State Office of Administrative Hearings

Cathleen Parsley
Chief Administrative Law Judge

September 2, 2008

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
2008 SEP -2 PM 4: 39
CHIEF CLERKS OFFICE

Les Trobman, General Counsel
Texas Commission on Environmental Quality
PO Box 13087
Austin Texas 78711-3087

Re: SOAH Docket No. 582-07-3917; TCEQ Docket No. 2007-1012-MIS; In Re: The Executive Director's Report and Recommendation to Designate a Priority Groundwater Management Area (PGMA) for the North-Central Texas-Trinity and Woodbine Aquifers Area

Dear Mr. Trobman:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the original documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than September 22, 2008. Any replies to exceptions or briefs must be filed in the same manner no later than October 2, 2008.

This matter has been designated **TCEQ Docket No.** 2007-1012-MIS; **SOAH Docket No.** 582-07-3917. All documents to be filed must clearly reference these assigned docket numbers. Copies of all exceptions, briefs and replies must be served promptly on the State Office of Administrative Hearings and all parties. Certification of service to the above parties and an **original and eleven copies** shall be furnished to the Chief Clerk of the Commission. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

Carol Wood

Carol Wood
Administrative Law Judge

CW/ds
Enclosures
cc: Mailing List

STATE OFFICE OF ADMINISTRATIVE HEARINGS

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AGENCY: **TEXAS COMMISSION ON ENVIRONMENTAL QUALITY (TCEQ)**

STYLE/CASE: **REPORT AND RECOMMENDATION TO DESIGNATE A PRIORITY GROUNDWATER MANAGEMENT AREA (PGMA) FOR NORTH-CENTRAL AND WOODBINE AQUIFERS AREA**

SOAH DOCKET NUMBER: 582-07-3917
TCEQ DOCKET NUMBER: 2007-1012-MIS

STATE OFFICE OF ADMINISTRATIVE HEARINGS	**CAROL WOOD** **ADMINISTRATIVE LAW JUDGE**

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TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2008 SEP -2 PM 4: 39

CHIEF CLERKS OFFICE

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 THE NORTH-CENTRAL TEXAS--TRINITY AND WOODBINE AQUIFERS AREA	§	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

PROPOSAL FOR DECISION

I. INTRODUCTION

In June 2007, the Executive Director (ED) of the Texas Commission on Environmental Quality (Commission or TCEQ) issued a report, "Updated Evaluation for the North-Central Texas - Trinity and Woodbine Aquifers – Priority Groundwater Management Study Area"[1] (ED's Report or Report), recommending that 13 of the 20 counties in the study area be included in a designated Priority Groundwater Management Area (PGMA).[2] Since the commencement of the PGMA study, the following five counties recommended for PGMA designation by the ED have been placed into newly-created groundwater conservation districts (GCDs): Tarrant,[3] Hood, Montague, Parker, and Wise Counties.[4] For the eight remaining PGMA counties of Collin, Cooke, Dallas, Denton, Ellis, Fannin, Grayson, and Johnson, the ED requests that the Commission establish a single, regional, fee-funded GCD for the conservation and management of the Trinity and Woodbine Aquifers. The Administrative Law Judge (Judge) recommends the Commission designate a PGMA over the counties of Collin, Cooke, Dallas, Denton, Ellis, Fannin, Grayson, Hood, Johnson, Montague, Parker, Tarrant, and Wise.[5] The Judge further

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[1] Ex. ED-KM-2.

[2] Collin, Cooke, Dallas, Denton, Ellis, Fannin, Grayson, Hood, Johnson, Montague, Parker, Tarrant, and Wise Counties. The ED found no critical groundwater problems occurring in either the Trinity or Woodbine Aquifers in the remaining seven counties of Delta, Hunt, Kaufman, Lamar, Navarro, Red River, and Rockwall in the study area.

[3] The Northern Trinity GCD was created in Tarrant County, effective June 15, 2007. Ex. ED-3 at 16.

[4] The Upper Trinity GCD was created in the remaining four counties, effective September 1, 2007. *Id.*

[5] No party is opposed to this recommendation.

recommends the Commission establish a single, regional GCD in the PGMA counties of Collin, Cooke, Dallas, Denton, Ellis, Fannin, Grayson, and Johnson for the conservation and management of the Trinity and Woodbine Aquifers in North-Central Texas. (*See* Attachment A.)

II. BACKGROUND AND PROCEDURAL HISTORY

A study of this area's groundwater problems began in 1990 with a report begun by the Texas Water Commission[6] and the Texas Water Development Board (TWDB). As a result of that study, the area was not recommended for PGMA designation; rather, TCEQ was to monitor the area.[7] In 1998, the PGMA study was again initiated, and updated reports were requested from TWDB and the Texas Parks and Wildlife Department (TPWD). Reports were prepared by both agencies in 1999.[8] Shortly thereafter, TCEQ postponed the updated study effort until the 2001-2002 regional and state water planning cycles were completed.[9] In 2001, the Texas Legislature amended Chapter 35 of the Texas Water Code (Water Code) and required TCEQ to complete this PGMA study.[10]

As required by Water Code § 35.007(a) and (b), notice of the initiation of the PGMA study was sent to approximately 1,200 stakeholders in July 2005. The notice solicited comments, data, reports of existing studies, and any other pertinent information on the area's water supply, groundwater availability, aquifer water-level trends, and groundwater quality.[11]

The ED mailed notice of the draft report to 1,300 stakeholders in the 20-county study area on December 14, 2006. In response to requests from the stakeholders, the comment period was extended for 90 days and concluded on April 30, 2007. On April 12, 2007, the ED met with

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6 TCEQ's predecessor agency, hereinafter either TCEQ or Commission.

7 Ex. ED-KM-2 at 19-20.

8 *See* Exs. ED-CL-2 and ED-RM-2.

9 Ex. ED-KM-2 at 1.

10 TEX. WATER CODE § 35.007(a).

11 Ex. ED-KM-2 at 21.

many of the stakeholders at an open meeting in Sherman, Texas, to discuss the report.[12] Copies of the report were placed in libraries and public places in the 20-county study area and, in the proposed PGMA 13-county area, copies were placed in the county clerks' offices.

