

KEMP SMITH LLP

ATTORNEYS AT LAW

816 CONGRESS AVENUE, SUITE 1150 | AUSTIN, TEXAS 78701-2443
512.320.5466 | FAX 512.320.5431 | www.kempsmith.com

ANDREW S. MILLER
ENVIRONMENTAL, ADMINISTRATIVE & PUBLIC LAW DEPARTMENT
BOARD CERTIFIED, ADMINISTRATIVE LAW
TEXAS BOARD OF LEGAL SPECIALIZATION
dmiller@kempsmith.com

August 18, 2008

VIA HAND DELIVERY

Ms. LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
P.O. Box 13087, MC-105
Austin, Texas 78711-3087

2008 AUG 18 PM 4: 33
CHIEF CLERKS OFFICE
TEXAS COMMISSION
ON ENVIRONMENTAL
QUALITY

RE: TRINITY AQUIFER PRIORITY GROUNDWATER MANAGEMENT AREA
SOAH DOCKET NO. 582-08-1502
TCEQ DOCKET NO. 2008-0099-MIS

Dear Ms. Castañuela:

Please find enclosed the original and twelve copies of the McLennan County Groundwater Conservation District's Exceptions to the Proposal for Decision for filing in the above-referenced matter.

Please return a file-stamped copy with the person delivering this. Thank you for your assistance on this matter.

Sincerely,

KEMP SMITH LLP



By:

Andrew S. "Drew" Miller

DM:legr
Enclosures

SOAH DOCKET NO. 582-08-1502
TCEQ DOCKET NO. 2008-0099-MIS

TRINITY AQUIFER PRIORITY § BEFORE THE STATE OFFICE
GROUNDWATER § OF
MANAGEMENT § ADMINISTRATIVE HEARINGS
AREA §

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TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

McLENNAN COUNTY GROUNDWATER CONSERVATION DISTRICT'S
EXCEPTIONS TO THE PROPOSAL FOR DECISION

The McLennan County Groundwater Conservation District ("McLennan District") respectfully submits these exceptions to the Proposal for Decision ("PFD") issued by the Administrative Law Judge ("ALJ") on July 28, 2008:

The McLennan District is a groundwater conservation district ("GCD") created by the Texas Legislature in 2007 and charged with regulating and managing groundwater withdrawals within McLennan County, Texas.¹ The McLennan District was designated as a party to and has participated in this proceeding.²

The goals of the McLennan District in this proceeding are to seek to insure that any decision or recommendation arising from this proceeding not hinder the progress being made by the McLennan District nor conflict with the expressed intent of the Texas Legislature with regard to the McLennan District.

The McLennan District files these exceptions on three issues as follows:

- The McLennan District does not oppose the creation of a PGMA or argue that the creation of a PGMA would be unreasonable.

¹ Testimony of Director S. Radcliffe; *see also* TEX. SPEC. DIST. CODE ANN. § 8821.001-.201 (Vernon 2008) (Exhibit McL-1).

² Order No. 1 (Prehearing Order).

- The Commission’s order should make clear that the Commission will not interfere with or frustrate the 2012 deadline established by the Texas Legislature for the McLennan District to be confirmed at a confirmation election.
- The Commission’s order should expressly address the scenario that *either* the McLennan District *or* the Tablerock Groundwater Conservation District (“Tablerock District”) is confirmed.

1. The McLennan District does not oppose the creation of a PGMA or argue that the creation of a PGMA would be unreasonable.

The PFD states that the McLennan District “argued that the designation of a PGMA for the five-county region would be unreasonable.”³ The PFD is mistaken. The McLennan District remained “neutral on the question of whether a [PGMA] ought to be designated for the five-county region proposed by [TCEQ].”⁴

The McLennan District argued that staff’s recommendation *to create a five-county GCD and that the proposed GCD board of directors be comprised of one director from each county* was unreasonable because it would place an oversized burden of maintaining a large GCD upon the citizens of McLennan County while giving them an undersized role in the governance and policy-making decisions of the GCD.⁵ This argument is completely different from an argument that *the designation of a PGMA* for the five-county region would be unreasonable – an argument that the McLennan District has not made.

³ PFD at 10.

⁴ McLennan County Groundwater Conservation District’s Closing Argument at 1.

⁵ McLennan County Groundwater Conservation District’s Proposed Findings of Fact and Conclusions of Law at 3.

2. The Commission's order should make clear that the Commission will not interfere with or frustrate the 2012 deadline established by the Texas Legislature for the McLennan District to be confirmed at a confirmation election.

a. The Texas Legislature has given the McLennan District until September 1, 2012, to achieve confirmation.

