TCEQ DOCKET NO. 2021-1391-WR

APPLICATION NO. 13098 OF SAN ANTONIO WATER SYSTEM FOR TEXAS WATER CODE § 11.042(B) AUTHORIZATION	**§ § § §**	**BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

SAN ANTONIO WATER SYSTEM'S RESPONSE TO GBRA'S PLEA TO THE JURISDICTION AND THIRD-PARTY REQUESTS FOR CONTESTED CASE HEARING

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SAN ANTONIO WATER SYSTEM'S RESPONSE TO GBRA'S PLEA TO THE JURISDICTION AND THIRD-PARTY REQUESTS FOR CONTESTED CASE HEARING

San Antonio Water System (SAWS) respectfully submits this response to Guadalupe Blanco River Authority's (GBRA) plea to the jurisdiction and the requests for contested case hearing filed by GBRA; INV Nylon Chemicals Americas, LLC (INVISTA); Union Carbide Corporation (UCC); New Braunfels Utilities (NBU); the Cities of San Marcos (San Marcos), Seguin (Seguin), and Victoria (Victoria); and Victoria County Navigation District. For the reasons set forth in this response, SAWS will show that GBRA's plea to the jurisdiction is meritless and should be dismissed. SAWS will also demonstrate that the law applicable to this matter does not provide a right to a contested case hearing on this kind of application; and that even if it did, each hearing requestor failed to demonstrate they are an affected person under the applicable law.

I. INTRODUCTION

SAWS has applied for a bed and banks authorization in order to retain ownership of its return flows derived from privately-owned groundwater after discharge to the San Antonio River basin, as authorized by Texas Water Code § 11.042(b). Eight entities have requested a contested case hearing, claiming potential impairment of their appropriative water rights. Section 11.042(b) provides no right to a contested case hearing and limits water rights subject to protection from impairment to existing water rights that were granted based on the use or availability of the applicant's return flows. None of the eight hearing requestors asserted ownership of a water right that is entitled to protection under § 11.042(b). The Commission must decide whether the law applicable to SAWS' application affords a right to a contested case hearing and, if so, whether the hearing requestors are affected persons.

II. BACKGROUND

SAWS operates one of the largest municipal water systems in the United States, providing water and wastewater services to more than 1.8 million Texans. Groundwater has been, and remains, the major component of SAWS' water supply. After its treated water supply is used by

retail customers, SAWS collects the wastewater generated and conveys it to water recycling centers. There, SAWS' municipal wastewater is processed to reclaimed water standards and either directly reused in SAWS' largest-in-the-nation recycled water system or discharged as effluent return flow to the San Antonio River basin.

In 1997, the Texas Legislature enacted Texas Water Code § 11.042(b) as part of Senate Bill 1, a major update of Texas water law. Section 11.042(b) authorizes an owner of "return flows derived from privately owned groundwater" to seek an authorization from the Texas Commission on Environmental Quality (TCEQ) to use the bed and banks of state watercourses to convey and subsequently divert and reuse those groundwater-based return flows. TCEQ has enacted rules to implement the § 11.042(b) authorization process. *See* 30 Tex. Admin. Code (TAC) §§ 295.112; 295.161; 297.16. Pursuant to § 11.042(b) and its rules, TCEQ has issued such authorizations to dischargers of groundwater-based return flows, including dischargers of return flows derived from Edwards Aquifer groundwater.[1] A bed and banks authorization pursuant to § 11.042(b) "allows an owner-discharger to *maintain ownership of the discharged groundwater-based effluent* even though it commingles with other water in the river."[2]

Recognizing both the economic and environmental value inherent in the indirect reuse of its groundwater-based return flows, SAWS filed an application (Application) at TCEQ for a bed and banks authorization pursuant to § 11.042(b) in 2013. The Application included a supplemental information sheet summarizing the specific nature of SAWS' request:

- SAWS is not seeking a "water right" to use state water.[3]
- SAWS' application applies solely to its groundwater-based return flows.[4]
- SAWS intends to reuse 50,000 acre-feet of its groundwater-based return flows for instream use as defined in 30 TAC § 297.1(25).[5]

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[1] *See* TCEQ Permit No. 5705 (Authorizing SAWS to "convey its privately developed Edwards Aquifer groundwater-based effluent for subsequent diversion and transport and re-circulation . . . for instream use purposes"); COA 19-4768C (Authorizing SAWS to "to use the bed and banks of Medio Creek to convey 994 acre-feet of its groundwater-based return flows for subsequent diversion of up to 994 acre-feet of such return flows from O.R. Mitchell Reservoir"); San Antonio River Authority Permit 13355 (authorizing SARA use the bed and banks of San Pedro Creek to convey up to 300 acre-feet of contracted groundwater based return flows). Other dischargers of return flows derived from privately-owned groundwater that have been granted § 11.042(b) authorizations include the Cities of Bryan, College Station, and Lubbock.

[2] *See* Brief of Appellee, Texas Commission on Environmental Quality at 4, *Guadalupe Blanco River Auth. v. Texas Attorney Gen.*, 2015 WL 868871 (Tex. App.—Austin 2015, pet. denied) (emphasis added).

[3] *See* Application, Supplemental Information at 1. A "water right" is "a right acquired under the laws of this state to impound, divert or use *state water*." Tex.Water Code § 11.002(5) (emphasis added).

[4] *See* Application, Supplemental Information at 1.

[5] *See id.*

- SAWS intends to reuse the remainder of its groundwater-based return flows for municipal, agricultural, industrial, mining, and instream use.[6]
- SAWS requests a single diversion reach near the mouth of the Guadalupe River.[7]
- SAWS' application includes an estimate of carriage loss from the point of discharge to the point of diversion determined from TCEQ's Guadalupe–San Antonio Water Availability Model.[8]
- SAWS acknowledged that its actual diversions will be subject to an accounting plan that addresses, *inter alia*, carriage loss and diversions pursuant to permits that were granted based on the use or availability of SAWS' return flows. SAWS committed to submit such plan when those quantities were determined.[9]
- SAWS identified the water rights it had determined to be granted based on the use or availability of SAWS' return flows and acknowledged that such rights are entitled to protection through a special provision.[10]

In 2021, pursuant to a request from TCEQ staff, SAWS submitted an accounting plan, as it committed to do in its application. That accounting plan—which tracks the volume of discharged return flows, the volume of carriage losses, the volume of discharged return flows diverted pursuant to water rights granted based on the use or availability of SAWS' return flows, and the volume of return flows available at the diversion reach—was reviewed by TCEQ staff and determined to be adequate.[11]

On August 17, 2021, TCEQ's Office of the Chief Clerk issued mailed notice of SAWS' application pursuant to 30 TAC § 295.161(a). The notice summarized SAWS' application and stated the Executive Director has approved SAWS' accounting plan, completed technical review of SAWS' application, and prepared a draft permit. The draft permit would impose special conditions requiring, among other things:

- Diversion authorization is conditioned on the availability of SAWS' discharges.
- SAWS may divert only the actual daily amount of groundwater-based return flows discharged, less the estimated losses, after accounting for travel times between the discharge and diversion points; and less any groundwater-based return flows diverted under SAWS' other authorizations, when those authorizations are being used.
- SAWS shall divert and use return flows only in accordance with the most recently approved accounting plan.
- Any modifications to the accounting plan shall be approved by the Executive Director.

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[6] *See id.*
[7] *See id.* at 5. By letter dated February 29, 2016, SAWS amended its request to seek a 7.38-mile diversion reach extending downstream from the originally proposed diversion point.
[8] *See id.* at 10; *see also* Application at Attachment 9.
[9] *See* Application, Supplemental Information at 7.
[10] *See id.* at 11.
[11] *See* Exhibit 6, Texas Commission on Environmental Quality Interoffice Memorandum at 3 (Mar. 24, 2021).

- Any modification to the accounting plan that changes permit terms must be in the form of an amendment to the permit.
- Any change in the diversion point or addition of diversion points shall require an amendment of the permit.
- SAWS must contact the South Texas Water Master prior to diversions.
- The permit is issued subject to the Commission's Rules and right of continuing supervision.

TCEQ received 51 responses to SAWS' application.[12] Twenty-seven commenters supported the application, noting both environmental and economic benefits resulting from SAWS' proposed reuse of its groundwater-based return flows. Additionally, SAWS forwarded more than twenty resolutions and letters or letters from local governments and other entities in support of the Application. Thirteen commenters opposed SAWS' application, with eight of those requesting a contested case hearing. Additionally, GBRA filed a plea to the jurisdiction. This response will address GBRA's plea to the jurisdiction and the requests for a contested case hearing.

III. PROCEDURAL HISTORY

SAWS' application was filed on December 30, 2013. By letters dated August 8, 2014, February 29, 2016, and March 25, 2016, SAWS responded to questions from TCEQ staff and supplemented its filing fees. SAWS' application was declared administratively complete on May 9, 2016. SAWS' accounting plan was initially submitted on March 17, 2021 and re-submitted with minor revisions that addressed TCEQ staff comments on March 24. Notice of SAWS' draft permit was issued on August 17, 2021. The comment period on SAWS' permit ended on September 20, 2021.

IV. SAWS' RESPONSE TO GBRA'S PLEA TO THE JURISDICTION

GBRA filed a plea to the jurisdiction challenging TCEQ's authority to grant a § 11.042(b) bed and banks authorization for groundwater-based return flows for groundwater derived from the Edwards Aquifer. GBRA's plea is based on its mistaken beliefs that § 11.042(b) applies only to "developed waters," and that "conflicts" between § 11.042(b) and the Edwards Aquifer Authority Act impose restrictions that cause TCEQ to lack jurisdiction to consider a § 11.042(b) bed and banks authorization request for Edwards-based return flows.[13] Because GBRA's plea to the jurisdiction directly challenges TCEQ's authority to act on SAWS' application, SAWS will

[12] This includes duplicates and requests to be added to the mailing list.
[13] GBRA Request at 8 & 16.

address GBRA's plea first. GBRA's analysis is flawed—and its plea to the jurisdiction should be denied—for the reasons set forth below.

A. TCEQ has exclusive original jurisdiction to authorize bed and banks conveyances of groundwater-based return flows.

In enacting Texas Water Code § 11.042(b) in 1997, the Texas legislature clearly and unambiguously specified TCEQ as the *sole entity* with authority to issue bed and banks authorizations for groundwater-based return flows:

> "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 reuse of these return flows . . . ."[14]

Under traditional principles of statutory interpretation, the text of the statute itself is the "first and foremost" indication of legislative intent.[15] And the text of § 11.042(b) plainly states (1) the authorization process created by the statute applies to "return flows derived from privately owned groundwater," and (2) the only entity empowered to grant such authorization is the TCEQ. There is no requirement that the return flows be "developed water," nor any exception for return flows that originate from Edwards Aquifer groundwater. Nor is there authority for a § 11.042(b) application to be considered by the Edward Aquifer Authority, or any other entity.

