TCEQ DOCKET NO. 2021-1391-WR

APPLICATION OF	**§**	**BEFORE THE**
SAN ANTONIO WATER SYSTEM	**§**	**TEXAS COMMISSION ON**
FOR WATER USE PERMIT NO. 13098	**§**	**ENVIRONMENTAL QUALITY**

REPLY IN SUPPORT OF GUADALUPE-BLANCO RIVER AUTHORITY'S PLEA TO THE JURISDICTION AND REQUEST FOR CONTESTED CASE HEARING

TO THE HONORABLE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW, the Guadalupe-Blanco River Authority ("GBRA") and files this Reply in support of its Plea to the Jurisdiction and Request for Contested Case Hearing, which asks the Texas Commission on Environmental Quality ("TCEQ") to deny or dismiss the above-referenced application (the "Application") of the San Antonio Water System ("SAWS") or, in the alternative, to grant GBRA a contested case hearing on the Application.

I. REPLY IN SUPPORT OF GBRA'S PLEA TO THE JURISDICTION

Even if SAWS's Application could be considered under § 11.042, the TCEQ may not grant SAWS's Application for an 11.042(b) bed and banks permit because the Edwards Aquifer Authority ("EAA") Act applies to and expressly disallows SAWS's proposed reuse of Edwards-derived effluent after discharge and outside the jurisdictional bounds of the EAA. GBRA thoroughly briefed the EAA Act's prohibition on indirect reuse of Edwards water in its September 20, 2021 filing and incorporates those arguments by reference.

1. The Place of Use of Edwards Aquifer Water Withdrawn by Wells is Governed by the EAA Act.

With respect to the use of Edwards water outside the jurisdiction of the EAA, Section 1.34(b) of the EAA Act requires that "[w]ater withdrawn from the aquifer must be used within the boundaries of the authority." SAWS attempts to avoid that unambiguous dictate by arguing that (1) by its terms, § 1.34 does not apply because SAWS's proposed use is not a "use" of "water

withdrawn from the aquifer," and (2) even if § 1.34 does prohibit SAWS's proposed use, the TCEQ should disregard the EAA Act's specific statutory prohibition in favor of exercising the general, discretionary authority of Texas Water Code § 11.042(b)[1]. Neither position is correct.

a. The Edwards Aquifer Authority Act expressly prohibits SAWS's requested "use" of "[w]ater withdrawn from the aquifer" outside the bounds of the Edwards Aquifer Authority.

SAWS's argument that § 1.34 does not apply to its proposed use is incorrect and based on an overly narrow and non-textual reading of § 1.34(b). The EAA Act unambiguously provides "[w]ater withdrawn from the aquifer must be used within the boundaries of the authority." § 1.34(b). That dictate is not limited to "water withdrawn from the aquifer that has not been treated or recycled," nor is it limited to "the first use" of water withdrawn from the aquifer, as SAWS argues.

SAWS attempts to avoid § 1.34's restriction on use of Edwards water by claiming, without authority, that treated effluent is no longer considered "[w]ater withdrawn from the aquifer." Resp. 10-11. Nothing supports SAWS's bald assertion that when Edwards water becomes wastewater and then treated and discharged effluent, it is no longer subject to § 1.34(b). Section 1.34(b) applies to *any* "[w]ater withdrawn from the aquifer." It is not limited to the initial use of water withdrawn from the aquifer. SAWS asks the TCEQ to read into the EAA Act limitations on the

[1] Even if available for Edwards-derived return flows, which it is not, a Section 11.042(b) authorization "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." Tex. Water Code § 11.042(b). But, because of the interconnection between Edwards Aquifer springflows and Guadalupe and San Antonio River streamflows, any TCEQ policy that requires explicit reference in a Guadalupe River surface water right to Edwards-derived return flows is grossly inconsistent with both the reality of these river basins and the history of their water rights. When, for example, GBRA's and Dow's downstream Calhoun Canal System water rights were granted in the 1940s and 1950s, there was no need to include an express statement documenting these water rights' reliance upon Edwards water, whether the Edwards water continued to flow unabated from the springs or, to the extent springflows are diminished by withdrawals of Edwards water, by return of surplus Edwards water to the streamflows; that was, and still is, the law. If the Commission should desire to grant SAWS's Application, an appropriate construction of Section 11.042(b) could at least avoid the risk of TCEQ's policy effectuating a regulatory taking, without a Takings Impact Assessment, by imposing special conditions to protect affected water rights.