On September 11, 2007, notice of the hearing was mailed to all stakeholders, governing bodies of each county, adjacent GCDs, river authorities, municipalities, water authorities or other entities that supply public drinking water, each holder of a CCN, and irrigation districts in the proposed PGMA.[13]

On October 23, 2007, a preliminary hearing was conducted in Fort Worth, Texas, by Judge Carol Wood of the State Office of Administrative Hearings (SOAH). The following were designated as parties to the proceeding: the ED, represented by Ross Henderson, staff attorney; the Commission's Public Interest Counsel (PIC), represented by Eli Martinez, attorney; the Greater Texoma Utility Authority (GTUA) and a coalition of 27 retail public utilities located in Grayson, Cooke, and Fannin Counties, aligned with Bois D'Arc Municipal Utility District (MUD), all now represented by Martin Rochelle and David Kline, attorneys; Marilee Special Utility District (SUD) and Mustang SUD, represented by John Rapier, attorney; City of Grand Prairie, now represented by Martin Rochelle and David Kline, attorneys; the aligned parties of Cooke County, Woodbine Water Supply Corporation (WSC), Kenneth Klement, and Era WSC, all now represented by J. D. Head, attorney; City of The Colony, now represented by Brad Castleberry, attorney; JEMcCombs Real Estate Ltd., represented by Mabel Simpson, attorney; Aqua Texas and Hillwood Properties, later represented by Mark Zeppa, attorney; City of Bridgeport, represented by Rob Allibon, city attorney; North Hunt WSC, now represented by Jim McLeroy, attorney; Sardis-Lone Elm WSC and Mountain Peak SUD, now represented by David Miller, attorney; and Malone Water Service, represented by Karin Malone, owner.[14]

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[12] *Id.* at 24.

[13] Ex. ED-A.

[14] The following entities have been withdrawn as parties at their request: JEMcCombs Real Estate Ltd., Aqua Texas, Hillwood Properties, City of Bridgeport, and Malone Water Service.

On May 13, 2008, the hearing on the merits was held in Austin, Texas. The parties submitted closing arguments, and the record closed on July 1, 2008.

III. APPLICABLE LAW

Pursuant to Water Code § 35.007(a), the ED and the Executive Administrator of TWDB shall meet periodically:

> to identify those areas of the state that are experiencing or that are expected to experience, within the immediately following 25-year period, critical groundwater problems, including shortages of surface water or groundwater, land subsidence resulting from groundwater withdrawal, and contamination of groundwater supplies.

If the ED decides a PGMA should be designated, he shall prepare a report to the Commission.[15] Before the report is filed, however, the ED is to give notice to the entities listed in Water Code § 35.009(c), that is, each "county, regional water planning group, adjacent groundwater district, municipality, river authority, water district, or other entity which supplies public drinking water," holders of certificates of convenience and necessity (CCNs), and irrigation districts located in whole or in part in the PGMA study area. Commission rules expand this group to also include the Texas Department of Agriculture; the Texas Cooperative Extension; and legislators whose districts are in the proposed PGMA study area.[16] The notified entities have 45 days to provide information to the ED concerning "the potential effects on an area of being identified as experiencing or expected to experience critical groundwater problems."[17]

Pursuant to Water Code § 35.007(d) and (e), the ED shall request reports from TWDB and TPWD. The TWDB report must include an appraisal of the hydrogeology of the area and matters within TWDB's planning expertise relevant to the area, as well as an assessment of the area's immediate, short-term, and long-term water supply and needs. The TPWD report must

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[15] Water Code § 35.007(b).

[16] 30 TEX. ADMIN. CODE (TAC) § 294.41(c)(2).

[17] Water Code § 35.007(c).

address the potential effects of the designation of a PGMA on the area's natural resources and what actions should be considered to conserve the area's natural resources.

According to Water Code § 35.007(f), the ED's report shall include the recommended delineation of the boundaries of any proposed PGMA; the reasons and supporting information for or against designating the area as a PGMA; a recommendation whether one or more GCDs should be created in the PGMA or whether the PGMA should be added to an existing GCD, or a combination of both; and an evaluation of information or studies submitted to the ED from any stakeholder. Pursuant to Commission rules, the ED also makes recommendations on GCD creation and the boundaries of the GCD or GCDs, provides an evaluation of required groundwater management planning and regulatory functions for the PGMA, and recommends adequate funding to finance required GCD groundwater management functions.[18] Water Code § 35.007(g) requires the ED to make his report available for public inspection.

Water Code § 35.008(b) requires the Commission to call an evidentiary hearing to consider:

(1) the designation of a PGMA; and

(2) whether one or more GCDs should be created over all or part of a PGMA, all or part of the land in the PGMA should be added to an existing GCD, or a combination of those actions should be taken.

Consideration of this issue must include a determination of whether a GCD is feasible and practicable.

Pursuant to Water Code § 35.008(g), the Commission's order designating a PGMA must recommend that the area be covered by a GCD in any of the following ways:

(1) creation of one or more new GCDs;

(2) addition of the land in the PGMA to one or more existing GCDs; or

(3) a combination of actions under Subdivisions (1) and (2).

[18] 30 TAC § 294.41(g)(1)(E) through (H).

In pertinent part, Water Code § 35.012(a) and (b) reads as follows:

(a) Following the issuance of a commission order under Section 35.008 designating a [PGMA] and recommending the creation of one or more [GCDs], or the addition of land to an existing [GCD], the landowners in the [PGMA] may:

(1) create one or more [GCDs]. . .

(2) have the area annexed to a [GCD] that adjoins the area; or

(3) create one or more [GCDs] 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 [PGMA], for those areas that are not within a [GCD], the commission shall:

(1) create one or more [GCDs]. . .

(2) recommend that the areas, or a portion of the areas, be added to an existing [GCD]. . . or

(3) take any combination of the actions under Subdivisions (1) and (2).

In pertinent part, Commission Rule 294.42(b)(1)(C), "Commission Action Concerning PGMA Designation," reads as follows:

(1) . . . At the evidentiary hearing, the commission or the [Judge] shall consider:

(C) the feasibility and practicability of each GCD recommendation. To determine the feasibility and practicability of each GCD recommendation, the Commission or the [Judge] shall consider:

(i) whether the recommended GCD can effectively manage groundwater resources under the authorities provided in [Water Code] 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 management planning, regulatory, and district-operation functions under [Water Code] Chapter 36.

IV. DISCUSSION

1. Whether a PGMA should be designated over any portion of the North-Central Texas–Trinity and Woodbine Aquifers area.

The Judge recommends the Commission designate a PGMA over the counties of Collin, Cooke, Dallas, Denton, Ellis, Fannin, Grayson, Hood, Johnson, Montague, Parker, Tarrant, and Wise.

The ED has requested that these 13 counties listed above (of the 20 counties in the North-Central Texas PGMA study area) be included in the PGMA. The ED has determined that aquifer usage that exceeds or comes near exceeding the regional planning groups' estimates for safe supply constitutes "critical groundwater problems" under Chapter 35 of the Water Code.

