SOAH DOCKET NO. 952-13-5210

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

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

TO THE HONORABEL JUDGE O'MALLEY:

Applicant End Op, L.P. ("End Op") files this response to Environmental Stewardship ("ES"), Bette Brown ("Brown"), Andrew Meyer ("Meyer"), and Darwyn Hanna's ("Hanna") (collectively, "Protestants")[1] Opening Brief on Party Status in this proceeding referred by the Lost Pines Groundwater Conservation District (the "District") to the State of Office of Administrative Hearings ("SOAH") and would show as follows:

Summary of the Argument

The Legislature has empowered groundwater districts to regulate and require permits for the exercise of groundwater rights by landowners. Exercise of these rights must comply with district requirements. Recognizing that contested case hearings were expensive and time consuming, the legislature provided a very limited process to seek a contested case hearing requiring that the protestant demonstrate that it could be adversely affected by the permit in a manner not shared by all landowners. End Op's applications meet all of the requirements of the District's Rules and were recommended for approval by the District's General Manager. To require a contested case hearing, the party must timely file a request and demonstrate a specific, not shared by all landowners, injury traceable to the permit if granted and redressable in this

[1] Although Frank D. and Janet Brown and Madeline B. and Gary Stifflemire initially filed requests for party status, they failed to appear at the preliminary hearing on August 12, 2013, thereby waiving their right to request party status and participate in this proceeding.

process. The Protestants failed to follow the process, seek only to oppose the requested permit, claim that their ownership of property gives them standing and do not seek relief in the form of permit conditions to prevent injury specific to them. Protestants own pleadings acknowledge that property ownership includes ownership of and the right to produce groundwater. End Op owns the groundwater rights beneath approximately 17,000 acres of land. The real question is what permit conditions should be imposed to protect against a specific, demonstrable injury in fact caused by the production, as opposed to general opposition to the system-wide impact of the exercise of landowners' rights. Drawdowns will occur because of existing pumping (not just End Op's pumping). The District's rules and permit requirements were established to manage the impact of those drawdowns for the benefit of all landowners. End Op has complied with all District rules.

The Legislature recognized, in providing for regulation of a landowner's groundwater rights, that the regulated community are the landowners with groundwater rights. Groundwater ownership alone does not establish a specific justiciable interest necessary to participate in a contested case hearing. The standing analysis requires that a person must show an injury to that interest redressable through permit conditions. Protestants who do not own wells fail to establish a legally protected interest that may give rise to a personal justiciable interest and all Protestants fail to show injury. For these reasons, the Protestants' requests should be denied.

I. The District Exceeded Its Authority When It Purported to Declare the Protestants' Requests Timely and an ALJ Has Authority to Determine Timeliness.

As thoroughly set out in Applicant's Initial Brief on Various Landowners' Improper and Untimely Requests for Party Status and Standing, the District did not have the authority to designate as a party in this proceeding a person who did not file a timely request for a contested case hearing. The Protestants rely on the District's Rule 14.3(E)(1)(b) as the basis for their

contention that "a request for party status presents a separate and independent question apart from whether to grant a request for a contested case hearing." This interpretation ignores the title of the rule's subsection ("Consideration of request for contested case hearing") and the language in 14.3(E)(1) stating that a timely-filed request for a contested case hearing is required before the District may designate parties. The Protestants' failure to identify any authority specifically supporting their position combined with the fact that the only authority granting such a right (section 80.109 of the Texas Administrative Code) does not apply, speaks for itself. Notwithstanding Protestants' contentions, it is absolutely necessary and within the ALJ's authority to revisit the timeliness question as the District exceeded its authority. TEX. ADMIN. CODE §§ 155.153(b)(6), 155.155(a)(6).

II. Protestants have misconstrued the standing test set out in section 36.415 as interpreted in *City of Waco* in a desperate attempt to establish standing.

Protestants have misconstrued the standing test set out in section 36.415 as analyzed by the Austin Court of Appeals in the *City of Waco v. Tex. Comm'n on Envt. Quality,* 346 S.W.3d 781 (Tex. App.—Austin 2011, *rev'd*, slip op. No. 11-0729 (8/23/13) in the following ways: (1) groundwater ownership alone is not sufficient to establish standing; (2) non-use of groundwater is a relevant fact in the standing analysis; and (3) an injury-in-fact that is traceable and redressable is the standard as opposed to groundwater system wide effects.

