

TCEQ DOCKET NO. 2015-0664-MWD

**APPLICATION BY JPHD, Inc.
FOR LAND APPLICATION PERMIT
WQ0015201001**

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**BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL QUALITY**

APPLICANT’S RESPONSE TO HEARING REQUESTS

TO THE HONORABLE COMMISSIONERS:

COMES NOW, the Applicant, JPHD, Inc. (“Applicant”) and files its Response to Hearing Requests in the above-referenced matter, and would respectfully show as follows:

I. INTRODUCTION

Hearing Requests from the following have been submitted: (1) Hamilton Pool Road Matters (“HPR”) (submitted by Eric Allmon); (2) The Ayers Family and the Shield Ranch (collectively referred to as the “Shield Ranch”) (submitted by Ed McCarthy and Robert Ayers) and (3) Daniel Jones.

Applicant requests that the Texas Commission on Environmental Quality (“TCEQ”) deny each of these hearing requests and approve the Applicant’s application for a new subsurface drip irrigation permit.

The Hearing Requests fail as specified below because the requesters fail to show how they are affected persons with a justiciable interest affected in a manner not common to the general public, and the requesters also fail to show any issue of disputed fact.

II. BACKGROUND AND PROCEDURAL HISTORY

This permit would authorize the application of treated domestic wastewater effluent at a daily average flow not to exceed 450,000 gallons per day via drip irrigation on 6 application areas with a minimum total surface area of 104.79 acres divided into 36 zones. The draft permit would not authorize the discharge of pollutants into waters in the State. The wastewater treatment facility and application site will be located 3.2 miles west of the intersection of State Highway 71 and Hamilton Pool Road, on Hamilton Pool Road in Travis County, Texas 78738. The wastewater treatment facility and application site will be located in the drainage basin of Barton Creek in Segment No. 1430 of the Colorado River Basin.¹

The application for this new permit was received November 25, 2013 and declared administratively complete on February 03, 2014.² A public meeting regarding this permit application was held on December 15, 2014 at Star Hill Ranch. The public comment period ended on December 15, 2014.

The Executive Director's Response to Comment ("RTC") was filed on March 25, 2015 and the Executive Director's Final Decision letter was issued on March 30, 2015. The opportunity to request a contested case hearing or request reconsideration of the Executive Director's decision on the Application expired on April 29, 2015.

¹ Segment 1430 is not on the list of impaired waters.

² The Notice of Receipt and Intent to Obtain a Water Quality Permit ("NORI") was published in the *Austin-American Statesman* on February 25, 2014. The Notice of Application and Preliminary Decision for a Water Quality Permit ("NAPD") was published in the *Westlake Picayune* and the *Lake Travis View* on August 07, 2014. The Notice of a Public Meeting was published in the *Lake Travis View* on November 6, 2014.

III. LEGAL STANDARD

Section 5.56 of the Texas Water Code expressly provides that in order to grant a hearing request, the Commission must determine that the request was filed by an “affected person.” Tex. Water Code § 5.56(c). An “affected person” means “a person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing.” Tex. Water Code § 5.115(a). An “interest common to members of the general public does not qualify as a personal justiciable interest.” *Id.* The Commission has outlined relevant factors for what constitutes an affected person at Section 55.203 of its rules. Tex. Admin Code § 55.203(c).

Even if an issue is raised by an affected person, that issue may not be referred to hearing unless the issue:

- (1) involves a disputed question of fact;
- (2) was raised during the public comment period; and
- (3) is relevant and material to the decision on the application.

Tex. Water Code § 5.556(d).

“The burden of proof is on the moving party by a preponderance of the evidence” (in this case, those who request a hearing). 30 Tex. Admin. Code § 80.17(a).

IV. AFFECTED PERSON STATUS

A. HPR IS NOT AN AFFECTED PERSON

For an organization to have standing, “one or more members of the group or association would otherwise have standing to request a hearing in their own right.”³ HPR identifies five members that it claims are “affected persons.”⁴ Two of those individuals (Hendricks, Tennant), by HPR’s own admission, are not adjacent to the development.⁵ Two of the other individuals, (Morabbi (Property 3) and Hanson (Property 11)) are adjacent to the overall development, but are not adjacent to any of the drip fields or the wastewater treatment plant.

The last property, the Shield Ranch (Robert Ayers) (Property 22), is across Hamilton Pool Road (RM 3238) from Application Field 6. The HPR Hearing Requests state that the Shield Ranch is concerned about and “odors” and “runoff.”⁶

With respect to “odors,” TCEQ rules require domestic wastewater treatment facilities to meet buffer zone requirements for the abatement and control of nuisance odors according to 30 TAC Section 309.13(e). Applicant has chosen to meet the buffer zone requirements by owning the buffer zone area.⁷ These buffer zone requirements were made clear to HPR in the ED’s RTC.⁸ After receiving the RTC, however, HPR made no attempt to dispute this fact or to show why the Shield Ranch might still be affected despite these buffer zones.

³ 30 Tex. Admin. Code § 55.205(a)(1).

⁴ HPR Letter dated May 30, 2014 at pages 2-3.

⁵ HPR Letter dated May 30, 2014 at page 2.

⁶ HPR Letter dated May 30, 2014 at page 3, ¶ 2.

⁷ JPHD Application, Domestic Administrative Report 1.1, page 16.

⁸ RTC at page 38.

With respect to “runoff,” the Executive Director (“ED”) made the following observations in the RTC:

The effluent application will be subsurface, *so effluent runoff should not occur*. Special Provision No. 10 *prohibits surfacing of the effluent* in accordance with 30 TAC §222.151(b). Special Provision No. 11 requires the establishment of Bermuda grass overseeded with ryegrass prior to effluent applications. These grasses will reduce the erosion rate to values much lower than that of the native landscape and *will reduce the potential for effluent surfacing*. Special Provision No. 15 prevents application when the ground is saturated. Special Provision No. 19 requires weekly monitoring of the drip application fields *to prevent problems resulting from surface runoff, surficial erosion*, and stressed or damaged vegetation. Special Provision No. 22 requires the permittee to provide a plan for review and approval showing how soil erosion will be prevented before construction of the drip fields.

RTC at 19 (footnotes omitted) (emphasis added). These requirements address “runoff” concerns and were made clear to HPR in the ED’s RTC.⁹ After receiving the RTC, however, HPR made no attempt to dispute show why the Shield Ranch might still be affected despite the ED’s statements of fact.

HPR’s refusal to address how the regulated activity might affect their inter interests after the ED clarified in the RTC that their concerns had been addressed means that HPR

⁹ RTC at page 19.

failed to show the following factors that apply to whether one is an “affected person.”¹⁰

- (1) whether a reasonable relationship exists between the interest claimed and the activity regulated,
- (2) the likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person, and
- (3) the likely impact of the regulated activity on use of the impacted natural resource by the person.

30 Texas Admin. Code §55.203(c)(3)-(5).

HPR, therefore, is not an affected person.

B. THE SHIELD RANCH IS NOT AN AFFECTED PERSON

The Shield Ranch Hearing Requests do not contain the information required to establish that they have a justiciable interest. The Shield Ranch Hearing Requests raised a number of concerns prior to the issuance of the RTC that were addressed by the ED in responses 5, 6, 11, 23, 26, and 28 of the RTC.

The Shield Ranch’s refusal to address how the regulated activity might affect their inter interests after the ED clarified in the RTC that their concerns had been addressed means that the Shield Ranch failed to show the following factors that apply to whether one is an “affected person.”¹¹

- (1) whether a reasonable relationship exists between the interest claimed and the activity regulated,
- (2) the likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person, and

¹⁰ Any attempt to make that showing in the Reply should fail because to do so at that time would be after the time that a valid hearing request must be submitted. 30 Tex. Admin. Code § 55.201(d)(4).

¹¹ Any attempt to make that showing in the Reply should fail because to do so at that time would be after the time that a valid hearing request must be submitted. 30 Tex. Admin. Code § 55.201(d)(4).

(3) the likely impact of the regulated activity on use of the impacted natural resource by the person.

30 Texas Admin. Code §55.203(c)(3)-(5).

In its letters dated August 27, 2014 and May 2, 2014, the Shield Ranch summarizes its argument by stating that it has “direct interests in and uses of Rocky Creek.” This assertion of interest ignores the fact that the application in question is not a discharge permit and nothing is proposed to be discharged into Rocky Creek.

For these reasons, the Shield Ranch is not an “affected person.”

C. DANIEL JONES IS NOT AN AFFECTED PERSON

Mr. Jones’ Hearing Request does not contain the information required to establish that he has a justiciable interest. Specifically, contrary to the requirement in 30 Tex. Admin. Code § 55.201(d)(2), he does not identify his distance relative to the proposed facility or activity that is the subject of the application.

Applying the factors of 30 Tex. Admin. Code § 55.203(c) also supports the conclusion that Mr. Jones is not an affected person.

First, Mr. Jones is not identified as an adjacent Landowner in the Application. 30 Tex. Admin. Code § 55.203(c)(2).

In addition, while Mr. Jones identifies various concerns, he does not establish any reasonable relationship between the interest claimed and the activity regulated. 30 Tex. Admin. Code § 55.203(c)(3). His concerns about potential surface water and groundwater contamination ignore the fact that this is not a discharge permit. His concerns about surface

water contamination and generalized pollution are no different than the concerns of the general public. With respect to groundwater, although he notes he “is on a well,” he makes no showing of how a permit that is not authorized to discharge into the groundwater and that has the protections discussed in RTC responses numbers 5 and 6 might affect his specific interests. With respect to odor and noise, although he claims in a conclusory manner that that there might be an adverse effect on his quality of life, he does not assert reasonable relationship between the interest claimed and the activity regulated.

Although Mr. Jones asserts there might be an impact, contrary to 30 Tex. Admin. Code § 55.203(c)(4), he makes no effort to show the likely of impact of the regulated activity on the health and safety of the person, and on the use of property of the person. Similarly, contrary to 30 Tex. Admin. Code § 55.203(c)(5), he makes no effort to show the likely impact of the regulated activity on use of the impacted natural resource by him.

Applying the “affected person” factors of 30 Tex. Admin. Code § 55.203(c) to Mr. Jones’ hearing request leads to a conclusion that he is not, in fact, an “affected person.”

V. DISPUTED QUESTIONS OF FACT

Even if an issue is raised by an affected person, that issue may not be referred to hearing unless the issue “involves a disputed question of fact.” Tex. Water Code § 5.556(d).

While the requesters have presented concerns, none of the hearing requests have actually presented any disputed questions of fact. For this reason, even if the Commission finds that an “affected person” exists, the Hearing Requests should not be granted.