meaning of "water withdrawn from the aquifer" that simply do not exist. The text of the statute makes clear that because the Edwards Aquifer supplies SAWS with the water that becomes the Application's treated effluent, that effluent is subject to § 1.34(b).

SAWS's contention that its proposed use is not restricted by the EAA Act is also based on the faulty proposition that "reuse" is not a form of "use," Resp. 10, or, in other words, that § 1.34 only limits the "first use" of water withdrawn from the aquifer. Again, this argument requires an overly narrow and non-textual reading of the statute. SAWS's contention that § 1.34(b) prohibits "use" but not "reuse," is contradicted by the express statutory language, which makes clear that "reuse" is a form of "use." "Reuse" is defined by the EAA Act as an "authorized **use** for one or more beneficial purposes of use of water." EAA Act § 1.03(19) (emphasis added). Thus, for purposes of § 1.34(b), "reuse" is encompassed in the broader term "use," so both reuse and first use of Edwards water outside the bounds of the EAA is prohibited.[2] Therefore, SAWS's proposed use of Edwards-derived effluent is prohibited by the EAA Act.

b. Any conflict between the EAA Act's prohibition on SAWS's proposed use and the Texas Water Code must be resolved in favor of the EAA Act's more specific mandate.

SAWS claims that, if there is a conflict between the EAA Act and Texas Water Code § 11.042, the TCEQ must apply § 11.042(b). That conclusion is fundamentally wrong. The TCEQ cannot grant SAWS an indirect reuse authorization that contravenes the EAA Act's express restrictions on Edwards water for two reasons.

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[2] *See, e.g., Cadena Comercial USA Corp. v. Texas Alcoholic Beverage Comm'n*, 518 S.W.3d 318, 327-28 (Tex. 2017) (applying the rule that "[i]If an undefined word used in a statute has multiple and broad definitions, we presume—unless there is clear statutory language to the contrary—that the Legislature intended it to have equally broad applicability," to conclude that "[t]he term 'interest,' standing alone, necessarily subsumes the other modifiers that might limit the term. For example, either the term 'an indirect interest' or the term 'a direct interest,' separately considered, is narrower than 'an interest.' 'Interest' includes *both* of these, in addition to any other interest that is neither direct nor indirect.").

First, any conflict between the EAA Act's prohibition of SAWS's proposed use and the mere grant of authorization to TCEQ under Section 11.042(b) is resolvable. *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."). While the EAA Act is mandatory—"[w]ater withdrawn from the aquifer *must* be used within the boundaries of the authority," § 1.34(b) (emphasis added)—Texas Water Code Section 11.042 provides the TCEQ *discretion* to grant a bed and banks permit. Tex. Water Code § 11.042(b) ("[t]he authorization *may* allow for the diversion and reuse by the discharger of existing return flows, less carriage losses…") (emphasis added). Nothing in § 11.042 mandates the TCEQ's authorization of SAWS's proposed use, much less beyond the boundaries of the EAA. Thus, any conflict between what the EAA Act mandates and what the Texas Water Code allows can be resolved by abiding by the explicit statutory mandate.

Second, even if there is a true conflict between the EAA Act § 1.34(b) and Texas Water Code § 11.042(b), the conflict must be resolved in favor of the more specific EAA Act. Texas courts hold that "as a general rule, a more specific statute prevails over a more general one." 67 Tex. Jur. 3d Statutes § 118 (citing cases); *see also Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 901 (Tex. 2001) (citations omitted) ("This conclusion is consistent with the traditional statutory construction principle that the more specific statute controls over the more general.").