The ED, after looking at all the best available data from the regional water-planning groups, TWDB, TPWD, the ED's own research, and comments from the stakeholders, found that water-user groups in Ellis, Johnson, and Tarrant counties are collectively using the Trinity Aquifer at quantities over regional water-planning group estimates for the safe supply for each county; and water-user groups in Collin, Cooke, Dallas, Denton, Fannin, Grayson, Hood, Parker, and Wise Counties are using the Trinity Aquifer at quantities near each county's estimated safe supply. Further, the ED found that 2007 Barnett Shale water use and demand projections, which were not considered in the regional water-planning group estimates for groundwater use, may push Trinity Aquifer use above the regional water-plan estimates of safe supply for Cooke, Denton, Parker, and Wise Counties and add to ongoing aquifer overdraft in Ellis, Johnson, and Tarrant Counties. The ED also found that water-user groups in Fannin and Johnson Counties are collectively using the Woodbine Aquifer at quantities over regional water-planning group estimates for the safe supply for each county.[19]

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[19] Ex. ED-3 at 9-13.

Because there was not a use of groundwater resources at or near exceeding the safe supply, the ED failed to find critical groundwater problems occurring in either the Trinity or Woodbine Aquifers in Delta, Hunt, Kaufman, Lamar, Navarro, Red River, and Rockwall Counties. Consequently, the ED does not recommend including those counties in the PGMA designation.[20]

Each of the interested parties in this case has either stated support for, or expressed no opposition to, this PGMA designation.

The Judge recommends the Commission designate a PGMA over the counties of Collin, Cooke, Dallas, Denton, Ellis, Fannin, Grayson, Hood, Johnson, Montague, Parker, Tarrant, and Wise because these counties are experiencing, or are expected to experience, critical shortages in the next 25 years, as shown by the uncontroverted and credible evidence in the record.

2. Whether the Commission should establish a single, regional, fee-funded GCD for the conservation and management of the Trinity and Woodbine Aquifers in the eight remaining PGMA counties of Collin, Cooke, Dallas, Denton, Ellis, Fannin, Grayson, and Johnson.

The Judge recommends the Commission establish a single, regional, fee-funded GCD for the conservation and management of the Trinity and Woodbine Aquifers in the PGMA counties of Collin, Cooke, Dallas, Denton, Ellis, Fannin, Grayson, and Johnson.

A. ED's Position

The ED recommends a single, regional, fee-funded GCD for the conservation and management of the Trinity and Woodbine Aquifers in the eight PGMA counties of Collin, Cooke, Dallas, Denton, Ellis, Fannin, Grayson, and Johnson. The ED asserts a regional, fee-funded GCD represents the most feasible, economic, and practicable option for protection

[20] *Id.* at 14.

and management of the groundwater resources. The ED argues his recommendation is based on the ability of the GCD to raise enough well production revenue to support its operations.

The ED points out that Kelly Wade Mills, leader of TCEQ's groundwater planning and assessment team, testified that, based on (1) audits on file with the Commission, (2) information compiled in interviews with district managers and board members of existing districts, (3) information contained in materials by the Texas Alliance of Groundwater Districts, and (4) information from the State Auditor's Office, a GCD would require annual revenues of approximately $250,000 to adequately serve its function of managing groundwater resources. Mr. Mills stated that none of the eight counties, standing alone, would be able to generate enough revenue to adequately fund a GCD's activities with well production fees.[21] Citing to a table in the ED's report to the Commission showing potential revenue from well production fees, the ED contends his proposed single, multi-county GCD would be able to generate the necessary revenue to fund its activities through well production fees.[22]

The ED further argues that a single, regional district would eliminate repetitive costs for duplicative management and administrative programs and allow for economies of scale, thus reducing fiscal waste. However, if multiple GCDs are formed, the ED notes the GCDs would still have to work together to coordinate management of the groundwater resources. The ED also points out Mr. Mills testified that, because of the area's heavy reliance on surface water, ad valorem tax revenue would not be a popular local option and would likely fail in a voter initiative.[23]

B. North Hunt WSC's Position

North Hunt WSC (North Hunt), a WSC serving portions of Hunt, Fannin, and Delta Counties in Northeast Texas, asserts that a single GCD comprised of the eight counties of Collin,

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[21] Tr. at 32.

[22] *See* Table 15, Ex. ED-KM-2 at 78.

[23] Tr. at 44-46.

Cooke, Dallas, Denton, Ellis, Fannin, Grayson, and Johnson ignores the political, economic, and practical realities that distinguish the various counties involved. It notes that the ED's proposal for a GCD only affects this WSC in the southeastern part of Fannin County, where North Hunt pumps from two wells that produce water solely from the Woodbine Aquifer. Yet, North Hunt argues, even though it may be the least significant water user in the proposed GCD, its insignificance makes its position significant.

North Hunt argues that only Fannin and Grayson Counties produce water from the Woodbine Aquifer and both have "rural characteristics that are fundamentally different from the more urban counties." It also contends that the smaller counties will face a substantial loss of influence and control, and North Hunt water users will find their water policy dictated by issues and concerns that often may have no bearing on them. Because an eight-county GCD "necessarily imposes the interest of larger more significant water users over the interest of [North Hunt], and similarly situated persons and entities, on critical issues concerning water availability," North Hunt supports the creation of multiple GCDs within the PGMA. It specifically endorses a fee-funded GCD that includes only Fannin, Grayson, Collin, and Denton Counties.

C. Mustang SUD's and Marilee SUD's Position

Mustang SUD (Mustang) and Marilee SUD (Marilee) support the ED's alternative recommendation set forth in his Report that creation of three multi-county, fee-funded GCDs within the PGMA is feasible and practicable. In the ED's alternative recommendation, the eight counties are divided as follows: (1) Collin, Denton, Fannin, and Grayson Counties are in one GCD; (2) Dallas, Ellis, and Johnson Counties are in another GCD; and (3) Cooke County is added to the Upper Trinity GCD comprised of Montague, Parker, Hood, and Wise Counties. Mustang and Marilee assert these three GCDs, shown on Figure 16 in the ED's Report,[24] is fully supported by the evidence, meets the test set out in Commission Rule 294.42, and will facilitate GCD creation and confirmation as required by statute. Furthermore, these two parties argue

[24] Ex. ED-KM-2 at 100.

Mr. Mills' testimony reveals that "the alternative approach is equally feasible and practicable from the agency's perspective."[25]

D. Mountain Peak SUD's and Sardis-Lone Elm WSC's Position

Mountain Peak SUD (Mountain Peak) and Sardis-Lone Elm WSC (Sardis) assert that neither the ED's recommendation of a single, regional GCD nor his alternative recommendation of three multi-county GCDs adequately addresses the needs for groundwater conservation for Ellis and Johnson Counties or the water service providers they contain. Instead, Mountain Peak and Sardis contend a more "feasible and practicable" recommendation is the segregation of Ellis and Johnson Counties into their own GCD, with Dallas County added to the GCD containing Collin and Denton Counties.