HPR submitted comments and requested a hearing on August 29, 2014, May 30, 2014, and April 29, 2015. In the comments provided before the RTC, HPR provided an impressive list of regulatory requirements and claimed that the Applicant “has not demonstrated that its application meets” those regulatory requirements.¹² The comments and issues raised in the 2014 submissions were directly addressed by the ED in the ED’s RTC. After the ED directly responded to HPR’s concerns, HPR merely dismissed the ED’s fact-based work by simply stating that “HPR . . . is unsatisfied with the responses.”¹³

HPR’s approach confuses the burden of proof. As the person requesting a hearing, HPR, not Applicant nor the ED, has the burden of proof. 30 Tex. Admin. Code § 80.17(a).¹⁴ It is not enough to cite the regulatory requirements, state in a conclusory manner that the Applicant did not demonstrate compliance, and, based on such a submission, assert that there are issues of fact for which a hearing is warranted. This approach undermines the process mandated by the Legislature and implemented by the Commission to identify truly affected persons and limit issues to issues of fact that are actually disputed.

Similarly, the Shield Ranch and Mr. Jones both submitted their comments and requests for hearing prior to the close of the comment period and prior to the ED’s RTC. As with the other commenters, the ED responded to each of their concerns. Unlike HPR, however, neither the Shield Ranch nor Mr. Jones even purported to disagree with the ED’s RTC. They simply filed nothing in response. The Hearing Requests therefore fail to satisfy

¹² HPR Letter dated May 30, 2014 at page 1, ¶ 1.

¹³ HPR Letter dated April 29, 2015 at page 1, ¶ 2.

¹⁴ *See also* Application of Southwestern Electric Power Company for Renewal and Major Amendment of TPDES Permit No. WQ0002496000, 2012 TX SOAH LEXIS 354 at *6 (at footnote 3).

30 Tex. Admin. Code § 55.201(d)(4), which requires the requesters to “list all relevant and material disputed issues of fact that were raised during the public comment period.” Because these Hearing Requests fail to fulfill this fundamental requirement, on this basis alone these Hearing Requests should be denied.

Even if the failure to submit a list after the RTC does not disqualify the Shield Ranch and Mr. Jones’ Hearing Requests, these Hearing Requests still fail to present any disputed questions of fact. Just as HPR utterly failed to timely identify the facts with which HPR still disagreed after issuance of the RTC, the Shield Ranch and Mr. Jones did not submit anything that raises a fact question in response.

In the same way that there must be some evidence provided to find a disputed issue of fact in a summary judgment context, “[s]elf-serving, speculative and conclusory statements of fact or law are insufficient to raise an issue of fact.”¹⁵ It is not enough simply to state in a conclusory manner that one “disagrees” and thereby create a fact issue that is disputed. To be a disputed fact there must be some presentation of evidence. In this proceeding, “[t]he burden of proof is on the moving party by a preponderance of the evidence” (in this case, those who request a hearing). 30 Tex. Admin. Code § 80.17(a). Here, HPR simply listed issues with which it “disagrees” but provided no substantive basis for such disagreement. The Shield Ranch and Mr. Jones didn’t even state that they disagree – they utterly failed to identify any point of disagreement with the responses that were provided in the RTC to their initial

¹⁵ *Los Cucos Mexican Cafe, Inc. v. Sanchez*, 2007 Tex. App. LEXIS 3408 , at *8 (Tex. App.--Corpus Christi May 3, 2007, no pet.) (mem. op.) (citing *McIntyre v. Ramirez*, 109 S.W.3d 741, 749-50 (Tex. 2003); *Purcell v. Bellinger*, 940 S.W.2d 599, 602 (Tex. 1997) (finding that conclusory statements that are unsupported by facts are not proper summary judgment proof); *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984)).

concerns.

There are, therefore, no disputed issues of fact upon which a hearing may be held.¹⁶
Tex. Water Code § 5.556(d).

VI. LEGAL QUESTIONS

If a question is presented that is a question of law, as opposed to a question of fact, it should not be referred to a hearing. This section identifies those issues that are questions of law and should not be considered appropriate for a hearing.

“The question as to whether [a] . . . regulation . . . is reasonable, is a question of law for the courts.” *Wilson v. Abilene Independent School Dist.*, 190 S.W.2d 406, 409 (Tex. Civ. App. -- Eastland 1945, *writ ref'd w.o.m.*). The requesters have raised several issues that, in essence, simply question whether a particular regulation is reasonable. The following are questions of law of law that should not be considered appropriate for any hearing. For ease of reference, this section will track the ED’s identification of these issues by referring to the number assigned those issues in the RTC. The parenthetical will identify the requester that raised the issue.

1) RTC 2 -- Compliance History (HPR):

HPR commented that JPHD failed to provide its compliance history in the application as required by TCEQ’s rules. Applicant is not required to submit a compliance history with its application. The concerns expressed about

¹⁶ Any attempt to raise disputed issues of fact in the Reply should fail because to do so at that time would be after the time that a valid hearing request must be submitted. 30 Tex. Admin. Code § 55.201(d)(4).

compliance history, therefore, are more concerns about the reasonableness of the regulations related to compliance history. This is a legal question, not appropriate for a hearing.

2) RTC 4 – Need for Permit/Term Limit (HPR):

The permit term for JPHD’s draft permit is five years in accordance with TCEQ rules at 30 Tex. Admin Code §222.39. The concerns expressed about the permit term, therefore, are more concerns about the reasonableness of the regulations related to compliance history. This is a legal question, not appropriate for a hearing.

3) RTC 8 – Engineering Reports (HPR)

HPR commented that the Applicant has not provided a sufficient engineering report in accordance with 30 TAC §222.113. JPHD was not required to submit an engineering report for the subsurface area drip dispersal system with its application for a TLAP because the ED reviews the engineering plans used for construction of the subsurface area drip dispersal system separately from the review process for the TLAP. The concerns expressed about engineering reports, therefore, are more concerns about the reasonableness of the regulations related to when the Engineering Report should be submitted. This is a legal question, not appropriate for a hearing.

4) RTC 18 – Effluent Limits (HPR)

HPR asserts that that 30 TAC §222.85 does not provide for adequate effluent

quality that will be protective of surface and ground water. The draft permit incorporates the effluent limits as specified by the rules in 30 TAC §222.85. The concerns expressed about effluent limits, therefore, are more concerns about the reasonableness of the regulations related to effluent limits. This is a legal question, not appropriate for a hearing.

5) RTC 19 – Effluent Limits-BOD₅ (HPR)

HPR commented that JPHD's application proposed an effluent limit of 5 mg/l BOD₅ (Biochemical Oxygen Demand). In the RTC the ED pointed-out that JPHD acknowledged in a letter dated June 30, 2014 that the 5 mg/l BOD₅ limit requested in its permit application was incorrect and that the draft permit incorporates the appropriate 10 mg/l BOD₅ effluent limitation as determined by the ED. The effluent limits in the draft permit comply with the rules in 30 TAC §222.85. The concerns expressed about effluent limits, therefore, are more concerns about the reasonableness of the regulations related to effluent limits. This is a legal question, not appropriate for a hearing.

6) RTC 20 – Effluent Application Rate (HPR)

HPR expressed concerns regarding the rate at which the effluent will be applied to the irrigation fields. The ED pointed-out in the RTC that the draft permit complies with the application rates set-forth at 30 Texas Admin. Code § 222.83(a)(2). The concerns expressed about application rates, therefore, are more concerns about the reasonableness of the regulations related to effluent

limits. This is a legal question, not appropriate for a hearing.

VII. THE ISSUES PRESENTED ARE NOT RELEVANT AND MATERIAL

Even if there are affected persons, and even if those affected persons raise disputed issues of fact, if the issues presented are not relevant or material, a hearing should not be granted on those issues.¹⁷ This section identifies those issues that might be considered relevant and material in the event that affected persons are found to exist that have raised issues of fact.

The ED identified the issues raised by the requesters in his RTC. For ease of reference, this section will track the ED's identification of these issues by referring to the number assigned those issues in the RTC. The parenthetical will identify the requester that raised the issue.

1) RTC 2 -- Compliance History (HPR):

Relevance and Materiality: To the extent that this is a fact issue (see Section VI, above), compliance history is neither relevant nor material because an applicant is not required to submit a compliance history with its application and JPHD's compliance history is unclassified by default since the facility is not constructed. This concern, therefore, is not material or relevant.

2) RTC 4 – Need for Permit/Term Limit (HPR):

Relevance and Materiality: To the extent that this is a fact issue (see Section

¹⁷ Tex. Water Code § 5.556(d);

VI, above), the permit term for JPHD's draft permit is five years. In accordance with TCEQ rules, a permit term shall not exceed ten years.¹⁸ This concern, therefore, is not material or relevant.

3) RTC 5 – Surface Water (HPR, Shield Ranch, Mr. Jones):

Relevance and Materiality: Discharge of treated effluent to surface water is not authorized by this permit. This concern, therefore, is not material or relevant.

4) RTC 6 – Groundwater (HPR, Shield Ranch, Mr. Jones)

Relevance and Materiality: Discharge of treated effluent to groundwater is not authorized by this permit. This concern, therefore, is not material or relevant.

5) RTC 7 – Recharge Feature Plan (HPR)

Relevance and Materiality: If, in fact, there was a disputed issue of fact presented by the Requesters, this issue would be material and relevant. In the RTC, however, the ED identified why the recharge feature plan was adequate. Because HPR only made a naked assertion of “disagreement,” no fact issue was placed into dispute.

6) RTC 8 – Engineering Reports (HPR)

Relevance and Materiality: To the extent that this is a fact issue (see Section VI, above), JPHD was not required to submit an engineering report for the subsurface area drip dispersal system with its application for a TLAP because

¹⁸ 30 Tex. Admin Code §222.39; See also, 30 Tex. Admin. Code §305.127 (relating to conditions to be determined for individual permits).

the ED reviews the engineering plans used for construction of the subsurface area drip dispersal system separately from the review process for the TLAP.

This concern, therefore, is not material or relevant.

7) RTC 11 – Soil Quality (HPR, Shield Ranch, Mr. Jones)

Relevance and Materiality: If, in fact, there was a disputed issue of fact presented by the Requesters, this issue would be material and relevant. In the RTC, however, the ED identified why he determined the permeability and absorption rates were appropriate. Because HPR only made a naked assertion of “disagreement,” and the other requesters did not address the ED’s analysis at all, no fact issue was placed into dispute.

8) RTC 12 – Soil Testing and Measurement (HPR)

Relevance and Materiality: If, in fact, there was a disputed issue of fact presented by the Requesters, this issue would be material and relevant. In the RTC, however, the ED identified how the Applicant complied with the requirements. Because HPR only made a naked assertion of “disagreement,” no fact issue was placed into dispute.

