

**NO. 2017-68069**

**KYLE BAUER, MONICA BAUER, CHRIS  
GAMBLE, THEODORE MARULES,  
STEVIE MARULES, STEVE MURAWSKI,  
JANET MURAWSKI, ROBERT  
TANNEHILL, ALBERT VASQUEZ, AND  
JUANITA VASQUEZ**  
*Plaintiffs,*

vs.

**HANSON AGGREGATES, LLC, LIBERTY  
MATERIALS, INC, MEGASAND  
ENTERPRISES, INC., TRIPLE P.G. SAND  
DEVELOPMENT, LLC, RC MATERIALS  
LLC, RGI MATERIALS, INC., SAN  
JACINTO RIVER MATERIALS, INC.,  
STACY KROPIK TRUCKING, INC.,  
TRAYLOR BROS., INC., ZACHRY-  
ODEBRECHT PARKWAY BUILDERS,  
WILLIAMS BROTHERS CONSTRUCTION  
CO., INC., EAGLE SORTERS, LLC, TEXAS  
STERLING CONSTRUCTION CO., TEXAS  
CONCRETE SAND AND GRAVEL INC.,  
SOUTHERN CRUSHED CONCRETE, LLC,  
PIONEER CONCRETE OF TEXAS, INC.,  
SAN JACINTO RIVER AUTHORITY, and  
TEXAS WATER DEVELOPMENT BOARD**  
*Defendants.*

**IN THE DISTRICT COURT OF**

**HARRIS COUNTY, TEXAS**

**151<sup>st</sup> JUDICIAL DISTRICT**

**PLAINTIFFS' SECOND AMENDED PETITION**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Kyle Bauer, Monica Bauer, Chris Gamble, Theodore Marules, Stevie Marules, Robert Tannehill, Albert Vasquez, Juanita Vasquez, Nancy Harrison and FYFFES LLC, Leslie Amato, Jude Auzenne, Scott Booth, Lance Borland, Ellen Brinks, Gary Caskey, Peter Clarke, Thina Clausen, Timothy Davis, Forrest Craig, Kenneth Doan, Gwendolyn Doan,

Ronald Doyal, Nelda Doyal, Michael David Eckls, Chris Heinrich, Brett Fant, Heather Fant, Marilyn Dulany, Keith Jalbert, Jabriska McCarley, Tyler Lee Johnson, Scott Nugent, Joan Nugent, Oksana Marroquin, Fernando Hualde, Kathleen McClain, Jesse McIntosh, Daniel Pavao, Cheryl Soper, Jay Soper, Andrea Rist, Patricia Quigley, Lisa Harbin, Hermann Haas, Richard Zeller, Kevin Wood, Leslee Beth Wood, Larry Zaludek, Stephen Steinke, Elaine Gray, William Gautier, Jr., Terry Farmer, Patricia Burnham, Robert Boudreaux, Milagros Boudreaux, Celeste Alba, Jose Alba, James Burney, Candice Maxey, Jeff Adams, Michael Ahearne, Jessica Ahearne, Donald Burton, Lisa Burton, Raul Hernandez, Michael J. Hyland, Joseph J. Folz, Jr., Mark Madigan, Thomas Kelchner, Laura Kelchner, Roy Saunders, Connie Saunders, Marshal Schaffer, Erica Schaffer, Brad Rully, Stephanie Rully, Rocky Zipprion, Sharon Zipprion, Andrew Wodzisz, Robin Wodzisz, Corey Taylor, Ashley Taylor, Tom Madigan, Heather Madigan, James Davis, Mona Davis, Jerry Cravy, Pam Cravy, Texas Adaptive Aquatics, Inc. Lakita Andrews, James Blankenship, Carol Blankenship, John Martinez, Lynette Martinez, Billy Loper, Brenda Loper, Lauren Wolf, Mike Scoggins, Diane Scoggins, Jason Cutbirth, Tara Cutbirth, Philip Cronknight, Belinda Cronknight, John Kowis, Carol Kowis, Rick Lee, Caroline Kollar Lee, Derrick Martin, Tuesday Martin, Tony Wang, Michael Woolley, Lois Woolley, James Black, Aida Black, Timothy McDermott, Victor Morris, Leon Myers, Virginia Myers, Nick Talevich, Lacie Talevich, Steven Rodger, Lisa Rodger, Christopher Troy, Gregory Toole, David Northup, Jean Northup, John Palkovics, Carol Anderson, Ellery Andrew, Raelynn Andrew, Rose Ascheri, Atascocita Community Improvement Association, Walden on Lake Houston Community Services Association, Inc., Sidney Astolfo, Jr., Gloria Bain, Oran Bain, Zain Baquer, Hilary Baquer, Mary Baty, Jeffrey Bayless, Amy Bayless, Walter Benlian, JoAnn Benlian, Frank Campisi, Diana Campisi, Janet Carranza, Harold Cisco, Mariann Cisco, James Colburn,

