

Jon Niermann, *Chairman*  
Emily Lindley, *Commissioner*  
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Toby Baker, *Executive Director*



*Vic McWherter, Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

January 14, 2022

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

RE: **SAN ANTONIO WATER SYSTEM**  
**TCEQ DOCKET NO. 2021-1391-WR**

Dear Ms. Gharis:

Enclosed for filing is the Office of Public Interest Counsel's Response to Hearing Requests in the above-entitled matter.

Sincerely,

  
Eli Martinez, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure



**TCEQ DOCKET NO. 2021-1391-WR**

<b>APPLICATION OF THE SAN</b>	<b>§</b>	<b>BEFORE THE</b>
<b>ANTONIO WATER SYSTEM FOR</b>	<b>§</b>	<b>TEXAS COMMISSION ON</b>
<b>WATER RIGHTS PERMIT NO.</b>	<b>§</b>	<b>ENVIRONMENTAL QUALITY</b>
<b>13098</b>	<b>§</b>	

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S**  
**RESPONSE TO HEARING REQUESTS**

TO THE HONORABLE MEMBERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) and files this Response to Hearing Requests in the above-referenced matter. OPIC recommends granting the requests for a contested case hearing filed by the Guadalupe-Blanco River Authority (GBRA), New Braunfels Utility (NBU), the City of San Marcos (San Marcos), the City of Seguin (Seguin), Nylon Chemicals Americas (INVISTA), Union Carbide Corporation (UCC), and the Victoria County Navigation District (Victoria County). In support of its recommendation, OPIC respectfully submits the following:

**I. INTRODUCTION**

The San Antonio Water System (SAWS or Applicant) seeks a water use permit to authorize the use of the bed and banks of multiple tributaries of the San Antonio River and the San Antonio River, San Antonio River Basin and the Guadalupe River, Guadalupe River Basin to convey 260,991 acre-feet of groundwater-based return flows per year for subsequent diversion and use for municipal, agricultural, industrial, mining, and instream purposes of use in Bexar, Calhoun, Goliad, Karnes, Refugio, Victoria and Wilson counties.

SAWS owns and operates four wastewater treatment plants:

A. Steven M. Clouse 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; and

B. Leon Creek WRC, authorized under TPDES Permit No. WQ0010137003 with a total discharge of 51,526 acre-feet per year; and

C. Medio Creek WRC, authorized under TPDES Permit No. WQ0010137040 with a total discharge of 17,922 acre-feet per year; and

D. Salado Creek WRC, authorized under TPDES Permit No. WQ0010137008 with a total discharge of 51,526 acre-feet per year.

The return flows are discharged at the following points, located in Bexar County within the San Antonio River Basin, ZIP code 78205:

Discharge Point No. 1 (Steven M. Clouse WRC Outfall 001) is located at Latitude 29.235827° N, Longitude 98.416244° W on the Medina River; and

Discharge Point No. 2 (Steven M. Clouse WRC Outfall 002) is located at Latitude 29.461615° N, Longitude 98.468752° W on the San Antonio River; and

Discharge Point No. 3 (Steven M. Clouse WRC Outfall 003) is located at Latitude 29.446454° N, Longitude 98.480740° W on the San Antonio River; and

Discharge Point No. 4 (Steven M. Clouse WRC Outfall 004) is located at Latitude 29.484730° N, Longitude 98.416819° W on Salado Creek; and

Discharge Point No. 5 (Steven M. Clouse WRC Outfall 005) is located at Latitude 29.420978° N, Longitude 98.485352° W on the San Antonio River; and

Discharge Point No. 6 (Steven M. Clouse WRC Outfall 006) is located at Latitude 29.275560° N, Longitude 98.428978° W on the San Antonio River; and

Discharge Point No. 7 (Leon Creek WRC Outfall 001) is located at Latitude 29.275319° N, Longitude 98.513008° W on Comanche Creek; and

Discharge Point No. 8 (Medio Creek WRC Outfall 001) is located at Latitude 29.398847° N, Longitude 98.668031° W on Medio Creek; and

Discharge Point No. 9 (Salado Creek WRC Outfall 001) is located at Latitude 29.275560° N, Longitude 98.428978° W on the San Antonio River.

