

SOAH DOCKET NO. 952-13-5210

APPLICATIONS OF END OP, L.P. FOR § BEFORE THE STATE OFFICE  
WELL REGISTRATION, OPERATING § OF  
PERMITS AND TRANSFER PERMITS § ADMINISTRATIVE HEARINGS

**END OP, L.P.’S RESPONSE TO ENVIRONMENTAL STEWARDSHIP AND THE  
OTHER LANDOWNERS’ REQUEST TO REVERSE THE ALJ’S DECISION  
ON AFFECTED PERSON AND REMAND MATTER TO SOAH**

TO LPGCD’S BOARD OF DIRECTORS:

Applicant End Op, L.P. (“End Op”) serves its response to Environmental Stewardship (“ES”), Bette Brown (“Brown”), Andrew Meyer (“Meyer”), and Darwyn Hanna’s (“Hanna”) (collectively, the “Landowners”) Request that the Lost Pines Groundwater Conservation District (the “District”) reverse the ALJ’s decision on affected person and remand the matter to the State of Office of Administrative Hearings (“SOAH”) and would show as follows:

**A. Because the District declined to consider and referred the Landowners’ standing issue to SOAH, it is improper and circumvents the Legislature’s intent for the District to review and/or overturn the ALJ’s decision on standing.**

Notwithstanding the District’s authority to determine whether the Landowners had standing to participate in this contested case hearing, the District declined to make this determination and instead expressly referred the whole matter including the Landowners’ standing issue to SOAH.<sup>1</sup> End Op and ES agreed with the District’s decision to refer the standing issue to SOAH.<sup>2</sup> In fact, ES’s counsel considered the referral of the Landowners’ standing to SOAH to be a “fairly standard practice” and “certainly not an unusual approach.” The Landowners previously sought to overturn this standard practice, to which ES openly agreed, through the guise of a certified question that the General Manager recommended be

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<sup>1</sup> Ex. A, District’s Order Referring Applications of End Op, LP for Operating Permits and Transport Permits to the State Office of Administrative Hearings, dated 06/19/13, at 2.

<sup>2</sup> Ex. B, Excerpts from the Hearing Transcript of the District’s Board Meeting on May 15, 2013, at 33:7-9, 37:12-19, 39:14-18.

denied and the ALJ did deny. The Landowners are now asking the District to ignore the ALJ's determination, based upon facts amply supported in the record, on an issue the Board declined to review and expressly requested the ALJ to determine.

When the Legislature authorized the referral of contested case hearings by a groundwater conservation district to SOAH at a party's request in Chapter 36, it sought to provide an impartial venue for contested case hearings on groundwater permits.<sup>3</sup> More importantly, although the final decision is the Board's, when the matter has been referred to the State Office of Administrative Hearings and a Proposal for Decision has been issued, Government Code Section 2001.058(e) specifically applies, limiting the circumstances that would allow the Board to Change the decision. None apply here. The Judge properly applied the law and there are no technical errors in his finds of fact, the only two reasons to justify a change in his Proposal for Decision. If the District now reviews an issue it expressly declined to consider, the Legislature's intent is circumvented.

While the Landowners are entitled to disagree with the ALJ's application of the law to the facts, such an issue is properly challenged *after* a final decision is rendered. In *Wimberley Valley Watershed Association v. Hays Trinity Groundwater Conservation District*, property owners who were denied a contested case hearing sought their remedy in district court after the district made a final decision on the permit applications.<sup>4</sup>

**B. The legal issue is whether the Landowners are affected persons not whether End Op's proposed pumping would cause drawdown.**

The Landowners argue that because they presented evidence demonstrating that End Op's proposed pumping would cause a drawdown beneath their property, the Landowners are affected

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<sup>3</sup> TEX. WATER CODE § 36.416.