Stephanie Colburn, Sandra Cox, Patrick Crane, Darlene Crane, Luis Cuevas, Liliana Cuevas, Terrell Davis, Debra Davis, Dennis Davis, Christy Davis, John Dees, Renee Dees, Jason Dement, Jaclyn Dement, Tom Denman, Lorri Denman, William Domescik, Sherran Domescik, Kevin Donnellan, Elda Donnellan, Philip Edge, Yukie Edge, McClellan Enterprises, Inc., Brandon Erwin, Kristina Erwin, Pat Esingruin, Salvador Figueroa, Maria Figueroa, Gene Foster, Denise Foster, Leslie Gardener, Hilda Garza, Darlene Georgiades, Louis Georgiades, Robert Gordon, Peggy Gordon, Bernard Gordon, Judy Gordon, William Hackett, Donna Hackett, Ron Hagest, Jane Hagest, Oto North Hahn III, Richard Hall, Cynthia Hall, Edward J. Hoerner, Robert Holland, Charles Hostetter, Deborah Hostetter, Rick Howard, Carolyn Howard, Barbara Rachelle Huber, Gary Irwin, Jamie Irwin, Albert Jamail, Jr., Mac L. Jones, Sharon K. Jones, David Keys, Sharon Keys, Gary Kilgore, Corey Kilgore, Phil McClellan, Glenda McClellan, Charles C. McClurkins, William McComas II, John C. McDavid, III, Ty McFarland, Bruce Meyer, Ann Meyer, Kevin Mills, Rebecca J. Molnar, Leonard Moore, Denise Moore, Stephen Nunes, Sandy Nunes, Monica Perales, Laurie Polomsky, Jim Polomsky, Steve Pullen, Alice Pullen, Nicholas Radloff, Elisanglea Radloff, Roger Randall, Joseph P. Rao, Brock Ratliff, Shelli Ratliff, Dr. Joe Rodriguez, Elvia Rodriguez, Evelyn G. Ronchetti, Ronald K. Rounsaville, Robert Schwarz, Christi Schwarz, Christopher Seckel, John Simonetti, Jeanne Simonetti, Robert Spinetti, Susan St. Germain, Ross Stephenson, Sherrill Stephenson, Peter Tinelli, Darla Tinelli, Darrol Vincent, Jr., Stephanie Vincent, George Von Kanel, Laura Von Kanel, Ken Walter, Connie Walters, David Wassell, Sean Williams, Charles Wueste, Crystal Wueste, Thelma Brass, and Joseph Brass, III hereinafter referred to as Plaintiffs, and file this First Amended Petition complaining of Hanson Aggregates, LLC, Liberty Materials, Inc, Megasand Enterprises, Inc., Triple P.G. Sand Development, LLC, RC Materials LLC, RGI Materials, Inc., San Jacinto River

Materials, Inc., Stacy Kropik Trucking, Inc., Traylor Bros., Inc., Zachry Construction Corporation, Odebrecht Construction, Inc., Williams Brothers Construction Co., Inc., Eagle Sorters, LLC, Texas Sterling Construction Co., Texas Concrete Sand and Gravel Inc., Southern Crushed Concrete, LLC, Pioneer Concrete of Texas, Inc., San Jacinto River Authority, and Texas Water Development Board, hereinafter referred to as Defendants and for cause of action would respectfully show the following:

**LEVEL DESIGNATION**

1. Plaintiffs intend to conduct discovery in accordance with Rule 190.4 of the Texas Rules of Civil Procedure, also known as "Level 3" Discovery Control Plan, and as such, requests a discovery control plan be entered herein. Plaintiffs affirmatively plead that this suit is not governed by the expedited-actions process in Rule 169 of the Texas Rules of Civil Procedure.
2. Plaintiffs would show that the Rules of Civil Procedure require Plaintiffs to set forth such demand or claim but that Plaintiffs represent that the Jury and/or Trier of Fact are charged with such final determination and Plaintiffs do not seek to represent or assert that the Rules of Civil Procedure Plaintiffs is required to honor in any way take away or impugn the obligations, duties and/or considerations of the Jury or Trier of Fact.

**VENUE AND JURISDICTION**

3. The present Court has personal jurisdiction over the parties as they are citizens of Texas or otherwise have minimum contacts with the State of Texas. The Court has subject matter jurisdiction as the amount in controversy is within the limits of the Court, and no other court has exclusive jurisdiction.
4. Venue is proper in the present forum for several reasons, including: (1) at least one or

more of the Defendants are based and maintain a principal office in Harris County, Texas, making venue proper pursuant to Tex. Civ. Prac. & Rem. Code §15.002(3); and (2) venue is proper in Harris County because this an action seeks " recovery of damages to real property" and the damaged property is located in Harris County, Texas, making venue proper pursuant to the mandatory venue provision of Tex. Civ. P. & Rem. Code § 15.011.

### **PARTIES**

5. Plaintiffs are residents of Harris County, Texas and/or own real property in Harris County, Texas.

6. Defendant Hanson Aggregates, LLC. is a limited liability company doing business in the state of Texas. This Defendant has filed an answer in this matter.

7. Defendant Liberty Materials, Inc., is a corporation doing business in the State of Texas. This Defendant has filed an answer in this matter.

8. Defendant Megasand Enterprises, Inc. is a corporation doing business in the state of Texas. This Defendant has filed an answer in this matter.

9. Defendant Triple P.G. Sand Development, LLC is a limited liability company doing business in the state of Texas. This Defendant has filed an answer in this matter.

10. Defendant RC Materials LLC is a limited liability company doing business in the state of Texas. This Defendant has filed an answer in this matter.

11. Defendant RGI Materials, Inc. is a corporation doing business in the state of Texas. This Defendant has filed an answer in this matter.

12. Defendant San Jacinto River Materials, Inc. is a corporation doing business in the state of Texas. This Defendant has filed an answer in this matter.

13. Defendant Stacy Kropik Trucking, Inc. is a limited liability company doing business in

the state of Texas. Stacy Kropic Trucking, Inc. has been duly served, but has not yet made an appearance in this matter.

