

SOAH DOCKET NO. 900-25-04017

TRANSPORT PERMIT	§	
APPLICATIONS BY UW BRAZOS	§	BEFORE THE STATE OFFICE
VALLEY FARM LLC AS CO-	§	
APPLICANT WITH THE	§	
FOLLOWING: RH2O LLC (BVTP-	§	
002), CLIFFORD A. SKILES III	§	OF
(BVTP-003), JAMES C. BRIEN (BVTP-	§	
004), L. WIESE MOORE LLC (BVTP-	§	
005), FAZZINO INVESTMENTS LP	§	
(BVTP-006), ELY FAMILY	§	ADMINISTRATIVE HEARINGS
PARTNERSHIP LP (BVTP-007), CULA	§	
D’BRAZOS LLC (BVTP-008)	§	

PROTESTANT TEXAS A&M UNIVERSITY SYSTEM’S RESPONSE TO APPLICANTS’ MOTION TO SET PROCEDURAL SCHEDULE AND ASSIGN DISCRETE DOCKET NUMBERS FOR EACH APPLICATION

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

Protestant Texas A&M University System (“Texas A&M System”) files this Response to Applicants’ Motion to Set Procedural Schedule and Assign Discrete Docket Numbers for Each Application, which was filed in the above-referenced matter on December 9, 2024, and respectfully shows as follows:

I. Factual and Procedural Background

Created pursuant to authority granted by the Texas Constitution, the Brazos Valley Groundwater Conservation District (“District”) has been entrusted by the State and the public with the conservation of the State’s water resources located in Robertson and Brazos Counties. The District’s activities are particularly significant because they impact the water resources available to serve Texas A&M University, the nation’s largest university, the State’s only land-, sea-, and air-grant institution, and a hub for cutting-edge research.

Applicant UW Brazos Valley Farm LLC (“Upwell”), a foreign entity that owns land in the District, has itself applied for sixteen production permits and one transport permit—for the transfer of up to 49,999 acre-feet of water per year out of the District. Upwell has also entered into agreements with seven local landowners, who in the aggregate have applied for thirty-two production permits and seven transport permits—for an aggregated transfer of up to an additional 57,718 acre-feet of water per year out of the District. As part of this development project, known as the Goodland Farm Project, Upwell has applied for permits that would allow it to siphon over 107,000 acre-feet of water per year out of the Simsboro Aquifer and transport it away from Brazos and Robertson County residents, and the size and scope of the Goodland Farm Project alone has necessitated the need for the District to expand its own offices.

Pursuant to the Water Code and District Rules, Texas A&M System has the right to request contested case hearings on the Goodland Farm Project permit applications. Texas A&M System has exercised that right, including protesting the seven transport permit applications at issue in this proceeding. A mandamus action is currently pending in the Brazos County District Court due to the District’s delay in referring the interrelated production permit applications to SOAH for contested case hearings, which explains why the transport permit applications reached SOAH before the production permit applications.

Seeking to resolve the matters between them informally, Texas A&M System, Upwell, the District and others participated in settlement discussions earlier this fall. Despite these discussions, Upwell and five of the landowner co-applicants intervened in the pending mandamus action and filed a summary judgment motion seeking to dismiss Texas A&M System’s claim for mandamus relief, halting settlement talks while the Court weighed in on Upwell’s legal arguments. The Court has since denied Upwell’s motion for summary judgment, and Texas A&M System remains

willing to discuss settlement evidenced by its planned participation in mediation with Judge Linda Brite in February 2025. Thus, opportunities for settlement should be revisited before the parties spend time and resources litigating a dispute that could be resolved within 60 days.

II. A Procedural Schedule is Premature Given the Upcoming Mediation.

Upwell's request to implement a procedural schedule in this contested case proceeding is entirely premature. The Texas Legislature and the Texas Supreme Court are consistent in encouraging parties to engage in voluntary settlement procedures in good faith to resolve the issues at the outset of litigation.¹ Formal mediation scheduled for February 10 provides the parties an opportunity to resolve not only issues concerning the pending transport permit applications but also the related production permit applications. At this point, investing time and effort to craft a procedural schedule that would be mooted by a successful mediation is simply unnecessary.

