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REGULATIONS DEVELOPMENT SECTION

TCEQ DOCKET NO. \_\_\_\_\_

PETITION FOR RULEMAKING § BEFORE THE TEXAS COMMISSION  
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 BY WESTERRA STONEBRIDGE L.P. § ON ENVIRONMENTAL QUALITY

**PETITION FOR RULEMAKING  
 TO CREATE AN EXCEPTION TO THE DEFINITION OF  
 “COMMERCIAL OPERATION” FOR PRE-EXISTING DAMS AND RESERVOIRS  
GOVERNED BY A FEDERAL CLEAN WATER ACT SECTION 404 PERMIT**

COMES NOW, Westerra Stonebridge, L.P. (“Westerra”) and pursuant to 30 Texas Administrative Code § 20.15, submits this its Petition for Rulemaking to the Texas Commission on Environmental Quality (“TCEQ”) to create an exception to the definition of “commercial operation” found in 30 Texas Administrative Code § 297.21(e) for pre-existing dams and reservoirs governed by a Clean Water Act Section 404 Permit issued by the United State Army Corps of Engineers to avoid issues of federal preemption. In support of this Petition, Westerra respectfully provides the following information as required by 30 Texas Administrative Code § 20.15:

**I. Petitioner’s Name and Address**

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**II. Explanation of the Proposed Rule**

This proposed rule would maintain the wildlife permit exemption for dams/reservoirs that (1) pre-existed the housing developments they are now surrounded by and that (2) are governed by a Clean Water Act Section 404 Permit that is structured to maintain pre-development

downstream flow conditions and prohibit all unauthorized activity which will destroy or adversely modify the critical habitat for various aquatic and vegetative species.

The wildlife permit exemption in Texas Water Code § 11.142(b) allows for the *construction* of a dam/reservoir without a permit if: (i) the reservoir is less than 200 acre-feet; (ii) is used for fish and wildlife purposes; (iii) is not part of a “commercial operation;” and (iv) the property on which the dam/reservoir will be constructed is *qualified open-space land* (as defined in the Tax Code).<sup>1</sup> Texas Tax Code § 23.51(1) defines “qualified open space” as real property currently devoted principally to *agricultural use* and has been for five out of the last seven years. “Agricultural use” is defined to include *wildlife management* and raising or keeping livestock. (TEX. TAX CODE § 23.51(2)). “Wildlife management” means that the land, at the time the wildlife management use began, was appraised as qualified open-space land to propagate a sustaining breeding, migrating or wintering population of indigenous wild animals for recreation. (TEX. TAX CODE § 23.51(7)).

Texas Administrative Code § 297.21(e) follows Water Code § 11.142(b), except that it defines “commercial operation” as the use of land for a housing development. TCEQ Rule § 297.21(e) was drafted to prevent residential developers from *creating* amenity lakes in new developments. However, reservoirs that pre-existed housing developments should not be penalized because they now find themselves surrounded by a growing population, especially if they are governed by a federal Clean Water Act Section 404 Permit issued by the United States Army Corps of Engineers. Such reservoirs should be eligible for the wildlife permit exemption, regardless of whether they are now located in a residential area. Certainly, the federal Clean Water Act Section 404 Permit *requires* such reservoirs to exist.

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<sup>1</sup> Notably, dams and reservoirs subject to the proposed exception would already be *constructed*.

Westerra requests that Rule § 297.21 be amended to create an exception to the definition of “commercial operation” stating that the wildlife exemption will apply to a reservoir in a housing development only if the dam/reservoir at issue pre-existed the residential development and is governed by a federal 404 Permit. A Clean Water Act Section 404 Permit requires that any activity on the property must maintain pre-development downstream flow conditions. The regulations set forth by the 404 Permit guarantee that the dam/reservoir at issue will not cause any undue harm to the downstream water rights holders. Specifically, the water flow and aquatic life movement will be the same before and after any residential construction occurs.

The federal permit also mandates, among other matters: that a mitigation plan for the area around the reservoir be created and followed; that vegetated buffers of native species be maintained around the reservoir; that no activity on the property disrupts the movement of those species of aquatic life indigenous to the water body, including those which migrate through the area; that no activity on the property destroys or adversely modifies the habitat of such species; that the property be restricted in some manner to protect and maintain the vegetated buffers; and that any activity on the property be authorized by the United States Army Corps of Engineers. Most critically, any failure to abide by the mitigation plan is a violation of the Clean Water Act, to which federal penalties will be applied.

