

Jon Niermann, *Chairman*
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Bobby Janecka, *Commissioner*
Toby Baker, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

January 14, 2022

Laurie Gharis, Chief Clerk
Office of the Chief Clerk
Texas Commission on Environmental Quality
P.O. Box 13087, MC-105
Austin, Texas 78711-3087

Subject: **TCEQ Docket No. 2021-1391-WR**; Application No. 13098 by San Antonio Water System for a Water Use Permit in Bexar, Calhoun, Goliad, Karnes, Refugio, Victoria and Wilson Counties, Texas.

Dear Ms. Gharis:

Enclosed for filing is an electronic copy of the Executive Director's Response to Hearing Requests and to the Plea to the Jurisdiction Filed by the Guadalupe-Blanco River Authority as backup material for the **February 9, 2022 agenda** item on the above-referenced matter.

Please let me know if you have any questions. My office number is 512-239-6635.

Thank you.

Sincerely,

A handwritten signature in cursive script that reads "Ruth A. Takeda".

Ruth Takeda, Staff Attorney - Environmental Law Division

Enclosure

Cc: Mailing List

TCEQ DOCKET NO. 2021-1391-WR

APPLICATION NO. 13098 BY	§	BEFORE THE TEXAS
SAN ANTONIO WATER SYSTEM	§	
FOR A WATER USE PERMIT IN	§	COMMISSION ON
BEXAR, CALHOUN, GOLIAD,	§	
KARNES, REFUGIO, VICTORIA,	§	ENVIRONMENTAL QUALITY
AND WILSON COUNTIES, TEXAS	§	

**EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUESTS
AND TO THE PLEA TO THE JURISDICTION
FILED BY THE GUADALUPE-BLANCO RIVER AUTHORITY**

The Executive Director of the Texas Commission on Environmental Quality (TCEQ or Commission) respectfully submits this response to the hearing requests filed regarding Application No. 13098 by San Antonio Water System (Applicant) for a water use permit in Bexar, Calhoun, Goliad, Karnes, Refugio, Victoria and Wilson Counties. The Executive Director also responds to the plea to the jurisdiction filed by the Guadalupe-Blanco River Authority.

The following hearing requests were received:

1. City of San Marcos;
2. City of Seguin;
3. City of Victoria;
4. Guadalupe-Blanco River Authority;
5. INV Nylon Chemicals Americas, LLC;
6. New Braunfels Utilities;
7. Union Carbide Corporation;
8. Victoria County Navigation District.

The Executive Director recommends granting the application.

Staff has prepared a map showing the location of the Applicant's proposed bed and banks permit for indirect reuse of the Applicant's groundwater-based return flows. All requestors hold water rights and are mapped according to the locations of those water rights. The map is attached as Attachment A.

I. BACKGROUND

The Applicant seeks a water use permit to authorize the use of the bed and banks of the Medina River, Salado Creek, Comanche Creek, Leon Creek, Medio Creek, and the San Antonio River in the San Antonio River Basin and the Guadalupe River in the Guadalupe River Basin to convey 260,991 acre-feet of groundwater-based return flows per year for subsequent diversion from a reach on the Guadalupe River for municipal, agricultural, industrial, mining, and instream purposes of use in Bexar, Calhoun, Goliad, Karnes, Refugio, Victoria and Wilson Counties.

The Applicant owns and operates four wastewater treatment plants with Texas Pollution Discharge Elimination System (TPDES) permits, which authorize multiple TPDES discharge points located in Bexar County in the San Antonio River Basin. The Applicant requests authorization to divert its discharged groundwater-based return flows from a reach on the Guadalupe River in Calhoun County. Portions of the 260,991 acre-feet of groundwater-based return flows requested in this application were previously authorized under Certificate of Adjudication Nos. 19-4768 and 19-2162 and Water Use Permit No. 5705. The Applicant requests to account for and use those groundwater-based return flows when they are not being diverted under the other authorizations. The Applicant has provided an accounting plan that the Executive Director has approved.

The Executive Director has prepared a draft permit with special conditions.

II. PROCEDURAL HISTORY

The Commission received this application on December 30, 2013. The application was declared administratively complete on May 9, 2016. Technical review was completed on March 24, 2021. Notice of the application was sent by mail by the Commission's Chief Clerk on August 17, 2021, to downstream water right holders of record in the San Antonio and Guadalupe River Basins pursuant to 30 Tex. Admin. Code § 295.161(a). Published notice was not required. No public meeting was held.

