

DOCKET NO. 2016-0469-WR

APPLICATION OF MONTGOMERY COUNTY MUNICIPAL UTILITY DISTRICT NOS. 8 & 9 FOR WATER USE PERMIT 12510 § **BEFORE THE TEXAS COMMISSION**
§
§ **ON**
§ **ENVIRONMENTAL QUALITY**
§

**SAN JACINTO RIVER AUTHORITY'S
REPLY TO THE MONTGOMERY COUNTY MUDS 8 & 9'S RESPONSE TO
REQUESTS FOR CONTESTED CASE HEARING**

TO THE HONORABLE COMMISSIONERS:

The San Jacinto River Authority ("SJRA") hereby submits this, its Reply to the Response to Hearing Requests by the Montgomery County Municipal Utility District Nos. 8 & 9 (the "MUDs" or collectively, the "Applicant"), and in support of the recommendations made by the Executive Director ("ED") of the Texas Commission of Environmental Quality ("TCEQ" or "Commission") and by the Office of Public Interest Counsel ("OPIC") to grant SJRA's and the City of Houston's ("Houston's") requests for contested case hearing regarding the MUDs' Application No. 12510 (the "Application"), in TCEQ Docket No. 2016-0469-WR.

I. INTRODUCTION

SJRA concurs with the ED's and OPIC's recommendations that SJRA's hearing request be granted as it complies with the requirements of Title 30, Section 55.251(c), and specifically because SJRA is an "affected person" pursuant to the Commission's rules.¹ As noted in SJRA's original hearing request, it, along with Houston, is authorized under Certificate Adjudication No. 10-4963, as amended ("COA 10-4963") to impound 430,260 acre-feet of water in Lake Conroe, with annual diversion rights of 100,000 acre-feet of water.² In addition, SJRA owns the

¹ See 30 Tex. Admin. Code § 55.256(c).

² Certificate of Adjudication No. 10-4963 at 1-2.

submerged lands underlying Lake Conroe for the benefit of SJRA and Houston, and Houston and SJRA have funded, owned and operated Lake Conroe for more than sixty years. Clearly, the use of its property, Lake Conroe and the associated water rights, are impacted by the Application given that the MUDs seek the authority to use Lake Conroe to transport and divert groundwater based return flows.

II. ISSUES RAISED IN MUDS' RESPONSE

SJRA submitted its timely hearing request on April 28, 2011, identifying six grounds upon which SJRA interests are affected by the proposed draft permit prepared by TCEQ staff (the "Draft Permit"). In the Applicant's extensive 23-page Response, however, the Applicant only focused on three such interests – impacts to Lake Conroe storage, impacts to SJRA diversion rights, and SJRA's real property interests. SJRA responds to each of these, in turn below, while preserving its rights as to the balance of interests identified in its hearing request letter.³

Before addressing the specific issues raised in the MUDs' Response, SJRA highlights an important factual inaccuracy in the MUDs' Response relating to the history of the MUDs' Application. Specifically, the Applicant implies that its water supply options have been impaired by an SJRA regulation the Applicant frames as "SJRA's groundwater reduction program."⁴ The Applicant may have intended to reference the Lone Star Groundwater Conservation District's

³ See Letter from M. Rochelle to L. Castanuela, dated April 28, 2011 at 1-2 ("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 use of the bed and banks of 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 and/or the bed and banks of the Lake, 3) affirmatively requiring any real property interest for the diversion of water from Lake Conroe, 4) addressing the 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 the navigation within Lake Conroe, and 6) requiring the consent of SJRA or the City for the use of and diversion of water from Lake Conroe.").

⁴ MUDs Response to Hearing Requests ("MUDs Response") at 5.

(“Lone Star’s”) groundwater reduction requirements in Montgomery County. In light of Lone Star’s regulations requiring a reduction in Montgomery County groundwater use (adopted by Lone Star in 2003 and approved by the Texas Water Development Board in 2008), more than 151 water systems, including 80 separate participant entities (the “Participants”) turned to SJRA to provide treated surface water in order to meet growing customer demands and comply with Lone Star’s mandate. As such, the Applicant’s decision to pursue the Application’s bed and banks project reflects its response to Lone Star’s (not SJRA’s) regulations. Additionally, it was the MUDs’ choice to satisfy Lone Star’s requirements in a manner that impacts existing water rights in and through Lake Conroe, and associated property interests.

