subject to eminent domain also includes those property interests necessary to establish a diversion point on a reservoir owned by another political subdivision. *See Canyon Regional Water Authority v. Guadalupe-Blanco River Authority*, 258 S.W. 3rd 613 (Tex. 2008). Also, there is no particular limitation on municipal utility district powers that would apply to an intake facility. If the Executive Director wishes to review more information and argument regarding the scope of its eminent domain authority, MUDs 8&9 will provide it.

MUDs 8&9 must, however, point out that SJRA's proposition regarding the acquisition of real property interests also is a dangerous and potentially overwhelming path for the TCEQ to tread. The Executive Director should not make the TCEQ the arbiter of condemnation authority and actions as a prerequisite to permitting. To the contrary, the TCEQ routinely grants water rights, even reservoir permits, to a political subdivision owner that will subsequently acquire land rights in order to implement the permit it is granted. Permittees that are political subdivisions always themselves determine the methods and scope necessary to acquire particular real property interests *after* permitting, whether by fee title or easement and by agreement or condemnation. It would be absurd for a permittee to expend public money to acquire all necessary interests for an intake, much less all interests necessary for the footprint of a reservoir, before a permit is obtained. Nor should TCEQ put itself in the position of examining whether or not each real property interest associated with building a reservoir was adequately acquired, and resolving any title questions, and determining whether or not a condemnation proceeding accorded with the law and proper procedure.

*MUDs 8&9 must object that SJRA's and Houston's tactics in this matter are unorthodox and irregular under any known rules and procedures of the TCEQ.*

The Executive Director's and Chief Clerk's preparation and issuance of notice of a recommended draft permit commences certain procedural steps pursuant to the TCEQ's rules. Those rules, and the rules of the State Office of Administrative Hearings provide for an orderly consideration of the matters at issue that allow the parties the benefit of discovery and preparing arguments in a managed briefing schedule. SJRA's and Houston's actions, however, have required MUDs 8&9 to join the issues outside of a regular briefing schedule and should not be condoned. Again, their proposed amendment of the draft permit prior to contested-case hearing should be rejected for what it is—another step in SJRA's attempt to make it impossible to satisfy

recent groundwater district regulations by any means other than signing a contract to join SJRA's collective.

As a final point in response to SJRA's May 9, 2011, letter and SJRA's and Houston's meeting, the MUDs urge the Executive Director to consider the real public interest involved in the MUDs' ability to have the independent water supply that they are entitled to under the Water Code. If at any time MUDs 8&9 divert water that they are not entitled to or enter SJRA real property without having acquired sufficient real property interests, SJRA will have various avenues of recourse at the TCEQ and in the courts. The same safety is not true for the MUDs if they are forced into the SJRA plan. SJRA's proposed contract expires on the later of December 31, 2089, or retirement of all bonds, which will most likely be never.

SJRA and Houston are acutely aware that even a meritless *delay* is to their advantage. The actions of the Executive Director in this matter and specifically with regard to the current draft permit have a direct impact on the MUDs property interests in their water supply and their right to avoid coercion by a public entity under the TCEQ's supervision. MUDs 8&9 have relied on the Executive Director's technical staff's evaluation and memoranda and the staff's officially noticed conclusions and recommendations in finalizing the MUDs' engineering feasibility studies, in continuing to pursue a supplemental supply of contract water from the City of Huntsville (also to be delivered by bed and banks), in a Town Hall meeting with their residents prior to a tax bond election, and in preparing their groundwater reduction plan submitted to the Lone Star Groundwater Conservation District on April 1, 2011.

Montgomery County Municipal Utility Districts Nos. 8 & 9 greatly appreciate your attention and your staff's attention. This matter is critical to MUDs 8&9 for the future of their community and for satisfying their governmental responsibilities to secure the most reliable, healthful, and economically reasonable water supply possible. MUDs 8&9 have gladly accepted the Executive Director's invitation for discussion of their conveyance application and will welcome suggestions for a solution that could avoid the delays and expense of litigation. MUDs 8&9 also will be happy to provide other information that you may require.

Sincerely,

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September 6, 2011

Mr. Mark Vickery  
Executive Director  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78767-3087

VIA ELECTRONIC TRANSMISSION

RE: Application for Bed and Banks Authorization by Montgomery County Municipal Utility Districts Nos. 8 and 9 (1197-19)

Dear Mark:

My client, the San Jacinto River Authority ("SJRA"), and Ed McCarthy's client, the City of Houston (the "City"), recently received a copy of a June 24, 2011 correspondence to you from Carolyn Ahrens regarding SJRA and the City's protest of the above-referenced application (the "Application") filed by Ms. Ahrens' clients the Montgomery County Municipal Utility Districts No. 8 and No. 9 (the "Applicants"). Although SJRA and the City have provided you with detailed information and correspondence regarding their concerns with the Application and associated draft permit prepared by your staff (the "Draft Permit") and hope to reach a settlement with the Applicants, we believe it appropriate to respond to and address some of the misrepresentations included in Ms. Ahrens' correspondence.

