

Kathleen Hartnett White, *Chairman*  
Larry R. Soward, *Commissioner*  
H. S. Buddy Garcia, *Commissioner*



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

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

April 19, 2007

The Honorable Sarah G. Ramos  
Administrative Law Judge  
State Office of Administrative Hearings  
P.O. Box 13025  
Austin, Texas 78711-3025



RE: City of Weston  
SOAH Docket No. 582-06-2770; TCEQ Docket No. 2006-0199-MWD

Dear Judge Ramos:

Enclosed for filing is the Public Interest Counsel's Reply to the City of Weston's Exceptions to the Proposal for Decision in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Emily A. Collins".

Emily A. Collins, Attorney  
Public Interest Counsel

cc: Mailing List

Enclosure

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 • P.O. BOX 13087 • AUSTIN, TEXAS 78711-3087 • 512-239-6363

P.O. Box 13087 • Austin, Texas 78711-3087 • 512-239-1000 • Internet address: [www.tceq.state.tx.us](http://www.tceq.state.tx.us)

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SOAH DOCKET NO. 582-06-2770  
TCEQ DOCKET NO. 2006-0199-MWD

2007 APR 19 PM 2: 21

IN THE MATTER OF THE  
APPLICATION OF THE CITY OF  
WESTON FOR TCEQ PERMIT NO.  
WQ0014602001

§ BEFORE THE  
§ TEXAS COMMISSION ON  
§ ENVIRONMENTAL QUALITY  
§

CHIEF CLERKS OFFICE

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S  
REPLY TO THE CITY OF WESTON'S EXCEPTIONS TO THE PROPOSAL FOR  
DECISION**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (TCEQ or Commission), and submits the following Reply to the Applicant's Exceptions in the above-captioned matter and would respectfully show the following:

**I. INTRODUCTION AND BACKGROUND**

The Commission issued an interim order on June 20, 2006,<sup>1</sup> referring five issues to the State Office of Administrative Hearings (hereinafter "SOAH") for a contested case hearing. The ALJ's Proposal for Decision found that the Applicant failed to meet its burden of proof on the following issues:

- 1) Whether the proposed facility is located in the 100-year floodplain, and if so, whether the draft permit contains adequate provisions to protect the facility from inundation by such a flood event;
- 2) Will the treated wastewater disposed of by irrigation seep into the shallow water table and the spring-fed ponds in the area, including during periods of heavy rain, freezing weather and ice storms.

Below, OPIC has responded to several of the specific contentions made by the Applicant in its exceptions to the ALJ's findings of fact and conclusions of law.

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<sup>1</sup> Applicant's Ex. 9.

## II. FINDINGS OF FACT AND CONCLUSIONS OF LAW AT ISSUE

### A. Proposed Finding of Fact Nos. 18 through 29 and Conclusions of Law Nos. 5 and 7.

One of the issues referred, namely whether the proposed facility is located in the 100-year floodplain, and if so, whether the draft permit contains adequate provisions to protect the facility from inundation by such a flood event, is clearly a two-part inquiry. FOF Nos. 18-29 respond specifically to the first part of the floodplain issue: the determination that the facility is within a floodplain.

The Applicant claims that FOF Nos. 18 through 29 should be deleted because they are “based on anecdotal testimony and inadmissible opinions of unqualified lay witnesses and are irrelevant to the specific issue referred for consideration by the Commission.”<sup>2</sup> OPIC notes that, while expert witnesses need to be “qualified” as experts, lay witnesses may testify to matters that are within their personal knowledge,<sup>3</sup> and are only limited in their opinion testimony to those opinions “rationally based on the perception of the witness and helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue.”<sup>4</sup> In this case, the rules of evidence allow the consideration of fact testimony based on personal knowledge that is helpful to determine the frequency and magnitude of floods that have previously occurred at the site.

Citing pages 18 through 26 of the PFD, the Applicant contends that the PFD treated lay witness testimony as expert opinions. However, the pages cited merely recite the testimony provided during the hearing rather than provide judicial analysis of that testimony, which is done

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<sup>2</sup> Applicant’s Exceptions, page 14.

<sup>3</sup> TEX. RULES OF EVID. (hereinafter “TRE”) 602.

<sup>4</sup> TRE 701.

in pages 28 through 30 of the PFD. If the Applicant is arguing that the ALJ gave improper weight to fact witness testimony, OPIC notes that the substantive law allows consideration of “any source” in determining the extent of the floodplain.<sup>5</sup> The probative value of the conflicting evidence on the floodplain issue is a decision within the ALJ’s purview, and OPIC concurs with the weight given this testimony resulting from the direct observation of flood conditions. Furthermore, OPIC does not agree with the Applicant’s presumption that its “expert opinion” testimony is more probative than that of a lay witness. Therefore, OPIC supports retention of FOF Nos. 18 through 29 and the accompanying legal conclusions in COL Nos. 5 and 7.

