

SOAH DOCKET NO. 957-18-4985

APPLICATIONS OF ELECTRO PURIFICATION, LLC, FOR WELL MODIFICATION AUTHORIZATION AND PRODUCTION PERMIT § **BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**
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**HAYS COUNTY’S INITIAL BRIEF
IN SUPPORT OF REQUEST FOR PARTY STATUS.**

Hays County possesses regulatory interests and private property interests that would be adversely impacted by the groundwater pumping for which Electro Purification, LLC (“EP”), seeks a production permit. The proposed pumping will adversely affect Hays County’s exercise of its statutory authority under the Local Government Code to promote the safe, orderly and healthful development of unincorporated areas of Hays County. The pumping will also adversely affect Hays County’s exercise of its statutory authority under the Water Code to prevent current or projected water use in the County from exceeding the safe and sustainable yield of the County’s water supply. Furthermore, EP’s proposed pumping will adversely affect the County’s property interests in its nearby water supply property and the Jacob’s Well Preserve. Considering these impacted interests, Hays County’s request for party status should be granted.

I. Under District Rules and the Texas Water Code, persons with a justiciable interest in a permit must be granted party status.

The standard applicable to a determination of party status is whether the requester has met the test for constitutional standing. Under Barton Springs Edwards Aquifer Conservation District (“BSEACD” or the “District”) Rule 4-9.4.D.3, the presiding officer at a hearing may designate the parties to a contested application, such as EP’s. Under the Texas Water Code, a person may participate in a hearing on a contested groundwater permit application if the person

possesses “a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing.”¹ This same standard is set forth in the District’s rules regarding the consideration of a hearing request.² This test embodies constitutional standing principles.³

The underlying concern in applying constitutional standing principles 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.”⁴ To this end, a person seeking party status must establish:

- (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 the would-be party's complaints regarding the proposed permit (i.e., refusing to grant the permit or imposing additional conditions).⁵

Notably, the injury-in-fact requirement is qualitative, not quantitative.⁶ As the United States Fifth Circuit Court of Appeals has noted, “The Constitution draws no distinction between injuries that are large, and those that are comparatively small.”⁷ In affirming this principle, the United States Supreme Court has noted that the standing threshold “serves to distinguish a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the

¹ Tex. Water Code § 36.415(b)(2).

² District Rule 4-9.13(B)(5) & (C).

³ *City of Waco v. Texas Comm’n on Environmental Quality*, 346 S.W.3d 781, 802 (Tex. App. – Austin, 2011)(applying then-identical language of Tex. Water Code § 5.115(a)), *rev’d on other grounds*, 413 S.W. 3d 409 (Tex. 2013).

⁴ *Bacon v. Texas Historical Commission*, 411 S.W.3d 161, 174 (Tex. App. – Austin 2013, no pet.).

⁵ *Stop the Ordinances Please v. City of New Braunfels*, 306 S.W.3d 919, 926 (Tex. App. – Austin 2010, no pet.) (“STOP”).

⁶ *Association of Community Organizations for Reform Now v. Fowler*, 178 F.3d 350, 357-358 (5th Cir. 1999).

⁷ *Cramer v. Skinner*, 931 F.2d 1020, 1027 (5th Cir. 1991).

problem.”⁸ The United States Supreme Court has commented that “concrete” in the standing context means “real and not abstract,” and is “particularized” when it impacts the pleader in an individual manner.⁹

A determination of standing presents an issue of subject-matter jurisdiction.¹⁰ Thus, in considering a challenge to standing that implicates the merits of an action, the court reviews the relevant evidence to determine if a fact issue exists, rather than whether the proponent has proven their allegations by a preponderance of the evidence.¹¹ The pleadings and allegations are construed liberally in favor of the person seeking standing.¹² To prevail on a jurisdictional challenge - such as the challenge EP has raised in opposition to Hays County’s request for party status - the challenger must show that even if all of the petitioner’s allegations are taken as true, there is an incurable jurisdictional defect that deprives the tribunal of jurisdiction.¹³ At the stage of determining party status, a person seeking standing to participate in a contested case hearing is not required to show that they will ultimately prevail.¹⁴

II. Hays County possesses justiciable interests affected by EP’s Application.

A. The proposed permit adversely affects Hays County’s exercise of its statutory powers to promote healthful development and protect groundwater resources.

Hays County has statutory authority to promote orderly and healthful development within Hays County, and Hays County also possesses statutory authority to prevent water use from exceeding

⁸ *U.S. v. Students Challenging Regulatory Agency Procedures* (SCRAP), 412 U.S. 669, 690, n. 14 (1973)(noting that injury for purposes of standing included the payment of \$1.50 poll tax).

⁹ *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1548 (2016).

¹⁰ *Texas Association of Business v. Texas Air Control Board*, 852 S.W.2d 440, 445-446 (Tex. 1993).

¹¹ *Texas Department of Parks and Wildlife v. Miranda*, 133 S.W.3d 217, 227 (Tex. 2002).

¹² *Id.* at 226.

