

2013 OCT 11 PM 4:51 SOAH DOCKET NO. 952-13-5210

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

**APPLICANT'S RESPONSE TO 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**

TO THE HONORABLE 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") 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 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 Response

The Legislature in Chapter 36 of the Texas Water Code ("Chapter 36") has empowered groundwater districts to require permits to produce groundwater and provided a very limited process authorizing a contested case hearing on such applications. There is no mechanism for appeals, certification of "questions" or abatement in Chapter 36, the District's rules or SOAH's rules after decisions concerning a party's ability to meet the requirements necessary to be a party to a contested case hearing. Protestants are seeking interlocutory relief when there is none available because Protestants prefer to have the question decided again under the glare of local influence—precisely the influence the Legislature had in mind when it authorized referral to an impartial venue at SOAH, at a party's request. Protestants' intent is to delay or increase

expenses and all of Protestants' alternatives would do one or both at great prejudice to End Op.

A. The District referred Protestants' standing issue to SOAH and referring it back to the District circumvents the Legislature's intent and is not authorized by statute.

Notwithstanding the District's authority to determine whether Protestants had standing to participate in this contested case hearing, the District declined to make this determination and instead expressly referred the whole matter, including Protestants' standing issue, to SOAH.¹ End Op and ES agreed with the District's decision to refer the standing issue to SOAH.² In fact, ES's counsel considered the referral of Protestants' standing to SOAH to be a "fairly standard practice" and "certainly not an unusual approach." Protestants now seek to overturn this standard practice, to which ES openly agreed, through the guise of a certified question. Certifying Protestants' purported question to the District is effectively referring the standing issue back to the District after the District declined to make the determination and doing so circumvents the Legislature's intent and violates applicable statutes.

When the Legislature authorized the referral of contested case hearings by a groundwater conservation district to SOAH at a party's request in Chapter 36, it sought to provide an impartial venue for contested case hearings on groundwater permits.³ If Protestants' purported question is certified to the District, Protestants get a second bite at the apple at the District with the glare of local influence—the same potential influence the Legislature intended to prevent. In addition to circumventing the Legislature's intent, referring the standing issue back to the

¹ Ex. A, District's Order Referring Applications of End Op, LP for Operating Permits and Transport Permits to the State Office of Administrative Hearings, dated 06/19/13, at 2.

² Ex. B, Excerpts from the Hearing Transcript of the District's Board Meeting on May 15, 2013, at 33:7-9, 37:12-19, 39:14-18.

³ TEX. WATER CODE § 36.416.

District exceeds the authority in Chapter 36 because it does not give the District the ability to review an ALJ's rulings other than a proposal for decision.⁴

Even if the District had authority to review an ALJ's ruling prior to a proposal for decision, the District could only do so in accordance with section 2001.058 of the Texas Government Code ("Section 2001.058").⁵ Section 2001.058 prohibits the District from supervising the ALJ or attempting to influence the finding of facts or the ALJ's application of the law without proper evidence or legal argument.⁶ Because Protestants seek to gain party status by changing the ALJ's ruling via a certified question that allows no input from the applicant, it is very likely the District, even unintentionally, could act in a supervisory role or influence the ALJ's findings of facts or the application of the law in its response to the certified question. Because the District declined to determine standing and referring the purported question back is not authorized, all of Protestants' motions should be denied.

B. Because there is no "controlling question of law" or policy to refer and Protestants have a proper remedy, all of Protestants' motions should be denied.

There is no "controlling question of law" or policy to refer to the District. The applicable law is undisputed as End Op and Protestants have agreed that Section 36.415 of the Texas Water Code and case law interpreting same (e.g., the *City of Waco*)⁷ is the law setting out the

⁴ TEX. WATER CODE § 36.4165. After a district has contracted with SOAH for a contested case hearing, the District is given the authority to make a final decision on the ALJ's proposal for decision. Because a district only has the authority expressly granted to it in Chapter 36, a district does not have the authority to review an ALJ's rulings other than a proposal for decision. *cf. Guitar Holding Co. v. Hudspeth County Underground Water Conserv. Dist. No. 1*, 263 S.W.3d 910, 918 (Tex. 2008) (District has only the authority granted in chapter 36).

⁵ TEX. WATER CODE § 36.4165.

⁶ TEX. GOV'T CODE § 2001.058(b), (d).

⁷ *City of Waco v. Tex. Comm'n on Env't. Quality*, 346 S.W.3d 781 (Tex. App.—Austin 2011, *rev'd on other grounds*, opinion dated 8/23/13). See also *United Copper Indus., Inc. v. Grissom*, 173 S.W.3d 797 (Tex. App.—Austin 2000, *pet. dismissed*); *Heat Energy Advanced Tech. v. West Dallas Coalition for Env't. Justice*, 962 S.W.2d 288 (Tex. App.—Austin 1998, *pet. denied*).

requirements necessary to establish standing.⁸ The facts regarding Protestants' wells or lack thereof, use/non-use of groundwater and intent to use groundwater in the Simsboro are undisputed. The ALJ merely applied the facts to the law and issued a ruling. The ALJ hearing evidence and applying the facts gleaned from the evidence to the applicable law should come as no surprise to the District or Protestants as both acknowledged that the determination of standing would be a fact specific inquiry. In fact, the District's reasoning in referring the Protestants' standing issue to SOAH was "because the determination of standing is a very fact-specific inquiry"⁹ and ES agreed that "fact-specific issues were best dealt with by the ALJ at SOAH."¹⁰

While Protestants are entitled to disagree with the ALJ's application of the law to the facts, such an issue is properly challenged *after* a final decision is rendered. In *Wimberley Valley Watershed Association v. Hays Trinity Groundwater Conservation District*, property owners who were denied a contested case hearing sought their remedy in district court after the district made a final decision on the permit applications.¹¹ Because no controlling question of law exists and Protestants have a remedy, Protestants' motions should be denied.

C. Because there is no authority for any of the relief Protestants seek, all motions should be denied.

Despite Protestants' contention that SOAH's rules do not directly address the issue of whether the ALJ has authority to certify a question or permit an interlocutory appeal, SOAH's rules do address these issues. Rule 155.421 (in SOAH's general procedural rules) expressly

⁸ See Protestants' Opening Brief on Party Status and Response to Applicant's Initial Brief, p. 4.

⁹ Ex. B, Excerpts from the Hearing Transcript of the District's Board Meeting on May 15, 2013, at 31:19-23 ("[B]ecause in each case, [it] is going to be very fact specific. And that will provide everyone with the time to make their case about their standing.").

¹⁰ Ex. B, Excerpts from the Hearing Transcript of the District's Board Meeting on May 15, 2013, at 39:14-18 ("if [the District is] referring it to deal with the fact-specific issues once it is at SOAH, I think that's best dealt with by the administrative law judge than try to burden you with accepting evidence and deciding on evidence here this evening.").