1. SJRA and the City's attempt to "control" a state watercourse

It is suggested in Ms. Ahrens' correspondence that SJRA and the City are seeking control over the state watercourse upon which Lake Conroe is impounded by asserting that consent from the owners of Lake Conroe is necessary in order for the Applicants to convey groundwater-based effluent through and to divert such effluent from Lake Conroe. This assertion omits and misrepresents critical facts and points of law. SJRA and the City are not asking to control discharges into and diversions from the West Fork San Jacinto River or to interfere with whether TCEQ issues or denies the Application. SJRA and the City are only interested in protecting Lake Conroe, which is owned and operated by SJRA and the City at significant expense, and their certified rights in the reservoir. Although Lake Conroe impounds state water pursuant to its state-issued certificate of adjudication, it is not a state watercourse and is not owned, maintained or operated by the State of Texas.

The MUD's Application was filed pursuant to Texas Water Code § 11.042(b) and TCEQ regulations at 30 TAC § 295.112, which addresses bed and banks authorizations issued by TCEQ for the conveyance of groundwater-based effluent down a state *watercourse*. TCEQ regulations at 30 TAC § 297.1(59) define a "watercourse" to mean a "definite channel of a stream in which

water flows within a defined bed and banks, originating from a definite source or sources.” Such definition does not include man-made constructed impoundments of appropriated water, such as Lake Conroe.

TCEQ’s regulations at 30 TAC § 295.12 require the consent from a reservoir owner to store water in and/or divert and use water from another’s reservoir. Pursuant to this regulation, TCEQ has required reservoir owner consent before authorizing the use of another’s impoundment to deliver water to diversion facilities. Such consent should be required in the Draft Permit and any subsequently issued permit. Nothing in Texas Water Code 11.042(b) suggests a different treatment should be afforded when an applicant seeks to divert groundwater-based return flows from another’s reservoir.

By requiring consent from the owners of Lake Conroe before authorizing the discharge into and diversion from portions of Lake Conroe that are not from, near, or over the original channel bed of the West Fork San Jacinto River, TCEQ is recognizing the impacts such use will have on the operations and maintenance of Lake Conroe, as well as the real property and water rights held by the owners of the reservoir. TCEQ does not adjudicate real property rights, and has long held that the granting of a permit, such as a water right permit, does not grant or authorize the right to access or use the property of a third party. Requiring the “consent” proposed by SJRA and the City does not replace or usurp the TCEQ’s authority to issue a bed and banks authorization – it is merely a special condition within such authorization that recognizes the limitation of TCEQ in granting the water right. As we have noted in prior correspondence, TCEQ has historically required that applicants seeking to use another’s impoundment to deliver water to diversion facilities secure the owner’s consent. Such consent does not replace the need for a TCEQ-issued water right addressing the use of state water, but acknowledges impact on a valuable resource and the third party’s property rights. Nothing in Texas Water Code 11.042(b) suggests TCEQ should afford a different treatment for groundwater-based effluent being transported in another’s impoundment.

2. SJRA and the City’s goal to “take” the Applicants’ groundwater-based discharges

Ms. Ahrens’ attempts to distort SJRA and the City’s interest in protecting Lake Conroe as a means for them to “take, by default, [the Applicants’] groundwater-based discharges to the watercourse.” To be clear, SJRA and the City recognize that the Applicants have the right to directly reuse their wastewater effluent for beneficial purposes; however, the MUDs are not seeking to directly reuse its effluent. A direct reuse project by the Applicants would have no impact on Lake Conroe. Pursuant to Texas Water Code 11.042(b), the Applicants have the right to indirectly reuse their privately-owned, groundwater-based return flows by the use of the bed and banks of a state “watercourse.” The imposition of a special condition (designed to recognize and protect existing water rights and third-party resources) in an indirect reuse authorization does not prevent the issuance of that authorization.

The MUD's Application does not propose to merely use the bed and banks of a state watercourse to deliver return flows from the discharge point(s) to the diversion point(s). Instead, the Application seeks to use the facilities and associated storage of a non-state owned reservoir in which they have no ownership interest to convey and divert their return flows. But for the storage made available by Lake Conroe, the Applicants cannot physically accomplish the delivery of their return flows to the proposed diversion point(s). SJRA and the City's goal, through their hearing request, is to ensure that any permit issued by TCEQ pursuant to the Application contains special conditions necessary to protect their undisputed property rights and the water supplies in Lake Conroe which will be impacted by the Applicants' indirect reuse project. By requiring that the Applicants obtain consent and reach an agreement with the owners of Lake Conroe regarding the use of that resource, SJRA and the City's goal will be met in the Draft Permit and any subsequently issued water right permit.

