

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

APPLICATION NO. 4340A BY	§	
THE CITY OF LUBBOCK	§	BEFORE THE
TO AMEND	§	TEXAS COMMISSION ON
WATER USE PERMIT NO. 3985	§	ENVIRONMENTAL QUALITY

**EXECUTIVE DIRECTOR’S REPLY TO EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE’S PROPOSAL FOR DECISION**

TO THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

The Executive Director of the Texas Commission on Environmental Quality (TCEQ or commission) files this Reply to Exceptions to the Administrative Law Judge’s Proposal for Decision (PFD) filed by protestant Janes Gravel Company (Janes Gravel) and the Office of Public Interest Counsel (OPIC) in the above-styled matter. The Executive Director would show the following in support of his recommendation that the commission adopt the PFD and accompanying Findings of Fact and Conclusions of Law as submitted by the Administrative Law Judge (ALJ).

I. The Draft Amendment will not authorize the Applicant to divert any water other than that which it directly discharges through Outfall 001

Protestant Janes Gravel takes exception with the PFD on the basis that the ALJ’s recommendation that the commission adopt Permit 3985A as drafted by the Executive Director will deprive Janes Gravel and other water rights users, as well as the environment, use of a portion of the base flow of the North Fork of the Double Mountain Fork of the Brazos River (North Fork).¹ This is inaccurate. As explained in the Executive Director’s Closing Argument in this matter, the amendment as drafted will only authorize the City of Lubbock (City) to divert flows which correspond directly to the amount of measured discharges it makes from Outfall 001 pursuant to its Texas Pollutant Discharge Elimination System (TPDES) permit.²

While the Executive Director believes there is insufficient evidence in the record in this matter to determine whether actions by the City of Lubbock have historically

¹ Janes Gravel’s Exceptions to the Proposal for Decision, at 12, 26.

² See Executive Director’s Closing Argument and Initial Post-Hearing Brief, at 6-7.

contributed to the normal or base flow of the North Fork prior to discharging return flows from Outfall 001, whether the City has conducted such actions has no bearing on issues relevant to this application. The City will not be authorized by this amendment to divert any such flows. All flows that originate upstream of Outfall 001, irrespective of their source, will be passed beyond the City's diversion point. If the city were to divert any of the normal or base flows originating upstream of Outfall 001, it would be in violation of its permit as amended.

II. The commission cannot require the Applicant to continue discharging indefinitely in favor of downstream water rights or other interests

The commission does not issue, and the Water Code does not contemplate the issuance of, indirect reuse permits to diverters who are not also the dischargers because return flows are inherently interruptible and are, therefore, not a reliable source of supply to anyone other than the entity with control over how much water is discharged.³ As observed in the Executive Director's Reply to Closing Arguments in this matter, there is no provision in law which grants the commission authority to reserve all or a portion of return flows for users other than the entity that discharges the flows pursuant to a valid TPDES permit.⁴ The pivotal fact in this case which should allow the City to obtain this permit is the fact that the City controls its discharge.

Because of the interruptible nature of return flows, it cannot be said that any water rights owner can obtain an implied right to continuation of use of return flows absent an express authorization to that effect. The Executive Director acknowledges that discharged return flows which are either not subject to any indirect reuse permit, or allowed to pass by the discharger despite the existence of a valid indirect reuse permit, may be subject to any number of uses downstream. However, historic reliance on the presence of those return flows cannot amount to a guarantee that their presence in the stream is perpetual and certainly cannot serve to create some equivalent of a promissory estoppel claim on the part of the user.

³ The commission may grant indirect reuse authorizations to a user other than the discharger pursuant to the continuation of a valid, legally-enforceable contract between the user and the discharger.

⁴ See Executive Director's Reply to Closing Arguments, at 2-5; provisions in various applicable statutes and rules require the commission to apply special conditions, as necessary, to diversions for the protection of other water rights and the environment. The draft permit contains such conditions.

Similarly, allowing return flows to pass downstream does not constitute an abandonment of a discharger's legal right to divert return flows discharged in the future, particularly in cases such as this one where the discharger did not historically discharge those return flows over any significant period of time prior to seeking an authorization to divert them. The actual water already discharged and allowed to pass may well be abandoned, but a legal right to either obtain an indirect reuse authorization, or to begin or resume diversion under an already-existing reuse authorization, is not forfeited by a brief, temporary cessation of diversion as suggested in other parties' exceptions. Carried further, that argument could be made to suggest that any time an owner of an appropriation right allows water he is permitted to divert to pass his diversion point for some undefined period of time, he creates a cause of action for any downstream user who has relied on that passed water to compel that water right owner to pass that water perpetually. That would be contrary to the scheme of water management employed by Texas for over 100 years.

