

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

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

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**BEFORE THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY**

**GUADALUPE-BLANCO RIVER AUTHORITY’S REPLY**

**I. Introduction**

The Guadalupe Blanco River Authority (“GBRA”) timely filed a request for a contested case hearing regarding the Application by New Braunfels Utilities (“NBU”) for Water Use Permit No. 12469 (the “Application”). GBRA also asked the Commission to dismiss the Application because, as GBRA explained in its plea to the jurisdiction, GBRA believes the Application asks for an authorization that, on its face, cannot be sought or granted under applicable law. The Executive Director of the Texas Commission on Environmental Quality (“TCEQ” or the “Commission”) responds that the plea is misplaced, doesn’t address the substance of the Plea, but agrees GBRA is entitled to a contested case hearing. The Office of Public Interest Counsel (“OPIC”) agrees that GBRA is entitled to a contested case hearing. NBU says no one is entitled to a hearing on its Application, but if the Commission decides to nevertheless hold a hearing, it should take the unprecedented step of confining the ALJ’s discretion, and it should avoid addressing an obviously relevant legal question raised by GBRA—namely, whether this permit can be issued given the prohibitions in the Edwards Aquifer Authority Act (the “EAA Act”). GBRA replies as follows.

**II. The EAA Act Limits Edwards-Derived Water to Direct Reuse, Precluding an Indirect-Reuse Authorization.**

GBRA asks TCEQ to find that, in accordance with the Edwards Aquifer Authority Act, all treated wastewater derived from groundwater withdrawn from the Edwards Aquifer (1)

becomes surface water and property of the State when discharged to a watercourse; (2) may not be transported for indirect reuse pursuant to Texas Water Code Section 11.042 or otherwise; and (3) may not be used outside the boundaries of the EAA. GBRA asks the Commission to make these findings because that is exactly what the EAA Act says. The Commission cannot simply ignore the EAA Act: By its express terms, the EAA Act gives the Commission statutory enforcement responsibility against those who violate the prohibition against indirect reuse of Edwards groundwater and the prohibition against use of Edwards groundwater outside the boundaries of the EAA.<sup>1</sup> The Commission has responsibility via mandamus powers to assure that the Edwards Aquifer Authority enjoins such activities.<sup>2</sup> To be able to satisfy this responsibility, the Commission must be ready, willing, and able to construe the EAA Act. GBRA asks the Commission to do so.

As set forth in detail in GBRA's plea to the jurisdiction, the EAA Act limits the authority of TCEQ in this matter. Those arguments are not repeated here, but in furtherance of your consideration, GBRA adds the following. While TCEQ can grant an indirect reuse authorization for most groundwater or groundwater-based effluent under Texas Water Code §11.042(b), the more specific statute—the EAA Act—carves out an exception with respect to Edwards-derived groundwater and groundwater-based effluent to TCEQ's general authority under §11.042. The EAA Act makes clear that any reuse of Edwards water must occur before the unconsumed water returns to a body of state-owned water:

“Reuse” means authorized use for one or more beneficial purposes of use of water that remains unconsumed after the water is used for the original purpose of use

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<sup>1</sup> See e.g. EAA Act at §§1.30, 1.39 & 1.40. “AN ACT ...relating to . . . the management of the Edwards Aquifer” addresses more than pumping—it also addresses use and reuse of Edwards water.

<sup>2</sup> EAA Act at §§1.38 & 1.39.

*and before the water is discharged or otherwise allowed to flow into a watercourse, lake, or other body of state-owned water.*<sup>3</sup>

The EAA Act is thus unambiguous in defining the line between reuse for Edwards-derived water and the point that the water or effluent—by statutory edict—becomes state water.

This express limit on indirect conveyance irreconcilably conflicts with Texas Water Code § 11.042(b) with respect to Edwards Aquifer-derived water. Section 11.042(b) provides:

A person who wishes to discharge and then subsequently divert *and reuse* the person's existing return flows derived from privately owned groundwater must obtain prior authorization from the commission for the diversion and the reuse of these return flows.<sup>4</sup>

When this provision was enacted in 1997, the Legislature was well aware of the 1993 enactment of the EAA Act<sup>5</sup>—built on findings that the Edwards Aquifer constituted “a unique and complex hydrologic system” and “a distinctive natural resource in this state.”<sup>6</sup> The Legislature did not purport to alter or redefine the parameters of that comprehensive legislative system, which carefully balanced the relationship between the aquifer and the spring flow that is the lifeblood of the Guadalupe River Basin surface water rights. A further history of the backdrop of the EAA Act and an explanation of the threat to GBRA's water rights if the legislative balance struck in the EAA Act is ignored is set forth in recent sworn testimony of Bill West (excerpt attached).<sup>7</sup>

Where there is such a direct conflict, the special provision prevails over the general provision, even when the general provision is later-enacted, unless the Legislature expresses a “the manifest intent” that the general provision prevail.<sup>8</sup> The EAA Act and Texas Water Code

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<sup>3</sup> EAA Act § 1.03(19) (emphasis added).

<sup>4</sup> (emphasis added).

<sup>5</sup> See, e.g., *Acker v. Tex. Water Comm'n*, 790 S.W.2d 299, 301 (Tex. 1990) (“A statute is presumed to have been enacted by the legislature with complete knowledge of the existing law and with reference to it.”).

<sup>6</sup> EAA Act § 1.01.

<sup>7</sup> Direct Testimony of William E. West, Jr. for Guadalupe-Blanco River Authority, In the Matter of the Application of GBRA for New Water Use Permit No. 12378, SOAH Docket No. 582-15-2477, TCEQ Docket No. 2014-1658-WR (Feb. 22, 2016).

<sup>8</sup> Tex. Gov't Code § 311.026.

11.042(b) cannot be harmonized because the EAA Act precludes indirect use through its discrete and express definition of “reuse.” In 1993 when the EAA Act was enacted, the possibility of bed and banks conveyance was long and well understood.<sup>9</sup> By defining “reuse” as direct—and only direct—reuse, the EAA Act struck a balance for the overall system of groundwater, spring flow, and surface water rights. Neither the express terms of Texas Water Code § 11.042(b) nor the legislative history associated with its enactment in SB 1 (1997) express *any* intent or desire to override the cautiously crafted, comprehensive scheme set out in the EAA Act.<sup>10</sup>

The EAA Act’s legal consequences have never been squarely presented to this Commission or the courts for decision. While dicta<sup>11</sup> and prior unchallenged TCEQ actions<sup>12</sup> exist, TCEQ has only that authority conferred on it by statute<sup>13</sup> and, therefore, an obligation to construe the limits of its statutory authority. “When the Legislature acts with respect to a particular matter, the administrative agency may not so act with respect to the matter as to nullify the Legislature’s action even though the matter be within the agency’s general regulatory field.”<sup>14</sup>

NBU mistakenly asserts that the Austin Court of Appeals “acknowledged TCEQ’s jurisdiction over water rights and reuse of groundwater-based return flows.” Instead, that court held only that it would not decide the issue in the context of a Government Code 1205 Public

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<sup>9</sup> For example, the Texas Legislature’s conception of bed & banks authorizations is documented in 1917 legislation. H.B. 237, 35th Leg., Reg. Sess., ch. 88, § 50 (Tex. 1917).

<sup>10</sup> See e.g., SB 1 (1997) HRO Bill Analysis and House Committee Report Analysis available at <http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=75R&Bill=SB1#>.

