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Re: Application of End Op, LP for Well Registration, Operating Permits, and Transfer Permits; SOAH Docket No. 952-13-5210.

Dear Counselors:

Attached is Environmental Stewardship, Bette Brown, Andrew Meyer, and Darwyn Hanna's Opening Brief on Party Status and Response to Applicant's Initial Brief which was filed with SOAH today.

Thank you for your attention to this matter and please feel free to contact me if you have any questions or concerns.

Sincerely,

Alysa Baker

Alysa S. Baker
Paralegal

SOAH DOCKET NO. 952-13-5210

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

ENVIRONMENTAL STEWARDSHIP, BETTE BROWN, ANDREW MEYER AND DARWYN HANNA'S OPENING BRIEF ON PARTY STATUS AND RESPONSE TO APPLICANT'S INITIAL BRIEF

TO THE HONORABLE JUDGE O'MALLEY:

Environmental Stewardship, Bette Brown, Andrew Meyer and Darwyn Hanna (collectively, "Protestants") hereby submit this brief on their rightful status as parties to a contested case hearing on the above-listed permits.

I. PROCEDURAL BACKGROUND

The procedural background presented by End Op is largely accurate, with certain significant omissions. Subsequent to the filing of requests for party status by Protestants on May 8th and 9th, End Op, L.P. ("End Op" or "Applicant") filed a response to these requests on May 14, 2013 in which it presented the same arguments regarding the timeliness of the requests as those now presented to the ALJ. At the meeting of the District, held on May 15, 2013, the Board of Directors for the Lost Pines Groundwater Conservation District (the "District" or "LPGCD") considered those arguments, as well as the advice of the District's legal counsel and oral arguments of the parties.[1] Thereafter, the Board reached a unanimous decision that Protestants requests for party status were timely. This decision was reflected in the District's order referring the matter to the State Office of Administrative Hearings issued June 19, 2013, by which the

[1] There is a dispute between various parties and the District as to whether this gathering constituted a "meeting" or a "hearing." For purposes of the issue at hand, the administrative law judge (ALJ) need not resolve this disagreement.

District charged the ALJ with determining whether the Protestants have standing to participate as a party in a contested case hearing.[2]

II. THE DISTRICT HAS ALREADY DETERMINED THAT PROTESTANTS' REQUESTS FOR PARTY STATUS WERE TIMELY

By its June 19, 2013 order, the District instructed both the State Office of Administrative Hearings ("SOAH") and the parties that Protestants' requests for party status were timely. Under the Board's rules, a request for party status presents a separate and independent question apart from whether to grant a request for contested case hearing. LPGCD Rule 14.3(E)(1)(b). Given that the District has already decided that Protestants' requests for party status in this case were timely, it is unnecessary for the ALJ to revisit this question.

III. THE LANDOWNERS OWN THE GROUNDWATER BELOW THE SURFACE AS REAL PROPERTY. TEXAS WATER CODE §36.002

The Legislature amended the Water Code to add Section 36.002 to recognize that landowners own the groundwater below their respective properties as real property. This provision makes no distinction as to how shallow or how deep the groundwater may be or how many aquifers may exist below the property. Further, no water district may deprive or divest a landowner of those water rights. *Id.*

Having demonstrated that each of these Protestants is a landowner situated above the Simsboro Aquifer and that their water rights have not been severed or transferred, standing to challenge a "taking" of the property interest is unquestionable.

[2] End Op Ex. No. 6, p. 2.

IV. LANDOWNERS ARE NOT REQUIRED TO DEMONSTRATE USE OF THE GROUNDWATER

Substantially all, if not all, of the Applicant's attack on these Protestants' standing was that they were not using the water from the Simsboro. This attack and argument is specious and wholly without merit. This precise issue has been settled by the Supreme Court in *Edwards Aquifer Authority v. Day,* 369 S.W.3d 814 (TEX. 2012). There the Authority also argued that Day's lack of use was a legitimate basis for denying a permit. The Supreme Court, however, after an exhaustive analysis of Texas law for groundwater regulation, held that to, "forfeit a landowner's right to groundwater for non-use would encourage waste", and therefore, defeats the policy and goal of conservation. Accordingly, Protestants' standing is not affected by their use, non-use, or intended use of the groundwater.