3. SJRA's "premise that a pass-through of water constitutes storage of that water"

Ms. Ahrens mischaracterizes SJRA's concern that the pass-through of the Applicants' groundwater-based return flows through Lake Conroe will diminish the available storage in the reservoir. The perpetual discharge and diversion of return flows into and out of Lake Conroe will continuously utilize a portion of the storage space of the reservoir, just as if a water pipeline were placed in the lake to transport water from one bank of the lake to another. Such a scenario would serve to displace a certain amount of storage space in the lake that is either 1) unoccupied and available to the City and SJRA to impound inflows of water or 2) filled with appropriated water of the City and SJRA that will be displaced due to the presence of the return flows, whether or not confined to a pipeline.

Currently, SJRA and the City are authorized to impound up to 430,260 acre-feet of water in Lake Conroe. The Applicants seek to divert up to 1,008.86 acre-feet of return flows discharged into Lake Conroe per year (or 0.9 million gallons per day ("MGD")). If, for example, the Applicants seek to discharge and then subsequently divert 0.9 MGD of return flows from Lake Conroe at a time when SJRA and the City have impounded the maximum amount of water authorized for impoundment, the Applicants' indirect reuse of return flows will effectively occupy storage space in Lake Conroe that SJRA and the City own and could otherwise be utilizing and/or displace an equivalent volume of water from the lake possibly causing it to be sent over the spillway and downstream, thereby being lost to the owners of Lake Conroe. The continuous use of the storage space in Lake Conroe, even if small, uses property and facilities owned by the City and SJRA, as well as, impacts their use and operation of this senior water right, particularly during times when the lake is full. Such impact cannot merely be addressed through an accounting plan and should be recognized by the Applicants by obtaining the consent of SJRA and the City to impact Lake Conroe in such a manner. Moreover, the impact cannot be unilaterally authorized by a permit issued by the Commission. Further, the possible cumulative impacts to SJRA and the City if other dischargers upstream of the Lake Conroe dam seek similar authorizations could be significant.

4. SJRA's concerns about the unidentified intake locations are "diversionary"

Although Ms. Ahrens concedes that the Applicants' "intake facilities have not yet been finally designed", she attempts to argue that SJRA's concerns regarding the unknown location of the diversion point are not justified. The Applicants will need to utilize the real property owned by SJRA within the footprint of Lake Conroe in order to place their intake structure for their return flows. Such location will indeed impact the use of a portion of Lake Conroe by limiting recreation and navigation activities, at a minimum. The Applicants should be required to consult with and obtain the consent of the reservoir owner before being allowed to impose such limitations through the presence of an intake structure. Because the Applicants are subject to Chapters 49 and 54 of the Texas Water Code, as discussed in prior correspondence, consent for the location of diversion facilities cannot be secured through the use of the Applicants' eminent domain powers, contrary to the assertions made by Ms. Ahrens. SJRA and the City note this fact for you and your staff not, as Ms. Ahrens asserts, so that TCEQ can be "the arbiter of condemnation authority" but so that the agency understands the need for the Applicants to work with and secure the consent of SJRA and the City to use their real property interests in Lake Conroe to facilitate the Applicants' indirect reuse project. The imposition of special condition language in the Draft Permit requiring the execution of an agreement between the Applicants, SJRA and the City should address any concerns regarding the fact that the Applicants have not yet finalized the location of their diversion facilities and the imposition of such facilities within Lake Conroe.

5. SJRA's attempt to "dominate" water supplies

Ms. Ahrens dedicates a significant amount of her correspondence to discussing the Applicants' background and challenges in developing a groundwater reduction plan in accordance with the Lone Star Groundwater Conservation District's regulations. Ms. Ahrens repeatedly asserts that SJRA is attempting to "totally dominate water supply alternatives in Montgomery County" through its involvement in groundwater reduction planning for the county. The assertions made by Ms. Ahrens in this regard are not only an unfounded and egregious attempt to discredit SJRA and its mission as a public institution, they simply are not germane to the Application, Draft Permit or the associated pending protest by SJRA and the City. SJRA and the City, through their protest of the Application and Draft Permit, are taking the steps necessary to protect their real property interests, water rights, and water supplies in Lake Conroe, supplies which serve their customers and represent a significant, long-term, investment of these resources.

On June 13, 2011 I provided you with some special condition language for consideration and incorporation, if appropriate, into the Draft Permit before it is finalized. The suggested language would require that the Applicants reach agreement with SJRA and the City before diverting return flows from Lake Conroe and would be sufficient to satisfy SJRA and the City's concerns regarding the Application and Draft Permit. Inclusion of this requirement in no way impairs or usurps the Commission's authority to issue a water right authorizing the use of the bed and banks of a state watercourse. It does, however, recognize and protect the water rights and the real property rights of SJRA and the City of Houston.