Janes Gravel and OPIC both cite the recent Texas Supreme Court decision in *Edwards Aquifer Authority v. Day* (*Day*) in arguing that downstream interests are entitled the City's return flows.⁵ Under Janes Gravel and OPIC's reading of *Day*, any initial discharge of return flows into a state watercourse without immediate or concurrent action on the part of the discharger to secure a legal right to recover similar discharges in the future would convert all future discharges to state water even before the discharges occur and permanently deprive the discharger from ever recovering those discharges. That conclusion was not the intent of the Supreme Court when it issued its decision. *Day* did not review and does not apply to discharges of treated wastewater effluent return flows, and is, therefore, not directly applicable to this application.⁶ *Day* was only concerned with constant, *uncontrolled*, and unmeasured discharges of raw groundwater.⁷

As explained more thoroughly in the Executive Director's Reply to Closing Arguments in this matter, there is a significant and important distinction between

⁵ Janes Gravel's Exceptions to the Proposal for Decision, at 10; The Office of Public Interest Counsel's Exceptions to the Proposal for Decision, at 9.

⁶ *Edwards Aquifer Authority v. Day*, 2012 WL 592729 (Tex.), 55 Tex. Sup. Ct. J. 343 (Tex. 2012).

⁷ *Id.*, at 4.

groundwater and “return flows” as that term is used in the Texas Water Code and defined and used in commission rules.⁸ The treatment of return flows, whether originally derived from surface water or groundwater resources, in law and in longstanding commission practice is so thoroughly distinct from flows of raw groundwater as to make the two fundamentally different classifications of water. At no point does the Supreme Court address or even recognize controlled, measured discharges of wastewater effluent return flows as being included in the scope of its decision. On the contrary, the Supreme Court observes the inherent difference between passively allowing groundwater to enter a water course, and deliberately and proactively causing water to enter a watercourse “when the water owner controls the discharge and withdrawal so that the water moves directly from the source to use.”⁹ The Court points to the provision of the Water Code that does address return flows as constituting an exception to the principles of law adopted in the decision.¹⁰

It is important to note that in *Day* the administrative action reviewed by the Court was a denial of a permit application which resulted in a restriction of activity by the plaintiffs. The permit denial essentially ordered a continued *inaction*, or maintenance of the *status quo*, on the applicant because the plaintiffs had no control over the flow of water introduced into the state watercourse.¹¹ To apply the protestant’s and OPIC’s interpretation here, that the City is effectively barred from obtaining a permit to begin an otherwise legally valid diversion of the entirety of its wastewater effluent-based return flows because discharging those return flows for a relatively brief period time prior to seeking that permit created a superior claim to them by downstream interests, would effectively compel the City to continue discharging that

⁸ Tex. Water Code §11.042(b); 30 TEX. ADMIN. CODE §297.1(43); Executive Director’s Reply to Closing Arguments, at 2-4.

⁹ *Day*, at 4.

¹⁰ *Id.*, at 4 (FN31); TEX. WATER CODE §11.042(b); see 30 TEX. ADMIN. CODE §297.1(43) for a legal definition of “return flow[.]” While only the section addressing indirect reuse of groundwater-based return flows in Chapter 11 uses that term, the definition adopted by the commission includes “sewage effluent” generally. The Executive Director has long interpreted that definition to include surface water-based return flows as well. In the case of return flows originating from state or surface water resources, the Executive Director would consider those return flows to be included in the category of “other water” as that term is used in Tex. Water Code §11.042(c). In any event, the return flows are separate and distinct from both raw “groundwater,” the kind concerned in *Day*, and “surplus water” as used in Section 11.046 which is explained more thoroughly below.

¹¹ See *Day*, at 4.

water expressly for the benefit of those downstream interests. Put another way, the Court in Day affirmed a directed inaction on the part of a regulated entity where Janes Gravel and OPIC would have the commission *compel* an action by a regulated entity. Neither Day, nor any other rule of law, gives the commission that authority.