Mountain Peak and Sardis assert that the ED's recommendation to place Ellis, Johnson, and Dallas Counties into a single GCD fails to take into consideration the wide discrepancies in demographics and interests of the individual counties, which are substantial enough to invite significant differences in perspective among the members of the governing body of the proposed GCD. Pointing to the data provided in Tables 2 and 3 in the ED's Report, Mountain Peak and Sardis argue that only 0.89 percent of the water used in Dallas County is groundwater, whereas 28.65 percent of the water used in Ellis and Johnson Counties is groundwater.[26] Mountain Peak and Sardis argue that, quantitatively, Dallas County relies on less than half of the amount of groundwater than either Ellis County or Johnson County relies on.[27] With Dallas County's more urban and densely populated characteristics and more than 99 percent of its water derived from surface water, Mountain Peak and Sardis allege that the concerns and interests of Dallas County's water suppliers and government officials will naturally not align with those of the water suppliers and government officials of Ellis or Johnson Counties, though they are contiguous counties.[28]

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[25] Tr. at 39.

[26] Ex. ED-KM-2 at 12 and 15.

[27] *Id.*, Table 3 at 15.

[28] *Id.*, Tables 2 and 3 at 12 and 15, respectively.

Additionally, with regard to finances, Mountain Peak and Sardis contend Dallas County would provide too few wells to be a substantial financial contributor to the GCD. They allege Dallas County would provide only $28,850 annually if the GCD is funded by well production fees, which amounts to only 15.65 percent of the revenues available to the GCD should the three counties be aligned. Indeed, argue Mountain Peak and Sardis, Dallas County's contribution of only $28,850 is less than half of the contributions of either Ellis County or Johnson County.[29] Furthermore, because of the recommendation of two board representatives from each county to comprise the board of directors, Mountain Peak and Sardis assert Dallas County would provide only 15.65 percent of the funds to operate the GCD, yet retain 33.33 percent of the control over the GCD.[30] Because their relationships with regard to groundwater consumption are so diverse and of such different nature, Mountain Peak and Sardis assert that differences in evaluating groundwater usage and conservation are to be expected if Ellis, Johnson, and Dallas Counties are included in a single GCD.

Additionally, Mountain Peak and Sardis argue that Collin and Denton Counties, like Dallas County, have populations larger than four times the populations of Ellis or Johnson Counties, and their interests would more naturally align with Dallas County than a GCD comprised of Dallas, Ellis, and Johnson Counties.[31] Mountain Peak and Sardis contend that a GCD comprised of Johnson and Ellis Counties would allow the water service providers of those counties to pursue an approach to groundwater that would best serves the interests of their mostly rural inhabitants, "leaving their agendas uncompromised by possibly contradictory desires of an urban, metropolitan center." Mountain Peak and Sardis assert that the ED's recommendations fail to adequately take into account the meaningful distinctions between counties that may be contiguous but ultimately possess different positions and motives regarding the use and conservation of groundwater. Thus, Mountain Peak and Sardis argue it is counter-productive to the interests of Johnson and Ellis Counties and to Dallas County to position those counties within the same GCD.

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[29] *Id.*, Table 15 at 78.

[30] *Id.* at 97.

[31] *Id.*, Appendix 1 at 107 and Table 15 at 78.

E. Cooke County Aligned Parties' Position

Cooke County Aligned Parties (Cooke County) urge creation of a single Cooke County GCD within the proposed PGMA.

Cooke County asserts it would be extremely difficult for the board of directors of a single, regional, multi-county GCD proposed by the ED to effectively manage and take into consideration the local and unique needs of all groundwater users within the eight-county area. Cooke County further argues that, within a single, multi-county GCD, it would be 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.

Regarding the ED's alternative recommendation of establishing three GCDs within the PGMA, Cooke County is opposed to adding Cooke County to the existing Upper Trinity GCD comprised of Montague, Wise, Parker and Hood Counties. Cooke County contends that, of the 13 counties in the recommended PGMA, it is unique by virtue of its overwhelming dependence on groundwater, that no other county approximates Cooke County's 80-percent groundwater use. Cooke County argues that, although the current four counties in the Upper Trinity GCD utilize Trinity Aquifer groundwater, they are primarily dependent on surface water. Thus, if Cooke County is added to a fee-funded GCD, Cooke County groundwater providers would bear a disproportionate share of GCD revenue as compared to the other four counties of Wise, Montague, Parker, and Hood.[32] Furthermore, Cooke County asserts that its ability to exert local control over its groundwater resources would be severely diminished as part of a five-county Upper Trinity GCD.

Cooke County notes Mr. Mills testified that Cooke County was among those counties in the proposed PGMA most capable of passing ad valorem taxes, based on its heavy groundwater

[32] Tr. at 31; see also Ex. ED-KM-2 at 12, 15, and 78.

use. Cooke County points out Mr. Mills also indicated that a Cooke County GCD could, by means of ad valorem taxes, raise $250,000 in revenue with a tax rate that would not be excessive.[33] Citing the ED's Report, Cooke County contends a tax rate of 0.015 per $100 assessed value would generate $250,000 in revenue per year for a Cooke County GCD.[34]

Cooke County is further opposed to combining Cooke County with Grayson and Fannin Counties in a three-county GCD. Cooke County notes that Grayson and Fannin Counties utilize Woodbine Aquifer groundwater, while Cooke County is solely dependent on Trinity Aquifer groundwater. Moreover, Cooke County asserts that Grayson and Fannin Counties are much less dependent on groundwater because of their large use of surface water.

F. City of Grand Prairie's, City of The Colony's, and GTUA's and Water Providers' Position[35]

City of Grand Prairie (Grand Prairie), City of The Colony (The Colony), and GTUA and Water Providers oppose the ED's recommendation to create one GCD for the eight counties that are not already in a GCD in the proposed PGMA. Just as Cooke County argues, these parties assert it would be extremely difficult for the board of directors of a single GCD to effectively manage and consider the local and unique needs of all groundwater users within the eight counties and for that GCD to establish a funding protocol that equitably considers the unique and varying uses of groundwater producers and users in the rural, urban, and suburban areas.[36] Instead, they contend that having more localized GCDs is, as Mr. Mills testified, an equally feasible and practicable approach to having a single, regional eight-county GCD.[37]

Grand Prairie, The Colony, and GTUA and Water Providers argue that the most feasible, economic, and practicable option for the protection and management of groundwater resources is

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[33] Tr. at 33 and 34.

[34] *See* Ex. ED-KM-2 at 77.

