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CLERK DISTRICT COURT HAYS CO, TX
By [Signature] Deputy

Cause No. 11-1086

WIMBERLEY VALLEY WATERSHED §
ASSOCIATION, JOHANNA L. SMITH, §
H.K. ACORD, JANET ACORD, JAMES §
R. MCMEANS, AND DAVID H. §
GLENN, §
Plaintiffs, §

IN THE DISTRICT COURT OF

HAYS COUNTY, TEXAS

v. §

207th DISTRICT COURT

HAYS TRINITY GROUNDWATER §
CONSERVATION DISTRICT, §
Defendant. §

PLAINTIFFS' ORIGINAL PETITION

TO THE HONORABLE JUDGE OF THE COURT:

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

I. CASE OVERVIEW

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

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

No. 168 to Wimberley Springs.

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

II. PARTIES

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

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

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

III. CLAIMS

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

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

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

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

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

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

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

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

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

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

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

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

IV. DISCOVERY

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

V. JURISDICTION

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

VI. PRAYER

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

Respectfully Submitted,

By: 
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CERTIFICATE OF SERVICE

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



Eric Allmon

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