Mr. Mark Vickery  
September 6, 2011  
Page 5

SJRA and the City hereby warrant that they will work in good faith to develop an acceptable agreement with the Applicants regarding the necessary consent to utilize Lake Conroe and will not unreasonably withhold such consent. This proposed resolution is beneficial to all parties, including TCEQ, inasmuch as it maintains the status quo and it serves to maintain the parties' current bargaining positions. Without such condition, SJRA and the City are forced to continue their request for a contested case hearing of this matter. For these reasons, I ask that the Draft Permit not be further processed until we are able to discuss this proposed language and complete discussion with the Applicants. Thank you, once again, for your attention to this important matter.

Sincerely,



Martin C. Rochelle

MCR/ldp  
1357684v2

cc: Ms. L'Oreal Stepney  
Ms. Linda Brookins  
Ms. Kellye Rila  
Mr. Robert Martinez  
Mr. Ed McCarthy  
Mr. Reed Eichelberger  
Mr. Jace Houston  
Mr. Ron Kelling  
Mr. Mike Page  
Ms. Michelle Smith

**Montgomery County  
Municipal Utility District No. 8**

c/o Johnson Radcliffe Petrov & Bobbitt PLLC  
1001 McKinney, Suite 1000  
Houston, Texas 77002-6424

**Montgomery County  
Municipal Utility District No. 9**

c/o Vinson & Elkins, L.L.P.  
1001 Fannin St., Suite 2500  
Houston, Texas 77002-6760

September 27, 2011

*Via Regular Mail and Facsimile Copy*

Mr. Mark Vickery, Executive Director  
Texas Commission on Environmental Quality  
P.O. Box 13807  
Austin, Texas 78767-3087

**RE: Montgomery County Municipal Utility Districts Nos. 8&9's Water Rights Application  
No. 12510 for Conveyance of Groundwater through a State Watercourse**

Dear Mr. Vickery:

We write to request your soonest possible affirmation that, as the Texas Commission on Environmental Quality's ("TCEQ") Executive Director, you stand behind and support the draft permit that was prepared by your water rights technical and legal staff regarding Montgomery County Municipal Utility Districts Nos. 8&9 ("MUDs 8&9") Water Rights Application No. 12510 for bed and banks conveyance of groundwater through a state watercourse on which Lake Conroe is constructed in Montgomery County.

Application No. 12510 was submitted almost two years ago, on October 2, 2009, and was declared administratively complete on April 12, 2010. After agency technical review, notice of the application and the recommended draft permit was provided pursuant to the agency's rules on March 23, 2011. MUDs 8&9 learned on May 25, 2011, that San Jacinto River Authority ("SJRA") subsequently contacted the Executive Director through correspondence and meeting, urging you to overrule your staff regarding the draft permit and to impose additional special conditions that would grant SJRA and the City of Houston authority to unilaterally prohibit implementation of any permit that may be issued by the TCEQ in this matter. We tremendously appreciated that you then invited our response and asked to meet also with MUDs 8&9. That meeting took place on June 27, 2011, and it was our understanding that we would be advised regarding your position on SJRA's request before the application proceeded.

Since the application was filed in 2009, MUDs 8&9 have described repeatedly our urgent need to proceed with bed and banks permitting with all possible speed. Groundwater district regulations require MUDs 8&9 to replace 30% of our historic water usage, and to meet all of our growth needs, with alternative water supplies and newly constructed facilities before year-2016. Delay in this matter has been and continues to be an SJRA tactic for defeating MUDs 8&9's bed and banks reuse in order to (1) force MUDs 8&9 to contract with SJRA for timely groundwater conversion, and (2) achieve the use of MUDs' 8&9 groundwater-based discharges to Lake Conroe without compensation to the MUDs. It is undisputed, even by SJRA, that the water rights for Lake Conroe were not authorized in reliance on those discharges.

This request for action that will move our application forward with full Executive Director support of the staff's recommended draft permit is made respectfully, and with

00086969

understanding that the state's dire drought emergency has placed unusual strain on the agency's time and resources. However, faced in four short years with the certain and permanent loss of more than 30% of the water supply that currently meets our resident's needs, MUDs 8&9 are forced *now* to make financing commitments and additional design and construction investments that will allow conjunctive use of groundwater, including groundwater from new wells, and bed and banks reuse of groundwater-based discharges by the regulatory conversion deadline.

SJRA's and the City of Houston's actions to monopolize water supply in Montgomery County and the context of the MUDs' water rights application are discussed in our response letter delivered to you on June 24, 2011. We find it imperative to emphasize again here that the actions of the Executive Director in this matter, specifically with regard to the current draft permit, have a direct impact on the MUDs' property interests in their water supply and their right to avoid coercion by a public entity under the TCEQ's supervision. MUDs 8&9 have relied on the Executive Director's technical and legal staff's evaluation and memoranda and the staff's officially noticed conclusions and recommendations in finalizing the MUDs' engineering feasibility studies, in continuing to pursue a supplemental supply of contract water from the City of Huntsville (discharged to the San Jacinto River in Walker County and also to be delivered to the MUDs by bed and banks of the state watercourse), in a Town Hall meeting with our residents prior to a successful tax bond election, and in preparing our groundwater reduction plan that has been certified by the groundwater district.