A. Storage

The MUDs’ Response bases much of its argument on the characterization of its Application as seeking authorization to “[p]ass[] water through an impounded watercourse.” This characterization is, at best, a significant oversimplification of the facts. The MUDs’ proposed return flows project would not be feasible but for the use of Lake Conroe, owned and operated by SJRA and Houston, to receive the MUDs’ discharges for subsequent diversion. Simply put, the project anticipates the ability to make use of storage in Lake Conroe.⁵ As provided by the Applicant’s own drawings,⁶ their return flows are discharged from the south side of a peninsula that is located on the southwest portion of the lake, and the Draft Permit does not limit diversion

⁵ SJRA remains concerned that despite TCEQ protocols for 24-hour accounting, the MUDs may, in fact, rely upon Lake Conroe storage to later divert or “true up” return flows that the MUDs failed to divert pursuant to the TCEQ-approved accounting protocol. SJRA’s concerns are underscored by the MUDs’ Response, acknowledging “imperfection[s] . . . that may exist in *the MUDs’ approach* to a 24-hour accounting cycle.” MUDs Response at 16 (emphasis added).

⁶ See Exhibit 1 to the MUDs Response, at 1-2, and corresponding maps (cleaner copies of which are provided hereto as **Exhibit 1** to this Reply).

to locations downstream of the MUDs' discharge.⁷ As such, the MUDs' project would not simply "pass[] water through an impounded watercourse," as the MUDs' Response contends,⁸ but, in fact, would allow the MUDs to access the return flows they seek to appropriate *upstream* from where such flows are physically discharged. Clearly, through the Application, the MUDs seek the authorization to use the property interests of others (i.e., both storage space in Lake Conroe owned by SJRA and Houston and stored water in Lake Conroe appropriated by SJRA and Houston) for the benefit of the MUDs' indirect reuse project. As such, the MUDs' reuse proposal is physically incapable of being achieved in the absence of their proposed use of the property interests of SJRA and Houston, and therefore SJRA is an affected person entitled to a contested case hearing.

B. Diversion Rights and Accounting Plan

As provided in its hearing request, SJRA relies upon water supplies in the San Jacinto River Basin, including under COA 10-4963, to meet the various municipal and industrial demands of its customers. Such needs are met, in part, by diversion authorizations pursuant to COA 10-4963, serving Participants of Montgomery County, in addition to other customers downstream of Lake Conroe.

The Applicant's Response argues that it anticipates no adverse impacts on SJRA's diversion rights, in part, because the volume of its return flows is small in comparison to the total impoundment authorization of COA 10-4963.⁹ However, the MUDs' rationale ignores the purpose of TCEQ's strict accounting requirements for bed and banks water rights. There is no

⁷ The Draft Permit, as prepared, does not require the MUDs' diversion point to be located downstream of the MUDs' discharge, providing that "Permittee is authorized to divert the groundwater-based return flows at a maximum combined diversion rate of 3.422 cfs (1,500 gpm) from a point or points to be determined at or inland from the perimeter of Lake Conroe." (emphasis added).

⁸ MUDs Response at 13.

de minimis exception to the requirement that groundwater based return flows be limited to discharge amounts less carriage losses. In fact, the Applicant signals in the MUDs' Response its apparent inability to comply with the TCEQ's 24-hour accounting protocol.¹⁰ Specifically, the Applicant asks TCEQ to grant a Special Condition that allows for "make up [of] any discovered over-diversion. . ." ¹¹ To the extent that the MUDs' diversions ever exceed the return flows sourced in the MUDs' discharges, less losses, the MUDs would literally be diverting water stored in Lake Conroe by SJRA and Houston, and therefore SJRA's senior water rights would be affected, particularly in times of drought.¹²

Even if the Applicant were correct as to its individual effects, the aggregate result of "imperceptible" diversions from the reservoir will, over time, impair existing rights (particularly if proper, TCEQ-approved accounting protocols are not followed). Consequently, TCEQ should not entertain the Applicant's "drop in the bucket" argument, given the costs and risks to SJRA and Houston.

C. Real Property Interests

Finally, as the MUDs have acknowledged, the use of SJRA's real property along Lake Conroe is necessary for the MUDs to construct diversion infrastructure on Lake Conroe's banks and into the water body. SJRA and the MUDs have attempted to negotiate a real property access agreement, although a final agreement has not been reached. The Applicant's contention that it could merely condemn SJRA property¹³ does not lessen the burden of such an act on SJRA's interests, as its property and storage in Lake Conroe would be subject to the MUDs' control and

⁹ *Id.* at 15-16.

¹⁰ *See id.* at 22.