TCEQ has previously determined and asserted its exclusive jurisdiction to consider and act on applications for bed and banks authorizations for Edwards Aquifer return flows. In 2014, GBRA unsuccessfully invoked the jurisdiction of a state district court in an effort to short circuit SAWS' application that is the subject of the pending request. TCEQ and others intervened and secured dismissal of GBRA's lawsuit. The Commission asserted, among other grounds for dismissal, that it has exclusive jurisdiction for bed and banks authorization requests; or, in the alternative, primary jurisdiction. The district court dismissed GBRA's lawsuit on all jurisdictional grounds asserted. The Austin Court of Appeals affirmed the dismissal on grounds that GBRA's suit exceeded the plain language of the Expedited Declaratory Judgment Act under which it was brought, and found it unnecessary to address the other jurisdictional claims.[16] However, the Court recognized TCEQ's central role under § 11.042(b) by noting in its opinion that GBRA was asking

[14] Tex. Water Code § 11.042(b) (emphasis added).
[15] *Hogan v. Zoanni*, 627 S.W.3d 163, 169 (Tex. 2021).
[16] *Guadalupe Blanco River Auth. v. Tex. Attorney Gen.*, 2015 WL 868871 at *7 (Tex. App—Austin 2015, pet. denied).

for a judicial determination that SAWS' application is inconsistent with the Edwards Aquifer Authority Act before TCEQ has had an opportunity to consider and rule on GBRA's request.[17]

B. A Texas Water Code § 11.042(b) authorization is not based on "developed water."

GBRA asserts that legislatively created bed and banks authorizations for return flows derived from privately owned groundwater pursuant to § 11.042(b) "are based on the presumption or determination that the effluent is 'developed water.'"[18] This assertion is flatly wrong: it ignores the plain language of the statute itself, fundamental rules of statutory construction, and is at odds with the clear legislative intent in enacting Texas Water Code § 11.042(b).

Statutes are to be construed "to effectuate the Legislature's intent by giving effect to every word, clause, and sentence."[19] The presumption in construing statutes is that the legislature chose words deliberately and purposefully, and that it likewise excluded language deliberately and purposefully.[20] The type of water that is subject to a bed and banks authorization under Texas Water Code § 11.042(b) is specified in the statute: "return flows derived from privately-owned groundwater." This language shows a focused intent to apply the bed and banks authorization process broadly to all privately owned groundwater-based return flows, rather than selectively based on differing characteristics of the aquifer of origin. The term "developed water" is never used in the language chosen by the Legislature. Nor is there any hint of a presumption or a requirement for a determination that the species of water for which an authorization is sought must be "developed water." In short, there is simply no basis in the plain language of the statute to support GBRA's argument that Water Code § 11.042(b) applies only to "developed water."

In construing § 11.042(b) to determine the merit of GBRA's assertion that the Commission's authority to issue bed and banks authorizations is limited to "developed water," TCEQ may take into consideration other factors—such the legislative history of the statute's enactment and prior administrative constructions given to its provisions.[21] A review of these factors further demonstrates that GBRA's "developed waters" theory is without merit.

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[17] *Id.* at 4 ("The Authority seeks to achieve those assurances by pursuing a judicial determination regarding whether the System's desire to reuse discharged water and its requested permit are inconsistent with the Edwards Aquifer Authority Act. Moreover, the Authority is asking that this determination be made before the Commission has had an opportunity to fully consider and rule on the Authority's request in an administrative proceeding.").

[18] *See* GBRA Request at 8.

[19] *Hogan v. Zoanni*, 627 S.W.3d 163, 169 (Tex. 2021).

[20] *Id.*

[21] The Code Construction Act, Texas Government Code § 311.023, authorizes consideration of various factors in construing a statue—including legislative history and administrative construction of a statute. Texas Water Code

The legislative history of S.B. 1 enacting Water Code § 11.042(b) re-affirms that a bed and banks authorization pursuant to the statute's terms was not meant to be limited to "developed waters" as claimed by GBRA. In fact, the legislative history demonstrates the legislature considered—and rejected—limiting § 11.042(b) authorizations to developed waters, and that the language in the enacted bill was specifically intended to benefit the City of San Antonio and other cities that rely upon groundwater-based return flows for reuse.

S.B. 1, as originally introduced by Senator Buster Brown in the Senate, would have enacted Texas Water Code § 11.042(b) that applied to "developed waters" as GBRA now claims:

> "A person who wishes to convey *developed water* in a watercourse or stream must obtain the prior approval of the Commission through a bed and banks authorization . . . ."[22]

However, this version of Water Code § 11.042(b) was rejected in favor of language contained in the House Committee substitute for S.B. 1, introduced by the House sponsor Representative Ron Lewis. That substitute provided:

> "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 . . . ."[23]

The legislative intent to change the language of S.B. 1 as introduced to the language in the adopted bill—in order to address reuse concerns of San Antonio and other cities that rely on groundwater—is manifested in a colloquy during the S.B.1 Conference Committee between Senator Brown, Representative Lewis, and San Antonio Representative Robert Puente explaining the basis for the language that was in the House version of the bill regarding § 11.042(b):

> Chairman Buster Brown: "No. 205 bed and banks permit. This section from the senate requires a person that wishes to convey water in a watercourse or stream to first obtain a bed and bank authorization. It allows for the diversion only of the water put into a water course or stream less carriage losses and subject to any special conditions."

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§ 1.002 provides that the Code Construction Act applies to the construction of each provision of the Water Code, except as expressly provided in the Code.

[22] *See* Exhibit 1, SB 1 (1997) Introduced Bill, *available at* https://capitol.texas.gov/billlookup/Text.aspx?LegSess=75R&Bill=SB1.

[23] *See* Exhibit 2, SB 1 (1997) House Committee Report Bill, *available at* https://capitol.texas.gov/billlookup/Text.aspx?LegSess=75R&Bill=SB1.

> Chairman Ron Lewis: "Mr. Chairman, we—this is probably—except for inter-basin transfers, this is probably the one that we've fought the most on in the—in the House. What we did when it came out—out of the Senate is that the—the reuse language dealt mainly with just surface water. And so ***that was a potential problem for cities such as San Antonio when most of their reuse deals with groundwater***. And, so, what we did in the House is we got all the parties together that agreed to the Senate Bill and—and ***negotiated a deal to bring San Antonio's language in to allow for groundwater reuse language in here also—***it doesn't really change or alter the happiness of the people that came out of the Senate, but ***it does add language for San Antonio on the reuse.***"
>
> Chairman Brown: "Mr. Puente?"
>
> Rep. Robert Puente: "May I—you said that this was—we might have the—this change was made in committee by our committee members, and we all talked about it and we all agreed to it. And on the House floor we were able to protect it with one just simple Lewis amendment that there was a little bit of opposition to, but essentially it still kept the same parameters of ***protecting groundwater for those communities, especially San Antonio*** and still keeping the Senate version intact."[24]

The enactment of S.B. 1 with the House Committee substitute for § 11.042(b) clearly demonstrates a legislative intent to *not* limit bed and banks authorizations to "developed waters" and to make such authorizations applicable to San Antonio and other cities that rely on groundwater for reuse.

Additionally, TCEQ's administrative construction of its jurisdiction and authority to grant bed and banks authorizations for return flows derived from privately-owned groundwater, including groundwater that originates from the Edwards Aquifer, has remained consistent since § 11.042(b) was enacted in 1997. This consistent interpretation by TCEQ belies GBRA's assertion that § 11.042(b) authorizations are limited to "developed waters" and are not applicable to Edwards Aquifer-based return flows. As noted in Section II and footnote 1 above, TCEQ has previously issued at least three § 11.042(b) authorizations for return flows derived from Edwards Aquifer groundwater—including two to SAWS and one to SARA. Significantly, the Authorizations granted by COA 19-4768C in 2019 and Permit 13355 in 2021 were granted following GBRA's failed attempt to obtain, by judicial decree, a determination that return flows

[24] *See* Exhibit 3, Transcript of Proceedings Before the House and Senate Natural Resources Joint Conference Committee on Senate Bill 1, 75th Legislative Session, Archives and Information Services Division, Texas State Library and Archives Commission (May 27, 1997). The original audio is available at https://tsl.access.preservica.com/uncategorized/IO_4f7b4f92-fa17-4ed8-a5ed-a82c7065cd24/.

derived from Edwards Aquifer groundwater may not be reused pursuant to Section 11.042(b).[25]

C. There is no conflict between § 11.042(b) and the Edwards Aquifer Authority Act.

GBRA's alternative arguments for its claim that TCEQ lacks jurisdiction to consider SAWS' bed and banks application for the portion of SAWS' return flows derived from Edwards Aquifer groundwater are based on GBRA's mistaken belief that § 11.042(b) conflicts with two provisions of the Edwards Aquifer Authority Act (EAA Act). In GBRA's view, those provisions mandate that "reuse of Edwards water must take place before discharge to a watercourse," and "use and reuse of Edwards groundwater is geographically limited to the area within the EAA boundary."[26] Upon analysis, these claims fare no better than GBRA's "developed waters" assertion. GBRA's arguments ignore the plain language of § 11.042(b); construe the language of the Edwards Aquifer Authority Act out of context; and ignore the mandate of the Code Construction Act to reconcile potentially conflicting provisions if at all possible. For each of these reasons, GBRA's arguments and its plea to the jurisdiction should be rejected.

SAWS agrees that the definition of "reuse" in the EAA Act describes direct reuse only. But GBRA is wrong in asserting that this definition operates to restrict reuse of Edwards water to use before the water is discharged. By defining the technical term "reuse" in the EAA Act, the legislature gave "reuse" a specialized meaning that applies to the use of the term *in that Act*.[27] The definition of "reuse" in the EAA Act is not self-implementing—it has meaning only in the context in which the term is used in the Act itself. "Reuse" is never applied in the EAA Act to impose a restriction on indirect reuse following discharge. Instead, reuse is applied within the EAA Act solely to:

- determine an activity that the District may fund through grants or loans (§ 1.11(d)(1), § 1.24);
- identify an activity for which the District must allow credits against its regulation of withdrawals (§ 1.13);

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[25] *See Guadalupe Blanco River Auth. v. Texas Attorney Gen.*, 2015 WL 868871 at *3 (Tex. App—Austin 2015, pet. denied) ("Regarding the declarations sought from the district court, *the [Guadalupe-Blanco River] Authority requested* the following: . . . that all treated wastewater derived from *water withdrawn from the Edwards Aquifer*, if discharged or otherwise allowed to flow into a watercourse, lake, or other body of state-owned water: (i) *may not be reused pursuant to Section 11.042(b) of the Water Code* or otherwise; and, therefore, (ii) is and *shall remain state-owned water* and part of the run-of-river flow of that watercourse to which state-issued water rights are entitled in the order of their respective priority dates . . . .") (emphasis added).

[26] *See* GBRA Request at 16.

[27] *PlainsCapital Bank v. Martin*, 459 S.W.3d 550 (Tex. 2015) ("[W]hen a statute provides a definition for or uses a word or phrase in a particular manner, then courts must apply that definition or manner of use when interpreting the statute."); *Burgess v. United States*, 553 U.S. 124, 129 (2008) ("Statutory definitions control the meaning of statutory words . . . in the usual case.") (internal citation omitted).

