Cause No. 29,696

ANDREW MEYER, BETTE BROWN DARWYN HANNA, Individuals, and ENVIRONMENTAL STEWARDSHIP, Plaintiffs	§	IN THE
v.	§	21ST JUDICIAL DISTRICT COURT
LOST PINES GROUNDWATER CONSERVATION DISTRICT, Defendant,	§	OF BASTROP COUNTY, TEXAS
END OP, LP, Intervenor.	§	

LOST PINES GROUNDWATER CONSERVATION DISTRICT'S
REPLY BRIEF

This lawsuit is a Texas Water Code section 36.251 appeal from an interim order of the Lost Pines Groundwater Conservation District (the "District") denying plaintiffs party status in a contested case hearing on permit applications filed by End Op, L.P. ("End Op"). The court lacks subject matter jurisdiction over this suit because section 36.251 does not authorize appeals from interim orders. The District has not yet issued a final order on End Op's applications.

But, if the court were to conclude that it has jurisdiction, the Board's decision to deny the plaintiffs' request for party status should be upheld under the applicable standard of review – the substantial evidence rule. To demonstrate standing to participate as parties, plaintiffs had to first identify a legal interest within the District's regulatory power, which they did – ownership of groundwater rights. But a property interest in groundwater rights alone is not sufficient to confer standing. Plaintiffs were also required to prove a particularized injury to this interest, one that is actual or imminent and not common to the general public. Plaintiffs' evidence that End Op's pumping would lower District-wide water levels in 2050 in an aquifer formation in which plaintiffs do not have any wells is not evidence of any particularized injury to their rights.

STATEMENT OF FACTS

End Op's applications for Operating and Transport Permits. In March 2013, the District General Manager issued a notice setting a public hearing on 14 applications for Operating Permits and Transport Permits filed by End Op. Those applications sought authorization to withdraw an aggregate of 56,000 acre-feet per year from 14 wells located in Bastrop and Lee Counties to be used for drinking water supply purposes in Travis and Williamson Counties. AR Tab 48.[1]

The District regulates pumping from a number of groundwater aquifer units within Bastrop and Lee Counties. From shallowest to deepest, the productive aquifer units are: the Sparta, Queen City, Carrizo, Calvert Bluff, Simsboro, and Hooper. Some wells also produce from shallow "alluvial" deposits along the Colorado River. *See* AR Tab 69 at BCAR 002124-27; AR Tab 75, attached as Attachment 1 to this Brief. End Op sought authority to produce groundwater from the Simsboro formation.

Public hearing and request for contested case hearing. The public hearing on the applications was scheduled for April 17, 2013. District Rules provide that three types of persons can request a contested case, that is, a trial-type, hearing on an application, not later than the fifth day before the public hearing: (1) the District General Manager; (2) the applicant; and (3) "a person who has a personal justiciable interest that is related to a legal right, duty, privilege, power, or economic interest that is within the District's regulatory authority and that is affected by the Board's action on the Application, not including persons who have an interest common to members of the public." Aqua Water Supply Corporation ("Aqua") timely submitted a request for a contested case hearing on End Op's applications on April 10, 2017. AR Tab 2.

[1] The stipulated administrative record filed on February 6, 2015 is cited as "AR." Each citation includes the Tab number of the document identified in the index filed with the administrative record. Individual pages in a document are identified by the BCAR bates number in the lower right hand corner.

On April 17, 2013, the District Board of Directors continued the public hearing on the applications to April 18, 2013. At the completion of the public hearing on April 18, 2013, the Board voted to schedule a hearing on May 15, 2013 to consider Aqua's request for a contested case hearing. After the April 18, 2013 public hearing, but before the May 15, 2013 hearing, the plaintiffs in this case submitted letters to the District requesting party status in any contested case hearing on End Op's applications. AR Tabs 3-6.

At the May 15 hearing, the Board voted to grant Aqua's request for a contested case hearing and refer the issue of whether plaintiffs had standing to participate in the contested case hearing as parties to the State Office of Administrative Hearings ("SOAH"). AR Tabs 11-12. Under the Texas Water Code and District Rules, a party to a contested case hearing has the right to request that a contested case hearing be conducted by SOAH, a state agency. *See* TEX. WATER CODE § 36.416; District Rule 14.4.B. End Op requested a SOAH hearing. AR Tab 7.

Evidentiary hearing on standing. On August 12, 2013, the SOAH Administrative Law Judge ("ALJ") held a full day preliminary hearing on the plaintiffs' requests for party status. At that hearing, both the plaintiffs and End Op presented evidence on whether the plaintiffs had standing to participate in the contested case hearing as parties.

Andrew Meyer. Mr. Meyer testified that he and his wife own 38.9 acres in Bastrop County. AR Tab 38 at BCAR 001683. There are no groundwater wells on the property. *Id.* at 001686. Mr. Meyer stated that he plans to drill a well on his property, but did not indicate the formation in which he plans to complete the well. *Id.* at 001686. End Op presented expert testimony that the estimated depth to the Simsboro on Mr. Meyer's property is 2,350 feet below ground level, and that a well drilled to that depth would cost approximately $250,000. *Id.* at

001759-61; AR Tab 70, attached at Attachment 2. The nearest registered or permitted wells are completed in the shallower Sparta and Carrizo formations. *Id.*

Bette Brown. Ms. Brown testified that she owns a 10-acre tract, a 204.61-acre tract, and a 106.67-acre tract in Lee County, Texas. AR Tab 38 at BCAR 001665. Ms. Brown testified that there are two wells on these three tracts. One of these is a hand-dug well that is not currently in use. *Id.* at 001666, 001675. The other well, which is in use, was drilled in the 1970s. *Id.* Ms. Brown did not know how deep the two wells are or whether they are completed in the Simsboro formation. *Id.* at 001677.

End Op offered expert testimony that the estimated depth to the Simsboro formation on Ms. Brown's properties is 1,600-1,700 feet below ground level, and that a well drilled to that depth would cost approximately $150,000. AR Tab 70, Attachment 2. The registered or permitted wells located nearest to Ms. Brown's properties are completed in the Queen City and Carrizo formations, which are shallower than the Simsboro formation. *Id.* End Op also presented expert testimony that low permeability layers between the various aquifer formations means that pumping from the Simsboro formation has minimal effect on overlying aquifers. AR Tab 38 at BCAR 001762; AR Tab 75, Attachment 1.

Darwyn Hanna. Mr. Hanna testified that he owns about 30 acres in Cedar Creek and about 200 acres in the Upton area in Bastrop County. AR Tab 38 at BCAR 001695-96. Mr. Hanna had no wells and no current plans to drill wells on either property. *Id.* at 001697-98. He currently gets his drinking water from Aqua. *Id.* at 001699. As long as Aqua continues to provide service, Mr. Hanna saw no need to drill a well on his property. *Id.* at 001700.

Environmental Stewardship. Environmental Stewardship presented testimony that it owns an approximately 0.25-acre tract in Bastrop County. AR Tab 38 at BCAR 001649. The tract is

about 75 feet by 150 feet in dimension. *Id.* at 001651. No groundwater well was located on the property, and Environmental Stewardship had no current intention to drill a well on the property. *Id.* at 001650. The current use of the property does not require access to water. *Id.* at 001652.

Environmental Stewardship also presented an expert witness who offered a map showing the drawdown of water levels in the Simsboro formation across the District in 2050 that modeling predicts would result from End Op's pumping. AR Tab 41, attached at Attachment 3.

ALJ ruling on party status. On September 25, 2013, the ALJ issued Order No. 3 denying party status to Andrew Meyer, Bette Brown, Darwyn Hanna, and Environmental Stewardship. AR Tab 22, attached as Attachment 4. The ALJ rejected plaintiffs' argument that their ownership of property over the Simsboro formation and evidence that End Op's proposed pumping would lower water levels in the Simsboro across the District as a whole gave them standing. *Id.* at BCAR 001423.

He held that the plaintiffs had to prove a concrete and particularized injury to their legal interests that was actual or imminent. Andrew Meyer, Darwyn Hanna, and Environmental Stewardship could not show an actual or imminent injury because they do not have any groundwater wells that would be affected by End Op's proposed pumping. *Id.* Although Ms. Brown owns one operational groundwater well, she offered no evidence that the well was completed in the Simsboro formation or that pumping from the Simsboro would affect her well. *Id.* at 001424. Plaintiffs expressed concerns about impacts on District-wide Simsboro formation water levels and the Colorado River are concerns they share with the general public, not the required particularized injury. *Id.* at 001423-24.

Board ruling on party status. After Order No. 3 was issued, the SOAH ALJ held a contested case hearing on the merits of End Op's applications. After the hearing, the ALJ issued

a proposal for decision, which was considered by the Board in a meeting held on September 10, 2014. At that meeting, the Board voted to deny plaintiffs' request for party status and adopt the findings of fact and conclusions of law presented in the ALJ's Order No. 3. AR Tab 36, attached as Attachment 5.

At the same time, the Board voted to remand End Op's applications to SOAH for an additional evidentiary hearing on the issue of beneficial use. That hearing was held and the ALJ issued a proposal for decision on the remand issues. The Board has considered that proposal for decision but has yet to enter a final order on End Op's applications.

STANDARD OF REVIEW

In an appeal under Texas Water Code section 36.251: "The burden of proof is on the petitioner, and the challenged law, rule, order, or act shall be deemed prima facie valid." TEX. WATER CODE § 36.253. The standard of review is "the substantial evidence rule as defined by Texas Government Code section 2001.174." *Id.*

Under section 2001.174, "a court may not substitute its judgment for the judgment of the state agency on the weight of the evidence on questions committed to agency discretion." The court may reverse or remand the case only "if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:"

(A) in violation of a constitutional or statutory provision;

(B) in excess of the agency's statutory authority;

(C) made through unlawful procedure;

(D) affected by other error of law;

(E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or

(F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

TEX. GOV'T CODE § 2001.174(2).

