

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

**ENVIRONMENTAL STEWARDSHIP, BETTE BROWN, ANDREW MEYER, AND
DARWYN HANNA’S REPLY TO APPLICANT’S RESPONSE BRIEF ON PARTY
STATUS**

TO THE HONORABLE JUDGE O’MALLEY:

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

I. SUMMARY OF ARGUMENT

Protestants stand on the facts and arguments presented in their opening brief. Those arguments substantially address the issues raised by Applicant’s Response. However, End Op, L.P.’s (“End Op”) only new argument is that Protestants’ reliance on the decision by the Austin Court of Appeals in *City of Waco v. Texas Comm’n on Env’tl. Quality*, 346 S.W.3d 781, 802 (Tex.App. – Austin 2011), *rev’d*, No. 11-0729, slip op. at 2, 2013 WL 4493018, at *4 (Tex. Aug. 23, 2013) is misplaced given the recent reversal of this decision by the Texas Supreme Court. In fact, it is End Op’s reliance on the Supreme Court reversal of *Waco* that is misplaced. The Texas Supreme Court reversed the Austin Court of Appeals on grounds other than those relied upon by Protestants. Consequently, the principles enunciated by the Austin Court of Appeals in *Waco* as set forth in Protestants’ opening brief remain valid and relevant to the question now before the Administrative Law Judge (“ALJ”).

End Op’s attempt to limit the definition of the term “general public” to only those landowners with groundwater rights in the Simsboro aquifer is also misplaced and baseless. End Op cites no authority for its contention that groundwater ownership alone does not establish a specific justiciable interest. The reason for that is that Texas law is to the contrary. The Supreme Court in *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814 (Tex. 2012) specifically affirms that it does. That property right cannot be taken away, in whole or in part, without due process and adequate compensation.

II. IN REVERSING THE DECISION OF THE AUSTIN COURT OF APPEALS IN *CITY OF WACO V. TCEQ*, THE TEXAS SUPREME COURT DID NOT DISTURB THE AUSTIN COURT OF APPEALS’ APPLICATION OF THE *MIRANDA* STANDARD IN DETERMINING WHETHER A PERSON HAS DEMONSTRATED ADMINISTRATIVE STANDING.

As discussed in Protestants’ opening brief, the Austin Court of Appeals in the *Waco* case found that the definition of affected person at Water Code § 5.115 created the same standing test as the threshold for constitutional standing in judicial matters.¹ Considering this analogous test, the Court of Appeals adopted the standard previously enunciated by the Texas Supreme Court in *Texas Parks and Wildlife v. Maria and Ray Miranda*, thereby holding that a person seeking to demonstrate standing in an administrative proceeding need only raise an issue of fact on questions that go to both standing and the merits of an application.² The Supreme Court did not reverse or modify this standard. Here, Protestants raised a question of fact on issues relevant to both standing and the merits of End Op’s applications.

¹ *City of Waco v. Texas Comm'n on Envtl. Quality*, 346 S.W.3d 781, 802 (Tex.App. – Austin 2011), *rev'd*, No. 11-0729, slip op. at 2, 2013 WL 4493018, at *4 (Tex. Aug. 23, 2013).

² *Id.* at 824, *adopting Texas Department of Parks and Wildlife v. Maria Miranda and Ray Miranda*, 133 S.W.3d 217 (Tex. 2004).

In reversing the Austin Court of Appeals' decision in the *Waco* case, the Texas Supreme Court did not hold that the Austin Court of Appeals had erred in applying the *Miranda* standard to determinations of administrative standing. In fact, the Supreme Court found it unnecessary to reach this issue. The City of Waco had requested a contested case hearing on an application for the amendment of a water quality permit.³ By statute, no right existed to a hearing on such an application under certain conditions where the application would not increase significantly the quantity of waste authorized to be discharged and would not materially alter the pattern or place of discharge.⁴ Ultimately, the Texas Supreme Court reversed the Austin Court of Appeals because the Court found that substantial evidence supported TCEQ's determination **that no right to a hearing existed at all** with regard to the permit application being challenged by the City of Waco under Chapter 26 of the Texas Water Code, even if it were assumed that the City would otherwise qualify as an "affected person" with standing to request a contested case hearing.⁵ That is not the case before SOAH here.

Unlike the permit application at issue in the *Waco* case, there is no dispute that the right to a contested case hearing exists with regard End Op's application. In fact, End Op itself stipulated to Aqua Water's request for a contested case hearing in this matter. It cannot argue that there is no right to a contested case hearing on their permit application. In short, the principles enunciated by the Austin Court of Appeals in the *City of Waco* case as set discussed in Protestants' Opening Brief on Party Status remain valid even after the Texas Supreme Court's reversal of that decision on other grounds.

³ *Tex. Comm'n on Environmental Quality v. City of Waco*, No. 11-0729, slip op. at 2, 2013 WL 4493018, at *4 (Tex. Aug. 23, 2013).

⁴ *Id.* at *6, citing Tex. Water Code § 26.028(d).

⁵ *Id.* at *10 & *15.

Protestants have clearly established that (1) they are landowners situated above the Simsboro Aquifer and (2) their respective water rights have not been severed or transferred. This is a legally protected interest, separate and distinct from the “general public”. *City of Waco*, at 809-811.

En Op’s own permit application and studies and the District’s analysis establish the second part of the *City of Waco* list. Their own exhibit demonstrates a drawdown effect on the aquifer below each of the respective landowners which will impair their rights. This injury is (i) concrete, particularized, actual and imminent, (ii) fairly traceable to the proposed permit, and (iii) would likely be redressed through a favorable decision. Further, both End Op and Protestants’ experts testified to the drawdown effect and the injury. It is not speculation but admittedly particularized. It is these landowners that are affected, not the “general public”. They have established unique circumstances giving rise to their standing to participate in this contested case hearing.

III. 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 ___ day of August, 2013.

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