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## SOAH DOCKET NO. 952-19-0705

<b>APPLICATION OF LOWER COLORADO RIVER AUTHORITY FOR OPERATING AND TRANSPORT PERMITS FOR EIGHT WELLS IN BASTROP COUNTY, TEXAS</b>	§ § § § §	<b>BEFORE THE STATE OFFICE  OF  ADMINISTRATIVE HEARINGS</b>
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**ORDER NO. 5  
RULING ON PARTY STATUS**

On February 19, 2019, the General Manager of the Lost Pines Groundwater Conservation District (General Manager) and Recharge Water, LP (Recharge) filed objections to certain claims of party status. On February 19, 2019, the Lower Colorado River Authority (LCRA) filed a response to party status; however, it stated that it does not object to the party status of any entity or individual who filed an affidavit. Aqua Water Supply Corporation (Aqua), City of Elgin (Elgin), Elvis and Roxanne Hernandez, and the Grissom Landowners filed replies to the General Manager's and Recharge's objections to party status.

The General Manager objected to the party status of the following: Mark and Penny Whiting, Tommy Claiborne, Sue Pardue, Felix and Beverly Villareal, Douglas and Dorothy Marousek, Carol and Ernest Pease, Tiger Davis, Donna Nelson, Maria and Paul Tuttrup, Sandi Schneiderman, Sue Ellen Christiansen, Esther Martinez, Stephen Shaw, Becky Jean Nichols, Paul E. Cox, Keith and Judy Everett, Anne and Donald Ross, Jason Sims and Paula Hanks, David and Elizabeth Babin, and Kimberly and James Walker. The General Manager argues that these individuals show nothing more than mere ownership of real property with attendant groundwater rights and generalized complaints about impact that might occur from the drawdown of water if LCRA's permits are granted. LCRA contends that the generalized claims do not establish a personal justiciable interest required by Chapter 36 of the Water Code.<sup>1</sup>

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<sup>1</sup> *Application of End Op., L.P. for Well Registration, Operating Permits, and Transfer Permits*, SOAH Docket No. 952-13-5210 (Sept. 25, 2013) (Order No. 3).

Recharge challenges the party status of certain landowners that it believes failed to demonstrate that the granting of the LCRA permits may cause actual and imminent injury to their legally protected rights. Like the General Manager, Recharge contends that certain landowners have not established that they have a registered or permitted well near the proposed LCRA wellfield that is completed or authorized to be completed in the Simsboro formation. In addition to the landowners that the General Manager objects to, Recharge also objects to the party status of Michael MacLeod, Marshall and Peggy Hilburn, and JC Jensen.<sup>2</sup> Recharge also objects to the party status of Kermit Heaton, John Watson, Suzanne Ragan, and Roger P. Fuller.<sup>3</sup> Recharge also objects to the party status of Michael and Tammie Hagerud, Philip and Deborah Alley, Steve and Suzannah Amable, Arthur Norman Aronsen, III, Hollie Denton, Claire and Michael Wunderlin, Kathryn Rogers, Larry and Irene Campbell, Newton and Fran Ellis, Roger Fleming, John Ricke, Jr., Lewis Sharpe, III, Catherine and Charles White, IV, Dave Teuscher, Dr. Christian and Bette Abee, and Richard Martinez.<sup>4</sup> Recharge also objects to the party status of Elvis and Roxanne Hernandez.<sup>5</sup> Additionally, Recharge objects to the party status of Philip Cook.<sup>6</sup> Recharge further objects to the party status of the Pines and Prairies Land Trust c/o Melanie Pavlas (the Trust) and Circle D Civic Association c/o Jeannie Jessup (the HOA).<sup>7</sup> Finally, Recharge objects to the party status of Aqua and Elgin.<sup>8</sup>

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<sup>2</sup> Recharge asserts that these individuals do not have wells or, if they plan to drill a well, they have not indicated which aquifer their potential well will produce from.

<sup>3</sup> Recharge asserts that these individuals have wells on their property but their wells draw from the Queen City aquifer; therefore, LCRA's wells will not likely cause a drawdown at their wells.

<sup>4</sup> Recharge contends that these individuals have not shown that their wells are in the Simsboro formation. Recharge maintains that an assertion that aquifers are connected is too tenuous to show that any drawdown in other aquifers will cause harm.

<sup>5</sup> Recharge claims that the mere assertion by Elvis and Roxanne Hernandez that the Calvert Bluff aquifer and the Simsboro aquifer are interconnected is too speculative to show standing.