**B. Proposed Finding of Fact No. 17**

In her findings of fact responsive to the second part of the floodplain issue referred, the ALJ drafted FOF No. 17 as follows: “[a]lthough the draft permit requires Applicant to provide facilities for the protection of its wastewater treatment facilities from a 100-year flood, neither the application nor the draft permit specify what those protective facilities will include.”<sup>6</sup> The Applicant argues that FOF No. 17 should be changed to the following: “[t]he draft permit requires the facilities as constructed to be designed to protect them from a 100-year flood.”<sup>7</sup>

As reflected by the ALJ’s proposed COL No. 5, once a preponderance of the evidence establishes that the facility will be located in the floodplain, the requirements of section 317.1(b)(4)(E)(i) (requiring a flood hazard analysis) are triggered and become an affirmative requirement. As the Applicant did not provide the design information required in the application

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<sup>5</sup> 30 TAC § 309.11(7) (2005).

<sup>6</sup> Proposed Order denying the application of Domestic Wastewater Permit No. WQ0014602001; TCEQ Docket No. 2006-0199-MWD; SOAH Docket No. 582-06-2770.

<sup>7</sup> Applicant’s Exceptions, page 14.

or at hearing, the ALJ properly found that the record does not contain sufficient information to fulfill the Applicant's burden of proof on the floodplain issue referred. Therefore, the ALJ's proposed FOF No. 17 is appropriately drafted in considering the two-part question of: (1) is the facility located in a floodplain; and, if so (2) what is the Applicant's flood hazard analysis. The Applicant's proposed revision to FOF No. 17, while true, merely attempts to shelter the Applicant from the likelihood that the facility is located in the floodplain.

OPIC has concerns that the Applicant's proposed FOF No. 17 and Special Provision No. 22 of the draft permit will be of no effect if the Applicant is convinced that the facility is outside the 100-year floodplain. The previously-discussed reasonable finding that flooding will occur at the site would have no bearing on appropriate protection of the facility from a 100-year flood if Applicant's proposed findings and provisions are adopted.<sup>8</sup> In sum, the Applicant's argument that the Special Provisions, namely SP No. 22, provide adequate protection of the facility from a 100-year flood completely ignores the likelihood, as discerned at the hearing, that flooding will occur at the facility.

### **C. Proposed Finding of Fact No. 32**

Proposed FOF No. 32 states that the "Applicant did not include on its Water Well Map at least one well used for human consumption that is within a half-mile of the proposed facility."

The Applicant requests that the Commission revise proposed FOF No. 32 to the following:

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<sup>8</sup> OPIC notes the flood hazard analysis of the "preliminary engineering report" required by 30 TAC section 317.1(b)(4)(E)(i) is "only necessary to resolve any potential disagreements between the design engineer and the commission regarding the essential planning information, design data, population projections, and other requirements of the commission." 30 TAC § 317.1(b)(1)(B). Therefore, any question regarding the flood hazard analysis that has come up between the provision of the ED's draft permit and the hearing will have been lost unless the ALJ and the Commission either require further inquiry as part of the permittee's summary transmittal letter and complete plans and specifications or deny the application.

“Applicant included in the application all required wells that could be identified based on available information.”<sup>9</sup> Commission rules require identification of water wells in the technical report portion of the permit application.<sup>10</sup> Applicants must provide information for “all of the water wells onsite and located within a half-mile radius of the disposal site or property boundaries.”<sup>11</sup> The Applicant asserts that it was “impossible for Weston to locate the McKee well...” and that the well report for that well was “obtained only through discovery in this proceeding.” However, because the well report is a required element of the application, OPIC cannot agree with the Applicant’s claim of impossibility nor its speculation upon the effect of such additional information. The report could have been submitted as a supplement, modification, or amendment to their application prior to the hearing given the procedural mechanisms available in Chapters 281 and 305 of the Commission’s rules. Therefore, OPIC cannot support the Applicant’s proposed revision to FOF No. 32.

**D. Proposed Finding of Fact Nos. 33 through 36 and Conclusion of Law No. 8.**

The Applicant requests deletion of proposed FOF Nos. 33 through 36 and COL No. 8 regarding the following issue for which the ALJ found the Applicant did not meet its burden of proof: “[w]ill the treated wastewater disposed of by irrigation seep into the shallow water table and the spring-fed ponds in the area, including during periods of heavy rain, freezing weather and ice storms.” The Applicant asserts that proposed FOF Nos. 33-36 and COL No. 8 should be deleted because no possibility of seepage exists where the proposed irrigation application rate.

