

APPLICATION OF END OP, L.P. FOR § BEFORE THE STATE OFFICE
WELL REGISTRATION, OPERATING § OF
PERMITS AND TRANSFER PERMITS § ADMINISTRATIVE HEARINGS

**ENVIRONMENTAL STEWARDSHIP, DARWYN AND MARIE HANNA, BETTE
BROWN, ANDREW AND MELISSA MEYER’S REPLY TO
APPLICANT’S RESPONSE BRIEF ON PARTY STATUS**

TO THE HONORABLE JUDGE O’MALLEY:

Environmental Stewardship, Darwyn and Marie Hanna, Bette Brown, as well as Andrew and Melissa Meyer (collectively, “Protestants”) hereby submit this reply brief on their rightful status as parties to a contested case hearing on the above-listed permits.

I. SUMMARY OF ARGUMENT

Protestants stand on the arguments presented in their opening brief, and those arguments largely address the issues raised by Applicant’s Response. By its response, however, End Op, L.P. (“End Op”) asserts that Protestants’ reliance on the decision by the Austin Court of Appeals in *Waco v. TCEQ* is misplaced given the recent reversal of this decision by the Texas Supreme Court. Considering that the Texas Supreme Court reversed the Austin Court of Appeals on grounds other than those relied upon by Protestants, the principles enunciated by the Austin Court of Appeals in the *Waco* case as set forth in Protestants’ opening brief remain valid and relevant to the question now before the administrative law judge (ALJ).

II. IN REVERSING THE DECISION OF THE AUSTIN COURT OF APPEALS IN *CITY OF WACO V. TCEQ*, THE TEXAS SUPREME COURT DID NOT DISTURB THE AUSTIN COURT OF APPEALS’ APPLICATION OF THE *MIRANDA* STANDARD IN DETERMINING WHETHER A PERSON HAS DEMONSTRATED ADMINISTRATIVE STANDING.

As discussed in Protestants' opening brief, the Austin Court of Appeals in the *Waco* case found that the definition of affected person at Water Code § 5.115 created the same standing test as the threshold for constitutional standing in judicial matters.¹ Considering this analogous test, the Court of Appeals adopted the standard previously enunciated by the Texas Supreme Court in *Texas Parks and Wildlife v. Maria and Ray Miranda*, thereby holding that a person seeking to demonstrate standing in an administrative proceeding need only raise an issue of fact on questions that go to both standing and the merits of an application.² Accordingly, Protestants have made the point that they are only required to raise a question of fact on issues relevant to both standing and the merits of End Op's applications.

In reversing the Austin Court of Appeals' decision in the *Waco* case, the Texas Supreme Court did not hold that the Austin Court of Appeals had erred in applying the *Miranda* standard to determinations of administrative standing. In fact, the Supreme Court found it unnecessary to reach this issue. The City of Waco had requested a contested case hearing on an application for the amendment of a water quality permit.³ By statute, no right existed to a hearing on such an application under certain conditions where the application would not increase significantly the quantity of waste authorized to be discharged and would not materially alter the pattern or place of discharge.⁴ Ultimately, the Texas Supreme Court reversed the Austin Court of Appeals because the Court found that substantial evidence supported TCEQ's determination that no right to a hearing at all existed with regard to the permit application being challenged by the City of

¹ *City of Waco v. Texas Comm'n on Env'tl. Quality*, 346 S.W.3d 781, 802 (Tex.App. – Austin 2011), *rev'd*, No. 11-0729, slip op. at 2, 2013 WL 4493018, at *4 (Tex. Aug. 23, 2013).

² *Id.* at 824, *adopting Texas Department of Parks and Wildlife v. Maria Miranda and Ray Miranda*, 133 S.W.3d 217 (Tex. 2004).

³ *Tex. Comm'n on Environmental Quality v. City of Waco*, No. 11-0729, slip op. at 2, 2013 WL 4493018, at *4 (Tex. Aug. 23, 2013).

⁴ *Id.* at *6, citing Tex. Water Code § 26.028(d).

Waco under Chapter 26 of the Texas Water Code, even if it were assumed that the City would otherwise qualify as an “affected person” with standing to request a contested case hearing.⁵

Unlike the permit application at issue in the *Waco* case, there is no dispute that the right to a contested case hearing exists with regard End Op’s application. To wit, End Op itself does not contest Aqua’s request for a contested case hearing in this matter. In short, the principles enunciated by the Austin Court of Appeals in the *City of Waco* case as set discussed in Protestants’ Opening Brief on Party Status remain valid even after the Texas Supreme Court’s reversal of that decision on other grounds.

III. PRAYER

For these reasons, Environmental Stewardship, Darwynn and Marie Hanna, Bette Brown, Andrew and Melissa Meyer, and Frank D. and Janet Brown respectfully pray:

- (1) That each of the Protestants be granted party status in this proceeding; and
- (2) That protestants be granted any other relief to which they may show themselves to be entitled.

⁵ *Id at* *10 & *15.