

TCEQ DOCKET NO. 2021-1391-WR

APPLICATION NO. 13098 BY	§	BEFORE THE TEXAS
SAN ANTONIO WATER SYSTEM	§	
FOR A WATER USE PERMIT IN	§	COMMISSION ON
BEXAR, CALHOUN, GOLIAD	§	
KARNES, REFUGIO, VICTORIA,	§	
AND WILSON COUNTIES, TEXAS	§	ENVIRONMENTAL QUALITY

**CITY OF SAN MARCOS’S REPLY TO
RESPONSES TO CONTESTED CASE HEARINGS**

COMES NOW the City of San Marcos, Texas (“City” or “San Marcos”) and files this Reply to Responses to Hearing Requests (“Reply”) in this docket for the Application filed by San Antonio Water Systems (“Applicant” or “SAWS”) for a bed and banks authorization. In Reply to the Responses to Hearing Requests previously filed, the City would show as follows:

I. Reply

The Commission received three responses to the City’s request for a contested case hearing. The respondents were: the Applicant, the Executive Director (“ED”) of the Texas Commission on Environmental Quality (“TCEQ”), and the Office of Public Interest Counsel (“OPIC”). The City will address each response in turn.

OPIC

OPIC found that the City met the definition of an affected person and recommended that the City’s request for a contested case hearing be granted. The City fully supports the OPIC’s analysis and recommendation.

Applicant

Applicant attacks all requests for contested case hearings on two fronts: (1) that there is no right to a contested case hearing; and (2) the affected person status of each requestor.

Applicant asserts that there is no right to contested case hearing in this matter as the bed and banks authorization sought does not involve “state water.” It draws a narrow argument that seeks to prevent and circumvent the plain jurisdiction of the Commission under Texas Water Code (“TWC”) § 11.042(b). The Texas Legislature has provided the Commission’s jurisdiction over the bed and banks authorization by clearly stating that the Commission has jurisdiction over “water and water rights including the issuance of water rights permits, water rights adjudication, cancellation of water rights, and enforcement of water rights.”¹ The Commission is further “authorized to call and hold hearings, receive evidence at hearings, administer oaths, issue subpoenas to compel the attendance of witnesses and the production of papers and documents, and make findings of fact and decisions with respect to its jurisdiction under this code and other laws and rules, orders, permits, licenses, certificates, and other actions adopted, issued, or taken by the commission.”² The delegation of the hearing responsibilities to the State Office of Administrative Hearings is granted by TWC § 5.311.

The Commission in exercising jurisdiction and calling for a contested case hearing in this case is empowered by the clear statutory authority granted it by the Texas Legislature. Thus, in allowing the Commission to issue an “authorization” for use of the bed and banks for the conveyance of water, the Commission’s action is an action taken by the Commission for which it may hold a hearing pursuant to TWC § 5.102(b). The Applicant’s insistence that the Commission may not hold a contested case hearing is spurious, at best, and cannot be sustained.

Further, the City agrees with the ED that affected persons may request contested case hearings pursuant to TWC § 11.132(a). As such, the City hereby requests that the Commission overrule Applicant’s assertion that a contest case hearing is not allowed. With the finding that the

¹ TWC § 5.013(a)(1).

² TWC § 5.102(b).

Commission may hold a contested case hearing, the Applicant’s assertion that the contested case hearing requests submitted by all requestors is not “authorized by law” likewise fails.

Next, the Applicant seeks that all hearing requestors marshal their evidence in making a request for contested case hearing. Applicant complains that the City did not make a complete statement in its request for contested case hearing. This is not the case. The City referenced its rights under its water rights permits and its contractual rights with Guadalupe Blanco River Authority (“GBRA”). The City stated that the Application will adversely affect water suppliers in the Guadalupe River basin and is concerned with the method of calculation of the requested 260,000 acre feet of water. The assertion that the City’s claims should also provide for a statement that the City must have a right for the “use or availability of SAWS' s return flows.”³ Such is not the case. The City asserted that “the proposed permit and accounting plan does not adequately account for and ensure that state water will be passed.”⁴ As such, the City has made the requisite demonstrations needed under TCEQ rules to be an affected person and be granted a contested case hearing.

As the City has demonstrated its affected person status, the City hereby requests that Applicant’s objections to City’s request for contested case hearing be overruled.

ED of TCEQ

The ED recommends against the City’s affected person status because the City is not “located within the conveyance reach” of the proposed bed and banks authorization. Further, it claims that the City’s contractual relationship with the GBRA does not provide the City with affected person status. Both arguments fail.

³ San Antonio Water System’s Response to GBRA’s Plea to the Jurisdiction and Third-Party Requests for Contested Case Hearing at 17.

⁴ City of San Marcos’s letter requesting a Contested Case Hearing at 2.

There is no rule or precedent that indicates to the public that in order to be an affected person for a bed and banks permit one must be “located within the conveyance reach” of the authorization. Indeed, this is a very narrow view of affected person status. The City has articulated its concern that the Application may impact the diversion of existing permits and certified adjudications. The Application may undoubtedly negatively impact the water rights and the diversion of water upstream of the “conveyance reach.” The ED’s view cannot merely be viewed in a vacuum of a narrow segment. The Commission should look at impacts on water rights holders upstream of the conveyance reach as impacts within the conveyance reach do not occur in isolation. Impacts downstream may certainly impact diversion rights upstream of the conveyance reach. As such, the City with water rights upstream of the conveyance reach has a personal interest in the Application.⁵

The City has water rights contract with GBRA. The inability for GBRA to perform under that agreement due to the impacts the Application has on GBRA’s surface water supply is impactful, not only to the City, but more importantly to the 63,000 residents in the City and surrounding community. The City agrees with the OPIC in that the City has an inherent interest in protecting its senior water rights and the availability of firm supply under the GBRA contract.

As such, the City has demonstrated that it is an affected person and its request for contested case hearing should be granted.

II. Conclusion and Prayer

The City respectfully requests the Commission:

- (1) Name the City as an affected person and grant the City’s request for a contested case hearing; and

⁵ See *City of Waco v. Texas Com’n on Environmental Quality*, 346 S.W.3d 781, 802 (Tex. App.-Austin, 2011).

(2) Grant the City all other and further relief to which it is justly entitled.

Respectfully submitted,

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MARCOS**

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of January, 2022 a true and correct copy of the foregoing document has been sent via facsimile, first class mail, or hand-delivered to all counsel of record.

/s/ Arturo D. Rodriguez, Jr.
ARTURO D. RODRIGUEZ, JR.