Here, the EAA Act is the more specific of the competing statutes. The Legislature adopted the EAA Act to apply **only** to the Edwards Aquifer because it "is a unique and complex hydrological system, with diverse economic and social interests dependent on the aquifer for water supply," and is "a distinctive natural resource in this state, a unique aquifer, and not an underground stream," which requires that "all reasonable measures be taken to be conservative in

water use." EAA Act § 1.01. While the EAA Act specifically applies to Edwards water, § 11.042(b) more broadly applies to "privately owned groundwater" throughout the state.

SAWS does not dispute that the EAA Act is the more specific of the relevant statutes, but claims that under the Code Construction Act, the TCEQ should grant its requested authorization under § 11.042(b) even if it violates the EAA Act. The Code Construction Act provides that "[i]f the conflict between the general provision and the special or local provision is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later enactment and the manifest intent is that the general provision prevail." Tex. Gov't Code § 311.026(b).

SAWS claims that § 11.042 must prevail here because it is both later-enacted, compared to the EAA Act, and, SAWS claims, it was the "manifest intent" of the Legislature that § 11.042(b) of the Water Code prevail over the EAA Act. In so arguing, SAWS points to legislative history in which San Antonio was mentioned as one reason underlying the passage of § 11.042(b). Resp. 11-12.

First, reference to Legislative history is not appropriate unless the statute involved is ambiguous. *See, e.g., Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 442 (Tex. 2009) (with respect to "going beyond the statutory text and looking to extrinsic aides such as the Act's legislative history…we do not resort to such extrinsic aides unless the plain language is ambiguous."). That is not the case here: the words of § 11.042(b) are clear and unambiguous.

But even if legislative history is properly examined in this instance, the history SAWS cites is a far cry from a "manifest intent" to undermine EAA Act's stated policy or express statutory prohibitions. Nothing in the history suggests that the "developed water" concept that was approved by the Senate in its version of Section 11.042(b) (which explicitly adopted the common law

meaning of "developed water") was wrong or repudiated by passage of the final EAA Act. Nothing in the legislative history suggests that TCEQ must grant bed-and-banks permits for groundwater. Rather, TCEQ is merely authorized to do so, under certain conditions. SAWS does not point to any mention of the EAA Act in the legislative history underlying § 11.042(b), nor is there any evidence that, in enacting § 11.042(b), the Legislature sought to undo the EAA Act's considered and specific dictates with respect to Edwards water. In fact, the Texas Water Code explicitly disclaims its effect on restrictions contained in specialized statutes like the EAA Act. *See* Tex. Water Code § 1.001(d) ("Laws of a local or special nature, such as statutes creating various kinds of conservation and reclamation districts, are not included in, or affected by, this code.").

In addition, while SAWS is correct that § 11.042(b) was enacted after the EAA Act, SAWS ignores that the EAA Act has since been amended, with the provisions relevant here remaining unchanged. The best explanation, from the legislative history, is that the Legislature tried to simplify and make § 11.042(b) generally applicable. Because the Legislature separately addressed Edwards water in the more specific EAA Act, and in that specific statute expressly prohibited its reuse following discharge or its use outside the bounds of the EAA, the Texas Legislature had no need to clarify in Water Code § 11.042(b) that the general Water Code provision did not apply to Edwards water. If, as SAWS argues, the Legislature sought to undermine the EAA Act through the enactment of § 11.042(b), it defies logic that the Legislature would subsequently reenact the EAA Act's restrictions without change.

Because the Legislature did not manifest an intent to undermine the EAA Act by passing § 11.042(b), and the Texas Water Code expressly does not affect "laws of a…special nature," like

the EAA Act, the TCEQ must abide by the EAA Act's specific dictate as opposed to § 11.042(b)'s more general allowance. Tex. Water Code § 1.001(d).