- identify a planning activity the District may impose on its permittees (§ 1.23)

Applying the defined term "reuse" in the EAA Act in the context of how that term is actually used in the Act would also comport with the mandate of the Code Construction Act—to construe potentially conflicting provisions between a general statute and a local statute, and giving effect to both if possible.[28] The provisions of the EAA Act whose meanings are informed by the definition of "reuse" in the Act can be given effect with no conflict—and certainly no irreconcilable conflict—with the grant of power to TCEQ through § 11.042(b) to authorize bed and banks conveyance and reuse of return flows derived from privately-owned groundwater without regard to the aquifer from which the groundwater originated.

GBRA's assertion that § 1.34(b) of the EAA Act mandates that "use and *reuse* of Edwards groundwater is geographically limited to the area within the EAA boundary"[29] is both a misreading of the plain language of the Act and an effort to construe the Act's meaning out of context. GBRA's interpretation also reflects its failure to follow the mandate of the Code Construction Act to avoid a conflict by giving effect to the provisions of both the EAA act and § 11.042(b) if possible.

Section 1.34(b) of the EAA Act provides: "Water withdrawn from the Aquifer must be used within the Aquifer." The legislature's omission of the term "reuse" in this statutory requirement must be presumed to be purposeful and intentional.[30] By asserting that this provision applies to "reuse" as well as "use" GBRA not only fails to recognize this purposeful omission, but it also does the opposite by reading "reuse" into the statute despite its omission.

Moreover, SAWS complies with the § 1.34(b) requirement that its Edwards groundwater must be "used" in the boundaries of the Edwards Aquifer by supplying it as treated potable water to SAWS' retail customers. Following this use, those retail customers return to SAWS the wastewater generated by their initial use. This wastewater is different, both legally and physically, from the pristine groundwater SAWS pumps from the Edwards Aquifer. Legally, this wastewater is classified as "sewage" or "waste."[31] Physically this wastewater may contain pollutants that limit its usefulness. At significant costs, SAWS collects this sewage or waste and conveys it to water recycling centers where it is processed into highly treated wastewater effluent—a commodity with

[28] *See* Tex. Gov't Code § 311.026(a) ("If a general provision conflicts with a special or local provision, the provisions shall be construed, if possible, so that effect is given to both.").
[29] See GBRA Request at 16.
[30] *Hogan v. Zoanni*, 627 S.W. 3d 163, 169 (Tex. 2021).
[31] Tex. Water Code §§ 26.001(6), (7).

both environmental and economic value that meets the standards of SAWS' TPDES permits and TCEQ's Chapter 210 Reclaimed Water Rules. SAWS' bed and banks application seeks authorization to reuse the groundwater-based component of SAWS' treated effluent that is discharged from its water recycling centers as return flows rather than "water withdrawn from the Aquifer."

Even if GBRA's effort to apply the prohibition on the reuse of Edwards Aquifer water outside of the boundaries of the Edwards were recognized, SAWS is still entitled under the EAA Act to treat and subsequently use its return flows. EAA Rule 711.220 specifically provides that "the place of use for groundwater withdrawn from the Aquifer that is processed into or used to produce a commodity is the plant site where the commodity is produced."[32] Under this rule, SAWS' recycling plants produce a "commodity"—highly treated effluent—and are located within the boundaries of the Edwards, thus a qualifying "place of use" for purposes of the Act.

GBRA asserts that § 1.08(a) of the EAA Act providing that the Act "prevails over any provision of general law that is in conflict or inconsistent with this article regarding *the area of the authority's jurisdiction*" deprives TCEQ of jurisdiction to consider SAWS' § 11.042(b) application insofar as it includes a component of return flows derived from Edwards water. However, the authority to grant a bed and banks authorization does not fall within the "area of the Authority's jurisdiction," thus it cannot be in conflict or inconsistent with the Act. Accordingly, this language is not applicable to SAWS' § 11.042(b) application. As demonstrated above, there is no irreconcilable conflict between § 11.042(b) and the EAA Act that prevents giving meaning to the sections GBRA alleges to be in conflict.

Finally, GBRA's general assertion that specific laws prevail over general laws[33] ignores the dictate of the Code Construction Act that this general assertion is reversed, and the general law prevails if "the general provision is the later enactment, and the manifest intent is that the general provision prevail."[34] Section 11.042(b) is the later enactment. As shown by the analysis of § 11.042(b)'s plain language and its legislative history, the manifest intent in its enactment was to provide a process to allow all dischargers of return flows derived from privately-owned

[32] *See* Exhibit 4, Edwards Aquifer Authority Rules at 3, EAA Rule 711.220(b).
[33] GBRA Request at 19.
[34] Tex. Gov't Code § 311.026(b).

groundwater, including San Antonio, to maintain their ownership of groundwater-based effluent after discharge.

D. GBRA's plea to the jurisdiction provides no basis for an exercise of discretion to deny an authorization for indirect reuse of Edwards-derived effluent.

GBRA implies that TCEQ should determine, as a matter of discretion, that the agency lacks jurisdiction to grant a § 11.042(b) authorization to SAWS for return flows derived in part from Edwards groundwater.[35] GBRA's view conflicts with TCEQ's own description of its role in a bed and banks authorization request—"to initially decide whether SAWS or any other entity qualifies for a bed and banks permit—and thus realize what the Texas Supreme Court stated was the 'great benefit [that] is derived from the agency's uniformly interpreting its laws, rules and regulations.'"[36] In short, the discretion to be exercised is whether the application meets the statutory requirements, not whether the Commission may decline to consider the application.

Surprisingly, GBRA cites the case of *Edwards Aquifer Authority v. Day* as support for its "discretion, but no mandate" argument.[37] However, in *Day*, the Texas Supreme Court expressly recognized "the [Water] Code specifically allows the Water Commission to authorize a person to discharge privately owned groundwater into a natural watercourse and withdraw it downstream" citing to Texas Water Code § 11.042(b).[38] The judicial recognition of TCEQ's authority as deriving from this statute—by the highest court in the State of Texas, in a significant case concerning Edwards Aquifer groundwater—affirms rather than undermines TCEQ's jurisdiction with regard to SAWS' application that concerns a component attributable to Edwards groundwater.

For the foregoing reasons, GBRA's plea to the jurisdiction is "all hat and no cattle," and should be denied.

V. SAWS' RESPONSE TO REQUESTS FOR CONTESTED CASE HEARING

All the hearing requestors claim potential impairment of their appropriative water rights if SAWS is authorized to retain ownership of its groundwater-based effluent following discharge to the San Antonio River basin. None claim ownership of a water right that is subject to protection under § 11.042(b)—those granted based on use or availability of an applicant's return flows. Six requestors have water rights only on the Guadalupe River upstream of its confluence with the San

[35] GBRA Request at 16–17.
[36] *See* Brief of Appellee, Texas Commission on Environmental Quality at 15, *Guadalupe Blanco River Auth. v. Texas Attorney Gen.*, 2015 WL 868871 (Tex. App.—Austin 2015, pet. denied).
[37] *See Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 822 (Tex. 2012).
[38] *Id.*

Antonio River and are not within the conveyance zone requested in SAWS application.[39] One requestor has water rights only on the Guadalupe below its confluence with the San Antonio River.[40] GBRA asserts water rights on the Guadalupe, both upstream and downstream of its confluence with the San Antonio River.

Many of the hearing requestors made similar arguments. To the extent the issues raised by multiple requestors can be addressed collectively, and to avoid unnecessary repetition in this brief, SAWS hereby responds to those issues at the beginning of this Section. Issues raised by only one or a minority number of parties will be addressed at the end of this Section.

For the reasons stated in this response, SAWS believes that no hearing is authorized based on the requests filed in this case. However, if the Commission determines otherwise, SAWS respectfully urges the Commission to *specify* the issues referred to hearing and to *limit* the issues to those for which a requestor has shown it has an interest protected by the law applicable to SAWS' application and is an affected person with a justiciable interest.

A. Texas law does not recognize a third-party right to a contested case hearing on a § 11.042(b) authorization request.

The hearing requestors in this case all seek a contested case hearing under the Administrative Procedure Act. A "contested case" is defined in the Act:

> "'Contested case' means a proceeding, including a ratemaking or licensing proceeding, in which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing."[41]

It is a well-established principle of administrative law that this definition in the APA does not create a right to a contested case for matters before an agency *sua sponte*. Instead, that right must be provided by separate express statutory authority. In *Texas Logos LP v. Texas Department of Transportation*, the Austin Court of Appeals noted "this court has long held that, *absent express statutory authority the APA does not independently provide a right to a contested case hearing*."[42] The Texas Supreme Court has similarly affirmed that the right to a contested case hearing is controlled by statute. In *TCEQ v. City of Waco*, the court affirmed TCEQ's decision to deny Waco's request for a contested case hearing on an application for a CAFO water quality permit to

[39] Cites of San Marcos, Seguin and Victoria, and NBU, INVISTA and Victoria County Navigation District.
[40] Union Carbide.
[41] Tex. Gov't Code § 2001.003(1).
[42] *Texas Logos LP v. Texas Dept. of Transp.*, 241 S.W.3d 105, 123 (Tex. App.—Austin 2007, no pet.) (emphasis added).

increase the size of a dairy within the watershed of Waco's municipal water supply lake, based on a statutory exception provided in Texas Water Code § 26.028(d).[43] The *Waco* court held "Agency rules provide that an affected person may request a contested case hearing '*when authorized by law*'. . . . But no right to a contested case hearing exists for 'an application, under Texas Water Code, Chapter 26, to renew or amend a permit' under certain circumstances."[44]

Although the Texas Water Code provides a right to a contested case hearing on specific matters concerning the permitting of *state water*,[45] no such right is afforded for a § 11.042(b) bed and banks authorizations for return flows derived from privately-owned groundwater, as requested by SAWS. Therefore—as a matter of law—a third-party right to a contested case hearing on a § 11.042(b) authorization request does not exist, and all third-party hearing requests on SAWS' application should be denied on this basis alone.

The Commission has previously clarified that the law applicable to a bed and banks application for return flows derived from privately-owned groundwater comes solely from § 11.042(b) and not from statutes applicable to state water. An appeal by the Cities of Bryan and College Station in 2006—of the Executive Director's return of their groundwater-based return flow bed and banks applications as incomplete—led to one of the Commission's earliest cases applying and interpreting § 11.042(b). Following written briefing and oral argument, the Commission entered an order clarifying "as a matter of law" that "applications that request authorization to divert and reuse return flows derived exclusively from privately owned groundwater . . . *do not involve state water*" and that § 11.042(b) provides "the *criteria* for the owner of privately owned groundwater *to retain ownership of groundwater after discharge into a state watercourse.*"[46] As a result of its legal determinations, the Commission ordered the Executive Director to "process the Cities' applications *solely under Section 11.042(b)* and the Commission's bed and banks authorization rules and *not under statutes and rules applicable to state water.*"[47]

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[43] *Texas Comm'n on Envtl. Quality v. City of Waco*, 413 S.W.3d 409 (Tex. 2013). The *Waco* court went on to hold that "Although the APA defines 'contested case' and sets the procedural framework, *the agency's enabling act here sets out whether rights are to be determined after an opportunity for adjudicative hearing*, and agency rules may decide whether that opportunity may include a contested case hearing." *Id.* at 423 (emphasis added).
[44] *Id.* at 424 (citing Texas Water Code § 26.028(d)) (some internal citations and quotation marks omitted).
[45] *See, e.g.*, Tex. Water Code §§ 11.132, 11.085(e), and 11.1273 authorizing a contested case hearing for permits for appropriative rights to use state water, inter-basin transfers of state water, and water management plans for specific water rights.
[46] *See* Exhibit 5, Interim Order, TCEQ Docket Nos. 2006-1831-WR and 2006-1832-WR (Dec. 20, 2006) (emphasis added).
[47] *Id.* (emphasis added).