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<sup>9</sup> Applicant’s Exceptions, page 15.

<sup>10</sup> 30 TAC § 309.20(a)(1)(B).

<sup>11</sup> *Id.*

and storage capacity are calculated to either consume or hold the effluent. The Applicant suggests to the Commission that the identification and evaluation of springs, seeps, surface waters or any other minimum considerations as set out in 30 TAC section 309.12 are unnecessary given the proposed facility's application rate and storage capacity.

Commission rules condition issuance of a permit and approval of construction plans and specifications of wastewater facilities on "selection of a site that minimizes possible contamination of ground and surface waters...."<sup>12</sup> In addition, the "commission may not issue a permit for a new facility or for the substantial change of an existing facility unless it finds that the proposed site, when evaluated in light of the proposed design, construction or operational features, minimizes possible contamination of surface water and groundwater."<sup>13</sup> Factors considered in such a decision include the following:<sup>14</sup>

- (1) active geologic processes;
- (2) groundwater conditions such as groundwater flow rate, groundwater quality, length of flow path to points of discharge and aquifer recharge or discharge conditions;
- (3) soil conditions such as stratigraphic profile and complexity, hydraulic conductivity of strata, and separation distance from the facility to the aquifer and points of discharge to surface water; and
- (4) climatological conditions.

The Commission has defined "aquifer" as "[a] geologic formation, group of formations, or part of a formation capable of yielding a significant amount of groundwater to wells or springs.

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<sup>12</sup> 30 TAC § 309.10(b) (2005).

<sup>13</sup> 30 TAC § 309.12 (2005).

<sup>14</sup> *Id.*

Portions of formations, such as clay beds, which are not capable of yielding a significant amount of groundwater to wells or springs are not aquifers.”<sup>15</sup>

TCEQ requires the technical report portion of the application to include information on geology, soils, groundwater quality, and agricultural practice.<sup>16</sup> While the Applicant provided a topographic map from U.S.G.S.,<sup>17</sup> the Applicant does not indicate the location of any springs or seeps on the map,<sup>18</sup> and Mr. James testified that no one performed a field investigation to determine the presence of any groundwater recharge features, geologic conditions or soil conditions on the site.<sup>19</sup> The Applicant failed to provide any evidence, other than occasional second-hand data that was not necessarily site-specific, on the existence of seeps on the site,<sup>20</sup> the suitability of the soils on the site,<sup>21</sup> aquifer recharge characteristics,<sup>22</sup> baseline groundwater

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<sup>15</sup> 30 TAC § 309.11(2) (2005).

<sup>16</sup> 30 TAC § 309.20(a) (2005).

<sup>17</sup> Applicant's Ex. 15, United States Department of the Interior Geological Survey, located in the second manila sleeve of the application.

<sup>18</sup> *Id.*

<sup>19</sup> Tr. at 233, lines 12-25; 234, lines 1-19.

<sup>20</sup> 30 TAC §§ 309.10(b); 309.12 (prohibiting the Commission from issuing a permit unless it finds that the proposed site minimizes possible contamination of surface water and groundwater); 309.20(a)(3) (requiring conceptual design of the wastewater facility to be based on the “soil physical and chemical properties, hydraulic characteristics, and crop use suitabilities for the waste application site”).

<sup>21</sup> Tr. at 236, lines 13-17; 30 TAC § 309.20(a)(5) (requiring a description of the adaptability of the crop to the particular soil, climatological, and wastewater sensitivity conditions that will exist at the waste disposal site); 30 TAC § 309.12(3) (requiring consideration of soil conditions such as stratigraphic profile and complexity, hydraulic conductivity of strata, and separation distance from the facility to the aquifer and points of discharge to surface water).

<sup>22</sup> 30 TAC § 309.12(2) (requiring consideration of groundwater conditions); 30 TAC § 309.20(a)(4) (requiring a full assessment of the impact of the waste disposal operation on the uses of local groundwater resources).

conditions,<sup>23</sup> or the existence of any geologic features on the site.<sup>24</sup> However, the Protestants testified that seeps, springs, and surface waters exist at the irrigation site.<sup>25</sup>

Furthermore, the Applicant's assertion that the Executive Director's Groundwater Impact Evaluation proves that irrigated effluent will not seep into groundwater or spring-fed ponds fails on evidentiary grounds. The conclusory document, without more, fails to provide sufficient facts or evidence to support an expert conclusion as required by TEX. R. EVID. 703. Opinion testimony that is conclusory or speculative is not relevant evidence. TEX. R. EVID. 401; *Coastal Transport Co., Inc. v. Crown Central Petroleum Corp.*, 136 S.W.3d 227, 232 (Tex.2004). Therefore, OPIC urges the Commission to retain proposed FOF Nos. 33 through 36 and COL No. 8 in its order.

