

**KEN BAILEY and  
BRADLY PETERSON,**  
*Plaintiffs,*  
VS.

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**IN THE DISTRICT COURT**

\_\_\_\_ **JUDICIAL DISTRICT**

**CARTER SMITH, Executive  
Director, CLAYTON WOLF,  
Wildlife Division Director,  
MITCH LOCKWOOD, Big Game  
Program Director, and  
TEXAS PARKS & WILDLIFE  
DEPARTMENT,**  
*Defendants.*

**TRAVIS COUNTY, TEXAS**

**EXECUTIVE SUMMARY**

**NATURE OF THE CASE**

This is a case to protect the rights of captive-bred deer owners and to prevent the needless “emergency” slaughter of their deer to test for chronic wasting disease (CWD), a disease that has been detected in the wild deer population for years and that has recently been detected in a handful of captive-bred deer in Medina County, Texas. The Parks & Wildlife Department improperly suspended its own statute regarding transfer permits for healthy captive-bred deer and effectively declared that all captive-bred deer are unhealthy. Although the Parks & Wildlife Department made a showing of including the deer breeders in certain discussions about the rules, Defendants Smith, Wolf, and Lockwood developed their emergency regulatory scheme largely in secret, in violation of the Texas Open Meetings Act and the Administrative Procedure Act.

## RELIEF REQUESTED

Plaintiffs seek

(1) a declaratory judgment to resolve the dispute with the Parks & Wildlife Department over whether deer breeders have an ownership interest in their captive-bred deer;

(2) a declaratory judgment and injunctive relief to remedy possible past and future violations of the Texas Open Meetings Act (TOMA), both with respect to the “advisory” committees involved with the CWD regulations and with respect to communications between the members of the Parks & Wildlife Commission and others in numbers of less than a quorum for the purpose of engaging in secret deliberations in violation of the TOMA;

(3) a writ of mandamus under article I, section 28, of the Texas Constitution to remedy Defendants’ Smith’s, Wolf’s, and Lockwood’s unconstitutional suspension of section 43.362 of the Parks & Wildlife Code, under which the Department may deny transfer permits only if the specific deer at issue are found to be “unhealthy”;

(4) a writ of mandamus or injunction and declaratory judgment pursuant to the APA to remedy the Parks & Wildlife Department’s summary suspension of its existing rules allowing the movement of captive-bred deer that are healthy;

(5) a writ of mandamus or injunction and declaratory judgment pursuant to the APA to remedy the Parks & Wildlife Department’s “emergency” rules because there is insufficient factual basis to establish an emergency and because the rules exceed the Parks & Wildlife Department’s statutory authority and conflict with the statutes and regulations of the Texas Animal Health Commission (TAHC); and

(6) in the alternative, assuming *arguendo* that the rules are within the Parks & Wildlife Department’s statutory authority, to establish that the applicable Parks & Wildlife Code provisions are unconstitutional as applied because the regulatory scheme violates the constitutional rights of deer breeders and their customers to due process and equal protection.

## SUMMARY STATEMENT OF FACTS

Texas has approximately 3.9 million deer, less than 5% of which are captive-bred.

Historically around 500,000 deer are taken each year by hunters, only a small fraction of

which are captive-bred deer released to the wild. There is a surplus of deer in many communities and no risk that deer, as a species, are not sustainable in Texas.

Deer, whether wild or captive-bred, can fall prey to a variety of ailments, one of which is Chronic Wasting Disease (“CWD”). There is no live test approved in this state – testing requires the partial dissection of deer to remove the obex (the hind brain).

CWD is not a new problem. CWD was first documented almost 50 years ago. CWD has been documented in 23 states and 2 Canadian provinces. CWD was confirmed in wild deer in West Texas three years ago. Despite that fact, the total population has remained relatively constant, even increasing.

In response to positive test results for CWD in June in a facility in Medina County, despite the fact that the TAHC had already taken action to quarantine the facility, the Parks & Wildlife Department implemented an immediate “emergency” *state-wide* shut down of the captive-bred deer industry on the eve of the marketing, sale, and transport of captive-bred deer in advance of the opening of the Texas deer-hunting season.

The Defendants implemented the shut-down with two actions in particular:

- (1) the Parks & Wildlife Department simply shut down the computer application process by which licensed deer breeders could obtain permits to transport deer, thereby suspending section 43.362 of the Parks & Wildlife Code and Department Rule 65.610, which provide for transfer permits; and
- (2) having effectively suspended its statute and existing rules, the Parks & Wildlife railroaded through new “emergency” rules, without APA notice and comment rule making, that effectively place a strangle hold on the transfer of captive-bred deer.

The Parks & Wildlife regulations do not apply to landowners who offer hunting of only wild deer on their property -- wild deer also susceptible of carrying and transmitting

CWD. Nor do the rules apply to their customers. Only deer breeders and their customers are the target of the emergency regulatory scheme. Only the captive-bred owners must slaughter deer with no signs of CWD for testing and test deer that no longer belong to them that are taken by hunters.

The emergency rules require the destruction of hundreds of deer to obtain such samples, deer for which there is no demonstrated risk of CWD. The emergency rules provide for no notice, no hearing, and no appeal. Notice and individual findings, however, are required under the Parks & Wildlife Code. In addition, notice, a full-blown contested case APA hearing, and appeal would be required if the same actions were taken by the Texas Animal Health Commission. The protections afforded in the TAHC statute and the TAHC rules, however, are simply being ignored by the Parks & Wildlife Department.

## **OUTLINE OF LEGAL ARGUMENTS**

### **I. Texas Open Meetings Act Violations**

- A. Actions taken in violation of the TOMA are voidable.**
- B. The CWD Task Force did not comply the TOMA**
- C. Commission deliberations on the emergency rules violated the TOMA.**

### **II. The Parks & Wildlife Department's regulatory scheme**

- A. Department jurisdiction over "wild animals"**
- B. Deer bred in captivity are private property, not "wildlife," until and unless they are released to the wild**
- C. The Department's regulatory scheme suspends the law on the transfer of captive-bred deer**
- D. The Parks & Wildlife Department must give individual notice**
- E. The Parks & Wildlife Department lacks statutory authority to impose CWD testing requirements as a condition of a transfer permit**

- F. The Parks & Wildlife Department's actions conflict with Texas Animal Health Commission authority over captive-bred deer**
- G. The Parks & Wildlife Department lacks statutory authority to regulate release sites.**
- H. The Parks & Wildlife Department has authority to regulate hunters directly**

**III. Parks & Wildlife Department did not follow APA rule making procedures**

- A. The suspension or effective repeal of a rule is a rule**
- B. The emergency rules are invalid**
  - 1. Insufficient Statement of Emergency**
  - 2. Department authority is limited to an immediate danger to a species under the Department's jurisdiction.**
  - 3. No scientific evidence of danger to the species**
  - 4. The Emergency Rules effectively last longer than 120 days**
- C. The remedy for invalid rules**

**IV. Parks & Wildlife Department's Constitutional Violations**

- A. The Parks & Wildlife regulatory scheme violates due process**
  - 1. The regulatory scheme violates procedural due process**
  - 2. The regulatory scheme violates substantive due process**
- B. The emergency rules deny equal protection**