The comment period and hearing request period closed on September 20, 2021.

III. LEGAL AUTHORITY – HEARING REQUESTS

Pursuant to 30 Tex. Admin. Code § 55.251(a), the following may request a contested case hearing on water rights applications: the Commission; the Executive Director; the applicant; and affected persons when authorized by law.

Affected persons are authorized to submit hearing requests for water rights applications under Tex. Water Code § 11.132(a). The Commission, on the request of any affected person, shall hold a hearing on a water rights application. The procedures for determining whether a hearing requestor is an affected person and whether the hearing request is valid are set forth in 30 Tex. Admin. Code §§ 55.250-55.256, which apply to water rights applications such as this one that were declared administratively complete after September 1, 1999.

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.” 30 Tex. Admin. Code § 55.256(a). An interest “common to members of the general public” does not qualify as a personal justiciable interest. Id.

Governmental entities with authority under state law over issues contemplated by the application may be considered affected persons. 30 Tex. Admin. Code § 55.256(b).

To determine whether a hearing requestor is an affected person, all relevant factors must be considered. 30 Tex. § 55.256(c). These factors include, but are not limited to:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health, safety, and use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

A hearing request by a group or association must meet the requirements set forth in 30 Tex. Admin. Code § 55.252(a). There are three requirements:

- (1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;
- (2) the interests the group or association seeks to protect are germane to the organization's purpose;
- (3) neither the claim asserted nor the relief requested requires participation of the individual members in the case.

A hearing request must substantially comply with the four requirements set forth in 30 Tex. Admin. Code § 55.251(c):

- (1) give the name, address, and daytime telephone number of the person who files the request. If the request is made by a group or association, the request must identify one person name, address, daytime telephone number and, where possible, fax number, who shall be responsible for receiving all official communications and documents for the group.
- (2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the activity that is the subject of the application and how and why the requestor believes he or she will be affected by the activity in a manner not common to members of the general public;
- (3) request a contested case hearing; and
- (4) provide any other information specified in the public notice of the application.

The request for a contested case hearing must be filed with the Commission's Chief Clerk during the public comment period. 30 Tex. Admin. Code § 55.251(d).

The Commission must grant a request for a contested case hearing made by an affected person if the request complies with the requirements of 30 Tex. Admin. Code § 55.251; is timely filed with the Chief Clerk; and is pursuant to a right to hearing authorized by law. 30 Tex. Admin. Code § 55.255(b)(2).

IV. HEARING REQUESTS AND RECOMMENDATIONS

All hearing requests were timely filed with the TCEQ. The Executive Director recommends granting the requests of the Guadalupe-Blanco River Authority and Union Carbide and denying all other hearing requests.

1. City of San Marcos – Arturo D. Rodriguez, Jr., Esq.

The requestor indicates that it holds Water Use Permits Nos. 1744, 3867, and 5092 in the Guadalupe River Basin. Agency records indicate that the requestor holds Certificate of Adjudication (COA) No. 18-3876 and Water Use Permit No. 5092 in the Guadalupe River Basin. The requestor asserts that its water rights, in conjunction with its water purchase contract with the Guadalupe-Blanco River Authority, provide a basis for affected person status related to this application.

The requestor states that its water rights are located approximately 40 miles from the Applicant's proposed facility, but the estimated distance appears to be measured from the requestor's water right location(s) to the Applicant's discharge point(s) rather than the Applicant's proposed conveyance reach or diversion reach. The Water Rights Permitting program estimates that the distance between the Applicant's furthest downstream diversion point to the Applicant's proposed diversion reach is approximately 235 miles.

The requestor's concerns include: the transportation of 260,000 acre-feet of groundwater approximately 100 miles downstream and its release into San Antonio Bay; adverse impacts to water suppliers in the Guadalupe River Basin; removing Edwards Aquifer water from the boundaries of the Edwards Aquifer Authority in violation of the Edwards Aquifer Authority Act; lack of conformance of the application to applicable state requirements; the manner in which the applicant will calculate and account for the groundwater, water quality, and evaporative losses; impact on senior water rights. The requestor states that the application will impair the health and safety of the requestor's customers, the requestor's senior water rights, downstream environmental flows, and the Guadalupe River Basin.

