

**SOAH DOCKET NO. 582-11-3522
TCEQ DOCKET NO. 2010-0837-WR**

APPLICATION BY CITY OF	§	BEFORE THE STATE OFFICE
	§	
LUBBOCK FOR AMENDMENT TO	§	OF
	§	
WATER USE PERMIT NO. 3985	§	ADMINISTRATIVE HEARINGS

APPLICANT CITY OF LUBBOCK’S RESPONSES TO
OFFICE OF PUBLIC INTEREST COUNCIL’S EXCEPTIONS
TO PROPOSAL FOR DECISION

TO THE HONORABLE COMMISSIONERS:

The City of Lubbock (herein referenced interchangeably as the “Applicant” or the “City”) submits this reply to the exceptions made to the Proposal for Decision issued in the above-referenced application (the “PFD”) by the Office of Public Interest Counsel (“OPIC”), and would respectfully show the Commissioners of the Texas Commission on Environmental Quality (the “Commissioners”) the following:

I.

In the Office of Public Interest Counsel’s Exceptions to the Proposal for Decision,¹ counsel for OPIC reiterates his argument that the testimony provided by David Dunn, P.E., and Kathy Alexander, Ph.D., as well as the assessments and conclusions contained in the technical memorandum developed by John Botros for the Executive Director, were all insufficient to demonstrate that the requests made in the Application would not adversely impact instream uses in the North Fork.

As the City reiterated in the “Applicant’s Reply to OPIC Closing Arguments,”² the record clearly demonstrates that the City is only requesting the authority to divert the developed water-

¹ Herein “OPIC Exceptions.”

² Herein “Reply to OPIC Closing Arguments.”

based treated effluent that it discharges from Outfall No. 001.³ OPIC never accounts for, or even acknowledges, the fact that the City's request is based on the availability of flows that the City is under no legal obligation to place into the North Fork at any time, for any reason.⁴ Accordingly, as demonstrated below, OPIC's position has no support in the record or under applicable law.

A. TCEQ Technical Staff Conducted An Appropriate Environmental Review

Contrary to OPIC's characterization of the Executive Director's technical review of this request, TCEQ staff undertook a thorough assessment of the Application to determine the extent to which, if any, special conditions would be necessary to offset any impacts of the request on fish and wildlife habitat, water quality, instream uses associated with the affected body of water, and the Brazos River estuary.⁵ The record demonstrates that, following this review, the TCEQ Resource Protection Team recommended a number of special conditions designed to address the limited environmental impacts attributable to the requests made in the Application—including the installation of a mesh screen, and the implementation of a specific design, on the intake structure so that any potential impact to aquatic organisms would be minimized.⁶ The Draft Amendment proposed by the Executive Director contains these multiple special conditions that were designed by the Resource Protection Team to address the potential environmental impacts that could be attributable to the requests made in the Application, including components of Special Condition 6.A., C., D., and E.⁷

David Dunn testified during the hearing that there simply would have been no basis for conducting an additional environmental review for the City's requests apart from what was

³ COL 3985A Ex. 12:8-9.

⁴ Tr. at 196:15-16.

⁵ COL 3985A Ex. 9 at 45:6-16.

⁶ ED 3985A Ex. 6; ED 3985A Ex. 7.

⁷ COL 3985A Ex. 8 at 4-5; COL 3985A Ex. 9 at 30:8-11.

performed by the TCEQ Resource Protection Team.⁸ Moreover, based on his unchallenged expertise, he provided prefiled testimony to the parties that he was able to conclude the authorizations proposed in the Draft Amendment would not adversely impact any instream uses for the same reasons that the proposed amendment will not adversely impact any existing water rights in the North Fork—because the City would only be diverting water that the City was singularly responsible for placing into the North Fork through discharges made from Outfall No. 001.⁹

Judge Wilfong’s proposed findings of fact and conclusions of law relevant to this issue are supported in each instance by a preponderance of the evidence. Accordingly, there is no support in the record to modify the PFD, or the findings of fact and conclusions of law included with the PFD,¹⁰ based on this portion of the OPIC Exceptions.