14. Defendant Traylor Bros., Inc. is a foreign corporation doing business in the State of Texas. Traylor Bros., Inc. owns property in the State of Texas. This Defendant has filed an answer in this matter.

15. Defendant Zachry-Odebrecht Parkway Builders is a joint venture between Zachry Construction Corporation and Odebrecht Construction, Inc. These Defendants have filed an answer in this matter.

16. Defendant Williams Brothers Construction Co., Inc., individually and d/b/a Market Street Precast Yard, is a Texas corporation doing business in the State of Texas. This Defendant has filed an answer in this matter.

17. Defendant Eagle Sorters, LLC is a Texas limited liability company doing business in the State of Texas. Eagle Sorters, LLC has been duly served, but has not yet made an appearance in this matter.

18. Defendant Texas Sterling Construction Co., is a corporation doing business in the State of Texas. This Defendant has filed an answer in this matter.

19. Defendant Texas Concrete Sand and Gravel Inc., is a Texas corporation doing business in the State of Texas. This Defendant has filed an answer in this matter. Defendant Southern Crushed Concrete, LLC is a Texas limited liability company doing business in the State of Texas. This Defendant has filed an answer in this matter.

20. Defendant Pioneer Concrete of Texas, Inc., was a Texas corporation doing business in the State of Texas and has, through a series of mergers, merged into Hanson Aggregates, Inc. Pioneer Concrete of Texas, Inc. is now the prior name of Hanson Aggregates, Inc. The

registered agent for service of process for Hanson Aggregates, Inc., and thus Pioneer Concrete of Texas, Inc., is:

**Pioneer Concrete of Texas, Inc./Hanson Aggregates, Inc.  
c/o CT Corporation System  
350 N. St. Paul Street  
Dallas, Texas 75201**

21. Defendant San Jacinto River Authority (hereinafter referred to as “SJRA”) is a governmental agency created by the Texas Legislature to develop, conserve, and protect the water resources of the San Jacinto River basin. This Defendant has filed a responsive pleading in this matter.

22. The “Governmental Defendants” include SJRA. Both Governmental Defendants are governmental entities created by the Texas Legislature to develop, conserve, and protect the water resources of the San Jacinto River basin.

23. The remaining defendants, (hereinafter “Corporate Defendants”) are either in the construction business or in the business of producing, marketing, selling, distributing, and/transporting concrete, construction materials, sand, limestone, fill, and/or top soil products and/or managing companies that provide such services and products across the state of Texas, specifically near and/or along the San Jacinto River.

24. The “Governmental Defendant” means SJRA. SJRA is a governmental entity created by the Texas Legislature to develop, conserve, and protect the water resources of the San Jacinto River basin.

25. The remaining defendants, (hereinafter “Corporate Defendants”) are either in the construction business or in the business of producing, marketing, selling, distributing, and/transporting concrete, construction materials, sand, limestone, fill, and/or top soil products and/or managing companies that provide such services and products across the state of Texas,

specifically near and/or along the San Jacinto River.

### **BACKGROUND/FACTUAL ALLEGATIONS**

26. For those on the Gulf Coast, the time period of June 1 until November 30 is fraught with worry, regular “Tropical Storm” Updates, and stocking up on bottled water, canned foods, and batteries. The summer of 2017 was no different. But what transpired along the Texas Gulf Coast and specifically, in southern Montgomery County and Harris County, was unlike anything ever seen.

#### ***Hurricane Harvey Develops and Sets its Sights on Texas***

27. In mid-August, 2017, all eyes turned to a series of tropical disturbances making their way across the Atlantic basin—one in particular, what would become known as Hurricane Harvey, developed, then dissipated over several days from August 17-19—a pattern it would unfortunately show again, after it made landfall in Southern Texas, days later. When it first developed, Harvey did very little to raise the fears and worries it would later wreak on the Texas Gulf Coast. But that soon changed.

28. By Wednesday, August 23, 2017, the storm had further developed into a Category 2 hurricane, just 220 miles from Port O’Connor. The very next day, the storm was upgraded to a Category 3 “major hurricane.” Meteorologists warned of torrential rains and flooding of 30-40 inches in the greater Houston area alone, as Harvey moved inland then outward, with anticipated travel up the Texas coast toward Houston. That forecast anticipated widespread flooding throughout the Texas Gulf Coast.

29. The storm made landfall on Friday, August 25, 2017 with little fanfare for those in Harris County—the storm came ashore between Port Aransas and Port O’Connor. Sitting on the “dirty”

side of the storm, Harris County residents sat in their homes, watching the devastation in the Corpus Christi and Rockport areas as we all questioned the forecasters who had predicted three and four feet of water inundating our areas. Those questions were soon cast away as Harvey, who had already moved inland, and ultimately stationed itself over Harris County—dumped catastrophic rain throughout the county—just as the forecasters had predicted.

*Texas's Lake and River Basins Have a Multi-Purpose Use*

30. As the Texas Water Board acknowledges, Texas's reservoirs, including both Lake Conroe and Lake Houston, are important for providing water supplies. Reservoirs are able to capture and store flood-waters for use during times of drought when the rivers are low or dry. Importantly, many of the state's major reservoirs were constructed principally for flood control, with water supply as a secondary benefit. See <http://www.twdb.texas.gov/surfacewater/rivers/reservoirs/index.asp>.