[35] GTUA is the spokesman for 27 water utilities, districts, and municipalities located in Cooke, Grayson, and Fannin Counties (Water Providers). GTUA and Water Providers are aligned with Bois D'Arc MUD.

[36] Ex. GTUA-1 at 10-11; Ex. GP-1 at 11.

[37] Tr. at 38-39.

to establish GCDs that are funded through well permitting and production fees.[38] However, they request that the Commission postpone the creation of any GCDs within the PGMA study area until the completion of the 2009 Legislative Session.

The Colony specifically requests the Commission establish a GCD that addresses the local and unique issues of it and Denton County. The Colony notes that 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.[39] The Colony points out it owns four groundwater wells capable of producing 5.7 million gallons of groundwater per day and has offered evidence of its intent to continue to use and develop additional groundwater resources in Denton County.[40] Lastly, The Colony asserts that, should the Legislature not have the first opportunity to create a GCD or be unable in the 2009 Legislative Session to create a GCD that includes Denton County, a GCD for Denton County should be created to allow for sufficient local input and control.

G. PIC's Position

The PIC recommends GCDs be created according to the ED's recommendations. The PIC notes Mr. Mills testified that creation of multi-county GCDs with boundaries based on aquifer occurrence or on other political-preference considerations would be considered feasible if sufficient fee revenue could be generated in the area to finance district operation and maintenance. However, Mr. Mills further stated that, having two, three, or more GCDs in the proposed PGMA would require that largely duplicative administrative and groundwater management programs be implemented and coordinated.[41] Pointing out that no evidence refutes the feasibility and practicality of the ED's suggested GCDs, the PIC recommends the ED's recommendations be adopted.

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[38] Ex. GTUA-1 at 11.

[39] Ex. ED-KM-2 at 74.

[40] Ex. TC-1 at 5-6.

[41] Ex. ED-3 at 22.

H. Judge's Analysis

The Judge recommends the Commission establish a single, regional, fee-funded GCD for the conservation and management of the Trinity and Woodbine Aquifers in the PGMA counties of Collin, Cooke, Dallas, Denton, Ellis, Fannin, Grayson, and Johnson. The Judge concurs with the ED's assertion that, based on the ability of the GCD to generate enough well production revenue to support its operations, a single, regional, fee-funded GCD represents the most feasible, economic, and practicable option for protection and management of the groundwater resources in the proposed PGMA area.

The evidence shows that none of the eight counties, standing alone, would be able to generate sufficient revenue through well production fees to adequately finance a GCD's resource management activities. A single, regional, multi-county GCD, however, would be able to adequately finance the GCD's activities. Mr. Mills testified that a GCD needs to generate $250,000 in revenue to finance groundwater management activities, and none of the eight counties has enough revenue from well production fees to generate the required $250,000.[42] Although many of the counties in the PGMA could finance GCD operation and maintenance activities through ad valorem taxes, the record indicates that the majority of the eight counties are heavily reliant on surface water, making it difficult for ad valorem taxes supporting GCDs to be approved by voters. As Mr. Mills testified, if a GCD is created with the funding mechanism of ad valorem taxes and that mechanism is then voted down, the GCD would be left with either no funding mechanism or inadequate funding through well production fees.[43]

The evidence further demonstrates that a single, regional GCD would eliminate repetitive costs for duplicative management and administrative programs and allow for economies of scale, thus reducing fiscal waste.[44] Even if multiple GCDs were created, they still would have to cooperate and work together to coordinate management of the groundwater resources. As expressed by Mr. Mills, a single, regional GCD would be able to apply the regulatory rules for

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[42] Tr. at 31-32; *See also* Ex. ED-KM-2 at 78, Table 15.

[43] Tr. at 45-46.

[44] *Id.* at 44.

management of the groundwater resources over the entire area; whereas several smaller GCDs would require higher levels of cooperation in the planning processes to protect the area's groundwater resources.[45]

The Judge concurs with the ED's response to Mount Peak and Sardis' assertion that Ellis and Johnson Counties should not be aligned with Dallas County because such an alignment would cause Dallas County to be unjustly represented in the GCD in relation to its groundwater use and fee support. The ED points out that, under Water Code § 36.0161(b)(2), the apportionment of directors appointed to a GCD shall be made by the Commission to reflect, as closely as possible, the proportion each county's estimated groundwater use bears to the sum of the estimated groundwater use for the entire GCD. In addition, pursuant to Water Code §36.1071(a)(8), each GCD that is created within a PGMA will be required to submit "desired future conditions of the groundwater resources," which means all GCDs within the PGMA will be required to work together. If a PGMA comprising the 13 counties is created, Dallas County, one of the counties comprising the PGMA, must be included in a GCD. The ED's recommendation of a single, regional multi-county GCD that includes Dallas County is the most practicable and feasible GCD for the eight remaining PGMA counties.

The Judge further agrees with the ED that Cooke County should not be placed in a single, stand-alone GCD. The ED's Report indicates that Cooke County would generate only $50,670 annual revenue from well production fees under the GCD creation rules authorized for use by the Commission, which is much less than the $250,000 needed to adequately manage a GCD.[46] Although Cooke County asserts that adequate financing could be obtained through a combination of well production fees and ad valorem taxes "with a tax rate that would not be excessive," or through the collection of fees on agricultural production, the Judge notes the evidence indicates that ad valorem taxes are difficult to pass through local initiatives. Cooke County also contends that a Cooke County GCD could raise approximately $500,000 in annual revenue with a fee structure similar to that of the Upper Trinity GCD. Cooke County's argument, however,

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[45] *Id.* at 45.

[46] *Id.* at 78.

is irrelevant because the Commission is not authorized to create a GCD with such a fee structure. Only the Legislature can do so.

For the above reasons, the Judge recommends the Commission create a single, regional GCD comprised of the PGMA counties of Collin, Cooke, Dallas, Denton, Ellis, Fannin, Grayson, and Johnson for the conservation and management of the Trinity and Woodbine Aquifers in North-Central Texas.

V. ADDITIONAL FACTS

In addition to the facts addressed in the preceding discussion, the Findings of Fact contained in the attached proposed order include other facts, established during the proceeding, that are necessary to show compliance with regulatory requirements applicable to this administrative process. Those additional facts are incorporated by reference into this proposal for decision.

VI. CONCLUSION

The Judge recommends the Commission adopt the attached proposed order finding that a PGMA should be designated over the counties of Collin, Cooke, Dallas, Denton, Ellis, Fannin, Grayson, Hood, Johnson, Montague, Parker, Tarrant, and Wise. The proposed order also finds that a single, regional, fee-funded GCD can effectively manage groundwater resources in the PGMA counties of Collin, Cooke, Dallas, Denton, Ellis, Fannin, Grayson, and Johnson; that the boundaries of the recommended single, regional GCD can provide for effective management of the Trinity and Woodbine Aquifers; and the single, regional GCD can be adequately funded to

finance the management planning, regulatory, and district-operation functions required under Chapter 36 of the Water Code.