9) RTC 13 – Vegetation Quality (HPR)

Relevance and Materiality: If, in fact, there was a disputed issue of fact presented by the Requesters, this issue would be material and relevant. In the RTC, however, the ED identified how he determined that the vegetation quality of the proposed application site is sufficient to uptake the treated

effluent. Because HPR only made a naked assertion of “disagreement,” no fact issue was placed into dispute.

10) RTC 15 – Site Characteristics (HPR)

Relevance and Materiality: If, in fact, there was a disputed issue of fact presented by the Requesters, this issue would be material and relevant. In the RTC, however, the ED identified the provisions that enhance the suitability of the soil in the application areas. Because HPR only made a naked assertion of “disagreement,” no fact issue was placed into dispute.

11) RTC 16 – Design Criteria (HPR)

Relevance and Materiality: If, in fact, there was a disputed issue of fact presented by the Requesters, this issue would be material and relevant. In the RTC, however, the ED described how the application shows that JPHD will be in compliance with the design criteria requirements of 30 TAC Chapter 217. Because HPR only made a naked assertion of “disagreement,” no fact issue was placed into dispute.

12) RTC 17 – System Failures/Design Flaws (HPR)

Relevance and Materiality: If, in fact, there was a disputed issue of fact presented by the Requesters, this issue would be material and relevant. In the RTC, however, the ED described how he determined that the proposed facility complies with the design requirements of 30 TAC Chapter 222 regarding the Design Criteria of Subsurface Area Drip Dispersal Systems. Because HPR

only made a naked assertion of “disagreement,” no fact issue was placed into dispute.

13) RTC 18 – Effluent Limits (HPR)

Relevance and Materiality: To the extent that this is a fact issue (see Section VI, above), the ED describes in the RTC how the draft permit incorporates the effluent limits as specified by the rules in 30 TAC §222.85. Nobody has challenged the ED’s assertion that the draft permit complies with the regulations. Therefore, there are no material or relevant issues of fact.

14) RTC 19 – Effluent Limits-BOD₅ (HPR)

Relevance and Materiality: To the extent that this is a fact issue (see Section VI, above), the ED describes in the RTC how the draft permit incorporates the effluent limits as specified by the rules in 30 TAC §222.85. Nobody has challenged the ED’s assertion that the draft permit complies with the regulations. Therefore, there are no material or relevant issues of fact.

15) RTC 20 – Effluent Application Rate (HPR)

Relevance and Materiality: To the extent that this is a fact issue (see Section VI, above) and if, in fact, there was a disputed issue of fact presented by the Requesters, this issue would be material and relevant. In the RTC, however, the ED described how the applicant will be required to comply with applicable regulations and why preferential flow features should not develop. Because HPR only made a naked assertion of “disagreement,” no fact issue was placed

into dispute.

16) RTC 21 – Monitoring Requirements (HPR and Daniel Jones)

Relevance and Materiality: If, in fact, there was a disputed issue of fact presented by the Requesters, this issue would be material and relevant. In the RTC, however, the ED described how the applicant will be required to comply with applicable regulations. Because HPR only made a naked assertion of “disagreement,” and Daniel Jones did not address the ED’s analysis at all, no fact issue was placed into dispute.

17) RTC 22 – Operations and Maintenance (HPR)

Relevance and Materiality: If, in fact, there was a disputed issue of fact presented by the Requesters, this issue would be material and relevant. In the RTC, however, the ED described how the applicant will be required to comply with applicable regulations. Because HPR only made a naked assertion of “disagreement,” no fact issue was placed into dispute.

18) RTC 23 – Impacts to Human Health and Livestock (Shield Ranch)

Relevance and Materiality: Discharge of treated effluent to surface water is not authorized by this permit. This concern, therefore, is not material or relevant.

19) RTC 25 – Nuisance (HPR and Daniel Jones)

Relevance and Materiality: The TCEQ does not have jurisdiction to address these types of issues as a part of the wastewater permitting process. This

concern, therefore, is not material or relevant.

20) RTC 26 – Use and Enjoyment of Property and Property Values (Shield Ranch)

Relevance and Materiality: The TCEQ does not have jurisdiction to review the effect, if any, the location of the wastewater treatment facility might have on property values and tax assessments of surrounding landowners when reviewing a permit for a domestic wastewater treatment plant. This concern, therefore, is not material or relevant.

21) RTC 27 – Odor (Daniel Jones)

Relevance and Materiality: If, in fact, there was a disputed issue of fact presented by the Requesters, this issue would be material and relevant. In the RTC, however, the ED described how the applicant will be required to comply with applicable regulations. Because the requesters Jones did not address the ED's analysis at all, no fact issue was placed into dispute.

22) RTC 28 – Regionalization (Shield Ranch)

Relevance and Materiality: Shield ranch claims that this is an issue due to the proximity of Travis County MUD 16. Travis County MUD 16, however, entered into a settlement agreement (see Exhibit "A") which specifically forbids treatment or disposal for any wastewater customers located outside of the "Project" (Exhibit "A," page 7, Section 3.01 (h)). This concern, therefore, is not material or relevant.

VIII. ADDITIONAL ELEMENTS REQUIRED BY RULE 55.209(e)

Although Applicant asserts that a hearing is not warranted based upon the discussion above, Rule 55.209(e) requires this response to address identified factors. These factors are identified in this section.

- (1) Whether the requestor is an affected person:

Response: This is addressed at Part IV, above.

- (2) Which issues raised in the hearing request are disputed:

Response: Applicant does not believe there are any disputed issues of fact. Although all of the requesters provided a list of concerns, none of them provided any basis upon which to find that a disputed issue of fact exists. See Part V, above.

- (3) Whether the dispute involves questions of fact or law:

Response: RTC Numbers 2, 4, 8, 18, 19, and 20 pose questions of law. Applicant does not believe there are any issues of fact that are disputed. Although all of the requesters provided a list of concerns, none of them provided any basis upon which to find that a disputed issue of fact exists. See Part V, above.

- (4) Whether the issues were raised during the public comment period:

Response: All of the concerns discussed herein were raised during the public comment period.

- (5) Whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the ED's Response to Comments:

Response: To the best of Applicant's knowledge, no comments have been withdrawn.

- (6) Whether the issues are relevant and material to the decision on the Application:

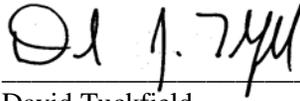
Response: This is addressed at Part VII, above.

(7) A maximum expected duration for the contested case hearing:

Response: Although the Applicant does not believe a hearing is warranted, if a hearing is granted, the Applicant proposes a period of no greater than 120 days.

Respectfully submitted,

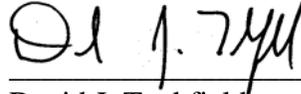
THE AL LAW GROUP, PLLC

A handwritten signature in black ink, appearing to read "D. Tuckfield", is written over a horizontal line.

David Tuckfield
State Bar No. 00795996
12400 Highway 71 West
Suite 350-150
Austin, TX 78738
(512) 576-2481
(512) 366-9949 Facsimile
david@allawgp.com

CERTIFICATE OF SERVICE

I certify that a true and correct copy of JPHD, Inc.'s Response to Hearing Request was served on the following by U.S. Regular Mail, Certified Mail (return receipt requested), electronic mail, hand delivery and/or facsimile at the address listed below on this 8th day of June, 2015.



David J. Tuckfield

MAILING LIST
JPHD, INC.
DOCKET NO. 2015-0664-MWD; PERMIT NO. WQ0015201001

FOR THE APPLICANT:

John Hatchett, President
JPHD, Inc.
17024 Hamilton Pool Road
Austin, Texas 78738-7203
Tel: (347) 829-5646

Daniel Ryan, P.E.
LJA Engineering, Inc.
5316 West Highway 290, Suite 150
Austin, Texas 78735-8925
Tel: (512) 439-4700
Fax: (512) 439-4716

John Clark, P.E.
LJA Engineering, Inc.
5316 West Highway 290, Suite 150
Austin, Texas 78735-8925
Tel: (512) 439-4700
Fax: (512) 439-4716

FOR THE EXECUTIVE DIRECTOR
via electronic mail:

Ashley McDonald, Staff Attorney
Texas Commission on Environmental
Quality
Environmental Law Division, MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-0600
Fax: (512) 239-0606

Phillip Urbany, Technical Staff
Texas Commission on Environmental
Quality
Water Quality Division, MC-148
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-4542
Fax: (512) 239-4430

Brian Christian, Director
Texas Commission on Environmental
Quality
Environmental Assistance Division
Public Education Program, MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-4000
Fax: (512) 239-5678

FOR PUBLIC INTEREST COUNSEL
via electronic mail:

Vic McWherter, Public Interest Counsel
Texas Commission on Environmental
Quality
Public Interest Counsel, MC-103
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-6363
Fax: (512) 239-6377

FOR ALTERNATIVE DISPUTE
RESOLUTION

via electronic mail:

Kyle Lucas
Texas Commission on Environmental
Quality
Alternative Dispute Resolution, MC-222
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-4010
Fax: (512) 239-4015

FOR THE CHIEF CLERK:

via electronic filing:

Bridget C. Bohac
Texas Commission on Environmental
Quality
Office of Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-3300
Fax: (512) 239-3311

REQUESTER(S)/INTERESTED
PERSON(S):

See attached list.