V. A PERSON SEEKING PARTY STATUS MUST ONLY DEMONSTRATE A POTENTIAL IMPACT, AND MUST ONLY RAISE A QUESTION OF FACT ON ISSUES WHERE STANDING AND THE MERITS OVERLAP

Protestants do not dispute that obtaining party status requires demonstration that the requester possesses "a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing." Tex. Water Code § 36.415(b)(2), LPGCD Rules at 14.3.D.3. Nor do Protestants dispute that this standard reflects the "constitutionally minimal requirements for litigants to have standing to challenge governmental action in court." *City of Waco v. Texas Comm'n on Envtl. Quality*, 346 S.W.3d 781, 801-02 (Tex.App. – Austin 2011, *pet. granted*). The underlying concern is "whether the particular plaintiff has a sufficient personal stake in the controversy to assure the presence of an actual

controversy that the judicial declaration sought would resolve." *Id.* To this end, a person seeking party status must establish:

> (1) an "injury in fact" from the issuance of the permit as proposed--an invasion of a "legally protected interest" that is (a) "concrete and particularized" and (b) "actual or imminent, not conjectural or hypothetical";
>
> (2) the injury must be "fairly traceable" to the issuance of the permit as proposed, as opposed to the independent actions of third parties or other alternative causes unrelated to the permit; and
>
> (3) it must be likely, and not merely speculative, that the injury will be redressed by a favorable decision on its complaints regarding the proposed permit (i.e., refusing to grant the permit or imposing additional conditions).[3]

End Op's description of this legal standard fails to recognize the particular treatment that must be given to questions of fact related to standing that overlap with the merits of a case, however.

In *City of Waco* the Austin Court of Appeals recently addressed the significance of such an overlap in the application of Texas Water Code § 5.115, which contains language identical to Texas Water Code § 36.415(b)(2). In the *Waco* case, the Austin Court of Appeals explicitly adopted the standard applied to the consideration of a plea to the jurisdiction in Texas courts as the standard applicable to the TCEQ's determination of whether a person had demonstrated a justiciable interest. *Waco*, 346 S.W.3d at 824, *adopting Texas Department of Parks and Wildlife v. Maria Miranda and Ray Miranda*, 133 S.W.3d 217 (Tex. 2004). *Miranda,* in turn, had simply

[3] *Waco*, 346 S.W.3d at 802, *citing Brown v. Todd, 53 S.W.3d 297, 305 (Tex. 2001).*

adopted the standard applicable to the consideration of a motion for summary judgment in Texas courts. *Miranda*, 133 S.W.3d at 228. In that case, the Texas Supreme Court held that where "the evidence creates a fact question regarding the jurisdictional issue, then the trial court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the fact finder." *Id.* at 227-28. "In a case in which the jurisdictional challenge implicates the merits of the plaintiffs' cause of action and the plea to the jurisdiction includes evidence, the trial court reviews the relevant evidence to determine if a fact issue exists." *Id.* at 227.

Under this standard, the following principles must be applied to the consideration of a person's request for party status:

1. The party opposing a requester's standing has the burden of showing that there is no genuine issue of material fact related to whether a requester is an affected person.

2. Evidence favorable to the hearing requester will be taken as true.

3. Every reasonable inference must be indulged in favor of the hearing requester and any doubts resolved in its favor.

See Gaile Nixon, et al. v. Mr. Property Management Company, Inc., 690 S.W.2d 546, 548 (Tex. 1985).

