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June 22, 2012

VIA FAX

TCEQ Office of the Chief Clerk
P.O. Box 13087, MC 105
Austin, Texas 78711
Phone: 512-475-4993
Fax: 512-239-3311

RE: City of Lubbock Application for Amendment to Water Right Permit No. 3985A
SOAH Docket No. 582-11-3522; TCEQ Docket No. 2010-0837-WR (2020-02);
Exceptions.

Dear Clerk:

Enclosed please find my exceptions in regards to the above referenced matter.

Sincerely yours,



Oscar B. Jackson III

cc: Mailing list

Enclosure/obj

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

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

FORREST’S EXCEPTIONS TO THE PROPOSAL FOR DECISION

COMES NOW, Lynn Forrest (“Forrest”) and files its exceptions to the ALJ’s Proposal for Decision (“PFD”) and would respectfully show:

I. CARRIAGE LOSS ISSUE

As referenced at the bottom of page 17 in the ALJ’s PFD, one of the major issues in this case is the calculation of carriage loss. It is not disputed that the methodology for carriage loss calculation presumed a lake would exist. That lake does not exist and the calculation is erroneous. Furthermore, the Applicant did not make the witness who prepared this calculation available at trial, and the parties did not have an opportunity to cross examine this witness.

A second key issue in this case was that Protestant Forrest retained counsel late in this case and was not afforded ample opportunity to retain experts to rebut the presumption that the carriage loss calculation would be accurate. Moreover, the Applicant filed a motion to amend the procedural schedule via a statute that was amended while the case was pending, which is attached hereto as Exhibit A. The Applicant used this procedural tactic to expedite the procedural schedule to prevent the parties from performing its own carriage loss calculation in preparation for trial.

The Protestants' request the Commission take these two key factors into consideration and allow the parties to take additional evidence so that the amount of water diverted is 100% accurate with respect to carriage loss.

II. PRAYER

For the forgoing reasons, Forrest respectfully requests the Commission remand this matter to SOAH and reopen the record for additional evidence with respect to carriage loss in this case.

Respectfully submitted,

The Law Office of Oscar B. Jackson III, PLLC

By: Oscar B. Jackson III

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Attorney for Protestant Lynn Forrest

CERTIFICATE OF SERVICE

I certify that on June 22, 2012 a true and correct copy of the Protestant Forrest's Exceptions were served by fax on the following parties.

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EXHIBIT A

Mr. Hill's Direct Line: (512) 322-5855
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July 8, 2011

The Honorable Richard R. Wilfong
Administrative Law Judge
State Office of Administrative Hearings
300 West 15th Street, Suite 502
Austin, Texas 78701

VIA HAND DELIVERY

Re: City of Lubbock Application for Amendment to Water Right Permit No. 3985A
SOAH Docket No. 582-11-3522; TCEQ Docket No. 2010-0837-WR
(2020-02)

Your Honor:

Enclosed with this correspondence, please find the Applicant City of Lubbock's Request to Amend the Procedural and Prehearing Conference Schedule in the above-entitled matter. As indicated below, a copy of this transmittal and the enclosed filing is being provided to the Acting Chief Clerk of the Texas Commission on Environmental Quality, as well as to the persons identified on the official SOAH service list for this particular application.

With apologies for the rushed delivery, the request was developed in reaction to recently discovered legislative changes that appear to have implications on the schedule for this case. Given the fact that the City's direct case is due to be filed at your office on Monday, any opportunity you have to review, consider, and ultimately rule on the requested amendments in an expedited manner would be greatly appreciated.

Sincerely,



Jason T. Hill

JTH/plh
1322452
ENCLOSURE

cc: Ms. Melissa Chao, Acting Chief Clerk, TCEQ
Mr. Martin C. Rochelle, *of the firm*
Mr. Brad B. Castleberry, *of the firm*
Service List

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'S REQUEST TO AMEND PROCEDURAL AND
PREHEARING CONFERENCE SCHEDULE**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

The City of Lubbock, Applicant in the above-style and numbered contested case, submits this request to amend the procedural schedule and prehearing conference date previously established by the Administrative Law Judge through Order No. 1 and Order No. 4, and would respectfully show the following:

I. Background

On May 28, 2011, the Texas Legislature passed to enrollment House Bill 2694, relating to the continuation and functions of the Texas Commission on Environmental Quality and abolishing the On-site Wastewater Treatment Research Council (the "TCEQ Sunset Act"). The TCEQ Sunset Act was signed by the Governor of the State of Texas on June 17, 2011. Included within the TCEQ Sunset Act is a provision that amends Chapter 5 of the Texas Water Code to include a new provision, Section 5.315, to read as follows:

Sec. 5.315. DISCOVERY IN CASES USING PREFILED WRITTEN TESTIMONY. In a contested case hearing delegated by the commission to the State Office of Administrative Hearings that uses prefiled written testimony, all discovery must be completed before the deadline for the submission of that testimony, except for water and sewer ratemaking proceedings.¹

¹ Act of May 28, 2011, 82d Leg., R.S., H.B. 2694, § 10.03.

