

**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**

**INV NYLON CHEMICALS AMERICAS, LLC 'S**  
**REPLY TO RESPONSES TO REQUEST FOR CONTESTED CASE HEARING**

TO THE HONORABLE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

INV Nylon Chemicals Americas, LLC (“INVISTA”) holds one of the most senior water rights in the Guadalupe River Basin and depends exclusively on that water to support its Victoria manufacturing operation. Under Texas’s system of prior appropriation, water right seniority means water security in times of shortage. Granting SAWS’s above-referenced application (the “Application”) would divert Edwards-derived return flows from the mouth of the Guadalupe River and deprive INVISTA of a critically significant component of its water right: reliability or “firmness” during drought. SAWS generically, and incorrectly, argues that no one has the right to contest its Application; the TCEQ Executive Director, on the other hand, inexplicably ignores the obvious interconnection between the San Antonio and Guadalupe Rivers.

Because granting the Application will undeniably reduce flows available to senior water rights holders GBRA and Union Carbide, who will, in turn, call on INVISTA’s upstream water rights, INVISTA is an affected person with a personal justiciable interest not common to the general public. INVISTA respectfully asks that the Commission grant INVISTA’s request for a contested case hearing.

**I. INVISTA Holds a Personal Justiciable Interest In The Application Not Common To The General Public**

INVISTA’s affected person status rests on two tenants: first, the fact the Application implicates Edwards water; and second, the placement of SAWS’s requested diversion reach in a

manner that particularly and uniquely impacts INVISTA's 1948 water right on the Guadalupe River.

TCEQ's Office of Public Interest Council ("OPIC") correctly articulates the impact SAWS's Application, if granted, will have on INVISTA:

"Locating 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 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 INVISTA to pass water downstream to the proposed diversion reach in times of low flows."

OPIC Resp. at 12 (emphasis added). OPIC recognizes that SAWS's diversion reach—for taking Edwards water—would effectively grant SAWS a superseding right to water flowing<sup>1</sup> in either the San Antonio or Guadalupe Rivers. That outcome undermines the balance achieved in the Edwards Aquifer Authority Act ("EAA Act") as well as the long-established priority system in the Guadalupe-San Antonio Basin.

The following map shows the Guadalupe-San Antonio River Basin, the confluence of the two rivers, and the approximate location of INVISTA's Certificate of Adjudication ("COA") 18-3861:

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<sup>1</sup> Restricted only numerically by the amount of SAWS's discharges, less carriage losses.

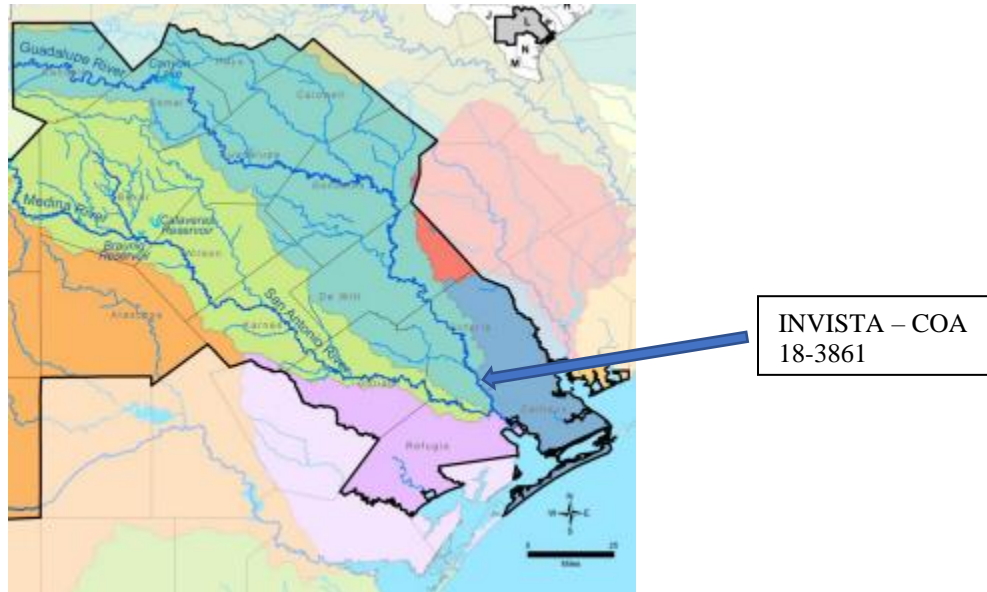


Figure 1-9 from 2021 Region L Regional Water Plan<sup>2</sup>

SAWS practically ignores the impact its proposed diversion reach will have on senior water rights like INVISTA’s, instead preferring to rely on its distorted and misplaced legal interpretation of the interplay between the EAA Act and Texas Water Code. For the reasons articulated in GBRA’s brief, which INVISTA supports, SAWS’s legal interpretation is wrong.

