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December 30, 2010

Ms. LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
P.O. Box 13087
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VIA ELECTRONIC FILING

Re: City of Lubbock Application No. 4340A for Amendment to Water Right Permit No. 3985A; TCEQ Docket No. 2010-0837-WR (2020-2)

Dear Ms. Castañuela:

On behalf of my client, the City of Lubbock, Texas (the "City"), enclosed for filing please find the City's Response to Requests for Contested Case Hearing in the above-entitled matter.

Thank you in advance for your attention to this matter. Please do not hesitate to contact me if you have any questions.

Sincerely,

Martin C. Rochelle

MCR/jdg
1238223

cc: Ms. Marsha Reed
Mr. Aubrey Spear
Mr. Brad B. Castleberry
Ms. Paige L. Hamilton

DOCKET NO. 2010-0837-WR

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

CITY OF LUBBOCK'S RESPONSE TO REQUESTS FOR CONTESTED CASE HEARING

TO THE HONORABLE COMMISSIONERS:

The City of Lubbock (herein referenced interchangeably as "Lubbock," the "City," or "Applicant") submits this response to requests made to the Texas Commission on Environmental Quality (the "TCEQ") for a contested case hearing on Application No. 4340A (the "Application") and would respectfully show the Commissioners the following:

I. BACKGROUND

In 1983, Lubbock acquired Water Use Permit No. 3985 (the "Permit") through Application No. 4340, which authorizes the City to use, within the Brazos River Basin, 22,910 acre-feet of treated effluent created as a result of the City's use of water purchased from the Canadian River Municipal Water Authority ("CRMWA"), with 4,480 acre-feet authorized for industrial use at the Jones Power Plant in Lubbock County, and 18,430 acre-feet authorized for agricultural use for the irrigation of 10,000 acres of land in Lubbock and Lynn Counties.

Lubbock is authorized by TPDES Permit No. WQ0010353002 (the "TPDES Permit") to treat and dispose of an average of not to exceed 21.5 MGD of treated effluent, of which 9.0 MGD (10,081 acre-feet per year) is authorized for discharge into the North Fork Double Mountain Fork Brazos River (the "North Fork"), tributary of the Double Mountain Fork Brazos River, tributary of the Brazos River, Brazos River Basin. The source of all treated effluent currently discharged by the City is either privately owned groundwater or developed surface water from the Canadian River Basin.

By filing the Application, the City seeks to amend the Permit to authorize the diversion and use of all historical and future discharges of Canadian River Basin surface water-based effluent and privately owned groundwater-based effluent, including the currently authorized 10,081 acre-feet per year, and to authorize the use of such water for agricultural, municipal, industrial and recreational purposes anywhere within Lubbock and Lynn Counties. The City also seeks to convey the effluent from the discharge point authorized by the TPDES Permit to a downstream diversion point using the bed and banks of the North Fork.

The discharge point authorized by the TPDES Permit is near the point where F.M. 400 in Lubbock County crosses the North Fork, which can also be described generally as Latitude

33.51°N and Longitude 101.659°W. The most downstream diversion point sought is approximately 14,300 feet downstream of the point of discharge, near the point where C.R. 7300 in Lubbock County crosses the North Fork, which can also be described generally as Latitude 33.493°N and Longitude 101.624°W, at a point bearing N 84.883°W, 129.25 feet from the northeast corner of the Section 34, Block S, GCSF Rail Road Co., Abstract 58, approximately 4.5 miles northeast of the City of Slaton, Texas, in Lubbock County.

The Executive Director has prepared a draft permit (the "Draft Permit") that authorizes the City to divert and use not to exceed 32,991 acre-feet of historical and future return flows per year for agricultural, municipal, industrial and recreation purposes in Lubbock and Lynn Counties, as well as additional future return flows discharged pursuant to the TPDES Permit. The Draft Permit also authorizes the City to use the bed and banks of the North Fork to convey the return flows discharged pursuant to the TPDES Permit, less any transportation losses, from the discharge point authorized by that permit to the diversion point near the point where C.R. 7300 crosses the North Fork. A special condition in the Draft Permit requires the City to only divert and use these in accordance with *Lubbock Reuse Accounting Plan.* Any modification to the accounting plan that changes the Permit terms must be in the form of an amendment to the Permit.

The diversions authorized by the Draft Permit are interruptible and are dependent upon the actual discharge of return flows by the City, and the availability of those discharges. The City only seeks to divert those return flows that are actually discharged. The City does not seek by the Application to divert the normal flow or the flood flow of the North Fork. Moreover, pursuant to TEX. WATER CODE §11.042(b), the City is the only entity that may claim the right to divert its developed water-based return flows.