SAWS seeks to divert the discharged groundwater-based return flows from a reach on the Guadalupe River, Guadalupe River Basin, at a maximum combined diversion rate of 161,878 gpm (360.53 cfs), with the proposed upstream point of the reach being at Latitude 28.478432° N, Longitude 96.862858° W and the downstream point being at Latitude 28.447519° N and Longitude 96.785611° W in Calhoun County, ZIP code 77979.

Portions of the 260,991 acre-feet of groundwater-based 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. SAWS requests to account for and use those groundwater-based return flows, under Water Use Permit No. 13098, when those portions of the previously authorized return flows are not being diverted under those authorizations. SAWS has provided and the Executive Director has approved the *San Antonio Water System Groundwater Based Effluent Water Balance Accounting Plan Water Use Permit Application No. 13098*.

The application and partial fees were received on December 30, 2013. Additional information and fees were received on July 8 and August 8, 2014, February 29, and March 29, 2016. The application was declared administratively complete and accepted for filing with the Office of the Chief Clerk on May 9, 2016. Additional information was received on March 17 and March 24, 2021. On August 17, 2021, the TCEQ Chief Clerk mailed notice to every water right holder of record downstream of the discharge point. Publication of notice is not required for this permit pursuant to 30 TAC §295.161(d). The deadline to request a contested case hearing was

August 20, 2021. Timely hearing requests were received by GBRA, NBU, San Marcos, Seguin, INVISTA, UCC, and Victoria County.

## II. REQUIREMENTS OF APPLICABLE LAW

### A. Requirements to Obtain Affected Person Status

This application was declared administratively complete after September 1, 1999, and is subject to Chapter 55, Subchapter G, sections 55.250 - 55.256. According to these rules, an “affected person” must submit a timely contested case hearing request in writing and in compliance with Commission requirements for making a request.<sup>1</sup> In addition, the request must identify the person’s personal justiciable interest affected by the application, including a brief, specific explanation regarding “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 the members of the general public.”<sup>2</sup>

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” in a manner not common to members of the general public.<sup>3</sup> Relevant factors considered in determining a person’s affected person status include:

- (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 the property of

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<sup>1</sup> 30 TEX. ADMIN. CODE (“TAC”) §§ 55.251 *et seq.* and 30 TAC § 295.171.

<sup>2</sup> 30 TAC § 55.251(c)(2).

<sup>3</sup> 30 TAC § 55.256(a). “This standard does not require parties to show that they will ultimately prevail on the merits; it simply requires them to show that they will potentially suffer harm or have a justiciable interest that will be affected.” *United Copper v. TNRCC*, 17 S.W.3d 797, 803 (Tex.App. - Austin 2000).

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.<sup>4</sup>

A contested case hearing should be granted if an affected person's hearing request meets all requirements of applicable law. A request for hearing shall be granted if the request is made by the applicant or the executive director.<sup>5</sup> The Commission may also refer an application to the State Office of Administrative Hearings if the Commission determines that a hearing would be in the public interest.<sup>6</sup>

## **B. Requirements for a Bed and Banks Authorization**

Section 11.042(b) of the Texas Water Code (TWC) provides that 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.

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<sup>4</sup> 30 TAC § 55.256(c).

<sup>5</sup> 30 TAC § 55.255(b)1

<sup>6</sup> 30 TAC § 55.255(c).

Such authorizations, known as bed and banks permits, allow diversion only of 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 such authorizations shall not cause a degradation of water quality to the extent that the stream segment's classification would be lowered.<sup>7</sup>

### **III. DISCUSSION**

#### **A. Determination of Affected Persons**

##### **a. Guadalupe-Blanco River Authority**

The Commission received a hearing request from GBRA on September 20, 2021. GBRA is a governmental agency and body politic created in 1933 by special act of the Legislature for the purposes of Section 59 of Article 16 of the Constitution of the State of Texas. GBRA stewards the water resources in its ten-county district, which consists of Kendall, Comal, Hays, Caldwell, Guadalupe, Gonzales, DeWitt, Victoria, Calhoun, and Refugio Counties. GBRA maintains multiple water rights along the Guadalupe River to provide water to the customers in its district. Those water rights are upstream of the proposed diversion reach and include COA Nos. 18-2074, 18-5173, 18-5174, 18-5175, 18-5176, 18-5177, 18-5178, 18-3863B, 18-3896, 18-3600, 18-5234, and Permit No. 12378.