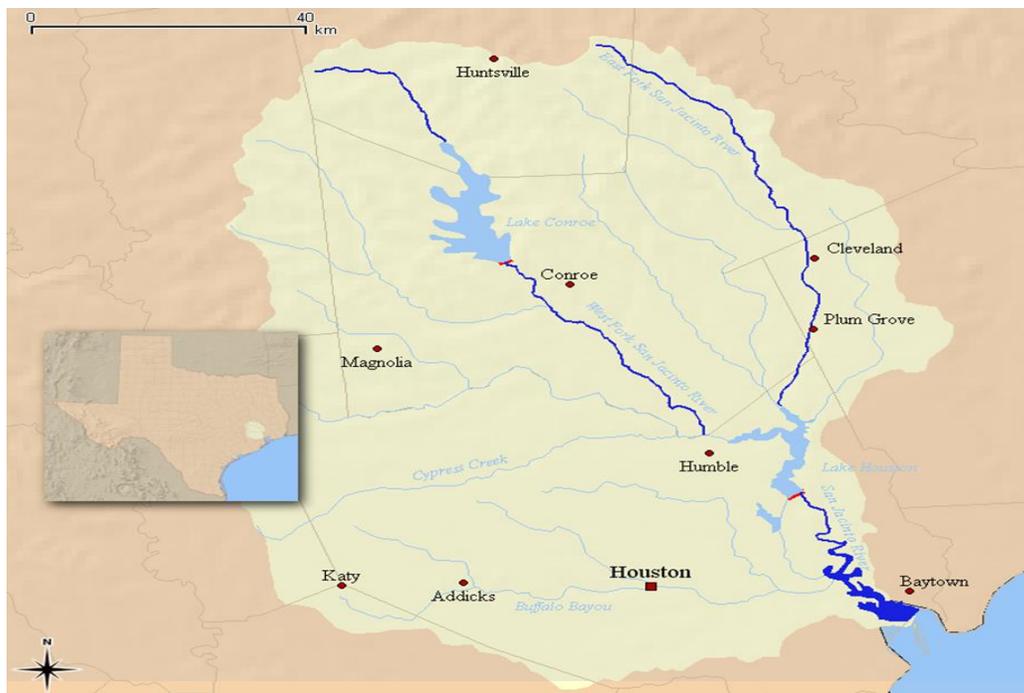
31. Lake Conroe is a 21,000-acre (85 km<sup>2</sup>) lake in Montgomery County, Texas. The lake lies on the West Fork of the San Jacinto River, just west of Interstate 45 off State Highway 105 in Montgomery and Walker counties. The City of Houston owns a two-thirds interest in the lake; the SJRA owns one-third. The lake and dam facility are maintained by SJRA. Certificate of Adjudication 10-4964 was granted to the City of Houston, the SJRA, and the Texas Water Board to maintain and use the lake. Lake Conroe was built as an alternate water supply for the city of Houston. <http://www.twdb.texas.gov/surfacewater/rivers/reservoirs/conroe/index.asp>.

32. According to the Texas Water Board, the San Jacinto River Basin is one of the smallest river basins in Texas. From headwaters in Walker County, the San Jacinto River flows southeast through both Lake Conroe and Lake Houston, into Galveston Bay, which drains to the Gulf of Mexico. An important issue in the basin is meeting the water supply needs of the Houston metropolitan area. The Texas Water Board has indicated that available groundwater supplies are

decreasing as demands from the metropolitan area are increasing and groundwater pumping in the basin has caused land subsidence and seawater intrusion into aquifers.

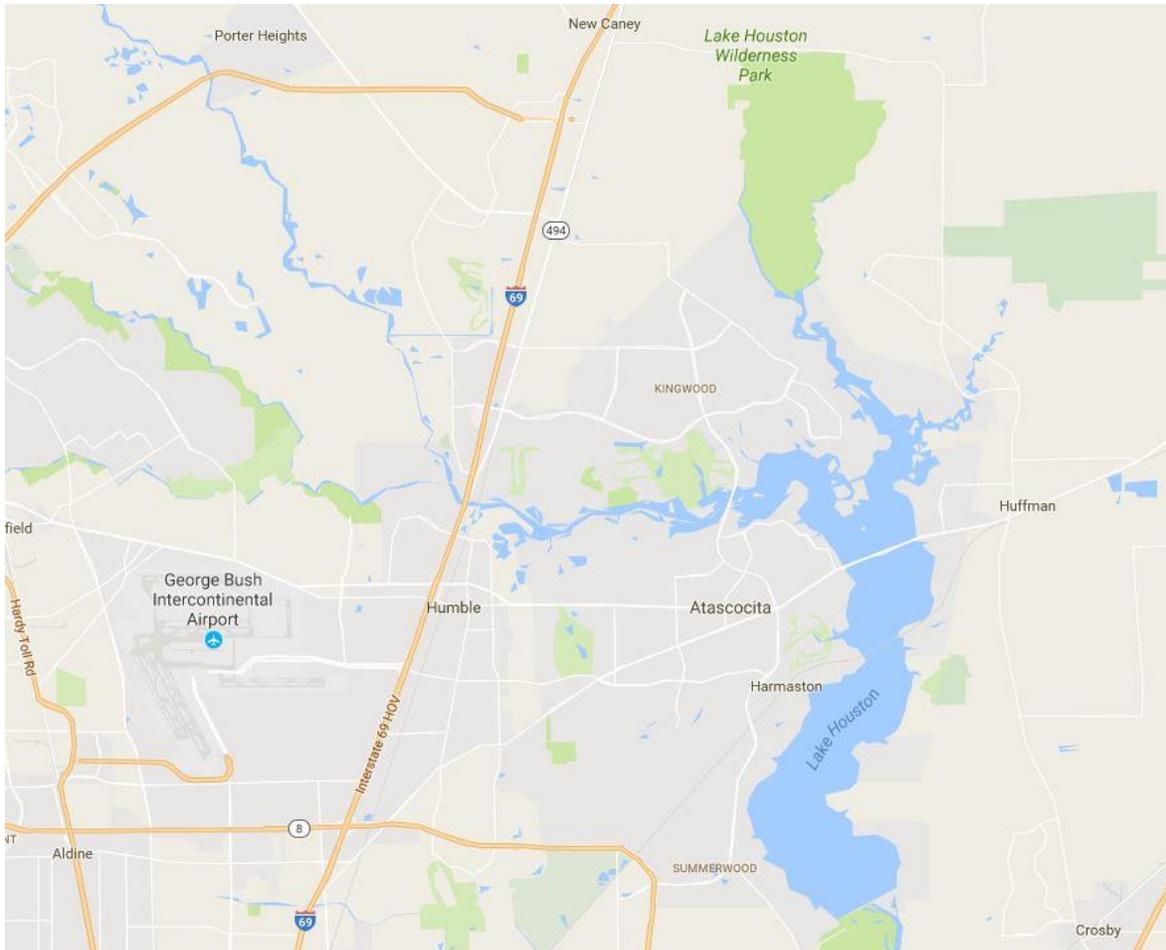
[http://www.twdb.texas.gov/surfacewater/rivers/river\\_basins/sanjacinto/index.asp](http://www.twdb.texas.gov/surfacewater/rivers/river_basins/sanjacinto/index.asp)

