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Blas J. Coy, Jr., *Public Interest Counsel*

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**  
*Protecting Texas by Reducing and Preventing Pollution*

December 30, 2010

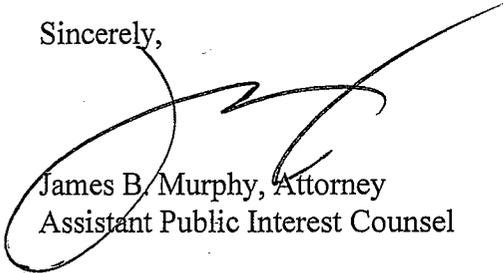
LaDonna Castañuela, Chief Clerk  
Texas Commission on Environmental Quality  
Office of the Chief Clerk (MC-105)  
P.O. Box 13087  
Austin, Texas 78711-3087

**RE: CITY OF LUBBOCK**  
**TCEQ DOCKET NO. 2010-0837-WR**

Dear Ms. Castañuela:

Enclosed for filing is the Office of Public Interest Counsel's Response to Requests for Hearing in the above-entitled matter.

Sincerely,



James B. Murphy, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

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**TCEQ DOCKET NO. 2010-0837-WR**

**IN THE MATTER OF  
APPLICATION NO. 4340A OF THE  
CITY OF LUBBOCK TO AMEND  
WATER RIGHTS PERMIT  
NO. WRPERM 3985**

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**BEFORE THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE  
TO REQUESTS FOR HEARING**

TO THE HONORABLE MEMBERS OF THE TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this Response to Requests for Hearing in the above-referenced matter and respectfully shows the following.

**I. INTRODUCTION**

The City of Lubbock (the City or Applicant) has applied for an amendment to its water use permit to authorize the diversion and use of all historic and future discharges of Canadian River Basin surface water-based effluent and groundwater-based effluent, including the currently authorized 10,081 acre-feet per year associated with TPDES Permit No. 10353-002, for agricultural, municipal, industrial, and recreational purposes anywhere within Lubbock and Lynn Counties. The City further applied for authorization to convey treated effluent via the bed and banks of the North Fork Double Mountain Fork Brazos River (North Fork), tributary of the Double Mountain Fork Brazos River, tributary of the Brazos River, in the Brazos River Basin, and to divert the effluent at a downstream diversion point. The City estimates carriage loss to be approximately 0.47 percent due to transportation, evaporation, seepage, and channel losses. The draft permit authorizes a maximum diversion rate of 29.45 cubic feet per second (cfs).

Water Use Permit No. 3985 originally issued May 23, 1983. It authorizes the City to use, within the Brazos River Basin, 22,910 acre-feet of treated effluent per year created as a result of the City's use of municipal water purchased from the Canadian River Municipal Water Authority, of which not to exceed 4,480 acre-feet may be supplied to Southwestern Public Service Company for industrial use at the Jones Power Plant in Lubbock County, and not to exceed 18,430 acre-feet may be supplied for agricultural use for the irrigation of 10,000 acres of land in Lubbock and Lynn Counties.

TPDES Permit No. 10353-002 originally issued May 31, 1991. It authorizes the City to discharge an annual flow not to exceed 9.0 MGD (10,081 acre-feet per year) of treated effluent into the North Fork.

The City submitted its application on April 27, 2004 and additional information on August 9, 2004 and September 2, 2004. The Commission declared the application administratively complete on October 12, 2004. The Office of Chief Clerk mailed notice of the application on December 31, 2004. Two persons entitled to notice were omitted from the mailing list, and so the Chief Clerk mailed notice to those persons on February 10, 2005. The deadline to request a contested case hearing was extended to March 14, 2005 to cure the notice defect for the two omitted persons. The City published notice of the application in the *Lubbock Avalanche Journal* on January 14, 2005.

The Commission received timely filed requests for a contested case hearing from: Attorney Lawrence L. Bellatti on behalf of Chocolate Bayou Water Company on January 12, 2005; Attorney George Nelson on behalf of Clark Wood, Jr., Lynn Forrest, John O. Long, and Michael and Justin Damron on January 28, 2005; John and Marianne Loveless on January 27, 2005; Mike Schneider on behalf of R.E. Janes Gravel Company (Janes Gravel) on January 31,

2005; Cathey Forrest Colwell on behalf of the Forrest Family Partnership—Susan Evans Forrest Sparkman, Cathey Forrest Colwell, Laurie Forrest Moy, and David Lamar Forrest—on January 31, 2005; and Martha Jean Forrest McNeely on February 1, 2005. Chocolate Bayou Water Company withdrew its request on July 20, 2005. The Commission received additional comments and a supplemental request for hearing from Attorney Scott R. Shoemaker on behalf of Janes Gravel on January 4, 2010 in response to revisions to the draft permit. OPIC recommends the Commission grant the hearing requests of Clark Wood, Jr., Janes Gravel, Susan Evans Forrest Sparkman, Cathey Forrest Colwell, Laurie Forrest Moy, David Lamar Forrest, and Martha Jean Forrest McNeely, and deny the remaining requests.