¹¹ Ex. C, Plaintiffs' Original Petition (excluding exhibits). Plaintiffs in *Wimberley Valley Watershed Association* were represented by Mr. Eric Allmon who is representing ES in this matter.

prohibits certification of questions unless the referring agency is TCEQ or PUC.¹² As noted by Protestants, SOAH's general procedural rules do not contemplate interlocutory appeals. Rule 80.131 (in SOAH's rules for proceedings referred by TCEQ) permits interlocutory appeals only on jurisdictional issues.¹³ Rule 22.127 (in SOAH's rules for proceedings referred by PUC) does not contemplate interlocutory appeals.¹⁴ SOAH's rules, therefore, clearly indicate that the ALJ cannot certify a question to the District because TCEQ and PUC were not the referring agencies and an interlocutory appeal is not available because this is not a proceeding referred by TCEQ in which there is a jurisdictional issue.

Even if SOAH's rules contemplated certification of questions in groundwater permit proceedings, which they do not, the certified questions would be governed by the rules of the PUC and the TCEQ.¹⁵ Rule 80.131 in TCEQ proceedings grants the ALJ discretion to certify a question to TCEQ only if the question involves one of policy, jurisdiction or the imposition of sanctions, none of which apply here.¹⁶ Rule 22.127 in PUC proceedings permits certification on issues that involve an ultimate finding of compliance with a standard the determination of which is committed to the discretion of PUC or the PUC's interpretation of its rules and applicable statutes, among others, all of which do not apply.¹⁷ Because the purported question is not one of policy, jurisdiction, imposition of sanctions, an ultimate finding of compliance, or an interpretation of the District's rules, there is no basis under any SOAH rule to certify Protestants' purported question. Further, even if certification was permitted, it is within the ALJ's discretion

¹² 1 TEX. ADMIN. CODE § 155.421.

¹³ 30 TEX. ADMIN. CODE § 80.131.

¹⁴ 16 TEX. ADMIN. CODE § 22.127.

¹⁵ 1 TEX. ADMIN. CODE § 155.421.

¹⁶ 30 TEX. ADMIN. CODE § 80.131(b).

¹⁷ 16 TEX. ADMIN. CODE § 22.127(a)-(b).

to decline to certify a question.¹⁸ Protestants' reliance on former Chairman White's alleged statement of frustration with an ALJ's failure to certify a question is not binding or even authoritative given the ALJ's discretion to decline and that this is not a TCEQ proceeding.

Not only do SOAH's rules fail to provide authority for an ALJ to certify a question to the District or permit an interlocutory appeal to the District, Chapter 36 of the Texas Water Code also does not provide mechanisms for certification of questions or interlocutory appeals. Further, and unlike the timeliness of requests for party status, the District's rules make no reference to certified questions or interlocutory appeals.

Protestants' reliance on and failure to cite to any authority applying Texas Rule of Civil Procedure 168 and section 51.014 of the Texas Civil Practice and Remedies Code speaks for itself. There is no authority because they do not apply. An ALJ in a SOAH proceeding is to construe SOAH's rules to ensure the just and expeditious determination of every matter referred to SOAH and should only look to the Texas Rules of Civil Procedure if there is a contested procedural issue that is not susceptible to resolution by reference to the APA, other applicable statutes, SOAH's general rules, and case law.¹⁹ SOAH's rules, therefore, should be construed to preclude certification, an interlocutory appeal, and abatement to ensure the just and expeditious determination of this matter and the Texas Rules of Civil Procedure never come into play as the issue is not a procedural one. Even if it were procedural, the issue is clearly resolved by referral to SOAH's rules, which as previously discussed, prohibit certification and interlocutory appeals

¹⁸ 30 TEX. ADMIN. CODE § 80.131(b) ("On a motion by a party or on the judge's own motion, the judge *may* certify"); 16 TEX. ADMIN. CODE § 22.127(a) ("The presiding officer *may* certify").

¹⁹ 1 TEX. ADMIN. CODE § 155.3(g).

in groundwater permit proceedings. Even if Rule 168 and section 51.014 applied, which they do not, the ALJ has discretion to decline to certify a question or permit an interlocutory appeal.²⁰

Lastly, SOAH's rules, Chapter 36 and the District's rules provide no authority justifying abatement. For these reasons, none of the relief Protestants seek is authorized and all motions should be denied.

D. Putting aside the lack of authority to certify, appeal, or abate, a referral to the District is not otherwise warranted.

The ALJ's fact-specific determination is not one of first impression and does not have far reaching implications for future cases. In determining Protestants' standing, the ALJ was not and the District would not be tasked with resolving the issues raised by the *Day* decision as Protestants continue to extend and misapply the dictum in *Day* analyzing whether permit applicants satisfied the Edwards Aquifer Authority's (the "Authority") permit requirements and 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.²¹

Similarly, Protestants' reliance on *Andrade* is misplaced. The standing test utilized in determining whether citizens of Travis County had standing to sue the Texas Secretary of State Andrade alleging that her certification of an electric voting system violated the Election Code and the Texas Constitution is distinct from the test utilized to establish standing of a third party to participate in a contested case hearing on a groundwater permit. In *Andrade*, the Texas Supreme

²⁰ Tex. R. Civ. P. 168 ("On a party's motion or on its own initiative, a trial court *may* permit an appeal from an interlocutory order that is not otherwise appealable...."); Tex. Civ. Prac. & Rem. Code § 51.014(d) ("On party's motion or on its own initiative, a trial court in a civil action, *may*, by written order, permit an appeal from an order that is not otherwise appealable if...").

²¹ *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814 (Tex. 2012). 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).

Court noted that “[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.”²² The distinction here is the ALJ found that none of the Protestants demonstrated an injury under the applicable test²³ as opposed to denying standing because too many persons were injured. Because the ALJ has granted Aqua standing, End Op’s applications will not go unquestioned and all of Protestants’ motions should be denied.

E. Abatement is merely sought to delay or increase expenses.

If the ALJ grants Protestants’ request for certification or interlocutory appeal, abatement of the current proceeding, as previously mentioned, is not authorized. Further, abatement will further delay final resolution on End Op’s applications, which have been pending before the District for over 6 years. If there is a certification or appeal, End Op’s expenses will increase significantly.

Request for Relief

End Op respectfully requests the following relief:

- (1) deny Protestants’ request for a certified question;
- (2) deny Protestants’ request for permission to seek an interlocutory appeal of Order No. 3;
- (3) deny Protestants’ request for abatement;
- (4) deny Protestants’ request for provisional party status; and
- (5) grant such other and further relief to which End Op is entitled.

²² *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 7 (Tex. 2010) (internal citations omitted).

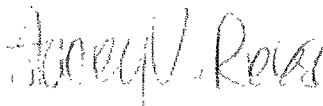
²³ See Order No. 3, at p. 11.

Respectfully submitted,

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By: 
Stacey V. Reese

ATTORNEYS FOR END OP L.P.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Applicant's Response to 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* was filed via hand delivery to SOAH and then sent to the following at the addresses or faxes and/or emails below, on October 11, 2013.

