

SOAH DOCKET NO. 582-07-3917
TCEQ DOCKET NO. 2007-1012-MIS

IN THE MATTER OF THE EXECUTIVE § BEFORE THE
DIRECTOR'S REPORT AND §
RECOMMENDATION TO DESIGNATE §
A PRIORITY GROUNDWATER § STATE OFFICE OF
MANAGEMENT AREA (PGMA) FOR THE §
NORTH-CENTRAL TEXAS TRINITY AND §
WOODBINE AQUIFERS AREA § ADMINISTRATIVE HEARINGS

THE CITY OF GRAND PRAIRIE, GREATER TEXOMA UTILITY
AUTHORITY, AND THE CITY OF THE COLONY'S JOINT
EXCEPTIONS TO THE PROPOSAL FOR DECISION

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**THE CITY OF GRAND PRAIRIE,
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THE CITY OF THE COLONY'S EXCEPTIONS TO THE PROPOSAL FOR DECISION**

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TO THE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

The City of Grand Prairie ("Grand Prairie"), the Greater Texoma Utility Authority¹ ("GTUA") and the City of The Colony ("The Colony")(Grand Prairie, GTUA, and The Colony shall be collectively referred to as the "Water Providers") hereby jointly file their Exceptions to the Proposal for Decision in the above-referenced matter and would respectfully show the following:

I. EXCEPTIONS TO THE PROPOSAL FOR DECISION

The Commissioners of the Texas Commission on Environmental Quality ("Commission") should modify the Administrative Law Judge's ("ALJ's") proposed Findings of Fact ("FOF"), Conclusions of Law ("COL") and Commission Order to reflect the Water Provider's recommendations that (1) the Commission should allow the Texas Legislature to have the first opportunity to create groundwater conservation districts ("GCDs") within the proposed North Central Texas Priority Groundwater Management Area (Trinity and Woodbine Aquifers)(the "NCT PGMA") and (2) the Executive Director's single eight county GCD² (the

¹ The Authority is the spokesperson for the following 27 water utilities, districts and municipalities located in Cooke, Grayson, and Fannin Counties: the City of Bells, Bolivar WSC, City of Collinsville, City of Denison, Desert WSC, City of Dorchester, City of Gainesville, City of Gunter, City of Howe, City of Leonard, City of Lindsay, Luella SUD, Northwest Grayson WCID, City of Oak Ridge, Pink Hill WSC, City of Pottsboro, City of Savoy, City of Sherman, South Grayson WSC, City of Southmayd, Starr WSC, City of Tioga, City of Tom Bean, Two Way SUD, City of Van Alstyne, City of Whitesboro and City of Whitewright (collectively, the "Water Providers").

² The ED has recommended that the most feasible and practicable GCD for the NCT PGMA is a single GCD that includes all of the NCT PGMA Counties that are not already within a GCD: Collin, Cooke, Dallas, Denton, Ellis, Fannin, Grayson, and Johnson.

“Single GCD Option”) is not the “most feasible and practicable” approach to creating GCDs within the NCT PGMA. Title 30 Texas Administrative Code § 294.42(b)(1) provides as follows:

(1) The commission shall hold an evidentiary hearing [regarding the designation of a PGMA]. On behalf of the commission, the executive director may refer the evidentiary hearing directly to SOAH. At the evidentiary hearing, the commission or the administrative law judge shall consider:

(A) whether the proposed PGMA should be designated;

(B) whether one or more groundwater conservation districts (GCDs) should be created within all or part of the proposed PGMA, whether all or part of the land in the PGMA should be added to an existing GCD, or whether a combination of these actions should be taken; and

(C) **the feasibility and practicability of each GCD recommendation.** To determine the feasibility and practicability of each GCD recommendation, the commission or the administrative law judge shall consider:

(i) whether the recommended GCD can effectively manage groundwater resources under the authorities provided in Texas Water Code (TWC), Chapter 36;

(ii) whether the boundaries of the recommended GCD provide for the effective management of groundwater resources; and

(iii) whether the recommended GCD can be adequately funded to finance required or authorized groundwater management planning, regulatory, and district-operation functions under TWC, Chapter 36.³

Here, the feasibility and practicability of the Water Provider’s proposed recommendation to allow the Legislature to have the first opportunity to create GCDs within the proposed NCT PGMA is not addressed in the proposed FOF, COL, and Commission Order. Additionally, the recommendation to create the Single GCD Option in the suggested FOF, COL and Commission Order does not take into consideration the recommendations of all of the other parties to this evidentiary hearing. In other words, such GCD creation recommendation is not supported by the record. Consequently, the Commission should modify the ALJ’s proposed FOF, COL and Order to address the City’s NCT PGMA GCD creation recommendations.