## II. APPLICABLE LAW

All holders of permits, certified filings, and certificates of adjudication must obtain authority from the Commission to alter their water right, including changing the place of use, purpose of use, point of diversion, rate of diversion, and acreage to be irrigated. TWC § 11.122(a). The Commission must approve the requested amendment unless it increases the amount of water to be diverted, the rate at which the water will be diverted, or the requested change would have an adverse impact upon other water rights holders or the environment beyond that which would occur if the water right holder seeking the amendment fully exercised the existing right. TWC § 11.122(b). *See also* 30 TEX. ADMIN CODE (TAC) § 297.45(b). The burden is on the applicant to prove that the amendment will have no adverse impact to other water right holders or the environment. 30 TAC § 297.45(d).

The Commission's rules prohibit amendments from injuring other appropriators:

An application for an amendment to a water right requesting an increase in the appropriative amount, a change in the point of diversion or return flow, an

increase in the consumptive use of the water based upon a comparison between the full, legal exercise of the existing water right with the proposed amended right, an increase in the rate of diversion, or a change from the direct diversion of water to on-channel storage shall not be granted unless the commission determines that such amended water right shall not cause adverse impact to the uses of other appropriators.

30 TAC § 297.45(a). Adverse impact to other appropriators includes: (1) the possibility of depriving an appropriator of the equivalent quantity or quality of water that was available with the full, legal exercise of the existing water right before the change, (2) increasing an appropriator's legal obligation to a senior water right holder, and (3) otherwise substantially affecting the continuation of stream conditions as they would exist with the full, legal exercise of the existing water right at the time the appropriator's water right was granted. 30 TAC § 297.45(a).

In addition, the Commission may approve an amendment only if it would not be detrimental to the public welfare. 30 TAC § 297.46. The Commission must consider effects on surface water and groundwater quality, groundwater uses, aquatic and wildlife habitat, bays and estuaries, and instream flows necessary to support recreation, navigation, and federally listed species. 30 TAC §§ 297.47, 297.53–297.56. The Commission must include any “condition, restriction, limitation or provision reasonably necessary for the enforcement and administration of the water laws of the state and the rules of the commission.” 30 TAC § 297.59(a). Finally, the amendment also must “meet all other applicable requirements” of TWC Chapter 11. TWC § 11.122(b). *See also City of Marshall v. Uncertain*, 206 S.W.3d 97, 109–111 (Tex. 2006).

Authorizations to use the bed and banks of a watercourse to convey water are subject to different requirements depending on the source of the conveyed water. Section 11.042(c) applies to all sources of water except stored or conserved water and privately owned groundwater:<sup>1</sup>

[A] person who wishes to convey and subsequently divert water in a watercourse or stream must obtain the prior approval of the commission through a bed and banks authorization. The authorization shall allow to be diverted only the amount of water put into a watercourse or stream, less carriage losses and *subject to any special conditions that may address the impact of the discharge, conveyance, and diversion on existing permits, certified filings, or certificates of adjudication, instream uses, and freshwater inflows to bays and estuaries*. Water discharged into a watercourse or stream under this chapter *shall not cause a degradation of water quality to the extent that the stream segment's classification would be lowered*.

TWC § 11.042(c) (emphasis added).<sup>2</sup>

Commission rules provide separate application and notice requirements for amendments to water rights and authorizations to convey water in beds and banks. *Compare* 30 TAC §§ 295.71 (Applications to Amend a Permit) and 295.158(b) (Notice of Amendments to Water Rights) *with* 295.113 (Application to Convey Water in Bed and Banks) and 295.161 (Notice of Application to Convey Water in Bed and Banks). For amendments to water rights, the Commission must provide notice by first class mail to every claimant or appropriator of record from the source of water supply and all navigation districts within the river basin and must publish notice in a newspaper of general circulation within the section of the state where the source of water is located. 30 TAC §§ 295.152 and 295.153(a). Both mailed and published notice must be provided at least 30 days prior to Commission consideration of the application. 30 TAC §§ 295.152 and 295.153(b). For beds and banks authorizations, the Commission must provide notice by first class mail to every water right holder of record downstream of the

<sup>1</sup> Although groundwater comprises a portion of the City's effluent, Section 11.042(b) pertaining to privately owned groundwater likely does not apply because the City's groundwater is publicly owned.