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By:


Stacey V. Reese

EXHIBIT A

LOST PINES GROUNDWATER CONSERVATION DISTRICT

**AN ORDER REFERRING APPLICATIONS OF END OP, LP
FOR OPERATING PERMITS AND TRANSPORT PERMITS
TO THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

WHEREAS, End Op, LP (“Applicant”) submitted applications for Operating Permits for 14 wells in Bastrop and Lee Counties seeking authorization to withdraw an aggregate of 56,000 acre-feet per year from the Simsboro aquifer to be used for municipal purposes in Travis and Williamson Counties (the “Applications”); and

WHEREAS, after proper notice under District Rule 14.3.C, the Board of Directors of the District (the “Board”) held a public hearing on the Applications at 5:00 p.m. on April 18, 2013, at the American Legion Hall in Giddings, Texas; and

WHEREAS, the Board heard comments on the Applications at that public hearing; and

WHEREAS, on April 10, 2013, Aqua Water Supply Corporation submitted to the District a request for a contested case hearing on the Applications; and

WHEREAS, at the completion of the public hearing, the Board voted to schedule a preliminary hearing on May 15, 2013 to consider Aqua Water Supply Corporation’s request for a contested case hearing; and

WHEREAS, on May 7, 2013, the City of Giddings submitted to the District a request for a contested case hearing on the Applications for a request for party status in any contested case hearing held on the Applications, but withdrew those requests on May 15, 2013; and

WHEREAS, on May 8, 2013, Environmental Stewardship submitted to the District a request for a contested case hearing on the Applications or for party status in any contested case hearing held on the Applications; and

WHEREAS, on May 9, 2013, Applicant requested that the District contract with the State Office of Administrative Hearings (“SOAH”) to conduct a hearing on Aqua Water Supply Corporation’s request for a contested case hearing; and

WHEREAS, on May 9, 2013, Andrew Meyer, Bette Brown, and Darwyn Hanna submitted to the District requests for a contested case hearing on the Applications or for party status in any contested case hearing held on the Applications; and

WHEREAS, on May 14, 2013, Applicant filed responses to the requests for party status filed by all persons, other than Aqua Water Supply Corporation, arguing that the requests were untimely under the District Rules and that the requestors lacked standing to participate in the contested case hearing as parties; and

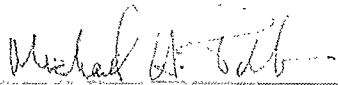
WHEREAS, the Board held a hearing on May 15, 2013 to consider the requests for a contested case hearing on the Applications and the requests for party status; and

WHEREAS, the Board voted to grant and deny the requested relief as set forward in this Order.

NOW THEREFORE, the Board ORDERS the following:

1. that Aqua Water Supply Corporation's request for a contested case hearing on the Applications is GRANTED;
2. that all other requests for a contested case hearing on the Applications, if any, are DENIED as untimely under the District rules;
3. that the General Manager is authorized to enter into a contract with SOAH to conduct a contested case hearing on the Applications pursuant to Texas Water Code § 36.416;
4. that the contested case hearing shall be held in Bastrop County at a location that the Board has designated for regular and special called Board meetings and public hearings on applications for permits and permit amendments;
5. that the requests for party status filed by Environmental Stewardship, Andrew Meyer, Bette Brown, and Darwyn Hanna were timely under the District rules;
6. 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; and
7. that Applicant shall deposit with the District the sum of \$26,000 to pay the amount of the contract with SOAH, with any excess money to be refunded to Applicant at the conclusion of the hearing.

ISSUED:



President, Lost Pines Groundwater
Conservation District Board of Directors

Date: 6-19-13

EXHIBIT B

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IN RE:)
LOST PINES GROUNDWATER)
CONSERVATION DISTRICT)
)
BOARD MEETING)

BOARD MEETING
WEDNESDAY, MAY 15, 2013

BE IT KNOWN THAT the above-entitled matter came on for hearing at 5:00 p.m. on the 15th day of May, 2013, at the Bastrop County Convention Center, 1408 Chestnut Street, Bastrop, Bastrop County, Texas, with Vice President WILLIAM SHERRILL presiding, reported by machine shorthand by NANCY A. URBANOWICZ, CSR in and for the State of Texas, and the following proceedings were had:

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| <p style="text-align: right;">Page 2</p> <p>1 BOARD MEETING</p> <p>2 WEDNESDAY, MAY 15, 2013</p> <p>3 Opening Remarks..... 3</p> <p>4 Statement by City of Giddings (Weiser) 4</p> <p>5 Statement by City of Giddings (Brown) 5</p> <p>6 Statement by Aqua Water (Gershon) 5</p> <p>7 Statement by Forestar (US) Real Estate (McCarthy) 18</p> <p>8 Statement by LCRA (Graml) 23</p> <p>9 EXECUTIVE SESSION 26</p> <p>10 Vote on Agenda Item No. 2 26</p> <p>11 Recommendation by Ms. Melvin 28</p> <p>12 Statement by End Op (Reese) 32</p> <p>13 Statement by Environmental Stewardship (Allmon) 37</p> <p>14 EXECUTIVE SESSION 40</p> <p>15 Vote On Agenda Item No. 3 40</p> <p>16 Meeting Adjourned 46</p> <p>17 Court Reporter's Certificate 48</p> | <p style="text-align: right;">Page 4</p> <p>1 under the district rules. The board may convene in</p> <p>2 closed executive session for consultation with its</p> <p>3 attorneys under the Texas Government Code Section</p> <p>4 551.071."</p> <p>5 I also want to announce -- the way I have</p> <p>6 it here is that Aqua will get 20 minutes. Aqua will</p> <p>7 get 20 minutes. Giddings will get 20 -- I apologize.</p> <p>8 Aqua plus Giddings has ten minutes apiece for Aqua, ten</p> <p>9 minutes for Giddings. Forestar gets ten minutes; LCRA</p> <p>10 gets ten minutes.</p> <p>11 Who would like to go first?</p> <p>12 MR. FLEMMING: Mr. Vice President, I need</p> <p>13 to recuse myself from this item.</p> <p>14 MR. SHERRILL: So noted. All right.</p> <p>15 MS. WEISER: Michéle Weiser, for the</p> <p>16 City of Giddings.</p> <p>17 MR. SHERRILL: Ms. Wagner (sic), welcome.</p> <p>18 MS. WEISER: The City of Giddings wants</p> <p>19 to protect our water, and we would like -- we</p> <p>20 understand you have rules that you must follow, and we</p> <p>21 respectfully ask you to be conservative and careful as</p> <p>22 you follow those rules and go slow. After further</p> <p>23 review, we do not feel like that these particular</p> <p>24 requests affect us enough for us to be a party in this.</p> <p>25 So we are respectfully withdrawing all of our requests</p> |
| <p style="text-align: right;">Page 3</p> <p>1 PROCEEDINGS</p> <p>2 MR. SHERRILL: Ladies and gentlemen,</p> <p>3 ladies and gentlemen, may I have your attention?</p> <p>4 Ladies and gentlemen, may I have your attention,</p> <p>5 please? The Lost Pines Groundwater Conservation</p> <p>6 District will now come to order.</p> <p>7 We are going to start. Of course, I want</p> <p>8 to welcome everybody here tonight. I'm glad to see</p> <p>9 everybody here, and I hope we get through this in a</p> <p>10 reasonable manner -- in a reasonable time. And with no</p> <p>11 further to-do, Mike Talbot is sick. Mike had to have</p> <p>12 an emergency appendectomy today. And that's the reason</p> <p>13 for my being here, and that's the only reason why I'm</p> <p>14 talking.</p> <p>15 And, number two, "hearing on the request</p> <p>16 for a contested case hearing on the application of</p> <p>17 Forestar (USA) Real Estate Group, Incorporated, for</p> <p>18 operating permits and transfer permits for ten wells in</p> <p>19 Lee County on the application of the -- and on the</p> <p>20 application of the Lower Colorado River Authority for</p> <p>21 operating permits for five wells in Bastrop County,</p> <p>22 Texas. The board will consider and may take action on</p> <p>23 whether the requests for contested case hearings filed</p> <p>24 by Aqua Water Supply Corporation, the City of Giddings</p> <p>25 and any other person or entity that were timely filed</p> | <p style="text-align: right;">Page 5</p> <p>1 for all of these. If permit requests are made later</p> <p>2 that are in our aquifer, we will be back. But for now,</p> <p>3 we would like to give our time to Aqua Water, and we</p> <p>4 will withdraw our request in both Forestar and LCRA.</p> <p>5 We are withdrawing all of those.</p> <p>6 MR. BROWN: Charlie Brown, mayor of</p> <p>7 Giddings. I want to -- I want to second what Michelle</p> <p>8 said. We value our water. We ask that you guys</p> <p>9 protect our water. Go carefully with these permits.</p> <p>10 And please don't think for a minute that by us stepping</p> <p>11 back from this matter that we're not willing to come</p> <p>12 back and protect the water of our citizens in our</p> <p>13 community.</p> <p>14 So we will yield the rest of our time to</p> <p>15 Aqua, and we thank you for your consideration.</p> <p>16 MR. SHERRILL: Thank you, sir.</p> <p>17 Would Aqua like to come speak?</p> <p>18 MR. GERSHON: Yes. Mr. Sherrill, members</p> <p>19 of the board, my name is Michael Gershon, and I work</p> <p>20 with Aqua Water Supply Corporation. I'm a water</p> <p>21 lawyer. I work with the Austin firm of Lloyd,</p> <p>22 Gosselink, Rochelle & Townsend. And I have worked with</p> <p>23 Aqua for many years. I would like for -- I would like</p> <p>24 to also introduce a couple of my board members. Our</p> <p>25 president, Cliff Kessler, is here as well as Duke</p> |