¹³ *Sweeney v. Jefferson*, 212 S.W.3d 556, 561 (Tex. 2006).

¹⁴ *Heat Energy Advanced Technology, Inc. v. West Dallas Coalition for Environmental Justice*, 962 S.W.2d 288, 295 (Tex. App. – Austin, 1998 pet. denied).

the safe sustainable yield of the County's water supply. EP's proposed pumping would undermine, and adversely affect, Hays County's exercise of these powers.

1. The permit adversely impacts Hays County's exercise of subdivision authority under Chapter 232 of the Local Government Code.

The granting of EP's application would affect the County's ability to implement its authority to promote the productive development of the unincorporated areas of Hays County. Under Chapter 232 of the Texas Local Government Code, Hays County possesses the authority to adopt subdivision regulations in order to promote the safe, orderly, and healthful development of the unincorporated areas of Hays County.¹⁵ In exercising this authority, Hays County has adopted subdivision regulations intended to regulate development in a manner that would be protective of groundwater resources.¹⁶ In part, these regulations protect groundwater resources by limiting the density of development within unincorporated areas of the County.¹⁷ These limits are premised on the assumed rate of water use of 330 gallons per day per household.¹⁸ As a point of reference, these regulations would result in the use of no more than 193,000 gallons of water per day within the property leased by EP upon which its groundwater wells are located if developed residentially.¹⁹ Hays County's subdivision regulations reflect a finding by Hays County that this level of water demand allows for the sustainable development of Hays County. EP's permit would allow the withdrawal of 2.5 million gallons of water per day,²⁰ which is more than 12 times the rate of water withdrawal limit that Hays County's development regulations encourage in order to

¹⁵ Tex. Local Gov't Code § 232.101(a).

¹⁶ Hays County Ex. 6 (Hays County Development Regulations).

¹⁷ See, e.g., Hays County Ex. 6 at pp. 46-47 (Hays County Development Regulations, Chapter 705, § 5.05).

¹⁸ Tr. p. 67.

¹⁹ Tr. p. 67.

²⁰ Tr. p. 67.

protect groundwater resources. Under the statute governing EP's application, the District is to consider whether "the proposed use of water unreasonably affects existing groundwater and surface water resources."²¹ The significant quantity of pumping proposed for permitting by EP will unreasonably affect existing groundwater resources in the area. By draining significant quantities of groundwater from beneath Hays County, EP's proposed pumping will impact Hays County's ability to promote the conservation of groundwater through the County's subdivision regulations.

2. The permit adversely impacts Hays County's implementation of water availability requirements under Chapter 35 of the Texas Water Code.

Hays County also includes a Priority Groundwater Management Area ("PGMA").²² A PGMA is an area of the state "designated and delineated by the [Texas Commission on Environmental Quality] as an area that is experiencing or is expected to experience critical groundwater problems."²³ Pursuant to Texas Water Code § 35.019(a):

The commissioners court of a county in a priority groundwater management area may adopt water availability requirements in an area where platting is required if the court determines that the requirements are necessary to prevent current or projected water use in the county from exceeding the safe sustainable yield of the county's water supply.

Pursuant to this authority, Hays County has sought to ensure that water is available for development through the adoption of water availability requirements within the County's subdivision regulations.²⁴ By placing a drain on the county's water supply, EP's proposed pumping

²¹ Tex. Water Code § 36.113(d)(2).

²² Tr. p. 66, Hays County Ex. No. 1, p. 4.

²³ Tex. Water Code § 35.002(12).

²⁴ Hays County Ex. 6, pp. 71 – 80 (Hays County Development Regulations, at Chapter 715), see, particularly, Hays County Ex. 6, pp. 76-78, regarding additional requirements for subdivisions served by individual water wells producing local groundwater in priority groundwater management areas (Hays County Development Regulations at Chapter 715, Section 3.06).

undermines the effectiveness of these regulations in ensuring that water demand within the County does not exceed the sustainable yield of the county's water supply. Commissioner Shell testified that he believed issuance of the permit would damage and subvert the County's authority to implement its subdivision regulations.²⁵ EP presented no evidence to the contrary.

3. The potential impact of EP's pumping upon Hays County's exercise of authority under Local Government Code Chapter 232, and Texas Water Code Chapter 35, constitutes a justiciable interest.

These impacts upon Hays County's exercise of its statutory authority demonstrate that Hays County possesses justiciable interests in EP's application.

The impact of EP's groundwater pumping upon Hays County's exercise of these powers constitutes an injury in fact. Hays County's ability to exercise its authority to promote healthful and orderly development, as well as its ability to implement water availability requirements are legally protected interests. EP's proposed pumping at issue in this proceeding concretely undermines these powers that are particular to Hays County. No other entity possesses the regulatory authority that Hays County seeks to protect through its participation as a party in the immediate proceeding.

This injury is fairly traceable to the permit under consideration, as the groundwater drainage of concern is a direct consequence of the pumping proposed to be authorized.

Finally, a denial or reduction of EP's permit would provide redress for this potential injury, as it would eliminate or significantly reduce the level of EP's pumping, and thereby reduce the consequent drawdown of the impacted groundwater.