Waco did not involve a decision made by the agency after an evidentiary hearing, but the underlying principle that a person need not prove the merits of their case in order to demonstrate a potential impact is not new for either the hearing request or SOAH context. For example, the Austin Court of Appeals also previously addressed the consideration of the question of affected person status after a SOAH hearing in *Heat Energy Advanced Technology, Inc. et al., v. West Dallas Coalition for Environmental Justice*, 962 S.W.2d 288 (Tex. App. – Austin 1998).

HEAT involved a request by an environmental justice coalition for a contested case hearing on the operating permit for a hazardous waste facility. Texas Natural Resource Conservation Commission ("TNRCC"), TCEQ's predecessor agency, had referred the case to SOAH for a determination on whether the coalition was an affected person entitled to such a hearing, *Id.* at 289, just as the District has referred a question of Protestants' party status to SOAH. After an evidentiary hearing, the administrative law judge concluded that the coalition had standing. However, TNRCC then substituted its own findings of fact and conclusions of law for those of the administrative law judge, and concluded that the coalition was *not* an affected person. First the district court, and then the Austin Court of Appeals held that the evidence did not support the Commission's determination of the affected person issue.

The Court of Appeals noted that one of the coalition's members had alleged that he could smell odors emanating from the facility, that the odors were stronger in the afternoon, and that the odors affected his breathing. *HEAT* at 295. The court held that these allegations, combined with acknowledgments by the facility that it did emit offensive odors, showed that the "facility had the potential to emit odors." *Id.* The court therefore rejected the Commission's ruling on the hearing request, noting that "the Commission's findings suggest that the Coalition would have had to prove the merits of its case against HEAT just to have standing to prove them again in a hearing on the merits," and that the standard for participating in judicial or administrative proceedings "does not require parties to show they will ultimately prevail in their lawsuits; it requires them to show only that they will *potentially* suffer harm or have a 'justiciable interest' related to the proceedings." *Id.* (citing Tex. Water Code § 5.115(a); *Texas Rivers Protection Ass'n v. Texas Natural Resource Conservation Comm'n*, 910 S.W.2d 147, 151, 152 n. 2 (Tex.App.—Austin 1995)) (emphasis added).

In sum, a person seeking party status in a contested case hearing must show only a potential impact in order to be deemed an affected person—the party seeking a hearing need not prove by a preponderance of the evidence that an impact will occur.

VI. PROTESTANTS HAVE DEMONSTRATED THE NECESSARY JUSTICIABLE INTEREST WITH REGARD TO END OP'S APPLICATIONS TO WARRANT ADMISSION AS PARTIES.

Protestants ownership of land over the Simsboro Aquifer, with the accompanying vested interest in groundwater which has not been severed or transferred, constitutes a legally protected interest within the regulatory framework established by Chapter 36 of the Water Code, pursuant to which this permit is being considered. At Section 36.002(c), this Code provides that, "[n]othing in this code shall be construed as granting the authority to deprive or divest a *landowner,* including a *landowner's* lessees, heirs, or assigns of the groundwater ownership and rights described by [§ 36.002]." In the Sections of Chapter 36 where the legislature specifically defines persons with standing to protect their rights, landowners are included without regard to whether they have a well. For example, Section 36.1082 allows an "affected person" to file a "petition for inquiry" with the TCEQ regarding a district's failure to implement its management plan. This statute specifically defines "affected person" to include both "an owner of land in the management area" as well as, "a person who has groundwater rights in the management area" without regard to whether such a person has a well, or has demonstrated an intent to drill a well.[4] Likewise, at Section 36.1083, Chapter 36 permits any person "with a legally defined interest in the groundwater in the management area" to file a petition with the Texas Water Development Board appealing the approval of desired future conditions jointly established by the groundwater

[4] 36.1082(1) & (5).

conservation districts in the area. One of the Protestants, Environmental Stewardship, previously pursued such a petition. While they disagreed on the substance of the petition, at no point did either the groundwater districts within Groundwater Management Area 12, or the Texas Water Development Board, question that Environmental Stewardship constituted a person with a legally defined interest in groundwater.

