

**SOAH DOCKET NO. 952-13-5210**

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

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**Environmental Stewardship, Bette Brown, Andrew Meyer, and Darwyn Hanna’s  
(Collectively “Protestants”) Request for Certified Question or, alternatively,  
Request for Permission to seek Interlocutory Appeal of Order No. 3  
And  
Motion to Abate, or, Alternatively, Request for Provisional Party Status**

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TO THE HONORABLE JUDGE O’MALLEY:

**I. INTRODUCTION**

By Order No. 3, the administrative law judge has ruled that, as a matter of general policy, “owning land and the groundwater under the land is not sufficient to show a particularized injury” with respect to an application for an operating permit absent a demonstrated use, or intent to use, groundwater within an aquifer experiencing drawdown as the result of the application.<sup>1</sup> This decision involves a controlling question of law presented as a matter of first impression in this case that not only significantly prejudices Protestants’ ability to participate in the hearing, but also impacts all subsequent permit proceedings before the Lost Pines Groundwater Conservation District (the District). If resolution of this question is delayed until after the issuance of a final proposal for decision, then the District, the parties and petitioners for party status will be subject to the added expense and delays associated with repeating the entire hearing in order to allow

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<sup>1</sup> Order No. 3, p. 11.

Protestants the proper opportunity to participate. For these reasons, Protestants ask that the administrative law judge certify this controlling question of law to the District, or, alternatively, permit the interlocutory appeal of Order No. 3 to the District. If this request is granted, Protestants move that the proceedings be abated, or, alternatively, that Protestants be granted provisional party status while the question is pending before the District.

## II. QUESTION TO BE CERTIFIED

Does the ownership of groundwater subject to potential drawdown as the result of a groundwater operating permit application constitute a personal justiciable interest in the application?

## III. ARGUMENT

### A. **The ALJ possesses authority to certify a question of policy or law to the Lost Pines Groundwater Conservation District or permit an interlocutory appeal of Order No. 3.**

The ALJ possesses authority to certify a question of law or policy to the District. SOAH rules do not directly address this authority. Even so, when the rules are silent on such a procedural question, the ALJ is to consider authorities including the Texas Rules of Civil Procedure.<sup>2</sup>

Under the Texas Rules of Civil Procedure, the trial court may permit an appeal from an interlocutory order that is not otherwise appealable.<sup>3</sup> In doing so, the Court is to identify the controlling question of law involved where there is a substantial ground for difference of opinion, and the manner in which an immediate appeal may materially

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<sup>2</sup> 1 Tex. Admin. Code § 155.3(g).

<sup>3</sup> Tex. R. Civ. P. 168, implementing Tex. Civ. Prac. & Rem. Code § 51.014(d).

advance the ultimate termination of the litigation.<sup>4</sup> In the SOAH context, the process of granting a certified question provides relief analogous to this option available under the Texas Rules of Civil Procedure.<sup>5</sup>

The referral of a question of law by SOAH to the referring agency is all the more appropriate given SOAH's role as the arbiter of facts, while the referring agency retains ultimate authority on questions of law and policy.<sup>6</sup> As noted by TCEQ's previous Chairman Kathleen White when expressing frustration that an ALJ had not certified a question to the Commission before determining a question of policy that significantly impacted the progress of a case:

[I]ts very important to me that the Commission protect its providence as an arbiter of law and policy, and that SOAH is an arbiter of facts and produces us a robust evidentiary record on the basis of which the Commission can make those final rulings on a matter of law and state policy[.]<sup>7</sup>

While Chairman White was addressing the TCEQ context – in which the governing procedural rules establish a particular process for a certified question – the same principle applies to the consideration of a question of law in a groundwater district matter. Certainly, not all questions of law justify a certified question. But, when the answer to a legal question involves a matter of first impression, has the potential to

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<sup>4</sup> *Id.*

<sup>5</sup> 1 TAC § 155.421, 30 TAC § 80.131 (Governing certified questions in TCEQ matters), 16 TAC § 22.127 (Governing certified questions in PUC matters).

<sup>6</sup> 30 TAC § 2003.021(a).

<sup>7</sup> November 9, 2005, TCEQ consideration of the Administrative Law Judge's Proposal for Decision and Order regarding the applications of Presidio Valley Farms, Maverick County, the City of Laredo, and the City of Eagle Pass Water Works System to amend Certificate of Adjudication No. 23-952. TCEQ Docket No. 2004-1873-WR; SOAH Docket No. 582-05-4254.

impact numerous subsequent cases in a significant manner, and significantly impacts the ability of one or more parties to present its case, then a certified question is appropriate.