33. As can be seen in the picture below, north of Lake Conroe, the West Fork of the San Jacinto River flows into the lake, with the Lake Conroe dam regulating flow southward, as the West Fork of the San Jacinto flows south through Montgomery County and ultimately combines with the East Fork of the San Jacinto River in northeast Harris County to form Lake Houston.



34. Thus, Lake Houston, as a reservoir on the San Jacinto River, receives flow from both the East and West forks of the River.

35. Lake Houston is situated between the communities of Kingwood, Atascocita and Humble on the west bank, Sheldon on the south, and Crosby and Huffman on the east.



36. Lake Houston was created in 1953 when the City of Houston built the dam to impound a reservoir to replace Sheldon Lake, which had been the primary source of water for the city.

***The Governmental Defendants Knew Well in Advance of the  
Need to Prepare for the Storm to Come***

37. Despite knowing, a week before it made landfall,<sup>1</sup> that Harvey could dump substantial rains on both Harris and Montgomery counties, the Governmental Defendants failed to take necessary precautions to prepare for the storm. Indeed, on Saturday, August 26, 2017, as Harvey parked itself over the greater Houston area (spanning three separate counties), Lake Conroe was

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<sup>1</sup> Nor did the Governmental Defendants take any evasive action to lower the water levels in Lake Conroe in the weeks before Harvey's arrival—despite the fact that the summer of 2017 has seen fifteen named storms as of the date of filing this suit.

sitting at 200.91 feet.<sup>2</sup> The Governmental Defendants had not pre-released water from the Conroe Dam in anticipation of this rain event.

38. One day later, on Sunday, August 27, 2017, as Harvey's rains pounded Harris County, with rain totals at that time of 6-15 inches in a twenty-four hour period, the Governmental Defendants began releasing water from Lake Conroe—starting at a rate of 27,925 cubic feet per second at 9:45 PM, then increasing that rate to 39,500 cubic feet per second during the minutes just before midnight.<sup>3</sup> *Prior to August 27, 2017, the SJRA had had never released more than 33,000 cubic feet per second from Lake Conroe.*

39. Ninety minutes after that, around 1:30 AM on Monday, August 28, 2017, the Governmental Defendants more than doubled that release—increasing the volume to **73,201 cubic feet per second**. At that same time downstream, the street flooding in the Kingwood area had receded from the day's rains, and Kingwood Drive was passable.

40. At the same time the Governmental Defendants doubled the flow from Lake Conroe downstream (1:30 AM on Monday, August 28, 2017), the West Fork of the San Jacinto River measured sixty feet. By mid-afternoon on Monday, August 28, 2017, the West Fork of the San Jacinto measured 62.79 feet—well over a foot above the Memorial Day floods that had inundated the area in May 2015.

41. At 6:00 PM on Monday, August 28, 2017, (almost 24 hours after The San Jacinto River Authority began its massive releases from the Conroe Dam) homes began to flood in the Kingwood area, and Kingwood High School was being used as a transport center for evacuees.

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<sup>2</sup> Conroe Dam is an earthfill embankment, 11,300 feet in length including the levees. The crest elevation of the dam is 212.0 feet above mean sea level and has a height of 82 feet above the old riverbed. A controlled emergence spillway is located near the center of the embankment. Maximum design water surface may reach to 207 feet above mean sea level. <http://www.twdb.texas.gov/surfacewater/rivers/reservoirs/conroe/index.asp>

<sup>3</sup> Yet when the Lake crested—before the massive release of water—it only stood at 4.25 inches above normal pool elevation.

By 9:00 PM on Monday, August 28, 2017, the Southbound side of the Eastex freeway, which transverses the San Jacinto River, would be closing. An hour later, SJRA announced that Lake Conroe had crested at 205.5 feet above sea level (still within its maximum design water surface) and was declining. See

<http://www.twdb.texas.gov/surfacewater/rivers/reservoirs/conroe/index.asp>. **Yet, the**

**Governmental Defendants continued pumping water from Lake Conroe, into the San Jacinto River at a rate of 2.1 billion gallons of water an hour.**

42. At 1:00 AM on Tuesday, August 29, 2017, Kingwood High School began taking on water. By 7:30 AM on Tuesday, August 29, 2017, the West Fork of the San Jacinto River measured its highest level in recorded history—67.69 feet, rising over 5 feet in less than 17 hours. Areas south of Lake Conroe, including those along the San Jacinto River, those in Kingwood, Humble, Atascocita, Huffman, and Crosby, were drowning in the billions of gallons of water the Governmental Defendants had released. The damage had been done.





