Buddy Garcia, *Chairman*
Larry R. Soward, *Commissioner*
Bryan W. Shaw, Ph.D., *Commissioner*
Mark R. Vickery, P.G., *Executive Director*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

October 2, 2008

Mr. Les Trobman, General Counsel
Texas Commission on Environmental Quality
MC-101
P.O. Box 13087
Austin, TX 78711-3087

RE: SOAH Docket No. 582-07-3917; TCEQ Docket No. 2007-1012-MIS; *IN THE MATTER OF THE EXECUTIVE DIRECTOR'S REPORT AND RECOMMENDATION TO DESIGNATE A PRIORITY GROUNDWATER MANAGEMENT AREA (PGMA) FOR NORTH-CENTRAL AND WOODBINE AQUIFERS AREA.*

Dear Mr. Trobman:

Enclosed you will find the Executive Director's Response to Exceptions to the PFD in the above captioned matter.

Sincerely,

Ross W. Henderson
Staff Attorney
Environmental Law Division

cc:

SOAH service list

MAILING LIST
NORTH-CENTRAL TEXAS-TRINITY AND WOODBINE AQUIFERS AREA
SOAH DOCKET NO.: 582-07-3917; TCEQ DOCKET NO.: 2007-1012-MIS

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Ross W. Henderson, Staff Attorney, Environmental Law Division (MC-173)
Blas Coy, Office of the Public Interest Counsel (MC-103)
LaDonna Castanuela, Chief Clerk, Office of the Chief Clerk (MC-105)
Kelly Mills, Water Supply Division (MC-147)

CC List:

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

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

EXECUTIVE DIRECTOR'S RESPONSE TO EXCEPTIONS TO THE PROPOSAL FOR DECISION

TO THE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

THE EXECUTIVE DIRECTOR of the Texas Commission on Environmental Quality (TCEQ or Commission) files this Response to Exceptions and would respectfully show the following:

On September 2, 2008, the Honorable ALJ issued a Proposal for Decision in the above captioned matter. The Executive Director has received two separate filings of exceptions to the PFD. The first was filed jointly by Mustang Special Utility District (Mustang SUD) and Marilee Special Utility District (Marilee SUD). The second was filed jointly by the City of Grand Prarie, Greater Texoma Utility Authority (GTUA), and the City of the Colony. GTUA is also the party representative for 27 other water utilities, districts, and municipalities.

Executive Director's Response to Mustang SUD's and Marilee SUD's Exceptions

At the hearing on the merits, Marillee and Mustang SUDs (the SUDs) supported the designation of a PGMA over the area and the Executive Director's alternative recommendation of having three smaller GCD's. Specifically, the SUDs support a groundwater conservation district (GCD) which would include Collin, Denton, Fannin and Grayson as the ED recommended in the alternative recommendation.

In their exceptions, the SUDs continue to object to the formation of a single eight-county GCD over the counties in the PGMA which are not yet included in a GCD. The SUDs mistakenly stated that the ED was the only party to support the single eight-county GCD. The Public Interest Counsel (OPIC) also supported the recommendation.

Next, the SUDs argue that because the other parties do not support the single eight-county GCD, that it will be more difficult for such a GCD to be created, and that the Commission should therefore support the ED's alternative recommendation. The ED disagrees with the SUDs argument for several reasons.

If the eight-county GCD recommendation is adopted by the Commission and the interested parties or the Legislature have failed to create one or more GCDs in the remaining PGMA area, the ED will have the authority to create the eight-county GCD without need for any creation confirmation election. The SUDs have mistakenly cited to section 36.017 of the Texas Water Code which requires a confirmation election for the creation of a GCD by petition. However, a GCD created in a PGMA area by the Commission under Section 35.012(b) of the TWC is governed by Section 36.0151, not section 36.017. Section 36.0151 requires that the ED form the GCD without an evidentiary hearing by issuance of an order. The only election required under this process is called by the temporary directors to authorize the district to assess

taxes and to elect permanent directors. The ED has recommended that any GCD created in the PGMA area support its functions with groundwater production fees due to the unlikelihood that taxes would garner enough public support. In this case, the GCD would not need a confirmation election to implement a production fee scheme.

The fact that a GCD that requires funding from Ad Valorem taxes would require voter confirmation only supports the ED's eight-county recommendation over the alternative recommendation. Although the alternative recommendation is configured so that Ad Valorem taxes would not be required, a Commission order which requires the alternative recommendation increases the likelihood that some GCD's within the PGMA area would not have sufficient operations revenue from production fees alone and would be forced to seek voter approval for Ad Valorem. If for instance, one or more counties formed a GCD that conformed to neither the eight-county recommendation nor the alternative recommendation, the ED would need only place the remaining counties into a single GCD. In such an instance, the GCD would be much more likely to still have the ability to fund itself from production fees alone than if the same scenario were to occur under the alternative recommendation. This is because any variation from the alternative recommendation would reduce funding from production fees over 3 smaller areas rather than a single eight-county area. If the Commission were to adopt the alternative recommendation and a different GCD or GCDs was formed in the area before the ED acted, it could hamper the ED's ability to act on the Order. Having the eight-county recommendation is necessary for the ED to have the flexibility to carry out the recommendation in the order in the event that different GCDs are created before the ED can act.

The Executive Director also reiterates its position that the most practicable and feasible GCD alignment is the eight-county GCD. This is in part due to the fact that each GCD that is

created will be within a groundwater management area and will be required to submit "desired future conditions." This means that all GCDs within the water management area will be required to work together anyway

Executive Director's Response to GTUA, City of the Colony, and City of Crand Praries' Exceptions to the PFD

The parties argued that the legislature should have the first shot at creating a GCD at the hearing and continue to do so in the Exceptions. The Executive Director has already stated on the record that the Commission has no intent to act on the GCD creation before the end of the next legislative session. However, the Executive Director believes that no such finding of fact is necessary or appropriate. Further, the ED does not agree with the parties' assertion that the creation of a GCD by the Legislature is a recommendation the Commission can make under Chapter 36 of the Water Code. Instead, Chapter 36 leaves the option of legislative action open if the legislature acts before the Commission does so.

The Parties continue to argue that the ED's single eight-county GCD is not the most practicable and feasible recommendation based solely on the arguments that the other parties do not support that recommendation and that the GCD recommendation should be a local decision. The parties have acknowledged that groundwater management is necessary in the area. However, the PGMA process has been ongoing in some form for at least 25 years and the local decision makers have failed to create a GCD over these eight counties. The Parties continue to decline to offer an alternative recommendation that they believe is reasonable and practicable and instead want the Commission to issue an order which has no GCD recommendation and no mechanism with which to act on if the parties themselves or the legislature do not create a GCD. The Parties' requested findings would negate the purpose of the PGMA process which is to

ultimately end up with groundwater management in the area. The Executive Director, therefore, requests the single eight-county GCD recommendation in the PFD be left intact.

Respectfully submitted,

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Mark R. Vickery, P.G., Executive Director

Robert Martinez, Director
Environmental Law Division

By: _____
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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of October, 2008, a true and correct copy of the foregoing document was sent by first class, agency mail and/or facsimile to the persons on the attached Mailing List.

_____
Ross W. Henderson, Staff Attorney
Environmental Law Division

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