In the case of *Edwards Aquifer Authority v. Day,* 369 S.W.3d 814 (Tex. 2012), the Texas Supreme Court defined the extent of this legally protected interest. Analogizing the treatment of groundwater to that afforded oil and gas, the Court held that a landowner is regarded as having absolute title to the water in place beneath his or her land, and that each owner of land owns separately, distinctly and exclusively all of the water beneath his or her land, subject to the law of capture and state regulation. *Day* 831-832. Founded in this principle, the Court went on to conclude that *landowners* have a constitutionally compensable interest in groundwater,[5] and that, "one purpose of groundwater regulation is to afford each *owner of water* in a common, subsurface reservoir a fair share." *Day* at 840 (emphasis added). Given this protection, Protestants need not demonstrate the ownership of a well, or an intent to drill a well, in order to demonstrate a legally protected interest.[6] Here, however, Brown has wells which are the sole

[5] *Day* at 838.

[6] End Op also alleges that Environmental Stewardship is precluded from drilling a well pursuant to District Rules 3.1 and 8.2. While ownership of a well is not necessary to demonstrate a legally protected interest, Environmental Stewardship would note that End Op's allegation is incorrect. Rule 3.1, relied upon by End Op, would simply prevent Environmental Stewardship from drilling a well exempt from permitting – it does not prohibit the drilling of a well by obtaining an operating permit from the District. Rule 8.2 establishes buffer zones for a non-exempt well of 100 feet from the property line, and 1,500 feet from the nearest well in the Simsboro. The Environmental Stewardship property is over 1,500 feet from the nearest well in the Simsboro, so the only legal impediment to the drilling of a well into the Simsboro by Environmental Stewardship is 100 foot property-line buffer. This does not constitute a prohibition, however, as District Rule 8.3 provides a variance process by which the District may waive this required buffer. Thus, it is not true that Environmental Stewardship is "precluded" from drilling a Simsboro well on its property.

sources of water for four (4) households and their agricultural operations. Further, Meyer demonstrated his intent to drill a well to support his organic farm.

It is undisputed that Protestants own real property overlying the Simsboro aquifer from which End Op seeks authorization to pump 56,000 acre-feet per year,[7] or 18.2 billion gallons per year.[8] It is further undisputed that groundwater modeling performed by the District itself indicates that this massive amount of pumping will result in a drawdown of water within the Simsboro Aquifer extending to their respective properties.[9] George Rice, an expert witness for Protestants, testified that this drawdown would make it more difficult for each Protestant to access water in the Simsboro Aquifer, and would increase the likelihood that they would lose access to water in the Simsboro aquifer altogether as additional pumping occurs over the coming years. End Op's own expert conceded that the drawdown of water in the Simsboro beneath the properties would necessitate the drilling of a deeper well to gain the same access to water in the Simsboro as it would have without the pumping proposed by End Op. Rice further testified that there was communication between the aquifers and that a drawdown on the Simsboro would affect the aquifers above it.

This drawdown of water beneath the respective Protestants' properties constitutes an "injury in fact." They possesses a legally protected interest in the groundwater beneath their property that is concretely impacted by this drawdown, such drawdown will only occur in the

[7] End Op Ex. 3, p. 1.

[8] An acre-foot is the quantity of water which would cover one acre in water of a depth of one foot. One acre-foot is equivalent to 325,851 gallons.

[9] Exhibit ES-3.

particular area impacted by the proposed groundwater withdrawal, and there is little dispute that some drawdown will occur.

The extent or significance of this drawdown is a question that goes to the merits of the permit applications under consideration in this hearing. For example, Texas Water Code § 36.113(f) provides that groundwater permits may be issued subject to terms and conditions to minimize as far as practicable the drawdown of the water table or the reduction of artesian pressure. *see also* District Rule 5.2.C.10. Likewise, the Water Code requires that the District consider whether the permits will unreasonably affect existing groundwater and surface water resources. Tex. Water Code § 36.113(d)(2) *see also* District Rule 5.2.C.2. Under the *Miranda* standard applicable at this stage of merely determining whether Protestants have demonstrated a right to standing, the court must accept Mr. Rice's testimony as true unless it has been conclusively disproven. The record contains no such conclusive evidence.

