

SOAH DOCKET NO. 952-13-5210

APPLICATION OF END OP, L.P. FOR
WELL REGISTRATION, OPERATING
PERMITS, AND TRANSFER PERMITS

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

LOST PINES GROUNDWATER CONSERVATION DISTRICT'S RESPONSE TO
ENVIRONMENTAL STEWARDSHIP, BETTE BROWN, ANDREW MEYER, AND
DARWYN HANNA'S REQUESTS 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

TO THE HONORABLE ALJ O'MALLEY:

I. INTRODUCTION

In their motion, Environmental Stewardship ("ES"), Bette Brown, Andrew Meyer, and Darwyn Hanna (collectively, the "Landowners") have requested that the ALJ send the following certified question to the Lost Pines Groundwater Conservation District (the "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?"

You have asked whether the District's General Manager believes that you have the authority to certify such a question to the District's Board. Though at this stage the District's General Manager¹ continues to take no position on the merits of ES and the Landowners'

¹ Though order No. 4 requests the District's position on the motions of ES and the Landowners, the undersigned counsel represents only the District's General Manager in this proceeding. Though the Board of Directorss cannot itself, of course, take a position on this matter, it should be noted that Greg Ellis represents the Board and is monitoring these proceedings. The General Manager recommends that Mr. Ellis be included on the distribution list for this case. Mr. Ellis's contact information is as follows:

requests for party status, because he finds no authority in either the District Board's referral of the matter to you or in the applicable rules, he opposes certification of such question and respectfully requests that ES and the Landowners' motions be denied. If the ALJ finds that the party status issue should be taken up on an interlocutory basis, the General Manager suggests instead that Order No. 3 submitted to the Board as a Proposal for Decision, and would support an abatement of this proceeding pending the Board's decision.

II. THE ALJ LACKS AUTHORITY TO CERTIFY A QUESTION TO THE DISTRICT

This proceeding is pending before the ALJ pursuant to Rule 14.4 of the Rules of the District ("District Rules"), which provides that contested case hearings on applications conducted before SOAH shall be governed by Chapter 2001 of the Texas Government Code (the "Administrative Procedures Act") and the procedural rules of SOAH, as set forth in Title 1 Section 155 of the Texas Administrative Code (the "SOAH Rules").² None of the District Rules, the Administrative Procedures Act, or the SOAH Rules provides any authority or defines any procedure for certification of a question to the District. Indeed, Section 155.421 of the SOAH Rules limits certification of questions by an ALJ to those arising in contested cases referred by the Texas Commission on Environmental Quality or the Public Utilities Commission.³ Because

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² District Rule 14.4(A) (providing that District Rule 14.4 applies to Applications for which a contested case has been granted); 30 TEX. ADMIN. CODE § 155.1(a) (SOAH Rules apply to all contested case hearings conducted pursuant to the Administrative Procedures Act).

³ 1 TEX. ADMIN. CODE § 155.421. ("In cases referred by the PUC and the TCEQ, a party may move to certify an issue to the respective commission.")

the certification of a question is limited under the SOAH Rules to circumstances not present in this proceeding, and because none of the procedural rules applicable to this proceeding provides for certification of a question to the District, the ALJ possesses no authority to certify a question of law or policy to the District.⁴

III. CERTIFICATION OF THE QUESTION WOULD DIRECTLY CONTRADICT THE DISTRICT'S REFERRAL OF THE QUESTION TO SOAH

The District has previously referred to SOAH the very question that ES and the Landowners seek to have certified to the District. In its Order Referring Applications of End OP, LP for Operating Permits and Transfer Permits to the State Office of Administrative Hearings, the District ordered "that the issue of whether Environmental Stewardship, Andrew Meyer, Bette Brown, and Darwyn Hanna have standing to participate in the contested case hearing as parties *is referred to SOAH*"⁵ (emphasis added). As such, certification of the question as requested by ES and the Landowners would directly contradict the District's delegation of the determination of standing to SOAH, and is therefore inappropriate.

IV. IF PARTY STATUS IS TO BE CONSIDERED ON AN INTERLOCUTORY BASIS, THE GENERAL MANAGER SUPPORTS CONVERSION OF ORDER NO. 3 TO A PROPOSAL FOR DECISION.

To the extent that the ALJ finds that the party status issue should be considered on an interlocutory basis at all, the General Manager proposes that Order No. 3 be converted to a Proposal for Decision, and that this proceeding be abated until such time as the District Board issues such a decision.

⁴ See TEX. GOV'T CODE §§ 2001.058(b) and 2001.058(d) (providing, respectively, that a state agency may not supervise the ALJ, or attempt to influence the ALJ except by proper evidence or legal argument).

⁵ AR 001019 at ¶6.

V. CONCLUSION AND PRAYER

Because the ALJ lacks authority to certify a question to the District Board, and because certification of the question as requested by ES and the Landowners would be in direct conflict with the order of the District referring such question to SOAH, the General Manager respectfully requests that all requests of ES and the Landowners be denied. To the extent that the issue of party status is to be considered on an interlocutory basis, the General Manager request that Order No. 3 be converted to a Proposal for Decision and submitted to the District Board, with this proceeding being abated pending the Board's decision.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing was served on the counsel of record listed below via hand delivery, first class mail, facsimile, or email on this the 11th day of October, 2013, as follows:

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