

Comments to Lost Pines GCD Board, October 16, 2013
By Phil Cook, Director, Lost Pines Sierra Club

I want to talk with you about recent events regarding the attempt by Landowners (otherwise known as the Protestants) to gain party status in the End Op contested case hearing requested by Aqua Water Supply Corporation.

Most of you are likely well aware that Environmental Stewardship and three other landowners (the Protestants) sought party status in the End Op contested case hearing, and, having been initially denied status by the Administrative Law Judge (ALJ Order No. 3), have attempted to appeal that decision through administrative remedies. Most recently the ALJ issued Order No. 5 that, again, denied standing to the Landowners, but, perhaps as important, denied you, the Lost Pines Board of Directors, the opportunity to make a timely decision on the matter of law at issue.

Let me just state at this point, for the record, that the ALJ's decision to deny landowners party status in a permit hearing before this District is a grave disservice to all landowners in the District who want to exercise their rights to ensure local groundwater resources are protected, and a disservice to you, the Board, by denying you the opportunity to resolve the party status issue in a timely manner. **This is something the Board needs to pay attention to.**

Let me also state, that though the ALJ and End Op disagree, most other parties and attorneys in this matter agree that the Lost Pines Board of Directors has the ultimate final authority in resolving the question of law involved in this issue. It *WAS* a question of whether the Board is able to exercise that option *NOW*, in a timely manner before the hearing has taken place, or *AT THE END*, when a reversal will cause this current hearing to be thrown out and bring about the time and cost of a rehearing. And I can assure you, on good authority, that those who have landowner interests at heart will not let final settlement of this issue go unchallenged.

Let me review for you the events of the last few weeks, which have resulted in a total of twelve (12) briefs and two (2) orders:

First, the Landowners appealed the decision to deny standing by seeking a "certified question" which would have put the question of law before this Board in a timely manner.

The questions the landowners sought to pose to the Lost Pines Groundwater Conservation District's Board is, in layman's terms: Does the ownership of real property above and within an aquifer (the ownership of groundwater) where drawdown will potentially occur as the result of a groundwater permit allowing the pumping of tens of thousands of acre-feet of water per year, constitute a legally protected ownership interest that a landowner can defend against those who wish to pump away his/her property?

Second, the ALJ placed a procedural question before the District. The General Manager responded that the rules of the District do not allow for a "certified question" but proposed, that if the ALJ saw fit, the question could be re-framed as a "proposal for decision" (PFD), which, in a similar manner, would have allowed the Board to make a timely decision on party status, thereby avoiding a potential

rehearing and the cost in time and resources that would incur. **So the District offered the “Proposal for Decision” route.**

Third, Aqua Water Supply Corporation, wishing to avoid the uncertainty of proceeding without resolution of the standing question, petitioned the ALJ to adopt the **“Proposal for Decision” route** and abate the hearing until the question is resolved.

Forth, the Landowners (Petitioners) joined Aqua’s plea and likewise requested that the ALJ take the **“Proposal for Decision” route.**

Disregarding the District, Aqua Water, and the Landowners, the Judge issued an order on Tuesday of this week denying all requests.

Why is this important? And why are those who have landowner interests at heart, so persistent?

These Administrative Orders together:

- 1) Strip landowners of their rights to protect their property. The only entity that was given standing was Aqua WSC, a water supply corporation with large well fields and pumping permits. The Administrative Law Judge (ALJ) ruled that a landowner must:
 - a) “demonstrate ownership of wells or have plans to exercise their groundwater rights,” AND
 - b) “must establish a specific injury to a personal justiciable interest” to have standing in a contested case hearing before a groundwater conservation district.

These Administrative Orders together:

- 2) Strip parties in a contested case hearing of an appeal process to obtain a final decision of law from the Board of Directors in a timely manner, and
- 3) Strip a groundwater conservation district’s board of its right to have sent and/or receive an interlocutory decision from an ALJ in a timely manner for a timely decision on the law in question.

In summary, the action of these administrative orders, if left to stand, could establish extremely narrow conditions for party status in future contested case hearings held before Lost Pines GCD and other GCDs throughout the state.

Further, these administrative orders severely limit the ability of landowners to protect their groundwater property rights by severely limiting their ability to argue the merits of their case, a right that follows from the Supreme Court *Day* decision.

And, these administrative orders severely limit the ability for GCD boards to exercise the authority granted to them by the Conservation Amendments of the Constitution and the Texas Legislature as reinforced in the *Day* decision.

These are severe results handed down by an unelected administrative law judge. They need your attention, and we, the coalition of local landowner and environmental interests, will not let this action go unchallenged when it comes before you at the end of this hearing process.