

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

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

APPLICANT CITY OF LUBBOCK’S RESPONSES TO  
PROTESTANT R. E. JANES GRAVEL COMPANY’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 R. E. Janes Gravel Company (the “Protestant”), and would respectfully show the Commissioners of the Texas Commission on Environmental Quality (the “Commissioners”) the following:

**I.**

As argued by the City in its objections to much of the Protestant’s prefiled testimony, as well as in the City’s written closing arguments, its written reply to the Protestant’s closing arguments, and the City’s post-hearing oral argument, the Protestant’s case is based almost exclusively on assertions that—even if true—would have no bearing on the outcome of this contested matter. In “Janes Gravel’s Exceptions to the Proposal for Decision,”<sup>1</sup> the Protestant simply retreats to the same baseless arguments that it attempted to advance in “Janes Gravel’s Closing Argument” and “Janes Gravel’s Consolidated Response to Closing Arguments.” Accordingly, the City incorporates herein the responses it made to those arguments in “Applicant

---

<sup>1</sup> Herein the “REJGC Exceptions.”

City of Lubbock’s Motion to Strike and Reply to Closing Arguments of R. E. Janes Gravel Company,”<sup>2</sup> as well as in “Applicant City of Lubbock’s Reply Pursuant to Order Nos. 12 and 13.”

## II.

The arguments that the Protestant makes in the REJGC Exceptions against Judge Wilfong’s PFD and his proposed findings of fact and conclusions of law<sup>3</sup> can be distilled down into four basic criticisms. Accordingly, the City addresses each of these complaints below.

### 1. Abandonment

The Application reflects the City’s request to divert, and beneficially reuse, its developed water-based treated effluent that is actually discharged from a single, discrete discharge point on the North Fork<sup>4</sup>—what is recognized throughout the evidentiary record as Outfall No. 001.<sup>5</sup> The City has not sought any authority through the Application to divert flows in the North Fork that emanate from points upstream of Outfall No. 001. This fact remains firmly supported by the great preponderance of evidence in the record.

According to the Protestant, the City has “abandoned” theoretical flows that the Protestant claims are sustained by a proliferation of springs in the North Fork *upstream* of Outfall No. 001. The Protestant then argues that by extension, the City is legally precluded from securing authorization to convey, divert and beneficially reuse the actual flows created from the

---

<sup>2</sup> Herein the “Reply to REJGC Closing Arguments.”

<sup>3</sup> Herein “Findings and Conclusions.”

<sup>4</sup> The North Fork, as used herein, is a reference to the North Fork Double Mountain Fork Brazos River, tributary to the Double Mountain Fork Brazos River, tributary to the Brazos River, in the Brazos River Basin.

<sup>5</sup> As the record demonstrates with an overwhelming weight of evidence, the City had never made any discharges from Outfall No. 001 of any kind before May 2003. Pursuant to the City’s TPDES Permit, it began in May 2003 discharging treated effluent comprised of a varying ratio of its imported surface water-based treated effluent and its groundwater-based treated effluent.

discharges at Outfall No. 001. The Application is not a request to appropriate any such flows in the North Fork, however. Even if the Protestant's argument here was true, therefore, such a fact would still not be probative of any material issue before the Commissioners in this matter. The evidence leaves no room for doubt that the Draft Amendment proposed by the Executive Director would *prohibit* the City from diverting any of these theoretical flows.<sup>6</sup>

Similarly, Protestant's reliance on *Edwards Aquifer Authority v. Day*, 2012 WL 592729 (Tex.), is out of place. The Supreme Court's decision provides no foundation to the Protestant's legal theory that the City has "abandoned" its ability to convey, divert, and beneficially reuse the developed water-based treated effluent that it directly discharges from Outfall No. 001 because the City did not divert flows in the North Fork that might be attributable to the Protestant's theoretical springs.

As a practical matter, the Application is not analogous to an application for a historical use-based groundwater production permit—which was obviously at the center of the dispute in *Day*. More importantly, however, the Supreme Court's treatment of groundwater-based effluent conveyances using the bed and banks of natural watercourses actually supports the City's position. Specifically, the Supreme Court acknowledged in *Day* that "[g]roundwater can be transported through a natural watercourse without becoming state water. The [Water] Code specifically allows the [Texas Commission on Environmental Quality] to authorize a person to discharge privately owned groundwater into a watercourse and withdraw it downstream."<sup>7</sup> There is simply no foundation for the application of *Day* in the manner advanced by the Protestant in REJGC Exceptions.