¹¹ *Id.*

¹² *See* note 5 and accompanying text regarding the Applicant's reference to the "MUDs' approach to a 24-hour accounting cycle."

use.¹⁴ Further, despite the MUDs' assertion, their ability to condemn SJRA's real property is not absolute, as condemnation between public entities is subject to a balancing framework, pursuant to established Texas law.¹⁵

III. ISSUES FOR REFERRAL

SJRA concurs with the ED's and OPIC's recommendations, as the issues SJRA raises are appropriate for referral to the State Office of Administrative Hearings ("SOAH"). The Commissioners should not limit the scope of issues to be referred to SOAH, despite the MUDs' request, as such scope reduction is not available for water rights applications subject to Chapter 11 of the Texas Water Code.¹⁶

IV. ALTERNATIVE DISPUTE RESOLUTION

Although SJRA has attempted to negotiate a settlement with the MUDs and Houston for several years without resolution, it is amenable to referral to TCEQ's alternative dispute resolution process if such referral is the will of the Commissioners, and Houston and the MUDs are agreeable to same.

V. CONCLUSION

For the reasons stated above, and in light of SJRA's "affected person" status pursuant to the Commission's rules, SJRA requests that the TCEQ Commissioners grant SJRA's request for

¹³ See MUDs Response at 13.

¹⁴ See Exhibit 1 to MUDs Response at 6, by which SJRA notes that "[e]ven if the Applicants were authorized to use eminent domain for their project, such use is simply ill suited for this matter" in light of SJRA's and Houston's capital investments in Lake Conroe. In that correspondence with TCEQ, SJRA adds that "[t]he use of eminent domain procedures to establish the value of that investment, particularly for the storage space of the Lake, is simply not appropriate."

¹⁵ See, *Canyon Reg'l. Water Auth. v. Guadalupe-Blanco River Auth.*, 258 S.W.3d 613 (Tex. 2008).

¹⁶ See Tex. Water Code Ann. §§ 5.551 (limiting the application of Subchapter M to "a permit issued under Chapter 26 or 27 of this code or Chapter 361, Health and Safety Code). Subchapter M includes Tex. Water Code Ann. § 5.556(e), by which the TCEQ may limit issues for SOAH referral for qualifying permit applications.

Docket No. 2016-0469-WR
Reply to Response to Contested Case Hearing Requests
Application No. 12510
Page 7

a contested case hearing on the Application and the associated Draft Permit, as recommended by the ED and OPIC.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served via hand delivery, facsimile, electronic mail, overnight mail, U.S. mail and/or Certified Mail Return Receipt Requested on all parties whose names appear on the following mailing list on this 12th day of September, 2016.

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Docket No. 2016-0469-WR
Reply to Response to Contested Case Hearing Requests
Application No. 12510
Page 9