The Executive Director concludes that the requestor's water rights will not be affected by this application because they are not located within the conveyance reach requested in the Applicant's proposed bed and banks permit. The Executive Director believes that the requestor's contractual relationship with the Guadalupe-Blanco River Authority is not in itself an adequate basis to provide the requestor affected person status for purposes of this application.

The Executive Director concluded that the request does not identify a personal justiciable interest in this application, therefore recommends denying the request.

2. City of Seguin – Mayor Donna Dodgen/ Deputy City Manager Rick Cortes

The requestor holds COA No. 18-3839 in the Guadalupe River Basin.

The requestor states that it owns and operates a public water system; holds a Certificate of Convenience and Necessity to provide retail water service to residential, commercial, and industrial accounts; and those accounts include an electric power generation facility, a bottling facility, a medical center, a dialysis center, a food processor/ marketer, and a water utility serving over 90,000.

The requestor states that its COA diversion point is located approximately 101 miles from the Applicant's proposed diversion reach.

The requestor's concerns include: the requestor's water supply and ability to distribute water; conditions within the Applicant's proposed diversion reach creating a potential priority call to users within both basins; the Applicant becoming the most senior water right holder within both basins by virtue of the permit being exempt from priority calls, which the requestor indicates would allow the Applicant to make priority calls on all other users in both basins regardless of those users' priority dates; impact to the requestor's ability to divert water to supply its customers; and impacts to users upstream of the confluence of the San Antonio River and Guadalupe River. The requestor does not indicate how the application will result in such impacts, but does indicate that its concerns could be mitigated by confining the Applicant's diversion reach to Bexar County and the San Antonio River Basin.

The Executive Director concludes that the requestor's water right will not be impacted by this application because it is not located within the conveyance reach requested in the Applicant's proposed bed and banks permit.

The Executive Director concluded that the request does not identify a personal justiciable interest in this application, therefore recommends denying the request.

3. City of Victoria – James T. Aldredge, Esq.

The requestor holds Water Use Permit Nos. 3606, 4117, 5466 and COA Nos. 18-3844, 18-3858, 18-3860, and 18-3862 in the Guadalupe River Basin.

The requestor does not provide information on the location or distance of its water rights relative to the Applicant's proposed project.

The requestor's concerns include: the effect of the proposed authorization on the prior appropriation system and senior priority within the Guadalupe River Basin; the draft permit's ambiguity and its impact on Guadalupe Basin water rights; lack of protection of instream uses and freshwater inflows in the proposed permit; the Applicant's accounting plan being developed/ based on incomplete data; the proposed permit's effect on how the Guadalupe-Blanco River Authority manages its sources of supply, which in turn may alter typical stream flows at the requestor's diversion points, thereby impacting the requestor's ability to divert because the requestor's water rights are subject to flow restrictions. The requestor indicates that at a minimum, additional special conditions should be included in the draft permit to protect the requestor's water rights.

The Executive Director concludes that the requestor's water rights will not be impacted by this application because they are not located within the conveyance reach requested in the Applicant's proposed bed and banks permit. The Executive Director does not believe that the Guadalupe-Blanco River Authority's management of its sources of supply provides a sufficient basis for the requestor to establish affected person status because it is too attenuated.

The Executive Director concludes that the request does not identify a personal justiciable interest in this application, therefore recommends denying the request.

4. Guadalupe-Blanco River Authority – Molly Cagle, Esq.

The requestor holds Water Use Permit No. 12378 and COA Nos. 18-2074, 18-5173, 18-5174, 18-5175, 18-5176, 18-5177, 18-5178, 18-3863, 18-5484, 18-3896, 18-3600, and 18-5234.

Notably the requestor holds COA 18-5484. This COA authorizes the requestor's saltwater barrier and diversion dam, which is located upstream of the proposed diversion reach and within the proposed conveyance reach in the Applicant's bed and banks permit. The requestor's COA Nos. 18-5173, 18-5174, 18-5175, 18-5176, 18-5177, 18-5178 and 18-3863 authorize diversion from the impoundment created by that saltwater barrier and may also be impacted.

The requestor's concerns include: the source of Applicant's groundwater-based return flows, the Edwards Aquifer; the proposed bed and banks transportation of water; the effect of the proposed authorization on water rights priority; the effect of the proposed authorization on the requestor's firm water supplies; and the Applicant's proposed uses of the water.