Like Bryan and College Station, SAWS is requesting a bed and banks authorization to retain ownership of its groundwater after discharge into a state water course. Also like Bryan and College Station, SAWS' application applies solely to its groundwater-based return flows and not to state water. Neither § 11.042(b) nor TCEQ's bed and banks authorization rules create a right to a contested case hearing for such an application. As noted above, the legislature's omission of language when enacting a statute must be viewed as a purposeful act.[48] The Commission should give meaning to this purposeful act of the legislature to omit a contested case hearing opportunity when enacting § 11.042(b) by denying the requests for a contested case hearing on SAWS' application.

B. Affected persons may request a contested case hearing only *when authorized by law*, and no law authorizes a hearing for third-party requestors for an application under § 11.042(b).

Assuming *arguendo* that a legal right to a contested hearing was applicable to this matter, which is clearly not the case, each requestor would still be required to demonstrate that they meet the requirements of TCEQ's rules applicable to "affected persons." This subsection will summarize affected person requirements relevant to this matter; the subsection below will show that the hearing requests filed in this matter fail to meet those requirements.

TCEQ rules applicable to requests for a contested case hearing provide that such requests may be made by the Commission; the Executive Director; the Applicant; or, *when authorized by law*, affected persons.[49] This limitation on "affected persons" to only those who are *authorized by law* to request a hearing establishes a threshold test: a third party who wishes to be granted affected person status must first demonstrate that the law applicable to the application for which they are seeking a hearing provides the right to claim affected person status. As demonstrated above, no law, and certainly not Texas Water Code § 11.042 (b), creates a right to a contested case hearing for third persons on an application that requests authorization to divert and reuse return flows derived exclusively from privately-owned groundwater. Furthermore, the Commission has considered and previously determined through its order in the Bryan and College Station applications that such applications are to be processed solely under Section 11.042(b) and the Commission's bed and banks authorization rules, and not under statutes and rules applicable to state water. None of the third-party hearing requests filed in this docket have pointed to a law

[48] *Hogan v. Zoanni*, 627 S.W.3d 163, 169 (Tex. 2021).
[49] 30 TAC §§ 55.251; 55.256(a); *see also* Tex. Water Code § 5.115(a).

authorizing them to seek affected person status to request a hearing on SAWS' application, and all the requests should be denied.

Furthermore, and assuming any of the hearing requestors are able to point to a law authorizing the pursuit of affected person status in an application processed under § 11.042(b), the requestor must have "personal *justiciable* interest related to a *legal* right, duty, privilege, power, or economic interest affected by an application."[50] An interest common to members of the general public does not qualify as a personal justiciable interest.[51] The hearing request must include a *specific* written statement explaining in plain language why the requestor believes he or she will be affected by the activity in a manner not common to members of the general public.[52]

In evaluating whether a requestor is an affected person, the Commission considers all relevant factors including:

- Whether the interest claimed *is protected by the law under which the application is considered*;
- Distance restrictions or other *limitations imposed by law* on the affected interest;
- Whether a reasonable relationship exists between the interest claimed and the activity regulated;
- Likely impact of the regulated activity on the health, safety, and use of property of the person;
- Likely impact of the regulated activity on use of the impacted natural resource by the person; and
- For governmental entities, their statutory authority over or interest in the issues relevant to the application.[53]

C. The law under which SAWS' application is considered limits protection of appropriative water rights to those that were granted based on the use or availability of SAWS' return flows.

Common to all of the requests for a contested case hearing filed in response to SAWS' application is the false assertion that SAWS' requested bed and banks authorization to divert and use only its groundwater-based return flows will "impair" the "water rights" or "senior water rights" of the requestors.[54] However, none of the requestors has claimed ownership of a water right that falls within the class of water rights protected by § 11.042(b)—an existing right granted

[50] Tex. Water Code § 5.115(a) (emphasis added).
[51] *Id.*
[52] 30 TAC § 55.251(c)(2).
[53] 30 TAC § 55.256.
[54] GBRA Request at 12–13; INVISTA Request at 2–3; Union Carbide Request at 1; NBU Request at 3–4; Victoria Request at 3–4; Seguin Request at 2–3; San Marcos Request at 2; Victoria County Navigation District Request at 1.

based on the use or availability of SAWS' groundwater-based return flows. These requestors are seeking to claim ownership of SAWS' return flows derived from privately owned groundwater when the only interest they have asserted is a usufructuary interest in state water that is not subject to the protection afforded by § 11.042(b).

Although Section 11.042(b) provides for protection of *certain* existing water rights, that protection is expressly limited:

> "The authorization may allow for the diversion and reuse by the discharger of existing return flows, less carriage losses, and shall be subject to special conditions if necessary *to protect an existing water right that was granted based on the use or availability of these return flows . . . .*[55]

This express limitation imposed by the legislature in enacting § 11.042(b) defines and cabins the appropriative water rights that are protected by law in this matter. Two conditions must be satisfied: (1) there must be an existing water right, and (2) that right must have been granted based on the use or availability of SAWS's return flows. All requestors made the first claim, but none made the second. This is fatal. It is also as it should be, since none of the requestors have ever been granted a water right based on the use or availability of SAWS's return flows. As noted in the Hydrology Review Memo for SAWS' application by Executive Director staff member Dr. Kathy Alexander, all water rights that were granted based on use or availability of SAWS' return flows are either owned by SAWS or based on contracts with SAWS.[56] Having failed to assert that their water rights fall within the narrow classification of such rights protected by the law applicable to this matter, the hearing requestors' claims of alleged impairment to their water rights are meritless and provide no basis to determine that the requestors are affected persons who have a right to a contested case hearing on their water rights impairment claims.

Some of the hearing requestors claiming impairment of their water rights couch their concerns in terms of potential impacts of SAWS' bed and banks authorization request on the time

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[55] Tex. Water Code § 11.042(b) (emphasis added).

[56] *See* Exhibit 6 at 2. The Hydrology Memo states "[S]taff reviewed water rights in the San Antonio and Guadalupe River Basins to determine whether any existing water rights were explicitly granted based on SAWS' return flows and determined that, based on available commission records, there were water rights that were explicitly granted based on these return flows. *These water rights are either owned by SAWS or are based on contracts with SAWS*" (emphasis added). Dr. Alexander has previously given sworn testimony affirming that TCEQ Staff's "standard practice" for determining "whether or not a water right was granted based on use of availability of [an applicant's] return flows" was to "go through all permits in the basin and determine whether they have special conditions in them referencing the use of availability of someone else's return flows." *See* Exhibit 7, Application by City of Lubbock for Amendment to Water Use Permit No. 3985, Hearing on the Merits (Oct. 19, 2011) at 296, Lines 3–10; *id.* at 297, Lines 17–25.

priority system applicable to surface water[57] or potential calls on water rights resulting from effectively making SAWS' groundwater-based return flows "the most senior water right in the basins."[58] These claims, at best, reflect a fundamental misunderstanding of the statutory basis for the time priority system and the nature of SAWS' request.

The statutory reach of the time priority system is clear from the plain language of the law: "*As between appropriators*, the first in time is the first in right."[59] The time priority system applies to appropriators of *state* water. There is no similar time priority provision in the Water Code applicable to privately-owned groundwater-based return flows. That is the reason why SAWS' draft permit and the other § 11.042(b) authorizations previously issued by TCEQ typically declare "the groundwater-based return flows to be conveyed via the bed and banks of State watercourses do not have a priority date and are not subject to priority calls from senior water rights." The water being conveyed is outside of the appropriative water rights system except with regard to those existing permits that were granted based on use or availability of the applicant's return flows, which are subject to protection through special conditions authorized by § 11.042(b).

The hearing requestors' claims of potential impairment of their water rights are not based on the law applicable to a § 11.042(b) application. Accordingly, the Commission should find that each third-party requestor has failed to show they are an affected person and deny their request for a contested case hearing.

D. Other 30 TAC § 55.256 factors do not make requestors affected persons.

Other factors identified in 30 TAC § 55.256 that the Commission may consider do not afford "affected person" status to the hearing requestors in this case. An affected person is "one who has a personal *justiciable interest* related to a *legal* right, duty, privilege, power, or economic interest affected by the application."[60] The only legal right, duty, privilege, power, or economic interest asserted by these requestors is their unprotected "water rights" which, as discussed above, fall outside the limitation imposed by § 11.042(b) on water rights that are subject to protection under an application pursuant to its terms. Because the interests asserted by the hearing requestors

[57] *See* GBRA Request at 13; NBU Request at 2; Victoria Request at 4; Seguin Request at 3.
[58] *See* INVISTA Request at 3; Seguin Request at 2.
[59] Tex. Water Code § 11.027.
[60] Tex.Water Code § 5.115(a); 30 TAC § 55.256(a).

do not fall within the statutory limitation on water rights subject to protection, they do not—and cannot—assert a *justiciable interest* for which relief can be afforded under the applicable law.[61]

E. The Executive Director has properly approved SAWS' accounting plan.

Several hearing requestors provided comments related to SAWS' accounting plan, which was reviewed and approved by the Executive Director. San Marcos expressed a generalized concern "with the manner in which SAWS will calculate and account for" its return flows.[62] Victoria and NBU both stated that they were "concerned that the accounting plan as currently proposed has been developed based on incomplete data relating to loss factors, travel times and other calculations . . . ."[63] NBU alone asserted, without explanation, its "belief" that a portion of SAWS' return flows proposed for diversion were previously classified as "historic."[64] Victoria County Navigation District stated that questions exist "related to the calculations used by the Applicant to determine the potential availability of the requested groundwater-based return flows and those related to evaporation and absorption rates between the discharge and diversion points referenced in said Application."[65] These general and speculative concerns fail to provide the specificity required by 30 TAC § 55.251(c)(2) to show how these requestors will be affected differently than the general public, thus denying SAWS an opportunity for a specific response.

GBRA offered opinion testimony that SAWS' accounting plan "should separately track the percentage of its effluent stream that is sourced from the Edwards Aquifer"; fails "to adequately account for all conveyances losses" which "would have SAWS regularly calling for more water to be passed by GBRA and others than would be authorized by Permit 13098"; fails to honor senior water rights when accounting for diversions under water rights that were granted based on the use or availability of SAWS' return flows; and fails to account for time of travel between the point of discharge and point of diversion.[66]

To the extent that GBRA's opinion testimony attempts to show an effect on GBRA different than the general public, those effects relate to how SAWS' diversion of its return flows derived from privately-owned groundwater may impact GBRA's appropriative rights to state

[61] "[F]or a controversy to be justiciable, there must be a real controversy between the parties *that will be actually resolved by the judicial relief sought*." *State Bar of Tex. v. Gomez*, 891 S.W.2d 243, 245 (Tex. 1994) (emphasis added).
[62] San Marcos Request at 2.
[63] *See* Victoria Request at 2; NBU Request at 3.
[64] *See* NBU Request at 3.
[65] *See* Victoria County ND Request at 1.
[66] GBRA Request at Exhibit 1, ¶¶ 13–17.

surface water. As outlined in Section IV.B. above, the legislature did not provide legal protection to all water rights in the § 11.042(b) authorization process—it expressly limited that protection to those water rights that were "granted based on the use or availability of the applicant's return flows."[67] GBRA's hearing request makes no claim that its water rights fall within the limited classification protected by law. Accordingly, GBRA's concerns are no different than that of the general public, not relevant, and GBRA's hearing request fails to show a justiciable interest that can be addressed by relief authorized by law.