2 (Pages 2 to 5)

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| <p style="text-align: right;">Page 30</p> <p>1 you ask End Op to deposit 26,000 with the district to</p> <p>2 pay the costs associated with the hearing before the</p> <p>3 State Office of Administrative Hearings. By statute,</p> <p>4 you can ask the person who has requested such a hearing</p> <p>5 to pay -- make a deposit to pay all the costs. If it</p> <p>6 doesn't cost that much, the statute requires you to</p> <p>7 refund what's left over. You should also have before</p> <p>8 you an email that I received today from the State</p> <p>9 Office of Administrative Hearings in which they have</p> <p>10 estimated that the cost of the hearing will be</p> <p>11 approximately \$26,000.</p> <p>12 Finally, there's one more issue that's</p> <p>13 before you. Yesterday -- excuse me. In addition to</p> <p>14 Aqua's request for a contested case hearing, a number</p> <p>15 of people have requested that they -- not necessarily</p> <p>16 that they request a contested case hearing, but if you</p> <p>17 were to grant a contested hearing request -- for</p> <p>18 example, Aqua's request -- that they be named as</p> <p>19 parties to that contested case hearing.</p> <p>20 Yesterday End Op filed a response to</p> <p>21 those requests for party status in which End Op made</p> <p>22 two arguments: First, End Op argued that those</p> <p>23 requests are untimely. End Op's argument is that you</p> <p>24 can't be a party unless you also file a timely request</p> <p>25 for a contested case hearing. And, therefore, because</p> | <p style="text-align: right;">Page 32</p> <p>1 other requests be denied as untimely, the general</p> <p>2 manager be authorized to enter into a contract with the</p> <p>3 State Office of Administrative Hearings to conduct the</p> <p>4 contested case hearing, that the issue of whether or</p> <p>5 not the persons who have requested party status have</p> <p>6 standing to be parties be specifically referred to the</p> <p>7 State Office of Administrative Hearings, that the</p> <p>8 contested case hearing be held on your decision either</p> <p>9 in Austin or another designated place where the board</p> <p>10 meets and that End Op deposit \$26,000 with the district</p> <p>11 to pay the costs of the State Office of Administrative</p> <p>12 Hearings hearing within 14 days. Thank you.</p> <p>13 MR. SHERRILL: Would End Op's lawyers</p> <p>14 like to speak?</p> <p>15 MS. REESE: Yes, we would.</p> <p>16 MR. SHERRILL: You have five minutes,</p> <p>17 ma'am.</p> <p>18 MS. REESE: Good evening. My name is</p> <p>19 Stacey Reese. I'm a lawyer representing End Op. We</p> <p>20 agree with most of the recommendations that were made</p> <p>21 by Ms. Melvin with regard to Aqua's request and what</p> <p>22 will be referred to SOAH and the logistics of the SOAH</p> <p>23 proceeding. We would request that the proceeding occur</p> <p>24 in Austin, not Bastrop.</p> <p>25 The things that we disagree with, with</p> |
| <p style="text-align: right;">Page 31</p> <p>1 these folks did not file a timely request for a</p> <p>2 contested case hearing, they should be denied party</p> <p>3 status.</p> <p>4 Secondly, End Op argued that these people</p> <p>5 haven't pled enough facts or give enough facts in their</p> <p>6 request for party status to show whether they have</p> <p>7 standing or a justiciable interest to participate in</p> <p>8 the hearing.</p> <p>9 My recommendation to you is that you rule</p> <p>10 that these requests for party status were timely.</p> <p>11 There's nothing in the district's rules that requires a</p> <p>12 person -- if a person wants party status, that says</p> <p>13 they have to file a request for a contested case</p> <p>14 hearing. Indeed, the rules separate those. They say</p> <p>15 there will be a request for a contested case hearing,</p> <p>16 and then at that preliminary hearing, the district or</p> <p>17 SOAH may grant party status.</p> <p>18 So I recommend that you rule that those</p> <p>19 are timely. But then you send the issue of whether or</p> <p>20 not these persons have standing to request party status</p> <p>21 to SOAH because in each case, this is going to be very</p> <p>22 fact specific. And that will provide everyone with the</p> <p>23 time to make their case about their standing.</p> <p>24 So in summary, I recommend that Aqua's</p> <p>25 request for a contested case hearing be granted. All</p> | <p style="text-align: right;">Page 33</p> <p>1 what Ms. Melvin said is the part about the party</p> <p>2 status. Ms. Melvin is correct that we did file some</p> <p>3 responses to those requests. To clarify our arguments,</p> <p>4 there are two components that you need to consider</p> <p>5 before you can be a party in a SOAH proceeding. You</p> <p>6 need to have timely and properly made the request, and</p> <p>7 you need to have standing. We don't disagree with the</p> <p>8 issue of standing being referred to SOAH to be</p> <p>9 determined. We, however, do disagree with the</p> <p>10 timeliness and properness issue being referred to SOAH</p> <p>11 or that they be considered timely if the board decides</p> <p>12 to make that decision.</p> <p>13 Basically, Environmental Stewardship and</p> <p>14 some other landowners have filed requests to be</p> <p>15 parties. They have not filed requests for contested</p> <p>16 case hearings. They are trying to sneak in the back</p> <p>17 door with Aqua's timely-filed request and become a</p> <p>18 party in the proceeding. The district's rules, Chapter</p> <p>19 36, and all other government law or rules do not permit</p> <p>20 that to happen in a groundwater permit proceeding at</p> <p>21 SOAH.</p> <p>22 If you could take a look at the first</p> <p>23 packet that I gave you that has your rules on the front</p> <p>24 of it, if you look at Rule 14.4.E, consideration of a</p> <p>25 request for a contested case hearing, before the board</p> |

