

TCEQ DOCKET NO. 2021-1391-WR

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

**NEW BRAUNFELS UTILITIES’
REPLY TO RESPONSES TO HEARING REQUESTS**

TO THE HONORABLE COMMISSIONERS:

New Braunfels Utilities (“NBU”), pursuant to TCEQ Rule 55.209(g), files this Reply to Responses to Hearing Requests filed by the Executive Director (“ED”) and San Antonio Water System (“SAWS”) related to SAWS’s application for Water Use Permit No. 13098 (the “Application”) and the draft permit filed by the ED in this matter related to the Application (“Draft Permit”). In support of the same, NBU respectfully shows the following.

SUMMARY

If GBRA is affected, NBU is affected. The ED concluded that GBRA is affected in this matter because GBRA owns impoundment and diversion rights within SAWS’s requested conveyance reach. Among the water rights GBRA owns that overlaps with the requested conveyance reach is the permit that authorizes GBRA to store water in and use water from Canyon Reservoir, and to convey water released from storage downstream using the bed and banks of the Guadalupe River. NBU possesses contract rights for water stored in Canyon Reservoir and relies on its own diversion rights that are dependent on maintenance of flows within the Guadalupe River—flows that are heavily influenced by GBRA’s releases from Canyon Reservoir. Moreover, NBU’s water rights are expressly subordinate to GBRA’s water rights.

Further, NBU’s hearing request also asserted that issuance of the Draft Permit will affect springflows upstream of NBU’s diversion points—an assertion that neither the ED nor SAWS controverts in their respective responses. For these reasons, NBU is affected by the Application and Draft Permit, and the Commission should grant its hearing request.

DISCUSSION AND ANALYSIS

1. Reply to Executive Director’s Response

The complete justification cited by the ED in recommending that NBU’s hearing request be denied is, in full, as follows:

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 by 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.

Despite carefully outlining the legal standard for affectedness at the outset of the response, the ED provided no analysis that applied that law to the facts stated in NBU’s hearing request other than to state the baseless conclusion that NBU’s request does not identify a personal justiciable interest. The commissioners should not accept the ED’s recommendation because it is bereft of any legal analysis at all.

Instead, NBU encourages the commissioners to properly apply the applicable legal standard for determining NBU’s affectedness—whether NBU has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application.¹ The relevant rule clarifies that such an interest will not constitute

¹ 30 Tex. Admin. Code § 55.256(a).

affectedness if it is common to members of the general public.² The Commission’s adopted and non-exhaustive list of factors to be considered in determining affectedness includes whether a reasonable relationship exists between the interest claimed and the activity regulated, likely impact of the regulated activity on the health and safety of the requestor, likely impact of the regulated activity on use of the impacted natural resource by the person asserting affectedness, and for governmental entities, their statutory authority over or interest in the issues relevant to the application.³ The affectedness rules do not say that only persons who own rights to store and divert water within a proposed conveyance reach are affected.

In determining affected person status, TCEQ may include reference to any reports, opinions, and data it has before it. In *Texas Commission on Environmental Quality v. Sierra Club*, the Austin Court of Appeals upheld TCEQ’s denial of a hearing request on the basis that the information contained in the administrative record and available to the commissioners supported the conclusion.⁴ The court explained generally that the existence of substantial evidence in the record supporting TCEQ’s decision on affectedness is a factor—often a dispositive one—in determining whether TCEQ abused its discretion. That opinion quoted from the following statement of the Supreme Court in *Texas Commission on Environmental Quality v. Bosque River Coalition*: “There is no indication that the Commission refused to consider any evidence tendered to substantiate these asserted deficiencies.”⁵ One necessary implication in *Sierra Club* and *Bosque River*

² *Id.*

³ *Id.* at 55.256(c).

⁴ 455 S.W.3d 228, 240 (Tex. App.—Austin 2014, pet. denied).

⁵ *Id.* at 235-36 (quoting *Texas Comm’n on Envntl. Quality v. Bosque River Coal.*, 413 S.W.3d 403, 408 (Tex. 2013)).

Coalition is that TCEQ abuses its discretion in denying a hearing request if it refuses to consider substantial evidence available to the commissioners.

A reasonable relationship exists between NBU's water rights and SAWS's requested activity.⁶ NBU's hearing request identified three water rights permits owned by NBU to be interests "related to a legal right, duty, privilege, power, or economic interest" relevant to the potential impacts this proceeding will have in the Guadalupe River Basin. TCEQ's issuance of Permit No. 13098 raises novel legal and technical issues and could have repercussive effects on water rights throughout the Guadalupe River Basin—including NBU's. GBRA's management of its resources directly affects NBU as a water rights permit owner whose diversion rights depend on Guadalupe River flows that are heavily influenced by GBRA's activities. In addition, as noted in NBU's hearing request, all of NBU's water rights permits include a special condition that makes those rights subordinate to GBRA's rights as they existed at the time of issuance of NBU's permits.