End Op complains that Protestants' groundwater interest is one common to the general public. This argument ignores the particularized predictions of being landowners and the drawdown within the Simsboro Aquifer which has been presented. While it is true that groundwater beneath many other properties in the District will also experience drawdown in the Simsboro, this is a function of the massive quantity of water End Op proposes to withdraw rather than an indication that Protestants' interest is common with the general public. The mere fact that an interest is shared with others does not render that interest "common with the general public" so as to preclude an injury in fact for purposes of standing. As the Texas Supreme Court has noted, in approvingly quoting the United States Supreme Court, "[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 . . . where a

harm is concrete, though widely shared, the Court has found injury in fact." *Andrade v. NAACP of Austin,* 345 S.W.3d 1, 7-8 (Tex. 2010) quoting approvingly *United States v. Students Challenging Regulatory Agency Procedures,* 412 U.S. 669, 686-688 (1973) and *FEC v. Akins,* 524 U.S. 11, 24 (1998). In this manner, the Texas Supreme Court has soundly rejected End Op's contention that an interest is common with the general public merely because it is shared by many others.

This drawdown in the Simsboro is fairly traceable to the permits at issue in this proceeding. The drawdown as shown on Exhibit ES-3 for the respective properties is modeled as the direct result of the pumping proposed by End Op in the permits under consideration in this proceeding. Furthermore, it is likely that this injury would be addressed by the immediate proceeding. The drawdown caused by the End Op permits would be cumulative of drawdown resulting from other causes, including other permitted groundwater withdrawals. If End Op's permit is denied as a consequence of this proceeding, or if the quantity of groundwater authorized for withdrawal is substantially reduced as a consequence of this proceeding, the resulting cumulative drawdown in the Simsboro Aquifer beneath the Protestants' property will be reduced.

Moreover, Environmental Stewardship has demonstrated a justiciable interest related to the impact of the proposed permits on the Colorado River near the Environmental Stewardship property. The real property owned by Environmental Stewardship in Bastrop County is near the Colorado River, and this provides Environmental Stewardship with a level of access to the River that is not common to the general public. As Mr. Rice testified, the pumping to be authorized by the proposed permits would reduce the natural inflows to the Colorado River from the Simsboro aquifer. As noted above, the applicable statutes and rules provide that the impact of the permit

on surface water resources must be considered in the decision of whether to grant the permit, so this question of the extent of the impact that the permits would have on the Colorado River goes also to the merits of the question before the ALJ. Tex. Water Code § 36.113(d)(2) & District Rule 5.2.C.2. Thus, Environmental Stewardship need only raise a question of fact that the permits will impact the Colorado River – it need not demonstrate the existence of such an impact by a preponderance of the evidence at this stage. The consequent reduction of flow in the Colorado River would reduce Environmental Stewardship's ability to use and enjoy both the Colorado River, and the real property that Environmental Stewardship owns near this River.

In this manner, Protestants have demonstrated a justiciable interest in the End Op applications under consideration in this hearing. Particularly considering the *Miranda* standard that must be applied at this stage, they have demonstrated injuries in fact that are fairly traceable to the permits under consideration, and this proceeding would likely provide redress for those injuries.

VII. PRAYER

For these reasons, Environmental Stewardship, Bette Brown, Andrew Meyer and Darwyn Hanna respectfully pray:

(1) That each of the Protestants be granted party status in this proceeding; and

(2) That Protestants be granted any other relief to which they may show themselves to be entitled.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been either hand delivered, sent by U.S. Mail, Certified Mail, Return Receipt Requested, and/or Facsimile Transmission to the following service list on this 20 day of August, 2013.