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| <p style="text-align: right;">Page 34</p> <p>1 can even designate parties or the district, the 2 district has to receive a timely-filed request for a 3 contested case hearing. And at the preliminary 4 hearing, the board then can designate parties. 5 Well, it doesn't make any sense that the 6 board can designate parties for people who haven't 7 filed a timely request for a contested case hearing. 8 The same argument with the timely request for the 9 contested case hearing applies. Otherwise, we would 10 just have this rolling procedure by which people could 11 just join the party late in the game. 12 Chapter 36 does not allow for that 13 either. If you flip over to Page 1, 2 and 3, you will 14 see that Chapter 36 does not give a groundwater 15 district authority to designate parties to -- party 16 status to persons who have not filed a timely request. 17 Some other governing law is the Administrative 18 Procedure Act. I included some provisions in your 19 packet from the Administrative Procedure Act that apply 20 to a groundwater permit proceeding. 21 Nowhere in Subchapter C, D or F of the 22 Administrative Procedure Act does it give a groundwater 23 district authority to designate party status to a 24 person who has not filed a timely request for a 25 contested case hearing. So what else would apply then</p> | <p style="text-align: right;">Page 36</p> <p>1 party in a contested case hearing when they have not 2 filed a timely request for a contested case hearing. 3 And even if there were, assuming there 4 were, we still are under the same deadline that would 5 apply to the request for a contested case hearing. End 6 Op would be prejudiced by allowing this to happen. 7 When End Op requested a contested case hearing at SOAH, 8 it did so at its own cost, and it did so after the 9 deadline for request for contested case hearings were 10 filed knowing that it was limiting the issues in the 11 proceedings to just Aqua's protest. 12 As we have stated in the past, we have 13 not contested Aqua's standing. Therefore, we incurred 14 the costs knowing that we were limited to just 15 technical issues at the hearing. Allowing these 16 latecomers to come in is going to be at Aqua's expense, 17 and we are going to have multiple hearings on standing 18 issues related with those parties. 19 I respectfully request that the board not 20 deem those requests timely and either deny them as 21 timely -- say they are not timely or, at a minimum, 22 refer that issue to SOAH for consideration. 23 Thank you for your time. 24 MR. SHERRILL: Does the board have any 25 questions? Hearing none, thank you, ma'am.</p> |
| <p style="text-align: right;">Page 35</p> <p>1 to a contested case hearing at SOAH? SOAH's procedural 2 rules. 3 If you look at SOAH's procedural rules, 4 nowhere in the general procedure rules -- and I haven't 5 provided you with those because they are very large and 6 voluminous. But I'll represent to you that nowhere in 7 the SOAH general procedure rules does it allow for a 8 party who has not filed a timely request for a 9 contested case hearing to be designated as a party. 10 If you look at the second document I gave 11 you, those are the TCEQ procedure rules for a contested 12 case hearing at SOAH. Under the TCEQ rules, which 13 don't apply in this case, you can be designated as a 14 party in a contested case hearing even though you did 15 not file a timely request for a contested case hearing. 16 If you flip to Page 4 of those rules, 17 Provision 80.109 specifically allows for an ALJ in a 18 SOAH proceeding in which TCEQ is a party to designate 19 folks who show up at the preliminary hearing. That's 20 not what's happening here, and these TCEQ rules do not 21 apply. And because there are special TCEQ rules for 22 those proceedings and the general SOAH procedure rules 23 do not allow for this, then by the very nature of that, 24 there is no expressed authority for a groundwater 25 district or an ALJ judge to designate a person as a</p> | <p style="text-align: right;">Page 37</p> <p>1 Environmental Stewardship, please. 2 MR. ALLMON: Yes. If it would please the 3 board, if you are going to be making a decision on our 4 request, I would appreciate the opportunity to speak to 5 the issue as well. 6 MR. SHERRILL: It will be my pleasure. 7 Please tell me your name. 8 MR. ALLMON: My name is Eric Allmon. I'm 9 counsel for Environmental Stewardship. We agree 10 with -- 11 MR. SHERRILL: Five minutes, please. 12 MR. ALLMON: Yes, sir. We agree with the 13 recommendations of the district's counsel. The 14 designation of parties after a case has been referred 15 to SOAH is fairly standard practice for many 16 administrative agencies. It is done by the TCEQ. It 17 occurs in Public Utility Commission matters. It occurs 18 with many agencies. So this is certainly not an 19 unusual approach. 20 With regard to -- we think one of the 21 most -- one of the important -- they say there's 22 nowhere where this is explicitly authorized. We would 23 point out there is nowhere where it says this is not 24 the process. 25 Where the Legislature has wanted to limit</p> |