As stated above, we respectfully request your soonest possible affirmation of support for the draft permit that was recommended by your technical and legal staff and of which procedural notice was made in due course. MUDs 8&9 will be happy to provide any other information that you may require to expedite your consideration.

Montgomery County MUD No. 8

  
Ross J. Radcliffe, General Counsel

Montgomery County MUD No. 9

  
Clark S. Lord, General Counsel

cc: Mark Vickery, TCEQ (Mark.Vickery@tceq.texas.gov)  
Robert Martinez, TCEQ (Robert.Martinez@tceq.texas.gov)  
Todd Chenoweth, TCEQ (Todd.Chenoweth@tceq.texas.gov)  
L'Oreal Stepney (Loreal.Stepney@tceq.texas.gov)  
Linda Brookins (Linda.Brookins@tceq.texas.gov)  
James Aldredge, TCEQ (James.Aldredge@tceq.texas.gov)  
Kellye Rila, TCEQ (Kellye.Rila@tceq.texas.gov)  
Craig Mikes, TCEQ (Craig.Mikes@tceq.texas.gov)  
Roy McCoy, President, MCMUD No. 8 (roy@nwdls.com)  
Linda Wilson, President MCMUD No. 9 (lindarwilson43@gmail.com)  
Carolyn Ahrens (Carolyn@baw.com)  
Dr. Robert J. Brandes (Robert.Brandes@atkinsglobal.com)  
Mr. Jack Stowe (jstowe@jstoweco.com)  
Ms. Emily Rogers (ERogers@bickerstaff.com)

**TCEQ DOCKET NO. 2016-0469-WR  
APPLICATION NO. 12510**

<p><b>APPLICATION OF MONTGOMERY COUNTY MUDS 8 &amp; 9 FOR BED AND BANKS CONVEYANCE AND DIVERSION AUTHORIZATION</b></p>	<p><b>§ § § § § §</b></p>	<p><b>BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY</b></p>
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**APPLICANT MONTGOMERY COUNTY MUDS 8 & 9's  
RESPONSE TO REQUESTS FOR CONTESTED CASE HEARING**

# **EXHIBIT 2**

Texas Commission on Environmental Quality

INTEROFFICE MEMORANDUM

To: Craig Mikes  
Water Rights Permitting Team

December 06, 2010

From: Kathy Alexander, Technical Specialist  
Water Rights Permitting and Availability Section

Subject: Montgomery County MUD Nos. 8 & 9  
WRPERM 12510  
CN600736599 and CN600626519  
West Fork San Jacinto River (Lake Conroe)  
San Jacinto River Basin  
Montgomery County

**HYDROLOGY REVIEW**

**Application Summary**

Montgomery County MUD Nos. 8 & 9 (the MUDs) seek authorization to use the bed and banks of the West Fork San Jacinto River (Lake Conroe), tributary of the San Jacinto River, to convey current and future groundwater based return flows. TPDES Permit No. WQ0011371001 currently authorizes the discharge of 0.9 MGD from a combination of one existing and one proposed discharge point on the perimeter of Lake Conroe. The discharged return flows will be diverted at a diversion location(s) at, or inland from, the perimeter of Lake Conroe within or adjacent to the MUDs' boundaries, for municipal, industrial, and agricultural purposes within the MUDs' service area in Montgomery County.

**Review**

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 determine water availability and ensure that senior water rights are protected.

Resource Protection staff did not recommend instream flow requirements for this application, though they did recommend special conditions to protect aquatic organisms.

Staff acknowledges that the naturalized flow dataset for the San Jacinto WAM likely includes the MUDs' return flows. The procedure for adjusting the naturalized flows in this basin is consistent with the WAM Resolved Technical issues. Historic discharges from the MUDs did not meet the threshold for consideration in the naturalization process and are extremely small compared to the total flow. Therefore, in order to determine the impacts associated with current return flow volumes, staff modified the Full Authorization version of the San Jacinto WAM dataset (all basin rights utilize their maximum authorized amount) to include an estimate of the

*Montgomery County MUDs 8 & 9*

*Application 12510*

*San Jacinto River (Lake Conroe)*

2 of 3

MUDs' historic discharges. To estimate the historic discharges, staff used discharge data submitted by the MUDs for the period 2004-2008. Staff used the minimum monthly value for each month of the five year period to create constant inflow records. Staff then ran a simulation 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 the diversion of the discharged return flows, assuming that those diversions had the most senior priority date in the basin. Staff then compared results for the two simulations.