III. Carriage losses were calculated pursuant to all applicable laws and commission rules

Applicable statutes and rules require that carriage losses be deducted from the amount of water discharged before that water is subsequently diverted by the permittee.¹² Section 295.112 of the commission rules requires that an application to use the bed and banks of a state watercourse to convey groundwater-based return flows be accompanied by “the estimated amount of water that will be lost to transportation, evaporation, seepage, channel or other associated carriage losses from the point of discharge to the point of diversion.”¹³ The City complied with that requirement by submitting as an attachment to the Application a memorandum from the City’s Water Planning Manager that outlined estimates of all types of losses listed in Section 295.112(b)(6).¹⁴ The Executive Director’s Water Rights staff reviewed the estimate provided by the City and determined that the methodology used to generate the estimate was reasonable and incorporated the loss estimate into the draft permit.¹⁵ No party has cited any statute or rule of law that requires additional analysis of losses. The application satisfies all applicable laws and regulations with respect to loss calculations.

IV. The draft amendment designates a distinct diversion point

Janes Gravel asserts that the draft amendment does not satisfy all applicable statutes and rules in that the designated diversion point is hypothetical and illusory.¹⁶ The draft amendment clearly designates a specific location for diversion under the right authorized.¹⁷ Janes Gravel is correct in observing that the commission may not issue a

¹² TEX. WATER CODE §11.042(b); *see also* 30 TEX. ADMIN. CODE §297.16(a).

¹³ 30 TEX. ADMIN. CODE §295.112(b)(6).

¹⁴ Ex. COL 3985A 4, at 163-166.

¹⁵ Ex. ED 3985A 11, at 11.

¹⁶ Janes Gravel’s Exceptions to the Proposal for Decision, at 1, 9, 16.

¹⁷ Ex. ED 3985A 10 (Draft Permit No. 3985A), at 3.

permit with a diversion right without designating a place of diversion; however that is not the case here.

In support of its argument that the draft permit's designated diversion point is legally insufficient, Janes Gravel notes that a Proposal for Decision issued in an application by the Brazos River Authority (BRA) recommended that the commission deny a permit based, in part, on the fact that certain proposed diversions were to be made at indefinite locations.¹⁸ Draft Amendment 3985A is distinguishable from that scenario because it does designate a specific diversion point.¹⁹ Should the City desire to change its diversion point under, or add a diversion point to, Permit 3985A, it will be required to apply for an amendment to do so.

V. Texas Water Code Section 11.046 does not apply to return flows

As explained in the Executive Director's Reply to Closing Arguments in this matter, Texas Water Code Section 11.046 is not written to apply to the discharge of wastewater effluent-based return flows. Rather, that section applies to "Return Surplus Water" as that term is defined in Chapter 11 of the Water Code.²⁰ A plain reading of the definition of surplus water and Section 11.046 reveals only that unused water returned to a stream as return surplus water is effectively unappropriated state water available for diversion and use by permitted water rights owners and riparian users. That should be contrasted with use of the term return flows in Section 11.042 which mirrors the previous use of that term in commission rules which acknowledge a discharger's right under Section 11.042 to recover and reuse discharged return flows with a permit.

IV. The commission should adopt the ALJ's PFD in full and issue Water Use Permit 3985A as drafted

The Executive Director has reviewed this application and performed numerous technical evaluations of its sufficiency. Following his review, the Executive Director determined that this application satisfies all applicable statutory and regulatory

¹⁸ Janes Gravel's Exceptions to the Proposal for Decision, at 16-17.

¹⁹ In the PFD for the BRA application, the ALJs rejected a so-called "two-step" process which would have allowed the permittee to identify specific points of diversion after the issuance of the permit without requiring an amendment application. *In re. Brazos River Authority*, TCEQ Docket No. 2005-1490-WR, SOAH Docket No. 282-10-4184, Proposal for Decision, at 20-30.

²⁰ TEX. WATER CODE §§11.002(10), 11.046.

requirements. The Executive Director agrees with the ALJ's determination that the permit should be issued as drafted. The Executive Director respectfully recommends that the commission adopt the PFD and accompanying findings of fact and conclusions of law in full, and issue Water Use Permit 3985A as drafted.

Respectfully submitted,

Texas Commission on Environmental
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CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2012, an original and seven copies of the "Executive Director's Reply to Exceptions to the Administrative Law Judge's Proposal for Decision" was hand delivered to the Office of the Chief Clerk of the Texas Commission on Environmental Quality and filed electronically with the same, and that a copy was filed electronically with the State Office of Administrative Hearings and sent via electronic mail to the parties listed below.



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