II. PROCEDURAL HISTORY

On April 27, 2004, Lubbock filed Application No. 4340A with the Texas Commission on Environmental Quality ("TCEQ"). Additional information was provided to TCEQ in the form of responses to requests for information on August 9, 2004 and September 2, 2004. TCEQ staff declared the application to be administratively complete and filed with the Office of the Chief Clerk on October 12, 2004.

Notice of the Application was issued, as required by law, on December 31, 2004. The notice stipulated that public comments, requests for a public meeting, and requests for a contested case hearing on the application must be filed with the TCEQ Chief Clerk's office no later than January 31, 2005. As noted below in Section IV, several hearing requests were filed, and one hearing request has since been withdrawn.

TCEQ has concluded its review of the Application, and on December 3, 2009 TCEQ staff issued a Draft Permit amending Permit No. 3895. On December 17, 2010, the Applicant received notice that the above-referenced matter would be considered by the Commissioners at their January 26, 2011 agenda. The Applicant hereby submits this response to requests made to the TCEQ regarding the Application, pursuant to Title 30, Section 55.250, *et. seq.*, Texas Administrative Code.

III. DETERMINATION OF AFFECTED PERSONS

TCEQ rules clearly state that a contested case hearing can only be requested by 1) the TCEQ Commissioners, 2) the TCEQ Executive Director, 3) the Applicant, and 4) any "affected person."[1] An "affected person" is defined as one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application.[2] An interest common to members of the general public does not qualify as a personal justiciable interest.[3] Accordingly, a request for a contested case hearing must include a brief, but specific, description of the person's location and distance relative to the activity that is the subject of the application.[4] In addition, the person must do more than just provide a conclusory statement in the request that he or she will be harmed by the application, if granted. The person must describe briefly, but specifically, how and why he or she will be affected by the granting of the application.[5]

Persons claiming to be affected persons must also submit their hearing requests in writing to the Chief Clerk "within the time period specified in the notice."[6] For purposes of the Application, the Chief Clerk's notice directed all potential requestors to submit their requests for a contested case hearing on the matter to the Chief Clerk within the 30-day period following the date notice of the Application was issued, or by January 31, 2005. Notice was issued by the Chief Clerk on December 31, 2004, and pursuant to the terms of the notice all timely hearing requests must have been received by the Chief Clerk by no later than January 31, 2005.[7] All such requests not filed within this period are not timely and thus cannot be processed by the Chief Clerk.[8]

When determining whether an individual or entity is an "affected person," all relevant factors are considered by the Commission, including: 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; 3) whether a reasonable relationship exists between the interest claimed and the activity regulated; 4) the likely impact of the regulated activity on the health, safety, and use of property of the person; and 5) the likely impact of the regulated activity on use of the impacted natural resource by the person.[9]

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1 30 TEX. ADMIN. CODE § 55.251(a) (2009).
2 *Id.* § 55.103.
3 *Id.*
4 *Id.* § 55.251(c)(2).
5 *Id.*
6 *Id.* §§ 55.251(b), (d), .254(a).
7 See Notice of Water Rights Application for Application No. 4340A issued December 31, 2004.
8 *Id.* §§ 55.251(f)(1), .254(a).
9 *Id.* § 55.256(c).

IV. EVALUATION OF HEARING REQUESTS

A. RIPARIAN WATER RIGHTS

Six (6) persons who either claim or appear to be riparian water right interests have filed comments and requested a contested case hearing regarding the Application. Those requestors are:

1. Martha Jean Forrest McNeely ("McNeely")
2. Forrest Family Partnership ("FFP")
3. John and Marianne Loveless ("Loveless")
4. Lynn Forrest ("Forrest")
5. John O. Long ("Long")
6. Michael and Justin Damron ("Damron")

Of these six (6), one (1) hearing request (McNeely) was not timely filed. None of these hearing requests suggest a harm that is sufficient to grant a contested case hearing.

As noted herein, the Application does not seek to divert and use water native to the Brazos River Basin. The source of all water sought for diversion is the City's effluent return flow resulting from its use of either i) privately owned groundwater, or ii) surface water imported from the Canadian River Basin. Moreover, the City's discharges pursuant to the TPDES Permit did not commence until May 2003, less than a year before the Application was filed, so no riparian water right interests can legitimately claim to have come to rely upon these discharges for any other purpose prior to the filing date.