The results indicate that when 100% of the modeled historic discharge of 356 acre-feet was diverted, 7 of the approximately 140 modeled water rights showed a decrease in volume reliability. These rights include water diversion rights from Lake Conroe although the effect was minimal. The average decrease in volume reliability was 0.08%, with a maximum decrease of 0.26%. Staff conducted an additional simulation to determine the effect of a reduced level of diversions on the volume reliability of basin water rights. The results indicate that when 50% (178 acre-feet) of the modeled historic discharge was diverted, 5 water rights showed a decrease in volume reliability. The average decrease in volume reliability was 0.01% with a maximum decrease of 0.04%.

One water right authorized for municipal use was 100% reliable in the original scenario and was reduced below 100% when return flows were diverted, although the reduction was less than 0.04% when all return flows were diverted. Although availability for this water right was determined using the WAM, which may have included the MUDs historic return flows, staff does not believe that this water right would be impacted by the diversion of return flows because any actual impacts are well within the accuracy of the USGS stream gages used to determine the naturalized flows. Staff reviewed water rights in the San Jacinto River Basin and found no additional water rights that were granted based on the use and availability of the MUDs' groundwater based return flows.

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. In addition, because none of the affected water rights were based on the use and availability of the MUDs' return flows, this does not constitute an impact on these water rights. Requiring the MUDs to maintain an accounting plan will mitigate any possible impacts on existing basin water rights, should those impacts be determined to exist.

The MUDs provided an accounting plan on October 30, 2009 that accounts for discharges and diversion of return flows. To estimate losses, the MUDs propose to use the maximum calculated monthly loss rate of 0.08% for each month of the year. Staff reviewed the estimate of losses and accounting plan and found them adequate.

### **Conclusion**

TWC 11.042(b) specifically allows for the use of waters of the state for the conveyance of groundwater based return flows. The bed and banks of Lake Conroe meet the definition of a watercourse, and the water impounded in Lake Conroe is state water. The MUDs' groundwater based return flows are not part of the natural inflows to the reservoir and therefore cannot

Montgomery County MUDs 8 & 9

Application 12510

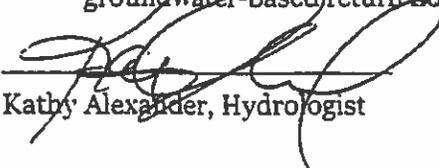
San Jacinto River (Lake Conroe)

3 of 3

impact the flows which were the basis of the Lake Conroe authorization.

Pursuant to TWC 11.042(b), the only limitations on the amount of return flows the MUDs 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 the MUDs' request to divert current and future groundwater based return flows provided the permit includes Resource Protection staff's recommendations and the following special conditions:

1. The 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, Permittees shall immediately cease diversion under this permit and either apply to amend the permit, or voluntarily forfeit the permit. If Permittees do not amend or forfeit the permit, the Commission may begin proceedings to cancel this permit. Permittees shall only divert the return flows that are actually discharged and if there is a permanent reduction in available return flows, Permittees shall immediately seek an amendment to the permit to reflect the reductions.
2. Permittees shall only divert and use groundwater based return flows pursuant to Paragraph 1. USE and Paragraph 3. DIVERSION in accordance with the most recently approved accounting plan. Permittees shall maintain the plan in electronic format and make the data available to the Executive Director and the public 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 Permittees fail to maintain the accounting plan or notify the Executive Director of any modifications to the plan, Permittees shall immediately cease diversion of discharged return flows, and either apply to amend the permit, or voluntarily forfeit the permit. If Permittees fail to amend the accounting plan or forfeit the permit, the Commission may begin proceedings to cancel the permit. Permittees shall immediately notify the Executive Director upon modification of the accounting plan and provide copies of the appropriate documents effectuating such changes.
3. Prior to diversion of groundwater-based return flows in excess of the amount currently authorized by TPDES Permit No. WQ0011371001, described in Paragraph 2. DISCHARGE, Permittees shall apply for and be granted the right to reuse those return flows. Permittees shall amend the accounting plan to include future discharges of groundwater-based return flows prior to diverting said return flows.

  
Kathy Alexander, Hydrologist

**TCEQ DOCKET NO. 2016-0469-WR  
APPLICATION NO. 12510**

<p><b>APPLICATION OF MONTGOMERY COUNTY MUDS 8 &amp; 9 FOR BED AND BANKS CONVEYANCE AND DIVERSION AUTHORIZATION</b></p>	<p>§ § § § § §</p>	<p><b>BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY</b></p>
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**APPLICANT MONTGOMERY COUNTY MUDS 8 & 9's  
RESPONSE TO REQUESTS FOR CONTESTED CASE HEARING**

# **EXHIBIT 3**

Bryan W. Shaw, Ph.D., *Chairman*  
Carlos Rubinstein, *Commissioner*  
Toby Baker, *Commissioner*  
Zak Covar, *Executive Director*



## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

October 10, 2012

Mr. Roy McCoy, President  
Montgomery County MUD 8  
PO Box 1268  
Montgomery, Texas 77356-1268

Re: Reconnaissance Investigation at:  
Montgomery County MUD 8 SW Treatment Plant, Conroe, Montgomery Co., Texas  
Regulated Entity No. RN101412922 TCEQ ID No.1700176, Investigation No.1035671

Dear Mr. McCoy:

On September 6, 2012, Mr. Barry Price of the Texas Commission on Environmental Quality (TCEQ) Houston Region Office conducted a site investigation of the above-referenced facility to evaluate the proposed surface water intake location for the proposed surface water treatment plant. The site appears to meet all the requirements of 30 Texas Administrative Code 290, Subchapter D rules. No violations are being alleged as a result of the investigation.