Substantial evidence in the record under subsection (E) requires "only more than a mere scintilla" to support the agency determination. *Railroad Comm'n v. Torch Operating Co.*, 912 S.W.2d 790, 792-93 (Tex. 1995). "[T]he evidence in the record actually may preponderate against the decision of the agency and nonetheless amount to substantial evidence." *Texas Health Facilities Comm'n v. Charter Med.–Dallas, Inc.*, 665 S.W.2d at 452. The true test is not whether the agency reached the correct conclusion, but whether some reasonable basis exists in the record for the agency's action. *Id.*

ARGUMENT

I. Plaintiffs' appeal of an interim order should be dismissed for lack of jurisdiction.

Plaintiffs appeal under Texas Water Code section 36.251. At the time plaintiffs filed suit, Texas Water Code section 36.251 provided: "A person, firm, corporation, or association of persons affected by and dissatisfied with any provision or with any rule or order made by a district is entitled to file a suit against the district or its directors to challenge the validity of the law, rule, or order. … The suit may only be filed after all administrative appeals to the district are final."

In *West v. Texas Commission on Environmental Quality*, 260 S.W.3d 256 (Tex. App.—Austin 2008, pet. denied), the Austin court of appeals considered the appeal of an interim order under a very similar statute authorizing appeals of decisions of the Texas Commission on Environmental Quality. Texas Water Code section 5.351 provides: "A person affected by a ruling, order, decision, or other act of the commission may file a petition to review, set aside, modify, or suspend the act of the commission."

The appellants in *West* sought judicial review of a Commission order denying their requests for a contested case hearing on the application and an ALJ order remanding the application to the Commission's executive director for decision. The Court held that the orders were "interim orders not subject to appeal or judicial review." *Id.* at 263-64. These interim order were "subsumed within the Commission's final decision to approve the permit application and subject to judicial review on appeal therefrom. To obtain judicial review of these interim orders, appellants were required to seek judicial review of the Commission's final decision in compliance with section 5.351." *Id.* at 264.

"Concern for efficient administrative procedure requires consideration of the validity of interim orders only upon appeal from final orders." *City of Corpus Christi v. Pub. Util. Comm'n*, 572 S.W.2d 290, 299 (Tex. 1978). *See also Sun Oil Co. v. Railroad Comm'n*, 311 S.W.2d 235, 296 (Tex. 1958) ("an administrative order to be judicially reviewable, it must be 'final', that is to say, not a mere intermediate ruling or step which does not terminate the proceeding in which it occurs").

The District Board has not entered a final order on End Op's applications. The order denying plaintiffs party status is an interim order, not a final order. Texas Water Code section 36.251 does not authorize appeals of interim orders. Therefore, plaintiffs' suit must be dismissed because Water Code section 36.251 does not waive the District's immunity from suit in this case.

II. The District Order should be upheld because plaintiffs failed to prove that their legal interests will suffer particularized injury that is actual or imminent.

A. Plaintiffs had the burden to prove they met the statutory and constitutional requirements for standing.

The Texas Water Code expressly authorizes groundwater conservation districts to adopt rules that "limit participation in a hearing on a contested application to persons who have a

personal justiciable interest related to a legal right, duty, privilege, power, or economic interest that is within a 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 public." TEX. WATER CODE § 36.415(b)(2). The District adopted such a rule. *See* District Rule 14.3.D(3).[2]

The Austin court of appeals has held that the Water Code section 36.415 test for standing – personal justiciable interest not common to the general public – incorporates the constitutional minimum requirements for standing to challenge governmental actions. *See City of Waco v. Tex. Comm'n on Envtl. Quality*, 346 S.W.3d 781, 801 (Tex. App.—Austin 20*11), rev'd on other grounds,* 413 S.W.3d 408 (Tex. 2013)*; Bosque River Coalition v. Tex. Comm'n on Envtl. Quality*, 347 S.W.3d at 356, 375 (Tex. App.—Austin 2011), *rev'd on other grounds*, 413 S.W.3d 403 (Tex. 2013).

To demonstrate standing under these principles, a person must demonstrate a particularized interest in a conflict distinct from that sustained by the public at large. *Stop the Ordinances Please v. City of New Braunfels*, 306 S.W.3d 919, 926 (Tex. App.—Austin 2010, no pet.). The person seeking party status must show, among other things:

> an 'injury in fact'— an invasion of a 'legally protected' [or cognizable] interest which is (a) concrete and particularized and (b) 'actual or imminent, not conjectural or hypothetical.'

Id., citing *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136 (1992).

A person seeking party status has the burden to plead facts supporting these elements of standing and, if challenged, to prove them. *Lujan*, 112 S.Ct. at 2136-37. Because these elements are "not mere pleading requirements," they "must be supported in the same way as any other

---

[2] The District Rules have been amended since the Board denied the plaintiffs' request for party status, and the substance of Rule 14.3.D(3) is now included in Rule 15.1.E(2)(d). This brief cites to the District Rules as they existed on the date the Board denied plaintiffs' request for party status. A copy of the rule as it existed at that time is attached as Attachment 6.

matter on which the plaintiff bears the burden of proof." *Id.* at 2136. "[A]t the final stage, those facts (if controverted) must be 'supported adequately by the evidence adduced at trial.'" *Id.* at 2137. *See also Good Shepherd Med. Ctr. v. State*, 306 S.W.3d 825, 836 (Tex. App.—Austin 2010, no pet.) ("Standing … requires pleadings (and, ultimately, proof)" that elements are met).

Plaintiffs, then, had the burden to prove, at the evidentiary hearing held for that purpose: (1) that they had a "legally protected interest", or, as Water Code section 36.415 provides, "a legal right, duty, privilege, power, or economic interest that is within a district's regulatory authority;" and (2) that granting the permit applications will cause a "concrete and particularized" injury to the plaintiffs, not common to members of the public, that is actual or imminent, not conjectural or hypothetical.

Plaintiffs argue that a challenge to standing should be evaluated under the summary judgment standard and that the person challenging standing is in the position of a movant for summary judgment and bears the burden of demonstrating a lack of standing based on undisputed facts. Plaintiffs' Initial Brief, pp. 16, 24. Plaintiffs are wrong. The summary judgment standard has no application here, where an evidentiary hearing was held at which the parties offered testimony and exhibits and had the opportunity to cross-examine witnesses on undisputed and disputed facts. The plaintiffs had the burden of proof at that trial. Under the substantial evidence rule, the resolution of the disputed facts was a question for the ALJ initially and the District Board ultimately. Their findings of fact and the conclusions of law based on those findings must be upheld if they are supported by substantial evidence in the record and the law.

B. The District's conclusion that plaintiffs did not demonstrate an actual or imminent particularized injury is supported by substantial evidence.

The District does not dispute that the plaintiffs met the first prong for standing. Plaintiffs proved that they had a legally protected interest. They owned property within the District, which,

under the Texas Supreme Court's decision in *Edwards Aquifer Authority v. Day*, 69 S.W.3d 814, 832 (Tex. 2012), includes ownership of the groundwater in place beneath the property. However, the District Board concluded that Plaintiffs did not prove the second prong of the test, a particularized injury not common to the general public that is actual or imminent, and this conclusion is supported by substantial evidence.

1. Plaintiffs failed to prove that End Op's proposed pumping will cause an actual or imminent injury to their current or proposed use of groundwater.

It is undisputed that Andrew Meyer, Darwyn Hanna and Environmental Stewardship do not own any groundwater wells and are not producing any groundwater from any aquifer. End Op's proposed pumping, therefore, cannot cause any actual or imminent injury to Mr. Meyer's, Mr. Hanna's, or Environmental Stewardship's use of groundwater from their properties.

Plaintiffs argue that the District improperly disregarded Mr. Meyer's intent to drill a groundwater well at some time in the future to support his organic farming operation. Plaintiffs' Initial Brief, p. 24. End Op proposes to withdraw water from the Simsboro formation. Mr. Meyer did not say that he intended to complete a well in the Simsboro formation, and there was evidence that a well completed in the Simsboro would cost approximately $250,000 and that nearby wells are completed in shallower formations. AR Tab 70, Attachment 2. Thus, substantial evidence in the record supports the conclusion that Mr. Meyer failed to prove that he intends to complete a well in the Simsboro formation.

Ms. Brown does have one groundwater well in use. Plaintiffs argue that the District also unjustifiably disregarded this fact. Plaintiffs' Initial Brief, p. 24. But plaintiffs offered no evidence that Ms. Brown's well is completed in the Simsboro formation. Ms. Brown said she did not know the depth of this well, and plaintiffs' expert testified that he was not even aware of her wells until the hearing. AR Tab 38 at BCAR 001677, 001748. End Op's expert testified that the

Simsboro formation was 1,600-1,700 feet deep at Ms. Brown's property, and that nearby wells were completed in the shallower Queen City and Carrizo aquifers. AR Tab 70. Thus, substantial evidence in the record supports the conclusion that Ms. Brown did not prove that her functional well was completed in the Simsboro aquifer.

Plaintiffs then complain that the District disregarded its expert's conclusory testimony that the Simsboro formation is hydrologically connected to formations above it and that pumping from the Simsboro formation could impact the ability to pump from other formations. Plaintiffs' Initial Brief, p. 24. However, End Op's expert offered a cross-section of the groundwater formations in the District and testified that low permeability layers between the formations mean that "when you pump from the Simsboro you have minimal, if even detectable, on the water levels that are in the sands and overlying aquifers." AR Tab 38 at BCAR 001762; AR Tab 75, Attachment 1.

Under the substantial evidence rule, "a court may not substitute its judgment for the judgment of the state agency on the weight of the evidence on questions committed to agency discretion." TEX. GOV'T CODE § 2001.174. An "agency may, or may not, accept the testimony of witnesses, expert or non-expert. ... Moreover, the agency may accept part of the testimony of one witness and disregard the remainder." *Southern Union Gas Co. v. Railroad Comm'n*, 692 S.W.2d 137, 141 (Tex. App.—Austin 1985, writ ref'd n.r.e.). The District was free to reject plaintiff's expert's opinion, rely on End Op's expert's testimony on this issue, and conclude that End Op's proposed pumping in the Simsboro formation will have minimal, if any, effects on wells completed in shallower formations.