REQUESTER(S)

ERIC ALLMON
FREDERICK PERALES ALLMON & ROCKWELL PC
707 RIO GRANDE ST STE 200
AUSTIN TX 78701-2733

ROBERT A AYRES
SHIELD RANCH
3101 BEE CAVES RD STE
260 AUSTIN TX 78746-5574

DANIEL H JONES
7107 DESTINY HILLS DR
AUSTIN TX 78738-7419

EDMOND R MCCARTHY, JR
JACKSON SJOBERG MCCARTHY & TOWNSEND
711 W 7TH ST
AUSTIN TX 78701-2711

PUBLIC OFFICIALS - INTERESTED PERSON(S)

THE HONORABLE PAUL D WORKMAN
STATE REPRESENTATIVE, DISTRICT
47 PO BOX 2910 E2.410
AUSTIN TX 78768-2910

INTERESTED PERSON(S)

ADAM RICHARD ABRAMS
SAVE OUR SPRINGS ALLIANCE
PO BOX 684881
AUSTIN TX 78768-4881

ARIEL AXELROD
17008 RUSH PEA CIR
AUSTIN TX 78738-4041

BRENT BERTRAND
7709 LYNCHBURG DR
AUSTIN TX 78738-7648

JIM BRADSHAW
2707 WINDING BROOK DR
AUSTIN TX 78748-2007

HENRY H BROOKS
PO BOX 118
DRIPPING SPRINGS TX 78620-0118

GEANNEITA M BUTLER
8617 BELLANCIA DR
AUSTIN TX 78738-7624

GREGORY CESNKER
106 SADDLEHORN DR
DRIPPING SPRINGS TX 78620-2720

JONATHAN COKER
5117 AVISPA WAY
AUSTIN TX 78738-7602

KELLY DAVIS
905 W OLTORF ST STE A
AUSTIN TX 78704-5369

SAMUEL C DAY-WOODRUFF
LOWERRE FREDERICK PERALES ALLMON &
ROCKWELL 707 RIO GRANDE ST STE 200 AUSTIN
TX 78701-2733

PENNY DOYLE
6812 CAUDILL LN
AUSTIN TX 78738-7511

JIM DUSTER
201 WINCHESTER DR
DRIPPING SPRINGS TX 78620-2702

STEPHEN ENGLAND
17501 WILDRYE DR
AUSTIN TX 78738-4052

MARA EURICK
20314 HAMILTON POOL RD
DRIPPING SPRINGS TX 78620-2821

JEFF GARDNER
16721 CORY CACTUS DR
AUSTIN TX 78738-4087

JULIE GAYLER
18200 FLAGLER DR
AUSTIN TX 78738-7654

ELIZABETH & PETER W GOLDE
8301 BELLANCIA DR
AUSTIN TX 78738-7659

ELIZABETH GOLDE
8301 BELLANCIA DR
AUSTIN TX 78738-7659

PETER GOLDE
8301 BELLANCIA DR
AUSTIN TX 78738-7659

CHARLIE GRAHAM
408 SADDLEHORN DR
DRIPPING SPRINGS TX 78620-2822

RAJAT GUPTA
8001 MAGNOLIA RIDGE CV
AUSTIN TX 78738-7646

JOHN & MRS MOLLY GURASICH
16608 DESTINY CV
AUSTIN TX 78738-7400

MOLLY GURASICH
16608 DESTINY CV
AUSTIN TX 78738-7400

DICK & MRS KATHLEEN MALICK HANSON
16400 HAMILTON POOL RD
AUSTIN TX 78738-7300

KATHLEEN HANSON
16400 HAMILTON POOL RD
AUSTIN TX 78738-7300

W M HEAVIN
17717 WILD RYE DR
AUSTIN TX 78738-4054

RANDY HECKMANN
20310 HAMILTON POOL RD
DRIPPING SPRINGS TX 78620-2821

HENRY & NOVELLA HEFFINGTON
6801 DESTINY HILLS DR
AUSTIN TX 78738-7416

NOVELLA HEFFINGTON
6801 DESTINY HILLS DR
AUSTIN TX 78738-7416

JUDY HENDRICKS
16618 DESTINY CV
AUSTIN TX 78738-7400

CHRIS HERRINGTON
505 BARTON SPRINGS RD FL
11 AUSTIN TX 78704-1245

LAUREN ICE
1044 CAMINO LA COSTA APT 2055
AUSTIN TX 78752-3937

JEANNA JAMES
7114 DESTINY HILLS DR
AUSTIN TX 78738-7414

ROBERT N JOCIUS
WEST CAVE ESTATES HOA
10905 W CAVE BLVD
DRIPPING SPRINGS TX 78620-5065

DAN & LINDA JONES
7107 DESTINY HILLS DR
AUSTIN TX 78738-7419

EUGENE LOWENTHAL & MARK KILGORE
206 HIGH PLAINS DR
DRIPPING SPRINGS TX 78620-2724

JIM KOERNER & NOREEN KORNER
7824 LYNCHBURG DR
AUSTIN TX 78738-7649

CHARLES & DORIS KRAFT
9918 CRUMLEY RANCH RD
AUSTIN TX 78738-6017

DORIS KRAFT
9918 CRUMLEY RANCH RD
AUSTIN TX 78738-6017

EUGENE LOWENTHAL
9600 CRUMLEY RANCH RD
AUSTIN TX 78738-6016

LINDA LOWENTHAL
9600 CRUMLEY RANCH RD
AUSTIN TX 78738-6016

ED & SANDY LUECKENHOFF
17725 FLAGLER DR
AUSTIN TX 78738-7628

NOAH MONIKOFF
7900 LYNCHBURG DR
AUSTIN TX 78738-7650

MR MEHRDAD MORABBI
12004 FORTUNA CV
AUSTIN TX 78738-5403

HEATHER MORRISON
17405 LAKESHORE DR
DRIPPING SPRINGS TX 78620-3109

MONICA MURPHY
8400 BELLANCIA DR
AUSTIN TX 78738-7660

CHRISTY MUSE
EXECUTIVE DIRECTOR, HILL COUNTRY ALLIANCE
15315 W HIGHWAY 71
BEE CAVE TX 78738-2806

NELL PENRIDGE
HAMILTON POOL RD SCENIC CORRIDOR COALITION
15100 HAMILTON POOL RD
AUSTIN TX 78738-7619

MIKE PERSONETT
PO BOX 1088
AUSTIN TX 78767-1088

PAULA PRIOUR
17120 HAMILTON POOL
RD AUSTIN TX 78738-7101

DAVID RAESZ
10844 W CAVE LOOP
DRIPPING SPRINGS TX 78620-5078

DESI & LISA RHODEN
7111 DESTINY HILLS DR
AUSTIN TX 78738-7419

D LAUREN ROSS
GLENROSE ENGINEERING
INC PO BOX 1948
AUSTIN TX 78767-1948

KATIE SCHATZLEIN
17928 TURKEY TROT TRL
DRIPPING SPRINGS TX 78620-5041

RON SCHATZLEIN
17928 TURKEY TROT TRL
DRIPPING SPRINGS TX 78620-5041

KAREN STEWART
7016 DESTINY HILLS DR
AUSTIN TX 78738-7413

TERI STREUSAND
17837 FLAGLER DR
AUSTIN TX 78738-7630

HANK STRINGER
15603 HAMILTON POOL
RD AUSTIN TX 78738-7504

DAVID TUCKFIELD
12400 W HIGHWAY 71 STE 350-
150 BEE CAVE TX 78738-6517

RON UBERTINI
8401 BELLANCIA DR
AUSTIN TX 78738-7660

GARY & LESLIE URANO
7716 LYNCHBURG DR
AUSTIN TX 78738-7648

TERRI & TIM VAN ACKEREN
PO BOX 342648
AUSTIN TX 78734-0045

TIM VAN ACKEREN
PO BOX 342648
AUSTIN TX 78734-0045

THOMAS W WEBER
MANAGER, TRANSPORTATION AND NATURAL
RESOURCES DEPT
PO BOX 1748
AUSTIN TX 78767-1748

ARLIE & WHITNEY WHATLEY
9809 MARTIN CV
DRIPPING SPRINGS TX 78620-2818

JON A WHITE
TRAVIS COUNTY NTR
PO BOX 1748
AUSTIN TX 78767-1748

CHARLES WILLIAMS
16112 SPILLMAN RANCH
LOOP AUSTIN TX 78738-6578

HUGH WINKLER
9510 MOR DR
DRIPPING SPRINGS TX 78620-2860

MATT WORRALL
214 SETTLERS VALLEY DR
PFLUGERVILLE TX 78660-4731

EXHIBIT A

AMENDED AND RESTATED SETTLEMENT AGREEMENT

This Amended and Restated Settlement Agreement ("Agreement") is entered into as of the 31st day of August, 2010, (the "Effective Date") between RC Travis, LP, a Texas limited partnership ("RC Travis"), Travis County Municipal Utility District No 16 ("MUD 16") and the following Protestants: Linda and Gene Lowenthal, and Robert A. Ayres, Managing Partner of Shield Ranch (the "Neighboring Protestants"), and Lisa Railsback, Charles Crumley, Connie Henry, Charles and Doris Kraft, Paula and Damian Priour, and Kathleen Oliver (the "Other Protestants"). The Neighboring Protestants and Other Protestants are collectively referred herein as the "Protestants."

RECITALS

On or about September 24, 2007, Rocky Creek Wastewater Utility, L.P., a Texas limited partnership ("RCWU"), KD Rocky Creek, L.P., a Texas limited partnership ("Kerby") and Protestants entered into that certain Settlement Agreement (the "Original Settlement Agreement") with respect to (i) approximately 323.44 acres of property near the intersection of Hamilton Pool Road and Crumley Ranch Road in Travis County, Texas (the "Rocky Creek Property"), that is more specifically described in Exhibit "A", attached to and incorporated into this Agreement for all purposes, and (ii) approximately 144.28 acres of property near the intersection of Hamilton Pool Road and Crumley Ranch Road in Travis County, Texas ("WWTP Property"), that is more specifically described in Exhibit "B", attached to and incorporated into this Agreement for all purposes. LegacyTexas Bank ("Legacy") obtained title to the Rocky Creek Property and the WWTP Property and intends to sell the Rocky Creek Property and the WWTP Property to RC Travis on the date which shall be the Effective Date. As the successor owner of the Rocky Creek Property and the WWTP Property, RC Travis desires to develop the property by constructing a 397 home single family subdivision project on the property as shown on the proposed Preliminary Plan attached as Exhibit "C" ("Project").

RCWU was the original permittee under water quality permit no. WQ0014664-001 ("Permit") issued by the Texas Commission on Environmental Quality ("TCEQ") in order to provide 125,500 gallons per day of wastewater service to the Project. Protestants filed hearing requests and submitted public comments regarding the issuance of the Permit and RCWU, Kerby and the Protestants subsequently entered into the Original Settlement Agreement to resolve Protestants objections to the Permit. RCWU transferred all rights and obligations as the Permittee under the Permit to MUD 16. MUD 16 desires to construct a wastewater treatment plant (the "Wastewater Plant") and associated irrigation facilities (the "Irrigation System") on the WWTP Property to serve the Project.

As of the Effective Date, RC Travis is the successor in interest to that certain "Utility Facilities Construction and Water Service Agreement" dated December 7, 2004, by and between the Lower Colorado River Authority and McHargue Family II, Ltd., and assignable to one or more utility districts created pursuant to either Chapter 51 or Chapter 54 of the Texas Water Code.

MUD 16, RC Travis and Protestants mutually desire to protect Rocky Creek and its environs, and expressly acknowledge that is their intent to amend and restate the Original Settlement Agreement in its entirety by entering into this Agreement in order to facilitate the

orderly development of the Project in a manner that provides the maximum potential protections to Rocky Creek and its environs.