In its request, GBRA contends that, without SAWS and others pumping water from the Edwards Aquifer, that water would naturally make its way into the Guadalupe River through

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<sup>7</sup> Tex. Water Code §11.042(c).



several large springs. These springs include the state's two largest natural springs at New Braunfels and San Marcos. Because the availability of water under GBRA's water rights depends on the Guadalupe River Basin's surface water flows, GBRA is affected by any proposal to remove Edwards water from the Guadalupe River system, including the proposed authorization to remove Edwards-derived effluent from the mouth of the Guadalupe River.

GBRA argues that impacts resulting from the requested diversions may decrease firm water supplies in the lower basin and elsewhere because the draft permit provides that "the groundwater-based return flows authorized to be conveyed via the bed and banks of a State watercourse in this permit do not have a priority date and are not subject to priority calls from senior water rights."<sup>8</sup> The GBRA-Dow Run-of-River water rights are senior to most others in the Basin, but the requested authorization would allow SAWS to operate outside of the prior appropriation system and effectively supersede GBRA's senior rights. In times of drought, SAWS could insist on 360 cfs of surface water flow downstream of GBRA's senior diversion point, notwithstanding the fact that a portion of this water, if it were present in the watercourse, should be available to GBRA under its senior surface water rights.

The ED created a map for these proceedings, demonstrating that GBRA's primary diversion points for its water rights are all located upstream from the Applicant's requested diversion reach. However, due to the potential impacts GBRA articulates on spring and surface water flows upstream of the reach in the Guadalupe River Basin and inherent interest in protecting the firm yield of its water supply and its customers, OPIC recommends that GBRA be determined an affected person and that their hearing request be granted.

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<sup>8</sup> Draft Permit at 13098.

**b. New Braunfels Utility (NBU)**

The Commission received a hearing request from NBU on September 21, 2021. NBU owns several water rights, including Certificate of Adjudication (COA) Nos. 18-3823, 18-3824, and 18-3830, that are directly impacted by flows in the Comal and Guadalupe Rivers. NBU contends that implementation of the activities in the Draft Permit may affect their ability to divert water within the Guadalupe River Basin and thereby interrupt their water supply.

One basis for NBU's concerns is the following special condition that exists in each of its certificates:

The diversion and use of water under this Certificate will be subordinate to all previously existing water rights of the Guadalupe-Blanco River Authority (GBRA) upstream of the Applicant's diversion point on the Guadalupe River and also subordinate to any future amendments to existing rights of GBRA and to any future or additional right of GBRA, with respect to impounding water and/or diverting and/or using water from Canyon Reservoir.

Effects of the application on water rights owned by GBRA—including significant rights with diversion points downstream of the confluence of the Guadalupe and San Antonio Rivers and upstream of the diversion reach in the Draft Permit—therefore also impact NBU's water rights. NBU has contractual rights through water supply contracts with GBRA, and NBU is concerned that the proposed authorization would force GBRA to alter how it uses its water resources in the Guadalupe Basin in a way that depletes firm-yield availability of Canyon Reservoir flows, needed for NBU's municipal water supply.

A second area of concern for NBU relates to the hydrological uniqueness of the San Antonio and Guadalupe River Basins, including the influence of spring flows from the Edwards

Aquifer. NBU contends that, although the Edwards Aquifer is itself unique and complex, the review conducted contains no acknowledgement or consideration of how use of water produced from the Edwards Aquifer may influence water availability and exercise of rights within the San Antonio and Guadalupe Basin. The proposed authorization would permit discharge of 260,991 acre-feet of water per year into one basin and then divert that water in a separate, non-adjacent basin without a clear understanding of how it may impact prior appropriation and senior priority within the Guadalupe River Basin.