<sup>11</sup> For example, NBU expressly acknowledges in its footnote 20 that the statements NBU cites from *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814 (Tex. 2012) were dicta.

<sup>12</sup> GBRA is aware of two small, uncontested, 11.042(b) authorizations issued by TCEQ for Edwards-derived effluent. Water right permit 5705 authorized the San Antonio Water System (“SAWS”) to transport Edwards-derived wastewater approximately 790 feet downstream within the bed and banks of the San Antonio River, then to divert, pipe, and discharge the Edwards-derived effluent approximately 2000 feet upstream for instream flows. SAWS’s permit went to limited notice and was granted without a contested case hearing. Similarly, the San Antonio River Authority (“SARA”) water right permit 5917 authorized SARA to use the bed and banks of Martinez Creek to discharge and transport Edwards-derived effluent from three wastewater treatment plants to a downstream diversion point for reuse as municipal, industrial, and irrigation water within Bexar County. Like the SAWS permit, SARA WR 5917 went to limited notice only and was granted without a contested case hearing.

<sup>13</sup> *In re Entergy Corp.*, 142 S.W.3d 316, 322 (Tex. 2004).

<sup>14</sup> *State v. Jackson*, 376 S.W.2d 341, 344-45 (Tex. 1964).

Security Declaratory Judgment Action. The counterparties argued TCEQ has jurisdiction to make the determination GBRA is asking this Commission to make, but the Austin Court of Appeals did not reach those assertions. GBRA is now asking that TCEQ construe the scope of statutory authority given the provisions of the EAA Act as it considers this specific Application. Consider the absurdity of the contrary: that the Commission has the authority under Water Code Section 11.042(b) to authorize actions that are clearly prohibited under the EAA Act—actions that under the express terms of the EAA Act, the Commission may enforce against through penalties or should cause the EAA to enjoin via the Commission’s mandamus power.<sup>15</sup>

### **III. TCEQ has Authority to Construe its Legislative Authority, and Now is the Appropriate Time to Do So.**

Just like a court can decide a plea to the jurisdiction, so too can TCEQ decide its own jurisdiction as an initial matter. Indeed, while district courts are courts of general jurisdiction, a “similar presumption does not exist for administrative agencies, which may exercise only those powers the law confers upon them in clear and express statutory language and those reasonably necessary to fulfill a function or perform a duty that the Legislature has expressly placed with the agency.”<sup>16</sup> Thus, GBRA’s request that TCEQ construe the relevant statutes that collectively define the scope of its authority in this matter was styled as a plea to the jurisdiction. It may well be that every agency has jurisdiction to decide what it can and cannot do, and thus the plea is not the vehicle the Commission will or should utilize here to conclude that it cannot, as a matter of law, grant NBU’s Application. But that should not change the outcome, nor the appropriate timing for considering the question.

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<sup>15</sup> EAA Act § 1.38, 1.39, 1.40.

<sup>16</sup> *In re Entergy Corp.*, 142 S.W.3d at 322.

Commission rules make clear such key legal interpretations are appropriately decided by the Commission. When legal interpretation questions arise *during* a hearing, on motion, the judge may certify certain types of questions to the Commission and may abate the hearing:

Certified questions may be made at any time during a proceeding, regarding commission policy, [or] jurisdiction, . . . Policy questions for certification purposes include, but are not limited to: (1) the *commission's interpretation of its rules and applicable statutes*; (2) which rules or statutes are applicable to the proceeding; or (3) whether commission policy should be established or clarified as to a *substantive* or procedural issue of *significance to the proceeding*.<sup>17</sup>

NBU suggests there is no need for the Commission to even entertain the plea, all the while arguing extensively that the Commission should make legal determinations for purposes of narrowing the scope of the hearing. GBRA's request is for similar narrowing, but focuses on legal questions not factual. The legal relationship between the Texas Water Code and the EAA Act is critically important to the outcome of this proceeding. According to 30 TAC § 50.115(f), the disputed issues for hearing are "deemed to be those *defined by law governing these applications*, unless the commission orders otherwise under 80.6(d)."<sup>18</sup> Thus, TCEQ can and should recognize the governing laws include the EAA Act, a law which specifically provides enforcement authority for TCEQ,<sup>19</sup> and can and should resolve the questions of the EAA Act's effect on this matter.

If NBU truly wants to "ensure that SOAH's proceeding does not unreasonably tax public resources,"<sup>20</sup> it should support the Commission addressing this foundational legal issue now.

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<sup>17</sup> See 30 Tex. Admin. Code § 80.131(b) (emphasis added). If necessary, a motion for summary judgment is another vehicle to pursue a legal determination on the request for Edward's-derived water. These procedural tools are not exclusive, however, and represent unnecessary steps to reach a Commission determination that is proper through this proceeding.

<sup>18</sup> (emphasis added).

<sup>19</sup> See the EAA Act at §1.03 (Commission is the Texas Natural Resource Conservation Commission, predecessor to TCEQ) and subsequent amendment at §1.26A regarding TCEQ and its role in critical period management.

<sup>20</sup> NBU's Response to Hearing Requests at 39.

Holding a hearing on an authorization TCEQ must ultimately deny as beyond its statutory authority is not a sound use of anybody's resources.

**IV. If TCEQ Defers Acting on GBRA's Plea, GBRA Maintains that NBU's Application is an Application for an Appropriation of State Water; Accordingly, a Right to Hearing is Provided by Law**

Absent a legal determination that NBU's Application for groundwater-based effluent is *not* an application for an appropriation of state water, the right to hearing for the use of state water applies.<sup>21</sup> NBU stating repeatedly that its Application is only for privately-owned groundwater<sup>22</sup> does not make it so, nor does it make that statement dispositive of whether a hearing can or should be granted on the Application. The nature of NBU's Application is a legal question to be determined by the Commission and the courts. Setting aside for the moment GBRA's position that: (1) NBU's Application is for an appropriation of state water; NBU's Application is fundamentally flawed; and (3) neither the Application nor the administrative record can support issuance of a water right outside the priority system, GBRA is still entitled to a hearing.

**V. GBRA is Entitled to a Hearing Even if TCEQ Determines the Effluent is Not State Water.**

NBU asserts it is "effectively" pursuing an application for "privately owned groundwater," though it has never amended its Application to drop the surface-water based authorization under Texas Water Code § 11.042(c) authorization. According to NBU, the right to a hearing was provided because of the § 11.042(c) request and—even though § 11.042(c) no more expressly states a right to a hearing than § 11.042(b)—now TCEQ should abandon the present procedural path.

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<sup>21</sup> Tex. Water Code § 11.132.

<sup>22</sup> See e.g., *id.* at 7, 8-9, 21, 29, 30.

The Executive Director is correct that Texas Water Code § 11.132(a) provides a right to hearing for bed and banks authorizations under 11.042(b) and (c) because NBU has filed an application for a water right. No question exists that NBU has filed an Application under Chapter 11 of the Water Code, and the right to a hearing is triggered by such Application. NBU somehow wants its Application to be construed as something other than an application for a “water right”<sup>23</sup> or a right to “use state water.”<sup>24</sup> But that characterization ignores NBU’s specific request to use state water within the state’s watercourse to carry effluent for subsequent diversion—NBU is asking to use state water and the State’s bed and banks as a delivery system. NBU can’t isolate the groundwater-based effluent molecules from what even it would acknowledge is state water in that watercourse—ensuring the security of the state water and its management is precisely what a bed & banks request is all about. A hearing is both necessary and appropriate<sup>25</sup> because the privilege of using the state’s water and its watercourse for conveyance and treatment implicates the rights of existing water right holders, water quality, environmental flows, and the Commission’s ability to effectively manage the surface rights in the basin. Accordingly, this Commission recently referred City of Pearland’s bed and banks application to a hearing.<sup>26</sup> Thus, even if the Application were actually amended to exclude 11.042(c), the request under 11.042(b) still triggers the right to a hearing under the Texas Water Code.