For the foregoing reasons, MUD 16, RC Travis and Protestants have entered into this Agreement in good faith, with the desire to settle any and all disputes regarding the issuance, transfer, amendment, renewal or replacement of the Permit and enter into this Agreement as a compromise of those disputes.

By entering into this Agreement, the Parties are hereby amending, restating and superseding in its entirety the Original Settlement Agreement in order to fully and completely settle and resolve all issues, actions, and rights of any kind regarding the issuance, transfer, amendment, renewal or replacement of the Permit, and development of the Project as set forth below.

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

AGREEMENT

I. DEFINITIONS

1.01 “Access Agreement” means that certain agreement between RC Travis as the “Owner” and the Protestants of even date granting a license, including terms and conditions, to the Protestant Representative to conduct inspections of the Project for compliance with this Settlement Agreement, specifically Section 5.11 hereof.

1.02 “Collection System” means wastewater lines and related appurtenances designed and constructed to convey Wastewater generated within the Project to the Wastewater Plant.

1.03 “Deed Restrictions” means the Master Declaration of Covenants, Conditions and Restrictions for the Project that is recorded in the Travis County, Texas, Official Public Records.

1.04 “Irrigation Area” means the 70 acres of the WWTP Property described on Exhibit “D”.

1.05 “Irrigation System” means the pumps, pressure tanks, water lines, spray heads, monitoring devices and related appurtenances used to dispose of treated Wastewater from the Wastewater Plant by means of low volume irrigation, as described in Sections 3.02(c) and (d) of this Agreement, on the Irrigation Area in accordance with this Agreement and the Permit.

1.06 “LCRA Agreement” means that certain “Utility Facilities Construction and Water Service Agreement” dated December 7, 2004, by and between the Lower Colorado River Authority and the McHargue Family II, Ltd, a Texas limited partnership, as amended, assigned or superseded.

1.07 “Lot Owner” means any owner of a developed single family residential lot within the Project Property.

1.08 “Lowenthal Property” means that certain 57.70 acre tract and related ingress-egress easements deeded to Eugene Lowenthal and wife, Linda Lowenthal, by B.L. Johnson and wife, Donna M. Johnson, and recorded in Volume 10654, Page 0301, of the Travis County Real Property Records and as more fully described on Exhibit “E”.

1.09 “Lowenthal Access Easement” means the 0.605 acre ingress-egress easement that is identified as Tract III of Exhibit B to the deed recorded in Volume 10654, Page 0301, of the Travis County Real Property Records and as more fully described on Exhibit “F”.

1.10 “MUD 16” means Travis County Municipal Utility District No. 16

1.11 “Parties” means MUD 16, RC Travis and Protestants, collectively.

1.12 “Permit” means water quality permit number 14664-001 issued by the TCEQ, as amended, assigned, renewed or replaced.

1.13 “Preliminary Plan” means the plan attached as Exhibit “C”.

1.14 “Project” means the 397 single family lot development on the Rocky Creek Property, including all related subdivision infrastructure and improvements necessary to serve the homes located on the Rocky Creek Property.

1.15 “Project Property” means the combined 467.72 acres owned by RC Travis and reflected in Exhibits “A” and “B,” attached hereto and incorporated into this Agreement for all purposes.

1.16 “Protestant Representative” means initially Gene Lowenthal and, thereafter, his successor and/or substitute, as appointed by the Protestants, provided that such appointment will not be effective until RC Travis and MUD 16 are provided notice of the appointment in writing.

1.17 “RC Travis” means RC Travis, LP, a Texas limited partnership and its successors and assigns.

1.18 “Sensitive Environmental Features” means caves, sinkholes, faults with solution-enlarged openings, fracture zones with solution-enlarged openings, springs, seeps or any area that holds water or supports mesic vegetation for sustained periods as described in the “USFW Recommendation for Protection of Water Quality of the Edwards Aquifer”, dated September 1, 2000.

1.19 “Shield Ranch Property” means the property described in the metes and bounds field notes provided to RC Travis on or before the effective date of this Agreement and reflected on the plats attached hereto as Exhibit “G”.

1.20 “Regulatory Authority” means any local, state or federal governmental entity that regulates any aspect of the Project or requires RC Travis or MUD 16 to obtain approval of that entity for the Project or any component thereof, including but not limited to the City of Austin, Travis County, the Lower Colorado River Authority and the TCEQ.

1.21 “TAC” means Texas Administrative Code.

1.22 “TCEQ” means the Texas Commission on Environmental Quality or its successor agencies with jurisdiction over the Permit.

1.23 “TCEQ Penalty Policy” means TCEQ Regulatory Guidance document number RG-253 dated September 2002 and titled “Penalty Policy of the Texas Commission on Environmental Quality.”

1.24 “USFW” means the United States Fish & Wildlife Service or its successor agencies.

1.25 “Wastewater System” means the Wastewater Plant, Irrigation System and Collection System.

1.26 “Wastewater Plant” means the facility constructed to treat Wastewater generated within the Project in accordance with the Permit.

1.27 “Wastewater” means water-borne human excreta and gray water.

II. PROTESTS AND HEARING REQUESTS

2.01 The Parties agree that they mutually desire to implement this Agreement and avoid any disputes or disagreements over the development of the Project and, in particular, the quality of and methodology for the disposal of Wastewater generated by the Project. The Parties agree that the Permit, as currently issued, satisfies the terms and conditions of this Agreement.

2.02 Protestants agree that they will not prosecute any protests or hearing requests with the TCEQ regarding the Permit, or any transfer, assignment, amendment, renewal or replacement of the Permit or any application by RC Travis or MUD 16 that complies with the terms and conditions of this Agreement applicable to the Permit. MUD 16 and RC Travis agree that they will coordinate with Protestants prior to filing any such application to transfer, assign, amend, renew or replace the Permit with the TCEQ by providing a copy of any such application to Protestants for review and comment, in accordance with Section 3.04, in order to allow Protestants to insure compliance with the terms and conditions of this Agreement. In recognition of the fact that the laws of the state of Texas related to participation as a party in a wastewater permit proceeding include jurisdictional deadlines that would preclude Protestants from exercising their right to enforce the terms of this Agreement if Protestants did not discover the need to protest an application until after the passage of the applicable deadline, the Parties agree as follows:

(a) If and only if (1) Protestants are not provided a copy of any application to amend, renew or replace the Permit as required by Section 3.04 and/or (2) an application is filed for an amendment, renewal or replacement of the Permit that is not consistent with the conditions set forth in subparagraph (b), below, then Protestants may timely file a conditional request for a contested case hearing on any application to amend, renew or replace the Permit filed by MUD 16 or RC Travis; provided that such request includes notice that the sole purpose of the request is to insure compliance with the terms of this Agreement. Upon presentation to Protestants of a copy of the final permit amendment, renewal or replacement application evidencing compliance with the applicable terms and

conditions specified in subparagraph (b), Protestants shall provide the TCEQ with a timely letter of withdrawal, in no event later than 30 days following Protestant's receipt of such document, stating that such withdrawal is based upon Protestants' reliance upon such document and the applicant's written confirmation that it would be a direct violation of this Agreement thereafter to modify the language of the Permit in a manner that is inconsistent with the conditions specified in subparagraph (b).

(b) Notwithstanding subparagraph (a) above, Protestants shall forego their right and agree not to file a conditional request for a contested case hearing on any application to amend, renew or replace the Permit filed by MUD 16 or RC Travis that contains the following express conditions: (i) limits the daily averages of CBOD (5 mg/l), TSS (5mg/l) and Ammonia Nitrogen (2 mg/l), (ii) limits pH to not less than 6.0 standard units nor greater than 9.0 standard units, and (iii) requires that the effluent shall be chlorinated in a chlorine contact chamber to a residual of 1.0 mg/l with a minimum detention time of 20 minutes based on peak flow; and is not otherwise inconsistent with the terms of this Agreement. In consideration for not filing a conditional hearing request, MUD 16 and RC Travis acknowledge that, in addition to any other rights available to Protestants to enforce the terms and conditions of this Agreement, whether such rights be set forth in this Agreement or otherwise be available at law or in equity, if either or both MUD 16 and/or RC Travis shall file any such application, whether or not the same is granted, and said application is contrary to the terms and conditions of this Agreement and, in particular, this subparagraph (b), then Protestants shall be entitled to seek to enjoin the processing of the application and/or the implementation of any permit or permit amendment, renewal, or replacement resulting therefrom as being a violation of this Agreement for which adequate monetary damages are not available as a remedy at law.

(c) Protestants will assist MUD 16 and RC Travis in any reasonable manner to expedite any assignment, renewal, transfer, amendment or replacement of the Permit containing terms and conditions consistent with this Agreement, and any other approvals from TCEQ or other Regulatory Authority on any issue expressly covered by this Agreement; provided, however, that nothing in this Agreement shall be construed to require that any Protestant take a public position in favor of the Project or in support of any governmental authorization required or necessary for the development of the Project.

2.03 Protestants will not file any protests or participate in any way, whether directly or indirectly, to oppose RC Travis' various applications for development of the Project, or MUD 16's construction, operation or maintenance of the Wastewater Plant, Collection System or Irrigation System that are required to be approved by a Regulatory Authority on any issue expressly covered by this Agreement so long as RC Travis and MUD 16, respectively, and the affected applications, remain in full compliance with the Agreement. Protestants may, however, take actions necessary to protect its rights under this Agreement and insure MUD 16's and RC Travis' compliance with the terms and conditions of this Agreement, including by way of example only filing a conditional request for a contested case hearing consistent with the provisions of Section 2.02 of this Agreement.

2.04 If the TCEQ refers any application relating to the transfer, renewal, replacement or amendment of Permit No. 14664-001, the Wastewater Plant, Collection System or Irrigation System to a contested public hearing as a result of any hearing request or protest by

any individual, regardless of whether that individual is a Protestant or not, or at the request of the Executive Director of the TCEQ, either RC Travis or MUD 16 shall have the option to terminate this Agreement in their sole and absolute discretion after notifying Protestants of the referral to a contested public hearing, providing Protestants with information related to the hearing request or protest that resulted in the matter being referred to a contested case hearing and allowing Protestants a reasonable opportunity to resolve the matter outside of a contested case hearing by obtaining a withdrawal of the hearing request or protest. The Parties agree that it is their intent to preserve this settlement for their mutual benefit.

2.05 The provisions of this Article II are essential to the implementation of the Parties' settlement of the prior disputes and the avoidance of potential disputes between the Protestants, RC Travis and MUD 16 with respect to the Permit, the Wastewater Plant, Collection System, Irrigation System or the Project. Notwithstanding any other provision in this Agreement to the contrary, if any word, phrase, clause, sentence, paragraph, section, or other part of this Article II or the application thereof to any person or circumstances is ever held by any court of competent jurisdiction to be invalid or unconstitutional for any reason, this Agreement will automatically terminate and be of no further force and effect.