SIGNED September 2, 2008.

Carol Wood

CAROL WOOD
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE

Figure 15. Regional GCD Recommendation

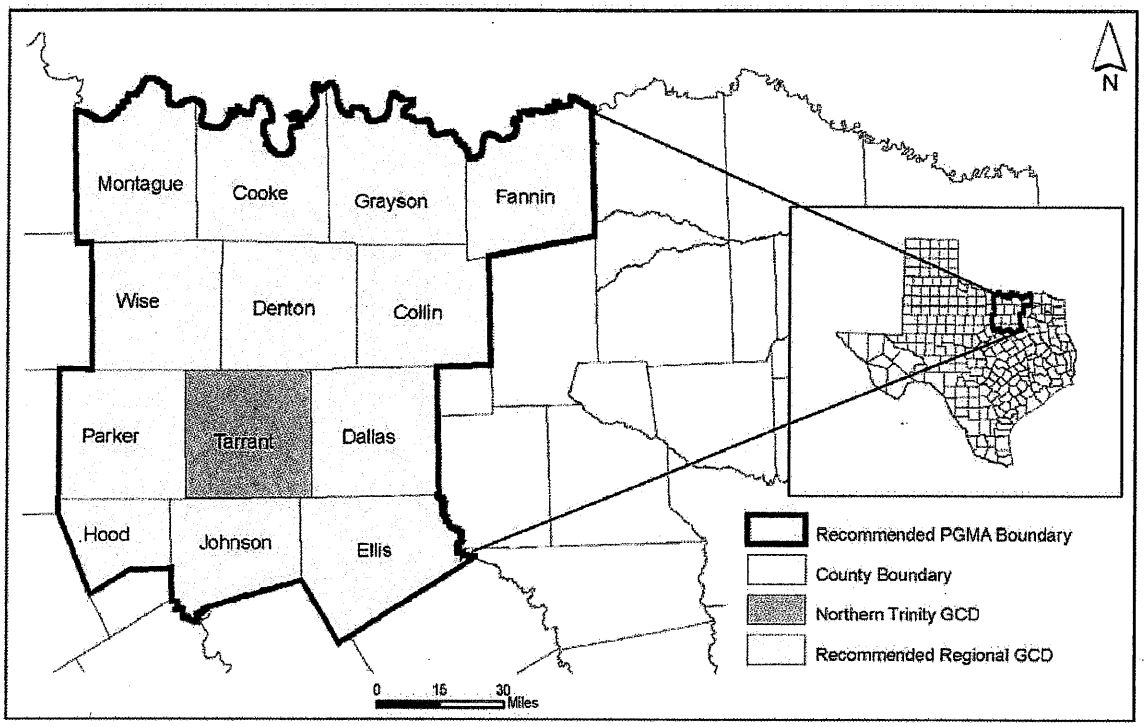
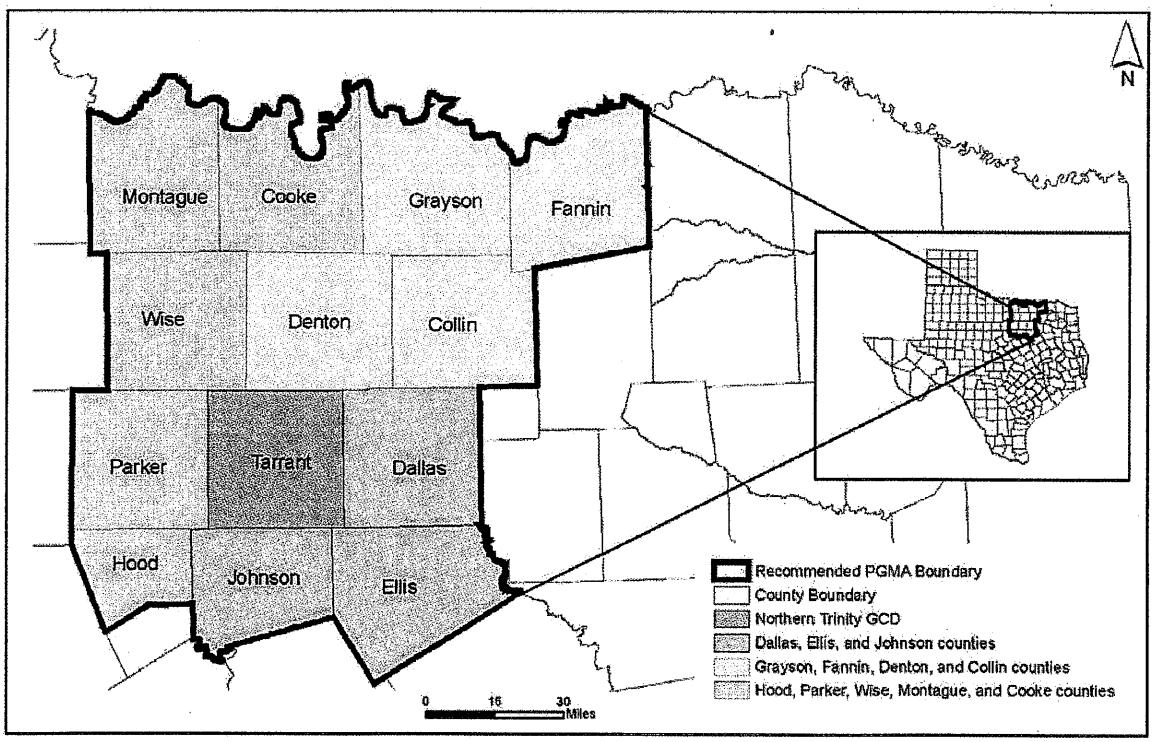


Figure 16. Alternative Recommendation for Three Multi-County GCDs



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

AN ORDER Designating the North-Central Texas - Trinity and Woodbine Aquifers - Priority Groundwater Management Area and Approving the Executive Director's Recommendation Regarding a Groundwater Conservation District in the Proposed Area; Docket No. 2007-1012-MIS

On _____, 2009, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the petition of the Executive Director (ED) for designation of the North-Central Texas – Trinity and Woodbine Aquifers – Priority Groundwater Management Area (PGM) and the ED's recommendations for creation of a groundwater conservation district (GCD) in the PGMA. The petition was presented to the Commission with a proposal for decision by Carol Wood, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH).

After considering the ALJ's proposal for decision and the evidence and arguments presented, the Commission makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. In 1990, the Executive Director (ED) wrote a report concerning critical area designation and management strategies for groundwater protection in Collin, Cooke, Dallas, Denton, Ellis, Fannin, Grayson, Hood, Hunt, Jack, Johnson, Kaufman, Montague, Navarro, Parker, Rockwall, Tarrant, and Wise Counties.

