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March 10, 2021

Barton Springs Edwards Aquifer Conservation District
Attn: Ms. Vanessa Escobar, General Manager
1124 Regal Row
Austin, Texas 78748

*via e-mail &
Certified Mail, RRR*

Re: Application of Electro Purification, LLC

Dear Ms. Escobar:

I am writing this morning to acknowledge receipt yesterday of your letter dated March 9, 2021, which I received by e-mail sent at 5:23 p.m. that evening. Due to the late hour of receipt, I have not had an opportunity to consult with my client, Electro Purification, LLC ("EP"), regarding your letter. Accordingly, please be advised that I will be supplementing this correspondence after I have had an opportunity to consult with my client and obtain guidance on filing a formal response.

At this juncture, however, please be advised that Electro Purification disagrees with your assessment of the status of its Application, and your authority to unilaterally dismiss EP's Application based on your assumption that EP is no longer "prosecuting" its Application.

As a preliminary matter, please be advised, that you have misinterpreted the SOAH ALJ's Order No. 15, issued on February 4, 2021, and its effect. The Order granting EP's request to Nonsuit the Hearing (not the Application) and the resulting dismissal of the case from the SOAH Docket, was not a dismissal of the Application. Instead, Order No. 15 remanded this matter (EP's Application) back to the District for further action.

At this juncture in the EP Application, the Application is *not* in the hands of the General Manager, but rather is before the District's Board of Directors. It was the District's Board of Directors which, after considering the requests for contested case hearing filed by the parties in response to the publication of Notice of the EP Application, ordered that the matter be referred to SOAH for a contested case hearing pursuant to the request of the Applicant, EP, pursuant to Section 36.416, of the Texas Water Code.

EP's request for SOAH to conduct the hearing was made at a time when the General Manager, then Mr. John Dupnik, had recommended the granting of the Application for 2.5 MGD production with special conditions on a phased-in basis. Based upon your unilateral reversal of that recommendation with the filing of your December 21, 2020 prefiled testimony and recommendation to grant only a .25 MGD permit to EP, everything that transpired since the publication of Notice on June 3, 2018, has been nullified.

For six years EP worked with the District to develop its Application. Thereafter, EP continued to cooperate with the District to refine the Application to facilitate its being granted and, thereafter, implemented in a manner that would be protective both of EP's property rights in its groundwater leases that form the basis of the Application, as well as the property rights of neighboring landowners, permittees, and well owners. On the eve of the hearing on the merits, you unilaterally, without prior notice or explanation reduced your recommendation to one which effectively would, at a maximum, grant EP initially about 10% of the volume of production it requested and, ultimately 20% of its request.

You made that unilateral recommendation at the eleventh hour in the SOAH proceeding. By all appearances, that decision was driven by EP's declining to write the District a blank check for at least the first 2-3 years of EP's permit life. In addition to the surprise of your unilateral announcement, it scuttled all of the prior work EP had done on the Project and the SOAH Hearing, including preparation of its prefiled testimony and discovery conducted in the case premised upon both of your predecessor's recommendation to grant EP the permit for 2.5 MGD.

Under these circumstances, EP had two options, request a continuance of the hearing in order to conduct discovery and refile its prefiled testimony and other required evidence based upon your new recommendation, or pursuant to SOAH Rule 155.403(a), seeking a nonsuit of the hearing without prejudice to allow EP time to reevaluate its Application and status of the proceedings in light of your surprise change in recommendation.

Since February 4, 2021, when Order No. 15 was granted, EP has been assessing its options. EP's management is still in that posture. The dramatic eleventh hour, unforeseen, unilateral reversal of position on your part is not something which can be addressed or resolved in an expeditious manner.

EP has expended more than \$3 Million Dollars in its Project, which initially required no groundwater production permit until the passage of HB 3405 granting the District jurisdiction over the area in which the EP Project was located, thereby usurping EP's freedom to exercise its property rights under Texas law in place prior to the adoption of HB 3405. The regulatory constraints imposed upon EP as a result of that legislation, and the continued revolving door status of the District in its changes of General Managers (you are the fourth General Manager who has been involved in the EP Project), together with the shifting sands of the different District General Manager's recommendations on the Permit, warrant EP being granted adequate time to assess and prosecute the Application.