The Executive Director believes that the requestor's water rights related to the saltwater barrier and diversion dam may be affected by the application in a manner not common to members of the general public because those water rights are located within the proposed conveyance reach and upstream of the proposed diversion reach in the Applicant's bed and banks permit.

The requestor may be affected by the Applicant's bed and banks permit in a manner not common to members of the general public, therefore the requestor has an identified personal justiciable interest in this application and the Executive Director recommends granting the request.

5. INV Nylon Chemicals Americas – Molly Cagle, Esq.

The requestor holds the majority portion of COA No. 18-3861 in the Guadalupe River Basin.

The requestor states that it owns and operates a manufacturing facility in Victoria, Texas and indicates that its operations depend upon access to water. The requestor state that its water right is located upstream of the confluence of the Guadalupe and San Antonio Rivers, but does not indicate its distance from the Applicant's proposed bed and banks permit.

The requestor's concerns include: the source of the Applicant's groundwater-based return flows, the Edwards Aquifer, because the requestor does not believe such water subject to TCEQ authorization under § 11.042(b); the effect on senior water rights because the requestor believes that the permit would make the Applicant effectively the most senior water right in both the San Antonio River Basin and the Guadalupe Basin, as it would result in senior water rights upstream having to pass water downstream to the Applicant's proposed diversion reach in times of low flows.

The Executive Director concludes that the requestor's water right will not be impacted by this application because it is not located within the conveyance reach requested in the Applicant's proposed bed and banks permit.

The Executive Director concludes that the request does not identify a personal justiciable interest in this application, therefore recommends denying the request.

6. New Braunfels Utilities – James T. Aldredge, Esq.

The requestor holds COA Nos. 18-3823, 18-3824, and 18-3830 in the Guadalupe River Basin. The requestor is a municipally owned utility that provides water,

wastewater, and electric utility services.

The requestor's water rights are located approximately 115 miles from the upstream point of the Applicant's proposed diversion reach.

The requestor's concerns include: the effect of the proposed authorization on the requestor's diversion of water because the requestor's water rights are subject to flow restrictions and are subordinate to the Guadalupe-Blanco River Authority's water rights; the Guadalupe-Blanco River Authority may change how it manages its sources of supply because of the Applicant's proposed permit, therefore may impact the requestor's ability to divert; the source of the Applicant's groundwater-based return flows, which is the Edwards Aquifer; the Applicant's accounting plan being developed based on incomplete data; and the lack of a reference to historicity of the Applicant's return flows in the draft permit.

The Executive Director concludes that the requestor's water rights will not be impacted by this application because they are not located within the conveyance reach requested in the Applicant's proposed bed and banks permit.

The Executive Director concludes that the request does not identify a personal justiciable interest in this application, therefore recommends denying the request.

7. Union Carbide Corporation – Carlos Moreno, Esq.

The requestor states that is a fully owned subsidiary of The Dow Chemical Company and that the requestor wholly owns water rights and shares water rights with the Guadalupe-Blanco River Authority, but does not identify those water rights other than indicating that the requestor's diversion point for its Seadrift Operations is approximately 3 linear miles of the upstream boundary of the Applicant's proposed diversion reach. The Guadalupe-Blanco River Authority hearing request for this application indicates joint ownership with Union Carbide of COA Nos. 18-5173, 18-5174, 18-5175, 18-5176, 18-5177, and 18-5178. These COAs authorize diversion from the impoundment created by the saltwater barrier and dam authorized under COA No. 18-5484, held by the Guadalupe-Blanco River Authority.

The requestor owns the Seadrift Operations site and the manufacturing processes at the site require use of freshwater.

The requestor's concerns include: during periods of drought, the limited availability of freshwater in the Guadalupe River Basin; the need for protection against saltwater intrusion during low flow periods restricts the requestor's ability to obtain its water; new appropriations or expansions of use in upstream water rights adversely affects the requestor; groundwater-based effluents are a significant contributor to the streamflow in the Guadalupe River, therefore the Applicant's proposed removal of more than 260,000 acre-feet of groundwater-based effluent will jeopardize the requestor's water rights during a drought of record; the modeling basis of the Applicant's application is unclear; and the draft permit does not include an instream flow requirement.

The Executive Director concludes that the requestor's water rights may be impacted by this application because the requestor holds and shares water rights with the Guadalupe-Blanco River Authority that are located upstream of the Applicant's proposed diversion reach and within the conveyance reach requested in the Applicant's proposed bed and banks permit.