Review of the District's resolution of disputed facts is governed by the substantial evidence rule. Substantial evidence in the record supports the District's conclusion that the

plaintiffs failed to prove that End Op's proposed pumping will result in an actual and imminent injury to plaintiffs' use of groundwater

2. Lower water levels in the Simsboro formation in 2050, standing alone, do not prove a particularized injury that is actual or imminent.

Plaintiffs argue that proof of their ownership of the groundwater beneath their land, and evidence that groundwater modeling predicts that District-wide water levels in the Simsboro formation will be lower in 2050 as a result of End Op's proposed pumping, is sufficient to show that they will suffer a particularized injury that is actual and imminent. But lower water levels in the Simsboro formation only injure the plaintiffs if they are using or plan to use groundwater from the Simsboro formation.

For example, plaintiffs argue that the lower water levels will injure them because it would increase the cost of drilling a Simsboro well and the cost of pumping water from that formation. Plaintiffs' Initial Brief, p. 24. But those injuries can only occur if plaintiffs have completed a well in the Simsboro formation or plan to complete a well in the Simsboro formation. As discussed in the section above, substantial evidence supports the District's conclusions that Ms. Brown did not prove that her existing groundwater well is completed in the Simsboro formation, that Mr. Meyer currently has no well on this property and that he did not prove that he plans to drill a well into the Simsboro aquifer, and that Mr. Hanna and Environmental Stewardship do not have a well or plan to drill one. Therefore, substantial evidence in the record supports the conclusion that lower water levels in the Simsboro formation will not result in an injury that is particular to them or any injury that is actual or imminent.

Plaintiffs also argue that lower water levels injure their "correlative rights." Plaintiffs' Initial Brief, p. 27. There are no common law correlative rights in groundwater. *Edwards Aquifer Authority v. Day*, 369 S.W.3d at 830. "[C]orrelative rights are a creature of regulation rather than

the common law." *Id.* Here, the Water Code and the District Rules require plaintiffs to show an actual or imminent particularized injury in order to participate in a contested case hearing.

If plaintiffs were correct – and lowering of water levels alone creates standing because it injured their "correlative rights" – then every property owner in Bastrop and Lee Counties would be entitled to seek a contested case hearing on every application to withdraw groundwater and participate in every contested case on an application to withdraw groundwater. All groundwater production results in lowered water levels in the formation in which the well is completed. AR Tab 38 at BCAR 001801. According to plaintiffs' expert, all groundwater production lowers water levels in all other formations as well. Every property owner would have standing to participate in every contested case hearing even if the property owner testified that he did not own a groundwater well and never intended to drill one. In the most extreme case, every property owner would have standing to participate in every contested case hearing, even if the property owner could not legally drill a well due to restrictive covenants or state or local regulations. This logical extreme of plaintiffs' standing argument demonstrates that it is wrong because it would grant standing to persons who cannot prove a particularized injury that is actual or imminent.

Without this actual or imminent particularized injury, plaintiffs and other property owners in the District share a common interest with the general public and the District – an interest in protection of the region's groundwater resources – which does not confer standing. *See Stop the Ordinances Please*, 306 S.W.3d at 930 (allegation that city ordinances would discourage tourism would not confer standing on businesses that rented tubes and coolers for use on Guadalupe and Comal Rivers because economic impact would be shared with other residents).

The District's decision to deny plaintiffs' request for party status is not arbitrary or capricious, as plaintiffs claim. *See* Plaintiffs' Initial Brief, p. 4. An agency decision is arbitrary and capricious if it is not supported by substantial evidence, if the agency failed to consider legally relevant factors, if it considers legally irrelevant factors, or if it weighs only relevant factors but reaches completely unreasonable result. *Tex. Dept. of Ins. v. State Farm Lloyds*, 260 S.W.3d 233, 245-46 (Tex. App.—Austin 2008, no pet.).

In this case, the District's conclusion that plaintiffs' failed to show a particularized injury that is actual or imminent is supported by substantial evidence. The District considered the factors for determining whether party status should be granted as set out in Texas Water Code section 36.415(b)(2) and District Rule 14.3.D(3). It did not weigh any irrelevant factors. And it did not reach a completely unreasonable result.

CONCLUSION AND PRAYER

The court lacks jurisdiction over an appeal of an interim order in a case in which the District has not yet issued a final order. If, however, this court determines that it does have jurisdiction, then, under the substantial evidence rule, the District's decision to deny plaintiffs' request for party status must be affirmed unless the plaintiffs meet their burden to demonstrate that the decision was affected by an error of law, not supported by substantial evidence in the record as a whole, or is arbitrary and capricious. The District properly applied the law set out in the Water Code, the District Rules, and the relevant case law to the facts that it found, and those facts are supported by substantial evidence. The District did not consider irrelevant factors, and its conclusion is reasonable. The District respectfully requests that the court affirm the District's order and grant such other relief to the District to which it is justly entitled.

Respectfully submitted,

GRAVES, DOUGHERTY, HEARON & MOODY, P.C.
401 Congress Avenue, Suite 2200
Austin, Texas 78701
(512) 480-5731
(512) 480-5899 (fax)

By: Robin A. Melvin

David P. Lein
State Bar ID No. 24032537
dlein@gdhm.com
Robin A. Melvin
State Bar ID No. 13929590
rmelvin@gdhm.com

ATTORNEYS FOR LOST PINES GROUNDWATER CONSERVATION DISTRICT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served on the following via first class mail and email on 4th of May, 2016:

Donald H. Grissom
William W. Thompson
Grissom & Thompson
509 West 12th Street
Austin, Texas 78701
512-478-4059
512-482-8410 FAX

Ernest F. Bogart
P.O. Box 690
Elgin, Texas 78621
512-281-3326
512-281-5094 FAX
ATTORNEYS FOR BROWN, MEYER AND HANNA

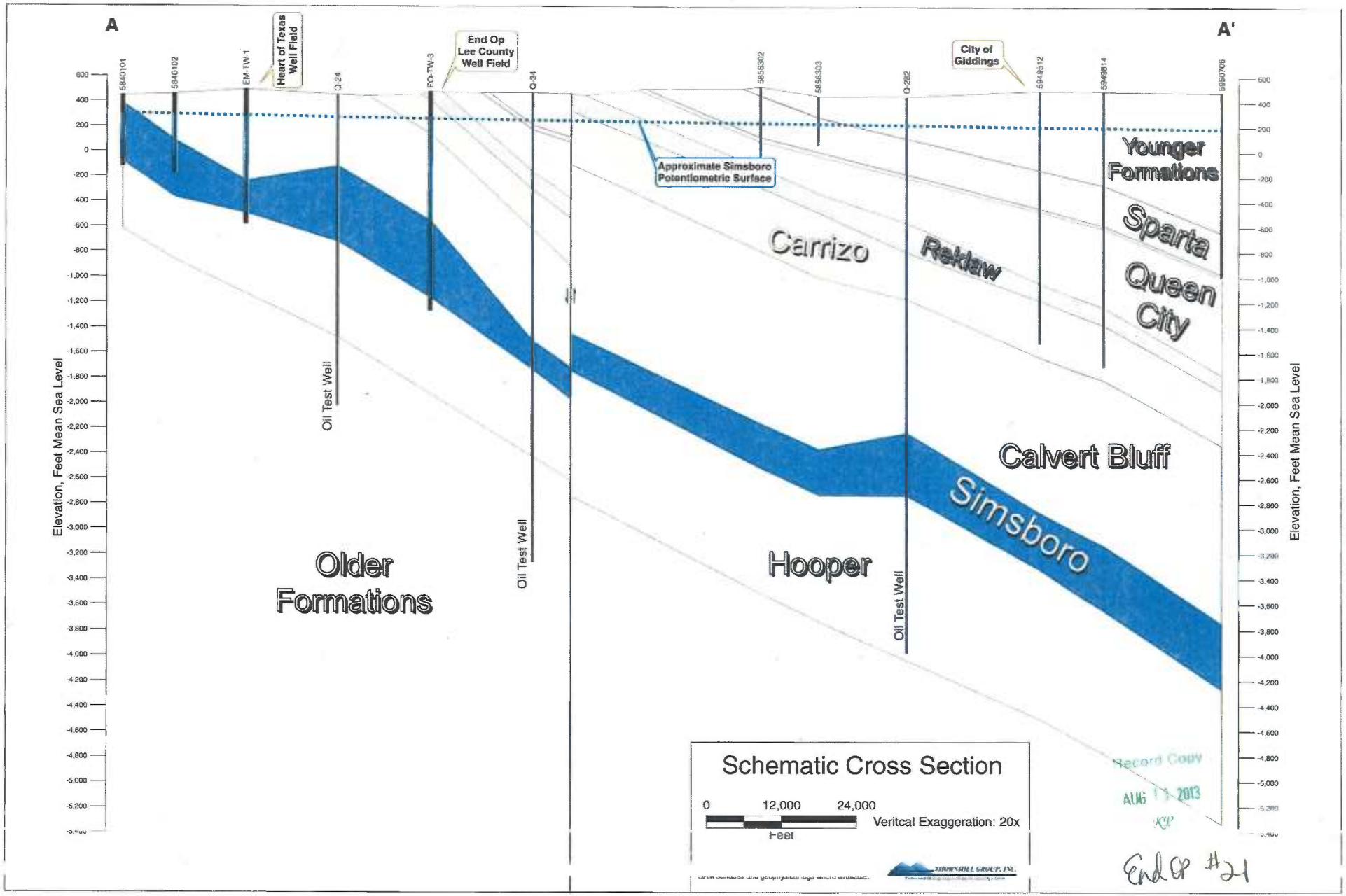
Eric Allmon
Frederick, Perales, Allmon & Rockwell, P.C.
707 Rio Grande, Suite 200
Austin, Texas 78701
512-469-6000
512-482-9346 FAX
ATTORNEYS FOR ENVIRONMENTAL STEWARDSHIP

Stacey V. Reese
Stacey V. Reese Law PLLC
2405 West 9th Street
Austin, Texas 78703
512-212-1423
512-233-5917 FAX

Russell S. Johnson
McGinnis, Lochridge & Kilgore, L.L.P.
600 Congress Avenue, Suite 2600
Austin, Texas 78701
512-495-6074
512-505-6374 FAX
ATTORNEYS FOR END OP, L.P.