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| <p style="text-align: right;">Page 38</p> <p>1 the parties in a contested case hearing to only persons 2 who have requested a hearing beforehand, the 3 Legislature has shown that it knows how to do that. 4 They introduced version -- the committee substitute for 5 Senate Bill 957, essentially tried to add language that 6 said that someone seeking party status at SOAH and a 7 TCEQ proceeding must have timely requested a contested 8 case hearing. They know how to write that. They did 9 not. 10 Section 36.415 of the Water Code says 11 that the board -- the district is to establish who may 12 participate in contested case hearings, and then 13 says -- it says it will be limited to essentially the 14 persons with a justiciable interest. Had the 15 Legislature intended that the parties be limited to 16 those who had requested a contested case hearing, it 17 could have easily included that limitation at that 18 place. It chose not to. 19 If you deny the party status based on a 20 failure to file a hearing request previously, then 21 you're basing your decision on a factor that's not 22 contained in statute. I would encourage you not to do 23 that. It is arbitrary when the agency decides to 24 consider something that the Legislature has not asked 25 you to consider, has not authorized you to consider.</p> | <p style="text-align: right;">Page 40</p> <p>1 session with its attorneys under the Texas Government 2 Code Section 551.071. The time is 7:18 -- 6:18. We 3 will be back in a little bit, ma'am. 4 UNIDENTIFIED SPEAKER: People who have 5 filed for party status, why aren't they allowed to 6 speak? 7 MR. SHERRILL: We will be back in a 8 little bit, ma'am. Thank you. 9 (Brief recess: 6:18 p.m. to 6:40 p.m.) 10 MR. SHERRILL: Ladies and gentlemen, the 11 board is back from executive session. It is 6:40. No 12 votes were taken. We will talk about End Op. We've 13 got several things that need to be taken care of. I 14 would like to start out with is there a motion that 15 Aqua Water's request for a contested case hearing be 16 granted? 17 MR. HANSBERGER: I so move. 18 MR. SHERRILL: I call for a second. 19 MR. MCPHAUL: Second. 20 MR. SHERRILL: Moved and seconded that 21 the Aqua Water request for a contested case hearing be 22 granted. Is there any discussion by the board? 23 Hearing none, all in favor raise your hand. 24 (Show of hands) 25 MR. SHERRILL: All opposed, same sign?</p> |
| <p style="text-align: right;">Page 39</p> <p>1 And we do not think that End Op is unduly prejudiced by 2 this. 3 An applicant is always going to be 4 prejudiced by a contested case hearing whether -- you 5 know, they just -- they don't like these things. They 6 don't like having to go through it. The mere fact that 7 an applicant is prejudiced does not mean that it is not 8 warranted. Environmental Stewardship will add very 9 little burden to the hearing. The hearing is occurring 10 anyway. We have no intent to ask that it go on any 11 longer. And any agreement reached between Aqua 12 Texas -- Aqua and End Op would ask for it to occur. So 13 we think there will be no additional burden due to our 14 participation. And if you are referring it to deal 15 with the fact-specific issues once it is at SOAH, I 16 think that's best dealt with by the administrative law 17 judge than trying to burden you with accepting evidence 18 and deciding on evidence here this evening. 19 And with that -- as I said, I agree with 20 the recommendation and am available for any questions 21 you may have and certainly do appreciate your time on 22 this issue. 23 MR. SHERRILL: Any questions? Hearing 24 none, thank you, sir. 25 The board will now convene into executive</p> | <p style="text-align: right;">Page 41</p> <p>1 Motion is carried. 2 Number two, is there a motion that all 3 other requests for a contested case hearing be denied 4 as untimely? Is there a motion? 5 MR. PRINZ: So move. 6 MR. SHERRILL: So moved. Is there a 7 second? 8 MR. HANSBERGER: I second. 9 MR. SHERRILL: It's been moved and 10 seconded that all other requests for a contested case 11 hearing be denied as untimely. Any discussion? Take a 12 vote. All in favor, raise your hand, please. 13 (Show of hands) 14 MR. SHERRILL: All opposed? Pass. 15 Is there a motion that the general 16 manager be authorized to enter into a contract with the 17 State Office of Administrative Hearings to conduct a 18 contested case hearing? 19 MR. STEINBACH: I so move. 20 MR. SHERRILL: It's been moved. Is there 21 a second? 22 MS. DARNELL: I second. 23 MR. SHERRILL: It's been moved and 24 seconded that the general manager be authorized to 25 enter into a contract with the State Office of</p> |

11 (Pages 38 to 41)

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1 The second approves the amendment.
2 MR. SHERRILL: Call for a vote. All in
3 favor, raise your hand.
4 (Show of hands)
5 MR. SHERRILL: All opposed, same sign.
6 Motion is carried.
7 (Applause)
8 MR. SHERRILL: We've got one left, ladies
9 and gentlemen: The End Op LP deposit of \$26,000 with
10 the district to pay all the costs associated with the
11 contract for the hearing at the State Office of
12 Administrative Hearings. It needs to be paid --
13 \$26,000 and paid within 14 days. Is there a motion?
14 MR. DAUGHTRY: I make a motion.
15 MR. STEINBACH: Second.
16 MR. SHERRILL: Is there any discussion?
17 Vote by the usual sign tonight, raise your hand.
18 (Show of hands)
19 MR. SHERRILL: All opposed, like sign.
20 Motion carries.
21 All right. Now we are going to turn back
22 to the five o'clock meeting. Ladies and gentlemen,
23 there's nothing -- since there's nothing else upon this
24 five o'clock meeting, the meeting is adjourned. See
25 you at seven.

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1 (Meeting adjourned at 6:49 p.m.)
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1 CERTIFICATE
2 THE STATE OF TEXAS)
3 COUNTY OF BASTROP)
4
5 I, NANCY A. URBANOWICZ, Certified Shorthand
6 Reporter in and for the State of Texas, do hereby
7 certify that the above-mentioned matter occurred as
8 hereinbefore set out.
9 I FURTHER CERTIFY THAT the proceedings of such
10 were reported by me or under my supervision, later
11 reduced to typewritten form under my supervision and
12 control and that the foregoing pages are a full, true,
13 and correct transcription of the original notes.
14
15 Certified to by me this the 27th day of
16 May, 2013.
17
18
19
20
21 Nancy A. Urbanowicz, CSR #051
22 Expiration Date: 12/31/13
23 Fredericks Reporting & Litigation #611
24 3305 Northland Drive
25 Suite 403
Austin, Texas 78731
P(512) 477-9911 F (512) 345-1417
Info@frltexas.com

EXHIBIT C

Cause No. _____

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| WIMBERLEY VALLEY WATERSHED | § | |
| ASSOCIATION, JOHANNA L. SMITH, | § | IN THE DISTRICT COURT OF |
| H.K. ACORD, JANET ACORD, JAMES | § | |
| R. MCMEANS, AND DAVID H. | § | |
| GLENN, | § | HAYS COUNTY, TEXAS |
| Plaintiffs, | § | |
| | § | |
| v. | § | _____ DISTRICT COURT |
| | § | |
| HAYS TRINITY GROUNDWATER | § | |
| CONSERVATION DISTRICT, | § | |
| Defendant. | § | |

PLAINTIFFS' ORIGINAL PETITION

TO THE HONORABLE JUDGE OF THE COURT:

COMES NOW, Wimberley Valley Watershed Association ("WVWA") and Johanna L. Smith, H.K. Acord, Janet Acord, James R. McMeans, and David H. Glenn (collectively, "Plaintiffs") and file this original petition, seeking judicial review of actions by the Hays Trinity Groundwater Conservation District ("District" or "Defendant"), and in support thereof, would respectfully show the following:

I. CASE OVERVIEW

1. Plaintiffs seek an order reversing Defendant's decision to deny each of them a contested case hearing regarding an application by Wimberley Springs Partners, Ltd. ("Wimberley Springs") for a 3-year production permit, and a one-time "Re-Growth" use. Plaintiffs also seek an order reversing the Defendant's February, 21, 2011 decision to issue said permit, HTGCD Production Permit No. 168 ("Permit").