Furthermore, the District's board of directors has directed the parties to conduct a meaningful mediation before they are put to the burden and expense of discovery and other case preparation. The District's Order No. 1 requires "the parties to participate in SOAH mediation . . . prior to the commencement of discovery for the contested case hearing" due to the "good faith belief that the parties may be able to resolve all or a portion of their dispute in mediation". The Applicants' request for an anticipatory procedural schedule thwarts the District's intent behind referring the dispute to pre-hearing mediation and undermines any good-faith negotiations.

An ALJ certainly has the authority to modify SOAH's rules to promote fairness and efficiency under 1 Tex. Admin. Code § 155.153, but a less than two-month delay to revisit settlement discussions does not amount to the "unnecessary delay" referenced in the rule.

¹ Tex. Civ. Prac. & Rem. Code § 154.002 ("It is the policy of this state to encourage the peaceable resolution of disputes . . . and the early settlement of pending litigation through voluntary settlement procedures."); *see also* *Loya v. Loya*, 526 S.W.3d 448, 449 (Tex. 2017) (citing Tex. Civ. Prac. & Rem. Code § 154.002).

Moreover, SOAH's default timelines set forth in the Administrative Code proactively protect against unreasonable delay. Ultimately, the ALJ "may modify and supplement the requirements of this chapter to promote the fair and efficient handling of the case and to facilitate resolution of issues."² Instead of facilitating resolution through good-faith mediation, however, Applicants are asking the ALJ to provide them with additional leverage going into mediation.

Applicants' request to supersede the applicable rules with an expedited schedule smells of an attempt to garner an advantage at mediation, not promote fairness and efficiency. Previous settlement discussions between the parties were unquestionably hindered by Upwell's belief in the strength of its legal challenges to the pending mandamus action. However, the Court dispensed with those arguments by denying Upwell's motion for summary judgment on December 9. That same day, Applicants filed their motion seeking an expedited procedural schedule in this contested case presumably to regain leverage before mediation. Applicants likely assume that a preemptive procedural schedule will quell the mediator's reminders that the administrative process will take time to run its course, a typical tool in any mediator's tool belt to encourage settlement.

In all reality, the likelihood of a successful mediation has only increased considering the legal clarity provided by the Brazos County District Court. With that additional information and the guidance of Judge Brite, the settlement landscape is entirely different than it was a few months ago. The potential for settlement regarding Applicants' contested production permit and transport permit applications should be revisited before time, effort and resources are expended on litigating these hearings.

² 1 Tex. Admin. Code § 155.3(a).

III. A Consolidated Proceeding with a Single Docket Number Promotes Efficiency.

The Goodland Farm Project, although made up of a collective group of landowners and individual permits, is one development project. Upwell itself has consistently referred to this as a single regional supply project.³ To ensure an efficient process for all parties, the District referred the applications to SOAH for a single contested case hearing. The District's Order No. 1 referred "aggregated transport permit applications for a planned project" as a consolidated docket. To be consistent with the District's efforts thus far to facilitate an efficient process, SOAH should maintain a single docket number.

Applicants' reasoning for this request is unclear. They express the desire for efficiency, but creating additional docket numbers will not assist in "maintaining order" while SOAH considers the Applications at a single hearing. The Applications already have distinguishable marks by which they can be identified: both by landowner co-applicant (*i.e.* the Skiles permit) or by permit number (*i.e.* BVTP-003). Instead, separate docket numbers for each application in this single, consolidated docket only creates the opportunity for confusion. Assigning discrete docket numbers would be inefficient and unnecessary.

CONCLUSION & PRAYER

Texas A&M System prays that the ALJ deny the Applicants' Motion to Set Procedural Schedule and Assign Discrete Docket Numbers for Each Application, allow the parties to move forward with scheduled mediation before entering a procedural schedule, and maintain a single docket number for the consolidated case in the same manner as it was referred by the District.

³ See <https://www.goodland-farms.com/faq> ("UWBVF has also invested in the development of a regional supply project, alongside seven of its neighboring landowners").

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on December 16, 2024, a true and correct copy of the foregoing was served in accordance with Rules 21 and 21a of the Texas Rules of Civil Procedure on the parties or their counsel of record listed below:

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