This provision clearly requires that a party's discovery of another party's case in a contested case on TCEQ-related applications (other than water and sewer ratemaking proceedings) be completed before the other party prefiles its direct case. Additionally, Section 10.05(b) of the TCEQ Sunset Act provides that the changes in law made by Article 10 thereof, including the language provided in the new Section 5.315, Water Code, are to apply to proceedings that are either "pending" or filed with the State Office of Administrative Hearings on or after September 1, 2011.² A copy of the most relevant excerpt of the TCEQ Sunset Act is attached hereto as Attachment No. 1 for the Administrative Law Judge's convenient reference.

Notwithstanding the September 1, 2011 effective date of the changes made in the TCEQ Sunset Act,³ the Texas Legislature appears to have intended for the provisions of Section 5.315, Water Code, to have at least some degree of retroactive application on cases referred by the Texas Commission on Environmental Quality ("TCEQ") to the State Office of Administrative Hearings ("SOAH") and that are pending at SOAH on September 1, 2011. The Applicant did not become aware of the provision until mere days ago. During the interim period, counsel for the Applicant have been working with the counsel for the Executive Director and the Office of Public Interest Counsel in an effort to determine the most reasonable approach to take for purposes of this contested case in light of the procedural schedule in the above-referenced and docketed matter that allows for discovery by all parties well beyond the dates required for the filing of their respective prefiled testimony.

The selection of wording used by the Texas Legislature in Sections 10.03 as well as 10.05(b) of the TCEQ Sunset Act creates enough ambiguity regarding the legislative intent to foster, potentially, several interpretations of the applicability of the provision to the schedule

² *Id.* § 10.05(b).

³ *Id.* § 11.01.

established in this particular case. However, a reasonable interpretation of the provision would require the procedural schedule of this contested case to be amended in order to satisfy the requirements of Water Code Section 5.315 on and after September 1, 2011. Accordingly, it seems most appropriate and prudent to revise the procedural schedule in a way that attempts to meet the requirements of Sections 10.03 and 10.05(b) of the TCEQ Sunset Act.

II. Request to Amend Procedural and Prehearing Conference Schedule

The procedural schedule attached hereto as Attachment No. 1, and incorporated herein by this reference for all purposes, (the "Proposed Amended Schedule") was designed to follow the most reasonable interpretation of the legislative intent of Sections 10.03 and 10.05(b) of the TCEQ Sunset Act by implementing discovery deadlines that are triggered on the date of submission of prefiled testimony. In order to ensure that parties are afforded a fair opportunity for discovery under the new standard, the Proposed Amended Schedule would require full disclosure of a party's testifying experts no later than three weeks prior to the submission of prefiled testimony. The Proposed Amended Schedule accommodates and preserves the opportunity of all parties, including the *pro se* parties if they so choose, to conduct meaningful written discovery. While the Proposed Amended Schedule would change the prehearing conference in this matter from October 11, 2011 to October 13, 2011, it would still preserve the October 18 – 21, 2011 hearing dates. The goal of the Proposed Amended Schedule is to reasonably accommodate the changes made by the TCEQ Sunset Act in a manner that preserve's all parties' ability to conduct meaningful discovery in this contested case.

Under the amended procedural schedule issued by the Administrative Law Judge in Order No. 4 in this matter, the Applicant's prefiled case-in-chief is due to be filed with the Administrative Law Judge at 3:00 p.m. on Monday, July 11, 2011. Recognizing the proximity of

this filing with the Applicant's prefiled testimony deadline, and with apologies to the Administrative Law Judge for any inconveniences that may result from the timing of this filing, the Applicant respectfully urges the Administrative Law Judge to review, consider, and agree to this request, in as expeditious a manner as practicable, in light of the Administrative Law Judge's availability.

III. The Request is Not Intended to Cause Undue Delay

The Proposed Amended Schedule is a good faith effort to reasonably comply with the changes in discovery practice ordered by the Texas Legislature through the TCEQ Sunset Act. It is not motivated by a design to create delay, but instead by an effort to reasonably comply with a law that the Legislature has passed and the Governor has signed.

IV. Certificate of Conference

Counsel for the undersigned has conferred with counsel for the Executive Director as well as counsel for the Office of Public Interest Counsel. Both parties have indicated their agreement with and support of the Proposed Amended Schedule.

Counsel for R. E. Janes Gravel Company has indicated that R. E. Janes Gravel Company does not support the Proposed Amended Schedule. Efforts to reach Lynn Forrest to discuss the matter were unsuccessful.