B. OPIC Misconstrues Applicable Law

In addition, OPIC simply reargues its theory in the OPIC Exceptions that it advanced for the first time in its closing arguments—that the review conducted by the Executive Director’s Resource Protection Team, and the memos they prepared memorializing their review, “are inadequate to demonstrate maintenance of instream uses.” And as with his closing arguments, counsel for OPIC offers no authority in the OPIC Exceptions and points to no evidence that supports his opinion.

TCEQ, however, has previously determined that requests for the conveyance and diversion of groundwater-based treated effluent are to be considered “solely under Section 11.042(b) [of the Water Code] and the Commission’s bed and banks authorization rules and not

⁸ Tr. at 186:23 – 187:1.

⁹ COL 3985A Ex. 9 at 46:15-21.

¹⁰ Herein the “Findings and Conclusions.”

under statutes and rules applicable to state water.”¹¹ And while not even acknowledged by OPIC in its closing arguments or in the OPIC Exceptions, TCEQ has also determined that the criteria found in Section 11.134(b) of the Water Code did not apply to the requests to beneficially reuse interbasin transfer surface water-based treated effluent under Section, 11.042(c), either.¹²

Nevertheless, as noted by Judge Wilfong in the PFD, the City offered evidence concerning the Section 11.134(b) factors for both the groundwater-based and imported surface water-based components of the Application. By doing so, the City was able to demonstrate complete satisfaction of each of those factors—*i.e.*, that the diversions made in the Application, and proposed in the Draft Amendment, were intended for beneficial reuses without waste, would not impair existing water rights or vested riparian rights, would benefit the public welfare, would not harm the environment, and were entirely consistent with the Region O Regional Water Plan and State Water Plan.

As demonstrated by the City, the Application is not, and has never been, a request to appropriate any flows that are native to the Brazos River watershed. This is a critically important consideration that counsel for OPIC wholly ignores in the analysis provided in the OPIC Exceptions.

The overwhelming weight of evidence in the record supports the findings of fact and conclusions of law reached by Judge Wilfong in his Findings and Conclusions. Accordingly, there is no support in the record for modifying the PFD or the Findings and Conclusions in response to this portion of OPIC Exceptions.

C. OPIC’s Evidentiary Exceptions Are Without Merit

¹¹ TCEQ Docket Nos. 2006-1832-WR, 2006-1831-WR.

¹² Reply to OPIC Closing, pp. 3-4.

As also addressed in the Reply to OPIC Closing, the *post-hoc* criticism OPIC wages against the qualifications of Mr. Dunn are baseless. There simply is nothing in the law that supports OPIC's position that opinions regarding instream uses may only be offered by a biologist.¹³ Mr. Dunn never attempted in his prefiled testimony or in his responses to cross-examination to provide expert opinions regarding instream use impacts as a biologist. He was providing expert testimony regarding instream use impacts as a seasoned hydrologist with decades of professional experience in the water resources industry.¹⁴ His expert hydrology testimony regarding the absence of any adverse impacts on instream uses that are attributable to the Application and Draft Amendment, therefore, validated the conclusions reached by the Executive Director's aquatic scientists.

As Judge Wilfong concluded in the PFD, OPIC's criticisms are both unfounded and untimely. Therefore, OPIC has articulated no supportable basis in this argument for modifying the PFD or the Findings and Conclusions.

D. OPIC's Proposed Special Condition Is Not Supported By Substantial Evidence

The Office of Public Interest Counsel has taken the unusual position of advocating that the Commissioners include a special condition in the Draft Amendment that, by counsel for OPIC's own confession, has little evidentiary support. Specifically, there is no competent evidence in the record that even tangentially supports the pass-through requirement advanced by the counsel for OPIC.

¹³ Tex. R. Evid. 702; *Cuadros-Fernandez v. State*, 316 S.W.3d 645, 659-60 (Tex. App.—Dallas 2009) (Determining that witness's career as a cabinet maker, including developing experience understanding causes of cabinet failures, qualified him to testify as an expert concerning causation of cabinet damage).

¹⁴ COL 3985A Ex. 9 at 5:18 – 6:3, 46:14-21.

OPIC can point to no competent evidence that would provide any legal support to its proposed special condition. Accordingly, there is no support in the record to modify the PFD or the Findings and Conclusions in any way based on this portion of the OPIC Exceptions.

II.