<sup>6</sup> Recharge argues that Mr. Cook's wells are fifteen miles away from the LCRA well field and will likely experience zero drawdown.

<sup>7</sup> Recharge contends that the Trust has not established that its wells are in the Simsboro aquifer. Recharge asserts that the HOA has not shown that any drawdown will have an impact on the HOA's lake.

<sup>8</sup> Recharge claims that Aqua and Elgin have not shown that their wells are in the Simsboro aquifer and the impact of the drawdown on their wells.

The mandatory standing test is set out in section 36.415(b)(2) of the Texas Water Code. This test, which embodies constitutional standing principles, requires that groundwater districts to limit participants in hearings on well permits to those who have standing to participate, requiring the district to:

[L]imit 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.<sup>9</sup>

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

- (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).<sup>10</sup>

Therefore, to prevail on a request for party status, 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.<sup>11</sup> The following parties have not demonstrated a particularized injury-in-fact that is not common to the general public because they do not have a well that draws groundwater, and owning land and the

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<sup>9</sup> Tex. Water Code § 36.415(b)(2). District Rule 15.1(E)(2)(d).

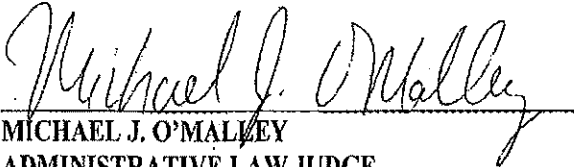
<sup>10</sup> *City of Waco v. Texas Com'n on Environmental Quality*, 346 S.W.3d 781, 802 (Tex.App.-Austin 2011, pet. denied), rev'd on other grounds, 113 S.W.3d 409 (Tex. 2013).

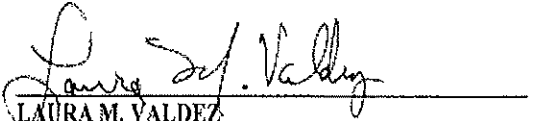
<sup>11</sup> *City of Waco*, 346 S.W.3d at 805. *End OP., L.P. v. Meyer*, No. 03-18-00049-CV, 2018 WL 4102013 at \*3 (Tex. App.—Austin 2018, no pet.).

groundwater under the land is not sufficient to show a particularized injury.<sup>12</sup> The parties that have not established a justiciable interest are: Mark and Penny Whiting, Tommy Claiborne, Sue Pardue, Felix and Beverly Villareal, Douglas and Dorothy Marousek, Carol and Ernest Pease, Tiger Davis, Donna Nelson, Maria and Paul Tuttrup, Sandi Schneiderman, Sue Ellen Christiansen, Esther Martinez, Stephen Shaw, Becky Jean Nichols, Paul E. Cox, Keith and Judy Everett, Anne and Donald Ross, Jason Sims and Paula Hanks, David and Elizabeth Babin, and Kimberly and James Walker. Therefore, their requests for party status are denied. James Allen Tate's request for party status is denied because he failed to file an affidavit. Although these individuals will not be parties, they will be allowed to make public comment at the hearing on the merits.

All other individuals and entities have demonstrated a particularized interest sufficient for party status. However, for the individuals that currently do not have a well on their property (but have stated they plan to drill a well), their testimony, if filed, will have limited weight unless they have drilled a well by the time of the hearing or have concrete written plans to drill a well. For those individuals/entities that draw groundwater from other aquifers or formations, their testimony, if filed, will be also be given the appropriate weight in light of the distance from LCRA's wells.

**SIGNED March 5, 2019.**

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

  
 LAURA M. VALDEZ  
 ADMINISTRATIVE LAW JUDGE  
 STATE OFFICE OF ADMINISTRATIVE HEARINGS

<sup>12</sup> *Application of End Op., L.P. for Well Registration, Operating Permits, and Transfer Permits*, SOAH Docket No. 952-13-5210 (Sept. 25, 2013) (Order No. 3).

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**AGENCY:** Lost Pines Groundwater Conservation District (LPG)

**STYLE/CASE:** APPLICATION OF LCRA FOR OPERATING AND TRANSPORT PERMITS FOR 8 WELLS IN BASTROP CO.

**SOAH DOCKET NUMBER:** 952-19-0705

**REFERRING AGENCY CASE:**

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**STATE OFFICE OF ADMINISTRATIVE  
HEARINGS**

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**ADMINISTRATIVE LAW JUDGE**

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