Moreover, Texas case law is clear. Riparians have the right to use the normal flow of the river subject to a standard of reasonable use.[10] Riparians can only divert the normal flow of streams for domestic and livestock purposes.[11] The water sought for diversion pursuant to the Application is not the normal flow of the North Fork. It is "developed water" not native to the Brazos River Basin and not naturally found in the North Fork; it is water that, but for the efforts of the City, would not be found in the North Fork. Moreover, the TCEQ has included provisions in the Draft Permit explicitly limiting the City's diversions to only that water which is actually discharged, and TCEQ has required (and approved) an accounting plan to ensure compliance with these provisions. Therefore, there can be no impact to the hearing requestors' riparian use of water, if any such use they make.

Some of the hearing requestors (Forrest, Long, and Damon) raise concerns regarding flooding of their property. By the Application, the City only seeks to divert the developed water return flows it has the current, lawful right to discharge pursuant to the TPDES Permit, so the possible flooding of these requestors' properties is simply illogical. They also allege the City has

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[10] *Cummins v. Travis Cnty. Water Control & Improvement Dist. No. 17,* 175 S.W.3d 34, 45-47 (Tex. App.—Austin 2005); *see Motl v. Boyd*, 286 S.W. 458, 470 (1926).

[11] *Cummins, 175 S.W.3d at 45-47; see In re Adjudication of Water Rights of Upper Guadalupe Segment of Guadalupe River Basin,* 642 S.W.2d 438, 439 (Tex. 1982).

the ability to discharge and divert an "unlimited" amount of water in "unspecified volumes" and at "unspecified times and intervals." These statements are completely inaccurate and do not reflect either the Application or the terms of the Draft Permit. First, the discharge of the City's developed water return flows is authorized pursuant to the TPDES Permit, and the City is limited by the TPDES Permit in both the daily average flow and the peak flow that can be discharged. Second, the accounting plan and special conditions in the Draft Permit only allow the City to divert what it actually discharges, less carriage losses. The City cannot divert water that it does not discharge pursuant to the TPDES Permit, and the amount it discharges will not only be regulated and metered pursuant to the TPDES Permit, but also metered and recorded in accordance with the accounting plan, and as required by the Draft Permit. The authorization to discharge, including the volume, rate, and other matters associated with the TPDES Permit, is simply not a matter subject to this Application. Moreover, even if this alleged flooding issue was logically alleged, which it is not, and even if it was material to the pending Application, the Commission does not have jurisdiction to address property rights for alleged flooding.

All of these requestors mischaracterize the source of water that is the subject of the Application. Forrest, Long, and Damon consider this water to be the normal flow of the North Fork. That is clearly incorrect. Loveless suggests the City would be diverting from a natural water source, but at the same time suggests concerns regarding water quality. McNeely and FFP want the City to be required to guarantee flow in the North Fork. All of these statements and comments clearly show a misunderstanding of the source of the supply of water that is the subject of the Application. Moreover, Loveless incorrectly claims that these discharges have been occurring for years (even though the City's discharges were initiated less than a year before the Application was filed) and without any facts to support such claim of discharge. This allegation stands in stark contrast to the evidence submitted by the City reflecting actual discharge monitoring reports for the TPDES Permit, which clearly show the City had begun discharging these developed water return flows less than a year before the Application was filed. Indeed, the City's proactive approach to securing authorization to use the water subject to the Application was in part due to its recognition that, failing to do so, others may come to rely upon these developed water return flows to the City's detriment.

In addition to the flawed arguments submitted by these riparians, it should be noted that McNeely's request was not timely submitted pursuant to 30 Tex. Admin. Code Section 55.251(d) as the deadline for filing hearing requests was January 31, 2005. McNeely's request was filed on February 1, 2005 as evidenced by the Commission's date stamp on the comment letter.

B. CERTIFICATES OF ADJUDICATION AND WATER USE PERMITS

Three (3) water rights filed comments and requested contested case hearings regarding the Application. Those requestors are as follows:

1. Clark Wood ("Wood") -- Certificate of Adjudication No. 12-3709
2. R. E. Janes Gravel Co. ("Janes") – Certificate of Adjudication No. 12-3710
3. Chocolate Bayou Water Company ("CBWC")

Of the three (3) requestors, one (1) request (CBWC) has since been withdrawn and will not be addressed herein. The remaining two (2) requestors filed timely requests; however, Janes sought to supplement its request via an untimely letter submitted some three (3) years after the original deadline, so the comments included in that supplemental letter are not timely filed and will not be addressed given the blatant tardiness in such filing.