Contrary to the criticisms made in the OPIC Exceptions, Judge Wilfong's PFD reflects a deliberate and thorough consideration of all evidence admitted into the record, as well as an appropriate and judicious assignment of weight to that evidence. Accordingly, each of the findings of fact and conclusions of law proposed in Judge Wilfong's Findings and Conclusions are supported by a great preponderance of weight in the evidentiary record, and are otherwise reflections of appropriate interpretations and applications of the operative law governing this case.

Therefore, based on the foregoing, the evidentiary record in this case, and the legal arguments advanced by the City in response to such overwhelming weight of evidence, the City respectfully requests that the Commissioners adopt the PFD, approve the Application, issue Judge Wilfong's proposed order, and issue the Draft Amendment.

Respectfully submitted,

**LLOYD GOSSELINK ROCHELLE &
TOWNSEND, P.C.**

816 Congress Avenue, Suite 1900

Austin, Texas 78701

(512) 322-5800 (telephone)

(512) 472-0532 (facsimile)

By:

A handwritten signature in black ink, appearing to read "J. Hill", is written over a horizontal line. The signature is stylized and somewhat cursive.

JASON T. HILL

State Bar No. 24046075

MARTIN C. ROCHELLE

State Bar No. 17126500

BRAD B. CASTLEBERRY

State Bar No. 24036339

**ATTORNEYS FOR APPLICANT
CITY OF LUBBOCK**

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was delivered by hand delivery, facsimile, United States Postal Service, or by email to the persons listed in the attached service list on this, the 3rd day of July, 2012.



JASON T. HILL

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE
300 West 15th Street Suite 502
Austin, Texas 78701
Phone: (512) 475-4993
Fax: (512) 475-4994

SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)
STYLE/CASE: CITY OF LUBBOCK
SOAH DOCKET NUMBER: 582-11-3522
REFERRING AGENCY CASE: 2010-0837-WR

STATE OFFICE OF ADMINISTRATIVE HEARINGS **ADMINISTRATIVE LAW JUDGE**
ALJ RICHARD R. WILFONG

REPRESENTATIVE / ADDRESS

PARTIES

JAMES ALDREDGE
STAFF ATTORNEY
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
LITIGATION DIVISION
P.O. BOX 13087, MC 173
AUSTIN, TX 78711
(512) 239-2496 (PH)
(512) 239-0606 (FAX)
james.aldredge@tceq.texas.gov

TEXAS COMMISSION ON ENVIRONMENTAL
QUALITY

JAMES MURPHY
STAFF ATTORNEY
OFFICE OF PUBLIC INTEREST COUNSEL
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
12100 PARK 35 CIRCLE, MC-103, BUILDING F
AUSTIN, TX 78753
(512) 239-4014 (PH)
(512) 239-6377 (FAX)
james.murphy@tceq.texas.gov

TEXAS COMMISSION ON ENVIRONMENTAL
QUALITY OFFICE OF PUBLIC INTEREST COUNSEL

PAUL M. TERRILL, III
SCOTT SHOEMAKER
THE TERRILL FIRM, P.C.
810 WEST 10TH STREET
AUSTIN, TEXAS 78701
(512) 474-9100 (PH)
(512) 474-9800 (FAX)
pterrill@terrill-law.com
sshoemaker@terrill-law.com

R. E. JANES GRAVEL COMPANY

OSCAR B. JACKSON, III
LAW OFFICE OF OSCAR B. JACKSON III, PLLC
1905 WEST 30TH STREET
AUSTIN, TEXAS 78703
(512) 551-0677 (PH)
(512) 551-0679 (FAX)
trey@jacksonlawatx.com

ALIGNED INDIVIDUAL PROTESTANT LYNN
FORREST

REPRESENTATIVE / ADDRESS

“INTERESTED PERSONS”

GWENDOLYN HILL WEBB
WEBB & WEBB
211 EAST 7TH STREET, SUITE 712
AUSTIN, TEXAS 78701
(512) 472-9990 (PH)
(512) 472-3183 (FAX)
g.hill.webb@webbwebblaw.com

“INTERESTED PERSONS” GEORGE BINGHAM, ET
AL., DON CLARK, ET AL., WILLIAM D. AND MARY
L. CARROLL, AND ROBERT STARKS