2. As a result of the 1990 report, the area was not recommended for PGMA designation; rather, TCEQ was to monitor the area.

3. In 1998, the ED reinitiated the study and requested reports from the Texas Water Development Board (TWDB) and Texas Parks & Wildlife Department (TPWD). TWDB and TPWD prepared reports and sent them to the ED in 1999.

4. The ED postponed the updated study effort until the 2001-2002 regional and state water planning cycles were completed.

5. On July 26, 2005, the ED sent notice of the initiation of the study to approximately 1,200 stakeholders in the study area. Those stakeholders included area legislators, planning entities, county officials, municipalities, river authorities, groundwater conservation districts, water districts, entities supplying public drinking water, agricultural interest groups, selected federal and state agencies, and environmental interest groups.

6. The ED mailed notice of its draft report, "Updated Evaluation for the North Central Texas – Trinity and Woodbine Aquifers – Priority Groundwater Management Study Area" (the Report), to the same stakeholder group in December 2006.

7. Notice of the ED's final report was sent to the same stakeholders and placed in the *Texas Register*. Copies of the report were placed in libraries and public places in the 20-county study area and, in the proposed PGMA 13-county area, copies were placed in the county clerks' offices.

8. Notice of the hearing was mailed on September 11, 2007, to all stakeholders, governing bodies of each county, adjacent GCDs, river authorities, municipalities, water authorities or other entities that supply public drinking water, each holder of a certificate of convenience and necessity, and irrigation districts in the proposed PGMA.

9. On October 23, 2007, a preliminary hearing was conducted in Fort Worth, Texas, by Carol Wood, a SOAH ALJ.

10. The following were designated as parties to the proceeding: the ED, the Commission's Public Interest Counsel (PIC), the Greater Texoma Utility Authority (GTUA) and a coalition of 27 retail public utilities located in Grayson, Cooke, and Fannin Counties (Water Providers), Bois D'Arc Municipal Utility District (MUD), Marilee Special Utility District (SUD), Mustang SUD, City of Grand Prairie, the aligned parties of Cooke County, Woodbine Water Supply Corporation (WSC), Kenneth Klement, Era WSC, City of The Colony, JEMcCombs Real Estate Ltd., Aqua Texas, Hillwood Properties, City of Bridgeport, North Hunt WSC, Sardis-Lone Elm WSC, Mountain Peak SUD, and Malone Water Service. JEMcCombs Real Estate Ltd., Aqua Texas, Hillwood Properties, City of Bridgeport, and Malone Water Service were later withdrawn as parties upon their request.

11. The ALJ granted a unanimous request made by the interested parties to waive the statutory requirement to complete the hearing process within 75 days of the notice of the hearing and to waive the statutory requirement to hold the hearing in a county within the study area.

12. On May 13, 2008, the hearing on the merits was held in Austin, Texas.

13. From 2000 to 2030, the population of the 20-county study area is projected to increase from over 5.5 million people to almost 9.5 million people.

14. Demand for water in the study area is projected to increase from 1.35 million acre-feet used in 2000, to 1.85 million acre-feet in 2010, to 2.46 million acre-feet of water by 2030.

15. Declines in water level, including the associated reduction in artesian pressure caused by the removal of water from aquifer storage, is a regional groundwater problem that was reported in the ED's 1990 critical area study and remains a significant groundwater problem today.

16. Over 200 water-user groups in the study area anticipate the continued use of the Trinity and Woodbine Aquifer supplies at present levels, and most are planning to drill supplemental or replacement wells to maintain their supply. Increased reliance on the Trinity and Woodbine Aquifers has also been recommended as a strategy for many water-user groups in the study area. Forty-one water-user groups plan to overdraft the Trinity Aquifer through at least 2010 and plan to add new wells or increase well production as a regional water planning strategy. Similarly, 23 water-user groups plan to overdraft the Woodbine Aquifer, increase well production, and add new wells in the area.

17. Thirty-three water-user groups in the study area have plans to reduce reliance on the Trinity and Woodbine Aquifers. Overall, however, their strategies, collectively, will result in a higher collective groundwater demand through 2010 for both aquifers and, through 2030, a higher groundwater demand for the Woodbine Aquifer. By 2020, the reduced Trinity Aquifer use strategies are projected to offset the new, increased aquifer use strategies.

18. More groundwater is currently being withdrawn than is effectively being recharged to the aquifers in the North-Central Texas PGMA study area.

19. Historically, pumpage in the study area has exceeded effective recharge, resulting in declining water levels, removal of water from aquifer storage, and possible deterioration of chemical quality.

20. The "Assessment of Groundwater Use in the Northern Trinity Aquifer Due to Urban Growth and Barnett Shale Development" (Barnett Shale Report) was prepared because TWDB was concerned about the effects of growth and gas exploration on groundwater resources in the area. These effects were not considered in the regional water plans.

21. Barnett Shale water use and demand projections may exacerbate overdraft conditions in the study area and push other areas into overdraft situations.

22. "Safe supply" is an estimate of groundwater availability determined by the regional water planning groups.

23. In the Region C Water Plan, the estimated safe supply of groundwater is generally defined as the amount of groundwater available for use with acceptable long-term impacts to water levels.

24. In the Region B Water Plan, the safe supply for municipal and manufacturing user groups is defined as 120 percent of the projected demand.

25. Water-user groups in Ellis, Johnson, and Tarrant Counties, collectively, are using the Trinity Aquifer at quantities over regional water planning group estimates for the safe supply for each county.

26. Water-user groups in Collin, Cooke, Dallas, Denton, Fannin, Grayson, Hood, Parker, and Wise Counties are using the Trinity Aquifer at quantities near each county's estimated safe supply.

27. Water user groups in Fannin and Johnson Counties, collectively, are using the Woodbine Aquifer at quantities over regional water planning group estimates for the safe supply for each county.

28. Groundwater use can decrease groundwater reserves, which impacts the springs, which in turn impacts species that rely on surface water. Long-term decreases in groundwater can exacerbate water quality and impact these species.

29. Designation of the area as a PGMA could lead to more efficient use of existing water resources of the area.

30. Collin, Cooke, Dallas, Denton, Ellis, Fannin, Grayson, Hood, Johnson, Montague, Parker, Tarrant, and Wise Counties are experiencing, or are expected to experience, critical groundwater problems in the next 25 years.

31. Delta, Hunt, Kaufman, Lamar, Navarro, Red River, and Rockwall Counties are not experiencing critical groundwater problems, nor are they expected to experience critical groundwater problems within the next 25 years.