Even if the Commission were to conclude that the hearing requestors' concerns about SAWS' accounting plan met the legal threshold of showing an interest different from the general public, which the requestors have not demonstrated, the Commission has the discretion to consider the likely impact of the regulated activity on the interests of the requestors when deciding their status as "affected persons."[68] The record before the Commission in this matter provides ample evidence in support of a decision to deny these requestors' affected person status based on their speculative and misplaced concerns about SAWS' accounting plan:

- SAWS' original application, filed in 2013, provided an estimate of channel losses based on TCEQ's Water Availability Model (WAM).[69]
- Channel loss information based on TCEQ's WAM was used in developing SAWS' accounting plan.[70]
- The Executive Director's professional staff conducted an independent review of SAWS' accounting plan and determined it to be adequate.[71]
- The Executive Director has reviewed and approved SAWS' accounting plan.[72]
- The draft permit provides that "Permittee shall only divert its return flows actually discharged."[73]

[67] *See* Tex. Water Code § 11.042(b).
[68] "In making a decision regarding affected person status, TCEQ enjoys the discretion to weigh and resolve matters that may go to the merits of the underlying application, including the likely impact of the regulated activity . . . will have on the health, safety, and use of property by the hearing requestor and on the use of natural resources. . . . *TCEQ's inquiry into these and other factors may include reference to the permit application, attached expert reports, the analysis and opinions of professionals on its staff, and any reports, opinions, and data it has before it*. . . . And importantly, the existence of substantial evidence in the record supporting TCEQ's decision is a factor—often a dispositive factor—in determining whether TCEQ abused its discretion." *Sierra Club v. Tex. Comm'n on Envtl. Quality*, 455 S.W.3d 228, 235 (Tex. App.—Austin 2014, pet. denied) (emphasis added).
[69] *See* Application, Supplemental Information at 10; *see also id.* at Attachment 9 "Distance and Channel Loss Information for SAWS Bed and Banks Application."
[70] See Application, Accounting Plan Narrative at 2, 10, and 11.
[71] *See* Exhibit 6 at 3.
[72] *See* Draft Permit at 3.
[73] *See* Draft Permit, Special Condition 5.B.

- The draft permit provides that SAWS "shall only divert the actual daily amount of groundwater-based return flows discharged . . . less the estimated losses between the discharge and diversion points, and less any groundwater-based return flows diverted under permittee's other authorizations when those authorizations are being used."
- SAWS is required to contact the South Texas Water Master prior to diversion of water authorized by its permit.[74]
- The permit is issued subject to TCEQ's rules and the right of continuing supervision of state water resources exercised by the Commission.

The existing record provides a reasonable basis for the Commission to determine that SAWS accounting plan will provide an effective tool of memorializing discharge and diversion data that will promote compliance with the requested authorization and an efficient means for TCEQ staff to oversee and verify SAWS' compliance.

GBRA's concerns that SAWS could call for more water to be passed by GBRA and others is misplaced—SAWS' diversion of its groundwater-based return flows will be subject to oversight by the South Texas Watermaster as well as the continuing supervision by the Commission. Pursuant to Special Condition 5.I. of the draft permit and 30 TAC § 304.15, SAWS will have to contact the Watermaster prior to diversion of water. The Watermaster rules require submittal of a "declaration of intent to divert" expressing the diverter's intent with regard to the intended diversion, transport, or release.[75] These rules give the watermaster the tools needed to supervise SAWS' diversions of its groundwater-based return flows to ensure compliance with the authorization granted by the Commission.

Additionally, the draft permit expressly states that it is issued subject to the continuing right of supervision of state water resources exercised by the Commission.[76] Accordingly, if the Commission or its Executive Director modify the channel losses contained in its Water Availability Model, SAWS' permit and accounting plan will be subject to modification to conform to the revised WAM. GBRA also appears to misconstrue the role that SAWS' accounting plan will play in accounting for diversions under water rights that were granted based on the use or availability of SAWS' return flows. The quantity of water diverted under those permits will be decided by the relevant permittee and the South Texas Watermaster, not SAWS. The role of

[74] *See* Draft Permit at 5, ¶ I.
[75] 30 TAC § 304.15(a).
[76] Draft Permit at 6.

SAWS' accounting plan is to subtract those diversions, if they occur, from the amount that SAWS may divert pursuant to the authorization it seeks.

F. SAWS' response to individual hearing requests.

The primary concern of all hearing requestors appears to be the impact on their state water rights if SAWS is authorized to retain ownership over its privately-owned groundwater after discharge into a state water course as § 11.042(b) allows. This concern is addressed in Section V.C. above and will not be repeated here. This subsection will address additional issues raised in individual requests.

1. GBRA's individual concerns fail to provide a basis for affected person status.

GBRA asserts TCEQ has the discretion—but not the obligation—to grant bed and banks authorizations, and that in exercising this discretion the agency "*must* take into account and impose special conditions that address the impact of authorizing a bed and banks permit on, among other things, 'existing permits, certified filings, or certificates of adjudication.'"[77] GBRA cites to Texas Water Code § 11.042(c) to support its argument. This is—at best—disingenuous. As opposed to Section 11.042(b), subsection (c) does not concern return flows derived from privately-owned groundwater, and its requirements are not applicable in this matter. As noted previously in Section V, the Commission decided through its interim order in the Bryan and College Station matter that *Section 11.042(b) alone* provides "the criteria for the owner of privately-owned groundwater to retain ownership after discharge into a state watercourse," and such applications are to be processed solely under § 11.042(b)'s provisions. Subsection (c) has no legal relevance in this case, and GBRA's reliance on it only serves to prove SAWS's point that the legislature made a purposeful decision in limiting the protection of water rights affected by an application under 11.042(b) to those based on the use or availability of return flows derived from privately owned groundwater. Subsection (c)'s broader protection that applies to applications for "water in a watercourse or stream" are not applicable here.

GBRA further asserts that SAWS' proposed diversion location near the mouth of the Guadalupe River is "tantamount to waste," speculating that the water will not be used for a beneficial purpose.[78] GBRA apparently fails to recognize that SAWS' application expressly identifies instream use as one of the intended uses of SAWS' return flows. Moreover, TCEQ's

[77] *See* GBRA Request at 4 (emphasis in original).
[78] *Id.* at 14.

rules expressly provide that "*instream use is a beneficial use* of water,"[79] thus negating GBRA's speculative concern. Furthermore, GBRA failed to show how its concern is not common to members of the general public.

GBRA next asserts that SAWS seeks authorization for instream use only and has no intention of diverting water flows at the bay.[80] This odd reversal of positions reveals the lengths to which GBRA appears willing to engage in uninformed speculation in an effort to find a basis to delay or defeat SAWS' bed and banks authorization. SAWS' application originally proposed a single diversion point. This was amended by SAWS' February 16, 2016 response to a TCEQ staff request for information to describe a diversion reach and identify SAWS' plans for diversion.

GBRA expresses a further concern about the impact of SAWS' application on GBRA's operation of its salt-water barrier. GBRA speculates a hypothetical situation in which SAWS would make a priority call that would require GBRA to deflate its salt-water barrier dam, impacting GBRA's water rights. GBRA's hypothetical scenario ignores the reality that SAWS' diversion rights will be limited to SAWS' groundwater-based return flows, and do not include any of the state water which has been appropriated to GBRA. GBRA's real complaint is not directed at SAWS' draft permit, but rather at the legislature's enactment of § 11.042(b), which authorizes issuance of an authorization such as that requested by SAWS' and allows a person to retain ownership of his or her groundwater following discharge to a watercourse.

GBRA's flawed concern about impacts on its operation of its salt-water barrier dam also overlook the terms of GBRA's own permit.[81] Relevant permit provisions include:

- Special Condition 4 mandating that GBRA maintain a suitable outlet in its salt water barrier dam to allow free passage of water that GBRA is not entitled to impound or divert;
- Provision stating that COA is issued subject to all senior and superior water rights in the Guadalupe River Basin; and
- Provision stating that COA is issued subject to the Rules of the Commission and its right of continuing supervision of State water resources consistent with the public policy set forth in the Texas Water Code.

Special Condition 4 put GBRA on notice that it had to have a means of passing water that it is not authorized to impound, and the issuance of SAWS' requested bed and banks authorization

[79] 30 TAC § 297.1(26).
[80] GBRA Request at 14–15.
[81] Certificate of Adjudication No. 18-5484.

is consistent with the public policy set forth in the Water Code through § 11.042(b). Here again, GBRA's complaint is not with SAWS' application, but rather with the Legislature's policy decision to enact § 11.042(b) to provide a means to retain ownership of groundwater following discharge to a watercourse. GBRA's individual concerns fail to provide a basis for affected person status.

2. INVISTA's individual concerns fail to provide a basis for affected person status.

Without joining in GBRA's plea to the jurisdiction, INVISTA repeats GBRA's argument that Edwards Aquifer water is not "developed water" and is not subject to authorization under § 11.042(b). The reasons this argument fails are set forth in Section IV above and will not be repeated here. INVISTA raised no other unique argument. Its "developed waters" argument fails to provide a basis for affected person status.

3. Union Carbide's individual concerns fail to provide a basis for affected person status.

Union Carbide asserts that the draft permit does not include specific requirements to support minimum instream flows in the Guadalupe River. Such specific requirement is not necessary to ensure that SAWS' requested authorization will enhance rather that reduce stream flows. Under the requested authorization, SAWS' return flows are discharged into the San Antonio River basin and will remain in the river until the diversion point near the mouth of the Guadalupe River below its confluence with the San Antonio. This will enhance rather than reduce minimum instream flows in the San Antonio and Guadalupe Rivers.

Union Carbide also states that the draft permit is unclear how it would restrict SAWS' ability to move its diversion point in the future. This suggests that Union Carbide overlooked Special Condition 5.F. which provides that a change in location of or addition of diversion points will require an amendment of the permit. Union Carbide's individual concerns fail to provide a basis for affected persons status.

4. NBU and City of Victoria's individual concerns fail to provide a basis for affected person status.

NBU and Victoria are both represented by the same legal counsel and filed similar requests for hearing. For the sake of brevity, they will be addressed together. Without joining in GBRA's plea to the jurisdiction, both NBU and Victoria repeated some of GBRA's arguments about the EAA Act requiring Edwards water to be used within the boundaries of the Edwards, and the EAA's

power to "certify lawful use and reuse" of Edwards water. These arguments are addressed in detail in Section IV above and will not be repeated here.