The McLennan District's enabling legislation (its organic act), passed in 2007, expressly allows the McLennan District to hold a confirmation election and be confirmed *anytime prior to September 1, 2012*.⁶ (The Legislature has established the same September 1, 2012, deadline for confirmation of the Tablerock GCD.⁷) Thus, the Texas Legislature has expressed its clear intent that the McLennan District will have five years from the passage of its enabling legislation to achieve confirmation.

Because this deadline is important and affects how the Commission may and should proceed in this matter, the Commission should include an additional conclusion of law in its order (*see* page 11 of the draft order) which states as follows:

7. The enabling legislation of the McLennan District and the Tablerock District allow those districts to have until September 1, 2012, to be confirmed at a confirmation election.

b. The draft order is silent regarding *when* the Commission will initiate or take action to create, or add territory to, a district or districts within the PGMA.

The draft order submitted to the Commission by the ALJ would create a PGMA covering Bosque, McLennan, Coryell, Hill and Somervell Counties.⁸ The draft order also

⁶ TEX. SPEC. DIST. CODE ANN. § 8821.003(a) (Vernon 2008) (Exhibit McL-1).

⁷ *See* TEX. SPEC. DIST. CODE ANN. § 8823.003 (Vernon 2008).

⁸ Draft order at 11.

recommends certain actions regarding the creation of, or the addition of territory to, a district or districts within the PGMA given two scenarios as follows:

5. If elections do not confirm McLennan County GCD and Tablerock GCD, the most practicable and feasible option for the five county PGMA is one GCD that covers all five counties.
6. Because two GCDs, McLennan County and Tablerock GCD, have been legislatively created in the PGMA, and both GCDs are required to add a county, if both GCDs are confirmed, the most practicable and feasible option for GCD creation is two CGDs. One GCD would consist of Bosque, Somervell, and Coryell Counties and the other would consist of McLennan and Hill Counties.⁹

The draft order is silent, however, with regard to exactly **when** it may or should be determined whether these groundwater districts have been confirmed (or not) with respect to these further recommended actions (*i.e.*, the creation or expansion of a district or districts) and **when** such recommended actions might be taken or put into effect.

Among other potential actions, an action to create a district covering all five counties within the PGMA, if taken prior to September 1, 2012, would be contrary to the intent of the Texas Legislature as expressed via the language of the McLennan District's enabling legislation, which allows the McLennan District to be confirmed anytime before September 1, 2012. Accordingly, the Commission should not make any determination regarding whether either the McLennan District or the Tablerock GCD has been confirmed, and should not take or initiate action to create any districts – and, in particular, a five-county district – within the PGMA until the legislatively-established September 1, 2012, deadline for confirmation of those districts has passed.

⁹ *Id.*

- c. **The draft order should be revised to make it clear that no action will be taken regarding the creation of, or the adding of territory to, a district or districts within the PGMA until the deadline for the existing districts to achieve confirmation has passed.**

The draft order should be revised to make clear that the Commission is accommodating and respecting (and will not act to frustrate) the Legislature's September 1, 2012, confirmation deadlines for the districts that have been legislatively created within the PGMA. The addition of the following language in the order, indicated by underscoring (*see* draft order at 11), will insure that the Legislature's September 1, 2012, confirmation deadlines are being respected:

5. If elections do not confirm McLennan County GCD and Tablerock GCD by September 1, 2012, the most practicable and feasible option for the five county PGMA is one GCD that covers all five counties.
6. Because two GCDs, McLennan County and Tablerock GCD, have been legislatively created in the PGMA, and both GCDs are required to add a county, if both GCDs are confirmed by September 1, 2012, the most practicable and feasible option for GCD creation is two CGDs. One GCD would consist of Bosque, Somervell, and Coryell Counties and the other would consist of McLennan and Hill Counties.

- d. **The Commission's order should expressly decline to adopt that portion of the PFD that recommends a two-year timetable from the designation of the PGMA for further actions regarding districts in the PGMA**

While the draft order is silent on the question of *when* the Commission may create a groundwater conservation district covering all five counties (or take other actions creating or adding territory to a district or districts) within the PGMA, the PFD speaks to this issue.

The McLennan District had argued to the ALJ that the Commission should not take such action or actions until after the September 1, 2012, deadline for the existing districts to achieve confirmation. In rejecting this request, the ALJ adopted the Executive Director's recommendation that "[t]he Commission should set a timetable of two years" after which certain actions regarding the creation of a district or the adding of territory to a district (or districts) may be taken depending on whether various conditions are met.¹⁰

The problem with the two-year timetable is as follows: Under that timetable, if the PFD is adopted and the draft order designating the PGMA is issued in September of 2008, then a district covering all five counties may be created (or territory may be added to a district or districts) within the PGMA in as early as September of 2010. September of 2010 is two full years before the expiration of the deadline set by the Texas Legislature for the McLennan District to achieve confirmation at a confirmation election. If the Commission takes action to create or add territory to a district or districts within the PGMA prior to September 1, 2012, that would interfere with and frustrate that deadline and the express intent of the Texas Legislature – to allow the McLennan District five years from its creation to achieve confirmation by a confirmation election.