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<sup>23</sup> Tex. Water Code § 11.002(5).

<sup>24</sup> “‘State water’ means (a) The water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state is the property of the state; (b) Water imported from any source outside the boundaries of the state for use in the state and which is transported through the beds and banks of any navigable stream within the state or by utilizing any facilities owned or operated by the state is the property of the state.” Tex. Water Code 11.021.

<sup>25</sup> While the Water Code expressly provides for a hearing, it also grants TCEQ general powers to call hearings. Tex. Water Code § 5.102.

<sup>26</sup> Application by the City of Pearland for New Water Use Permit No. 13071, TCEQ Docket No. 2016-0160-WR , SOAH Docket No. 582-16-5061 (seeking authorization to divert and use not to exceed 280 acre-feet per year of historically discharged surface water and groundwater-based return flows).



**VI. GBRA is an Affected Person Entitled to a Contested Case Hearing on NBU's Application.**

As acknowledged by the ED and OPIC, GBRA provided a timely hearing request that establishes its status as an affected person—GBRA's water rights are upstream, at, and downstream of NBU's proposed discharge and diversion.

NBU's principle complaints are that GBRA's claimed interests "relate exclusively to state water" and that GBRA has not rebutted TCEQ and NBU's modeling, which both *demonstrate impacts to existing water rights*. First, the status of Edwards-derived water as state water, once discharged, is precisely the legal issue GBRA asks the Commission to consider at the outset—whether or not Edwards-derived water can be discharged into a river and then be reused. And if not, TCEQ is precluded from acting in any way except to dismiss the Application. NBU wants to ignore this threshold matter; it also wants TCEQ to tacitly adopt NBU's construction of the law without consideration. Second, GBRA expressly indicated in its hearing request that its senior water rights would be impaired in a number of ways. Even under NBU's view of the world, its own modeling showed impacts, though NBU asserts the effect on GBRA is "minimal." In fact, the TCEQ modeling indicated that groundwater-based diversions of 3,293 acre feet would impact 115 senior water rights. Yet, NBU's submitted modeling indicates that groundwater-based diversions of 9,408 acre-feet would affect 76 water rights. In *Sierra Club v. Texas Comm'n on Env'tl. Quality*,<sup>27</sup> the Commission was recognized to have discretion to weigh and resolve matters that may go to the merits of an underlying application, including the likely impact of the regulated activity. But the facts are telling. In that case, people located over three miles away, expressing generalized concerns about pollution where modeling indicated "no detrimental impact to a potential off-site resident at the property

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<sup>27</sup> 455 S.W.3d 214, 223 (Tex. App. 2014), reh'g overruled (Feb. 13, 2015), review denied (Oct. 9, 2015).

boundary,” among other things, were held by the Commission not to be distinguishable from the general public.<sup>28</sup> Surely GBRA does not need to rebut modeling *that shows impacts*—the very existence of that modeling supports granting GBRA’s hearing request so that TCEQ can conduct an evaluation of what is and is not “minimal.” GBRA expressly stated that it disagrees with NBU’s characterization that effects will be “minimal,” calling out the assumed losses, accounting procedures, and the location of diversions as problematic. In fact, NBU seeks to divert from *GBRA’s own reservoir* and does not have an approval to do so.

## **VII. TCEQ Should Specify Governing Law but Need Not Narrow the Issues in the Referral**

TCEQ should refer this Application to hearing, but it need not try to limit the issues beyond the governing law. The relevant issues are “deemed to be those defined by law governing these applications, unless the commission orders otherwise under 80.6(d).”<sup>29</sup> GBRA believes the relevant law governing the Application includes the EAA Act and, in fact, that the request to divert Edwards-derived water is prohibited by the EAA Act. If the Commission will not decide this legal question at the threshold, the Commission should at least express that the applicable laws for consideration are both the Texas Water Code and the EAA Act.

The original notice for the Application did **not** require or suggest that affected persons should articulate a disputed-issues list for the Commission’s consideration, as this would be a departure from TCEQ’s consistent and longstanding application of its rules. Aside from making clear that two statutes are at issue, the Texas Water Code and the EAA Act, there is not a need to attempt a translation that might inadvertently limit the development of a complete record.

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<sup>28</sup> *Id.* at 225.

<sup>29</sup> (emphasis added).

**VIII. If TCEQ Elects to Articulate the Issues with Any More Specificity than Otherwise Provided by the Applicable Law, NBU's List is Too Narrow.**


If a disputed-issues list is deemed to be permissible and worthwhile, GBRA believes the following is a more appropriate list:

1. Whether upon discharge the Edwards-derived effluent is state water pursuant to the EAA Act;
  - a. Insufficiency of application as an application for state water under 11.134 (e.g., lack of available water, etc.)
  - b. Insufficiency of draft permit to protect existing water right holders and otherwise address requirements for an appropriation of state water.
2. Whether the notice for the application was insufficient;
3. Whether the reservoir owner authorization is a prerequisite to the application and whether it has been satisfied;
4. Whether the primary purpose is to dilute and treat the effluent rather than convey it (or, as discussed in opinion of the Third Court of Appeals in the San Marcos case, whether the effluent discharged and the water proposed to be diverted are “fungible”<sup>30</sup>);
5. Inadequacy and inaccuracy of the carriage loss assumptions or calculations;
6. Inadequacy of the accounting plan;
7. Whether the adverse effect of the diversions on existing water rights demonstrate they were granted based on the use or availability of the return flows;
8. Inadequacy of protections for existing water right holders;
9. Inadequacy of the special conditions for instream uses and freshwater flow to bays and estuaries.

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<sup>30</sup> *City of San Marcos v. TCEQ*, 128 S.W.3d 264, 276-77 (Tex. App.—Austin 2004).

Respectfully submitted,

By:  \_\_\_\_\_

Molly Cagle

Texas Bar No. 03591800

molly.cagle@bakerbotts.com

Paulina Williams

paulina.williams@bakerbotts.com

Texas Bar No. 24066295

BAKER BOTTS L.L.P.