<sup>2</sup> Commission rules also require that the water discharged into the watercourse or stream not cause a degradation of water quality as provided by 30 TAC § 307.5. *See* 30 TAC § 297.16(c).

discharge point, the Texas Parks and Wildlife Department, and OPIC at least 30 days prior to Commission consideration of the application. 30 TAC § 295.161(a). Published notice is not required for a beds and banks authorization. 30 TAC § 295.161(d).

A contested case hearing is available on both types of applications. 30 TAC §§ 295.171 and 295.172. The City's application was declared administratively complete on October 12, 2004. Because the application was declared administratively complete after September 1, 1999, it is subject to the requirements of 30 TAC §§ 55.250–55.256. 30 TAC §§ 55.250, 295.171. Under those provisions, the Commission, Executive Director (ED), applicant and affected persons may request a contested case hearing. 30 TAC §§ 55.251(a) and 295.171.

A hearing requestor must submit their request in writing within the time period specified in the notice<sup>3</sup> and identify the requestor's personal justiciable interest affected by the application, specifically noting the "requestor's location and distance relative to the activity" and "how and why the requestor believes he or she will be affected by the activity in a manner not common to members of the general public." 30 TAC §§ 55.251(b)–(d).

An affected person is "one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application." 30 TAC § 55.256(a). Governmental entities with authority under state law over issues contemplated by the application may be considered affected persons. 30 TAC § 55.256(b). Relevant factors to be considered in determining whether a person is affected include but are not limited to:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;

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<sup>3</sup> The time period to request a hearing is generally 30 days from the date of receipt of notice or the date of publication, but the Commission may extend the time allowed for submitting a request. 30 TAC § 295.171.

- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health, safety, and use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

30 TAC § 55.256(c).

The Commission shall grant a request for a contested case hearing if (1) the request is made by the applicant or the ED, or (2) the request is made by an affected person, timely filed with the chief clerk, and made pursuant to a right to hearing authorized by law. 30 TAC § 55.255(b).

### III. DISCUSSION

#### A. R.E. Janes Gravel Co.

Janes Gravel is authorized under Permit No. 003710-006 to divert and use water on the North Fork approximately 11 miles downstream of the proposed diversion point. Janes Gravel states that its rights and interests in the North Fork may be impaired by the proposed amendments depending on the timing of the City's diversion, particularly during low flow periods during the summer. Janes Gravel states that water is integral to its plant process and any shortage could adversely affect its operation.<sup>4</sup> Based on its water right, OPIC concludes Janes Gravel is an affected person entitled to a contested case hearing.

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<sup>4</sup> Janes Gravel expresses additional concerns in a letter submitted January 4, 2010. These comments were not timely filed. However, the original timely filed hearing request is sufficient to establish affected person status for Janes Gravel.

**B. Clark Wood, Jr.**

Mr. Wood is authorized under Permit No. 3709 to divert and use water on the North Fork approximately 7 miles downstream of the proposed diversion point. Mr. Wood states that his rights and interests in the North Fork may be impaired by the proposed amendments, particularly during low flow periods. Based on his water right, OPIC concludes Mr. Wood is an affected person entitled to a contested case hearing.

Mr. Wood also states that he did not receive notice of the application. Mr. Wood was omitted from the notice mailed on December 31, 2004. However, the Commission mailed notice on February 10, 2005 to Nathaniel Clark Wood, Jr. at the address listed on Mr. Wood's hearing request and provided Mr. Wood an additional 30-day comment period. Accordingly, OPIC finds that the Commission cured any notice defect to Mr. Wood, and notice was proper.

**C. Lynn Forrest, John O. Long, and Michael and Justin Damron**

Mr. Forrest, Mr. Long, and the Damrons own and lease land along the discharge route. Mr. Forrest owns and leases land near the proposed diversion point, Mr. Long owns land approximately 500 feet below the discharge point, and the Damrons lease land from Mr. Long and also own land located below the proposed diversion point. None claim a water right or appropriation of water. They express concerns about potential flooding of their properties and alteration of river banks on their lands. They also state that the application is too vague to determine what is being authorized.

Based on the information provided in the hearing request, Mr. Forrest, Mr. Long, and the Damrons are not affected persons under the factors provided in 30 TAC § 55.256(c). The Water Code and Commission rules protect the interests of water right holders and other appropriators, instream uses, and inflows to bays and estuaries. Mr. Forrest, Mr. Long, and the Damrons do not

hold water rights and do not claim to have appropriated water or used the North Fork for instream uses. In addition, the application does not request any additional discharge of effluent, so there is no likelihood of flooding due to use of the bed and banks to convey water. Although the draft permit will authorize the City to convey future increases in effluent, such an increase at this point is speculative. Based on the information received so far, OPIC is unable to conclude Mr. Forrest, Mr. Long, and the Damrons are affected persons.