Both NBU and Victoria assert that the draft permit makes no provision for maintenance of instream flows and freshwater inflows. As noted in SAWS' response to Union Carbide, such requirement in the form of a permit condition is not necessary, because SAWS' requested authorization will enhance rather than reduce stream flows. NBU and Victoria's individual concerns fail to provide a basis for affected person status.

NBU alone noted its interest in protecting Comal Springs located within the City of New Braunfels' corporate limits, but fails to offer any claim that SAWS' requested authorization will impact those springs or that NBU's interest in Comal Springs is justiciable or different from that of the general public.

5. City of San Marcos' individual concerns fail to provide a basis for affected person status.

Without joining in GBRA's plea to the jurisdiction, San Marcos asserts that water withdrawn from the Edwards must be used within its boundaries, and that SAWS' application seeks to remove groundwater from those boundaries. This argument is addressed in detail in Section IV above and will not be repeated here. San Marcos made no unique arguments not already addressed that would provide a basis for affected person status.

6. City of Seguin's individual concerns fail to provide a basis for affected person status.

Seguin's concerns appear to relate solely to its appropriative water rights and the potential impact of a hypothetical priority call by SAWS. Seguin made no assertion that its rights, which are on the Guadalupe far above its confluence with the San Antonio River, were granted based on use or availability of SAWS' return flows. This argument is addressed in detail in Section V above and will not be repeated here. Seguin made no unique arguments not already addressed that would provide a basis for affected person status.

7. Victoria County Navigation District's individual concerns fail to provide a basis for affected person status.

Victoria County Navigation District's concern appears to relate solely to its appropriative water right. The District made no assertion that its right is based on use or availability of SAWS' return flows. This concern is addressed in detail in Section V above and will not be repeated here.

The District made no unique arguments not already addressed that would provide a basis for affected person status.

VI. CONCLUSION AND PRAYER

For the foregoing reasons, SAWS respectfully requests the Commission deny GBRA's plea to the jurisdiction. SAWS further requests the Commission deny the third-party hearing requests filed in this matter, because (1) no law affords a third-party requestor a right to a contested case hearing on a § 11.042(b) application; (2) none of the hearing requestors has a legal right to a hearing; (3) none of the hearing requestors has shown it has a right or interest protected by the law under which SAWS' application is to be considered; and (4) none of the hearing requestors has demonstrated a justiciable interest that can be addressed and remedied in a contested case hearing.

SAWS requests the Commission grant its application for a § 11.042(b) authorization. Alternatively, if the Commission determines one or more of the hearing requests should be granted and referred for a contested case hearing, SAWS requests the Commission limit the scope of its referral to the specific grounds for which it determines that requestor to be an affected person, and identify the specific and narrow issues to be addressed.

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EXHIBIT 1

By: Brown S.B. No. 1

97S0149/2

A BILL TO BE ENTITLED

AN ACT

relating to the development and management of the water resources of the state; providing penalties.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

ARTICLE 1. DROUGHT RESPONSE MANAGEMENT

SECTION 1.01. Subchapter C, Chapter 16, Water Code, is amended by adding Section 16.060 to read as follows:

Sec. 16.060. STATE DROUGHT PLANNING. (a) The executive administrator shall prepare, coordinate, and oversee the development and implementation of a comprehensive state drought plan. The board is the state agency primarily responsible for ongoing drought and water supply monitoring, technical and financial assistance for drought planning, and administrative support of committee functions.

(b) The state drought plan shall provide for the initial development and updating of effective regional and local drought response plans.

(c) The board may provide cost-sharing financial assistance from the research and planning fund to assist local governments in the development of regional and local drought response plans.

(d) The drought planning and monitoring committee is created. The committee is composed of one representative from each of the following entities, appointed by the administrative head of that entity:

(1) the board;

(2) the commission;

(3) the Parks and Wildlife Department;

SECTION 2.02. Section 11.002, Water Code, is amended by adding Subdivisions (9) and (10) to read as follows:

(9) "Developed water" means:

(A) groundwater that is in a watercourse or stream, that would not be in the watercourse or stream but for the efforts of the developer, and that is intended for subsequent diversion and use by the developer; and

(B) surface water obtained through an approved interbasin transfer of water that is in a watercourse or stream, that would not be in the watercourse or stream but for the efforts of the developer, and that is intended for subsequent diversion and use by the developer.

(10) "Surplus water" means water in excess of the initial or continued beneficial use of the appropriator and not consumed or used beneficially for the purpose authorized by law.

SECTION 2.03. Subsection (e), Section 11.023, Water Code, is amended to read as follows:

(e) The amount of water appropriated for each purpose mentioned in this section shall be specifically appropriated for that purpose, subject to the preferences prescribed in Section 11.024 of this code. The commission may authorize appropriation of a single amount or volume of water for more than one purpose of use. In the event that a single amount or volume of water is appropriated for more than one purpose of use, the total amount of water actually diverted for all of the authorized purposes may not exceed the total amount of water appropriated.

SECTION 2.04. Section 11.036, Water Code, is amended to read as follows:

Sec. 11.036. CONSERVED OR STORED WATER: SUPPLY CONTRACT.

(1) that he is entitled to receive or use the water;

(2) that he is willing to comply with all reasonable contractual provisions;

(3) that he is willing and able to pay a just and reasonable price for the water;

(4) [~~(3)~~] that the party owning or controlling the water supply has water not contracted to others and available for the petitioner's use; and

(5) [~~(4)~~] that the party owning or controlling the water supply fails or refuses to supply the available water to the petitioner, or that the price or rental demanded for the available water is not reasonable and just or is discriminatory.

SECTION 2.06. Section 11.042, Water Code, is amended to read as follows:

Sec. 11.042. DELIVERING WATER DOWN BANKS AND BEDS. (a) Under rules prescribed by the commission, a person, association of persons, corporation, or water improvement or irrigation district supplying stored or conserved water under contract as provided in this chapter may use the bank and bed of any flowing natural stream in the state to convey the water from the place of storage to the place of use or to the diversion plant

of the appropriator. The commission shall prescribe rules for this purpose.

(b) A person who wishes to convey developed water in a watercourse or stream must obtain the prior approval of the commission through a bed and banks authorization. Such authorization shall ensure that an unlawful appropriation of water does not occur by allowing only the amount of developed water put into the watercourse or stream to be diverted, less carriage

losses. Developed water discharged into a watercourse or stream must also meet all applicable water quality standards, and the water and its discharge and conveyance including diversion rates and location point may not otherwise cause adverse environmental impacts. Authorizations under this section and water quality authorizations may be approved in a consolidated permit proceeding.

(c) A person who has discharged groundwater into a watercourse or stream and who subsequently wishes to divert and use such water must first obtain authorization for the diversion and use from the commission subject to special conditions as necessary to protect existing water rights, instream uses, and freshwater inflows to bays and estuaries.

SECTION 2.07. Section 11.046, Water Code, is amended to read as follows:

Sec. 11.046. RETURN UNUSED WATER. (a) A person who takes or diverts water from a watercourse or [~~running~~] stream for the purposes authorized by this code shall conduct surplus water back

to the watercourse or stream from which it was taken if the water can be returned by gravity flow or mechanical means and it is reasonably practicable to do so.

(b) In granting an application for a water right, the commission may include conditions in the water right providing for the return of surplus water, in a specific amount or percentage of water diverted, and the return point on the watercourse or stream as necessary to protect senior downstream water rights or provide flows for instream uses or bays and estuaries.

(c) Except as specifically provided otherwise in the water right, water appropriated under a water right may, prior to its release into a watercourse or stream, be beneficially used and reused by the water right holder for the purposes and locations of

EXHIBIT 2

75R14023 MI-F

By Brown S.B. No. 1

Substitute the following for S.B. No. 1:

By Lewis of Orange C.S.S.B. No. 1

A BILL TO BE ENTITLED

AN ACT

relating to the development and management of the water resources of the state; providing penalties.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

ARTICLE 1. WATER PLANNING: DROUGHT, CONSERVATION, DEVELOPMENT, AND MANAGEMENT

SECTION 1.01. Section 16.051, Water Code, is amended to read as follows:

Sec. 16.051. STATE WATER PLAN: DROUGHT, CONSERVATION, DEVELOPMENT, AND MANAGEMENT; EFFECT OF PLAN. (a) No later than September 1, 2001, and every five years thereafter, the board [~~The executive administrator~~] shall adopt [~~prepare, develop, and formulate~~] a comprehensive state water plan that incorporates the regional water plans approved under Section 16.053 of this code. The state water plan shall provide for the orderly development, management, and conservation of water resources and preparation for and response to drought conditions, in order that sufficient water will be available at a reasonable cost to ensure public health, safety, and welfare; further economic development; and protect the agricultural and natural resources of the entire state.

(b) The state water plan, as formally adopted by the board, shall be a guide to state water policy. The commission shall take the plan into consideration in matters coming before it.

(c) The board by rule [~~plan~~] shall define and designate river basins and watersheds.

(c) The terms of a contract may expressly provide that the person using the stored or conserved water is required to develop alternative or replacement supplies prior to the expiration of the contract and may further provide for enforcement of such terms by court order.

(d) If any person uses the stored or conserved water without first entering into a contract with the party that conserved or stored it, the user shall pay for the use at a rate determined by the commission to be just and reasonable, subject to court review as in other cases.

SECTION 2.05. Section 11.042, Water Code, is amended to read as follows:

Sec. 11.042. DELIVERING WATER DOWN BANKS AND BEDS. (a) Under rules prescribed by the commission, a person, association of persons, corporation, [~~or~~] water control and improvement district, water improvement district, or irrigation district supplying stored or conserved water under contract as provided in this chapter may use the bank and bed of any flowing natural stream in the state to convey the water from the place of storage to the place of use or to the diversion point [~~plant~~] of the appropriator. [~~The commission shall prescribe rules for this purpose.~~]

(b) A person who wishes to discharge and then subsequently divert and reuse the person's existing return flows derived from privately owned groundwater must obtain prior authorization from the commission for the diversion and the reuse of these return flows. The authorization may allow for the diversion and reuse by the discharger of existing return flows, less carriage losses, and shall be subject to special conditions if necessary to protect an existing water right that was granted based on the use or

availability of these return flows. Special conditions may also be provided to help maintain instream uses and freshwater inflows to bays and estuaries. A person wishing to divert and reuse future increases of return flows derived from privately owned groundwater may obtain authorization to reuse increases in return flows before the increase.

(c) Except as otherwise provided in this section, a person who wishes to convey and subsequently divert water in a watercourse or stream must obtain the prior approval of the commission through a bed and banks authorization. The authorization shall allow to be diverted only the amount of water put into a watercourse or stream, less carriage losses and subject to any special conditions that may address the impact of the discharge, conveyance, and diversion on existing permits, certified filings, or certificates of adjudication, instream uses, and freshwater inflows to bays and estuaries. Water discharged into a watercourse or stream under this chapter shall not cause a degradation of water quality to the extent that the stream segment's classification would be lowered. Authorizations under this section and water quality authorizations may be approved in a consolidated permit proceeding.

(d) Nothing in this section shall be construed to affect an existing project for which water rights and reuse authorizations have been granted by the commission before September 1, 1997.