98 San Jacinto Boulevard

Suite 1500

Austin, Texas 78701-4078

(512) 322-2500

(512) 322-2501 (fax)

*Attorneys for Guadalupe-Blanco River  
Authority*

## CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2016, a true and correct copy of the Guadalupe-Blanco River Authority's Reply was served as indicated below to the following:

### **FOR THE APPLICANT:**

Sara R. Thornton  
Lloyd Gosselink Rochelle & Townsend, P.C.  
816 Congress Ave., Suite 1900  
Austin, TX 78701-2478  
Tel: 512.322.5800  
*Via Email:* [sthornton@lglawfirm.com](mailto:sthornton@lglawfirm.com)

### **EXECUTIVE DIRECTOR:**

Dinniah Tadema  
Texas Commission on Environmental Quality  
Environmental Law Division, MC-173  
P.O. Box 13087  
Austin, Texas 78711-3087  
*Via Email:* [dinniah.tadema@tceq.texas.gov](mailto:dinniah.tadema@tceq.texas.gov)

Sarah Henderson, Technical Staff  
Texas Commission on Environmental Quality  
Water Availability Division, MC-160  
P.O. Box 13087  
Austin, Texas 78711-3087  
*Via Email:* [sarah.henderson@tceq.texas.gov](mailto:sarah.henderson@tceq.texas.gov)

Brian Christian, Director  
Texas Commission on Environmental Quality  
Environmental Assistance, MC-108  
P.O. Box 13087  
Austin, Texas 78711-3087  
*Via Email:* [brian.christian@tceq.texas.gov](mailto:brian.christian@tceq.texas.gov)

### **FOR PUBLIC INTEREST COUNSEL:**

Pranjal Mehta  
Texas Commission on Environmental Quality  
Public Interest Counsel, MC-103  
P.O. Box 13087  
Austin, Texas 78711-3087  
*Via Email:* [pranjal.mehta@tceq.texas.gov](mailto:pranjal.mehta@tceq.texas.gov)

### **FOR ALTERNATIVE DISPUTE RESOLUTION:**

Kyle Lucas  
Texas Commission on Environmental Quality  
Alternate Dispute Resolution, MC-222  
P.O. Box 13087  
Austin, Texas 78711-3087  
*Via Email:* [kyle.lucas@tceq.texas.gov](mailto:kyle.lucas@tceq.texas.gov)

### **FOR THE CHIEF CLERK:**

Bridget C. Bohac  
Texas Commission on Environmental Quality  
Office of Chief Clerk, MC-105  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel. 512.239.3300  
Fax: 512.239.3311  
*Via E-Filing*


### **REQUESTER(S):**

Jim Mathews  
Mathews & Freeland, L.L.P.  
8140 N. Mopac Expy, Suite 2-260A  
Austin, Texas 78759-8837  
*Via Email:* [jmathews@mandf.com](mailto:jmathews@mandf.com)

Phil Wilson  
Lyn Clancy  
Lower Colorado River Authority  
P.O. Box 220  
3700 Lake Austin Blvd.  
Austin, Texas 78767-0220  
*Via Email:* [phil.wilson@lcr.org](mailto:phil.wilson@lcr.org)  
*Via Email:* [lyn.clancy@lcr.org](mailto:lyn.clancy@lcr.org)

### **INTERESTED PERSON(S):**

Carolyn Ahrens  
Booth, Ahrens & Werkenthin, P.C.  
206 E. 9th Street, Suite 1501  
Austin, Texas 78701-4423  
*Via Email:* [carolyn@baw.com](mailto:carolyn@baw.com)

  
Paulina Williams

ATTACHMENT

SOAH DOCKET NO. 582-15-2477  
TCEQ DOCKET NO. 2014-1658-WR

IN THE MATTER OF THE  
APPLICATION OF THE  
GUADALUPE-BLANCO RIVER  
AUTHORITY FOR  
NEW WATER USE PERMIT NO. 12378

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BEFORE THE STATE OFFICE  
OF  
ADMINISTRATIVE HEARINGS

DIRECT TESTIMONY  
OF  
WILLIAM E. WEST, JR.

FOR  
GUADALUPE-BLANCO RIVER AUTHORITY

February 22, 2016

DIRECT TESTIMONY OF WILLIAM E. WEST, JR.

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I. PROFESSIONAL BACKGROUND

- 9 Q. STATE YOUR NAME.
- 10 A. William E. West, Jr.
- 11 Q. BY WHOM ARE YOU CURRENTLY EMPLOYED, AND IN WHAT CAPACITY?
- 12 A. I am the General Manager of the Guadalupe Blanco River Authority (GBRA).
- 13 Q. HOW LONG HAVE YOU SERVED IN THAT CAPACITY?
- 14 A. I was hired by GBRA's Board of Directors in 1994 directly as the General Manager.
- 15 Q. PLEASE DESCRIBE YOUR RESPONSIBILITIES AS GENERAL MANAGER OF
- 16 GBRA
- 17 A. Interestingly, I am retiring this year and the GBRA Board has attempted to capture my
- 18 responsibilities in writing in order to find my successor. According to those materials, I
- 19 am the public face and the senior executive of GBRA. I think that's accurate. I know it
- 20 is true that I oversee GBRA's entire operations, more than 150 employees, multiple
- 21 locations, and assets of nearly \$250 million. I lead GBRA's strategic initiatives, in
- 22 concert with the nine member board of directors, appointed by the Governor of Texas.
- 23 That includes a variety of specific tasks, from making policy recommendations and
- 24 exercising Board authorizations to working with legislative and regulatory bodies at all
- 25 levels of government.
- 26 Q. WHERE DID YOU WORK PRIOR TO BEING HIRED TO MANAGE GBRA?
- 27 A. I've been working on Central Texas water resources for my entire 45+ year career. I
- 28 started in 1970 at the Lower Colorado River Authority, became System Operations
- 29 Manager in 1974, and Water Resources Director in 1984. This period included the Texas
- 30 Water Commission's adjudication of the Colorado River, which began in the early 1970s,
- 31 but wasn't finally resolved until the late 1980s. I was at Lower Colorado River Authority
- 32 (LCRA) and had a lead role in development of LCRA's first integrated water

1 management plan designed to balance the competing interests for water in the Colorado  
2 River Basin. TCEQ recently approved the third amended version of that plan. In 1986, I  
3 was named Executive Director of Natural Resources. I am proud to say I was a key  
4 negotiator in several landmark water rights cases on the Colorado River. For example, I  
5 was deeply involved in the dispute over the Stacy Reservoir, now known as the O. H. Ivie  
6 Reservoir, and the ultimate resolution of that dispute.

7 **Q. DESCRIBE YOUR EDUCATIONAL BACKGROUND.**

8 **A.** I graduated from Texas A&M University in 1970 with a B.S. degree in Agricultural  
9 Engineering.

10 **Q. HAVE YOU BEEN INVOLVED IN OTHER POSITIONS OR OTHER  
11 ORGANIZATIONS IN ADDITION TO LCRA AND GBRA WHERE YOU HAVE  
12 BEEN EXPOSED TO WATER PLANNING/SUPPLY POLICIES?**

13 **A.** I've served on various State Water Oversight Committees appointed by the Governor. I  
14 also participated in the development of the Balcones Canyon Conservation Plan in Travis  
15 County for the issuance of an Endangered Species Act 10-A permit.

16 I have been active in various trade organizations that focus on water supply. I am a past  
17 president of the Texas Water Conservation Association (TWCA), the leading  
18 organization in Texas devoted to conserving, developing, protecting, and using the water  
19 resources of the state for all beneficial purposes. I am now a member of the TWCA  
20 Board. I served as President of the National Water Resources Association, an  
21 organization founded in 1932 to advocate federal policies, legislation, and regulations  
22 promoting protection, management, development, and beneficial use of water resources.  
23 I also am a past chairman of the Texas Water Forum. I have been active in the State's  
24 development of environmental flows, serving as a member of the Senate Bill 1 Region L  
25 Water Planning Committee. Governor Rick Perry appointed me in 2003 to the state's  
26 Study Commission on Water for Environmental Flows. I am very proud that in 2012, I  
27 was recognized by my peers and named an Honorary Diplomate of The American  
28 Academy of Water Resources Engineers (AAWRE). That organization was founded in  
29 October 2004 to recognize and support excellence in the professional practice of water  
30 resources engineering. Honorary Diplomate is AAWRE's highest honor given to an  
31 individual. It is granted to recognize one of the following: a position of eminence in the  
32 water resources engineering profession; a singular noteworthy achievement or sustained  
33 noteworthy contributions to the advancement of the water resources engineering  
34 profession; or outstanding service over a sustained period of time in the field of water  
35 resources.