A. Groundwater ownership alone is not sufficient to establish standing.

The Protestants confuse groundwater ownership as a real property interest under section 36.002 with the injury-in-fact requirements necessary to establish standing under section 36.415(b)(2). Although section 36.002 mirrors the common law that a landowner owns the groundwater beneath the property, it does not establish the requirements for standing. Although section 36.002 recognizes the interplay between groundwater ownership and groundwater

regulation, it is only relevant to standing by identifying landowners as the regulated community. The *City of Waco* case clearly establishes that groundwater ownership alone does not confer standing. In the *City of Waco*, the Austin Court of Appeals determined that a combination of the City's ownership, use of the water as the sole supply for its municipal water supply, and investment in water treatment established the City's legally protected interest that may give rise to a specific justiciable interest. *Id.* at 809 ("These undisputed facts establish, as a matter of law, the type of interest, rooted in property rights, that constitute legally protected interests, distinct from those of the general public."). It should be noted that reliance on this opinion is misplaced, given the Texas Supreme Court's reversal of this decision (cite). The Supreme Court found that given the limited (by statute) authorization for contested case hearings the City was not entitled to seek a contested case hearing, very analogous to the situation in this proceeding. Like in *Waco*, §36.415(b)(2) limits who may seek contested case hearing. The Supreme Court specifically found that the statute did not authorize a contested case hearing, even if they city demonstrated some special interest.

B. Non-use of groundwater is a relevant fact in the standing analysis.

Protestants extend and misapply the dictum in *Day* analyzing whether the Authority's denial of the permit in the amount requested constituted a "taking" to the analysis for standing of a third party seeking participation in a contested case hearing. *Edwards Aquifer Authority v. Day,* 369 S.W.3d 814 (Tex. 2012). *Day* addresses whether landowners have an interest in groundwater that is compensable under the takings clause of the Texas Constitution, among other related issues. *Id.* *Day* does <u>not</u> address <u>*or*</u> even mention the factors necessary for a third party to participate in a contested case hearing on an applicant's permit. The Protestants' extension and misapplication of what they refer to as a holding in *Day* is not applicable here.

The analysis in *Day* regarding whether non-use as the basis for denial of a permit application constitutes a constitutional taking without compensation has no bearing on what facts are evaluated in establishing standing (specifically, whether use or non-use establishes a legally protected interest distinct from the general public).

C. Standing is established when there is a concrete and particularized, actual or imminent injury-in-fact that is traceable and redressable.

Protestants' argument that they must show only a potential impact to groundwater levels to establish standing and need not prove that a specific injury to their exercise of their groundwater rights will occur oversimplifies the standing test. *City of Waco* identifies a two-step process for analyzing standing. *Id.* at 810. The party must establish that it has the legally protected personal justiciable interest and must also demonstrate injury to its legally protected interest. *Id.* at 809-811. Protestants Environmental Stewardship, Hanna and Meyer have not established a legally protected interest, separate and distinct from other landowners, because the undisputed record establishes that they do not own wells. The injury they complain of is common to the landowner community. To establish injury in fact to a legally protected interest, the party must show an injury that is (i) concrete and particularized and actual or imminent, (ii) fairly traceable to the proposed permit as opposed to the independent acts of third parties or unrelated causes, and (iii) it would be likely and not merely speculative that the injury would be redressed through a favorable decision on the complaint. *Id.* at 810.

City of Waco expressly dismisses that "allegations or proof of *some* or *any* 'potential' for harm, however remote, are sufficient" and instead, expressly states that the "required 'potential harm' ... must be more than speculative." *Id.* at 805. The Austin Court of Appeals applied the injury requirement laid out in the *City of Waco* to two predecessor cases, *Heat* and *United Copper,* and found the holdings in *Heat* and *United Copper* to be consistent with the requirement

laid out in the *City of Waco. Id.* at 805-806; *United Copper Industs., Inc. v. Grissom*, 173 S.W.3d 797 (Tex. App.—Austin 2000, pet. dism'd); *Heat Energy Advanced Tech. v. West Dallas Coalition for Envt. Justice,* 962 S.W.2d 288 (Tex. App—Austin 1998, pet. denied).

In these two cases, the injury or "potential harm" that conferred standing was established through proof of potential injury unique to each complainant and different from the general public. In *United Copper,* the injury that conferred standing was data indicating that lead and copper particulate would increase at complainant's home and his son's school ***combined*** with the fact that complainant and his son suffered from serious asthma. *United Copper*, 17 S.W.3d at 803-804. In *Heat,* the injury that conferred standing was established through facts that the facility emitted odors **combined** with the allegations that the complainant's house was very close to the factory and complainant could detect odors. *Heat,* 962 S.W.2d at 295. Protestants have not presented such specific, unique injuries nor does the record support any finding of such specific injury.

Protestants must establish a concrete and particularized, actual or imminent injury that is traceable and redressable by presenting evidence of an injury unique to each Protestant as the complainants in *United Cooper* and *Heat* did, and Protestants cannot. For example and set out more specifically below, no Protestant has established that his or her property is uniquely situated near End Op's such that he/she would experience an injury other than one common to the general public. In fact, under the District's Rules, End Op was not required to give any Protestant notice of its applications as no Protestant is an adjacent property owner or a person with a registered or permitted well within 5,000 feet including Brown's unregistered wells that are more than 7 miles from End Op's well site. Protestants, therefore, cannot establish unique circumstances regarding location or impact as set out in *United Copper* and *Heat*.

III. No Protestant can establish an injury in fact that is concrete and particularized, actual or imminent, traceable and redressable.

