

APPLICATIONS OF END OP, § BEFORE THE LOST PINES
L.P. FOR OPERATING PERMITS § GROUNDWATER
AND TRANSFER PERMITS § CONSERVATION DISTRICT

**ENVIRONMENTAL STEWARDSHIP'S REPLY TO END OP, L.P.'S RESPONSE
TO REQUESTS FOR PARTY STATUS**

Contrary to the assertions in the Response filed by End Op, L.P., a person with a sufficient interest may be granted party status in a contested case hearing held by the Lost Pines Groundwater Conservation District, and Environmental Stewardship holds such an interest.

I. Under the applicable law, a person is not required to timely request a contested case hearing in order to participate as a party in a contested case hearing.

End Op asserts that a person must have previously filed a timely request for contested case hearing in order to be granted party status in a contested case hearing held by a groundwater district. Notably, this claim is not accompanied by any reference to either a rule or statute establishing such a requirement.

It is fundamental that an agency decision is arbitrary if the agency does not consider a factor the Legislature directed it to consider, considers an irrelevant factor, or weighs relevant factors but reaches a completely unreasonable result.¹ At Texas Water Code § 36.415(b)(2) the Legislature has established the limitations which apply to participation in a contested case hearing:

[A] district shall . . . limit participation in a hearing on a contested case application to persons who have a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest that is within a

¹ *City of El Paso v. Public Util. Comm'n*, 883 S.W.2d 179, 184 (Tex. 1994).

district's regulatory authority and affected by a permit or permit amendment application, not including persons who have an interest common to members of the general public.²

Nowhere does this statute provide that participation in a hearing on a contested application is limited to persons who have previously submitted a request for a contested case hearing. Where the Legislature intends to make participation in a contested case hearing conditional on a person's prior submission of a hearing request, it knows how to make this a requirement.³

If Lost Pines Groundwater Conservation District were to deny Environmental Stewardship's request for party status based on a finding by the District that Environmental Stewardship had not filed a timely hearing request, then the District's decision would be premised on a factor that the Legislature has not established. Such reliance on an extra-statutory factor is by its very nature arbitrary.

The imposition of a requirement that a person previously submit a timely hearing request as a prerequisite to party status is also contrary to the District's own rules. As previously noted, Rule 14.3(E)(1) establishes certain decisions which the Board may make in considering a hearing request. Under Rule 14.3(E)(1)(a), the initial decision is whether to grant or deny the hearing request. Under Rule 14.3(E)(1)(b), a separate decision is the designation of parties to the hearing. If participation in a contested case hearing as a party were limited to only those persons who filed a hearing request that was

² Tex. Water Code § 36.415(b)(2).

³ See, e.g., Section 1 of Committee Substitute for Senate Bill 957, 83rd Regular Session of the Texas Legislature, seeking to add Tex. Gov't Code § 2001.306 to provide that a person may join as a party to a contested case hearing only if the person requested a contested case hearing in compliance with any applicable deadlines established by TCEQ rule.

granted by the Board, then Rule 14.3(E)(1)(b) would be wholly superfluous, as the decision on the hearing requests would be determinative of the parties to the hearing.

II. Environmental Stewardship has standing.

End Op's challenge to Environmental Stewardship's standing should also be rejected. As an initial matter, Environmental Stewardship has not sought, and is not seeking associational standing. Accordingly, such issues are irrelevant.

Environmental Stewardship holds a vested property interest in the groundwater beneath its property that will be potentially impacted by the issuance of the permits which End Op seeks. Whether Environmental Stewardship has yet exercised its right to drill a well into the groundwater beneath its property does not diminish Environmental Stewardship's interest in protecting this right. End Op alleges that this interest will not be impacted based on End Op's contention that the District's own modeling demonstrating the existence of an impact beneath Environmental Stewardship's property is simply wrong. In doing so, End Op raises an issue going to the magnitude of the impact of its wells that is appropriate for consideration perhaps during the hearing on the merits. It is improper to deny a request for party status premised on the resolution of such a fact question involving the merits of the application at issue. At the early stage of determining a party's standing, the person seeking party status need only raise a genuine fact issue on the question, and the available evidence is to be construed in the light most

favorable to the person seeking standing.⁴ It is unquestionable that information developed by the District itself indicates the potential for the End Op permits to have an impact on groundwater levels beneath Environmental Stewardship's property that would adversely impact Environmental Stewardship's right to access and utilize this groundwater.

PRAYER

For these reasons, Environmental Stewardship maintains its request that it be granted party status in any hearing held with regard to End Op's pending applications now before the board, and each other matter in which Environmental Stewardship has requested party status.

Respectfully Submitted,

By: 
Eric Allmon, SBT # 24031819

LOWERRE, FREDERICK, PERALES,
ALLMON & ROCKWELL
707 Rio Grande, Suite 200
Austin, Texas 78701
(512) 469-6000
(512) 482-9346
COUNSEL FOR ENVIRONMENTAL
STEWARDSHIP

⁴ *City of Waco v. Tex. Comm'n on Envtl. Quality*, 346 S.W.3d 781 (Tex. App.—Austin 2011, pet. granted February 1, 2013); *Texas Department of Parks and Wildlife v. Maria Miranda and Ray Miranda*, 133 S.W.3d 217 (Tex. 2004).

CERTIFICATE OF SERVICE

By my signature, below, I hereby certify that the foregoing document was served on the following persons *via* facsimile transmission and/or e-mail:


Eric Allmon

**For Lost Pines Groundwater
Conservation District:**

Mr. Joe Cooper, General Manager
908 N E Loop 230
Post Office Box 1027
Smithville, Texas 78957
lpgcd@lostpineswater.org

**For Lost Pines Groundwater
Conservation District:**

Ms. Robin Melvin, General Counsel
Graves Dougherty Hearon & Moody
401 Congress Avenue, Suite 2200
Austin, Texas 78701
Fax: 512-480-5888
rmelvin@gdhm.com

For Aqua WSC:

Mr. Michael A. Gershon, Counsel,
Ms. Kristen Olson Fancher
c/o Lloyd Gosselink
816 Congress Avenue, Suite 1900
Austin, Texas 78701
Fax: 512-322-5872
mgershon@lgJawfirm.com

For End Op L.P.:

Russell S. Johnson
600 Congress Avenue, Suite 2600
Austin TX 78701
(512) 505-6374 FAX
rjohnson@mcginnislaw.com

**For Forestar (USA) Real Estate Group,
Inc.:**

Mr. Edmond R. McCarthy, Jr. Counsel
711 West 7th Street
Austin, Texas 78701
Fax: 512-225-5565
emccarthy@jacksonsjoberg.com

For Lower Colorado River Authority:

Mr. Greg Graml, Counsel
Ms. Lyn Clancy, Counsel
c/o Office of General Counsel
PO Box 220, Mailstop H 424
Austin, TX 78767
Fax: 512- 473-4010
greg.graml@lcra.org
lyn.clancy@lcra.org

For End Op L.P.:

Stacey V. Reese
2405 W. 9th Street
Austin, Texas 78703
Fax: 512- 233-5917
staccy@reeselawpractice.com