2.06 The provisions of this Article II do not:

(a) apply to any application to amend, modify, or otherwise change the terms and conditions of the Permit in a manner that is inconsistent with or contrary to the terms and conditions set forth in this Agreement; nor

(b) after issuance of the Permit, preclude the Protestants from exercising any right, at law or in equity, to seek enforcement of the Permit or otherwise bring suit to protect their rights and/or any property adversely affected by the operation of the Wastewater Plant or the Project in a manner inconsistent with this Agreement under any local, state or federal rule, ordinance or statute.

III. WASTEWATER SYSTEM

3.01 **Wastewater Plant.** The Parties agree to the following limitations and other various requirements regarding design, construction and operation of the Wastewater Plant:

(a) MUD 16 will provide standby power for all critical elements of the Wastewater System, including but not limited to lift stations, pumps, sensors, alarms, telecommunications, etc. Standby power for blowers is not required.

(b) MUD 16 will notify the Protestant Representative of any uncontrolled overflow of untreated or partially treated wastewater from the Wastewater Plant or Collection System that is in excess of 100 gallons within 24 hours of the overflow event.

(c) MUD 16 will install positive displacement tri-lobed blowers with manufacturer's sound attenuating cabinetry to reduce the impact of noise attributable to the Wastewater Plant on adjacent properties.

(d) MUD 16 will plant and maintain a stand of fast-growing native trees and shrubs between the Wastewater Plant site and the Lowenthal Property and Lowenthal Access Easement to provide a visual and sound buffer before construction of the Wastewater Plant is complete.

(e) MUD 16 will only allow the construction of and operate one lift station for the transport of untreated effluent within the Wastewater System, which will be located within the boundaries of the Wastewater Plant site.

(f) MUD 16 will provide the Protestant Representative with copies of all monthly reports required to be filed with TCEQ in accordance with the Permit at the time those reports are filed with TCEQ.

(g) MUD 16 will provide the Protestant Representative with notice and an opportunity to split water quality samples taken at the Wastewater Plant at least once per calendar year.

(h) MUD 16 will design and construct the Wastewater Plant and Irrigation System to ensure that neither the Wastewater Plant nor the Irrigation System will be used to serve homes and facilities outside of the Project. MUD 16 will not provide any such treatment or disposal service for wastewater customers outside of the Project that requires or contemplates utilization of the proposed Wastewater Plant and Irrigation System.

(i) MUD 16 will design and construct the effluent holding pond in a location that is at least 75 feet from the Lowenthal Property and from the Lowenthal Access Easement at its nearest point. Notwithstanding the preceding, the pond will be designed and constructed so as to leave undisturbed all of the existing trees (including cedars) and shrubs to the south and east of the Tree Protection Line shown on the attached aerial photograph attached hereto as Exhibit "H". In addition, MUD 16 will plant stands of native mixes of trees (such as a live oak and cedar elm) in the Tree Planting Areas shown in Exhibit "H".

(j) MUD 16 will design and construct the Wastewater Plant to include charcoal filtered vented headworks, and to minimize turbulence and the amount of contact time between untreated Wastewater and the air prior to the Wastewater entering the treatment basins.

(k) Unless required by any Regulatory Authority pursuant to a regulation, rule, ordinance, statute or law, MUD 16 will only install lighting at the Wastewater Plant that: (i) for exterior lighting, is directed downward to illuminate the minimally required area; (ii) for exterior lighting, is "sensored" to be on based upon movement of humans within the fenced perimeter of the Wastewater Plant site; and (iii) for any permanent lighting at the doorways of buildings within the Wastewater Plant site, is limited to a small low form of lighting at the doorway itself as required for safety purposes. All other lighting should be on timers so that, when lighting is necessary for purposes of working after dark, the lights will automatically be cut off if workers forget to turn off the lights.

(l) The Wastewater Plant location and footprint will be approximately as shown on the map attached hereto as Exhibit "I."

3.02 **Irrigation System.** The Parties agree to the following limitations and other various requirements regarding design, construction and operation of the Irrigation System:

(a) MUD 16 will construct the Irrigation System in a manner that provides for setbacks from Sensitive Environmental Features, as defined by USFW, that comply with any Regulatory Authority rules in effect at the time the Irrigation System is constructed. A map reflecting the locations and extent of USFW mandated setbacks is attached hereto as Exhibit "J" and incorporated into this Agreement for all purposes.

(b) RC Travis will convey the Irrigation Area to MUD 16 and MUD 16 will dedicate the entire Irrigation Area for irrigation of treated wastewater effluent, regardless of whether the number of LUEs to be served within the Project is reduced below 397 or not.

(c) MUD 16 will design and construct the Wastewater Plant and Irrigation System to ensure that the annual average daily dosing of treated effluent on the irrigation site does not exceed 1/10th of an inch per day.

(d) MUD 16 will use fixed irrigation risers within the Irrigation System that are capable of a reasonably uniform application of treated effluent not to exceed an application rate of one-half inch per day.

(e) MUD 16 will install embedded soil moisture sensors to measure whether the soil is saturated within the Irrigation Area.

(f) MUD 16 will design and operate the Irrigation System to prevent nuisance spray drift on to adjoining property. MUD 16 will incorporate automatic shutdown controls such that spraying of effluent is discontinued for 20 minutes following wind gusts of 25 miles per hour or more as measured by a typical irrigation system weather station located on the WWTP Property. MUD 16 will adjust operating parameters for the automatic shutdown controls (including but not limited to maximum wind speed) as necessary to prevent nuisance spray drift on to adjoining property in response to actual performance.

(g) MUD 16 will use good faith efforts to obtain TCEQ approval of the "Irrigation System Management Plan" (the "Plan") attached as Exhibit "K".

(h) RC Travis, or its successors or assigns, and MUD 16 will maintain all of the Rocky Creek Property and WWTP Property (to the extent owned by the respective party) south of the southern-most residential lots in the Preliminary Plan in a natural and undisturbed state, except to the extent minimally required to construct and maintain the Wastewater System.

(i) MUD 16 will allow access during normal business hours to the Protestant Representative at MUD 16's designated office to review and copy records, reports, etc., related to the irrigation Plan and its implementation.

(j) MUD 16 shall engage professionals with experience in the hydrology and ecological restoration of hill country rangeland to develop and implement a detailed plan for successfully managing and maintaining a native prairie effluent field consistent with the recommendations contained in the "Report for Scope of Work on Rocky Creek (August 2006)" appended to the draft Irrigation System Management Plan incorporated into this Agreement as Exhibit "K." MUD 16 agrees to review the Plan with its qualified expert to evaluate the success of its implementation (i) on an annual basis during the first three years following the commencement of irrigation, (ii) then bi-annually during the next six years, and (iii) at least once during every three years thereafter.

(k) The Parties acknowledge that the Plan attached as Exhibit "K" is the current final draft. The Parties further acknowledge and agree that if the TCEQ rejects the Plan submitted, the Parties shall work together in good faith to develop a Plan that is both acceptable to TCEQ and consistent with the Plan attached as Exhibit "K."

(l) To maximize the beneficial effect of the effluent disposal and minimize the potential for run-off and unintended discharges into waters of the state, MUD 16 agrees to implement the recommendations of the Soils Report attached to the Plan as related to (i) prohibiting the use of coastal bermuda grass [or other non-native vegetation] in the Irrigation Area that could reduce the diversity of native vegetation; and (ii) requiring the use of native grasses, plants and trees which are better adapted to the local soils and climatic conditions to provide better uptake of the effluent and its constituents, in addition to providing a more natural habitat to support native fauna species within the Irrigation Area.

(m) MUD 16 acknowledges that the initial volume of effluent available for irrigation will be insufficient to irrigate the entire Irrigation Area simultaneously. Accordingly, MUD 16 agrees to rotate its application of treated effluent over the entire Irrigation Area (to the extent that the Irrigation Area has been improved with Irrigation System Improvements, it being acknowledged that such improvements will be constructed in phases) to facilitate an even and healthy grow-in of the foundation vegetative cover of native species.

3.03 Water Quality Monitoring. The Parties agree to the following limitations and other various requirements regarding water quality monitoring by MUD 16 within the Project, in order to monitor any impact of effluent from the Wastewater Plant:

(a) MUD 16 will conduct water quality testing of air temperature, water temperature, pH, total suspended solids, total dissolved solids, dissolved oxygen, ammonia, total phosphorus and nitrates, and e-coli bacteria in Rocky Creek to produce baseline stream flow monitoring data before commencing construction of the Project and operation of the Wastewater System at the following locations: (i) upstream of the Project within 100 feet of the point where Rocky Creek enters the Rocky Creek Property, and (ii) immediately downstream of the Project within 100 feet of the point where Rocky Creek leaves the Rocky Creek Property. MUD 16 will provide the test results to the Protestant Representative.

(b) After the average daily flow at the Wastewater Plant reaches 100,000 gallons per day MUD 16 will conduct water quality testing of air temperature, water temperature, pH, total suspended solids, total dissolved solids, dissolved oxygen, ammonia, total phosphorus and nitrates, and e-coli bacteria in Rocky Creek twice per year at the following locations: (i) upstream of the Project within 100 feet of the point where Rocky Creek enters the Rocky Creek Property, and (ii) immediately downstream of the Project within 100 feet of the point where Rocky Creek leaves the Rocky Creek Property. MUD 16 will provide the test results to the Protestant Representative.

3.04 Notice of Amendments or Changes. MUD 16 will notify the Protestant Representative of any proposed amendment or change to the Permit, including any request pursuant to TAC Chapter 210 to beneficially reuse treated wastewater effluent generated within the Project on areas other than the Irrigation Area, and provide Protestant Representative with a copy of any proposed amendment or application for any change contemplated by this section at least ten business days before filing the same with the TCEQ.

3.05 **Notice of Emergency.** MUD 16 will provide a copy of any notice of emergency it issues or publishes to TCEQ in accordance with the provisions of the Permit by delivering the same to the Protestant Representative within twenty-four hours of issuance/publication.

IV. LOT DENSITY

4.01 Except as necessary to operate the Wastewater System in a manner consistent with the terms and conditions set forth in this Agreement, RC Travis will not develop any of the Rocky Creek Property on the southwest side of Rocky Creek.

4.02 RC Travis will not plat more than 397 single family lots on the Project Property.

4.03 RC Travis will seek approval of final plats with lots in locations that are substantially similar to the Preliminary Plan.