The Executive Director believes that the requestor's water rights related to the saltwater barrier and diversion dam may be affected by the application in a manner not common to members of the general public because the water rights related to the

saltwater barrier and diversion dam are located within the Applicant's proposed conveyance reach and upstream of the Applicant's proposed diversion reach.

The requestor may be affected by the Applicant's bed and banks permit in a manner not common to members of the general public, therefore has an identified personal justiciable interest in this application and the Executive Director recommends granting the request.

8. Victoria County Navigation District – Duane G. Crocker, Esq.

The requestor holds water use Permit No. 3606 in the Guadalupe River Basin.

The requestor's water right authorizes diversion from the Guadalupe River and off-channel reservoir storage approximately 20 to 27.5 miles upstream from the Applicant's proposed diversion reach.

The requestor's concerns include: the Applicant's proposed authorization reducing the volume of available water; the calculations used by the Applicant to determine the potential availability of groundwater-based return flows, as well as evaporation and absorption between the discharge and diversion points.

The Executive Director concludes that the requestor's water rights will not be impacted by this application because the requestor's water right is not located within the conveyance reach requested in the Applicant's proposed bed and banks permit.

The Executive Director concludes that the request does not identify a personal justiciable interest in this application, therefore recommends denying the request.

V. PLEA TO THE JURISDICTION

The Guadalupe-Blanco River Authority (GBRA) requests that the Commission dismiss the Applicant's application in whole or in part because GBRA alleges that 1) the Commission has no jurisdiction to authorize the indirect reuse of Edwards Aquifer derived effluent because Tex. Water Code § 11.042(b) does not apply to such effluent and 2) that the Commission has no jurisdiction to authorize use of treated wastewater derived from the Edwards Aquifer outside the boundaries of the Edwards Aquifer Authority because the Edwards Aquifer Authority Act under § 1.34(b) limits where Edwards Aquifer water may be used.

The Executive Director believes that GBRA is incorrect as to the Commission's jurisdiction because the Texas Legislature has given the Commission exclusive authority over bed and banks authorizations under Tex. Water Code § 11.042(b), the statute under which this application was submitted. The Commission has jurisdiction to determine whether to grant or deny a bed and banks permit application, including this application, because Tex. Water Code § 11.042(b) encompasses return flows derived from groundwater and the Edwards Aquifer is a source of groundwater.

The Executive Director believes that GBRA is incorrect as to the Commission's jurisdiction to authorize the use of treated wastewater derived from groundwater pumped from the Edwards Aquifer outside the boundaries of the Edwards Aquifer Authority (EAA). Even if the EAA Act is relevant to this application, the Commission's exclusive authority over bed and banks permit applications pursuant to Tex. Water Code § 11.042(b) is not divested by § 1.34(b) the EAA Act because that subsection governs a transfer of rights related to land that may have been historically irrigated with water withdrawn from the Edwards Aquifer. The Executive Director notes that the EAA Act in

§ 1.08(b) indicates that the EAA's powers do not extend to the regulation of surface water. A bed and banks authorization is part of the regulation of state water, often called surface water, which is under the Commission's jurisdiction pursuant to Tex. Water Code § 5.103(a). See Tex. Water Code § 11.021.

The Commission has jurisdiction over this application; therefore the Executive Director recommends that GBRA's Plea to the Jurisdiction be denied.

VI. CONCLUSION

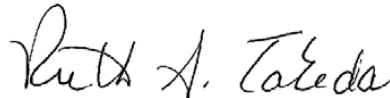
The Executive Director respectfully recommends granting the hearing requests of the Guadalupe-Blanco River Authority and Union Carbide, denying all other hearing requests, and denying the Plea to the Jurisdiction filed by the Guadalupe-Blanco River Authority.

Respectfully submitted,

Toby Baker
Executive Director

Erin E. Chancellor, Director
Office of Legal Services

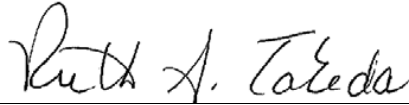
Guy Henry, Acting Deputy Director
Environmental Law Division



Ruth Ann Takeda
State Bar of Texas No. 24053592
Environmental Law Division, MC 173
P.O. Box 13087
Austin, Texas 78711-3087
(512) 239-6635
(512) 239-0606 (FAX)
ruth.takeda@tceq.texas.gov

CERTIFICATE OF SERVICE

I certify that on the 14th day of January, 2022, the foregoing *Executive Director's Response to Hearing Requests and to the Plea to the Jurisdiction Filed by the Guadalupe-Blanco River Authority* was filed electronically with the Chief Clerk of the Texas Commission on Environmental Quality in Austin, Texas, and that a true and correct copy was delivered as indicated to the persons on the attached Mailing List.