2. Briefly, the facts of the case are: Wimberley Springs submitted an application for a 3-year production permit, and a one-time "Re-Growth" use of 81,462,750 gallons to be used following a calendar year in which rainfall has exceeded 32 inches. Wimberley Springs published notice of the application and also mailed notice to adjacent landowners. The District conducted a public hearing concerning the application on February 21, 2011. During the hearing, the Board voted to grant the permit application submitted by Wimberley Springs. Pursuant to the Defendant's interpretation of its own rules, in addition to repeated confirmation by Defendant, Plaintiffs filed letters seeking a contested case hearing on or before March 3, 2011.
3. On March 28, 2011, the same day on which a pre-hearing conference was scheduled to consider the requests for a contested case hearing, Wimberley Springs filed a motion challenging the timeliness of the requests. Plaintiffs sought and were granted a continuance and were ordered to respond to Applicant's motion by April 1. Such a response was filed on April 1. The Applicant submitted a reply on April 5, and the continued prehearing conference was held on April 7. At the conclusion of the conference, the Board reversed its interpretation of its rules and denied all hearing requests on the basis that they were not timely. This is the primary basis for this suit.
4. On April 12, the Board adopted Order No. 148, an order determining that protests and requests for contested hearing were untimely filed and affirming the Board's earlier decision to issue Permit No. 168 to Wimberley Springs.
5. Plaintiffs are additionally aggrieved by Defendant's February 21, 2011 decision to grant the permit application and its subsequent February 28, 2011 issuance of Permit

No. 168 to Wimberley Springs.

6. Pursuant to requirements set forth in Order No. 148, Plaintiffs timely filed a Motion for Rehearing¹ regarding Defendant's decision. The motion was denied during Defendant's April 25, 2011 Board Meeting.

II. PARTIES

7. Plaintiff Johanna L. Smith is an individual property owner adversely affected by the action taken by the Defendant's decision to reverse its interpretation of the District's Rules and deny Ms. Smith's hearing request, as well as the Defendant's issuance of the Permit.
8. Plaintiff Wimberley Valley Watershed Association ("WVWA") is a non-profit corporation and the owner of real property located in Hays County. WVWA also participates in the management of the Jacob's Well Natural Area. The flow of groundwater from Jacob's Well will be reduced by the pumpage allowed by the Permit that will occur at the six Permitted wells encircling Jacob's Well. WVWA is adversely affected by the Defendant's decisions to deny WVWA's hearing request, and issue the Permit to WSP.
9. Plaintiffs H.K. Acord and Janet Acord are property owners adversely affected by the action taken by the Defendant's decision to reverse its interpretation of the District's Rules and deny their hearing request, as well as the Defendant's issuance of the Permit.

¹ Hearing Requesters' Motion for Rehearing, Exhibit 2 to that motion, and Attachment C to the Exhibit, are included as Attachment A to this Petition, and incorporated herein for all purposes.

10. Plaintiff James R. McMeans is a property owner adversely affected by the action taken by the Defendant's decision to reverse its interpretation of the District's Rules and deny his request for a contested case hearing, as well as the Defendant's issuance of the Permit.
11. Plaintiff David H. Glenn is a property owner adversely affected by the action taken by the Defendant's decision to reverse its interpretation of the District's Rules and deny his request for a contested case hearing, as well as the Defendant's issuance of the Permit.
12. Defendant Hays Trinity Groundwater Conservation District is a political subdivision of the State of Texas with responsibility to promote water conservation, preservation, protection, and recharge of groundwater and aquifers within western Hays County and to ensure that groundwater is used efficiently and at sustainable rates. It operates the Well Registration and Production permitting program pursuant to which the denial of hearing requests and permit approval at issue in this suit occurred. Defendant may be served through its President, Mr. Jimmy Skipton, at Center Lake Business Park, 14101 Hwy 290 W, Bldg. 100, Suite 212, Dripping Springs, Texas 78737.

III. CLAIMS

13. **Error 1: Failure to Grant Plaintiffs' Hearing Requests.** Defendant erred by reversing its interpretation of the Districts Rules and denying party status to WVWA, Johanna L. Smith, H.K. Acord, Janet Acord, James R. McMeans, and David H. Glenn. This error adversely affected Plaintiffs.

14. Johanna L. Smith filed a request for a contested case hearing that was received by the District on March 2, 2011.
15. Pursuant to the District's Rule 5.5F, Ms. Smith included information showing she had an interest not common to members of the public and that she would be directly affected by the Board's action on the application in her request.
16. Her property is located approximately 2000 feet from the permitted Maintenance 1 and Maintenance 2 wells. There are two groundwater wells on her property she uses to furnish water to two residences, as well as livestock and wildlife. The property was then, and is still used as a working cattle ranch, and is also subject to a conservation easement granted to the Texas Land Conservancy. Cypress Creek also runs through her property, which is located downstream of Jacob's Well, so that any impact of the proposed pumping on Jacob's Well will impact her ability to use Cypress Creek.
17. WVWA filed a request for contested case hearing on March 3, 2011. The request was received by the District at 5:12 p.m.
18. Pursuant to the District's Rule 5.5F, WVWA included information showing it had an interest not common to members of the public and that it would be directly affected by the Board's action on the application in its request.
19. This organization owns property that is adjacent to Cypress Creek, and also participates in the management of the Jacob's Well Natural Area. Jacob's Well is the source of Cypress Creek. The flow of groundwater from Jacob's Well will be

reduced by the pumpage that will occur at the six permitted wells encircling Jacob's Well.

20. H.K. Acord and Janet Acord filed a request for a contested case hearing that was received by the District on March 3, 2011.
21. The Acords own property abutting Cypress Creek downstream of Jacob's Well and rely upon groundwater wells in the Trinity Aquifer for domestic uses on their property. The pumping allowed by the Permit will reduce both the flow of water in Cypress Creek abutting their property, and impair the availability of groundwater from the Trinity aquifer in their groundwater wells.
22. James R. McMeans submitted a hearing request that was received by the District on February 28, 2011.
23. Mr. McMeans uses a groundwater well to supply water to the property he owns near Wimberley. The pumping allowed by the Permit will impact his ability to use this groundwater well, as it will contribute to a lowering of the aquifer in the area.
24. David H. Glenn submitted a request for a contested case hearing which was received by the District on March 3, 2011.
25. Mr. Glenn owns property on the Blanco River which is sourced by spring flow from the Trinity Aquifer. Mr. Glenn's sole source of water for domestic and wildlife uses is a groundwater well that produces water from the Trinity Aquifer. The wildlife on his property is managed under a Wildlife Management Plan appraised by the Hays Central Appraisal District.
26. The District's Rule 3.2 does not provide a deadline to file a hearing request for an

affected person (nor does it provide a deadline for an applicant whose permit is denied). The only hearing request deadline set forth in this rule regards the deadline for an applicant whose permit is granted with conditions to file a hearing request.