---

<sup>6</sup> *Id.*

<sup>7</sup> *Day*, 2012 WL 592729 at \*4 (citing to TEX. WATER CODE § 11.042(b)).

The Protestant’s argument on this issue simply has no support in the law or the evidentiary record. To the contrary, 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 the Protestant’s argument.

## **2. Reliability of Carriage Loss Estimation**

In addition to the above arguments, the Protestant asserts in the REJGC Exceptions that the City’s carriage loss estimate was “not supported by testimony.” Yet, the evidence admitted into the record—including a significant amount of both prefiled and live testimony on the subject—demonstrates that the carriage loss estimate provided by the City in the Application was endorsed by no fewer than four different individual professionals—Chester Carthel, P.E., a former City employee and the original developer of the estimate,<sup>8</sup> David Dunn, P.E., the City’s technical consultant and expert witness on the Application,<sup>9</sup> Stephen Densmore, P.E., an expert hydrologist for the Executive Director,<sup>10</sup> and Kathy Alexander, Ph.D., yet another expert hydrologist and the Executive Director’s expert witness on the Application.<sup>11</sup> As demonstrated in the hearing, all four agreed on (1) the reasonableness of the methodology used for this Application, (2) the reliability of the data used in the methodology for the purposes of calculating carriage losses for this Application, and (3) the reliability of the results.<sup>12</sup>

---

<sup>8</sup> COL 3985A Ex. 4 at 163-171.

<sup>9</sup> COL 3985A Ex. 9 at 21:8 – 24:16.

<sup>10</sup> COL 3985A Ex. 9 at 24:17 – 25:1; ED 3985A Ex. 4.

<sup>11</sup> ED 3985A Ex. 11 at 11:13-27; Tr. at 309:11 – 310:24.

<sup>12</sup> COL 3985A Ex. 9 at 22:4-8, 24:11-6; ED 3985A Ex. 4 at 2; ED 3985A Ex. 11 at 11:25-27; Tr. at 145:12-21, 18-22.

The Protestant's argument that the City's carriage loss estimate was based on losses attributable to a reservoir, instead of what would be expected to occur with conveyances made between Outfall No. 001 and the Diversion Point,<sup>13</sup> is so devoid of merit that the argument approaches frivolousness. As demonstrated in the Reply to REJGC Closing Arguments, the overwhelming weight of evidence in the record completely undermines the entirety of the Protestant's carriage loss complaint.<sup>14</sup>

In each instance, therefore, the Judge's proposed findings of fact and conclusions of law relevant to this issue are supported by a preponderance of the evidence. 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 Protestant's exceptions.

### **3. The City's "Illusory" Diversion Point**

Furthermore, the Protestant suggests in the REJGC Exceptions that the City should be required to (1) propose a specific diversion point or points in the Application, and (2) refrain from identifying "infinite" diversion points in the Application. It is not entirely clear what the Protestant seeks to gain by this argument, however, as the Application does identify a single proposed Diversion Point at a specified location—*i.e.*, at the intersection of the North Fork and County Road 7300. Similarly, the Application does not include a request for an "infinite" number of diversion points to be located anywhere on the North Fork. The Protestant's "genuine diversion point" argument suggests that it would be proper—and under the Protestant's rationale,

---

<sup>13</sup> The term Diversion Point, as used herein, is a reference to the diversion point proposed in the Application to be located at the intersection of the North Fork and County Road 7300, which is approximately 2.7 river miles downstream of the location at which Outfall No. 001 reaches the North Fork.

<sup>14</sup> Reply to REJGC Closing Arguments, pp. 18-29.

critical to the outcome of this case—for the City to spend public resources on the construction of diversion facilities before obtaining the Commissioners’ approval of the Draft Amendment.<sup>15</sup>

The Protestant cannot point to any statute, rule, or even final TCEQ order that provides any legal support to its criticisms of this portion of PFD. 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 Protestant’s exceptions.

#### **4. Environmental Impairment**

Similarly, the Protestant’s argument regarding environmental impacts associated with the City’s request to indirectly reuse its developed water-based treated effluent is without any support in the record. As demonstrated throughout the hearing on the merits of this matter, the authorizations proposed in the Draft Amendment will 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—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.<sup>16</sup> The weight of evidence on this issue is not merely overwhelming, it is uncontroverted by any credible evidence whatsoever. Contrary to the heart of the Protestant’s argument on this issue, the record clearly demonstrates that the City is not requesting the authority to divert any flows that have historically been in the North Fork.<sup>17</sup> The City instead is requesting the authority to divert only the developed water-based treated effluent that it discharges from Outfall No. 001—less the carriage losses that it has estimated will occur between Outfall No. 001 and the

---

<sup>15</sup> The term Draft Amendment, as used herein, is a reference to the draft permit proposed by the Executive Director in response to the Application.