It is evident from the recent filings that the real reason EP's Application has been torpedoed is the financial instability of the District, which resulted from its imprudent assumption of jurisdictional territory far in excess of its means to properly, efficiently and effectively operate and manage the powers granted to it by the Texas Legislature pursuant to HB 3405, and even more imprudent decision to grant a considerable number of wells "exempt" status in the newly acquired area knowing that many of them did not meet the District's explicit statutorily mandated criteria in Section 8206.106 of the District's enabling legislation and, thereby forfeiting the ability to collect annual production fees.

The lack of financial stability of the District, and its resultant inability to operate and manage groundwater regulation within its boundaries at all levels, including the EP Permit, was demonstrated when your predecessor, Ms. Reinmund-Martinez, made the first dramatic change in her recommendation with respect to the issuance of the EP Permit. In May, 2019, when the General Manager issued a new proposal shortly in advance of EP's filing deadlines in the SOAH proceeding, the shift in position and change of recommendation was not based upon the impacts to the aquifer that might be experienced upon the implementation of EP's Permit, but rather upon the anticipated cost to the District to respond to every concern, regardless of the validity, expressed about the EP Project. Ms. Reinmund-Martinez had decided to fund what she perceived as dramatic increases in manpower staffing and economic costs, notwithstanding the lack of legislative authority to do so, and she wanted to shift those costs to EP as a condition precedent to having EP's application granted, far in excess of the legislatively permitted production fees and administrative charges the District is authorized to require from a permittee.

In your prefiled testimony of December 21, 2020, you chose to dramatically reduce EP's Permit on the basis that the District could not economically manage the Permit based upon EP's declining to accede to the District's 2019 demand to fund a blank check payment to the District on an annual basis. That action triggered the filing of EP's Motion for Nonsuit.

The District has demonstrated that it is economically unstable and incapable of carrying out the duties granted to it by the Legislature. The result of that is the District's attempt to use its regulatory authority to deny property owners, like EP, the right to beneficially develop and enjoy the groundwater resources that are its property rights because the District cannot handle the pressure.

Please be advised that it is EP's current position that you lack the authority to unilaterally "dismiss" EP's Application. It is EP's further opinion that:

1. You have misinterpreted the law and the effect of Order No. 15; and
2. EP's Application is still live and viable at this point, and will remain such until either EP withdraws its Application voluntarily, or the Board makes a decision on EP's Application; and
3. The District suffers no harm by allowing EP a reasonable and adequate period of time to assess your unilateral actions of December 21, 2020, after the February 4, 2021, Nonsuit was granted.

Again, I am in consultation with my client, and will follow-up with a supplemental response based upon input received from EP. In the meantime, please take no further action with respect to EP's Application based upon your letter of March 9th other than (i) finalizing the accounting on EP's SOAH Deposit and refunding the balance to my law firm for distribution to EP, (ii) apprising the Board of Directors of your position, and the position expressed herein on behalf of EP, and (iii) the fact that it will be supplemented.

March 11, 2021

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By copy of this letter, I am apprising all of the "Parties" on the SOAH Service List of this communication.

Best wishes.

Sincerely,

MCCARTHY & MCCARTHY, LLP


Edmond R. McCarthy, Jr.

ERM/tn

cc: Governor Greg Abbott
Lt. Governor Dan Patrick
Chairman Charles Perry, Senate Ag, Water and Rural Areas Committee
Chairman Tracy King, House Natural Resources Committee
Senator Judith Zaffirini, District 21
Senator Sarah Eckhardt, District 14
Representative Eddie Rodriguez, District 51
Representative Erin Zwiener, District 45
Electro Purification, LLC
Attn: Tim Throckmorton/Bart Fletcher, Co-Managers
Dr. Robert Bridges, Landowner/EP Lessor
The Odell Family, Landowners/EP Lessors
Attn: Mr. Eddie Odell
Bill Dugat, General Counsel, BSEACD
Service List – SOAH Docket 957-18-4985