2. Edwards Water is not Developed Water, so a Section 11.042(b) permit is unavailable to SAWS.

Regardless, SAWS is not entitled to the requested bed and banks permit under § 11.042(b) because, under common law and the provisions of the EAA Act, the return flows derived from Edwards Water are not developed water, so they become State water upon, and must remain State water after, discharge to a watercourse or other body of State-owned water. SAWS does not contest that the water it seeks authorization to indirectly reuse pursuant to its Application is not developed water. Resp. 5; *see also* Hutchins, The Texas Law of Water Rights, at 541 (1961) (Developed water is "water that in its natural state does not augment a water supply, but that is added to a water supply or is otherwise made available for use by means of artificial works" (citation and quotation omitted)); Anthony Dan Tarlock & Jason Anthony Robison; Developed water, Law of Water Rights and Resources § 5:19 ("Developed water has been defined as 'that water which has been added to the supply of a natural stream and which never would have come into the stream had it not been for the efforts of the party producing it'" (citations omitted)).

SAWS instead claims that a § 11.042 authorization is not intended to apply solely to developed water, but that argument ignores the reality of the Texas Water Code. In arguing that § 11.042(b) was intended to include Edwards water, SAWS points to legislative history in which legislators discussing the implementation of § 11.042(b) referred to groundwater reuse in San Antonio. Resp. 8. But, nowhere in that history did the legislators either (1) discuss the different sources of groundwater San Antonio then was using or intended to use, or Edwards water specifically, or an intent that § 11.042(b) would apply to Edwards water, or (2) give any reason for using the language "groundwater" instead of "developed water." Resp. 7-8. In any case, most

importantly, § 11.042(b) does not require the Commission to grant bed and banks authorizations for the conveyance of return flows derived from *all*, or *any particular*, source or sources of privately-owned groundwater. *See* Water Rights: Overview (TX), Practical Law Practice Note Overview w-010-4184 (citing § 11.042 and noting that under it "the state may authorize use of a natural watercourse to transport developed water downstream"); Water Rights Permitting (TX), Practical Law Practice Note w-010-4215 (noting § 11.042(b) as an example of "[d]ifferentiation of natural flow from developed water").

Because § 11.042 applies *only* to developed water and Edwards Water is not developed water, an § 11.042 authorization is unavailable for SAWS's proposed use.

II. REPLY REGARDING AFFECTED PERSONS

As the Executive Director and OPIC recognize, GBRA holds a personal justiciable interest (including, but not limited to, its lower basin surface water rights) affected by the Application, and, accordingly, GBRA should be admitted as a party to the contested case hearing on this Application. OPIC also recognizes that, in addition to impacting GBRA and Union Carbide, the Application's diversion reach at the mouth of Guadalupe River will affect water rights holders upstream of SAWS's conveyance reach as well as those within the Guadalupe River Basin. In times of drought, the Application will create priority calls and change the allocation and use of surface water rights in the Guadalupe River far upstream of the San Antonio River's confluence.

While SAWS categorically claims that no one has standing[3] to challenge its Application, the Executive Director seems to believe that SAWS's Application will affect only surface water

[3] Incredibly, SAWS also suggests that GBRA has been on notice, through Special Condition 4 of its saltwater barrier water right, that GBRA would be required to pass over 260,000 acre-feet per year downstream. *See* SAWS Resp. at 23. Not only does history belie this position—GBRA's saltwater barrier right, Certificate of Adjudication 18-5484, was adjudicated nearly a decade before the Legislature passed Section 11.042(b)—but, if the Commission could deprive GBRA of a primary benefit of its senior, adjudicated, water rights based on SAWS's Application, that would pose a serious question of regulatory taking.

rights holders within the Application's proposed conveyance reach. That is not so. As OPIC explains, "[l]ocating SAWS' diversion reach below the confluence of the San Antonio and Guadalupe Rivers 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 rights holders upstream of it, in either basin, and require" water rights holders "to pass water downstream to the proposed diversion reach in times of low flows." OPIC Resp. at 12 (supporting INVISTA's party status). OPIC similarly appreciates that the Application would authorize SAWS to "discharge…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." OPIC Resp. at 9 (supporting New Braunfels Utilities' ("NBU's") party status). Water rights holders like INVISTA, NBU, and others will be affected by SAWS's Application, notwithstanding their water rights' location upstream of the confluence.