Robin A. Melvin

ATTACHMENT 1


A
A'
5840101
5840102
EM-TW-1
Heart of Texas Well Field
Q-24
EO-TW-3
End Op Lee County Well Field
Q-34
5856302
5856303
Q 282
City of Giddings
5949612
5949814
5950706
Approximate Simsboro Potentiometric Surface
Younger Formations
Sparta
Queen City
Carrizo
Reklaw
Calvert Bluff
Simsboro
Hooper
Oil Test Well
Oil Test Well
Oil Test Well
Older Formations
Elevation, Feet Mean Sea Level
Elevation, Feet Mean Sea Level
Schematic Cross Section
0
12,000
24,000
Feet
Veritcal Exaggeration: 20x
Record Copy
AUG 1 1 2013
End Op #21

BCAR 002170

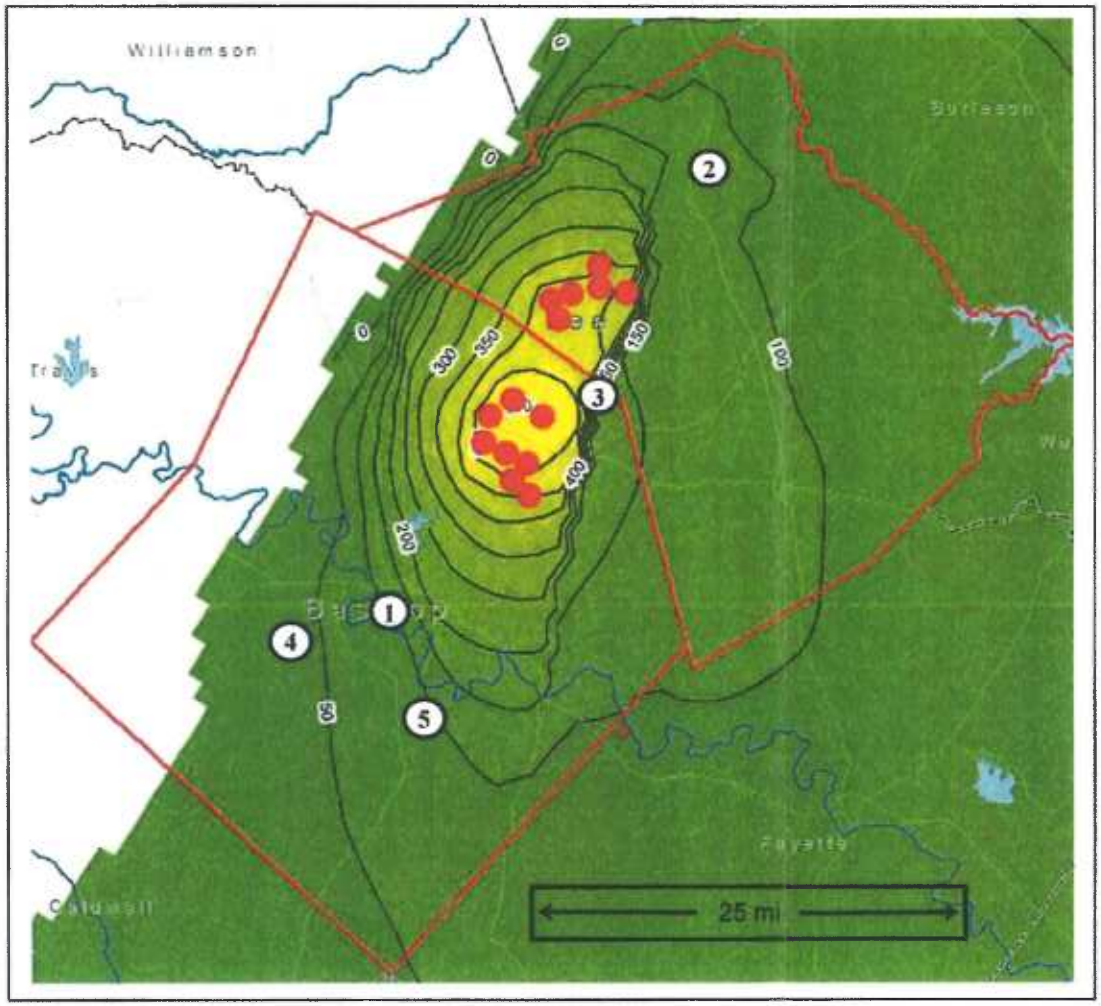
ATTACHMENT 2

Person/Entity	Property ID	Acres	Registered Well	Permitted Well	Nearest Well	Est. Min. Drill Depth for Domestic Simsboro Well (feet BGL)	Est. Cost for Simsboro Domestic Well	Shallowest Aquifer	Comments
Environmental Stewardship	R31799	0.242	No	No	Calvert Bluff	800	$40,000	Calvert Bluff	Short side is about 75 feet. No location on property is a minimum of 50 feet from all property lines.
Andrew Meyer	R94740	39.903	No	No	Sparta	2,350	$250,000	Sparta	
	R17421	12.217	No	No	Carrizo	1,700	$150,000	Carrizo	
	R35096	25.782	No	No	Lower Wilcox	100	$2,500	Wilcox - Undifferentiated	
Darwyn Hanna	R42645	47.416	No	No	Carrizo	1,700	$150,000	Carrizo	
	R55639	155.871	No	No	Carrizo	1,700	$150,000	Carrizo	
	R56971	5.324	No	No	Lower Wilcox	100	$2,500	Wilcox - Undifferentiated	
	10874	130	No	No	Carrizo	1,600	$150,000	Queen City	
Frank D. Brown	11369	0.1964	No	No	Carrizo	1,900	$175,000	Queen City	Short side is about 85 feet. No location on property is a minimum of 50 feet from all property lines.
Bette Brown	21438	79.5	No	No	Alluvium	1,700	$150,000	Queen City	
	22486	0.5	No	No	Alluvium	1,700	$150,000	Queen City	
	24425	223.7	No	No	Queen City	1,700	$150,000	Queen City	
	10869	102	No	No	Queen City	1,600	$150,000	Sparta	
	10870	102.61	No	No	Queen City	1,600	$150,000	Sparta	
	18186	10	No	No	Queen City	1,600	$150,000	Sparta	
	22445	106.67	No	No	Carrizo	1,600	$150,000	Queen City	
	10898	144.75	No	No	Queen City	1,700	$150,000	Sparta	
Gary Stifflemire	16914	1	No	No	Simsboro	600	$30,000	Calvert Bluff	Manville Simsboro wells less than 1 mile away
	76035	47.34	No	No	Calvert Bluff	700	$35,000	Calvert Bluff	Manville Simsboro wells less than 2 miles away

SOAH DKT NO. 952-13-5210

End Op Exh No. 16

ATTACHMENT 3



1. Environmental Stewardship
2. Brown
3. Meyer
4. Hanna 1
5. Hanna 2

● Proposed End Op Well

Figure 1
Property Locations
(Adapted from LPGCD memo of March 20, 2013)

BCAR 001825

Record Copy
AUG 13 2013
KP

EXHIBIT
tabbies
ES #3

ATTACHMENT 4

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE
300 West 15th Street Suite 502
Austin, Texas 78701
Phone: (512) 475-4993
Fax: (512) 322-2061

DATE: **9/25/2013**

NUMBER OF PAGES INCLUDING THIS COVER SHEET: **15**

REGARDING: **ORDER NO. 3 - DENYING PARTY STAUS IN PART & GRANTING PARTY STATUS IN PART**

DOCKET NUMBER: **952-13-5210**

JUDGE MICHAEL J OMALLEY

FAX TO:	**FAX TO:**
ROBIN A. MELVIN (GRAVES DOUGHERTY HEARON & MOODY)	(512) 480-5888
MICHAEL A. GERSHON (LLOYD, GOSSELINK, ROCHELLE & TOWNSEND, P.C.)	(512) 472-0532
ERIC ALLMON (LOWERRE, FREDERICK, PERALES, ALLMON & ROCKWELL)	(512) 482-9346
RUSSELL JOHNSON (MCGINNIS LOCHRIDGE & KILGORE, LLP)	(512) 505-6374
STACEY V. REESE	(512) 233-5917
BETTE BROWN	VIA REGULAR MAIL
ANDREW MEYER	VIA REGULAR MAIL
DARWYN HANNA	VIA REGULAR MAIL

xc: Docket Clerk, State Office of Administrative Hearings
NOTE: IF ALL PAGES ARE NOT RECEIVED, PLEASE CONTACT LIZ SLICK(lsl) (512) 475-4993

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**

ORDER NO. 3
DENYING ENVIRONMENTAL STEWARDSHIP, BETTE BROWN, ANDREW MEYER AND DARWYN HANNA PARTY STATUS, AND GRANTING AQUA WATER SUPPLY CORPORATION PARTY STATUS

I. INTRODUCTION

In 2007, End Op, L.P. ("End Op") filed Applications for groundwater permits with the Lost Pines Groundwater Conservation District ("the District") seeking to withdraw water from the Simsboro Aquifer ("Simsboro"). The District imposed a moratorium on End Op's applications, preventing action on them until January 2013. On March 18, 2013 the District posted notice that a hearing would be held to consider End Op's applications on April 17, 2013.