36 **II. BACKGROUND ON GBRA**

37 **Q. LET'S TURN TO GBRA. WHAT DOES GBRA DO?**

38 **A.** GBRA was created by the Legislature in 1935. GBRA provides stewardship for the  
39 water and other resources in its ten-county statutory district, which begins near the  
40 headwaters of the Guadalupe and Blanco Rivers, ends at San Antonio Bay, and includes

1 Kendall, Comal, Hays, Caldwell, Guadalupe, Gonzales, DeWitt, Victoria, Calhoun and  
2 Refugio Counties. For ease of reference, when I refer to the GBRA's ten-county statutory  
3 district, I sometimes call it the "GBRA District." Planning and resource development  
4 efforts are carefully coordinated within the broader consideration of regional and  
5 statewide water needs in order to fulfill GBRA's primary responsibilities of developing,  
6 conserving and protecting the water resources of the GBRA District.

7 Most of GBRA's ten-county statutory district lies within the hydrologic boundaries of  
8 the Guadalupe River Basin, but some portions of the GBRA District extend beyond the  
9 hydrologic boundaries into other basins, and the GBRA District doesn't include the  
10 upper portion and certain other portions of the Guadalupe River Basin. At the lower end  
11 of the Guadalupe River Basin, the San Antonio River flows into the Guadalupe River  
12 about ten miles north of San Antonio Bay. The San Antonio River is, in fact, a tributary  
13 of the Guadalupe River and hydrologically a part of the Guadalupe River system.  
14 However, the watershed of the San Antonio River has nevertheless been designated as a  
15 distinct river basin—the San Antonio River Basin.

16 **Q. WHAT IS GBRA'S VISION STATEMENT?**

17 **A.** GBRA is a widely recognized leader in managing water resources that benefit both  
18 people and the environment.

19 **Q. HOW DOES GBRA BALANCE DEVELOPING WATER SUPPLY WHILE  
20 CONSIDERING ENVIRONMENTAL NEEDS?**

21 **A.** GBRA has a responsibility to timely develop sufficient additional water supplies to meet  
22 all current and future water needs within its ten-county statutory district. At the same  
23 time, we also have a responsibility to be a great steward of the lands and natural  
24 resources within the GBRA District and San Antonio Bay. It is equally important that we  
25 satisfy both charges, and the intent is that both will be pursued simultaneously.

26 With respect to the first charge, for decades now GBRA and other water suppliers in the  
27 region have struggled to timely develop sufficient supplies to keep up with the water  
28 demands of the rapidly increasing human population within the region. In the GBRA  
29 District, there are significant unmet demands for commitments of firm water today and an  
30 immediate need for additional supplies, particularly in the I-35 corridor that runs through  
31 GBRA's district. One obvious area of significant shortage in the region today is San  
32 Antonio and the Edwards Aquifer, where current usage exceeds the firm supply. In San  
33 Antonio, however, there finally appears to be recognition of the limits of the supply  
34 available from the Edwards Aquifer.

35 With respect to the second charge, GBRA has always kept environmental stewardship as  
36 a priority in all its actions. An easy example of that is reflected by the Application that is  
37 the subject of this proceeding. When we filed the Mid-Basin Application, TCEQ had not  
38 yet adopted environmental flow standards for the Guadalupe River Basin. GBRA  
39 voluntarily said in our application that we would accept those standards when adopted.

1 Sam Vaughn talks about the technical impacts and consequences of that position, but the  
2 policy decision was made by the GBRA Board.

3 We were of course involved in the controversial process by which the TCEQ adopted its  
4 environmental flow standards, and support those standards to assure protection of the  
5 environment. GBRA's work to protect the springflows associated with the Edwards  
6 Aquifer is another example of our commitment to the environment.

7 GBRA also played a major role in the establishment of the Guadalupe-Blanco River  
8 Trust, the San Antonio Bay Foundation (SABAY) and the Guadalupe River Foundation.  
9 The primary objective of the Trust is to conserve land in the Guadalupe watershed.  
10 SABAY has a motto, "Life is Better on the Bay", and the goal of that Foundation is to  
11 make that motto a reality. SABAY's mission is "to foster and steward the natural  
12 resources of the San Antonio Bay estuarine system for optimal benefit of the marine life,  
13 coastal wildlife and the people who use it for recreation and their livelihoods." The  
14 Guadalupe River Foundation establishes "a sustainable system for the funding, creating,  
15 constructing, developing, operating and maintaining of Guadalupe River Basin  
16 Environmental Learning Center(s) and associated programs to illuminate the natural  
17 qualities of the river basin and its watersheds as a pertinent theme for which to develop  
18 resources and tools for teaching, research, exploration and observation for the benefit of  
19 the public." There are many more examples of things GBRA does as an environmental  
20 steward, dozens which involve our employees, so these are just a few highlights.

21 Q. DOES GBRA HAVE A MISSION STATEMENT?

22 A. Yes. The mission of the GBRA is to protect, conserve, reclaim and steward the resources  
23 of the District, and provide leadership in regional cooperation in order to enhance quality  
24 of life for those we serve.

25 Q. FROM YOUR PERSPECTIVE, IS THERE ANYTHING "SPECIAL" ABOUT THE  
26 GUADALUPE RIVER BASIN AS FAR AS WATER RIGHTS ENFORCEMENT?

27 Yes, the Guadalupe River Basin is part of the South Texas Watermaster Program. The  
28 Watermaster manages surface water rights in 50 counties, making sure first in time is first  
29 in right. That is particularly important to GBRA because we hold the most significant  
30 senior water rights in the Guadalupe basin. The Watermaster and his Deputies know  
31 GBRA and the other water right holders in the basin and understand the water rights held  
32 by GBRA and others, including the special conditions in each. That is essential to  
33 avoiding misunderstandings about water allocation. The Rio Grande and, more recently,  
34 the Brazos River also have watermaster programs.

35 Enforcement of water rights is always important, but it is critical in dry periods, and we  
36 have plenty of those in our basin. Plus, at least in the Mid-Basin Draft Permit, we now  
37 have environmental flow requirements. Those requirements add another layer of  
38 conditions, and some, like the pulse flow requirements, impose pumping restrictions  
39 under wet conditions. Having the Watermaster to help assure a mutual understanding of

1 the proper interpretation and practical application of those requirements will be very  
2 beneficial to the enforcement of water rights for everyone in our basin.