A handwritten signature in black ink, reading "Ruth A. Takeda", is written over a horizontal line.

Ruth Ann Takeda, Staff Attorney
Environmental Law Division
Texas Commission on Environmental Quality

MAILING LIST
San Antonio Water System, Application No. 13098
TCEQ Docket No. 2021-1391-WR

APPLICANT

Via first-class mail:

Jim Mathews, Esq.
Mathews & Freeland, LLP
8140 N MoPac Expressway
Austin, Texas 78759
PH. 512-404-7800
FAX 512-703-2785
E-mail jmathews@mandf.com

OFFICE OF PUBLIC INTEREST COUNSEL

Via e-mail:

Eli Martinez
TCEQ
Office of Public Interest Counsel
MC-103
P.O. Box 13087
Austin, Texas 78711-3087
12100 Park 35 Circle Bldg F
Austin, Texas 78753
PH. 512-239-6363
FAX 512-239-6377
E-mail Eli.Martinez@tceq.texas.gov

OFFICE OF THE CHIEF CLERK

Via electronic filing:

Docket Clerk
TCEQ Office of Chief Clerk
P.O. Box 13087 MC 105
Austin, Texas 78711-3087
12100 Park 35 Circle, Bldg F
Austin, Texas 78753
PH. 512-239-3300
FAX (512) 239-3311

**EXECUTIVE DIRECTOR
EXTERNAL RELATIONS**

Via e-mail:

Ryan Vise, Director
TCEQ External Relations Division
Public Education Program MC-108
P.O. Box 13087
Austin, Texas 78711-3087
PH. 512-239-4000
FAX 512-239-5678
Email Ryan.Vise@tceq.texas.gov

ALTERNATIVE DISPUTE RESOLUTION

Via e-mail:

Kyle Lucas
TCEQ
Alternative Dispute Resolution MC-222
P.O. Box 13087
Austin, Texas 78711-3087
PH. 512-239-0687
FAX 512-239-4015
E-mail Kyle.Lucas@tceq.texas.gov

PROTESTANTS

Via first-class mail and e-mail:

City of San Marcos

Arturo D. Rodriguez, Jr., Esq.
Russell Rodriguez Hyde Bullock, LLP
1633 Williams Dr., Bldg. 2, Ste. 200
Georgetown, Texas 78628
PH. 512-930-1317
FAX 866-929-1641
E-mail arodriguez@txlocalgovlaw.com

City of Seguin

Rick Cortes, Deputy City Manager
205 N. River
Seguin, Texas 78155
PH. 830-386-2513
E-mail rcortes@seguintexas.gov

City of Victoria

James T. Aldredge, Esq.
Lloyd Gosselink
816 Congress Ave., Ste. 1900
Austin, Texas 78701
PH. 512-322-5859
FAX 512-472-0532
E-mail jaldredge@lglawfirm.com

Guadalupe-Blanco River Authority

Molly Cagle, Esq.
Baker Botts LLP
98 San Jacinto Blvd., Ste. 1500
Austin, Texas 78701-4078
PH. 512-322-2400
FAX 512-322-2501
E-mail molly.cagle@bakerbotts.com

INV Nylon Chemicals Americas

Molly Cagle, Esq.
Baker Botts LLP
98 San Jacinto Blvd., Ste.1500
Austin, Texas 78701-4078
PH. 512-322-2500
FAX 512-322-2501
E-mail molly.cagle@bakerbotts.com

New Braunfels Utilities

James T. Aldredge, Esq.
Lloyd Gosselink
816 Congress Ave., Ste. 1900
Austin, Texas 78701
PH. 512-322-5859
FAX 512-472-0532
E-mail jaldredge@lglawfirm.com