43. At 4 PM on Tuesday, August 29, 2017, the Governmental Defendants finally slowed the release from Lake Conroe—reducing the flow from 79,100 cubic feet per second to 22,172 cubic feet per second—shy of the previous record release of 33,300 cubic feet per second.

***The Governmental Defendants Knew or Should Have Known that Lake Houston Could Not Take on the Billions of Gallons of Water it Released.***

44. While Hurricane Harvey may have been a storm like no other, the Governmental Defendants were well aware that Lake Houston could not handle the billions of gallons of waters dumped into it.

45. In 2011, the Texas Water Board commissioned a volumetric and sedimentation survey of Lake Houston. The 2011 study, published in 2013, revealed astonishing results. First, while Lake Houston was originally designed to encompass 158,553 acres-feet when first built in 1954, it has sustained a steady decline in capacity. Eleven years after its development, Lake Houston's capacity had shrunk to 146,769 acre-feet. Forty years after its initial development, Lake Houston had lost 22,172 acre-feet of capacity. At the time the study was conducted, Lake Houston's capacity had shrunk to an estimated 136,381 acre-feet.

46. Thus, since its initial development, the Lake Houston Reservoir has steadily lost its reserve capacity at a rapid rate. The following chart illustrates the decrease in capacity:

<b>Year</b>	<b>Reservoir Capacity (Acre-Feet)</b>
1954	158,553
1965	146,769
1994	136,381
2011	124,661

47. That study further showed that since 1954, there has been a 21.4% decrease in the reservoir capacity. The Texas Water Board study explains that this loss in capacity is caused by the increased sedimentation being placed in Lake Houston. **The survey notes that Lake Houston loses an estimated 344 to 689 acre-feet of capacity each year due to sediment**

**accumulation.** The Governmental Defendants are aware of this sedimentation increase as well as the associated decreasing capacity of Lake Houston.

48. Moreover, the Governmental Defendants knew, or should have known, of the Corporate Defendants' repeated violations of the Texas Water Code and the associated dumping of wastewater, sediment, silt, and associated chemicals in the San Jacinto River basin. Each of the Corporate Defendants has been cited for wrongful discharges into the San Jacinto River basin—which flows right into Lake Houston. This illegal and wrongful dumping of wastewater, sediment, silt, concrete, and other materials into the San Jacinto River Basin and thus Lake Houston caused the marked decline in the overall capacity of Lake Houston.

49. Moreover, the Governmental Defendants, who acted to intentionally release billions of gallons of water from Lake Conroe in an effort to protect the Lake Conroe Dam, released those waters based upon the 1954 Lake Houston capacity, when in reality, the capacity of Lake Houston was dramatically less—and the Governmental Defendants knew that.

***The Corporate Defendants Have Exhibited a History of Wrongfully Dumping and Releasing Materials into the San Jacinto River Basin, Dramatically Reducing the Capacity and Depth of the Texas Waterways***

50. Corporate Defendants include Hanson Aggregates, LLC, Liberty Materials, Inc, Megasand Enterprises, Inc., Triple P.G. Sand Development, LLC, RC Materials LLC, RGI Materials, Inc., San Jacinto River Materials, Inc., Stacy Kropik Trucking, Inc., Traylor Bros., Inc., Zachry Construction Corporation, Odebrecht Construction, Inc., Williams Brothers Construction Co., Inc., Eagle Sorters, LLC, Texas Sterling Construction Co., Texas Concrete Sand and Gravel Inc., Southern Crushed Concrete, LLC, Pioneer Concrete of Texas, Inc.

51. These Corporate Defendants have been cited by the Texas Commission on Environmental Quality (“TCEQ”) from 1999 to the present for numerous issues, including excessive discharge which contained runoff dust, sand, construction materials and other products produced at the

business locations. The Corporate Defendants have been cited by TCEQ for a widespread of violations, including, but not limited to:

- Unauthorized discharge of silt runoff, in violation of Texas Water Code §26.039;
- Failure to obtain a permit to discharge storm water associated with industrial activities, in violation of Texas Administrative Code § 281.25;
- Failure to prevent an unauthorized discharge, in violation of Texas Water Code §26.121(a)(12);
- Failure to minimize generation of dust and off-site tracking, in violation of Texas Administrative Code §281.25(a)(4); and
- Unauthorized discharge of silt runoff, in violation of Texas Water Code § 26.039.

52. On many occasions, water from sand pits was being discharge into or near parts of Lake Houston or the San Jacinto River. On others, mud and industrial waste is being pumped directly into the San Jacinto River. Some defendants were cited because they were operating above their allowed permit limits. While on the other hand, other defendants were operating without any permits issued by the TCEQ.

53. Altogether, with excess waste water, silt, sand and waste being discharged into the bodies of water surrounding Plaintiffs' properties, and the lack of oversight by the Governmental Defendants, the San Jacinto River and Lake Houston continued to lose capacity.