<sup>4</sup> Ex. C, Plaintiffs' Original Petition (excluding exhibits). Plaintiffs in *Wimberley Valley Watershed Association* were represented by Mr. Eric Allmon who is representing ES in this matter.

persons. The legal test for whether a person may participate as a party in a contested case hearing is whether the person has a “personal justiciable interest related to a legal right, duty, privilege, power, or economic interest that is within a district’s regulatory authority and affected by a permit or permit amendment application, not including persons who have an interest common to members of the public.” TEX. WATER CODE ANN. § 36.415(b)(2). Further, because it is undisputed that any pumping will cause drawdown or impact, the evidence presented by the Landowners at the preliminary hearing certainly does not establish their status as affected persons but also fails to establish any useful evidence in evaluating whether End Op’s proposed pumping would unreasonably affect existing use (a factor considered when granting or denying a permit not determining party status).

**C. The ALJ’s Determination on the Landowners’ standing was a fact specific inquiry not subject to be over-turned by the District if the District were to review it.**

The District referred the issue of the Landowners’ standing to SOAH “because the determination of standing is a very fact-specific inquiry”<sup>5</sup> and ES agreed that “fact-specific issues were best dealt with by the ALJ at SOAH.”<sup>6</sup> The undisputed facts heard by the ALJ regarding the Landowners’ wells or lack thereof, use/non-use of groundwater and intent to use groundwater in the Simsboro were determinative of whether the Landowners met their burden under TEX. WATER CODE ANN. § 36.415(b)(2). Based upon a clear record, the ALJ concluded that the Landowners had failed to meet this burden, particularly since none of the Landowners owned a well in the Simsboro. The ALJ found that the record did not demonstrate that the

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<sup>5</sup> Ex. B, Excerpts from the Hearing Transcript of the District’s Board Meeting on May 15, 2013, at 31:19-23 (“[B]ecause in each case, [it] is going to be very fact specific. And that will provide everyone with the time to make their case about their standing.”).

<sup>6</sup> Ex. B, Excerpts form the Hearing Transcript of the District’s Board Meeting on May 15, 2013, at 39:14-18 (“if [the District is] referring it to deal with the fact-specific issues once it is at SOAH, I think that’s best dealt with by the administrative law judge than try to burden you with accepting evidence and deciding on evidence here this evening.”).

Landowners had standing to participate as parties in the contested case hearing.<sup>7</sup>

The District is only authorized to change a finding of fact or conclusion of law made by the ALJ, or may vacate or modify an order issued by the ALJ, if the District determines that:

- (1) that the administrative law judge did not properly apply or interpret applicable law, agency rules, written policies provided under Subsection (c), or prior administrative decisions;
- (2) that a prior administrative decision on which the administrative law judge relied is incorrect or should be changed; or
- (3) that a technical error in a finding of fact should be changed.<sup>8</sup>

The District must state in writing the specific reason and legal basis for any changes adopted.

The ALJ based his decision on the undisputed facts and the applicable law. There are no District rules, written policies, or prior administrative decisions that the ALJ should have considered and did not, or that he misinterpreted. There is no basis, therefore, for the District to change any of the ALJ's findings of fact or conclusions of law regarding the Landowners' party status or modify or vacate the previous orders issued by the ALJ regarding the same.

**D. The ALJ's Denial of Party Status was Not in Error.**

The ALJ denied the Landowners party status on the basis that the Landowners had not demonstrated ownership of wells or plans to exercise their groundwater rights sufficient to demonstrate a personal justiciable interest.<sup>9</sup> The ALJ did not, as the Landowners incorrectly state, conclude that the ownership of groundwater is not an interest warranting protection in the permitting process.

The ALJ's fact-specific determination is not one of first impression and does not have far

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<sup>7</sup> Proposal for Decision ("PFD"), Finding No. 17.

<sup>8</sup> Tex. Gov't Code § 2001.058(e).