#### **E. Proposed Revision to Special Provision No. 8.**

The Applicant requests that the ALJ and the Commission remove the language in SP 8 regarding submission of the summary submittal letter required by 30 TAC section 317.1, and mandate submission of plans, specifications, and a final engineering report that includes "how the wastewater treatment facilities and storage ponds will be protected from a 100-year flood as required by Special Provision Nos. 19 and 22." OPIC notes that the provision of such language in SP 8 does not rise to the level of the language recommended by OPIC in our Closing

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<sup>23</sup> *Id.*

<sup>24</sup> 30 TAC § 309.20(a)(2) (requiring identification of any unusual geologic formations such as faults or sink holes on the waste disposal site); 30 TAC § 309.12(1) (requiring consideration of active geologic processes).

<sup>25</sup> Tr. at 484, lines 11-15; Tr. at 489, lines 2-25; Tr. at 490, lines 1-4; Tr. at 533, lines 17-20.

Argument in this case. OPIC's proposed language,<sup>26</sup> which would have revised SP 22 of the draft permit, was designed to confront both the first and second parts of the floodplain issue, namely, whether the facility is located in the 100-year floodplain *and* the need to conduct a flood hazard analysis to assist in determining necessary design details. The Applicant's proposed language, however, would only address the second part of the floodplain issue referred by the Commission, and would do so after answering the first part of the floodplain issue in the negative. Therefore, under the Applicant's proposed language, the permittee would not need to submit any plans, specifications, or a final engineering design report to TCEQ with regard to facility flood protection.

### III. CONCLUSION

For the reasons stated above, OPIC supports the Administrative Law Judge's Proposal for Decision in its current form.

Respectfully submitted,

Blas J. Coy, Jr.  
Public Interest Counsel

By   
Emily A. Collins  
Assistant Public Interest Counsel  
State Bar No. 24045686  
P.O. Box 13087 MC 103  
Austin, Texas 78711  
(512) 239-6363 PHONE  
(512) 239-6377 FAX

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<sup>26</sup> OPIC recommended the following language in our Closing Argument with regard to the floodplain issue: "[t]he permittee shall submit the results of a detailed flood analysis for the areas in which the treatment units will be located with the summary submittal letter and final engineering report required by Special Provision No. 8. The final engineering report shall provide the design and specifications for any protective measures to protect the facility against a 100-year flood." The Applicant, notably, vehemently argued against the addition of OPIC's language based on finality concerns.

**CERTIFICATE OF SERVICE**

I hereby certify that on April 19, 2007, the original of the Office of the Public Interest Counsel's Reply to the City of Weston's Exceptions to the Proposal for Decision 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 or by deposit in the U.S. Mail.



Emily A. Collins

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

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CHIEF CLERKS OFFICE

**MAILING LIST  
CITY OF WESTON  
SOAH DOCKET NO. 582-06-2770  
TCEQ DOCKET NO. 2006-0199-MWD**

The Honorable Sarah G. Ramos  
Administrative Law Judge  
State Office of Administrative Hearings  
P.O. Box 13025  
Austin, Texas 78711-3025  
Tel. 512/475-4993 Fax: 512/475-4994

LaDonna Castañuela  
Texas Commission on Environmental Quality  
Office of Chief Clerk, MC-105  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-3300 Fax: (512) 239-3311

Angela M. Stepherson  
Law Office of Clay E. Crawford  
3100 McKinnon Street, 950  
Dallas, Texas 75201  
Tel: 214/981-9090 Fax: 214/981-9071  
*Representing: City of Weston*

Edward A. Town  
7997 Queens Way  
Celina, Texas 75009  
Fax: 972/837-2545

Thomas & Susie Crossland  
7006 Wellington Point Rd.  
McKinney, Texas 75070-5703

Mike & Eleanor McKee  
5065 County Road 170  
Celina, Texas 75009-4977

Lawrence & Nina Ringly  
313 N. Bengé St.  
McKinney, Texas 75069-3815  
*Representing: Selves and John & Irene Dowell*

Bryn Meredith  
Taylor Olson Adkins Sralla Elam, L.L.P.  
6000 Western Place, Suite 200  
Fort Worth, Texas 76107  
Tel: (214) 417-5420 Fax: (817) 332-4740

Scott Shoemaker, Staff Attorney  
Texas Commission on Environmental Quality  
Environmental Law Division, MC-173  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-0600 Fax: (512) 239-0606