Prior to the hearing and pursuant to the District's Rule 14.3(D),[1] Aqua Water Supply Corporation ("Aqua") filed a timely request for a contested case hearing on End Op's applications. On April 18, 2013, public comment on End Op's applications was conducted and closed, and the District's Board of Directors (the "Board") set a preliminary hearing on Aqua's request for May 15, 2013. On May 8, 2013, Environmental Stewardship ("ES"), Bette Brown, Andrew Meyer, and Darwyn Hanna (collectively, the "Landowners") filed requests for party status in any contested case hearing on End Op's Applications.

At the May 15th hearing, the District considered the timeliness of the Landowners' requests for party status and reached the conclusion that the Landowners' requests were timely. The District then designated the Landowners as parties for this contested case hearing at the

[1] District Rule 14.3(D) provides that: "A request for a contested case hearing on the Application, to be conducted under Rule 14.4, must be made in writing and filed with the District no later than the 5th day before the date of the Board meeting at which the Application will be considered."

May 15th hearing and referred the issue of the Landowners' standing to the State Office of Administrative Hearings ("SOAH").

II. PARTIES' ARGUMENTS AND ALJ'S ANALYSIS

A. Timeliness

1. End Op Argues Landowners' Requests for Party Status Were Improper and Untimely and Should Be Denied.

First, End Op argues that the Landowners' requests for party status should be denied because a person may not be a party in a contested case proceeding on groundwater permit unless they filed a timely request for a contested case hearing. End Op points to Chapter 36 of the Texas Water Code, which requires groundwater districts to adopt procedural rules limiting participation in a hearing on a contested application to persons with standing[2] and provides that when hearings are conducted by SOAH only Subchapters C, D, and F of the Administrative Procedure Act ("APA") and district rules consistent with the procedural rules of SOAH apply.[3] End Op claims that Chapter 36 does not permit a groundwater district or an Administrative Law Judge ("ALJ") with SOAH to designate a person who has not timely requested a contested case hearing as a party because to do so would violate the District's own procedural rules concerning party status. Since the Landowners did not file such requests, End Op argues, neither the District nor the ALJ may designate them as parties.

Second, End Op claims that the Landowners' requests for party status are untimely and should be denied because they had notice and ample time to request a contested case hearing or party status and did not make such requests. Third, End Op argues that granting party status is unnecessary because the Landowners' interests are already protected by the District. Finally, End Op claims that granting the Landowners party status would render the District's Rule 14.3(D) a nullity, would add considerable delay to an already greatly delayed venture, would burden End Op with substantial additional expense, and would create a loophole precedent which would allow for a continuous flow of new requests for party status beyond the proper deadline.

---

[2] *See* Tex. Water Code § 36.415.
[3] *See* Tex. Water Code § 36.416.

2. Landowners Argne That Since the District Has Already Determined that Landowners' Reqnests for Party Statns Were Timely, It Is Unnecessary for This ALJ to Revisit the Issne of Timeliness.

Landowners note that the District has already determined that Landowners' requests for party status were timely. The Landowners argued that, under District rules, a request for party status presents a separate and independent question apart from whether to grant a request for a contested case hearing. Since the District determined that Protestants requests for party status were timely, they argue, it is unnecessary for this ALJ to revisit the issue.

3. ALJ'S Analysis

District Rule 14.3(D) contemplates who may request a contested case hearing on a permit application.[4] After a hearing has been properly requested, Rule 14.3(E) governs the District's consideration of that request.[5] Rule 14.3(E) gives the Board the authority to grant or deny the request at its meeting, to designate parties at its meeting, or to schedule a preliminary hearing where the Board will make a determination of those issues.[6] End Op admits that Aqua filed a timely request for a contested case hearing on End Op's Applications. Accordingly, the Board was then given the authority to consider that request under Rule 14.3(E). The Board was entirely within its authority when it scheduled such a hearing for May 15, 2013. Under Rule 14.3(E), the Board has the authority to designate parties at this hearing.[7] The Landowners' requests for party status were filed on May 8, 2013. There is nothing in the District's rules that states that the

[4] District Rule 14.3(D) reads: "Request for contested case hearing. A request for a contested case hearing on the Application, to be conducted under Rule 14.4, must be made in writing and filed with the District no later than the 5th day before the date of the Board meeting at which the Application will be considered. A request for a contested case hearing may be granted if the request is made by: (1) the General Manager; (2) the applicant; or (3) a person who has a personal justiciable interest that is related to a legal right, duty, privilege, power, or economic interest that is within the District's regulatory authority and that is affected by the Board's action on the Application, not including persons who have an interest common to members of the public."

[5] District Rule 14.3(E) reads: "Consideration of request for contested case hearing. (1) If the District receives a timely-filed request for a contested case hearing on the Application, then, at its meeting, the Board may: (a) determine whether to grant or deny a request for a contested case; (b) designate parties... (e) schedule a preliminary hearing at which the Board will determine all of the matters described in subsections (a) to (e) or any matters described in those subsections that were not decided at the meeting."

[6] *Id.*

[7] *Id.*

Board may not consider requests that were filed before the date it holds its hearing pursuant to Rule 14.3(E). Accordingly, the Landowners' requests for party status are procedurally adequate.

B. Standing

Having found Landowners' requests for party status procedurally adequate, the next issue is whether the Landowners meet the mandatory standing test set out in section 36.415(b)(2) of the Texas Water Code. This test, which embodies constitutional standing principles, requires that groundwater districts:

> limit participation in a hearing on a contested application to persons who have a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest that is within a 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 public.[8]

In *City of Waco v. Tex. Com'n on Environmental Quality*, the Court of Appeals in Austin determined "an affected person"[9] must meet the following requirements to have standing to request a contested case hearing before Texas Commission on Environmental Quality ("TCEQ"):[10]

> (1) an "injury in fact" from the issuance of the permit as proposed—an invasion of a "legally protected interest" that is (a) "concrete and particularized" and (b) "actual or imminent, not conjectural or hypothetical";
> (2) the injury must be "fairly traceable" to the issuance of the permit as proposed, as opposed to the independent actions of third parties or other alternative causes unrelated to the permit; and
> (3) it must be likely, and not merely speculative, that the injury will be redressed by a favorable decision on its complaints regarding the proposed permit (i.e., refusing to grant the permit or imposing additional conditions).[11]

---

[8] Tex. Water Code § 36.415(b)(2).

[9] "Affected person" is defined in § 5.115 of the Texas Administrative Code as one "who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest" in the matter at issue, and not merely an "interest common to members of the general public" – a definition that is essentially identical to § 36.415(b)(2) of the Texas Waster Code. Additionally, the District adopted the same definition in Section 1, Rule 1.1 of its Rules and Regulations.

[10] Although Landowners are requesting party status, not a contested case hearing, the analysis of the meaning of a "justiciable interest" is applicable.

[11] *City of Waco v. Texas Com'n on Environmental Quality*, 346 S.W.3d 781, 802 (Tex.App.-Austin 2011), reh'g overruled (Aug. 2, 2011), review denied (June 29, 2012), order vacated (Feb. 1, 2013), *rev'd*, 11-0729, 2013 WL 4493018 (Tex. 2013); *See Brown v. Todd*, 53 S.W.3d 297, 305 (Tex. 2001) (quoting *Raines v. Byrd*, 521 U.S. 811,

The burden is upon the Landowners to present evidence establishing each of these elements, showing they possess a qualifying personal justiciable interest.

1. Landowners' Position

The Landowners argue that under section 36.002 of the Texas Water Code, they own the groundwater beneath their respective properties as a real property interest. Accordingly, they argue they possess standing to challenge the deprivation or divestment of their property interests (what they refer to as a "taking") by virtue of being landowners whose property sits above the aquifer at issue in this case.

The Landowners agree with End Op that a person seeking party status must (1) establish an injury in fact that is (2) fairly traceable to the issuance of the permit as proposed and (3) that it is likely, not merely speculative, that the injury will be redressed by a favorable decision on its complaints regarding the proposed permit. The Landowners argue, however, that particular treatment is given to questions of fact related to standing that overlap with the merits of a case. They argue that they need not prove the merits of their case in order to demonstrate a potential impact, but rather need only show that a fact issue exists. To be deemed an affected person, they argue that they need only show a potential impact.

Landowners also argue that they have demonstrated the necessary justiciable interest with regard to End Op's Applications to warrant admission as parties. The ownership of land over the aquifer at issue, they argue, which brings with it a real property interest in the water beneath the land, constitutes a legally protected interest under the Water Code. Since this interest is protected, they maintain that there is no need to demonstrate ownership of a well or intent to drill a well in order to demonstrate that interest. The Landowners claim that it is undisputed that End Op's pumping operations will result in a drawdown of water within the aquifer extending to their

---

818–19 (1997), *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61 (1992); *Stop the Ordinances Please v. City of New Braunfels,* 306 S.W.3d 919, 926–27 (Tex.App.-Austin 2010, no pet.); *Save Our Springs Alliance, Inc. v. City of Dripping Springs,* 304 S.W.3d 871, 878 (Tex.App.-Austin 2010, pet. denied). Although the *City of Waco* case has been reversed by the Texas Supreme Court, the relevant law on injury-in-fact, relied upon in many other Texas cases, remains valid law. The *City of Waco* case was reversed on grounds other than the law relating to injury-in-fact related to party status.

respective properties. They argue that this drawdown will make it more difficult for each of the Landowners to access water in the aquifer and will make it more likely that they will lose access altogether. They state that this drawdown constitutes the necessary injury in fact required for party standing and that the potential injury would be fairly traceable to End Op's operations.

Further, they argue that demonstrated use of said groundwater is not required for standing. In response to End Op's argument that the Landowners lack standing because they do not have wells or plans to develop wells on their property, the Landowners cite *Edwards Aquifer Authority v. Day* for the proposition that their standing is not affected by use, non-use, or intended use of the groundwater.[12] Landowners argue instead that a person seeking party status must only demonstrate a potential impact, and must only raise a question of fact on issues where standing and the merits overlap.