3 Q. WHAT DO YOU MEAN BY "PRACTICAL APPLICATION"?

4 A. Here's an example. The Mid-Basin Draft Permit has a maximum allowable diversion  
5 rate. That's a standard condition in all certificates of adjudication and permits. Before  
6 TCEQ adopted the e-flow standards, and without other conditions restricting  
7 withdrawals, and with due consideration of the seniority of the water right, a permittee  
8 might just divert at its maximum rate whenever flow in the watercourse supported that  
9 rate. Now, with stringent e-flow conditions, notwithstanding the maximum authorized  
10 diversion rate in a permit, diversion must be correlated to river flows measured at either  
11 an upstream or downstream measurement point or gage. You might logically assume that  
12 higher diversion rates are authorized with higher flows, but that's not always the case  
13 under Guadalupe River Basin e-flow standards and the Mid-Basin Draft Permit. Plus, in  
14 the Guadalupe River, our hydroelectric operations generate not just power, but significant  
15 swings in the river flow measured at the Gonzales gage, which is the important gage for  
16 the Mid-Basin Draft Permit. Sometimes these swings are in a 6-hour cycle, sometimes  
17 12 or 18 hours; it depends on the hours of hydroelectric operation each day. The swings  
18 can change the measured flow at the gage by several hundred cubic feet per second (cfs).  
19 Diversion pumps, though, are not so flexible. It's not physically possible to correlate  
20 diversion rates instantaneously with measured flows at a river gage. You don't want to  
21 shut the pumps off and on too frequently, or even try to adjust them constantly. The  
22 Watermaster understands that and, we believe, will work with us in a practical way to  
23 ensure we meet the permit's special conditions, including those implementing the e-flow  
24 standards, while safely and efficiently operating the diversion works for the Mid-Basin  
25 Project.

26 Q. FROM YOUR PERSPECTIVE, IS THERE ANYTHING "SPECIAL" ABOUT THE  
27 GUADALUPE RIVER BASIN AS FAR AS WATER RIGHTS SUPPLY PLANNING?

28 A. In every basin, the supplier is always concerned with three key elements—maintaining  
29 adequate and functioning operations, protecting existing water supplies, both surface and  
30 groundwater, and timely developing sufficient additional water supplies needed for the  
31 future. (Of course, these three components get balanced with other competing interests  
32 like environmental, regulatory, legislative initiatives, climate change, and so forth, but I  
33 want to start with the key water supply planning elements). Three special attributes of  
34 our basin are: (1) the relationship between the surface and groundwater; (2) the diversity  
35 of interests and users in GBRA's district, and (3) the history of litigation in the basin. In  
36 combination, these make our basin is like no other river basin in Texas when it comes to  
37 water supply planning. GBRA has learned that it must have maximum flexibility in  
38 developing new supplies.



1 Q. WHAT'S SPECIAL ABOUT THE RELATIONSHIP BETWEEN THE SURFACE  
2 AND GROUNDWATER IN THE GUADALUPE BASIN?

3 A. A unique and very special feature of the GBRA District is the role of the Edwards  
4 Aquifer, specifically the magnificent springs from the Edwards (primarily the Comal  
5 Springs in New Braunfels and the San Marcos Springs in San Marcos). The Comal  
6 Springs by itself is the largest spring in the entire southwestern United States, and the San  
7 Marcos Springs is the second largest. Springflow from these two springs is the lifeblood  
8 of the Guadalupe River. This is especially true during dry conditions, when there is little  
9 or no rainfall in the Guadalupe River Basin.

10 It is critical to GBRA that springflows from the Comal and San Marcos Springs be  
11 protected not only for environmental purposes, but also for water supply purposes.  
12 Protecting those springflows is a critical element of GBRA's plan to protect existing and  
13 new water supplies needed for the basin.

14 Q. ARE THERE ANY PROPOSED WATER SUPPLY PROJECTS FOR THE BASIN  
15 THAT CAN BE IMPLEMENTED QUICKLY?

16 A. No, all the "easy" projects in the basin, or "the least expensive options," have been fully  
17 developed. Some of those projects, like the subordination of our and the City of Seguin's  
18 hydro rights and amendment to the Canyon Reservoir water right to increase the amount  
19 of water that we are authorized to supply from Canyon, took years in permitting, so when  
20 I say "easy," I really mean any project that involves less than a decade of effort from start  
21 to finish.

22 Q. PLEASE DESCRIBE GBRA'S TEN-COUNTY STATUTORY DISTRICT.

23 A. Let me start with a map that shows the extent of GBRA's jurisdiction:



24  
25 The band that is colored rust to light yellow shows the Guadalupe basin. Just for  
26 orientation, you can see from the map that we are sandwiched between some of the, if not  
27 the, fastest growing communities in the State—Austin and San Antonio and the areas  
28 surrounding each. Boerne, Buda, Kyle, and Wimberley used to be little quaint towns.  
29 They are now some of the fastest growing areas in the entire USA. If you are familiar

1 with this stretch of Texas, you will not be surprised to know that GBRA serves a wide  
2 array of users—municipal, industrial, agricultural, mining and recreational users. Central  
3 Texas, and the GBRA District in particular, is subject to extreme weather. In my time at  
4 GBRA we have had some of the most serious flooding on record. That's why this part of  
5 the world is known as "Flash Flood Alley." The flood of 2002 that cut the Canyon Lake  
6 Gorge below the Canyon Lake Spillway is just one example. We also have had dry  
7 stretches, although none has been more severe than the Drought of Record, 1947-1957 in  
8 the Guadalupe Basin. As recently as summer 2013, it was so dry that we came close to  
9 completely shutting off the hydro generators at Lake Dunlap because of low river flows,  
10 but after operating for just a few hours each day, it finally rained and we avoided a  
11 complete shutdown. The last time the hydro operations were completely shut down,  
12 except for periodic maintenance, was summer of 1956 during the drought.

13 Q. SUMMARIZE GBRA'S MAIN EFFORTS TO MAINTAIN WATER SUPPLIES FOR  
14 THE BASIN.

15 A. We have been very diligent in protecting streamflows, defending the Texas water right  
16 permitting system, and defending our surface water rights from all sorts of attacks.

17 Q. PLEASE SUMMARIZE THE HISTORY OF GBRA'S EFFORTS TO PROTECT  
18 STREAMFLOWS.

19 A. It is a very long and interesting history, but I'll try to be as brief as I can. In doing so,  
20 there is much that I'm leaving out. In all of this, it is critical to remember that, as I said,  
21 protecting streamflows in the Guadalupe River is inextricably linked to protecting  
22 springflows from the Edwards Aquifer. This connection is unique to our basin.

23 GBRA's efforts to protect springflows from the Comal and San Marcos Springs date  
24 back to the drought of the 1950s, when increased pumping (which was less than half of  
25 current pumping) and the severe drought caused springflows at both the Comal and San  
26 Marcos Springs to plummet. In fact, the Comal Springs dried up completely for a period  
27 of five months in 1956. After that, GBRA tried in various ways to protect springflows,  
28 including efforts to get San Antonio to secure significant supplies of water from other  
29 sources (including offering San Antonio a contract for water from Canyon Reservoir,  
30 which the San Antonio City Council rejected by one vote). There were also numerous  
31 unsuccessful efforts to enact legislation that would effectively regulate pumping from the  
32 Edwards.

33 Things changed in the late 1980s, and GBRA decided to take decisive action in 1989, a  
34 particularly dry year. With San Antonio's population and Edwards pumping soaring,  
35 concerns about drastically low springflows (there was genuine fear that the Comal  
36 Springs could go dry in 1989) and the potentially catastrophic impacts downstream  
37 reached a peak. That year, GBRA filed a state-court lawsuit seeking a determination that  
38 the water in the Edwards Aquifer is State water because the Edwards meets all the  
39 requirements for an underground river under Texas law, thereby subjecting it to the prior  
40 appropriation doctrine and other requirements—including the need for water rights  
41 permits that honor senior downstream water rights. In the lawsuit, GBRA sought a

1 judicial adjudication of rights to pump water from the Aquifer. The lawsuit was removed  
2 to federal court and, by the time it was remanded back to state district court, the  
3 landscape had changed.