Protestants identify two provisions in chapter 36, section 36.1082 and section 36.1083, as support for their argument that land ownership is sufficient to confer standing. Sections 36.1082 and 36.1083 establish processes for review of district wide actions affecting all landowners and grant those landowners the right to initiate proceedings to review those actions. Sections 36.1082 and 36.1083 recognize that landowners generally are affected by the implementation of a management plan (section 36.1082) and setting of DFCs as both apply to the landowner regulated community regardless of use. The Legislature established processes by which members of the regulated community as a whole could seek review of decisions affecting all landowners. The Legislature used strikingly different language in describing the requirements for participation in a contested case hearing.

The question to be address in a contested case hearing is whether the application of the District's rules are inadequate to protect some peculiar special interest that should be addressed in permit conditions. When presented with a specific injury uncommon to the regulated community as a whole, the District has an opportunity to redress it in permit conditions. In contrast, the injury that Protestants claim is nothing more than impact of the District's rules on the groundwater resource in general. Impacts on the groundwater resource in general are addressed through the mechanisms provided under sections 36.1082 and 36.1083 by filing a petition of inquiry regarding a district's compliance with its management plan or appealing the District's desired future conditions.

The fact that ES participated in the processes under section 36.1082 and 36.1083 as a landowner with no well without complaint demonstrates this fundamental difference between the processes. It certainly is not persuasive on whether ES has standing to participate in a contested

case hearing on a particular permit. In other words, although ES may be an affected person under section 36.1082 and a person with a legally defined interest in the groundwater management area under section 36.1083, these facts alone and the different language under section 36.415 necessitate a different analysis to confer standing.

ES is not even close to proving a specific injury in fact that is traceable and redressable. First, because ES does not own a well and has no use, ES does not have even have the requisite legally protected interest that may give rise to a personal justiciable interest as laid out in the *City of Waco*. Second, ES has no specific injury that is traceable and redressable and not hypothetical. As Protestants' expert conceded, existing pumping can cause drawdowns and no specific analysis was done with regard to each Protestant's property regarding any impacts traceable to End Op and specific to any Protestants' property. Finally, the undisputed record establishes that ES cannot drill a well that complies with District rules. It is impossible for the claimed drawdown impacts to adversely affect ES's groundwater ownership interests when they cannot drill a groundwater well.

Any hypothetical impact on surface flow would be an impact on the general public regardless of groundwater ownership. ES's argument, "I can see the Colorado River from my property so I have standing" reveals how absurd its claim of standing is.

Just like ES, Meyer and Hanna do not have wells. Hanna sees no need to drill a well so long as Aqua Water Supply Corporation is his service provider and Meyer has not filed permit applications and has made no plans to do so. Thus, the same arguments made regarding ES lacking a legally protected interest that may give rise to a personal justiciable interest and a specific injury apply to Meyer and Hanna.

Although Brown has two wells, neither are registered with the District nor monitored by the District's Well Watch program, and the hand-dug well is not operational. Brown's alleged current use may help her establish a legally protected interest that may give rise to a personal justiciable interest as outlined in the *City of Waco,* but Brown must still establish a specific injury. Despite having an operational well that allegedly services four households, Brown provided no evidence on the amount of use or depth of the operating well nor has her expert conducted any analysis with regard to potential impact on Brown's well likely to be caused by End Op's permits. Given the depth of the wells of Brown's neighbors and that one is hand-dug, Brown's wells are not in the Simsboro formation. Brown, therefore, has submitted no evidence of any specific injury.

A general allegation that drawdown will occur in the Simsboro if End Op's applications are granted is merely a prediction based upon certain inputs into an uncertain mathematical model and does not per se establish specific injury for a non-well owner or a well-owner producing groundwater from an entirely different formation. The argument that drawdown of water in the Simsboro would necessitate the drilling of deeper wells is inconsistent with the undisputed record. As End Op's expert testified, if a well were drilled in the Simsboro, which is not the case for any Protestant, drawdown would not require drilling a deeper well as any drawdown would occur within the casing (i.e., the Simsboro formation does not move). Protestants' alleged injury is not just shared by many others, but by the entire regulated community of landowners within the District's jurisdiction. End Op does not contest Aqua's standing to request a contested case hearing. Aqua owns groundwater production wells completed in the Simsboro formation. It is precisely this type of proof required to demonstrate standing. Aqua's issues, if any, can be addressed through permit conditions. Thus, End Op

concedes that Aqua, a well owner situated in End Op's well field in Bastrop County, possesses the requisite legally protected interest and specific injury necessary to protest.

IV. Request for Relief

End Op respectfully requests the following relief:

(1) declare the Landowners' Requests for Party Status improper and/or untimely;

(2) deny the Landowners' Requests for Party Status either because they were improper or untimely or for lack of standing;

(3) upon final consideration of End Op's Applications, grant permits as recommended by the District's General Manager; and

(4) such other and further relief to which End Op is entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing ***Applicant's Response to Environmental Stewardship, Bette Brown, Andrew Meyer and Darwyn Hanna's Opening Brief on Party Status*** was filed electronically and hand-delivered to SOAH, and then sent to the following at the addresses or emails below, on August 23, 2013.

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