**B. Referral of the controlling question of law regarding the significance of an ownership interest in groundwater for immediate resolution by the District is warranted.**

The ALJ's decision on a controlling issue of law in Order No. 3, as set forth above, is appropriate for certification to the District as the decision involves a question of first impression, has far-reaching implications for future cases, potentially increases the cost of the proceedings for the District and the parties, and prejudices Protestants' ability to participate in the proceedings to such a degree as to violate Protestants' due process rights.

In addressing this legal dispute, the District must resolve issues raised by the decision of the Texas Supreme Court in *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814 (Tex. 2012), reh'g denied (June 8, 2012). By that decision, the Texas Supreme Court for the first time adopted a position that the ownership of real property includes the ownership of groundwater in place beneath the property.<sup>8</sup> The court did not condition this ownership on either the existence of a well, or an intent to drill a well. To the contrary, the Court relied upon this principle to overturn a decision in which it believed that the Edwards Aquifer Authority had *improperly* limited the rights of property owners based upon a distinction in the degree to which property owners were utilizing groundwater – much like the distinction drawn by the ALJ in Order No. 3. Neither End Op, nor the ALJ, has identified any previous instance where this principle of ownership has been applied to

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<sup>8</sup> *Day* at 831-832.

determine whether a landowner holds a personal justiciable interest in either an administrative or judicial proceeding. In this manner, the position adopted by the ALJ in Order No. 3 that “owning land and the groundwater beneath the land is not sufficient to show a particularized injury” is truly unprecedented. This lack of precedent does not, in itself, render the ALJ’s decision incorrect. But, the nature of this legal question as a matter of first impression does highlight its crucial importance.

The ALJ’s decision is all the more important because of its far-reaching impact. The principle enunciated in Order No. 3 would severely constrain the ability of landowners to participate in future permitting decisions by the District. Exceedingly few people would meet the stringent test for standing established by the ALJ – a test premised on the incorrect principle that an injury suffered by many persons cannot be a personal justiciable interest.<sup>9</sup> As previously noted by Protestants, the Texas Supreme Court has opined that an injury may be a valid basis for standing even if it is shared by many others.<sup>10</sup> Such a far-reaching question of law affecting so many constituents of the District is most appropriately determined in the first instance by the District’s Board, and not SOAH.

Furthermore, Protestants seek a certified question in light of the potentially significant increased costs for the District, the parties and the petitioners resulting from Order No. 3. Had the ALJ erred on the side of inclusion, and allowed Protestants to

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<sup>9</sup> See Order No. 3, at p. 11 (equating the “general public” with persons who individually possess property rights in groundwater subject to a potential drawdown as the direct result of a pending application).

<sup>10</sup> *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).

participate in the hearing as parties, then the District's Board could have adopted the ALJ's ultimate decision on the merits even if the Board believed that the potential depletion of groundwater owned by a requester as the result of a permitted activity did not constitute a justiciable interest. By Order No. 3, the ALJ has denied the Board such flexibility. As matters now stand, if the Board agrees with Protestants that the drawdown of groundwater owned by a petitioner for party status is a justiciable interest, then the Board will be required to *entirely repeat* the hearing process, thereby imposing duplicative costs on the parties and the District.

Finally, a certified question is justified because the ALJ's determination of the legal decision at issue so significantly prejudices Protestants' ability to participate in the proceeding. By categorically rejecting the ownership of impacted groundwater as a basis for standing, the ALJ has denied Protestants any opportunity to present evidence, conduct cross-examination or present argument at the hearing regarding End Op's application. Such rights are fundamental elements of due process where an administrative agency goes about resolving factual disputes in a matter that will impact a person's property interests.<sup>11</sup>

#### **IV. MOTION TO ABATE, OR ALTERNATIVELY, REQUEST FOR PROVISIONAL PARTY STATUS**

If the ALJ grants this request for a certified question, or grants permission for an appeal of Order No. 3 to the District Board, then Protestants move that the hearing either be abated pending the District's decision on the certified question or that Protestants be

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<sup>11</sup> *City of Corpus Christi v. Public Utility Commission*, 51 S.W.3d 231, 262 (Tex. App. – Austin, 2001) citing *Richardson v. City of Pasadena*, 513 S.W.2d 1, 3 (Tex. 1974).

granted provisional party status pending resolution of the certified question. Without such relief, Protestants' ability to participate in the proceedings will be unduly prejudiced.

## V. CONCLUSION & PRAYER

For the reasons set forth above, Protestants respectfully request that the ALJ certify the following question to the Lost Pines Groundwater Conservation District:

Does the ownership of groundwater subject to potential drawdown as the result of a groundwater operating permit application constitute a personal justiciable interest in the application?