4 Among other important events, in 1992 the Texas Water Commission, agreeing with  
5 GBRA, enacted rules declaring that the water in the Edwards Aquifer was indeed State  
6 water and requiring all pumpers to seek state water right permits. The Water  
7 Commission action was immediately appealed, and the rules were struck down on the  
8 ground that the Commission did not have the authority to make the State-water  
9 declaration. The Commission did not appeal because, by that time, legislation had been  
10 passed regulating pumping from the Edwards.

11 Perhaps the most significant event impacting springflows was Sierra Club's federal  
12 lawsuit under the Endangered Species Act (ESA). In that lawsuit, the Sierra Club sought  
13 initial rulings that included ordering the United States Fish and Wildlife Service (FWS)  
14 to define the minimum continuous springflows required to avoid takes of and jeopardy to  
15 the endangered species that live at and downstream of the springs and within the Edwards  
16 Aquifer. GBRA intervened in that lawsuit, aligned with the Sierra Club, and provided  
17 substantial support in the litigation. In early 1993, Judge Lucius Bunton ruled in favor of  
18 Sierra Club, declaring that the State needed to do something to regulate pumping from  
19 the Edwards to protect minimum springflows from the Comal and San Marcos Springs.  
20 In his May 26, 1993 Amended Final Judgment, Judge Bunton sent the clear message that  
21 if Texas didn't act by the end of the 1993 legislative session, he'd ensure the necessary  
22 pumping restrictions using the "Blunt Ax" of federal regulation under the ESA. In the  
23 Amended Final Judgment, Judge Bunton even scheduled a tentative hearing for June 28,  
24 1993 to address, among other things, "any additional relief sought by Plaintiff and  
25 Plaintiff-Intervenors under Federal law because of inadequacy of state law or because of  
26 inadequacy of the State's implementation under that law." This entire chapter of  
27 Guadalupe River history played out under the ESA.

28 The State responded to Judge Bunton's order by passing SB 1477 at the end of the 1993  
29 session, creating the Edwards Aquifer Authority (EAA). I'd be remiss if I didn't mention  
30 that, in that same SB 1477, the Legislature declared that the terms of the entire GBRA  
31 Board would expire on September 1, 1995 unless, before then, the legislature "continues  
32 the members of the board of directors in office" (which it ultimately did in the 1995  
33 session). The sunset provision and other political pressure led the GBRA Board to  
34 replace its longstanding General Manager shortly after the end of the 1993 session. That  
35 was right before I joined GBRA. As you might imagine, with the Board facing sunset,  
36 water planning in the Guadalupe River Basin came to a screeching halt. I had one year to  
37 convince the Legislature to eliminate that sunset provision; I did so.

38 The good news, though, was that creation of the EAA gave rise to the prospect of  
39 pumping limits, which were intended to protect minimum springflows from the Comal  
40 and San Marcos Springs—the base flow of the Guadalupe River. But before the EAA  
41 could get down to business, there was a Voting Rights Act lawsuit filed about the make-  
42 up of the EAA Board and a state lawsuit over the constitutionality of groundwater  
43 regulation. Those lawsuits held up any real regulation of pumping for three more years.

1 At last, by January 1, 2008, the first pumping limit deadline came . . . and went without  
2 compliance, and the Legislature raised the pumping limit. After more than a decade of  
3 litigation, EAA had ventured into the permitting arena by issuing hundreds pumping  
4 permits. The agency also restricted installation of new wells, but litigation continued,  
5 and there was little progress on exactly how to protect springflows in critical situations.

6 At the same time that the Legislature was considering raising the Edwards pumping limit,  
7 GBRA was meeting with representatives of the TCEQ, the Texas Water Development  
8 Board (TWDB) and Texas Parks and Wildlife Department (TPWD) to promote the  
9 concept of a "recovery implementation program" for the Edwards Aquifer ("the  
10 "EARIP"). I brought this concept to the table after hearing a presentation by senior  
11 managers of the United States Fish & Wildlife Department. With support from these  
12 three agencies, GBRA was successful in convincing the Legislature to adopt an EARIP  
13 concept in the legislation increasing Edwards Aquifer pumping limits. As a result, the  
14 EAA and certain other state and municipal water agencies were directed to participate in  
15 the EARIP and, by 2012, to prepare a plan for managing the Aquifer to preserve the listed  
16 species at Comal and San Marcos Springs. Finally, we thought we'd have a proposal that  
17 included pumping adjustments during drought. The plan required FWS approval.

18 By all accounts, the EARIP process has been a success. Stakeholders developed an  
19 Edwards Aquifer Habitat Conservation Plan ("EAHCP") that included immediate habitat  
20 protection measures to increase the viability of the species at Comal and San Marcos  
21 Springs, flow protection measures to ensure continuous minimum springflow during a  
22 repeat of the drought of record, and a robust adaptive management process. The EAHCP  
23 also established long-term biological goals and objectives for each species. Various  
24 entities, including the City of San Marcos, the City of New Braunfels, the EAA, Texas  
25 State University, and the City of San Antonio through the San Antonio Water System  
26 (SAWS), also agreed to seek an incidental take permit under the ESA. In 2013, the FWS  
27 approved the issuance of the incidental take permit and the EAHCP. GBRA played a  
28 pivotal role in getting that important approval.

29 Implementation of the EAHCP has resulted in additional protection for the endangered  
30 species associated with the Edwards Aquifer and the springflows upon which they  
31 depend. While the EAA has primary responsibility for managing the day-to-day  
32 activities related to the EAHCP and responsibility for most flow protection measures,  
33 GBRA remains involved as a non-voting member of the EAHCP implementing  
34 committee and contributes a minimum of \$400,000 annually to the cost of EAHCP  
35 implementation, plus hundreds of man hours. As Brian Perkins will discuss in his  
36 testimony, the springflow protections are now incorporated into TCEQ's surface water  
37 modeling so that new water rights are not issued if they will impair the minimum  
38 springflows.

39 Amazingly enough, the EAA is again embroiled in a Voting Rights Act lawsuit. The  
40 case is LULAC v EAA. SAWS intervened in the case to support LULAC, because  
41 SAWS wants more San Antonio held seats on the EAA Board. GBRA intervened in the  
42 suit to protect the current board structure because the EAA has finally gotten to take  
43 positive conservation steps for the aquifer and species supported by the springs. A

1 federal court heard arguments in June 2014 over whether the EAA is unconstitutional or a  
2 special purpose district exempt from one-person one-vote requirements. The case is still  
3 pending.

4 Q. WHAT ARE THE PROSPECTS FOR SPRINGFLOWS TO BE PROTECTED AFTER  
5 ALL THIS LITIGATION?

6 A. As I described, the EAHCP outlines what San Antonio, SAWS, and others will do to  
7 protect springflows in times of drought. This is considerable progress, but we must still  
8 think about obstacles, contingencies and adaptation.