In order to avoid interfering with or frustrating the express intent of the Texas Legislature in this manner, the Commission's order should expressly decline to adopt that portion of the PFD that recommends a two-year timetable between the date that the PGMA is designated and the creation of, or the addition of any territory to, any groundwater district or districts within the PGMA. To that end, the following language may be inserted into the order (*see* draft order at 11):

¹⁰ PFD at 14.

8. The Commission declines to adopt a two-year timetable between the designation of the PGMA and the creation of any new district or districts, or the expansion of any district or districts, within the PGMA.
- e. **To the extent the McLennan District's enabling legislation conflicts with TEX. WATER CODE ANN. § 35.012(b), the McLennan District's enabling legislation must prevail.**

The ED had argued that Chapter 35 of the Water Code obligates the Commission to create one or more new groundwater districts, recommend the designation of a PGMA to existing districts, or take a combination of those actions, *within two years* of the designation of the PGMA.”¹¹

It is an established rule of statutory construction that a special or local statutory provision is to prevail over a general statutory provision.¹² The McLennan District's enabling legislation is both a special and a local statutory provision.¹³ On the other hand, Chapter 35 of the Water Code is a general statute with statewide applicability. Accordingly, to the extent that the Legislature's decision to allow the McLennan District to have until September 1, 2012, to achieve confirmation conflicts with the two-year timeframe set forth in TEX. WATER CODE ANN. § 35.012(b), the Legislature's decision to allow the McLennan District to have until September 1, 2012, to achieve confirmation must be given primacy over § 35.012(b). The two-year timeframe in TEX. WATER CODE ANN. § 35.012(b) may not be used to supercede and frustrate the Texas Legislature's

¹¹ PFD at 12 (emphasis in original) (*citing* TEX. WATER CODE ANN. § 35.012(b); see also Executive Director's Response to Closing Arguments and McLennan County GCD's Proposed Findings of Fact and Conclusions of Law at 2. The PFD also notes that the ED made clear that it would discharge this duty “after 2009 but before 2012.” PFD at 12-13.

¹² See TEX. GOV'T CODE ANN. § 311.026 (Vernon 2005) (Code Construction Act); see also *Mitchell v. City of Dallas*, 855 S.W.2d 741, 747 (Tex. App.—Dallas 1993), *aff'd*, 870 S.W.2d 21 (Tex. 1994) (stating rule that when two statutes conflict, the specific controls over the general).

¹³ See TEX. CONST. art. XVI, § 59(e); *Vincent v. State*, 235 S.W. 1084, 1086 (Tex. 1921).

expressed intent to give the McLennan District until September 1, 2012, to achieve confirmation.

Although a primary goal of the PGMA designation process is to bring about timely and effective management of groundwater resources through the creation of GCDs within a designated PGMA, there is a risk that this PGMA process could have the *reverse effect* of creating inefficiency and delay with respect to groundwater regulation in McLennan County. Any GCD recommendations emerging from this PGMA process should not undermine the progress being made by the McLennan District.

The ED, in opposing the McLennan's District's request that the Commission not take any actions to create, or add territory to, a district or districts within the PGMA until after September 1, 2012, was (in the words of the ALJ) "unwilling to give the districts the greatest amount of latitude about the timing of their confirmation elections."¹⁴ Under the principle regarding the reconciliation of potentially conflicting statutes set forth above, however, the districts should be given *exactly* the amount of latitude regarding the timing of its confirmation elections that has been given to them by the Legislature – no more, no less.

3. The Commission's order should expressly address the scenario that *either* the McLennan District *or* the Tablerock District are confirmed.

The McLennan District had argued to the ALJ that the recommendation of two GCDs in the PGMA should not depend on **both** GCDs being confirmed. The ED acceded to this view. As the PFD notes, the ED and the McLennan District agree "that the alternative recommendation of two groundwater districts should not depend on

¹⁴ PFD at ___.

whether the two existing districts are confirmed.”¹⁵ However, the draft order does not expressly provide a recommendation in the case that *either* the McLennan District *or* the Tablerock District are confirmed. The following language (*see* draft order at 11) would address that situation in a manner that is consistent with the position taken by the parties:

6. Because two GCDs, McLennan County and Tablerock GCD, have been legislatively created in the PGMA, and both GCDs are required to add a county, if either or both GCDs are confirmed . . . the most practicable and feasible option for GCD creation is two CGDs. One GCD would consist of Bosque, Somervell, and Coryell Counties and the other would consist of McLennan and Hill Counties.