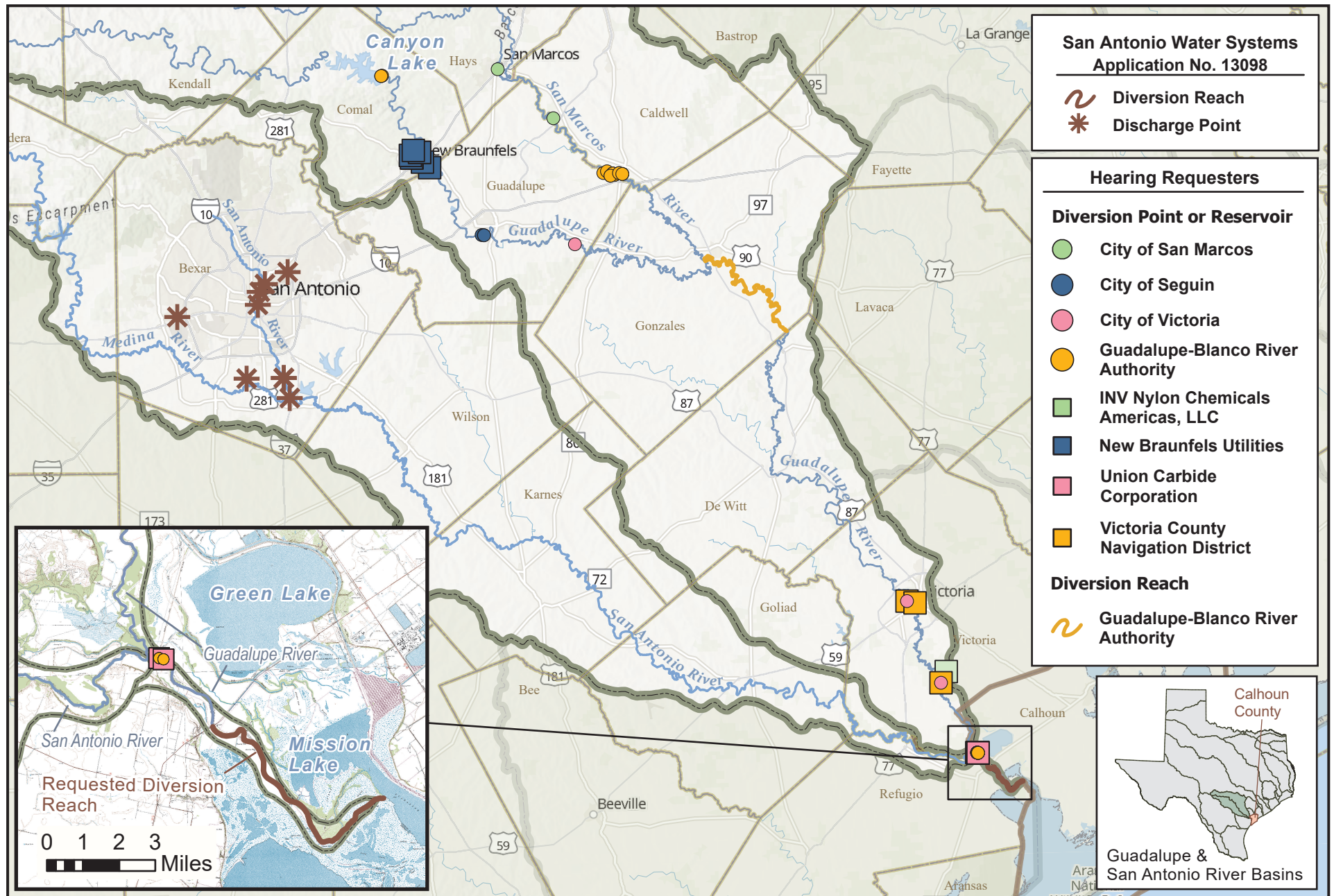
Union Carbide

Carlos J. Moreno, Esq.
The Dow Chemical Company
332 SH 332E, 4A016
Lake Jackson, Texas 77566
PH. 979-238-0407
E-mail cmoreno3@dow.com

Victoria County Navigation District

Duane G. Crocker, Esq.
The Law Offices of Duane G. Crocker,
PC
P.O. Box 2661
Victoria, Texas 77902
PH. 361-574-8898
E-mail dcrocker@duanecrockerlaw.com

Attachment A



This map was generated by the Water Availability Division of the Texas Commission on Environmental Quality. This product is for informational purposes and may not have been prepared for or be suitable for legal, engineering, or surveying purposes. It does not represent an on-the-ground survey and represents only the approximate relative location of property boundaries. For more information concerning this map, contact the Water Availability Division at (512)239-4600.



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