ES, which owns property in Bastrop County near the Colorado River, additionally argues that it has demonstrated a justiciable interest by virtue of the impact of the proposed permits on the Colorado River's flow. ES argues that the proximity of its property to the river gives it a level of access not common to the general public. ES claims that the damage to its interest is that the pumping to be authorized by the permits would reduce the natural inflows to the Colorado River from Simsboro, reducing the flow of the river and reducing ES's ability to use and enjoy the river and the property it owns near the river.

2. End Op's Position

End Op argues that even if Landowners had filed proper and timely requests, Landowners fail to meet the mandatory standing test set out in Tex. Water Code § 36.415(b)(2) and thus may not participate in the contested case hearing on End Op's applications. End Op maintains that the Landowners fail to meet the test because (1) groundwater ownership alone is insufficient to establish standing, (2) non-use of groundwater is a relevant factor when analyzing standing, and (3) an injury in fact that is traceable and redressable, not system-wide effects, is the standard.

[12] *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814 (Tex. 2012), reh'g denied (June 8, 2012).

a. Groundwater ownership alone is insufficient to establish standing.

End Op argues that mere ownership of groundwater under Texas Water Code section 36.002 as a real property interest does not satisfy the standing test. In *City of Waco*, End Op notes, the court found that the city possessed the requisite legally protected interest to have standing, as an affected person under the Water Code, in light of undisputed evidence that the city had ownership rights over the water, used the water as the sole supply for its municipal water utility, had an obligation to treat the water, and experienced escalating treatment costs.[13] End Op argues that when the court relied on this combination of factors, instead of relying on ownership alone, it established that mere ownership was insufficient to convey standing.

End Op also claims that the Landowners' reliance on *Edwards Aquifer Authority v. Day* is misplaced. End Op argues that *Day* addresses whether landowners have an interest in groundwater that is compensable under the Takings Clause of the Texas Constitution, not what factors are necessary to obtain third-party standing in a contested case hearing on an applicant's permit. End Op takes the position that the analysis in *Day* addressing whether non-use as the basis for denial of a permit application constitutes a constitutional taking without compensation does not bear on the issue of whether use or non-use establishes a legally protected interest distinct from the general public.

b. Showing a potential impact on system-wide groundwater levels is insufficient; Landowners must prove a specific injury in fact that is traceable and redressable.

End Op also argues that demonstrating a potential impact to groundwater levels, without offering proof of a specific injury to their exercise of their groundwater rights, is insufficient to obtain standing. End Op claims that under *City of Waco*, a potential party must establish both that it has a legally protected personal justiciable interest and an injury to its legally protected

[13] *City of Waco,* 346 S.W.3d 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) (*emphasis added*).

interest.[14] Further, End Op argues, *City of Waco* expressly dismisses that "allegation 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."[15] End Op cites *United Copper* and *Heat Energy* to demonstrate this injury requirement, arguing that the injury or potential harm that conferred standing was established through proof of potential injury unique to each complainant and different from that suffered by the general public. In *United Copper,* the "potential harm" that conferred standing was established by United Copper's own data indicating that its operations would increase levels of lead and copper particulate at Grissom's home and his child's school, together with proof that Grissom and his child suffered from "serious asthma."[16] In *Heat Energy,* the "potential harm" was established where the association member's house was located one-and-a-half blocks from the facility, the permit applicant had acknowledged in another Commission proceeding that the facility indeed emitted odors, and the association member claimed to detect strong odors coming from it.[17] The member in *Heat Energy* testified the odors affected his breathing, and that he had sought medical attention for throat problems caused by the odors.[18] End Op argues that none of the Landowners can establish such a concrete and particularized, actual or imminent injury that is traceable and redressable because they have not presented evidence of a unique injury not common to the general public as was the case in *United Copper* and *Heat Energy.*

End Op further argues that the Landowners' claim that a system-wide drawdown will occur if End Op's applications are granted is merely a prediction based on an uncertain mathematical model that cannot by itself establish a specific injury for either persons who do not own wells or persons who own wells that produce from a formation other than the Simsboro aquifer.

---

[14] *City of Waco* 346 S.W.3d 781 at 810.
[15] *City of Waco* 346 S.W.3d 781 at 805.
[16] *United Copper Indus., Inc. v. Grissom*, 17 S.W.3d 797, 803-04 (Tex.App.-Austin 2000, pet. dism'd).
[17] *Heat Energy Advanced Tech., Inc. v. W. Dallas Coal. for Envt. Justice*, 962 S.W.2d 288, 295 (Tex.App.-Austin 1998, pet. denied).
[18] *Heat Energy*, 962 S.W.2d at 295.

i. Environmental Stewardship

End Op argues that ES has not established a specific injury in fact that is traceable and redressable. First, End Op argues that since ES does not have a well and has no existing use, it does not have the requisite legally protected interest, separate and distinct from other landowners that could give rise to a personal justiciable interest as described in *City of Waco*. Second, End Op argues that ES has no specific injury that is traceable and redressable and not merely speculative or hypothetical. End Op points to the Landowners' own expert, who conceded that existing pumping can cause drawdowns and that no specific analysis was performed with regard to any of the Landowners' properties. Third, End Op argues that the record establishes that ES is barred from drilling a well by district rules, and that it is impossible for the claimed drawdown to adversely affect ES's groundwater ownership interest when they cannot drill a well. End Op also claims that any hypothetical impact on the surface flow of the Colorado River would be an impact to the general public regardless of groundwater ownership.

ii. Andrew Meyer

End Op argues that Andrew Meyer has not established a legally protected interest that may give rise to a personal justiciable interest and specific injury because he does not have a well, has not filed a permit application, and has no plans to do so.

iii. Darwyn Hanna

End Op argues that Darwyn Hanna has not established a legally protected interest that may give rise to a personal justiciable interest and specific injury because he does not have a well and sees no need to drill so long as Aqua is his service provider.

iv. Bette Brown

End Op concedes that Ms. Brown has two wells but notes that neither well is registered with the District. End Op argues that while Ms. Brown's alleged current use could help her establish a legally protected interest that may give rise to a personal justiciable interest as outlined in *City of Waco*, Ms. Brown must still establish a specific injury. End Op argues that Ms. Brown has submitted no evidence of specific injury since Ms. Brown has provided no evidence on the amount of use or depth of the operating well, nor has her expert conducted any analysis with regard to the potential impact of End Op's permits on Ms. Brown's wells. Finally, End Op argues that Ms. Brown's wells are not in the Simsboro formation.

3. ALJ's Analysis

The Texas Supreme Court ruled that for a party to have standing to challenge a governmental action, it "must demonstrate a particularized interest in a conflict distinct from that sustained by the public at large."[19] The issue, in other words, is "whether the particular plaintiff has a sufficient personal stake in the controversy to assure the presence of an actual controversy that the judicial declaration sought would resolve."[20] As previously discussed, in *City of Waco*, the Court of Appeals determined "an affected person" must have an injury in fact that is concrete, actual, fairly traceable, and likely to be redressed by a favorable decision to have standing to request a contested case hearing before TCEQ. Accordingly, to prevail, the Landowners must show a concrete, particularized injury-in-fact that must be more than speculative, and there must be some evidence that would tend to show that the legally protected interests will be affected by the action.[21] The *United Copper* and *Heat Energy* further show that the person seeking standing must (1) establish that it has a legally protected personal justiciable interest and (2) demonstrate injury of that personal interest that is concrete, particularized, and not speculative.

---

[19] *S. Tex. Water Auth. v. Lomas*, 223 S.W.3d 304, 307 (Tex. 2007).
[20] *City of Waco* 346 S.W.3d at 801-02.
[21] *City of Waco*, 346 S.W.3d at 805; *See Save Our Springs Alliance, Inc.*, 304 S.W.3d at 883.

a. Environmental Stewardship, Andrew Meyer, and Darwyn Hanna

The Landowners, ES, Meyer, and Hanna, who do not have wells,[22] are not like the association member in *Heat Energy*. In *Heat Energy*, the odors from the facility were negatively affecting the member and his use of his property. Here, unlike the member in *Heat Energy*, the Landowners in this case cannot demonstrate a particularized injury that is not common to the general public because owning land and the groundwater under the land is not sufficient to show a particularized injury, especially since the Landowners are not using and have not shown that they intend to use groundwater that will be drawn from the Simsboro. Similarly, the Landowners are not like the Gissom family in *United Copper*. In *United Copper*, the potential harm that conferred standing was not just that United Copper's data indicated that its operations would increase the amount of particulates in the air, there was proof that Grissom and his son were injured on a personal level. Here, End Op's data may indicate a potential for aquifer drawdown at some time in the future, but these Landowners cannot demonstrate that they suffer a particularized and concrete injury that is not common to the general public. In the universe of *United Copper*, they would resemble citizens concerned about particulate pollution in general. It is not enough that these Landowners possess an ownership right in the groundwater; that right must be potentially impaired in order for them to possess standing.[23] System-wide aquifer drawdowns affect the general public (all persons who own rights to the groundwater contained within that aquifer). Aqua, a well owner situated in the same field where End Op plans to operate, possesses the requisite protected interest and specific injury. However, without demonstrating ownership of wells or plans to exercise their groundwater rights, the Landowners lack a personal justiciable interest and therefore lack standing to participate in a contested case hearing on End Op's applications.

Furthermore, ES's argument that the water flow of the Colorado River will be negatively impacted by the potential drawdown, thereby impacting its use and enjoyment, is an interest shared by the general public. In addition, there is no credible evidence that the water flow of the

[22] Mr. Hanna will likely never build a well so long as he can obtain water from Aqua. Although Mr. Meyer may build a well at some point in the future, he has not filed a permit application for a well.

[23] End Op presented evidence that, even if the Landowners were to build wells, some of the Landowners would not draw their water from the Simsboro, given the formation of the Simsboro and the closer proximity of other aquifers to the Landowners' property and associated groundwater.