The Executive Director likewise downplays the impact of SAWS’s requested diversion reach, instead pursuing a narrow idea to an illogical conclusion: the Executive Director asserts that only water rights holders along SAWS’s requested conveyance reach are affected persons. ED Resp. at 6. To arrive at this conclusion, the Executive Director assumes, without support, that because SAWS submitted the Application under Section 11.042(b), and Edwards water originated underground, Texas Water Code Section 11.042(b) applies to Edwards-derived effluent. ED Resp. at 8. For the reasons explained in GBRA’s brief, Edwards water is unique and cannot, *as a matter of law*, be treated exactly like all other underground sources of water. See EAA Act § 1.01.

<sup>2</sup> <https://www.twdb.texas.gov/waterplanning/rwp/plans/2021/>

INVISTA agrees with GBRA that the correct legal framework<sup>3</sup> for Edwards-derived return flows is the EAA Act, not Section 11.042(b). Further, because the common-law understanding of “developed water” formed the basis for INVISTA’s water right, when granted, the Commission cannot now change that fundamental understanding without causing a taking.<sup>4</sup>

**a. Indirect Reuse of Edwards Water Impacts INVISTA**

But for SAWS’s continually increased pumping of the Edwards Aquifer, Edwards water would naturally emerge from aquifer-fed springs near the headwaters of the Guadalupe and San Antonio Rivers to feed those rivers and surface water rights like INVISTA’s COA 18-3861. INVISTA is entitled under COA 18-3861 to divert from the Guadalupe River up to 55,000 acre-feet per year (acft/yr), at a maximum instantaneous diversion rate of 137.5 cfs, at a priority date of 1948. This COA is INVISTA’s personal justiciable interest.

The Executive Director’s odd position—that only water rights holders along SAWS’s requested conveyance reach are affected persons—also belies the reality of how water flows in the Guadalupe-San Antonio River Basin. First, by pumping the Edwards Aquifer, SAWS and others have reduced the springflows that otherwise would have fed INVISTA’s Guadalupe River water right. SAWS’s discharge of Edwards-derived effluent back to the San Antonio River has historically made up for some of this withdrawal of Edwards Aquifer water, because the senior water rights holders located downstream of the San Antonio-Guadalupe River confluence, most notably GBRA and Union Carbide, can divert Edwards-derived return flows discharged to the San Antonio River instead of flows originating upstream in the Guadalupe River. Guadalupe River

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<sup>3</sup> Nothing in the legislative history of Texas Water Code Section 11.042(b) suggests that the Senate’s definition of “developed water,” passed in 1997, was incorrect. In addition, the Legislature recognized that the Commission “may” grant or deny requests made under Section 11.042(b). The one categorical exception, however, is for requests to indirectly reuse water governed by the EAA Act, which, as one of the “[l]aws of a local or special nature, such as statutes creating various kinds of conservation and reclamation districts,” is “not included in, or affected by, [the Texas Water] code.” Tex. Water Code § 1.001(d).

<sup>4</sup> INVISTA expressly adopts the arguments made by GBRA regarding takings.

flows, thus, have historically remained available to INVISTA and other water rights with diversion points upstream of the San Antonio River's confluence with the Guadalupe River. Second, adding a diversion reach down to the mouth of the Guadalupe River, as the Application contemplates, directly affects senior water rights holders on the Guadalupe River below the confluence—water rights like those held by GBRA and Union Carbide. Suddenly faced with having to pass—and not divert—Edwards-derived return flows from the San Antonio River, GBRA and Union Carbide would be expected to make priority calls in the Guadalupe River, directly affecting surface water rights like INVISTA's, which, while senior to many, is junior to GBRA and Union Carbide.

**b. SAWS's Requested Diversion Reach Creates a "Super Senior" Water Right that Affects INVISTA's Water Rights in the Guadalupe River**

SAWS's diversion reach down to the mouth of the Guadalupe River would immediately undercut every senior surface water right in two river basins. If SAWS becomes entitled to instantaneously divert 360 cfs from the mouth of the Guadalupe River, in times of drought, GBRA and Union Carbide will look upstream for water supply and make priority calls on more junior water rights holders. A senior call by GBRA or Union Carbide will directly impact INVISTA.

The Guadalupe and San Antonio Rivers are a system, collectively affected by "first in time, first in right" prior appropriation. SAWS's requested diversion reach will reduce the reliability of INVISTA's 1948 water right in times of drought, notwithstanding INVISTA's diversion point along the Guadalupe River upstream of the confluence. The Executive Director assumes that the only water rights affected by the Application are those located along the conveyance reach. That theory ignores that SAWS's demand for water at its diversion reach affects both the San Antonio and Guadalupe Rivers. Because senior surface water rights holders downstream of INVISTA who are impacted by the Application (such as GBRA and Union Carbide) can, in fact, call on more junior water rights holders *in either basin*, SAWS's Application affects not only those water rights


holders within its conveyance reach but also water rights holders along both the Guadalupe River and the San Antonio River.

**II. Conclusion**

Because INVISTA is affected by SAWS's request both to indirectly reuse Edwards-derived effluent and to divert this effluent at the mouth of the Guadalupe River, INVISTA is an affected person. INVISTA respectfully requests that the Commission hold a hearing on the Application and that INVISTA be admitted as a party.

Dated: January 31, 2022

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing INV Nylon Chemicals Americas, LLC's Reply to Responses to 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 31<sup>st</sup> day of January, 2022.

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