³ 30 Tex. Admin. Code § 294.42(b)(1)(2008)(emphasis added).

A. The Legislature Should Have the First Opportunity to Create GCDs within the NCT PGMA

Providing the Legislature with the first opportunity to create GCDs within the NCT PGMA, if designated, is a feasible and practicable approach to creating GCDs. This approach is supported by Texas Water Code, Chapter 35. Specifically, Texas Water Code § 35.012 (a) and (b) provide in relevant part as follows:

(a) Following the issuance of a commission order under Section 35.008 designating a priority groundwater management area and recommending the creation of one or more districts, or the addition of land to an existing district, the landowners in the priority groundwater management area may:

- (1) create one or more districts under Subchapter B, Chapter 36;
- (2) have the area annexed to a district that adjoins the area; or

(3) create one or more districts through the legislative process.

(b) **Within two years**, but no sooner than 120 days, from the date on which the commission issues an order under Section 35.008 designating a priority groundwater management area, for those areas that are not within a district, the commission shall:

- (1) create one or more new districts under Section 36.0151;
- (2) recommend that the areas, or a portion of the areas, be added to an existing district under Section 35.013; or
- (3) take any combination of the actions under Subdivisions (1) and (2).⁴

This position is also supported by the Executive Director, who stated that no GCDs should be created before the completion of the 2009 Legislative session.⁵ Since this position is neither considered by the ALJ in her PFD nor memorialized in the proposed FOF, COL, or Commission Order, the Commissioners should add the following provisions to the final FOF, COL, and Commission Order:

⁴ TEX. WATER CODE § 35.012(a)(b)(Vernon 2008).

⁵ Tr., p. 43, l. 23 – p. 44, l. 6.

- "FOF 54. Awaiting the Texas Legislature to create and/or modify GCDs would enable the local legislators, and thus their respective constituents, to address the unique local needs of the areas to be included within such GCD.
- FOF 55. No party to this evidentiary hearing opposed allowing the Legislature to have an opportunity to create and/or modify GCDs within the proposed NCT PGMA in the 2009 Texas Legislative Session before the Commission attempts to create one or more GCD(s) within such area."
- "COL 10. Title 30 Texas Administrative Code § 294.42(b)(1)(C) requires the Commission to consider the feasibility and practicability of each GCD recommendation by the parties to the evidentiary hearing.
- COL 11. Texas Water Code § 35.012(a) provides that GCDs within the PGMA can be created through the Legislative process.
- COL 12. Texas Water Code § 35.012(b) provides that the Commission has up to two years to create GCD(s) within a designated PGMA.
- COL 13. Awaiting the Texas Legislature to create GCD(s) through the Legislative Process is a practicable and feasible approach to creating GCD(s) for the NCT PGMA."
- "ORDER 6. The Commission shall await creating any GCD(s) as recommended by this Order until the 81st Texas Legislature has completed its Regular Session and any applicable enrolled legislation has had time to become effective."

B. The Executive Director's Single GCD Option Is Not the "Most Feasible and Practicable" Recommendation for Creating GCDs within the NCT PGMA

The record does not reflect that the Executive Director's Single GCD Option is the "most feasible and practicable" approach to creating GCDs over the area included in the proposed NCT PGMA. Except for the Executive Director and Public Interest Counsel, none of the other parties to this evidentiary hearing support this recommendation. In fact, Cooke County and aligned parties, North Hunt WSC, Mustang SUD and Marilee SUD, Mountain Peak SUD and aligned parties, the City of Grand Prairie, the Greater Texoma Utility Authority, and the City of The Colony are all on record as opposing the Executive Director's Single GCD Option. Further, the Executive Director's own witness, Mr. Kelly Mills, testified that from the TCEQ's perspective, having more localized GCDs is an *equally feasible and practicable* approach to the Single GCD Option.⁶

Testimony was provided by GTUA, Grand Prairie, and The Colony that with one multi-county GCD of such a great size, it could be extremely difficult for that district to establish a funding protocol that equitably considers the unique interests of groundwater producers and users, and their varying uses of groundwater in rural, urban, and suburban areas included within the district.⁷ There is uncontroverted testimony in the record that local control is necessary for a practicable and feasible GCD.⁸ The Region C Water Plan recommends that the formation of GCDs is a local decision and should be considered by water suppliers and governmental officials in areas of heavy groundwater use.⁹ To this end, the Executive Director's witness, Mr. Kelly

⁶ Tr., p. 38, l. 25 – p. 39, l. 10.