Colorado River will be impacted to such a degree (or at all) that ES's enjoyment of the river will be negatively impacted.[24] Finally, the record shows that ES cannot drill a well that complies with the District rules. Although it may be able to seek a variance, it is unlikely given the size of ES's lot and the cost to build a well, that ES will ever build a well.

b. Bette Brown

The facts concerning Bette Brown's request for party standing are slightly different from the other Landowners. The record demonstrates that she has two wells on her property. However, Ms. Brown must still establish a specific injury to a personal justiciable interest. Neither of Ms. Brown's two wells are registered or permitted with the District. Ms. Brown has submitted no evidence demonstrating that her wells draw from the Simsboro aquifer, no evidence on the amount of use or depth of the well that is operational, and no expert analysis with regard to the potential impact of End Op's permits on Ms. Brown's operational well. Without any such showing, Ms. Brown has not demonstrated a potential impact on her groundwater interest. For this reason, along with the reasoning expressed above with regards to the other Landowners, Ms. Brown lacks a personal justiciable interest and therefore lacks standing to participate in a contested case hearing on End Op's applications.

Accordingly, the Landowners' Requests (the requests of ES, Meyer, Hanna, and Brown) for Party Standing are **DENIED**. Aqua's request for party status is **GRANTED**.

SIGNED September 25, 2013.

MICHAEL J. O'MALLEY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARING

[24] Not only is there no credible evidence to support this argument, any impact on water flow is highly speculative.

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE
300 West 15th Street Suite 502
Austin, Texas 78701
Phone: (512) 475-4993
Fax: (512) 322-2061

SERVICE LIST

AGENCY:	**Lost Pines Groundwater Conservation District (LPG)**
STYLE/CASE:	**APPLICATION OF END OP LP FOR OPERATING PERMITS**
SOAH DOCKET NUMBER:	**952-13-5210**
REFERRING AGENCY CASE:	

STATE OFFICE OF ADMINISTRATIVE HEARINGS	**ADMINISTRATIVE LAW JUDGE ALJ MICHAEL J. OMALLEY**
REPRESENTATIVE / ADDRESS	**PARTIES**
ERIC ALLMON ATTORNEY LOWERRE, FREDERICK, PERALES, ALLMON & ROCKWELL 707 RIO GRANDE, SUITE 200 AUSTIN, TX 78701 (512) 469-6000 (PH) (512) 482-9346 (FAX) eallmon@lf-lawfirm.com	ENVIRONMENTAL STEWARDSHIP
RUSSELL JOHNSON MCGINNIS LOCHRIDGE & KILGORE, LLP 600 CONGRESS AVENUE, SUITE 2100 AUSTIN, TX 78701 (512) 495-6074 (PH) (512) 505-6374 (FAX)	END OP, L.P.
MICHAEL A. GERSHON ATTORNEY LLOYD, GOSSELINK, ROCHELLE & TOWNSEND, P.C. 816 CONGRESS AVENUE, SUITE 1900 AUSTIN, TX 78701 (512) 322-5872 (PH) (512) 472-0532 (FAX) mgershon@lglawfirm.com	AQUA WATER SUPPLY CORP.

ROBIN A. MELVIN
GRAVES DOUGHERTY HEARON & MOODY
401 CONGRESS AVE., SUITE 2200
AUSTIN, TX 78701
(512) 480-5600 (PH)
(512) 480-5888 (FAX)
ramelvin@gdhm.com

LOST PINES GROUNDWATER CONSERVATION DISTRICT

ANDREW MEYER
144 LEE COUNTY RD
PAIGE, TX 78659
(512) 944-4387 (PH)

ANDREW MEYER

BETTE BROWN
1386 CR 411
LEXINGTON, TX 78947
(979) 220-7746 (PH)
betzbrownm@yahoo.com

BETTE BROWN

DARWYN HANNA
1460 FM 20
CEDAR CREEK, TX 78612
(512) 303-7715 (PH)
darwynhanna@gmail.com

DARWYN HANNA

STACEY V. REESE
STACEY V. REESE LAW PLLC
2405 W. 9TH STREET
AUSTIN, TX 78703
(512) 289-4262 (PH)
(512) 233-5917 (FAX)

END OP, L.P.

ATTACHMENT 5

LOST PINES GROUNDWATER CONSERVATION DISTRICT

AN ORDER DENYING PARTY STATUS TO ENVIRONMENTAL STEWARDSHIP, DARWYN HANNA, BETTE BROWN, ANDREW MEYER, AND F.D. BROWN IN CONSIDERING APPLICATIONS OF END OP, L.P. FOR OPERATING PERMITS AND TRANSPORT PERMITS

WHEREAS, End Op, L.P. ("Applicant") submitted applications for Operating Permits and Transport 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, on April 10, 2013, Aqua Water Supply Corporation ("Aqua") submitted to the District a request for a contested case hearing on the Applications; and

WHEREAS, on May 8, 2013, Environmental Stewardship, Darwyn Hanna, Bette Brown, Andrew Meyer, and F.D. Brown (collectively, the "Landowners"), filed requests to be designated as parties in any contested case hearing held on the Applications.

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's request for a contested case hearing; and

WHEREAS, on June 19, 2013, the District issued an order that: (1) granted Aqua's request for a contested case hearing on the Applications; (2) denied all other requests for a contested case hearing on the Applications, if any, as untimely under the District rules; (3) authorized the General Manager to enter into a contract with SOAH to conduct a contested case hearing on the Applications; (4) found that the requests for party status filed by the Landowners were timely under the District rules; and (5) referred the issue of whether the Landowners have standing to participate in the contested case hearing as parties at SOAH; and

WHEREAS, after a preliminary hearing on August 12, 2013, the Administrative Law Judge ("ALJ") determined that Aqua had standing as a party under the provisions of Chapter 36, Water Code, to participate in this contested case hearing and that the Landowners had not demonstrated the required interest to participate as parties in the contested case hearing; and

WHEREAS, On October 7, 2013, the Landowners filed a 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; and

WHEREAS, on October 10, 2013, End Op, L.P., the General Manager of the District, and Aqua Water Supply Corporation responded to the Landowner's motions, and on October 14, 2013, the Landowners filed a reply to those responses; and

WHEREAS, on October 15, 2013, the Administrative Law Judge issued Order No. 5 denying the Landowners 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 because neither the District Rules or SOAH Rules to certify an issue to the District, nor is there authority to convert an interim order to a Proposal for Decision; and

WHEREAS, on September 10, 2014 the Board held the Final Hearing on the End Op, L.P. Applications and voted to deny Party Status to the Landowners as set forth in this Order.

NOW THEREFORE, the Board ORDERS that:

1. Environmental Stewardship, Darwyn Hanna, Bette Brown, Andrew Meyer, and F.D. Brown are hereby denied party status.

2. The Board hereby adopts the evidence presented, the Findings of Fact and the Conclusions of Law in the Administrative Law Judge's Order No. 3.

ISSUED:

Mark A. Talbot

President, Lost Pines Groundwater
Conservation District Board of Directors

Date: 1-19-15

ATTACHMENT 6

RULES OF THE LOST PINES GROUNDWATER CONSERVATION DISTRICT

Rule 14.3 Permit Actions by the Board

A. **"Application" defined.** In this Section 14, "Application" refers to:

(1) an application for a Operating Permit;

(2) an application for a Transport Permit;

(3) an application to amend an Operating Permit, except an application described in Rule 7.2.C. and Rule 7.2.D; or

(4) an application to amend a Transport Permit, except an application described in Rule 7.5.C. and Rule 7.5.D.

B. **Technical review.** Upon receipt of an Application, the General Manager will conduct a technical review as follows:

(1) Within 60 days of the receipt of an Application, the General Manager will notify the applicant if the Application is incomplete or if any additional information or documentation is useful or necessary to address the factors that the Board will consider in making a decision on the Application under these Rules. If the applicant has not supplied the additional information or documentation within 180 days following the date that the General Manager notified the applicant of the need for the additional information or documentation, the Application shall expire.

(2) Within 180 days of the later of the date the District receives an Application or the date that the applicant supplies the additional information or documentation requested under Rule 14.3.B(1), the General Manager will complete the technical review of the Application, and notify the applicant in writing that the Application has been declared Administratively Complete. The written notice will contain a summary of the General Manager's recommendation on the Application, and, if the General Manager recommends that a permit, an amendment, or a renewal be granted, may include a draft permit. The General Manager may extend the 180-day period for technical review for a reasonable period upon written notice to the applicant if the General Manager determines that some specific aspect of the application requires a technical review period of more than 180 days.

C. **Notice.** Within 60 days of the date on which the General Manager determines that an Application is Administratively Complete, the Application will be set on the agenda for a Board meeting. Notice of the meeting shall be provided as required by the Open Meetings Act and as follows:

(1) **Contents of notice.** The General Manager shall prepare a notice, which shall include the following information:

(a) the name of the applicant;

(b) the address or approximate location of the well or proposed well;

(c) a brief explanation of the proposed permit, permit amendment, permit renewal, or permit transfer, including any requested amount of groundwater, the purpose of the proposed use, and any change in use;

(d) the time, date, and location of the meeting; and

(e) any other information the General Manager considers relevant and appropriate.

(2) **District notice.** The General Manager shall provide the notice as follows:

(a) Not later than the 25th day before the date of the meeting, the General Manager shall provide the notice to the applicant by regular mail. At the request of the applicant, the General Manager will also provide the notice of hearing to the applicant by facsimile or electronic mail.

(b) Not later than the 20th day before the date of the meeting, the General Manager shall:

(i) post the notice in a place readily accessible to the public at the District Office;

(ii) provide the notice to the county clerks of Bastrop County and Lee County; and

(iii) provide the notice by regular mail, facsimile, or electronic mail to any person who has requested notice under Rule 14.3.C(4).