GBRA's affectedness directly passes through to NBU because GBRA could be forced to request that NBU's rights be cut off as a result of TCEQ's issuance of Permit No. 13098. GBRA owns Certificate of Adjudication No. 18-5173, which authorizes GBRA to impound and divert water within SAWS's requested conveyance reach. The ED has determined that GBRA's rights in COA 18-5173, among others, may be affected by TCEQ's issuance of Permit No. 13098. If GBRA's ability to divert water is limited in any way by Permit No. 13098, then GBRA may make more frequent calls on subordinate rights upstream from SAWS's requested conveyance reach. For that reason alone, the

⁶ See 30 Tex. Admin. Code § 55.256(c)

Commission should consider all junior upstream appropriators in the Guadalupe River Basin to be potentially affected persons in this matter.

Substantial evidence available to the commissioners supports the determination that owners of water rights in the Guadalupe River Basin upstream of the requested conveyance reach are affected. GBRA's assertion that its operations in the Guadalupe River Basin will be influenced by the TCEQ's issuance of Permit No. 13098 is supported by the Declaration of Samuel K. Vaugh, attached as Exhibit 1 to GBRA's hearing request. Mr. Vaugh stated his opinion that "when SAWS's Application causes increased shortages for GBRA's Lower Basin Water Rights, upstream water rights junior to GBRA's rights will also suffer increased shortages."⁷

In addition, NBU has legal rights through contracts with GBRA to more than 18,000 acre-feet of water per year that GBRA stores in Canyon Reservoir. NBU depends on those rights for its municipal water supply. NBU's rights to Canyon Reservoir water currently comprises 64 percent of NBU's municipal water supply inventory. As a municipal water supplier, NBU has a statutory duty to maintain a continuous and adequate supply of water for public health and safety.⁸

That issue is relevant to the Application.⁹ The ED correctly identified some of GBRA's water rights that authorize GBRA to store and divert water within SAWS's requested conveyance reach.¹⁰ The ED failed, however, to include Certificate of Adjudication No. 18-2074, as amended by Certificate of Adjudication No. 18-2074E, ("COA 2074") among them. COA 2074 authorizes GBRA to impound water in Canyon

⁷ Guadalupe-Blanco River Authority's Plea to the Jurisdiction, Request for Contested Case Hearing, and Comments on the Draft Permit, Exhibit 1 at 3-4.

⁸ See Tex. Water Code § 13.241.

⁹ See 30 Tex. Admin. Code § 55.256(c).

¹⁰ Executive Director's Response to Hearing Requests at 6.

Reservoir upstream of NBU's permitted diversion points.¹¹ It also authorizes GBRA to use the bed and banks of the Guadalupe River to convey water released from Canyon Reservoir for use throughout GBRA's statutory district,¹² which includes GBRA's diversion point within SAWS's requested conveyance reach.

The ED concluded that GBRA'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."¹³ Part of GBRA's stated basis for its affectedness is that such effect will impact the firm yield of Canyon Reservoir—potentially including water stored by GBRA expressly for NBU's exclusive use under contract. If GBRA's authority to impound water in Canyon Reservoir and divert water released from the Reservoir is affected by the Application in a manner not common to members of the general public, then NBU's legal rights are so affected as well.

Lastly, NBU's water rights permits restrict NBU's ability to divert water based on flows from Comal Springs. As explained in both NBU's and GBRA's hearing requests, TCEQ's issuance of the Draft Permit may encourage increased production of groundwater from the Edwards Aquifer, which in turn likely will affect streamflow conditions in the Guadalupe River Basin in a way that directly impacts both NBU's and GBRA's water rights.

2. Reply to SAWS's Response

SAWS acknowledges that its requested permit will affect streamflows in the Guadalupe River but, in SAWS's opinion, the permit will "enhance rather than reduce

¹¹ Certificate of Adjudication: 18-2074 at 2 (*available at* <https://gisweb.tceq.texas.gov/WRRRetrieveRights/?ID=ADJ2074>).

¹² *Id.* at 2, 14.

¹³ Executive Director's Response to Hearing Requests at 6.

stream flows.”¹⁴ NBU respectfully disagrees. But in either case, SAWS effectively recognizes that a disputed issue of fact exists as between SAWS and NBU. That fact issue—whether and how TCEQ’s issuance of Permit No. 13098 will affect streamflow conditions in the Guadalupe River Basin—directly affects NBU in a manner not common to members of the general public because NBU’s water rights are expressly dependent on those conditions.

CONCLUSION

NBU respectfully requests that the commissioners determine that, for the reasons stated herein and in NBU’s request for a contested case hearing, NBU is an affected person. NBU further requests that the commissioners grant NBU’s request for a contested case hearing and Order the State Office of Administrative Hearings (“SOAH”) to admit NBU as a party to the contested case hearing on the Application and Draft Permit. Alternatively, NBU respectfully requests that the commissioners refer the issue of NBU’s affectedness to SOAH for an ultimate determination on NBU’s standing. NBU further requests that the Commission grant all other relief to which it is entitled by law.

¹⁴ San Antonio Water System’s Response to GBRA’s Plea to the Jurisdiction and Third-Party Requests for Contested Case Hearing at 25.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing pleading was filed with the Office of the Chief Clerk and served to the Executive Director, OPIC, and the Applicant pursuant to 30 Tex. Admin. Code § 55.209(g) on this 31st day of January, 2022.

/s/ James Aldredge
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