Conclusion

For the reasons stated above, the following language should be added to the Commission’s order in this proceeding (*see* draft order at 11):

5. If elections do not confirm McLennan County GCD and Tablerock GCD by September 1, 2012, the most practicable and feasible option for the five county PGMA is one GCD that covers all five counties.
6. Because two GCDs, McLennan County and Tablerock GCD, have been legislatively created in the PGMA, and both GCDs are required to add a county, if either or both GCDs are confirmed by September 1, 2012, the most practicable and feasible option for GCD creation is two CGDs. One GCD would consist of Bosque, Somervell, and Coryell Counties and the other would consist of McLennan and Hill Counties.
7. The enabling legislation of the McLennan District and the Tablerock District allow those districts to have until September 1, 2012, to be confirmed at a confirmation election.
8. The Commission declines to adopt a two-year timetable between the designation of the PGMA and the creation of

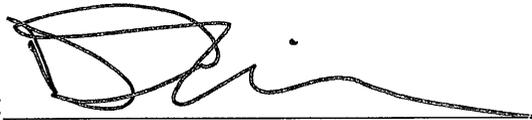
¹⁵ *Id.* at __.

any new district or districts, or the expansion of any district or districts, within the PGMA.

Respectfully submitted,

KEMP SMITH LLP
816 Congress, Suite 1150
Austin, Texas 78701
(512) 320-5466
(512) 320-5431 (FAX)

By: _____



Hunter Burkhalter
State Bar No. 00783758
Andrew S. "Drew" Miller
State Bar No. 00786857

ATTORNEY FOR McLENNAN
COUNTY GROUNDWATER
CONSERVATION DISTRICT

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has been sent via facsimile or first-class mail on this 18 day of August, 2008, to the following:

Judge Paul D. Keeper
State Office of Administrative Hearings
300 West 15th Street, Suite 502
Austin, Texas 78701
Phone: (512) 475-4993
Fax: (512) 475-4994
Carmen.montalvo@soah.state.tx.us

Robin Smith, Attorney
Texas Commission on Environmental
Quality
Environmental Law Division, MC-173
P.O. Box 13087, MC-103
Austin, Texas 78711-3087
Phone: (512) 239-0463
Fax: (512) 239-0606

Blas Coy/Eli Martinez
Texas Commission on Environmental
Quality
Office of the Public Interest Counsel
P.O. Box 13087, MC-103
Austin, Texas 78711-3087
Phone: (512) 239-6363
Fax: (512) 239-6377

Cole Ward, County Judge
P.O. Box 647
Meridian, Texas
Phone: (254) 435-2382
Fax: (254) 435-2152

Docket Clerk
Texas Commission on Environmental
Quality
Office of the Chief Clerk
P.O. Box 13087, MC-105
Austin, Texas 78711-3087
Phone: (512) 239-3300
Fax: (512) 239-3311

John Firth, County Judge
1704 Freedom Lane
Copperas Cove, Texas 76522
Phone: (254) 865-5911 ext. 222
Fax: (254) 865-2040

Justin W. Lewis, County Judge
P.O. Box 457
Hillsboro, Texas 76645
Phone: (254) 582-4020
Fax: (254) 582-4028

Patricia Coy, Attorney
P.O. Box 547
Clifton, Texas 76634
Phone: (254) 675-8663
Fax: (254) 675-8663

Lloyd Wirt, County Commissioner
P.O. Box 28
Glen Rose, Texas 76043
Phone: (254) 897-2206
Fax: (254) 897-7703

Ned Meister
Texas Farm Bureau
P.O. Box 2689
Waco, Texas 76702
Phone: (254) 751-2457
Fax: (254) 751-2671

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CHIEF CLERKS OFFICE
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Charlotte Miller
975 Anderson Lane
McGregor, Texas 76557
Phone: (254) 723-0337
Fax: (254) 840-2897

Jeffrey Martin Hewlett
10370 Highway 6
Meridan, Texas 76665
Phone: (254) 717-2022

David Freeman
620 E. Main Street
Gates Ville, Texas 79528
Phone: (254) 865-5911 ext. 221
Fax: (254) 865-2040

Ricky Young
U.S. Army Garrison – Fort Hood
DPW Environmental Division
(IMWE-80D-TWE)
4219 77th Street
Fort Hood, Texas 76544-5028



Andrew S. "Drew" Miller