Protestants further pray that the hearing be abated during such time as the District is considering this certified question, or, alternatively, that Protestants be granted provisional party status until final resolution of this controlling question of law by the District.

Respectfully Submitted,



Eric Allmon  
State Bar No. 24031819

*Lowerre, Frederick, Perales,  
Allmon & Rockwell*  
707 Rio Grande, Suite 200  
Austin, Texas 78701  
Telephone (512) 469-6000  
Facsimile (512) 482-9346  
*Attorneys for Environmental  
Stewardship*

*Eric Allmon (w/ Permission)*

GRISSOM & THOMPSON, LLP

Donald H. Grissom

State Bar No. 08511550

509 West 12<sup>th</sup> Street

Austin, Texas 78701

(512) 478-4059

(512) 482-8410 fax

*Attorney for Brown, Meyer and Hanna*

OWEN & BOGART

Ernest F. Bogart

State Bar No. 02556500

P.O. Box 690

Elgin , Texas 78621

(512) 281-3326

(512) 281-5094 fax

*Attorney for Brown, Meyer and Hanna*

Michele G. Gangnes

State Bar No. 0761940

1290 County Road B

Lexington, Texas 78947

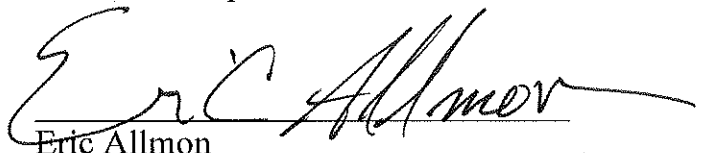
(512) 461-3179

(512) 273-0164 fax

*Attorney for Brown, Meyer and Hanna*

### **CERTIFICATE OF CONFERENCE**

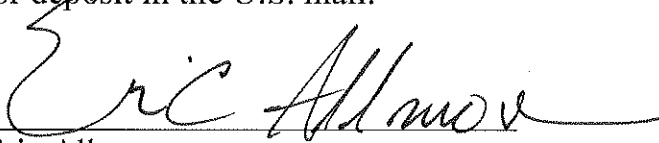
By my signature, below, I certify that on this 7<sup>th</sup> day of October, 2013, I conferred with all other parties in this matter regarding the contents of this motion. Counsel for Aqua Water Supply Corp. indicated it was supportive to this motion in all respects. Counsel for Applicant indicated it was opposed this motion. At time of signing this certificate, counsel for the General Manager has not stated its position on this motion.

  
Eric Allmon



## CERTIFICATE OF SERVICE

By my signature, below, I certify that on the 7<sup>th</sup> day of October, 2013, a true and correct copy of the foregoing document set out above was served upon those on the following service list facsimile transmission and/or deposit in the U.S. mail.

  
Eric Allmon

### SERVICE LIST

**FOR THE APPLICANT:**

Russell Johnson  
McGinnis, Lochridge & Kilgore, LLP  
600 Congress Avenue, Suite 2100  
Austin, Texas 78701  
(512) 495-6074  
(512) 505-6374 (facsimile)

Stacey V. Reese  
Stacey V. Reese Law, PLLC  
2405 W. 9<sup>th</sup> Street  
Austin, Texas 78703  
(512) 289-4262  
(512) 233-5917 (facsimile)

**FOR AQUA WATER SUPPLY CORP.:**

Michael A. Gershon  
Lloyd, Gosselink, Rochelle & Townsend,  
P.C.  
816 Congress Avenue, Suite 1900  
Austin, Texas 78701  
(512) 322-5872  
(512) 472-0532 (facsimile)

**FOR LOST PINES GROUNDWATER  
CONSERVATION DISTRICT**

**GENERAL MANAGER:**

Robin Melvin  
Graves, Dougherty, Hearon & Moody  
401 Congress Ave., Suite 2200  
Austin, Texas 78701  
(512) 480-5600  
(512) 480-5888 (facsimile)

**FOR ANDREW MEYER, BETTE  
BROWN AND DARWYN HANNA:**

Donald H. Grissom  
William W. Thompson  
509 West 12<sup>th</sup> Street  
Austin, Texas 78701  
(512) 478-4059  
(512) 482-8410 (facsimile)

Ernest F. Bogart  
P.O. Box 690  
Elgin, Texas 78621  
(512) 281-3326  
(512) 281-5094 (facsimile)

Michele G. Gangnes  
1290 County Road B  
Lexington, Texas 78947  
(512) 273-9595  
(512) 273-0164 (facsimile)