

SOAH DOCKET NO. 582-14-3427
TCEQ DOCKET NO. 2013-2228-MWD

APPLICATION OF DHJB	§	
	§	BEFORE THE STATE OFFICE
DEVELOPMENT, LLC FOR	§	
	§	OF
A MAJOR AMENDMENT TO	§	
	§	ADMINISTRATIVE HEARINGS
TPDES PERMIT NO. WQ0014975001	§	

PROTESTANTS’ RESPONSE TO THE COMBINED MOTION FOR EXTENSION OF TIME TO FILE EXCEPTIONS TO THE PROPOSAL FOR DECISION

TO THE HONORABLE SARAH RAMOS, ADMINISTRATIVE LAW JUDGE:

Protestants Patricia Graham, Terrell Graham, Margie Hastings, Asa Dunn, and Greater Edwards Aquifer Alliance, by and through their attorneys of record, and file this response to the Applicant’s Motion for Extension of Time.

I. Introduction

Protestants do not believe that in good faith they can agree to this motion, and accordingly oppose the motion. The motion filed by the Applicant is procedurally and substantively deficient. The motion is not filed or served on the General Counsel of the Texas Commission on Environmental Quality (“TCEQ”), as required by TCEQ Rule 80.257; the Motion requests relief from the State Office of Administrative Hearings (“SOAH”) Administrative Law Judge, when only the TCEQ General Counsel can grant the relief requested; and the Applicant failed to confer with Protestants. It is not clear that the Administrative Law Judge has jurisdiction to grant the relief requested in the Motion. Finally, the Applicant’s Motion consists only of allegations and lacks verified facts or other competent evidence in support.

II. Discussion

As described in the Applicant’s Motion, the Applicant’s Exceptions to the Proposal For Decision were not timely filed. Appl. Mot. at 1. TCEQ Rule 80.257 governs pleadings following

the proposal for decision in a contested case hearing. 30 TEX. ADMIN. CODE § 80.257. Pursuant to this rule, only “the general counsel may change the deadlines to file pleadings following the proposal for decision.” 30 TEX. ADMIN. CODE § 80.257(b). This may be done on his own motion, or at the request of a party. *Id.* Here, the Applicant’s Motion fails on its face because it seeks relief from the Administrative Law Judge, not the General Counsel of TCEQ.

SOAH Administrative Law Judges are vested with broad powers over the contested case, including the power to establish deadlines. *See* 1 TEX. ADMIN. CODE §§ 155.153 (powers and duties); 155.155 (relating to orders, including to establish deadlines). However, in any matter referred to SOAH by the TCEQ, it is the TCEQ rules that prevail when there is a conflict. 1 TEX. ADMIN. CODE §155.3(d) (“If there is any conflict between SOAH’s rules and the procedural rules of the TCEQ adopted in §155.1 of this title (relating to Purpose), the TCEQ rules will control”). Thus it is TCEQ Rule 80.257(b) that governs the relief the Applicant seeks.

Even assuming that the Applicant was intending to seek relief from the TCEQ General Counsel, instead of the Administrative Law Judge, the Motion fails in a second respect—it was not served on the General Counsel. *See* 30 TEX. ADMIN. CODE § 80.257(b) (mandating service “on the general counsel, the judge, and the other parties”).

A third deficiency with Applicant’s Motion is that the Applicant failed to confer with counsel for Protestants. The TCEQ Rule states that “the party requesting the change [in deadline] has contacted the other parties, and whether the request is opposed by any party.” 30 TEX. ADMIN. CODE § 80.257(b). Here, the Applicant’s Motion states that they attempted to confer with counsel for Protestants. *Appl. Mot.* at 4. Although the certificate of conference attached to the Motion states that the Applicant attempted twice to confer with counsel for Protestants by email, Protestants never received any such emails. Protestants communicated with counsel for OPIC and TCEQ, and discovered that the emails to Protestants’ counsel went to the wrong email account. *Exh. A. Counsel*

for Applicant appears to have inadvertently emailed Protestants' counsel at a former law firm—an email address not used since May 1, 2014. Exh. A (showing email addressed to charles@blackburncarter.com). The correct email for Protestants' counsel is charles@irvineconner.com. Protestants' counsel was not contacted by the Applicants by phone to confer on this Motion.