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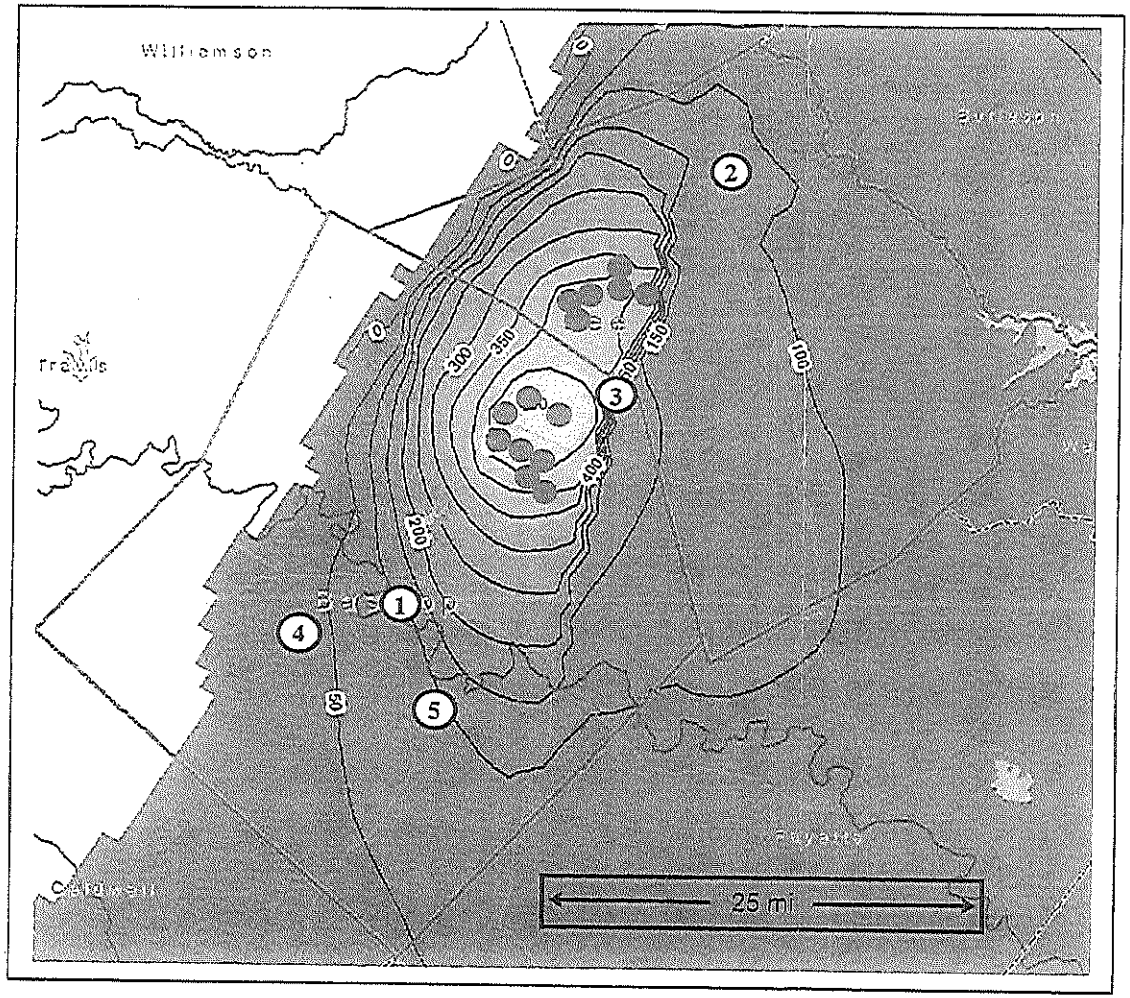

1 Environmental Stewardship

2 Brown

3 Meyer

4 Hanna 1

5 Hanna 2

Proposed End Op Well

Figure 1
Property Locations
(Adapted from LPGCD memo of March 20, 2013)

EXHIBIT
54-3