<sup>9</sup> Order No. 3 at p. 11. Although Ms. Brown submitted evidence of ownership of a well, she submitted no evidence demonstrating her wells would draw from the Simsboro and no evidence on the depth or amount of use on the one operational well and no expert analysis on potential impact. *Id.* at p. 12.

reaching implications for future cases. In determining the Landowners' standing, the ALJ was not tasked with resolving the issues raised by the *Day* decision as the Landowners continue to extend and misapply the dictum in *Day* analyzing whether permit applicants satisfied the Edwards Aquifer Authority's (the "Authority") permit requirements and the Authority's denial of the permit in the amount requested constituted a "taking" to the analysis for standing of a third party seeking participation in a contested case hearing.<sup>10</sup>

Similarly, the Landowners' reliance on *Andrade* is misplaced. The standing test utilized in determining whether citizens of Travis County had standing to sue the Texas Secretary of State Andrade alleging that her certification of an electric voting system violated the Election Code and the Texas Constitution is distinct from the test utilized to establish standing of a third party to participate in a contested case hearing on a groundwater permit. In *Andrade*, the Texas Supreme Court noted that "[t]o deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody."<sup>11</sup> The distinction here is the ALJ found that none of the Landowners demonstrated an injury under the applicable test<sup>12</sup> as opposed to denying standing because too many persons were injured.

The ALJ's ruling will not create an incentive for every landowner to drill a well and pump groundwater in order to protect their interest as the precedent relied upon the ALJ is well-established and has not had that effect in other permitting contexts. The Texas legislature made it abundantly clear in Chapter 36 that the only protestants with standing to participate in a

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<sup>10</sup>*Edwards Aquifer Authority v. Day*, 369 S.W.3d 814 (Tex. 2012). The analysis in *Day* regarding whether non-use as the basis for denial of a permit application constitutes a constitutional taking without compensation has no bearing on what facts are evaluated in establishing standing (specifically, whether use or non-use establishes a legally protected interest distinct from the general public).

<sup>11</sup> *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 7 (Tex. 2010) (internal citations omitted).

<sup>12</sup> See Order No. 3, at p. 11.

contested case hearing were those that could demonstrate a specific impact unique to their ownership, not simply an “ownership” interest in the resource managed for the collective benefit of all owners.

**E. A contested case hearing occurred with regard to the issues raised by the Landowners.**

The ALJ denied the General Manager’s plea to the jurisdiction and concluded that a contested case hearing was necessary as there were issues to resolve.<sup>13</sup> Although no direct evidence of specific impacts with regard to the Landowners was presented, the record does include direct evidence of potential impacts to Aqua, the largest water utility provider in the area, and other Landowners who have a well in the Simsboro or are within one mile of End Op’s proposed well field.<sup>14</sup> The General Manager introduced substantial evidence related to the modeled impacts of proposed production from the requested permit, the same issues raised by the Landowners. The record also demonstrates that End Op’s pumping will not unreasonably affect existing groundwater and surface water users or existing permit holders<sup>15</sup> such that the Landowners who did not have wells or have not provided evidence on impacts associated with their wells cannot be unreasonably affected. The Landowners’ common interest in the ownership of groundwater, therefore, were addressed at the contested case hearing.

**Request for Relief**

End Op requests that the Board deny the Landowners’ request, adopt the ALJ’s Order Number 3 and the PFD in full, and grant End Op all other equitable relief to which it is justly entitled.

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<sup>13</sup> Transcript from contested case hearing, at 23:25-24:19.

<sup>14</sup> Transcript from contested case hearing at 77:7-78:5, 178:1-6.

<sup>15</sup> PFD, Finding No. 23.

Respectfully submitted,

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ATTORNEYS FOR END OP L.P.

**CERTIFICATE OF SERVICE**

I hereby certify that on August 6, 2014, a true and correct copy of the foregoing was served in accordance with the rules of the State Office of Administrative Hearings and the Texas Rules of Civil Procedure on the following counsel of record:

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