9 The EAHCP may also be short-lived, depending on the outcome of LULAC v EAA. If  
10 LULAC wins the lawsuit, the number of Bexar County EAA Board Members could  
11 increase from seven out of fifteen to thirteen or fourteen out of fifteen. Once that  
12 happens the EAA rules and regulations and the EAHCP could be rewritten by a new  
13 Bexar County supermajority on the EAA Board. In addition, the EAA Board collects the  
14 funds, approves the budget, and staffs the EAHCP. A new supermajority could adversely  
15 influence the implementation of the EAHCP in numerous ways.

16 Beyond the threat posed by LULAC v EAA, we don't know if the adaptive management  
17 that is at the heart of the EAHCP will be successful. Thus far, only a relatively minor  
18 issue has tested the adaptive management process. We don't know that the parties will  
19 live up to their EAHCP commitments. The major hurdle is a decision in 2020 for  
20 expanded use of the San Antonio Water System's aquifer storage and recovery project,  
21 which can be blocked by the EAHCP Implementing Committee.

22 Q. IS PROTECTING SPRINGFLOWS YOUR ONLY CHALLENGE TO PROTECTING  
23 YOUR WATER RIGHTS?

24 A. No. Litigation, legislation, and regulation related to endangered species at the Comal and  
25 San Marcos Springs dominated the end of the century, and the 21st century brought even  
26 more litigation. After a dry 2008-2009 period, a newly-formed 501(c)(3) organization  
27 named "The Aransas Project" ("TAP") filed an Endangered Species Act lawsuit claiming  
28 the State's water right permitting program in the Guadalupe River Basin violated the  
29 ESA because, as TAP alleged, it resulted in a take of whooping cranes that winter at the  
30 Aransas National Wildlife Refuge. You can see where the Refuge is on this map:



1 The plaintiffs' suit was against TCEQ, but obviously GBRA's water rights were under  
2 attack, so GBRA intervened in the lawsuit. After spending millions of dollars, GBRA  
3 and the state ultimately prevailed, but the 5+ years that the case was pending slowed  
4 down the development of water projects in the basin including, and especially, this one.  
5 At the end of my testimony, I'll address TAP in a different context.  
6

7 Q. HAS THE ATTACK ON GBRA'S WATER RIGHTS ENDED AS A RESULT OF  
8 SUCCESS IN THESE TWO ACTIONS?

9 A. It has not.

10 SAWS and others recently filed applications with the TCEQ for Texas Water Code  
11 § 11.042(b) "bed & banks" permits seeking authorization to divert and "reuse" their  
12 Edwards-derived sewage effluent downstream of where the effluent is discharged. One  
13 of SAWS' applications asks for authorization to divert its Edwards-derived effluent at  
14 the mouth of the Guadalupe River, about 200 miles downstream of the discharge. Of  
15 course, the water diverted at that point would be nothing like the effluent that is  
16 discharged—it would be mixed with and diluted by other waters flowing not only in the  
17 San Antonio River, but also in the Guadalupe River, and the mixture would be treated  
18 and polished naturally as the water flows down the streams.

19 We believe that these bed & banks applications fail for several reasons, and mostly  
20 because TCEQ has no jurisdiction to grant them: as stated clearly in the EAA Act,  
21 immediately upon its discharge, treated effluent derived from water withdrawn from the  
22 Edwards Aquifer can no longer be "reused." Thus, TCEQ has no jurisdiction to issue a  
23 bed & banks permit authorizing diversion and "reuse" Edwards-derived wastewater.  
24 The legislature imposed this limitation in the EAA Act for a reason: Edwards-derived  
25 groundwater is unique in the state, in that the Edwards is so hydrologically connected to  
26 the Guadalupe River that water in the Edwards would eventually reach the Guadalupe  
27 River, without anyone pumping it out and returning the treated wastewater to surface  
28 streams that flow into the Guadalupe River. Thus, because of the terms of the EAA Act  
29 (as well as general law concerning "developed waters"), upon discharge, we believe that  
30 the Edwards-derived effluent becomes state water subject to the prior appropriation  
31 doctrine. That means the only mechanism by which someone can divert and use the

1 water is to seek a new water appropriation permit, which would carry a new priority  
2 date.

3 It would be extremely harmful to GBRA if anyone could effectively elbow their way to  
4 the front of the priority line by obtaining bed & banks permits for Edwards-derived  
5 effluent. GBRA and Dow hold senior water rights (the Lower Basin water rights) just  
6 downstream of the confluence of the San Antonio and Guadalupe Rivers—GBRA and  
7 Dow have the senior right to that discharged Edwards-derived effluent, and that senior  
8 right cannot be stripped through the bed & banks permit process. GBRA was in the  
9 process of issuing bonds for an important water supply project (the GBRA “Lower  
10 Basin Project”) to build off-channel storage to firm up the Lower-Basin rights, but the  
11 pendency of the SAWS bed & banks application meant the validity of those bonds was  
12 in question. More precisely, the validity of the Bond Resolution’s encumbrance of  
13 property (the Edwards-derived effluent itself, once discharged) and the pledge of  
14 revenues from the sale of that encumbered property, both of which are essential in order  
15 to secure repayment of the bonds, was in question.

16 GBRA filed an expedited declaratory judgment action under Chapter 1205 Government  
17 Code to try to expeditiously resolve the underlying legal issue (i.e., does the EAA Act  
18 dictate whether the TCEQ has the authority to grant a bed & banks “reuse” permit for  
19 Edwards-derived effluent?). We are waiting to learn if the Texas Supreme Court will  
20 take our appeal from the lower courts’ decision holding that the EAA statutory  
21 construction issue cannot be resolved in a case brought under Chapter 1205.

### 22 III. GBRA WATER PLANNING

23 Q. HOW HAS THIS HISTORY OF ATTACKS ON GBRA’S WATER RIGHTS  
24 AFFECTED GBRA IN ITS WATER PLANNING?

25 A. This difficult history taught GBRA valuable lessons. GBRA has to be vigilant to protect  
26 the water rights granted by the state and needed by its constituents. We’ve learned from  
27 these experiences that courts have their own schedules, and litigation can substantially  
28 delay development of a particular water project.

29 We try to stay ready for contingencies from all directions—the state courts, the federal  
30 courts, the legislature, agencies, cities, 501(c)(3) organizations of all stripes, and Mother  
31 Nature herself. These are lessons we took with us as we approached the 2011 and 2016  
32 Regional Plans and as we filed applications with TCEQ for projects. Our customers can’t  
33 afford for GBRA to put all of its eggs in one basket and plan on an obstacle-free course.  
34 To deal with this reality, GBRA is simultaneously pursuing multiple water projects and  
35 flexible authorizations to allow timely staging of projects, piecing different projects and  
36 parts or stages of different project together, etc.

37 The permit application (APP 202) under consideration in this proceeding for the Mid-  
38 Basin Project is a great example. I signed APP 202 in 2008, eight years ago. Getting the  
39 TCEQ to issue us a water right with enough flexibility to not need a major amendment  
40 (which has the potential to slow or even stop progress during the pendency of a contested

### AFFIDAVIT

BEFORE ME, the undersigned notary public, personally appeared William E. West, Jr. to  
me known, who being first duly sworn, deposed and said:

“My name is William E. West, Jr. I am over twenty-one years of age and fully competent  
to make this affidavit. I have personal knowledge of all facts recited herein and state that such  
facts are true and correct.”

  
William E. West, Jr.

Subscribed and sworn before me this 22nd day of February, 2016.

(Seal)



Notary Public in and for Christy S. Diert

My Commission Expires: May 11, 2016