As previously stated herein, the Application does not seek to divert and use water native to the Brazos River Basin. The source of all water sought for diversion pursuant to the Application is effluent return flows resulting from the City's use of either i) privately owned groundwater, or ii) surface water imported from the Canadian River Basin. Any existing water right holder will still have access to the normal flow of the North Fork as authorized in his or her water right. The Draft Permit only allows the City to divert the effluent return flows that it actually discharges, less carriage losses, and in accordance with the special conditions included therein. There is simply no authorization to divert water which would otherwise be available for diversion by either Wood or Janes, so there is no harm that could come in issuing the Draft Permit.

Janes and Wood's existing diversion points are approximately 11 and 7 miles downstream of the City's proposed diversion point, respectively. Their diversions would only be the beneficiary of the surcharge to the North Fork resulting from the City's discharge of its developed water return flows, as this surcharge would alleviate some portion of the normal streamflow losses that occur in the North Fork, and whatever flow the City cannot capture and divert as authorized pursuant to the Draft Permit would otherwise remain in the North Fork and convey to the permitted diversion points for both Janes and Wood. Thus, there is no way that either permit holder can be impacted by the Application. The City is adding non-native, developed water to the North Fork, and there can only be a benefit to existing water rights holders by virtue of this addition given the practicalities of operating diversion works.

Wood raises many of the same comments described herein on behalf of Forrest, Long, and Damon. Wood alleges that the water sought for diversion pursuant to the Application is the normal flow of the North Fork. As noted above, this is clearly incorrect, as the Application only involves the proposed diversion of developed water return flows discharged by the City. Wood also raises concerns regarding flooding of his property. However, the City only seeks to divert developed water return flows that it has the current, lawful right to discharge pursuant to the TPDES Permit, so flooding of Wood's property is not very likely, especially given the fact that his property is located downstream of the City's proposed diversion point. Like some of the riparians, Wood alleges the City has the ability to discharge and divert an "unlimited" amount of water in "unspecified volumes" and at "unspecified times and intervals." These statements are completely inaccurate and do not reflect either the Application or the terms of the Draft Permit. First, the discharge of the City's developed water return flows is authorized pursuant to the TPDES Permit, and the City is limited by the TPDES Permit in both the daily average flow and the peak flow that can be discharged. Second, the accounting plan and special conditions in the Draft Permit only allow the City to divert what it actually discharges, less carriage losses. The City cannot divert water that it does not discharge pursuant to the TPDES Permit, and the amount it discharges will not only be regulated and metered pursuant to the TPDES Permit, but also metered and recorded in accordance with the accounting plan, all as required by the Draft

Permit. The authorization to discharge, including the volume, rate, and other matters associated with the TPDES Permit, are simply not relevant to this Application. Moreover, even if this alleged flooding issue was legitimately alleged, which it is not, and even if it was material to the pending Application, the Commission has noted on many occasions that it does not have jurisdiction to address property rights associated with alleged flooding.

Janes raises concerns regarding the City building up a "surplus of water" that could be diverted at a later date. This concern is not real. The City has no authorized impoundment to store the developed water return flows discharged pursuant to the TPDES Permit. Moreover, the City is limited to its diversions of this water, in accordance with the City's approved accounting plan, to only those return flows actually discharged, less carriage losses. The City has no authority, or means for that matter, to impound state water that would otherwise flow to either Janes, or Wood, for subsequent diversion.

V. CONCLUSION

In conclusion, the City's Application is simple and diversions under the Draft Permit, if granted, will have no impact on any of the hearing requestors. The Application does not seek to divert and use water native to the Brazos River Basin. The source of all water sought for diversion is effluent return flow derived from the City's use of either i) privately owned groundwater, or ii) surface water from the Canadian River Basin. Additionally, the City is limited to diverting and using only that water which it actually discharges, less carriage losses. There is no authorization proposed in the Application or the Draft Permit to divert any water which may be either unappropriated state water, or arguably state water appropriated to others, and the City is the only entity that may lawfully divert its return flow pursuant to TEX. WATER CODE §11.042(b). There are ample conditions in the Draft Permit that will protect the interests of both riparians and existing water rights holders, and the concerns raised by the hearing requestors either i) mischaracterize the Application; ii) allege conditions that cannot occur, and/or iii) appear to demonstrate a misunderstanding of their own rights to use state water pursuant to Chapter 11 of the Texas Water Code.

VI. PRAYER

The City hereby respectfully requests that the Commissioners deny all of the requests for a contested case hearing for the reasons stated herein. The City further prays that the Commissioners issue the Executive Director's Draft Permit for Water Use Permit No. 3985A, and that Application 4340A be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of December, 2010, a true and correct copy of the foregoing Applicant's Response to Motion to Strike was provided by U.S. mail, hand-delivery, electronic mail or facsimile to the persons listed below:

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