NBU also raises concerns related to the lack of protection of instream uses and freshwater inflows which may adversely affect water rights within the Guadalupe Basin, including those rights owned by NBU. Furthermore, the Accounting Plan does not contain complete data relating to loss factors, travel times, and other calculations in the San Antonio and Guadalupe Water Basins. In addition, much of the return flow calculated by the Commission constitutes “historic flow,” though there is no such reference in the Draft Permit—which may impact Water Availability Model information for the San Antonio and Guadalupe Basins used in the Accounting Plan and Draft Permit.

The ED created a map for these proceedings, demonstrating that NBU’s primary diversion point is approximately 115 miles upstream from the Applicant’s requested diversion reach. However, due to the potential impacts NBU articulates on spring and surface water flows upstream of the reach in the Guadalupe River Basin, the GBRA-subordinate conditions contained in its COAs, water supply contracts with GBRA, and NBU’s inherent interest in protecting its source of municipal water supply, OPIC recommends that NBU be determined an affected person and that their hearing request be granted.

**c. City of San Marcos**

The Commission received a hearing request from the City of San Marcos on September 20, 2021. San Marcos holds Water Rights Nos. 1744, 3867, and 5902 in the Guadalupe Basin, which it contends may be impacted by the proposed authorization. San Marcos also has a purchase water contract with GBRA, who is authorized to impound water in the Canyon Reservoir in Comal County, Texas. San Marcos is concerned that transportation of groundwater over 100 miles to be released into San Antonio Bay may adversely affect water suppliers in the Guadalupe River Basin. San Marcos is also concerned the proposed permit and Accounting Plan do not adequately account for and ensure that State water will be passed. Further, San Marcos is concerned about the proposed measuring requirements, water quality, and the impact of evaporative losses on senior water rights. Lastly, San Marcos is concerned the proposed permit will impair the health and safety of its customers, its senior water rights, and downstream and environmental flows.

The ED created a map for these proceedings, demonstrating that the primary diversion points for the San Marcos water rights are located approximately 40 miles upstream from the Applicant's requested diversion reach. However, due to the analysis previously discussed regarding potential impacts on spring and surface water flows upstream of the proposed diversion reach in the Guadalupe River Basin and San Marcos' inherent interest in protecting its senior water rights and the availability of firm supply under its contract with GBRA, OPIC recommends that San Marcos be determined an affected person and that their hearing request be granted.

**d. City of Seguin**

The Commission received a hearing request from the City of Seguin on September 17, 2021. Seguin has a population of 30,712 and owns and operates a public water system (TC0940002) serving over 7500 industrial, commercial, and residential accounts. Seguin's water supply is comprised in part from water rights to the Guadalupe River pursuant to COA 18-3839.

Seguin expresses concern that, because conditions within the reach of the Guadalupe River described in the proposed permit as the diversion reach do not always satisfy the rate of diversion criteria, priority calls to users within the San Antonio and Guadalupe River basins would ensue. During these times, section 4 of the Draft Permit would operate to exempt SAWS from priority calls from senior water rights, potentially exacerbating the impacts on Seguin's water right. Such impacts could threaten Seguin's ability to divert water to supply its critical customers.

The ED created a map for these proceedings, demonstrating that the primary diversion points for the Seguin water rights are located approximately 100 miles upstream from the Applicant's requested diversion reach. However, due to the analysis previously discussed regarding potential impacts on spring and surface water flows upstream of the proposed diversion reach in the Guadalupe River Basin and Seguin's inherent interest in protecting its senior water rights and availability of water to its customers, OPIC recommends that Seguin be determined an affected person and that their hearing request be granted.

**e. Nylon Chemicals Americas (INVISTA)**

The Commission received a hearing request from INVISTA on September 20, 2021. INVISTA operates a nylon chemical manufacturing facility in Victoria, Texas, which is dependent on access to water. INVISTA holds COA 18-3861 in the lower Guadalupe-San

Antonio River Basin, which it utilizes to meet these needs.