32. The single county Northern Trinity GCD was created by the 80th Texas Legislature to cover Tarrant County and became effective June 15, 2007.

33. The Upper Trinity GCD comprised of Hood, Montague, Parker, and Wise Counties was created effective September 1, 2007, and confirmed by the voters on November 6, 2007.

34. No GCDs cover the eight counties of Collin, Cooke, Dallas, Denton, Ellis, Fannin, Grayson and Johnson recommended for inclusion in the PGMA.

35. No federal or state agencies have the authority to regulate groundwater in this area, and local governments cannot provide the type of groundwater regulation required to protect these resources.

36. GCDs are statutorily charged and authorized to manage groundwater resources within their jurisdiction. GCDs have many permissive powers, such as enacting rules requiring well permits, regulating spacing of wells, and transferring groundwater out of the districts.

37. GCDs are required to adopt management plans and to cooperate in joint planning with other GCDs in a Groundwater Management Area (GMA), including determining "desired future conditions" for the aquifers in the GMA.

38. Management through GCDs is the best management option for the 13 counties in the PGMA.

39. GCDs are the preferred method of groundwater management in the State.

40. A GCD must generate revenue, usually though a property tax or from well production fees.

41. The feasibility of a GCD is dependent upon many factors, including the size and total tax base of the GCD, the quantity of water that is subject to production fees, and the scale and scope of the programs undertaken by the GCD.

42. Creation of GCDs in the PGMA is feasible and practicable.

43. A minimum of $250,000 in revenue must be generated annually to operate a GCD and to fund meaningful groundwater management programs.

44. Under Chapter 36 of the Texas Water Code, a GCD may not levy a tax at a rate exceeding 50 cents per $100 assessed valuation to pay for maintenance and operating expenses.

45. Neither Cooke County nor Fannin County can generate tax revenue to support a single-county GCD if the rate is less than $0.01 per $100 valuation.

46. Cooke County would need to have a tax rate of .01526 per $100 and Fannin County would need a tax rate of .02637 of assessed property valuation to generate $250,000.

47. Cooke County would be able to generate only $50,670 annual revenue from well production fees under the GCD creation rules authorized for use by the Commission.

48. None of the eight counties in the PGMA study area without a GCD would be able to generate sufficient revenue through well production fees to adequately finance single-county GCD resource management activities.

49. Although many of the counties in the PGMA could finance GCD groundwater management activities through ad valorem taxes, the majority of the eight counties in the PGMA study area without a GCD are heavily reliant on surface water, making it difficult for ad valorem taxes supporting GCDs to be approved by voters.

50. If a GCD is created with the funding mechanism of ad valorem taxes and that funding mechanism is voted down, the GCD would be left with either no funding mechanism or inadequate funding through well production fees.

51. A single, regional GCD in the eight remaining PGMA counties of Collin, Cooke, Dallas, Denton, Ellis, Fannin, Grayson and Johnson is the most feasible, economic, and practicable option for protection and management of the groundwater resources.

a. A single, regional GCD would avoid costs for duplicative management and administrative groundwater management programs and would allow for economies of scale, thus reducing fiscal waste.

b. A single, regional GCD would cover the largest area of the aquifers.

c. A single, regional GCD would be able to apply the regulatory rules for management of the groundwater resources over the entire area.

d. A single, regional GCD would be able to adequately finance the GCD's resource management activities.

e. Local committees could be established for localized input.

52. Dallas County, one of the 13 counties comprising the PGMA study area and a county heavily reliant on surface water, must be included in a GCD.

53. A single, regional multi-county GCD that includes Dallas County is the most practicable and feasible GCD for the eight counties in the PGMA without a GCD.

CONCLUSIONS OF LAW

1. Pursuant to TEX. WATER CODE (Water Code) § 35.008(a), the Commission has authority to designate a PGMA in the North-Central Texas—Trinity and Woodbine Aquifers area.

2. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE (Gov't Code) Chapter 2003 and Water Code § 35.008.

3. Based on the Findings of Fact, the hearing on the ED's petition to designate the North-Central Texas – Trinity and Woodbine Aquifers – PGMA was conducted in accordance with Chapter 35 of the Water Code and the Commission's and SOAH's applicable procedural rules.

4. According to Water Code § 35.007(a), a PGMA is an area of the state that is experiencing or expected to experience, within the immediately following 25-year period, critical groundwater problems, including shortages of surface water or groundwater, land subsidence resulting from groundwater withdrawal, and contamination of groundwater supplies.

5. Pursuant to Section 35.007(a) of the Water Code, exceeding or approaching the groundwater "safe supply" estimates provided by the regional and state water planning groups denotes a shortage of groundwater and indicates that critical groundwater problems are occurring.

6. Based on the Findings of Fact, Collin, Cooke, Dallas, Denton, Ellis, Fannin, Grayson, Hood, Johnson, Montague, Parker, Tarrant, and Wise Counties are experiencing or are expected to experience, within the immediately following 25-year period, critical

groundwater problems, including shortages of surface water or groundwater, land subsidence resulting from groundwater withdrawal, and contamination of groundwater supplies and should be designated a PGMA.

7. Based on the Findings of Fact, Delta, Hunt, Kaufman, Lamar, Navarro, Red River, and Rockwall Counties are not experiencing and are not expected to experience, within the immediately following 25-year period, critical groundwater problems, including shortages of surface water or groundwater, land subsidence resulting from groundwater withdrawal, and contamination of groundwater supplies and should not be designated a PGMA.

8. Water Code § 35.008(b) requires the Commission to recommend a GCD that is both feasible and practicable.

9. Based on the Findings of Fact, creation of a single, regional GCD covering Collin, Cooke, Dallas, Denton, Ellis, Fannin, Grayson and Johnson Counties is feasible and practicable.

ORDER

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY THAT:

1. The North-Central Texas – Trinity and Woodbine Aquifers PGMA be created to cover Collin, Cooke, Dallas, Denton, Ellis, Fannin, Grayson, Hood, Johnson, Montague, Parker, Tarrant, and Wise Counties.

2. Upon this Order becoming final, the ED shall commence proceedings, to be completed within two years, for the creation of a single, multi-county GCD over Collin, Cooke, Dallas, Denton, Ellis, Fannin, Grayson and Johnson Counties, unless a GCD is created by landowners in the area, by counties in the area, or by the Texas Legislature.

3. All other motions, requests for entry of specific findings of fact or conclusions of law, and any other requests for general or specific relief not expressly granted herein are hereby DENIED for want of merit.

4. The effective date of this Order is the date the Order is final in accordance with Gov't Code § 2001.144.

5. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any portion shall not affect the validity of the remaining portions of the Order.

Issue Date:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

_____

Buddy Garcia
Chairman