***Plaintiffs Were Harmed By The Corporate Defendants' Actions In Decreasing The Overall Capacity Of The San Jacinto River Basin And Lake Houston And The Governmental Defendants Actions In Releasing Billions Of Gallons Of Water From Lake Conroe***

54. Before Hurricane Harvey made landfall on or about August 25, 2017, the Governmental Defendants knew and/or should have known of the impending rain event and the ramifications and effects the storm would create on or near the San Jacinto River and Lake Houston.

55. Importantly, throughout the 2017 Hurricane season the Governmental Defendants operated Lake Conroe at about 201 feet above mean sea level—an extremely high level, particularly during hurricane season. The high lake level in Lake Conroe proximately caused other tributaries and lakes to overflow causing the need for a release of the reservoirs. Had the Governmental Defendants maintained the lake level at the recommended 193 feet above main sea level, this would have allowed for more capacity in the lakes and would have allowed about 49 more hours of rainfall capacity. Moreover, had the Corporate Defendants not unlawfully and negligently discharged silt, sediment, and other industrial waste into the San Jacinto River Basin, the overall capacity of Lake Houston would not have been so dramatically reduced.

56. As a proximate result of the actions and/or omissions of the Corporate and Governmental Defendants, acting by or through their agents or employees, jointly, severally, singularly and together in any combination, Plaintiffs suffered injuries and damages about which they complain.

#### COUNT 1

#### **PHYSICAL AND REGULATORY INVERSE CONDEMNATION WITHOUT JUST COMPENSATION IN VIOLATION OF THE TEXAS CONSTITUTION**

57. Plaintiffs incorporate by reference the allegations set forth in the preceding paragraphs as if the same were fully set forth herein.

58. From at least 1994 to the present, the Governmental Defendants<sup>4</sup> have used the Lake Conroe Dam, their regulatory easement, and their regulatory plans to intentionally and repeatedly flood Kingwood, Atascocita, Humble, and the surrounding areas. These floods have occurred

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<sup>4</sup> The “Takings clauses” of the Texas and United States Constitutions are well-known exceptions to the doctrine of governmental immunity. See *Kirby Lake Dev. v. Clear Lake City Water*, 321 S.W.3d 1, 5 (Tex. App.—Houston [14th Dist.] 2008) *aff’d sub nom.* 321 S.W.3d 829 (Tex. 2010)(“There is a clear and unambiguous waiver of immunity from suit for inverse-condemnation claims within the ambit of article I, section 17 of the Texas Constitution ... Therefore, governmental immunity does not shield the Authority from a claim for compensation under the Takings Clause.”); *El Dorado Land Co., L.P. v. City of McKinney*, 395 S.W.3d 798, 801 (Tex. 2013)(same).

repeatedly, including, but not limited to: (1) October 1994; (2) May 2000; (3) June 2001; (3) May 2004; (4) May 2015; (6) April 2016; and (7) during Hurricane Harvey. These intentional, catastrophic floods have intended to serve the public use of maintaining the protecting the Lake Conroe Reservoir and preserving and maintaining the water rights to Lake Conroe, and the Lake Conroe Dam. These intentional floods were also orchestrated to serve the public use and safety of other areas, preventing those municipal areas owned and controlled by the Governmental Defendants from flooding.

59. These catastrophic, intentional floods have permanently and irreparably damaged Plaintiffs. Plaintiffs' homes have been submerged, inundated by sewage and other chemicals dumped in the waters of Lake Conroe and the San Jacinto River basin. Plaintiffs have been constructively evicted from their homes—many unable to return—others, having nothing to return to.

60. Plaintiffs' lives have been thrown into a tailspin, causing severe physical and emotional damage. The Governmental Defendants have directly and proximately caused Plaintiffs' substantial personal and property damages.

61. Plaintiffs would show that the Governmental Defendants have, by virtue of the above-described intentional conduct, and in the exercise of their lawful authority, intentionally damaged and/or destroyed Plaintiffs' homes in violation of the Texas Constitution, Article I, Section 17. Article I, Section 17 of the Texas Constitution provides “no person’s property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by consent of such person.”

62. The Governmental Defendants intentionally performed certain acts and/or intentionally failed to perform necessary acts in the exercise of their eminent-domain authority. These acts

and omissions include, but are not limited to: (1) operating the Lake Conroe Reservoir and Dam in a manner that guaranteed the flooding of Plaintiffs' properties; and (2) failing to perform necessary acts (i.e. pre-releases) in the operation of the Lake Conroe Reservoir and Dam, which directly caused severe flooding of Plaintiffs' properties. The Governmental Defendants have committed these unconstitutional physical and regulatory takings through their maintenance, operation, and control of the Lake Conroe Reservoir and the Lake Conroe Dam. Plaintiffs did not consent to this taking nor were Plaintiffs notified in advance, so that mitigating measures could be taken. Rather, Plaintiffs' only learned of the Governmental Defendants' tortious, unconstitutional acts when, in the wee morning of August 28-29, waters from Lake Conroe inundated their homes.

63. The Governmental Defendants further enacted regulations, including, but not limited to, the Lake Conroe engineering plan and Lake Conroe dam engineering plan which not only resulted in an actual, physical invasion of Plaintiffs' properties, but denied Plaintiffs any and all economically viable use of their properties. These actions and regulations amount to a land-use exaction and/or unreasonably interfered with Plaintiffs' right to use and enjoy their properties.