V. Prayer for Relief

Based on the foregoing, the Applicant respectfully requests that the Proposed Amended Schedule be adopted by the Administrative Law Judge and incorporated into the procedural

schedule for the above-referenced and numbered contested case through the issuance of an order reflecting the same.

Respectfully submitted,

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

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By: _____


JASON T. HILL

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MARTIN C. ROCHELLE

State Bar No. 17126500

**ATTORNEYS FOR APPLICANT
CITY OF LUBBOCK**

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing request was delivered by hand delivery, facsimile, or by email to the persons listed in the attached service list on this, the 8th day of July, 2011.



JASON T. HILL

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE
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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

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PRO SE REPRESENTATIVE FOR ALIGNED
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FORREST FAMILY PARTNERSHIP, MARTHA JEAN
FORREST MCNEELY, AND MARIANNE AND JOHN
LOVELESS.

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CONDITIONALLY-ADMITTED ALIGNED
INDIVIDUAL PROTESTANTS GEORGE BINGHAM,
ET AL., DON CLARK, ET AL., WILLIAM D. AND
MARY L. CARROLL, AND ROBERT STARKS

Attachment No. 1

H.B. No. 2694

1 application, the executive director or the executive director's
2 designated representative may not rehabilitate the testimony of a
3 witness unless the witness is a commission employee [~~testifying for~~
4 ~~the sole purpose of providing information to complete the~~
5 ~~administrative record~~].

6 SECTION 10.03. Subchapter H, Chapter 5, Water Code, is
7 amended by adding Section 5.315 to read as follows:

8 Sec. 5.315. DISCOVERY IN CASES USING PREFILED WRITTEN
9 TESTIMONY. In a contested case hearing delegated by the commission
10 to the State Office of Administrative Hearings that uses prefiled
11 written testimony, all discovery must be completed before the
12 deadline for the submission of that testimony, except for water and
13 sewer ratemaking proceedings.

14 SECTION 10.04. Section 5.228(e), Water Code, is repealed.

15 SECTION 10.05. (a) Section 5.115(b), Water Code, as
16 amended by this article, applies only to an application for the
17 issuance, amendment, extension, or renewal of a permit or license
18 that is received by the Texas Commission on Environmental Quality
19 on or after the effective date of this Act. An application that is
20 received before that date is governed by the law in effect at the
21 time the application is received, and the former law is continued in
22 effect for that purpose.

23 (b) The changes in law made by this article apply to a
24 proceeding before the State Office of Administrative Hearings that
25 is pending or filed on or after September 1, 2011.

26 ARTICLE 11. EFFECTIVE DATE

27 SECTION 11.01. This Act takes effect September 1, 2011.

Attachment No. 2

**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**

Proposed Procedural Schedule

Deadline / Date	Activity
August 10, 2011	Deadline for Applicant to supplement responses to written discovery as otherwise required by Rule 193.5 of the Texas Rules of Civil Procedure, including providing final supplement to its responses to requests for disclosure and otherwise supplementing any discovery responses that require it to designate its expert and fact witnesses for its direct case.
August 31, 2011	Deadline for Applicant to prefile testimony and exhibits.
August 31, 2011	Deadline for all oral and written discovery of Applicant and Applicant's witnesses. Submissions must be made so that responses are due no later than this date.
August 31, 2011	Deadline for Protestants and OPIC to supplement responses to written discovery as otherwise required by Rule 193.5 of the Texas Rules of Civil Procedure, including providing final supplement to their respective responses to requests for disclosure and otherwise supplementing any discovery responses that require Protestants or OPIC to designate their respective expert and fact witnesses for their direct cases.
September 14, 2011	Deadline for Protestants and OPIC to prefile their direct cases testimony and exhibits.
September 14, 2011	Deadline for all oral and written discovery of Protestants and OPIC and their respective witnesses. Submissions must be made so that responses are due no later than this date.
September 14, 2011	Deadline for the Executive Director to supplement responses to written discovery as otherwise required by Rule 193.5 of the Texas Rules of Civil Procedure, including providing final supplement to his responses to requests for disclosure and otherwise supplementing any discovery responses that require the Executive Director to designate his expert and fact witnesses for his direct case.
September 28, 2011	Deadline for the Executive Director to prefile his direct case testimony and exhibits.
September 28, 2011	Deadline for all oral and written discovery of the Executive Director and the Executive Director's witnesses. Submissions must be made so that responses are due no later than this date.
October 5, 2011	Deadline to file objections to, and motions to strike, any prefiled evidence.
October 10, 2011	Deadline for submitting responses to objections and motions to strike.
October 13, 2011	Prehearing conference with ALJ ruling on any prehearing motions at 9 a.m.
Tue., Oct. 18 – Fri., Oct. 21, 2011	Hearing on the merits commencing on October 18 at 9 a.m.