V. CONSTRUCTION/DEVELOPMENT AESTHETICS

5.01 Neither MUD 16 nor RC Travis will construct any part of the Wastewater System, road, drainage or other utility improvements for the Project after 7pm on Fridays, or at any time on Saturdays or on Sundays.

5.02 RC Travis will not gate the entrances to the Project from Hamilton Pool Road or Crumley Ranch Road.

5.03 RC Travis will work with Travis County and the Texas Department of Transportation to ensure that (i) the entrance to the subdivision off of Hamilton Pool Road includes a widening of the road and construction of a left turn lane for westbound vehicles entering the Project from Hamilton Pool Road; and (ii) that any additional right-of-way required to facilitate the left turn lane for purposes of access to and the development of the Project reflected on the Plan attached hereto as Exhibit "L" shall come from RC Travis's property on the south side of Hamilton Pool Road and not from the north side of Hamilton Pool Road.

5.04 RC Travis will construct all permanent electrical power, telephone and cable lines serving the single family lots within the Project underground. However, during the phased construction of the Project, RC Travis may use temporary overhead electrical power, telephone and cable lines until the permanent roads and utilities serving the single family lots are complete, at which time all electrical power, telephone and cable lines serving the single family lots will be underground.

5.05 RC Travis will require a rear setback from the foundation of any permanent structure (excluding fencing and community entry monuments) of at least 100 feet from the centerline of the existing Hamilton Pool Road right of way, as shown on the attached Exhibit "M," on all lots that are adjacent to Hamilton Pool Road through a deed restriction on any such affected lots.

5.06 RC Travis will not construct any recreational improvements or hiking/walking trails that extend further south than the southernmost point of the Wastewater Plant site. RC Travis will install and maintain signage as part of the trail system that discourages trail users from approaching the Wastewater Plant site and any locations south of the Wastewater Plant.

5.07 RC Travis will, to the extent approved by Travis County, minimize the width of the pavement along Little Redbud road between Crumley Ranch Road and the Lowenthal Access Easement and design the Little Redbud road improvements to preserve as many existing trees as reasonably possible.

5.08 RC Travis will, to the greatest extent practicable, ensure that construction of the Little Redbud road improvement does not prohibit access from Crumley Ranch Road to the Lowenthal Access Easement at any time.

5.09 RC Travis will install address signage for "9600 Crumley Ranch Road" at the intersection of Little Redbud road and Crumley Ranch Road.

5.10 RC Travis will provide a stub out for a water tap and cable access as part of the Project improvements for Gene Lowenthal on the Rocky Creek Property at or near the intersection of Little Redbud and the Lowenthal Access Easement. Gene Lowenthal will be responsible for all construction costs, connection fees, impact fees, and other charges that would normally be charged to a LCRA water customer or cable customer to connect to the same.

5.11 In order to allow for the periodic verification and inspection of the installation, operation and maintenance of the infrastructure construction BMPs, including erosion controls and siltation minimization, RC Travis and MUD 16 agree to give the Protestant Representative, and any successor or substitute Protestant Representative designated pursuant to Section 13.06, reasonable access to the Property during normal business hours upon at least 1 business day prior notice and request to MUD 16 and/or RC Travis. The Parties agree that any such access shall be granted in accordance with any applicable safety rules of RC Travis and/or MUD 16 and shall be subject to execution by the Protestant Representative of the Access Agreement attached hereto as Exhibit "N." This right of access will specifically exclude any portion of the Project Property which is conveyed to a Lot Owner.

5.12 RC Travis agrees that development of the Project Property shall abide by the condition in the preliminary plan approved by the Travis County Commissioner's providing that the overall impervious cover within the Project Property shall not exceed 15%, provided that individual phases within the Project Property may exceed 15% so long as the overall impervious cover does not exceed 15%.

VI. DEED RESTRICTIONS

6.01 RC Travis will include the language attached as Exhibit "O" in the Deed Restrictions for the Rocky Creek Property.

6.02 The Deed Restrictions shall apply to the entire Project Property.

VII. FENCING

7.01 Prior to construction activity for the Project, to the extent not already performed under the Original Settlement Agreement, RC Travis will (i) replace the approximately 1500 foot stretch of existing fence along the Lowenthal Property boundary between the Lowenthal Access Easement and a point west of Rocky Creek according to the guidelines attached hereto as Exhibit

“P,” subject to a \$3/foot cost limit, and (ii) repair the remainder of the existing fence along the Lowenthal Property boundary sufficient to provide an effective barrier to livestock. Thereafter RC Travis, or its successors and assigns, will be responsible for maintaining the fence along the entire Lowenthal Property boundary. If RC Travis is unable to construct a fence as contemplated in this section for an amount not to exceed \$3/foot and the Lowenthals do not enter into an agreement to pay the increased costs in full, RC Travis shall only be obligated to pay \$4500 to the Lowenthals prior to beginning construction activity for the Project, and the Lowenthals shall be responsible for construction of the 1500 foot stretch of fence described in this section.

7.02 To the extent not already performed under the Original Settlement Agreement, RC Travis will construct and maintain a minimum 12½ gauge, five-strand barbed wire fence with adequately spaced metal pipe posts that is sufficient to contain or turn livestock along the presently unfenced boundary between the Project Property and Shield Ranch Property until such time as permanent fencing is constructed for the Project. This temporary fence will be constructed before commencement of construction activity for the Project.

7.03 Permanent fencing to be constructed and maintained by RC Travis, or its successors and assigns, along lot lines, and in the absence of lot lines, along the property line between the Project Property and Shield Ranch Property will be of sufficient height and quality to insure that dogs cannot pass through the fence and sturdy enough to contain or turn cattle on the Shield Ranch Property side. Where individual lots within the Project border Shield Ranch Property, there will be no gates in the fence that would allow residents access onto Shield Ranch Property.

7.04 Prior to subdivision construction, RC Travis will construct two water gaps within the Lowenthal Property line fence where it crosses Rocky Creek and the tributary east of Rocky Creek, at a total cost not to exceed \$5000. The water gap structures will follow NRCS guidelines, with schematic diagrams provided by the NRCS and furnished to RC Travis by the Lowenthals. If the Lowenthals and RC Travis are unable to agree on a design that can be constructed for less than \$5000 and the Lowenthals do not enter into an agreement to pay the increased costs in full, RC Travis shall only be obligated to pay \$5000 to the Lowenthals prior to subdivision construction, and the Lowenthals shall be responsible for construction of the water gaps.

7.05 RC Travis, or its successors and assigns, shall be responsible for maintaining, repairing and replacing the fencing and related improvements contemplated by this Article VII. This includes clearing water gaps of debris as needed after storm events.

7.06 Section 7.05 does not apply to any fencing removed or destroyed by the Lowenthals, Shield Ranch, or their successors or assigns.

VIII. GROUNDWATER

8.01 RC Travis will cap any existing well located on the Rocky Creek Property in accordance with the TCEQ requirements.

8.02 No groundwater shall be produced from the Project Property, nor shall any rights be granted to produce groundwater located beneath the Project Property from wells drilled off of the Project Property.

IX.
PLAT ISSUES

9.01 The Travis County Commissioners' Court approved for the "Final Plat of Rocky Creek Ranch, Section 1" for 158.930 acres of the Project, including certain plat notes applicable to the first phase of development for the Property, filed March 29, 2010, under Clerk's #201000031, Official Public Records of Travis County, Texas. RC Travis agrees that it will include substantially similar plat notes on the final plats to be recorded for future phases of the Project, subject to approval by the Travis County Commissioners' Court.

X.
LANDSCAPING

10.01 RC Travis will maintain the existing visual buffer between Hamilton Pool Road and the lots adjacent to Hamilton Pool Road, except to the extent necessary to construct fencing and entry monumentation for the Project.

XI.
REMEDIES

11.01 **Remedies.** If any Party fails to comply with its obligations under this Agreement or fails to correct any default after notice and opportunity to cure, the other Party or Parties may exercise any remedy authorized at law or in equity, including termination or filing suit in a court of competent jurisdiction to seek any available remedy, including by way of example only, injunctive relief, specific performance and/or monetary damages. The prevailing Party or Parties to the litigation may recover costs of court, attorney's fees and expert consultant and witness fees incurred in enforcing or defending a claim under this Agreement. The obligations of RC Travis and its successors and assigns and MUD 16 and its successors and assigns are severable, and neither RC Travis and its successors and assigns or MUD 16 and its successor and assigns will be liable for the performance or non-performance of the other.

11.02 **Notice and Opportunity to Cure.** Notwithstanding any provision in this Agreement to the contrary, if any Party (referred to herein as the "Defaulting Party") fails to comply with its obligations under this Agreement or is otherwise in breach or default under this Agreement (collectively, a "Default"), then the other Party or Parties (referred to herein as the "Non-Defaulting Party") shall not have any right to invoke any rights or remedies with respect to any Default until and unless: (i) the Non-Defaulting Party delivers to the Defaulting Party a written notice (the "Default Notice") that specifies all of the particulars of the Default and specifies the actions necessary to cure the Default; and (ii) the Defaulting Party fails to commence the cure of any matters specified in the Default Notice within a reasonable period of time after the Defaulting Party's receipt of the Default Notice, but not less than 30 days, or fails to thereafter pursue curative action with reasonable diligence to completion.

11.03 **Remedies Cumulative, Not Exclusive.** Except as expressly provided otherwise in this Agreement, all remedies authorized and/or contemplated by this Agreement are intended to be cumulative, not exclusive, of any other remedy available to a Party either at law or in equity.

To RC Travis: c/o Hillwood Enterprises, L.P.
5430 LBJ Freeway, Suite 800
Dallas, TX 75240
Attn: Brian Carlock
Facsimile: (972) 201-2889
Ph: (972) 201-2932
E-mail: Brian.Carlock@hillwood.com

To MUD 16: c/o Armbrust & Brown, PLLC
100 Congress Avenue, Suite 1300
Austin, Texas 78701
Facsimile: (512) 435-2360
Ph: (512) 435-2307
E-mail: slittlefield@abaustin.com

Each party shall forward to the other within 24 hours of the filing thereof with the TCEQ or other court or agency of competent jurisdiction a true copy of any petition, application or other instrument affecting this Agreement, whether directly or indirectly.

13.03 Address Change Procedure. The addresses of the Parties shall, until changed as hereinafter provided, be as shown above. The Parties may at any time change their respective addresses by giving written notice of same to the other Parties.

13.04 Provision of Further Documents. The Parties will execute and deliver such other and further requested legal documents or instruments and perform such other and further acts as are reasonably necessary to effectuate the purposes and intent of this Agreement.