**COUNT 2**  
**NEGLIGENCE AND NEGLIGENCE *PER SE***

64. Through the Corporate Defendants' acts, omissions, and failures, in dumping processed water, silt, sand, sediment, waste products, and other industrial waste into the San Jacinto River Basin, the overall capacity of Lake Houston has been dramatically decreased. This sediment, silt, and other debris limited the overall capacity of Lake Houston such that when the Governmental Defendants released the billions of gallons of water from Lake Conroe, the Lake simply could not hold the volume. The overflow from Lake Houston flooded Plaintiffs' properties and as a proximate result, Plaintiffs suffered substantial damages.

65. Plaintiffs would show that the injuries and damages giving rise to this incident were proximately caused by the negligence and in some instances, negligence *per se*, of the Corporate Defendants acting by or through their agents or employees, jointly, severally, singularly and together in any combination.

66. The Corporate Defendants' conduct described herein constitutes an unexcused breach of duty imposed by the Texas Water Code. Plaintiffs are members of the class that the Texas Water Code was designed to protect. The Corporate Defendants' unexcused breach of the duty imposed by the Texas Water Code proximately caused the Plaintiffs' injuries described herein.

**COUNT 3**  
**NUISANCE**

67. When the Governmental Defendants' wrongfully released billions of gallons of water into the San Jacinto River Basin and thus, Lake Houston, the Governmental Defendants interfered with and/or invaded Plaintiffs' properties resulting in a substantial interference with Plaintiffs' use and enjoyment of their land, causing Plaintiffs to suffer an unreasonable discomfort or annoyance. This tortious conduct constitutes a private nuisance and Plaintiffs suffered substantial property damages as a result. The Governmental Defendants should be held liable for those damages and injuries proximately caused by this nuisance.

**DAMAGES**

68. As a direct and proximate result of Defendants' conduct as described herein, whether acting by or through their agents or employees, jointly, severally, singularly, and/or together in any combination, Plaintiffs have been caused to suffer or experience damages in the past and, in all reasonable probability, is expected to experience such damages for a long time into the future.

69. The damages of the Plaintiffs consist of one or more of the following:

- a. Cost of repairs to real property;
- b. Cost of replacement or fair market value of personal property lost, damaged, or destroyed during such event;
- c. Loss of use of real and personal property
- d. Diminution of market value of Plaintiffs' properties;
- e. Loss of income and business income;
- f. Consequential costs incurred, inclusive of but not limited to alternative living conditions or accommodations, lost time from work;
- g. Mental anguish and/or emotional distress;
- h. Prejudgment interest;
- i. Postjudgment interest; and,
- j. Costs of Court.

70. In accord with Texas Rules of Civil Procedure 47, Plaintiffs allege that this is a claim for only monetary relief in a sum over \$1,000,000.00 and no more than \$200,000,000.00, and a demand for judgment for all other relief to which the Plaintiffs may show themselves to be entitled, including but not limited to damages of any kind, penalties, costs, expenses, pre-judgment interest, and attorneys' fees.

71. By reason of the above and foregoing, Plaintiffs would show that they have been damaged in a sum within the jurisdictional limits of the Court.

### **GROSS NEGLIGENCE AND EXEMPLARY DAMAGES**

72. The conduct of the Corporate Defendants acting by or through their agents or employees, was not only negligence but gross negligence as those terms are defined by Texas law. The Corporate Defendants' acts or omissions described above, when viewed from the standpoint of the Corporate Defendants at the time of the act or omission, involved an extreme degree of risk, considering the probability and magnitude of the potential harm to Plaintiffs and others. The

Corporate Defendants had actual, subjective awareness of the risk involved in the above described acts or omissions, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of Plaintiffs and others. Based on the facts stated herein, Plaintiffs requests exemplary damages be awarded to Plaintiffs from the Corporate Defendants, jointly and severally.

**PRE- AND POST-JUDGMENT INTEREST**

73. Plaintiffs assert a claim for pre-judgment and post-judgment interest on all applicable elements of damages.

**CONDITIONS PRECEDENT**

74. All conditions precedent to Plaintiffs' right to recover herein and to Defendants' liability have been performed or have occurred.

**REQUEST FOR DISCLOSURE**

75. Pursuant to Rule 194, Plaintiffs hereby request Defendants to disclose, within fifty days (50) of service of this request, the information or material described in Rule 194.2.

**NOTICE OF INTENT TO USE AUTHENTICATED DOCUMENTS**

76. Pursuant to Rule 193.7 of the Texas Rules of Civil Procedure, Plaintiffs hereby gives notice of intent to offer into evidence all documents and items produced by Defendants in response to Plaintiffs' discovery requests as authenticated for use against Defendants by virtue of the Defendants production of the same.

**JURY DEMAND**

77. Plaintiffs hereby demand a trial by jury and have paid the appropriate fee.

**PRAYER**

**WHEREFORE PREMISES CONSIDERED** Plaintiffs respectfully request that each

Defendant each be cited to appear and answer, and that on final trial, Plaintiffs have and recover from the Defendants, jointly, severally, singularly and/or together in any combination, the following:

- a. judgment against Defendants for actual damages in an amount within the jurisdictional limits of the Court;
- b. judgment against Defendants for exemplary damages in an amount within the jurisdictional limits of the Court;
- c. pre-judgment interest as provided by law;
- d. post judgment interest as provided by law;
- e. costs of suit; and,
- f. such other and further relief to which Plaintiffs may show themselves to be justly entitled.

Respectfully submitted,

**SPURLOCK & ASSOCIATES, P.C.**

By: /s/ Kimberley M. Spurlock

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**ATTORNEYS FOR PLAINTIFFS**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing instrument was served on all counsel of record in accordance with the T.R.C.P., on this the 22<sup>nd</sup> day of January, 2018.

/s/ Jason C. Webster

Jason C. Webster