Texas Water Code Section 11.042(b) does not grant SAWS a superior right to water over all surface water rights holders. But, by placing its significant diversion of *Edwards* water—which necessarily impacts surface water holders on the Guadalupe River—and its desired diversion reach downstream of even the most senior surface water rights, SAWS effectively positions itself as the most senior water right in two river basins. Unburdened by the prior appropriation system, and claiming that all lack standing to challenge its Application, SAWS can insist on receiving 360 cfs instantaneously—260,991 acre-feet per year—without regard for *any* upstream surface water rights holders. GBRA, newly required to pass flows downstream to SAWS instead of diverting those Edwards-based streamflows that formed the basis for GBRA's adjudicated water rights, will be forced to make priority calls on upstream, junior water rights holders, or to reallocate reliance

on its own upstream water rights. This will impact every upstream surface water right holder with rights junior to GBRA.

As demonstrated by the submitted hearing requests, water rights holders within the Guadalupe River Basin, whether located upstream or downstream of the San Antonio River's confluence with the Guadalupe River, will be affected by the Application. Effects will differ depending on the water right's authorized uses, priority date, and other details. But the Application will have a wide-ranging impact on surface water rights in the Guadalupe River Basin both because it seeks to divert Edwards water and also as a direct result of SAWS's selected diversion reach.[4]

GBRA relies on its senior water rights to supply municipal, industrial, irrigation, and other water customers, including SAWS, throughout GBRA's ten-county statutory district. By removing Edwards water from the surface water system and then insisting that senior water rights in two river basins must pass SAWS water at a diversion reach located practically in the San Antonio Bay, SAWS's end-run around the prior appropriation system undoubtedly affects GBRA. This Application's impacts extend, however, far beyond the mere conveyance reach and will affect upstream surface rights within the Guadalupe River Basin, such as GBRA's Canyon water right and the rights discussed by other hearing requestors.

III. CONTESTED LEGAL ISSUES AND CERTIFIED QUESTIONS

GBRA respectfully requests that, if the Commission denies GBRA's Plea to the Jurisdiction, then, upon ordering SOAH to hold a contested case hearing on the Application, the

[4] Further, as explained in GBRA's September 20, 2021 comments and request for contested case hearing, SAWS's Application stretches over 150 miles from the point of discharge to the diversion reach, stretching credulity of SAWS's claim that its Application will support water-recycling to benefit the City of San Antonio. Following channel losses, the Edwards-derived return flows that arrive at SAWS's proposed discharge reach will have been polished by the 150 mile journey downstream, then allowed to mix with brackish water, requiring a significant amount of energy to treat and to pump the water back upstream to San Antonio. This effort bears little resemblance to true water recycling, water conservation, or good water stewardship.

Commission also refer the following legal issues for briefing before SOAH and certified question to the Commission:

1. Whether the Edwards Aquifer Authority Act precludes the issuance of Texas Water Code Section 11.042(b) authorizations for Edwards-derived effluent transported for diversion or use outside the boundaries of the EAA;
2. Whether common law and the EAA Act preclude the issuance of Texas Water Code Section 11.042(b) authorizations for Edwards-derived effluent because that effluent is not developed water; and
3. Whether, if issued, Permit 13098 will effectuate a regulatory taking of senior surface water rights within the Guadalupe and/or San Antonio Rivers.

IV. PRAYER

GBRA respectfully requests that the Commission grant GBRA's Plea to the Jurisdiction and dismiss or deny SAWS's Application in its entirety. Subject to GBRA's Plea, GBRA requests that the Commission hold a contested case hearing on SAWS's Application, that GBRA be admitted as a party to the hearing, and that the Commission refer the above-referenced issues for legal briefing before SOAH and certified question to the Commission.

Dated: January 31, 2022

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply in Support of Guadalupe-Blanco River Authority's Plea to the Jurisdiction and Request for Contested Case Hearing has been served on the following counsel/persons by regular U.S. Mail or, with the Chief Clerk, by electronic service, on this 31st day of January, 2022.

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