²⁵ Tr. 58.

B. The Proposed permit adversely impacts Hays County’s vested property rights

In addition to the regulatory interests discussed above, Hays County holds potentially impacted property interests that constitute justiciable interests in EP’s application.

1. In Texas, groundwater ownership is a legally protected interest.

Hays County possesses certain property rights in groundwater, and those rights warrant protection. Texas Water Code at Section 36.002(a) provides that, “[t]he legislature recognizes that a landowner owns the groundwater below the surface of the landowner’s land as real property.” This same section goes on to say that, “[n]othing in this code shall be construed as granting the authority to deprive or divest a *landowner*, including a *landowner’s* lessees, heirs, or assigns of the groundwater ownership and rights described by [§ 36.002].”²⁶ In the case of *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814 (Tex. 2012)(“*Day*”), the Texas Supreme analogized the treatment of groundwater to that afforded oil and gas, holding that a landowner is regarded as having absolute title to the water in place beneath his or her land, and that each owner of land owns separately, distinctly and exclusively all of the water beneath his or her land, subject to the law of capture and state regulation.²⁷

2. EP’s proposed pumping will adversely impact Hays County’s interest in its nearby water supply property.

Hays County owns a one acre piece of property within less than a mile of the nearest EP well (the “Water Supply Property”).²⁸ This property was purchased by Hays County in order to provide a well site for emergency firefighting water supply, and also as a water supply for the County’s

²⁶ Tex. Water Code Section 26.002(a) (emphasis added).

²⁷ *Day* at 831-832.

²⁸ Tr. p. 33, Hays County Ex, No. 2.

road department.²⁹ At the location of this property, EP's own modeling shows that a drawdown of water within the Cow Creek formation will occur as a result of EP's pumping.³⁰ An aquifer test performed by EP also resulted in drawdown of groundwater at the location of Hays County's water supply property.³¹ EP has not contested the potential drawdown of the aquifer at this property, and EP has offered no evidence to contest Hays County's contention that EP's pumping will result in the drawdown of groundwater beneath this property. Commissioner Shell testified that he is concerned that access to groundwater within this property would be damaged if pumping is allowed as proposed in the EP permit.³²

3. EP's proposed pumping will adversely impact Hays County's interest in Jacob's Well.

Hays County also owns Jacob's Well Preserve, which includes a natural spring located within the same aquifer as the proposed EP groundwater wells.³³ Jacob's Well is connected to the same aquifer that the permit will allow water to be drawn from.³⁴ The enjoyment of this preserve is reduced when the groundwater flow from Jacob's Well is reduced.³⁵ By resolution, Hays County has noted that EP's proposed pumping could adversely impact Jacob's Well.³⁶ EP presented no evidence that its proposed pumping would not impact the flow of water at Jacob's Well.

4. The impact of EP's proposed pumping upon Hays County's property interests constitutes a justiciable interest.

²⁹ Tr. pp. 40-41.

³⁰ Tr. p. 33, Hays County Ex, No. 2.

³¹ Hays County Ex. No. 4, p. 6.

³² Tr. p. 58.

³³ Hays County Ex. No. 1, p. 3, Tr. pp. 45 & 54.

³⁴ Tr. 54.

³⁵ Tr. 46-47.

³⁶ Hays County Ex. No. 1, p. 2,

These impacts upon Hays County's property interests present an injury in fact that is fairly traceable to EP's proposed permit, and redressable through the hearing to consider EP's application.

Hays County's property interest in groundwater is a legally protected interest, as discussed above. The drainage of this groundwater is a concrete injury that is particularized to Hays County. This injury is tied to Hays County's real estate, and Texas Courts have repeatedly affirmed that each piece of real estate is unique.³⁷ Thus, Hays County's interest in protecting against drainage from beneath its own property is distinct from the interest of other landowners related to drainage occurring beneath other properties.

This drainage is fairly traceable to EP's proposed pumping. The modeling and aquifer test performed by EP showing an impact at the Water Supply Property were directly examining the potential impact of the pumping to be authorized by EP's requested permit.

The immediate hearing provides an opportunity for Hays County to obtain redress for this injury to its property interests. Through the hearing process, Hays County will demonstrate that the level of pumping requested for authorization by EP is not consistent with applicable legal requirements, thereby showing that the requested quantity of permitted pumping should be entirely denied or significantly reduced. Such a reduction or prevention of EP's proposed pumping would reduce or eliminate the injury posed by EP's proposed pumping.

³⁷ See, e.g., *Valero Refining-Texas, L.P. v. Galveston Central Appraisal District*, 519 S.W.3d 66, 74 (Tex. 2017).

III. Prayer

For these reasons, Hays County requests that it be granted party status in the hearing to consider the issuance of EP's requested permit.

Respectfully Submitted,

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ON BEHALF OF HAYS COUNTY

Service List:

I hereby certify that on October 9, 2018, a true and correct copy of the foregoing document was e-filed with SOAH and was served on all parties of record by email.

/s/ Eric Allmon

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