SECTION 2.06. Section 11.046, Water Code, is amended to read as follows:

Sec. 11.046. RETURN SURPLUS [~~UNUSED~~] WATER. (a) A person who takes or diverts water from a watercourse or [~~running~~] stream for the purposes authorized by this code shall conduct surplus water back to the watercourse or stream from which it was taken if the water can be returned by gravity flow and it is reasonably practicable to do so.

EXHIBIT 3

PROCEEDINGS BEFORE THE

HOUSE AND SENATE NATURAL RESOURCES

JOINT CONFERENCE COMMITTEE ON SENATE BILL 1

75TH LEGISLATIVE SESSION

TRANSCRIPTION OF AUDIO RECORDING

MAY 27, 1997

Transcribed by: Lorrie A. Schnoor, CSR, RDR, CRR

(First requested audio portion begins)

CHAIRMAN BROWN: The conference committee on Senate Bill 1 will come to order.

The clerk will call the roll.

THE CLERK: For the Senate, Senator Brown?

CHAIRMAN BROWN: Here.

THE CLERK: Armbrister?

Lucio?

SENATOR LUCIO: Here.

THE CLERK: Truan?

Wentworth?

SENATOR WENTWORTH: Here.

THE CLERK: For the House, Representative Lewis?

CHAIRMAN LEWIS: Here.

THE CLERK: Cook?

REPRESENTATIVE COOK: Here.

THE CLERK: Counts?

REPRESENTATIVE COUNTS: (No audible response.)

THE CLERK: Puente?

REPRESENTATIVE PUENTE: Here.

THE CLERK: Walker?

REPRESENTATIVE WALKER: Here.

CHAIRMAN BROWN: Quorum is present. A

quorum is present of the House and the Senate.

(First requested audio portion ends, and second requested audio portion begins.)

CHAIRMAN BROWN: No. 205, bed and bank permit. This section from the Senate requires a person who wishes to convey water in a watercourse or stream to first obtain a bed and bank authorization. It allows for the diversion only of the water put into a watercourse or stream, less carriage losses, and subject to any special conditions.

CHAIRMAN LEWIS: Mr. Chairman, we -- this is probably -- except for interbasin transfers, this is probably the one that we fought the most on in the -- in the House.

What we did when we came out -- out of the Senate is that the -- the reuse language dealt mainly with just surface water. And so that was a potential problem for cities such as San Antonio when most of their reuse deals with groundwater.

And so what we did in the House is we got all the parties together that agreed to the Senate Bill and -- and -- and negotiated a deal to bring San Antonio's language in to allow for groundwater reuse language in here also. And it doesn't -- it doesn't really change or alter the happiness of the people that

came out of the Senate, but it does add language for San Antonio on the reuse.

CHAIRMAN BROWN: Mr. Puente?

REPRESENTATIVE PUENTE: May I -- you said that this was -- we might have the -- this change was made in committee by our committee members, and we all talked about it and we all agreed to it. And on the House floor, we were able to protect it with one just simple Lewis amendment that there was a little bit of opposition to, but essentially it still kept the same parameters of protecting groundwater for those communities, especially San Antonio, and still keeping the Senate version intact.

(Second requested audio portion concluded)

C E R T I F I C A T E

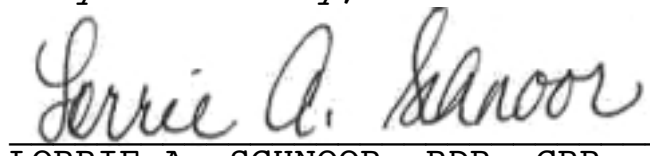
STATE OF TEXAS)

COUNTY OF WILLIAMSON)

I, Lorrie A. Schnoor, Certified Shorthand Reporter in and for the State of Texas, Registered Diplomate Reporter and Certified Realtime Reporter, do hereby certify that the above-mentioned matter occurred as hereinbefore set out.

I FURTHER CERTIFY THAT the proceedings of such were reported by me or under my supervision, later reduced to typewritten form under my supervision and control, and that the foregoing pages are a full, true, and correct transcription of the original notes.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 11th day of January, 2022.



LORRIE A. SCHNOOR, RDR, CRR
Certified Shorthand Reporter
CSR No. 4642 - Expires 1/31/24

Firm Registration No. 276
Kennedy Reporting Service, Inc.
100 E. Whitestone Boulevard
Suite 148
Cedar Park, Texas 78613
512.474.2233

EXHIBIT 4

EDWARDS AQUIFER AUTHORITY RULES

(Effective Date: December 20, 2019)

Subchapter I. General Prohibitions

Section

§ 711.220 Exportation Prohibited

(a) Groundwater withdrawn from the Aquifer must be used within the Authority boundaries.

(b) The place of use for groundwater withdrawn from the Aquifer that is processed into or used to produce a commodity is the plant site where the commodity is produced.

§ 711.222 Withdrawals from New Wells

(a) Except as provided in Subsection (b), a person may not make a withdrawal of groundwater from the Aquifer through new wells.

(b) A person may withdraw groundwater from the Aquifer from the following new wells:

(1) exempt wells;

(2) replacement wells;

(3) test wells; and

(4) wells recognized by the Authority as a transfer of the point of withdrawal for an initial regular permit.

§ 711.224 Unauthorized Activities

(a) Except as provided in § 711.14, a person may not withdraw groundwater from the Aquifer unless authorized by a groundwater withdrawal permit issued by the Authority.

(b) A person may not construct, install, drill, complete, alter, operate, or maintain a new well unless authorized by a well construction permit issued by the Authority.

EXHIBIT 5

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

THE STATE OF TEXAS
COUNTY OF TRAVIS
I hereby certify that this is a true and correct copy of a Texas Commission on Environmental Quality document, which is filed in the permanent records of the Commission.
Given under my hand and the seal of office on
DEC 20 2006
LaDonna Castanuela, Chief Clerk
Texas Commission on Environmental Quality

AN INTERIM ORDER concerning the Motion to Overturn filed by the City of Bryan and the City of College Station regarding the Executive Director's decisions to return Application Nos. 5912 and 5913 pursuant to 30 Texas Administrative Code Section 281.18 without prejudice to their re-submission; TCEQ Docket Nos. 2006-1832-WR and 2006-1831-WR..

On December 13, 2006, the Texas Commission on Environmental Quality (the "Commission") considered during its open meeting the Motion to Overturn (the "Motion") filed by the City of Bryan and the City of College Station (Cities) requesting the Commission overturn the Executive Director's September 21, 2006, decisions to return Application Nos. 5912 and 5913 pursuant to 30 Texas Administrative Code Section 281.18 without prejudice to their re-submission. In his letters dated September 21, 2006, the Executive Director stated that he was returning the applications because the Cities had not submitted certain specific information with regard to quantified targets for water savings, including goals for water loss programs and municipal use, and evidence indicating official adoption of water conservation plans that included these specified minimum requirements. The Commission also considered all related filings, the oral argument of the Cities, the Executive Director, and the Office of Public Interest Counsel, and answers to the Commission's questions during the public meeting

After such consideration and subsequent deliberation in open meeting, the Commission determined that it has the jurisdiction and authority to act on the Cities' request to reverse the Executive Director's decisions that the Cities' applications were not administratively complete under the general powers in Chapter 5 of the Water Code, and in particular, under Section 5.221 of the Water Code. The Commission also determined as a matter of law with regard to bed and banks authorization applications that request authorization to divert and reuse return flows derived exclusively from privately owned groundwater that, based on Water Code Section 11.042(b), such applications do not involve state water.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY that:

1. The Commission has jurisdiction under the general powers in Chapter 5 of the Water Code, particularly, Section 5.221 of Chapter 5, to consider and act on the Cities' Motion to Overturn;
2. The Commission determines as a matter of law that the Cities' applications do not involve state water based on Section 11.042(b) of the Water Code, which provides the criteria for the owner of privately owned groundwater to retain ownership of groundwater after discharge into a state watercourse;
3.. The Executive Director is directed to process the Cities' applications solely under Section 11.042(b) and the Commission's bed and banks authorization rules and not under statutes and rules applicable to state water;
4. The Cities' applications are remanded to the Executive Director for administrative and technical review; and

5. This Order is confined to bed and banks authorization applications that involve exclusively groundwater-based return flows.

Issue Date: DEC 20 2006

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Kathleen Hartnett White, Chairman

EXHIBIT 6

Texas Commission on Environmental Quality

INTEROFFICE MEMORANDUM

To: Sarah Henderson, Project Manager
Water Rights Permitting Team

Date: March 24, 2021

From: Kathy Alexander, Ph.D.
Technical Specialist
Water Availability Division

Subject: San Antonio Water System
WRPERM 13098
CN600529069
Multiple tributaries of the San Antonio River, San Antonio River and Guadalupe River
San Antonio and Guadalupe River Basins
Bexar, Wilson, Karnes, Goliad, Victoria, Refugio, and Calhoun Counties

HYDROLOGY REVIEW

Application Summary

San Antonio Water System (SAWS) requests authorization to use the bed and banks of the Medina River, Salado Creek, Comanche Creek, Leon Creek, Medio Creek, and the San Antonio River, San Antonio River Basin and the Guadalupe River, Guadalupe River Basin, to convey 260,991 acre-feet per year of groundwater-based return flows, for subsequent diversion from a reach on the Guadalupe River, for municipal, agricultural, industrial, mining, and instream purposes of use in Bexar, Wilson, Karnes, Goliad, Victoria, Refugio, and Calhoun counties.

SAWS owns and operates four wastewater treatment plants, Dos Rios Water Recycling Center (WRC), authorized under Texas Pollution Discharge Elimination System (TPDES) Permit No. WQ0010137033 with a total discharge of 140,017 acre-feet per year; Leon Creek WRC, authorized under TPDES Permit No. WQ0010137003 with a total discharge of 51,526 acre-feet per year; Medio Creek WRC, authorized under TPDES Permit No. WQ0010137040 with a total discharge of 17,922 acre-feet per year; and Salado Creek WRC, authorized under TPDES Permit No. WQ0010137008 with a total discharge of 51,526 acre-feet per year.

Portions of the 260,991 acre-feet of return flows per year requested in the application were previously authorized under Certificate of Adjudication Nos. 19-4768 and 19-2162 and Water Use Permit No. 5705. When those portions of the previously authorized return flows are not being diverted under those authorizations, SAWS requests to account for and use those return flows under Water Use Permit No. 13098.

SAWS submitted an accounting plan (*San Antonio Water System Groundwater Based Effluent Water Balance Accounting Plan Water Use Permit Application No. 13098*) on March 17, 2021 and minor non-substantive revisions to the text file on March 24, 2021.

The application was declared administratively complete on May 9, 2016.

Water Availability Review and No Injury Analysis

Resource Protection staff did not recommend instream flow requirements for the application although they did recommend that a special condition be included in the permit. See Resource Protection staff's March 24, 2021 memorandum.

Regarding the request to use the bed and banks of the Medina River, Salado Creek, Comanche Creek, Leon Creek, Medio Creek, and the San Antonio River, San Antonio River Basin and the Guadalupe River, Guadalupe River Basin to convey groundwater-based return flows, the application included the information required in 30 TAC 295.112.