(3) **Applicant notice.** The applicant shall provide the notice as follows:

(a) Not later than the 20th day before the meeting, the applicant shall provide the notice by regular mail to:

(i) the Owner and Landowners of property adjoining the Property Line, as shown in the county tax rolls on the date the notice is mailed;

(ii) the owners of all existing registered and permitted wells within 5,000 feet of the proposed well, as shown is the records of the District on the date the notice is mailed; and

(b) Not later than the 20th day before the meeting, the applicant shall publish the notice once in a newspaper of general circulation in each county within the District.

(c) The applicant shall provide the District with proof of the mailing and publication of notice before the date of the hearing. Proof of publication shall include a publisher's affidavit and tear sheet of the notice.

(4) **Request for notice.** A person may request notice from the District of a meeting or hearing on an Application. The request must be in writing and is effective for the remainder of the calendar year in which the request is received by the District. To receive notice of a hearing in a later year, a person must submit a new request. An affidavit of an officer or employee of the District establishing attempted service by first class mail, facsimile, or e-mail to the person in accordance with the information provided by the person is proof that notice was provided by the District. Failure to provide notice to a person requesting notice under this Rule 14.3.C(4) does not invalidate an action taken by the District at the meeting or hearing.

D. **Request for contested case hearing.** A request for a contested case hearing on the Application, to be conducted under Rule 14.4, must be made in writing and filed with the District no later than the 5th day before the date of the Board meeting at which the Application will be considered. A request for a contested case hearing may be granted if the request is made by:

(1) the General Manager;

(2) the applicant; or

(3) a person who has a personal justiciable interest that is related to a legal right, duty, privilege, power, or economic interest that is within the District's regulatory authority and that is affected by the Board's action on the Application, not including persons who have an interest common to members of the public.

E. **Consideration of request for contested case hearing.**

(1) If the District receives a timely-filed request for a contested case hearing on the Application, then, at its meeting, the Board may:

(a) determine whether to grant or deny a request for a contested case;

(b) designate parties;

(c) refer the Application to a Hearings Examiner or, if a timely request has been made under Rule 14.4.B(1), to the State Office of Hearings Administration for a contested case hearing

(d) if a timely request has been made under Rule 14.4.B(1), establish the deposit required by Rule 14.4.B(2);

(e) designate the location of the hearing; or

(f) schedule a preliminary hearing at which the Board will determine all of the matters described in subsections (a) to (e) or any matters described in those subsections that were not decided at the meeting.

(2) Any preliminary hearing called pursuant to Rule 14.3.E(1)(f) will be scheduled within 35 days of the Board meeting date. The District will provide notice of the preliminary hearing as required by the Open Meetings Act. In addition, the District shall send notice of the preliminary hearing to the applicant, any person who filed a request for a contested case hearing, and persons requesting notice under Rule 14.3.C(4) no later than the 10th day before the date of the preliminary hearing. Failure to provide notice to a person requesting notice under Rule 14.3.C(4) does not invalidate an action taken by the District at the preliminary hearing.

(3) If the Board grants a request for a contested case hearing, a hearing on the Application will be held in accordance with Rule 14.4.

F. **Uncontested Application.** If the District does not receive a timely-filed request for a contested case hearing on the Application, or if the Board denies all requests for a contested case hearing on the Application, the Board will take action on the application under Rule 14.5.

Rule 14.4 Permit Actions Requiring Contested Case Hearing

A. **Application.** This Rule 14.4 applies only to Applications for which the Board has granted a request for a contested case hearing under Rule 14.3.E.

B. **Hearing Conducted by SOAH.** If timely requested by the applicant or other party to a contested case, the District shall contract with the State Office of Administrative Hearings (SOAH) to conduct the hearing.

(1) The applicant or other party must request that the hearing be conducted by SOAH not later than the 5th day before the date of the preliminary hearing on the Application.

(2) The requesting party shall pay all costs associated with the contract for the hearing and shall deposit with the district an amount sufficient to pay the contract amount. The Board shall determine the amount of the required deposit at the preliminary hearing held under Rule 14.3.E. The requesting party shall make the required deposit with the District no later than the 20th day after the preliminary hearing. At the conclusion of the hearing, the District shall refund any excess money to the

paying party. All other costs may be assessed as authorized by this chapter or district rules.

(3) A hearing before a SOAH Administrative Law Judge shall be conducted as provided by Texas Government Code chapter 2001, subchapters C, D and F, the procedural rules of SOAH, and Rule 14.4 of the District Rules to the extent that Rule 14.4 is consistent with SOAH's procedural rules. The SOAH Administrative Law Judge will be the presiding officer for purposes of Rule 14.4.

C. **Hearing conducted by Board or Hearings Examiner.** Except as provided in Rule 14.B, a contested case hearing shall be conducted by a quorum of the Board, or the Board, at its sole discretion, may appoint a Hearings Examiner to preside at and conduct the hearing on the Application. The appointment of a Hearings Examiner shall be made in writing. If the contested case hearing is conducted by a quorum of the Board, the President shall preside. If the President is not present, the Board shall select one of the Directors who are present to preside. If the hearing is conducted by a Hearings Examiner, the Hearings Examiner shall be the presiding officer.

D. **Powers of Presiding Officer.** The presiding officer in a contested case has the following authority and obligations:

(1) May set any necessary additional hearing dates.

(2) May establish the order for presentation of evidence.

(3) May administer oaths to all persons presenting testimony.

(4) May examine persons presenting testimony.

(5) May ensure that information and testimony are introduced as conveniently and expeditiously as possible without prejudicing the rights of any party.

(6) May prescribe reasonable time limits for testimony and the presentation of evidence.

(7) May allow or require testimony to be submitted in writing and may require that written testimony be sworn to. On the motion of a party to the hearing, the presiding officer may exclude written testimony if the person who submits the testimony is not available for cross-examination by phone, a deposition before the hearing, or other reasonable means.

(8) Shall admit relevant evidence and may exclude evidence that is irrelevant, immaterial, or unduly repetitious. The Texas Rules of Evidence shall apply to a contested case, except that evidence inadmissible under those rules may be admitted if the evidence is: (a) necessary to ascertain facts not reasonably susceptible of proof

under those rules; (b) not precluded by statute; and (c) of a type on which a reasonably prudent person commonly relies in the conduct of the person's affairs.

(9) May issue subpoenas when required to compel the attendance of a witness or the production of documents or other tangible things in the manner provided in the Texas Rules of Civil Procedure.

(10) May allow any discovery that is authorized by the Texas Rules of Civil Procedure.

(11) May rule on motions, on discovery issues, on the admissibility of evidence, and on other interlocutory matters.

(12) May refer parties to an alternative dispute resolution (ADR) procedure on any matter at issue in the hearing, apportion costs for ADR, and appoint an impartial third party as provided by Section 2009.053 of the Government Code to facilitate that procedure.

(10) May continue a hearing from time to time and from place to place without providing notice under Rule 14.3.C. If the continuance is not announced on the record at the hearing, the presiding officer shall provide notice of the continued hearing by regular mail to the parties. If the hearing is being conducted by a quorum of the Board, Open Meetings notice also shall be provided.

E. **Ex parte communications.** A Board member, or a Hearings Examiner or Administrative Law Judge assigned to render a decision or to make findings of fact and conclusions of law in a contested case, may not directly or indirectly communicate in connection with an issue of fact or law in the contested case with a state agency, person, party, or a representative of those entities, except on notice and opportunity for each party to the contested case to participate. A Board member may communicate ex parte with another Board member in connection with an issue of fact or law in the contested case, if a quorum is not present. All ex parte communications that are not prohibited by Rule 14.4.E are expressly permitted.

F. **Record of hearing.** The presiding officer shall prepare and keep a record of each hearing in the form of an audio or video recording or a court reporter transcription. On the request of a party to the contested case hearing and payment of an appropriate deposit, as set by the presiding officer, the hearing shall be transcribed by a court reporter. The costs of such court reporter may be assessed against the party requesting it or among the parties to the hearing. The presiding officer may exclude a party from further participation in the hearing for failure to pay in a timely manner costs assessed against that party under this Rule 14.4.F.

G. **Hearings Examiner report.** If the Board has appointed a hearings examiner to be the presiding officer at the hearing, the hearings examiner shall submit a report to the Board not later than the 30th day after the date the hearing is concluded. A copy

shall be provided to the applicant and each party to the hearing. The applicant and other parties to the hearing may submit to the Board written exceptions to the report within 10 days of issuance of the report. The report shall include:

(1) A summary of the subject matter of the hearing;

(2) A summary of the evidence received; and

(3) The Hearing Examiner's recommendations for Board action on the subject matter of the hearing.

H. **Board order.** The Board shall issue a written order or resolution reflecting its decision, which shall be made at the hearing or at a meeting subject to the requirements of the Open Meetings Act. A copy of the permit shall be an attachment to that written order or resolution. The Board's decision shall be made within 60 days after the final hearing on the Application is concluded.

Rule 14.5 Permit Actions Not Requiring Contested Case Hearing

A. **Application.** This Rule 14.5 applies to:

(1) an Application for which the Board did not receive a timely-filed request for a contested case hearing on the Application;

(2) an Application for which the Board denied all requests for a contested case hearing on the Application; and

(3) any application other than the Applications described in Rule 14.3.A or Rule 14.7.A,

B. **Technical review.** Upon receipt of an application subject to this Rule, the General Manager will conduct a technical review as follows:

(1) Within 60 days of the receipt of an application, the General Manager will notify the applicant if the application is incomplete or if any additional information or documentation is useful or necessary to address the factors that the Board will consider in making a decision on the Application under these Rules. If the applicant has not supplied the additional information or documentation within 180 days following the date that the General Manager notified the applicant of the need for the additional information or documentation, the application shall expire.

(2) Within 180 days of the later of the date the District receives an Application or the date that the applicant supplies the additional information or documentation requested under Rule 14.5.B(1), the General Manager will complete the technical review of the Application, and notify the applicant in writing that the technical review has been completed and the application has been declared Administratively Complete.