13.05 Severability. Except as specifically set forth in this Agreement, the provisions of this Agreement are severable, and if any word, phrase, clause, sentence, paragraph, section, or other part of this Agreement or the application thereof to any person or circumstances is ever held by any court of competent jurisdiction to be invalid or unconstitutional for any reason, the remainder of this Agreement and the application of such word, phrase, clause, sentence, paragraph, section, or other part of this Agreement to other persons or circumstances will not be affected thereby and this Agreement will be construed as if such invalid or unconstitutional portion had never been contained herein.

13.06 Protestant Representative (Successors and/or Substitutes). (a) The Protestants shall be solely responsible for the selection, removal and/or replacement of the Protestant Representative, and any successor or substitute Protestant Representative. In the event that for whatever reason the Protestant Representative resigns, or otherwise becomes unable or unwilling to continue to serve in that fiduciary capacity on a permanent basis, the other Protestants shall designate a successor Protestant Representative willing to act on behalf of and for the benefit of the Protestants in a manner consistent with, and for the purposes set forth in both this Settlement Agreement and the Access Agreement. The Protestants shall provide written notice of the Successor Protestant Representative to the other Parties in the manner presented in this Agreement. In the event that for whatever reason the Protestant Representative becomes unwilling, unable or unavailable to serve in that fiduciary capacity on a temporary basis, either the Protestant Representative, or the Protestants if the Protestant Representative is unable for any

reason, can designate a temporary substitute Protestant Representative provided that all of the following conditions are met:

- (a) the designation of the substitute is made in writing to all of the Parties in a manner consistent with the notice requirements of both this Agreement and the Access Agreement; and
- (b) the designation states the estimated duration of the time during which this substitute will serve; and
- (c) if requested by any Party, the substitute executes a copy of the Access Agreement attached hereto.

(b) Notwithstanding the generality of subsection (a) above related to the selection, removal and/or replacement of the Protestant Representative, and any successor or substitute Protestant Representative, Protestants agree that, to be eligible to serve as Protestant Representative, the person must either be (i) one of the named "Other Protestants" that executed this Agreement, or (ii) be one of the Neighboring Protestants, or the Neighboring Protestants' heirs, successors or assigns with a title interest in the land currently owned by the Neighboring Protestants giving rise to this Agreement.

(c) Anything herein to the contrary notwithstanding, the Protestant Representative must be a single individual, designated by Protestants by notice given in accordance with this Agreement, and neither RC Travis nor MUD 16 will ever be required to notify, provide copies to or provide access to more than one Protestant Representative at any one time under this Agreement. Further MUD 16 and RC Travis will be entitled to rely on, and will have no liability for, the validity of any notice or designation of the Protestant Representative or any substitute or successor Protestant Representative received by it and believed by it to be genuine. In the event of multiple notices and/or designations, RC Travis and/or MUD 16 will be entitled to rely on, and to give notice, copies and access to, only the individual named in the last notice or designation received.

13.07 Entire Agreement. This Agreement, including all Exhibits attached hereto, which are expressly made a part hereof by reference for all purposes, constitutes the entire agreement between the Parties relative to the subject matter of this Agreement and supersedes all prior or contemporaneous agreements, representations, covenants or warranties, whether oral or in writing, respecting the subject matter hereof, including the Original Settlement Agreement.

13.08 Amendment. No amendment of this Agreement is effective unless and until it is duly approved by the governing bodies of each party and reduced to a writing signed by the authorized representatives of all of the Parties.

13.09 No Third Party Beneficiary. Nothing in this Agreement may be construed to confer any right, privilege or benefit on any person or entity not a party hereto or otherwise creates any vested right or third party beneficiary relationship.

13.10 Governing Law. This Agreement will be construed under the laws of the State of Texas and all obligations of the Parties are deemed performable in Travis County, Texas.

13.11 Venue. Venue for any suit arising under this Agreement is in Travis County.

13.12 Assignment. Except as provided in this Section and in Section 15.02, no party may assign its rights and obligations hereunder without the prior written consent of the other. RC Travis or MUD 16 may assign this Agreement to a financially capable successor entity, provided that the assignee assumes in writing for the benefit of Protestants all of RC Travis or MUD 16's rights, duties and obligations under this Agreement and such assignment is simultaneous with the assignee's acquisition of all of RC Travis's or MUD 16's interest in the Project or Wastewater System. Following the platting and sale to third party builders or Lot Owners of at least 90% of the 397 single family lots on the Project, RC Travis will assign any surviving obligations of RC Travis under this Agreement, including any remaining obligations under Sections 3.02(h), 5.05, 5.11, 7.01, 7.03, 7.05 and 10.01, to the Rocky Creek Master Community, Inc., or its successors or assigns (collectively, the "Association"). Nothing in this Agreement precludes the assignment of the rights and benefits of this Agreement to the heirs, successors and assigns of the Neighboring Protestants owning a fee title interest in and to the land owned by the Neighboring Protestants.

13.13 Duplicate Originals. This Agreement may be executed in duplicate originals each of equal dignity.

13.14 Effective Date. This Agreement becomes effective on the date that RC Travis acquires title to the Rocky Creek Property.

13.14 Exhibits. The following Exhibits are incorporated in this Agreement for all purposes:

- A. Description of Rocky Creek Property;
- B. Description of WWTP Property;
- C. Preliminary Plan of Rocky Creek Property;
- D. Map of Irrigation Area;
- E. Description of Lowenthal Property;
- F. Description of Lowenthal Access Easement;
- G. Plats describing Shield Ranch Property;
- H. Aerial Photograph identifying Tree Protection Line, Tree Planting Areas and location of the effluent holding pond;
- I. Map reflecting location of the wastewater treatment plant and footprint
- J. Map of USFW Setbacks;
- K. Irrigation System Management Plan;
- L. Plan reflecting TXDOT/Travis County approved left turn lane from Hamilton Pool Road into the Project;
- M. Map showing location of 100-foot setback from center line of existing Hamilton Pool Road;
- N. Access Agreement;
- O. Language for Inclusion in Deed Restrictions; and
- P. Fencing Guidelines for Lowenthal Property;

XIV. LIMITED RELEASE FROM LIABILITY

14.01 The Parties agree that from and after the date that the Protestants receive written verification from MUD 16 or the Association, respectively, that (a) as to MUD 16, that (i) MUD 16 has taken complete and full title to all property and facilities associated with the wastewater treatment and disposal facilities as authorized by the Permit, (ii) MUD 16 has assumed full

financial responsibility for the operation and maintenance of the Wastewater Plant and Irrigation Facilities and compliance with the terms and conditions of the Permit on a perpetual basis, and (b) as to the Association, that the Association has assumed any remaining obligations of RC Travis under this Agreement on a perpetual basis, the Protestants agree, on a prospective basis only, to look to MUD 16 and/or the Association, as appropriate, and their successors and assigns to perform and to be liable for compliance with the terms of this Agreement, including compliance with the terms and conditions of the Permit and the LCRA Agreement, as applicable.

14.02 Nothing in this Article XIV shall be construed to release, or otherwise waive any claim for liability of RC Travis for any act or omission arising prior to the date MUD 16 assumed full liability and responsibility pursuant to Section 14.01 above.

14.03 This Agreement is not intended to nor will it be binding upon any Lot Owner, nor will it create any encumbrance as to the title to any Lot Owner's property. No Lot Owner will have any obligation under this Agreement.

XV. CONSENT AND ACKNOWLEDGMENT

15.01 The Parties acknowledge and agree that the terms and conditions included in this Agreement are expressly contingent upon the acquisition of the Rocky Creek Property by RC Travis, such that the Effective Date referenced in the preamble to this Agreement shall be that date that RC Travis acquires title to the Rocky Creek Property.

15.02 RC Travis agrees that any subsequent sale or transfer of the Rocky Creek Property from RC Travis, other than sales of platted lots to builders or Lot Owners, shall be subject to the terms and provisions of this Agreement as a condition of any such sale or transfer. Further, RC Travis agrees to use commercially reasonable efforts to require any lender providing financing for the acquisition and/or development of the Rocky Creek Property to subordinate any lien rights against the Rocky Creek Property to this Agreement such that this Agreement shall be binding on such lender and future developers until such time as the obligations hereunder are released pursuant to Section 14 above.

(signatures on following page)

IN WITNESS WHEREOF, the authorized representatives of the Parties have executed this Agreement as of the date(s) set forth below.

RC Travis, L.P., a Texas limited partnership, by RCT Project GP, LLC, general partner **Travis County Municipal Utility District No. 16**


By: Brian Carlock, Senior vice president

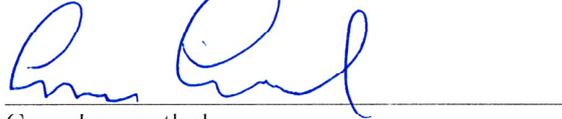
Date: May ~~_____~~, 2010
August 31,

By: _____
Board of Directors
Date: May _____, 2010

Protestants:


Linda Lowenthal

Date: May 20, 2010


Gene Lowenthal

Date: May 20, 2010

Shield Ranch


By: Robert A. Ayres, Managing Partner

Date: May 20, 2010

IN WITNESS WHEREOF, the authorized representatives of the Parties have executed this Agreement as of the date(s) set forth below.

RC Travis, L.P., a Texas limited partnership **Travis County Municipal Utility District No. 16**

By:

Date: May ____, 2010

Protestants:

Linda Lowenthal

Date: May ____, 2010

Gene Lowenthal

Date: May ____, 2010

Brad Philip

By:

Board of Directors

Date: ~~May~~ ____, 2010

September 8

Shield Ranch

By: Robert A. Ayres, Managing Partner

Date: May ____, 2010

Charles Kraft

Print Name: Charles Kraft
Date: June 10, 2010

Doris Kraft

Print Name: Doris Kraft
Date: June 10, 2010

Print Name: _____
Date: _____, 2010

X

Charles Crumley

Print Name: CHARLES CRUMLEY

Date: 6-12-10, 2010

Print Name: _____

Date: _____, 2010


Print Name: Terry Henry
Date: June 5, 2010


Print Name: Connie Henry
Date: June 5, 2010

Print Name: _____
Date: _____, 2010

L. Railsback

Print Name: LISA RAILSBACK
Date: June 8, 2010

Print Name: _____
Date: _____, 2010

X *Kathleen D. Oliver*

Print Name: Kathleen D Oliver
Date: June 6, 2010

Print Name: _____
Date: _____, 2010

Dominic Priour
Print Name: Dominic Priour
Date: 8/29, 2010

Paula Priour
Print Name: Paula Priour
Date: 8/29, 2010

Print Name: _____
Date: _____, 2010