Staff reviewed SAWS request to reuse its groundwater-based return flows by evaluating whether diversion and use of these return flows would affect water rights that were granted based on the use and availability of those return flows.

First, staff reviewed water rights in the San Antonio and Guadalupe River Basins to determine whether any existing water rights were explicitly granted based on SAWS return flows and determined that, based on available commission records, there were water rights that were explicitly granted based on these return flows. These water rights are either owned by SAWS or are based on contracts with SAWS.

Next, in order to evaluate whether SAWS reuse of its groundwater based return flows would affect other water rights that may have been granted based on the use or availability of the return flows, staff used the Full Authorization Simulation of the San Antonio and Guadalupe WAM in which all water rights use their authorized amounts and return flows are not included. The period of record for the San Antonio and Guadalupe WAM is 1934 through 1989.

Staff modified the San Antonio and Guadalupe WAM to include the historically discharged groundwater-based return flows from SAWS' wastewater treatment plants (WWTP). SAWS submitted five years of historical discharge data for 2008 through 2012. Staff also obtained WWTP discharge information for the period from January 2016 through December 2020. Staff calculated the minimum monthly discharge for each month from both datasets. Discharges from the WWTPs vary seasonally and between individual years and between the two five-year time periods. For example, for some of the WWTPs, there were individual months with a zero value. Staff compared the earlier data to the more recent data and used the greater of the monthly values from the two datasets, and further adjusted the monthly values to remove inconsistent or zero values. Staff's opinion is that using the higher values would be a better indicator of whether the application has the potential to affect existing water rights.

Staff added SAWS' return flows to the WAM and calculated the volume reliabilities of all water rights in the San Antonio River Basin and all water rights below the confluence of the San Antonio River and the Guadalupe River. Volume reliability is defined as the percentage of the total target demand for each water right that is actually supplied. Next, staff performed a simulation using this modified version of the WAM dataset and included diversion of SAWS' groundwater-based return flows, assuming that those diversions had the most senior priority date in the basin. Staff then compared results for the two simulations.

Staff reviewed the change in volume reliabilities and found that although 158 water rights were negatively impacted by the application, the average impact was less than 1% if all discharged return flows were diverted. Staff notes that, as described in the application summary above, some of the return flows would continue to be diverted under SAWS other authorizations and would not be available for use by downstream water rights, including Application 13098, if a permit is granted for the application.

Under Texas Water Code (TWC) §11.042(b) a permit authorizing conveyance of groundwater-based return flows may be subject to special conditions to protect the environment and other water rights. If SAWS adds upstream diversion points in the future, any permit granted would need to be amended to add those upstream diversion points. As noted by Resource Protection staff, if SAWS adds upstream diversion points in the future, an environmental review would need to be conducted to determine whether additional special conditions would be needed to protect the environment. Effects on other water rights would also need to be evaluated at the time of that amendment application.

SAWS submitted an accounting plan that tracks the volume of discharged return flows, losses, the volume of discharged return flows diverted under SAWS' other water rights and contracts, and the volume of return flows available at the diversion reach. Staff reviewed the accounting plan and found it adequate. Staff's opinion is that any possible impacts on existing water rights, should those impacts be determined to exist, would be mitigated by the accounting plan.

Finally, the application is subject to the requirements and orders of the South Texas Watermaster. The Watermaster actively manages water rights on a daily basis in accordance with the prior appropriation doctrine and protects senior water rights in times of shortage. Therefore, existing water rights should not be affected by the application.

Conclusion

TWC 11.042(b) specifically allows for the use of a state watercourse for the conveyance of groundwater-based return flows. SAWS' groundwater-based return flows would not be considered to be part of the natural flow of tributaries of the San Antonio River, the San Antonio River, and the Guadalupe River. Pursuant to TWC 11.042(b), the only limitations on the amount of groundwater-based return flows SAWS could reuse are for losses, environmental interests and protection of any water rights that were granted based on the use or availability of those return flows. Therefore, staff can support granting SAWS request to reuse its groundwater-based return flows.

Regarding reuse of return flows that may be discharged in the future as a result of authorized increases in discharges from the WWTPs, SAWS can apply to reuse those return flows when the increased discharges are authorized under a TPDES permit.

Staff recommends that the following special conditions be included in the permit:

1. The diversions authorized by this permit are dependent upon potentially interruptible return flows or discharges and are conditioned on the availability of those discharges. The right to divert the discharged return flows is subject to revocation if discharges become permanently unavailable for diversion and may be subject to reduction if the return flows are not available in quantities and qualities sufficient to fully satisfy the permit. Should the discharges become permanently unavailable for diversion, Permittee shall immediately cease diversion under this permit and either apply to amend the permit, or voluntarily forfeit the permit. If Permittee does not amend or forfeit the permit, the TCEQ may begin proceedings to cancel this permit. Permittee shall only divert its return flows that are actually discharged and if there is a permanent reduction in available return flows, Permittee shall immediately seek an amendment to the permit to reflect the reductions.

2. Permittee shall only divert and use return flows pursuant to Paragraph 1. USE, and Paragraph 3. DIVERSION in accordance with the most recently approved accounting plan (*San Antonio Water System Groundwater Based Effluent Water Balance Accounting Plan Water Use Permit Application No. 13098*). Permittee shall maintain the plan in electronic format and make the data available to the Executive Director upon request. Any modifications to *San Antonio Water System Groundwater Based Effluent Water Balance Accounting Plan Water Use Permit Application No. 13098* shall be approved by the Executive Director. Any modification to the accounting plan that changes the permit terms must be in the form of an amendment to the permit. Should Permittee fail to maintain the accounting plan or notify the Executive Director of any modifications to the plan, Permittee shall immediately cease diversion pursuant to Paragraph 3. DIVERSION, and either apply to amend the permit, or voluntarily forfeit the permit. If Permittee fails to amend the accounting plan or forfeit the permit, the Commission may begin proceedings to cancel the permit. Permittee shall immediately notify the Executive Director upon modification of the accounting plan and provide copies of the appropriate documents effectuating such changes.

3. Permittee shall only divert the actual daily amount of groundwater-based return flows discharged from the four treatment plants less the estimated losses after accounting for travel times between the discharge and diversion points, and less any groundwater-based return flows diverted under permittee's other authorizations when those authorizations are being used as determined in the accounting plan required by Special Condition 2.

4. Prior to reuse of groundwater-based return flows in excess of the amount currently authorized by TPDES Permit Nos. WQ0010137033, WQ0010137003,

WQ0010137040, and WQ0010137008, as described in Paragraph 2. DISCHARGE, Permittee shall apply for and be granted the right to reuse those return flows. Permittee shall amend the accounting plan to include future discharges of groundwater-based return flows prior to diverting said return flows.

5. A change in the location of the diversion point or addition of diversion points shall require an amendment to the permit and additional special conditions could be required.

EXHIBIT 7

SOAH DOCKET NO. 582-11-3522

TCEQ DOCKET NO. 2010-0837-WR

APPLICATION BY CITY OF LUBBOCK FOR AMENDMENT TO WATER USE PERMIT NO. 3985) STATE OFFICE OF ADMINISTRATIVE HEARINGS

HEARING ON THE MERITS

Wednesday, October 19, 2011

BE IT REMEMBERED THAT at 9:00 a.m., on Wednesday, the 19th day of October 2011, the above-entitled matter came on for hearing at the State Office of Administrative Hearings, William P. Clements, Jr., Building, 300 West 15th Street, Room 404, Austin, Texas, before RICHARD WILFONG, Administrative Law Judge, and the following proceedings were reported by Lorrie A. Schnoor, Certified Shorthand Reporter.

Volume 2 Pages 242 - 358

record, as well, particularly when juxtaposed against the Abilene certificate that the protestants had introduced into the record.

We filed it as reasonably promptly as the document was made available to us. And, in fact, Mr. Terrill's referring to our disclosure on the 14th of October, and if you see the certified filing copy on the -- or stamp on the exhibit, it reflects that we disclosed it as soon as we were able to get a certified copy of the document.

JUDGE WILFONG: Objection is overruled. To the extent you asked the witness about the document, the testimony will be allowed. I'll reserve a ruling on the admissibility of the exhibit when it's offered.

MR. HILL: Thank you, Your Honor.

Q (BY MR. HILL) Ms. Alexander, do you recognize this document that's in front of you?

A Yes, I do.

Q Do you see the file-marked copy that bears the certification of the TCEQ?

A Yes.

Q Does it indicate to you that it's a certified copy of this document?

A Yes.

Q Okay. Could you explain to the judge how you

became familiar with this document that's marked COL 3985A Exhibit 13?

A Yes. In my review of the City of Bryan and College Station's request to reuse their groundwater-based effluent, I followed our standard practice, which is to go through all permits in the basin and determine whether they have special conditions in them referencing the use or availability of someone else's return flows. And when I did that, I found -- located the certificate.

Q And how, Ms. Alexander, are you able to determine upon your review of this certificate whether or not it was issued based on specifically the availability of return flows?

A On Page 4 of this certificate, Special Condition, Item 4, it states, "Use of water under this certificate of adjudication is subject to the continuing discharge of sewage effluent by the City of Bryan and to Still Creek in sufficient quantity to yield the appropriation authorized herein, and no state water other than that water placed in Still Creek by the City of Bryan as sewage effluent may be used by owner under the certificate of adjudication."

MR. HILL: May I approach the witness, Your Honor?

JUDGE WILFONG: Yes.

Q (BY MR. HILL) I'm going to place in front of you a copy of Chapter 11 of the Texas Water Code and specifically direct your attention to Section 11.042.

Under Subsection (b) of 11.042, do you find that in front of you?

A Yes, I do.

Q Okay. Midway through the provision there, there's a reference to "The authorization may allow for the diversion and reuse by the discharger of existing return flows, less carriage losses, and shall be subject to special conditions if necessary to protect an existing water right that was granted based on the use or availability of these return flows."

Do you see that provision there?

A Yes.

Q When you're referring to your analysis to determine whether or not a water right has been issued based on the use or availability of these return flows, is the provision that you cited to in Exhibit 13, specifically Special Condition 4, is that a type of provision that you look for to determine whether or not a water right has been issued based on the use or availability of return flows?

A Yes.

C E R T I F I C A T E

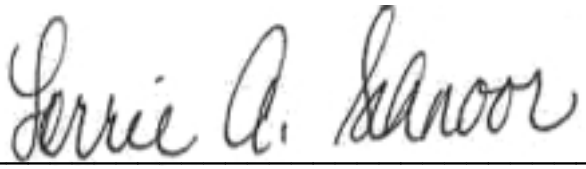
STATE OF TEXAS)

COUNTY OF TRAVIS)

We, Lorrie A. Schnoor and Jodi Cardenas, Certified Shorthand Reporters in and for the State of Texas, do hereby certify that the above-mentioned matter occurred as hereinbefore set out.

WE FURTHER CERTIFY THAT the proceedings of such were reported by us or under our supervision, later reduced to typewritten form under our supervision and control and that the foregoing pages are a full, true, and correct transcription of the original notes.

IN WITNESS WHEREOF, we have hereunto set our hand and seal this 28th day of October 2011.



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