⁷ Tr. p. 54, l. 5 – p. 55, l. 5; Ex. GP-1, p. 11, l. 18-22.

⁸ Tr. p. 56, l. 5 – p. 57, l. 22; Ex. GTUA-1, p. 9, l. 6-22; Ex. GP-1, p. 10, l. 3-19; and Tr. p. 65, l. 14 – p. 66, l. 4, Ex. TC-1, p. 8, l. 22 – p. 9, l. 6.

⁹ Ex. ED-KM-2, p. 74; Ex. ED-KM, p. 17, l. 18-22.

Mills, agreed with the Region C Plan recommendation.¹⁰ Thus, the proposed FOF, COL and Commission Order should not designate the Single GCD Option as the most feasible and practicable approach for creating GCDs in the NCT PGMA, if designated.

This evidentiary hearing was conducted, in part, to allow interested parties who may be regulated by the proposed NCT PGMA to participate and voice their concerns and opinions regarding the designation of this PGMA and the creation of GCDs within the PGMA. With this PFD, the Commissioners have been provided with a recommended GCD creation approach that is not supported by the very parties who would be forced to operate within this regulatory scheme in order to meet their regional water needs. With the foregoing in mind, the Water Providers request the Commissioners to modify and add the proposed FOF, COL, and Commission Order as follows:

Modifications to Existing Provisions

"FOF 41. The feasibility of a GCD is dependent upon many factors, including, but not limited to, the size and total tax base of the GCD, the quantity of water that is subject to production fees, the scale and scope of the programs undertaken by the GCD, the maximum water production fee rate authorized to be assessed, and the ability for local control by the local groundwater groundwater suppliers and government officials in areas of heavy groundwater use."

"FOF 51. A single, regional GCD in the remaining PGMA counties of Collin, Cooke, Dallas, Denton, Ellis, Fannin, Grayson, and Johnson is not the most feasible, economic, and practicable option for protection and management of the groundwater resources."

Subsections a.-d.- no modifications

¹⁰ Ex. ED-KM, p. 17, l. 18 – p. 18, l. 2; Tr., p. 36, l. 24 – p. 37, l. 10.

Subsection e- strike in its entirety as it is not supported by the record.

"FOF 53. A single, regional multi-county GCD that includes Dallas County is not the most practicable and feasible GCD for the eight counties in the PGMA without a GCD."

"COL 9. Local control is necessary to ensure a GCD can be effectively managed, and a single eight-county GCD for Cooke, Collin, Dallas, Denton, Ellis, Fannin, Grayson, and Johnson Counties is not the most feasible and practicable approach to creating GCDs within the proposed NCT PGMA pursuant to the TEXAS WATER CODE § 35.008(b)."

Additional Provisions

"FOF 57. All parties participating in the Hearing, including the ED, agree that local participation is an important factor in considering the practicability and feasibility of creating and managing a GCD.

FOF 58. The Region C Water Plan recommends that the formation of GCDs is a local decision and should be considered by water suppliers and government officials in areas of heavy groundwater use.

FOF 59. No party, absent the ED and Public Interest Counsel, recommended the creation of a single eight-county GCD that would include Collin, Cooke, Dallas, Denton, Ellis, Fannin, Grayson, and Johnson Counties.

FOF 60. With such single eight-county GCD, it could be extremely difficult for that district to establish a funding protocol that equitably considers the unique interests of groundwater producers and users, and their varying uses of groundwater in rural, urban, and suburban areas within such district.

FOF 61. Having more localized GCDs within the proposed NCT PGMA is an equally feasible and practicable approach to having a single eight-county GCD."

II. PRAYER

Grand Prairie, GTUA and The Colony respectfully request that the Commissioners modify the Administrative Law Judge's proposed Findings of Fact, Conclusions of Law, and Commission Order as recommended by these parties.

Respectfully submitted,

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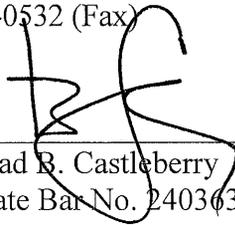
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CERTIFICATE OF SERVICE

I hereby certify that on this the 22nd day of September, 2008, a true and correct copy of the foregoing document was provided by hand delivery, first class mail, electronic mail or facsimile to the following persons:

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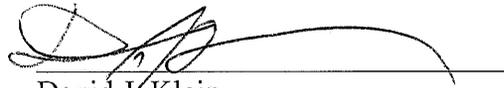
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