Mr. Forrest, Mr. Long, and the Damrons also state they did not receive notice of the application. Notice to landowners adjacent to the watercourse is not required under either 30 TAC § 295.158(b) or § 295.161. In addition, notice was published in a newspaper of general circulation. Accordingly, OPIC concludes that the lack of mailed notice to Mr. Forrest, Mr. Long, and the Damrons was in compliance with Commission rules.

**D. Forrest Family Partnership and Martha Jean Forrest McNeely**

The partners of the Forrest Family Partnership (Partners) and Ms. McNeely own land adjacent to the proposed diversion point and along the North Fork. None claim to hold a water right permit or certificate of adjudication, but they use the North Fork for personal enjoyment, household consumption, and cattle.

OPIC concludes the Partners and Ms. McNeely are affected persons entitled to a contested case hearing. The Partners and Ms. McNeely assert they use the North Fork for their households and to water cattle on their properties; these uses are riparian water rights for domestic and livestock purposes. It is not necessary for riparian rights to be vested to confer standing. *See Tex. Rivers Prot. Ass'n v. TNRCC*, 910 S.W.2d 147, 151–52 (Tex. App.—Austin 1995) (“Appellants’ riparian ownership alone sufficiently distinguishes their injury from that of the public at large. An injury need not affect “vested” property rights to confer standing; the

harm may be economic, recreational, or environmental.”) (citations omitted). OPIC concludes the Partners and Ms. McNeely are affected persons based on potential adverse impacts on their riparian use of the North Fork.

The Partners’ and Ms. McNeely’s use of the river for personal enjoyment also supports affected person status. Commission rules require consideration of effects on instream uses such as recreation and navigation. *See* 30 TAC § 297.56(a). As such, the interest in instream uses is one protected by the law pertaining to the application. 30 TAC § 55.256(c)(1). There are no distance limitations on this affected interest. 30 TAC § 55.256(c)(2). There is a reasonable relationship between the interest in instream uses and a potential reduction of 10,081 acre-feet per year in stream flow through their property. 30 TAC § 55.256(c)(3). There is also a likely impact on the Partners’ and Ms. McNeely’s use of their property and on the natural resources on their land. 30 TAC § 55.256(c)(4)–(5). Accordingly, OPIC concludes the Partners and Ms. McNeely are affected persons entitled to a contested case hearing.

**E. John and Marianne Loveless**

John and Marianne Loveless own land along the North Fork. They express concerns about adverse effects on the environment and natural state of the watercourse, ranching and farming in the area, and water quality. They do not claim to hold a water right permit or certificate of adjudication or assert any use of the water.

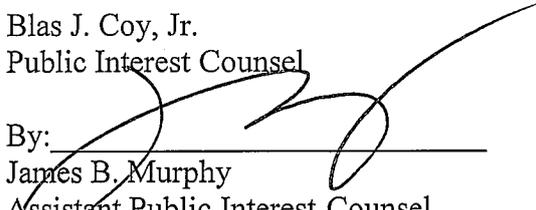
Based on the information provided in the hearing request, OPIC concludes John and Marianne Loveless are not affected persons. Although they raise legitimate concerns, their request is general in nature and expresses interests common to members of the general public. Accordingly, OPIC concludes John and Marianne Loveless are not affected persons.

**IV. CONCLUSION**

OPIC recommends granting the hearing requests submitted by Clark Wood, Jr., Janes Gravel, Susan Evans Forrest Sparkman, Cathey Forrest Colwell, Laurie Forrest Moy, David Lamar Forrest, and Martha Jean Forrest McNeely, and denying the remaining requests.

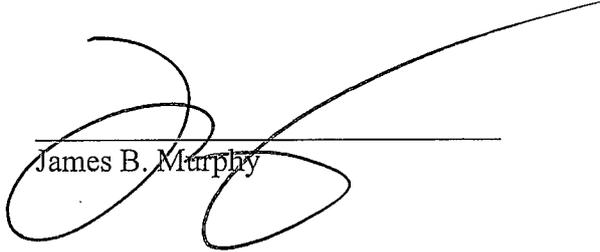
Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 30, 2010 the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Requests for Hearing was filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.

  
James B. Murphy



**CITY OF LUBBOCK**  
**TCEQ DOCKET NO. 2010-0837-WR**

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