<sup>16</sup> COL 3985A Ex. 9 at 46:15-21.

<sup>17</sup> COL 3985A Ex. 9 at 46:16-18.

Diversion Point.<sup>18</sup> The record demonstrates that the City is under no obligation to discharge these flows into the North Fork at Outfall No. 001 at any time, regardless of the outcome of this case.<sup>19</sup>

As the City noted in its Reply to REJGC Closing Arguments, the evidentiary record is replete with credible evidence demonstrating that (1) the City has discharged, and continues to discharge, its developed water-based treated effluent from Outfall No. 001 in accordance with the terms and conditions of the TPDES Permit;<sup>20</sup> (2) the TPDES Permit was designed—and is separately enforced—by TCEQ to ensure that the City’s discharges are protective of the agency’s stream standards for the North Fork, pursuant to Chapter 307 of the TCEQ’s rules;<sup>21</sup> (3) the City’s discharges into the North Fork from Outfall No. 001 therefore do not impair water quality of the North Fork<sup>22</sup>—in some instances the discharges might even improve water quality of the North Fork;<sup>23</sup> and (4) the diversions requested in the Application and proposed in the Draft Amendment would leave the North Fork water quality essentially the same, if not better, than the quality of flows in the North Fork upstream of Outfall No. 001.<sup>24</sup>

The Protestant’s principal target for its complaints on this issue, David Dunn, testified without challenge from any party during the hearing that he has developed a thorough understanding of the statutes, rules, and other regulatory considerations applied by TCEQ to water rights permit amendments like those requested in the Application.<sup>25</sup> This same experience

---

<sup>18</sup> COL 3985A Ex. 12:8-9.

<sup>19</sup> Tr. at 196:15-16.

<sup>20</sup> *E.g.*, COL 3985A Ex. 1 at 9:16-20, 10:19 – 11:3.

<sup>21</sup> *E.g.*, COL 3985A Ex. 9 at 48:1-7; Tr. at 185:3-8.

<sup>22</sup> *E.g.*, Tr. at 185:22 – 186:3.

<sup>23</sup> *E.g.*, Tr. at 185:15-16, 186:4-14.

<sup>24</sup> *E.g.*, COL 3985A Ex. 9 at 48:7-19; Tr. at 186:1-3.

<sup>25</sup> COL 3985A Ex. 9 at 5:18 – 6:3.

was the basis for his recognition as a water quality expert in a separate major TCEQ water rights permitting case conducted just months before the hearing on the Application.<sup>26</sup> His unchallenged experience similarly qualified him to provide the opinions he testified to in this case, as well.<sup>27</sup> And the evidence in the record provided through Mr. Dunn's testimony is unequivocal: the diversions requested in the Application, and proposed in the Draft Amendment, would not negatively impact the quality of water in the North Fork.<sup>28</sup>

The Judge's proposed findings of fact and conclusions of law relevant to this issue are in each instance supported by a preponderance of the evidence. There is, therefore, no support in the record to modify the PFD or the Findings and Conclusions in any way based on this portion of the Protestant's exceptions.

### III.

As discussed above, the Protestant's arguments in each instance are either made without any evidentiary support whatsoever, or they are made against an overwhelming weight of evidence to the contrary. In either event, 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

---

<sup>26</sup> Tr. at 91:25 – 92:18.

<sup>27</sup> COL 3985A Ex. 9 at 2:4-5, 3:3-8, 3:12 – 4:19, 5:4 – 6:3.

<sup>28</sup> Reply to REJGC Closing Arguments, pp. 29-34.

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: \_\_\_\_\_

  
JASON T. HILL

State Bar No. 24046075

MARTIN C. ROCHELLE

State Bar No. 17126500

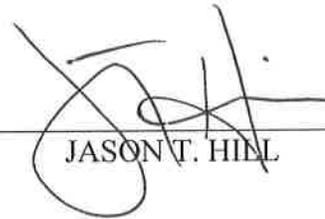
BRAD B. CASTLEBERRY

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 15<sup>th</sup> 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  
sshoeemaker@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

---

---