27. District Rule 5 includes a procedure by which an affected person or an applicant may file a written request for a contested case hearing. It also sets forth the procedure by which the Board may consider hearing requests. Moreover, Rule 5.5F states that an applicant or an affected person may request a contested case hearing, without discriminating between these two types of requesters.
28. While neither one of the above-mentioned rules explicitly provide a deadline for a hearing request by an affected person or applicant whose permit is denied, the lack of a specific deadline for these two types of requesters does not mean they have a different deadline than the one specified for an applicant whose permit is granted with conditions.
29. The District's rules are properly interpreted to establish a deadline for the filing of a request for contested case hearing no earlier than ten business days after the date of the meeting where the decision on a permit application is made.
30. Until the Wimberley Springs motion to dismiss Plaintiffs' hearing requests on the basis they were untimely, the District made clear that it interpreted the hearing request deadline to be March 3, 2011, which is ten business days after the District's consideration of the Application on February 21, 2011.
31. No notice issued by the District at any point indicated that the deadline to submit hearing requests regarding the Application was February 21, 2011.

32. The District's notice of the February 21, 2011 meeting included no notice that hearing requests were due by that date.
33. Via e-mail correspondence between the District's General Manager and Mr. Glenn occurring on March 3, 2011, the General Manager repeatedly confirmed that March 3rd was the deadline to file a hearing request.
34. The Notice of Open Meeting/Public Hearing issued by the District regarding the March 28 pre-hearing conference stated that "Submittals provided to the District office within the 10-day deadline of March 3, 2011 will be heard."
35. District Order No. 148, which states that requests filed on March 3, 2011 were received "after the expiration of the deadline", contradicts the interpretation of the District's Rules conveyed to the public on repeated prior occasions during the pendency of the applications.
36. Defendant's denial of Plaintiffs' hearing requests based on a changed interpretation of the deadline for hearing requests by affected persons was arbitrary and capricious, characterized by an abuse of discretion, in violation of constitutional or statutory provisions, in excess of the District's statutory authority, made through unlawful procedure, affected by other error of law, not reasonably supported by substantial evidence.
37. Defendant's denial of Plaintiff's hearing requests based on a deadline of February 21, 2011 which was developed after-the-fact, with no notice to Plaintiffs of this deadline, violated Plaintiff's due process rights under the Fourteenth Amendment to the United

States Constitution, and due course of law guarantees of Article I, Section 13 of the Texas Constitution.

38. **Error 2: In the alternative only, Defendant violated the Open Meetings Act.** In the final order issued by Defendant, Defendant takes the position that affected persons were required to submit hearings requests at or before the February 21st, 2011 meeting to consider the Application. Defendant provided no notice either that it would accept or consider hearing requests by the affected public at this meeting.
39. As a governmental body, Defendant is required to provide notice of the date, hour, place and subject of each meeting. Tex. Gov't Code § 551.041. The District provided no notice that the consideration or acceptance of hearing requests was a subject considered at its February 21, 2011 meeting.
40. For this reason, and in the alternative only to the arguments set forth in Claim No. 1 set forth above, Defendant's requirement that Plaintiffs submit a hearing request at the public meeting held February 21, 2011 without providing notice that such requests would be accepted or considered at that meeting constitutes a violation of Chapter 551 of the Texas Government Code.
41. **Error 3: Defendant erred in issuing the Permit.** As discussed above, Plaintiffs filed timely hearing requests regarding the Permit which should have been granted prior to the final issuance of the Permit. The issuance of the final Permit without first holding a contested case hearing as requested by Plaintiffs was arbitrary and capricious, characterized by an abuse of discretion, in violation of constitutional or statutory provisions, in excess of the District's statutory authority, made through

unlawful procedure, affected by other error of law, and not reasonably supported by substantial evidence.

42. In addition, a groundwater district may not act on any application for a groundwater permit until after the district's management plan is approved by the Texas Water Development Board. Tex. Water Code § 36.1071(f). Defendant had no approved management plan at the time it issued the Permit. Thus, issuance of the Permit is arbitrary and capricious, characterized by an abuse of discretion, in violation of constitutional or statutory provisions, in excess of the District's statutory authority, made through unlawful procedure, and affected by other error of law.
43. Moreover, when issuing a permit the District is required to consider, among other things, whether the proposed use of water: (1) unreasonably affects existing groundwater and surface water resources or existing permit holders; and (2) is dedicated to any beneficial use. Tex. Water Code § 36.113(2)&(3). Pursuant to the District's own rules, it is required to consider whether there is an adequate water supply available from a retail public water utility.
44. The area proposed to be served by the Permitted wells is within the area of Certificate of Convenience and Necessity ("CCN") No. 11157, held by Aqua Texas, Inc. ("Aqua Texas"). In order to obtain this CCN, Aqua Texas was required to demonstrate that it has adequate access to water and is capable of providing drinking water. 30 TAC § 290.102(a)(1).
45. The Application states that the water produced by the Permitted wells will be used for "municipal use." Because Aqua Texas holds a CCN for the area, it would be

unlawful for WSP to dedicate the Permitted groundwater for this use. Furthermore, the existence of a CCN establishes as a matter of law that an adequate water supply is available from Aqua Texas, a retail public utility, for this use. The issuance of a permit to WSP for an illegal use unreasonably affects existing groundwater and surface water resources or existing permit holders, and does not constitute a beneficial use of groundwater. For these reasons, issuance of the Permit arbitrary and capricious, characterized by an abuse of discretion, in violation of constitutional or statutory provisions, in excess of the District's statutory authority, made through unlawful procedure, affected by other error of law, and not supported by substantial evidence.

IV. DISCOVERY

46. Most of this case is an appeal of an administrative agency's actions. However, if discovery becomes necessary, it should be controlled by Level 3. Tex. R. Civ. Proc. § 190.4

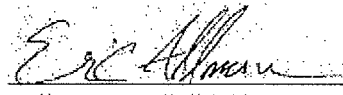
V. JURISDICTION

47. Jurisdiction lies in this Court pursuant to § 36.251, Water Code, and Gov't Code, §§ 551.141, 551.142. Plaintiffs timely filed a motion for rehearing in the underlying administrative proceeding. Please see Attachment A to this suit, the Motion for Rehearing by WVWA, Johanna L. Smith, H.K. Acord, Janet Acord, James R. McMeans, and David H. Glenn.

VI. PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that this court reverse Defendant's decision to deny hearing requests submitted by Plaintiffs regarding the Permit as set forth in Defendant's Order No. 168, reverse Defendant's issuance of the Permit as set forth in Defendant's Order No. Orders No. 148, and remand the matter to Defendant for further proceedings consistent with the Court's Opinion. Plaintiffs, finally, pray that the Court assess court costs against the Defendant and accord Plaintiff any further relief to which they may show themselves entitled.

Respectfully Submitted,

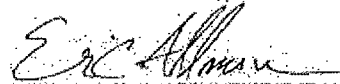
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CERTIFICATE OF SERVICE

By my signature below I certify that on the 27th day of May, 2010 a copy of the foregoing document was served upon the parties identified below by facsimile transmission, electronic mail, hand delivery and/or U.S. mail.



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