INVISTA is concerned the proposed permit would negatively impact its senior water right and operations of its facility because of the proposed permit's authorization of the transport and indirect reuse of Edwards-derived effluent, which would otherwise emerge naturally from springs to feed the Guadalupe and San Antonio Rivers and become surface water available for diversion. Further, the requested diversion reach at the mouth of the Guadalupe River harms INVISTA's water rights because of its placement. Locating SAWS' diversion reach below the confluence of the San Antonio and Guadalupe River would effectively allow SAWS to become the most senior water right in the San Antonio or Guadalupe River basins. This would permit SAWS to make a call on all senior water right holders upstream of it, in either basin, and require INVISTA to pass water downstream to the proposed diversion reach in times of low flows.

The ED created a map for these proceedings, demonstrating that INVISTA's primary diversion points for its water rights are located approximately 20 miles upstream from the Applicant's requested diversion reach. However, due to the potential impacts INVISTA articulates on spring and surface water flows upstream of the proposed diversion reach in the Guadalupe River Basin and INVISTA's inherent interest in protecting its senior water rights and the continuity of its operations, OPIC recommends that INVISTA be determined an affected person and that their hearing request be granted.

**f. Union Carbide Corporation (UCC)**

The Commission received a hearing request from UCC on September 20, 2021. UCC is the owner of the Seadrift Operations Site. The manufacturing process at this site requires the use of freshwater, which is procured through water rights which UCC owns and others which it shares with GBRA. During times of drought there is limited availability of freshwater in the

Guadalupe Basin. Water necessary for operations and saltwater intrusions may be comprised. The proposed permit would allow removal of groundwater-based effluent, which is a significant contributor to the streamflow in the Guadalupe. The authorization would therefore pose a threat to UCC's senior water rights during drought conditions.

The ED created a map for these proceedings, demonstrating that UCC's primary diversion point is approximately 3 miles upstream from the Applicant's requested diversion reach. Due to the potential impacts of the proposed permit on spring and surface water flows upstream of the reach in the Guadalupe River Basin, UCC's inherent interest in protecting its senior water rights and the continuity of its operations, OPIC recommends that UCC be determined an affected person and that their hearing request be granted.

**g. Victoria County Navigation District (Victoria County)**

The Commission received a hearing request from Victoria County on September 20, 2021. Victoria County holds Water Use Permit No. 3606B, which allows for construction and operation of an off-channel reservoir and diversion of water from the Guadalupe River. Victoria County is concerned the proposed permit will negatively impact use of its water right by reducing the volume of available water. Victoria County is also concerned with the accuracy of the calculations used to determine the-availability of the requested groundwater-based return flows and the calculations used to determine evaporation and absorption rates between the discharge and the proposed diversion points.

The ED created a map for these proceedings, demonstrating that Victoria County's primary diversion points are approximately 20 and 27 miles upstream from the Applicant's requested diversion reach. Due to the potential impacts of the proposed permit on spring and surface water flows upstream of the proposed diversion reach in the Guadalupe River Basin,

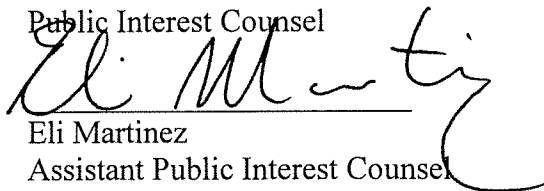
Victoria County's inherent interest in protecting its senior water right and the continuity of its reservoir operations, OPIC recommends that Victoria County be determined an affected person and that their hearing request be granted.

#### **IV. CONCLUSION**

OPIC respectfully recommends that the Commission grant the hearing requests of GBRA, NBU, San Marcos, Seguin, INVISTA, UCC, and Victoria County and refer this matter to SOAH for a contested case hearing.

Respectfully submitted,

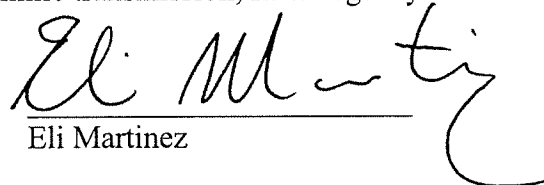
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#### **CERTIFICATE OF SERVICE**

I hereby certify that on January 14, 2022, the Public Counsel's Response to Hearing Requests was filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.



Eli Martinez



**MAILING LIST  
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TCEQ DOCKET NO. 2021-1391-WR**

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