### **III. Text of the Proposed Rule**

The “Wildlife Permit Exemption” is set forth in 30 Texas Administrative Code § 297.21(e). Westerra proposes the following additional language (underlined):

(e) In accordance with TWC, §11.142(b), a person may construct on the person's property a dam or reservoir with normal storage of not more than 200 acre-feet of water for wildlife management as defined in Texas Tax Code (TTC), §23.51(7), and for fish management purposes, excluding aquaculture or fish farming purposes, if the property on which the dam or reservoir will be constructed is qualified open-space land, as defined by TTC, §23.51. For purposes of this

subsection, normal storage means the conservation storage of the reservoir, i.e., the amount of water the reservoir may hold before water is released uncontrolled through a spillway or into a standpipe. This exemption does not apply to a commercial operation. For the purposes of this subsection, commercial operation means the use of land for industrial facilities, industrial parks, aquaculture facilities, fish farming facilities, or housing developments. However, a dam or reservoir that pre-existed the housing development in which the dam/reservoir is now located and that is governed by a Clean Water Act Section 404 Permit issued by the United States Army Corps of Engineers shall not constitute a commercial operation. The incidental use of the reservoir in a manner that does not remove the land from the definition of qualified open-space land as defined by TTC, §23.51, including using a photograph in advertising, does not constitute a use for which a permit must be obtained for an otherwise exempt reservoir.

#### **IV. Statement of Legal Authority for Proposed Rule**

The statutory provision creating the wildlife permit exemption (Texas Water Code § 11.142(b)) was adopted in 2001 during the 77<sup>th</sup> Regular Session. In 2002, TCEQ first addressed the wildlife permit exemption (in 30 TEX. ADMIN. CODE § 297.21) and specified that the exemption would not apply to housing developments. Precluding housing developments from being subject to the wildlife permit exemption is extraneous and additive to the statutory language found in the Water Code. The proposed rule change herein would be adopted as an amendment to TCEQ's "Wildlife Permit Exemption" rule found in Title 30, Part 1, Chapter 297, subchapter C "Use Exempt from Permitting."

This proposed amendment to 30 Texas Administrative Code § 297.21(e) would be adopted under the authority of the following:

- Texas Water Code §§ 5.102 and 5.103 authorize TCEQ to adopt rules necessary to carry out its powers and duties under the Texas Water Code;
- Texas Water Code § 5.013 authorizes TCEQ to control water and water rights, including the issuance of water rights permits; and
- *International Paper Co. v. Oullette*, 479 U.S. 481, 491-92 (1987) allows a federal statute to preempt state law where there is an actual conflict between the state law and federal statute such that the state law is an obstacle to the objectives of Congress (*see also English v. General Elec. Co.*, 496 U.S. 72 (1990)).

## **V. Injury or Inequity Resulting from Failure to Adopt Proposed Rule**

A long-existing dam/reservoir that has previously been exempt for domestic and livestock use should be able to maintain its exempt status when it converts from domestic and livestock to fish and wildlife purposes, even if the property is now surrounded by a housing development. Furthermore, the proposed rule requires not only that the dam/reservoir pre-existed the residential development but that it is also subject to a federal Clean Water Act Section 404 Permit issued by the United States Army Corps of Engineers.

Failure to adopt this rule will result in a significant preemption problem. Specifically, if a property owner is forced to seek a water right from TCEQ because the reservoir is not declared exempt under the wildlife management exemption, the property owner could be denied a TCEQ water rights permit and the owner's water use could be curtailed. If the water rights permit is not granted, the land owner could be forced to violate its existing federal 404 Permit. In the worst-case scenario, TCEQ could require removal of the dam, thereby subjecting the land owner to federal penalties. However unlikely this potential outcome may be, it illustrates why preemption is a real issue for these landowners forced to seek a water right because their wildlife use exemption has been denied.

The proposed rule effects only those property owners in the state who have owned a federally protected reservoir prior to the existence of a surrounding residential development. As the TCEQ Rule reads now, a landowner may be presented with the Hobson's choice of following TCEQ regulations at the risk of violating a federal permit.

The proposed rule allows the wildlife exemption to apply to a housing development if the dam/reservoir (1) pre-existed the construction of the residential development and (2) is subject to a federal 404 Permit. In no way does the approval of this amendment to the rule contradict the

Legislature's intent to prevent the creation of amenity lakes for housing developments.

**VI. Prayer**

Westerra prays that the Commission adopt this proposed rule to create an exception to the definition of "commercial operation" found in 30 Texas Administrative Code § 297.21(e) for pre-existing dams and reservoirs protected by a Clean Water Act Section 404 Permit issued by the United State Army Corps of Engineers. Westerra further prays for any and all other relief to which it is equitably entitled.

Respectfully submitted,

By:



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**ATTORNEYS FOR WESTERRA**

**CERTIFICATE OF SERVICE**

By my signature above, I hereby certify that, on this the 17<sup>th</sup> day of November, 2006, a true and correct copy of this document has been sent via hand delivery to the following:

Texas Commission on Environmental Quality  
12100 Park 35 Circle  
Building A, Room 166  
Austin, Texas 78753  
Attn: Russ Kimble