

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**

**CITY OF VICTORIA'S
REPLY TO RESPONSES TO HEARING REQUESTS**

TO THE HONORABLE COMMISSIONERS:

The City of Victoria (“Victoria”), 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, Victoria respectfully shows the following.

SUMMARY

If the Commission’s decision to issue Permit No. 13098 directly or indirectly impacts streamflow conditions in the Guadalupe River Basin upstream of SAWS’s proposed conveyance reach, then Victoria’s water rights will be affected. The ED concluded that GBRA is affected in this matter because GBRA owns impoundment and diversion rights within SAWS’s requested conveyance reach. GBRA’s claim of affectedness specifically includes concerns that impacts to its lower-basin diversion rights will affect GBRA’s system management. Victoria relies on its TCEQ-permitted diversion rights, most of which are junior in priority to GBRA’s lower-basin water rights and all of which depend on maintenance of flows within the Guadalupe River. Those flows are heavily influenced by GBRA’s management of its various water supply resources

upstream of Victoria. For these reasons, Victoria is affected by the Application and Draft Permit, and the Commission should grant Victoria's hearing request.

DISCUSSION AND ANALYSIS

1. Reply to Executive Director's Response

The complete justification cited by the ED to recommend that Victoria'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 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.

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 Victoria's hearing request other than to state the conclusion that Victoria's request does not establish affected person status. The reasoning is entirely conclusory and cites no authority to support the evident conclusion that an "attenuated" effect constitutes no affect at all.

The applicable legal standard for determining Victoria's affectedness is whether Victoria has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application.¹ The same rule clarifies that such an interest will not constitute affectedness if it is common to members of the general public.² The Commission's adopted non-exhaustive list of factors to be considered in determining affectedness include whether a reasonable relationship exists between the interest

¹ 30 Tex. Admin. Code § 55.256(a).

² *Id.*

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 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 Victoria’s water rights and SAWS’s requested activities.⁶ Victoria explained in its hearing request that TCEQ’s issuance of

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 Env’tl. Quality v. Bosque River Coal.*, 413 S.W.3d 403, 408 (Tex. 2013)).

⁶ See Tex. Admin. Code § 55.256(c).

Permit No. 13098 could have repercussive effects on water rights throughout the Guadalupe River Basin—including Victoria’s. Among those effects is GBRA’s management of its resources, which GBRA identified as the basis for its assertion of affectedness in its hearing request.

The “legal right, duty, privilege, power, or economic interest” related to the Application Victoria identified in its hearing request in the Guadalupe River Basin is Victoria’s legal rights in TCEQ-issued water rights permits authorizing diversion of water from the Guadalupe River. Those water rights include special conditions that restrict Victoria’s ability to divert water from the Guadalupe River when flows in the river are measured below certain flow rates.⁷ In low-flow periods, Victoria’s diversion rights are suspended altogether.⁸ Victoria depends on those rights for its municipal water supply. As a municipal water supplier, Victoria has a statutory duty to maintain a continuous and adequate supply of water for public health and safety.

That issue is relevant to the Application.⁹ TCEQ’s issuance of Permit No. 13098 will affect Guadalupe River Basin priority. GBRA owns Certificate of Adjudication No. 18-5173, which authorizes GBRA to impound and divert water within SAWS’s requested conveyance reach. The priority date for that water right is February 3, 1941, making GBRA’s right senior to all but one of Victoria’s water rights. 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 junior priority rights upstream from

⁷ *E.g.*, Permit to Appropriate and Use State Water No. 5466 at 3-4 (*available at* <https://gisweb.tceq.texas.gov/WRRetrieveRights/?ID=WRPERM5466>).

⁸ *Id.* at 4.

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

SAWS's requested conveyance reach. For that reason alone, the 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."¹⁰

In addition, the diversion authorizations in Victoria's permits are limited based on seasonal streamflow restrictions. Streamflows in the Guadalupe River are heavily influenced by GBRA's activities. The ED correctly identified some of GBRA's water rights that authorize GBRA to store and divert water within SAWS's requested conveyance reach.¹¹ The ED failed, however, to include Certificate of Adjudication No. 18-2074 ("COA 2074") among them. COA 2074 authorizes GBRA to impound water in Canyon Reservoir upstream of Victoria's permitted diversion points.¹² 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,¹³ which includes GBRA's

¹⁰ 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.

¹¹ Executive Director's Response to Hearing Requests at 6.

¹² Certificate of Adjudication: 18-2074 at 2 (*available at* <https://gisweb.tceq.texas.gov/WRRRetrieveRights/?ID=ADJ2074>).

¹³ *Id.* at 2, 14.

diversion point within SAWS's requested conveyance reach. Alterations to GBRA's releases from Canyon Reservoir and management of its mid-basin storage and diversion rights potentially affect Victoria because they necessarily influence how frequently Guadalupe River flows will be measured at or below Victoria's permit flow restrictions.

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."¹⁴ Part of GBRA's stated basis for its affectedness is that Permit No. 13098 will reduce the firm yield of Canyon Reservoir.¹⁵ GBRA suggests that such impacts to the firm yield of Canyon Reservoir may alter GBRA's patterns and practices of managing its system of water resources throughout the lower Guadalupe River Basin below Canyon Reservoir.¹⁶ Any alteration of flows at the U.S. Geological Survey gage at Victoria necessarily affects Victoria's legal rights and interests in its municipal water supply in a manner not common to members of the general public.

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 stream flows." Victoria respectfully disagrees. But in either case, SAWS effectively recognizes that a disputed issue of fact exists as between SAWS and Victoria. That fact issue—whether and how TCEQ's issuance of Permit No. 13098 will affect streamflow conditions in the Guadalupe River Basin—directly affects Victoria in a manner not

¹⁴ *Id.*

¹⁵ Guadalupe-Blanco River Authority's Plea to the Jurisdiction, Request for Contested Case Hearing, and Comments on the Draft Permit at 13.

¹⁶ *Id.*

common to members of the general public because Victoria's water rights are expressly dependent on those conditions.

CONCLUSION

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

Respectfully submitted,

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NEW BRAUNFELS UTILITIES**

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_____
James Aldredge