The TCEQ appreciates your assistance in this matter and your compliance efforts to ensure protection of the State's environment. If you or members of your staff have any questions regarding these matters, please feel free to contact Mr. Barry Price in the Houston Region Office at (713)767-3650.

Sincerely,

A handwritten signature in cursive script that reads "Leticia De Leon".

Leticia De Leon, Team Leader  
Public Water Supply  
Houston Region Office

LD/BHP/ra

cc: Montgomery County Environmental Health Department  
NRS Engineering Water Solutions, attn: David Pettry, 1222 E. Tyler, Suite C, PO Box 2544, Hartingen, TX 78551

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TCEQ Region 12 • 5425 Polk St., Ste. H • Houston, Texas 77023-1452 • 713-767-3500 • Fax 713-767-3520

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printed on recycled paper using soy-based ink

Bryan Shaw, Ph.D., *Chairman*  
Carlos Rubinstein, *Commissioner*  
Toby Baker, *Commissioner*  
Zak Covar, *Executive Director*



PWS/1700176/CO  
PWS/1700220/CO

**Texas Commission on Environmental Quality**  
*Protecting Texas by Reducing and Preventing Pollution*

April 5, 2013

Mr. Jesus Leal, P.E.  
NRS Engineers  
1222 E. Tyler, Suite C  
Harlingen, Texas 78550

Re: Montgomery County Municipal Utility District No. 8 – PWS ID No. 1700176  
Montgomery County Municipal Utility District No. 9 – PWS ID No. 1700220  
Exception to the 200-foot Intake Restrictive Zone Requirement  
Montgomery County, Texas  
RN 101412922 | CN 600736599  
RN 101411973 | CN 600626519

Dear Mr. Leal,

On March 7, 2013, the Texas Commission on Environmental Quality (TCEQ) received your letter dated March 5, 2013, providing supplemental information in support of your November 8, 2012 exception request to the requirement that all potable raw water intakes be protected by a minimum 200-foot restrictive zone as defined in 30 Texas Administrative Code (TAC) §290.122(a) and §290.41(e)(2)(C). Specifically you have requested a 55-foot restrictive zone for the proposed Lake Conroe potable water intake that will supply the Walden Road Treatment Plant for Montgomery County Municipal Utility Districts (MUDs) 8 and 9. Based on our review of the additional information you have submitted, we are **granting** your request for a reduced 55-foot restrictive zone for this intake under the following conditions:

1. The systems' Operations and Maintenance (O & M) manuals must be updated to contain procedures for the systems' staff to notify the appropriate legal authorities of any violations of this granted restrictive zone.
2. An emergency remediation plan (if not already in place) must be drafted and kept on file in the systems' O & M manuals and made available to TCEQ staff upon request. This procedure shall be utilized if contamination of the Lake Conroe source water should occur.
3. Each System must provide a 24-hour emergency contact telephone number to the appropriate San Jacinto River Authority (SJRA) Lake Conroe Division staff, so that the systems' operators can be notified if the SJRA becomes aware of a spill, boating accident, or any other event that could affect the raw water supplied to the Walden Road treatment plant.
4. Upon the identification of possible contamination of the source water, such as from a boating accident or fuel spill within 1000 feet of the intake or other cause, the systems' operators must terminate surface water production and notify the TCEQ. At that time, all water supplied to the community must be from the systems' other treatment facilities.

Mr. Jesus Leal, P.E.

Page 2 of 2

April 5, 2013

- Surface water treatment at the Walden Road treatment plant may resume upon mitigation of the accident with confirmation from chemical analysis that the source waters are safe, or the installation of additional TCEQ-approved treatment facilities, and approval from the TCEQ.
5. In the event that any Maximum Contaminant Level (MCL) for volatile organic contaminants (VOCs) is exceeded during routine compliance sampling at the Walden Road treatment plant entry point, **water service to customers from this facility must be terminated immediately upon receipt of the sample results from the laboratory, and the Walden Road treatment plant operator on duty shall notify TCEQ of the MCL violation.** The aforementioned emergency remediation plan, as defined in each system's O & M manual, will be implemented. Surface water treatment operations **may not** resume until the TCEQ has determined that all system facilities, including the distribution system, are safe and free of contamination.
  6. All hazardous wastes collected during the remediation of contaminated system facilities must be disposed in accordance with state and federal regulations as specified in 30 TAC §290.42(i).