Finally, Protestants believe that the actual allegations in the Motion are not adequately supported. The Applicant's Motion consists solely of the allegations in the Motion and one exhibit affirming that their Exceptions were not timely received by TCEQ. The facts alleged in the Motion are not verified, are not supported by sworn affidavits, and no other competent evidence is attached to support the allegation that the upload was initiated before 5:00 pm, or that unspecified technical difficulties delayed receipt by the TCEQ filing system until 5:36 pm. Protestants note that they received an emailed copy of Applicants' Exceptions at 5:35 pm on March 30, 2015, with no statement that technical difficulties had occurred. Exh. B.

III. Conclusion

Protestants therefore respectfully urge that this Motion must be denied due to the lack of jurisdiction, and substantive and procedural deficiencies.

Respectfully submitted,

IRVINE & CONNER, PLLC

by: /s/ Charles W. Irvine
Charles W. Irvine
IRVINE & CONNER, PLLC
4709 Austin Street
Houston, Texas 77004
(713) 533-1704

Attorney for Protestants

CERTIFICATE OF SERVICE

On this 18th day of May, 2015, a true and correct copy of the foregoing instrument was electronically filed with SOAH and served on all attorneys of record by the undersigned via email and/or regular U.S. mail.

/s/ Charles W. Irvine

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General Counsel, TCEQ

EXHIBIT A

From: Ed McCarthy [<mailto:emccarthy@jacksonsjoberg.com>]

Sent: Friday, May 08, 2015 3:43 PM

To: 'Charles Irvine' (charles@blackburncarter.com); Kathy Humphreys; 'Daniel Ingersoll'; Rudy Calderon

Cc: phaag@mcginnislaw.com; Eddie R. McCarthy III

Subject: Request for Conference in DHJB Development, LLC; TCEQ Docket No. 2013-2228-MWD, SOAH Docket No. 582-14-3427

This e-mail is intended to initiate the "conference" process in connection with the attached motion for extension of time to file exceptions to the pdf. As indicated in the attached draft motion, my office initiated and thought it had timely completed the uploading of its exceptions on March 30th before 5:00pm. We learned yesterday that the file did not actually get uploaded at TCEQ until 5:36pm, so we have prepared the attached motion.

I am travelling today, and am available by Cell – (512)426-7138 – if you have any questions. I will be back in my Office on Monday. We would like to file this early next week. I appreciate your review of the motion.

Thank you.
Ed McCarthy

<DHJB Motion for Extension of Time – Conference Draft 5-8-15.docx>

From: Kathy Humphreys
Sent: Friday, May 08, 2015 4:01 PM
To: Ed McCarthy; 'Charles Irvine' (charles@blackburncarter.com); Daniel Ingersoll; Rudy Calderon
Cc: phaag@mcginnislaw.com; Eddie R. McCarthy III
Subject: RE: Request for Conference in DHJB Development, LLC; TCEQ Docket No. 2013-2228-MWD, SOAH Docket No. 582-14-3427

The Executive Director does not object to the motion.

Kathy Humphreys
Staff Attorney

From: Ed McCarthy [<mailto:emccarthy@jacksonsjoberg.com>]
Sent: Friday, May 08, 2015 3:43 PM
To: 'Charles Irvine' (charles@blackburncarter.com); Kathy Humphreys; Daniel Ingersoll; Rudy Calderon
Cc: phaag@mcginnislaw.com; Eddie R. McCarthy III
Subject: Request for Conference in DHJB Development, LLC; TCEQ Docket No. 2013-2228-MWD, SOAH Docket No. 582-14-3427

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Thank you.
Ed McCarthy

EXHIBIT B

From: Temple Noble tnoble@jacksonsjoberg.com 

Subject: DHJB Development, LLC; TCEQ Docket No. 2013-2228-MWD, SOAH Docket No. 582-14-3427

Date: March 30, 2015 at 5:35 PM

To: charles@irvineconner.com, mary@irvineconner.com, kathy.humphreys@tceq.texas.gov, phaag@mcginnislaw.com, rudy.calderon@tceq.texas.gov

Cc: Ed McCarthy emccarthy@jacksonsjoberg.com, Eddie R. McCarthy III emc@jacksonsjoberg.com

TN

Please find the Combined Exceptions to the Proposal For Decision of DHJB Development LLC and Johnson Ranch Municipal Utility District, a hard copy of which was filed with SOAH earlier today.

Thank you,

Temple Noble, Legal Assistant

JACKSON, SJOBERG, McCARTHY & TOWNSEND, L.L.P.

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Applicant's Exceptions to
PFD.pdf