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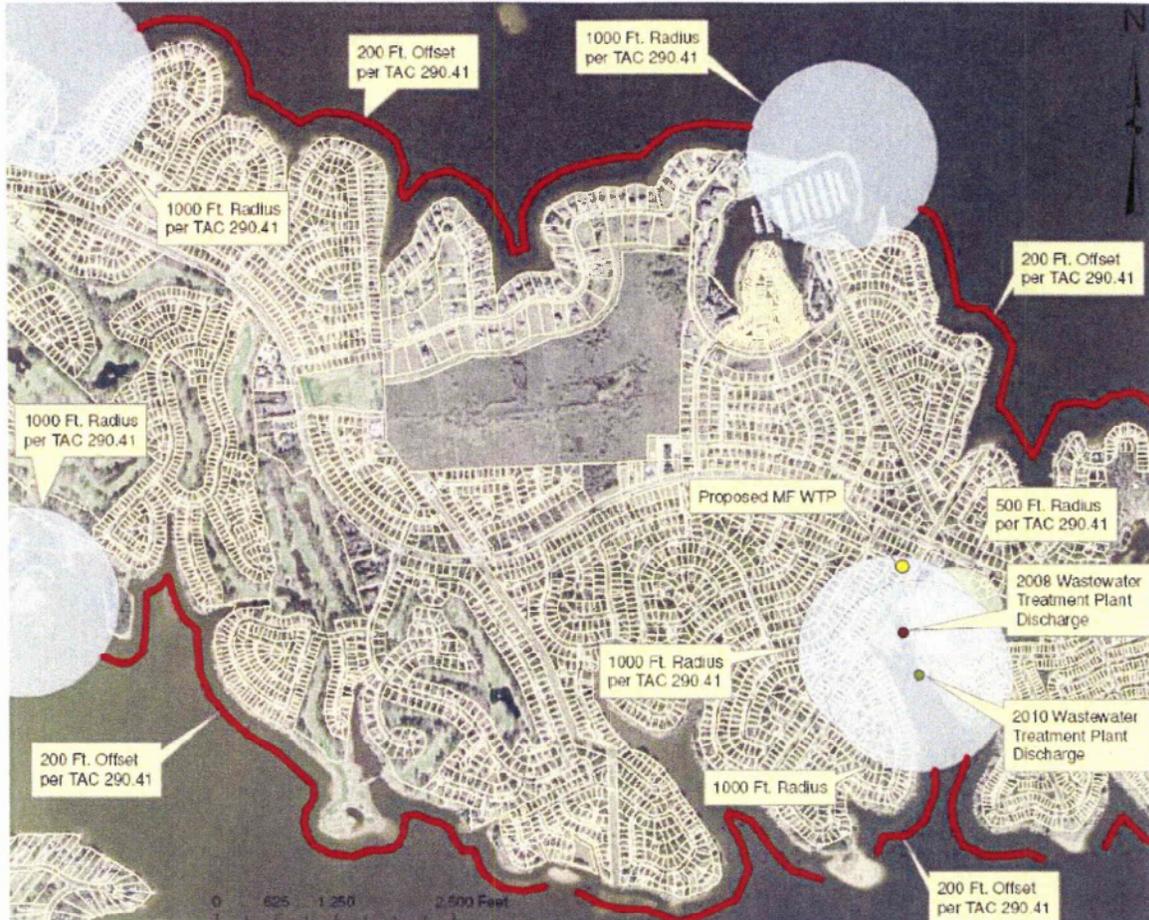
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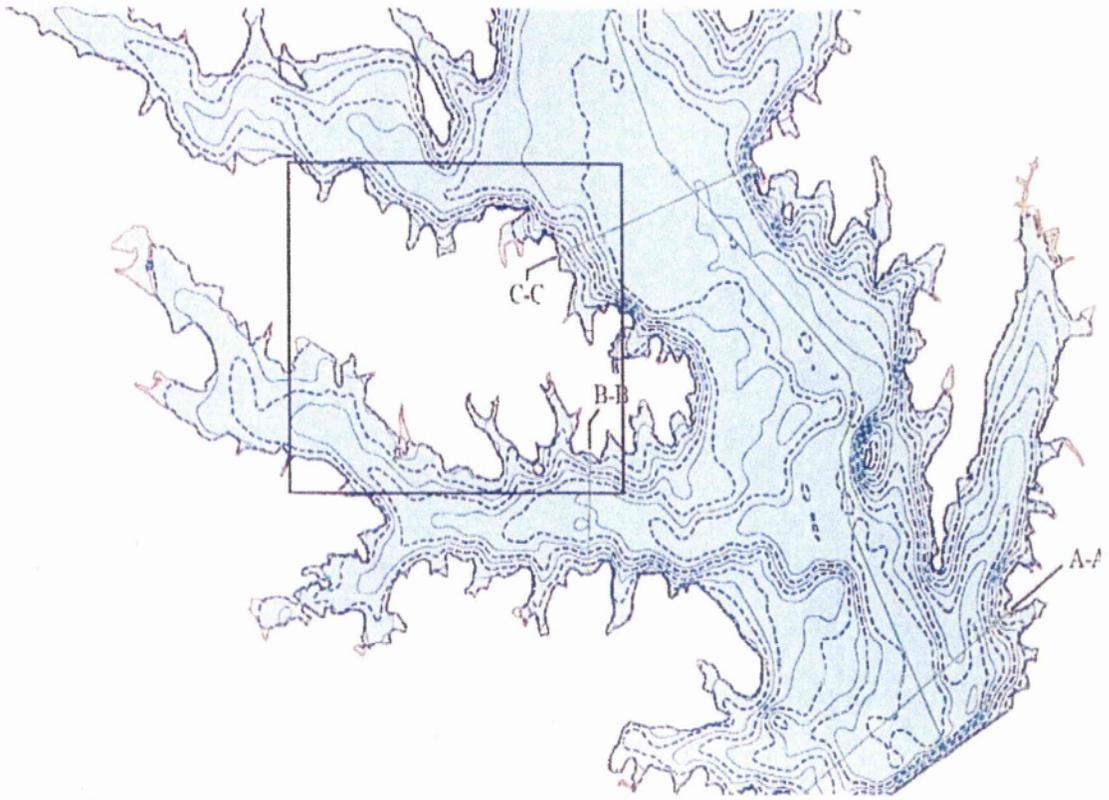
Exhibit 1



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



Proposed options for diversion points from Lake Conroe.



Lake Conroe.

Mr. Rochelle's Direct Line: (512) 322-5810
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May 9, 2011

Mr. Mark Vickery
Executive Director
Texas Commission on Environmental Quality
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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

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

Mr. Mark Vickery
May 9, 2011
Page 4

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

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
Page 7

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