Please note that this exception may be revised or revoked if water quality conditions change or if evidence is found that granting it has resulted in the degradation of potable water quality. This letter must be kept on file for as long as this exception is valid, and made available to TCEQ staff upon request.

If you have questions concerning this letter, or if we can be of additional assistance, please contact Mr. Mark Mikol, E.I.T., by email at [mark.mikol@tceq.texas.gov](mailto:mark.mikol@tceq.texas.gov), by telephone at (512) 239-6187, or by correspondence at the following address:

Technical Review & Oversight Team (MC 159)  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

Sincerely,



Joel Klumpp, Team Leader  
Technical Review and Oversight Team  
Plan and Technical Review Section  
Water Supply Division  
Texas Commission on Environmental Quality

JPK/MMM

cc: TCEQ Houston Regional Office – R12, Attn: Steve Smith (SM), Leticia DeLeon, Darla Branch  
Mr. John Schildwachter, TCEQ Drinking Water Protection Team (MC 155)  
Mr. Roy McCoy, President, P.O. Box 1268, Montgomery, TX, 77356-1268  
Ms. Linda R. Wilson, President, P.O. Box 1268, Montgomery, TX, 77356-1268

**TCEQ DOCKET NO. 2016-0469-WR  
APPLICATION NO. 12510**

<p><b>APPLICATION OF MONTGOMERY COUNTY MUDS 8 &amp; 9 FOR BED AND BANKS CONVEYANCE AND DIVERSION AUTHORIZATION</b></p>	<p><b>§ § § § § §</b></p>	<p><b>BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY</b></p>
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**APPLICANT MONTGOMERY COUNTY MUDS 8 & 9's  
RESPONSE TO REQUESTS FOR CONTESTED CASE HEARING**

# **EXHIBIT 4**



OPA

MAY 25 2011

By WS

Legal Department

CITY OF CONROE

May 23, 2011

Ms. LaDonna Castanuela  
Chief Clerk  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78767-3087

*WR*  
*72455*

CHIEF CLERKS OFFICE

2011 MAY 25 AM 10:04

TEXAS COMMISSION  
ON ENVIRONMENTAL  
QUALITY

Re: Application No. 12510 submitted by Montgomery County MUD No. 9  
and MUD No. 9 (1197-19)

Dear Ms. Castanuela:

At the request of the Mayor of the City of Conroe I am forwarding a copy of correspondence to the San Jacinto River Authority relating to a protest filed by Mike Mooney that is alleged to be an expression of the SJRA GRP Review Committee.

As a participant in the San Jacinto River Authority GRP Review Committee the City of Conroe does not support the protest and wishes to make it clear that the protest filed by Mr. Mooney does not represent Conroe.

The City of Conroe is unaware of any authorization given by the Review Committee to support the protest filed by Mr. Mooney in the Committee's name. The City of Conroe representative on the committee has reported that the Committee has taken no action to his knowledge to authorize the protest.

Sincerely,

Marcus L. Winberry  
City Attorney

MLW/pjp  
Enclosure

cc: Senator Robert Nichols  
Representative Brandon Creighton  
Mayor Webb K. Melder



Office of the Mayor

## CITY OF CONROE

May 13, 2011

H. Reed Eichelberger  
General Manager  
San Jacinto River Authority  
P. O. Box 329  
Conroe, Texas 77305

Certified Mail Receipt No. 7010 1870 0003 4705 2971  
& First Class US Postal

Re: GRP Advisory Committee member Mike Mooney's "letter of protest" to TCEQ regarding the permit application of Montgomery County MUDs 8 & 9

Dear Mr. Eichelberger:

I have been provided a copy of the attached letter signed by Mike Mooney, a member of the GRP Review Committee, addressed to the Texas Commission on Environmental Quality. The April 28, 2011 letter requests that the TCEQ consider the letter to be an expression of the Review Committee's formal protest of the above referenced application filed by MUDs 8 & 9.

Please confirm whether or not the GRP Review Committee authorized the protest filed by Mooney in the name of the Committee and provide me with a copy of the minutes of the Review Committee meeting at which the protest was authorized. Dean Towery, the City of Conroe's representative on the Review Committee has informed me that the protest letter was not authorized by the Committee and that he would not have favored supporting a protest of the permit application. Mr. Towery also believes that the Committee has no role in this matter as it is unrelated to the functions of the GRP. Since it appears that the letter was not authorized by the Committee please tell me who authorized that it be sent in the name of the Review Committee.

As Mayor of the City of Conroe I object to the use of GRP funds to pay any portion of the costs associated with the protest of the MUDs 8 & 9 application. Please confirm in writing that no portion of the GRP funds have or will be used for the purposes of opposing the disputed permit application.

Sincerely,

Webb K. Melder  
Mayor, City of Conroe

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
MAY 25 AM 10:04  
CHIEF CLERKS OFFICE