

TCEQ Docket No. 2022-0299-MIS

PETITION FOR INQUIRY) BEFORE THE
)
FILED BY) TEXAS COMMISSION ON
)
CURTIS CHUBB) ENVIRONMENTAL QUALITY

**POST OAK SAVANNAH GROUNDWATER CONSERVATION DISTRICT'S
RESPONSE TO THE PETITION FOR INQUIRY FILED BY CURTIS CHUBB**

INTRODUCTION

The Post Oak Savannah Groundwater Conservation District ("District")¹ has, from its inception long before the decisions in the Day and the Bragg² cases and the more recent amendments of *Section 36.002, Texas Water Code*,³ "...emphasized the fact that conserving and protecting the aquifers requires actual management of the aquifers to realize the benefits and values of the resource, and the rights of the owners of the water on an on-going basis, while assuring the aquifers are a viable resource for not only a planning period of fifty years but thereafter into the future."⁴ The District has accomplished, and does accomplish, its goals and duties to conserve and protect the aquifers by adopting and enforcing Rules and a Management Plan that secure the ability of the District to manage water production and the aquifers, protect the property rights of landowners and provide water for the State of Texas, and the State needs groundwater that can be produced on a sustainable basis without damage to or depletion of the aquifers. The owners of land that overlie an aquifer are entitled to an equitable share of the water that can be produced from the aquifer underlying their property on a long-term and sustainable basis without damage to or impairment of the aquifers. Unfortunately, in Dr. Curtis Chubb's ("Petitioner" or "Chubb") case, while he owns land, he does

¹ Sec. 36.001, Texas Water Code, defines district as follows: "District" means any district or authority created under Section 52, Article III, or Section 59, Article XVI, Texas Constitution, that has (lie authority to regulate the spacing of water wells, the production from water wells, or both. [Emphasis Added]

² Edwards Aquifer Authority v. Dav (Tex. 2012) 369 SW 3rd 814; Edwards Aquifer Authority v. Bragg (CA San Antonio 2013) 421 SW 3rd 118.

³ In pertinent part, *Sec. 36.002, Texas Water Code*, (a) The legislates recognizes that a landowner owns the groundwater below the surface of the landowner's land as real property. [Emphasis Added]

(b) The groundwater ownership and rights described by this section:

(1) entitle the landowner to drill for and produce die groundwater below the surface of real property ... without causing waste or malicious drainage of other property or negligently causing subsidence ...

(c) Nothing in this code shall be construed as granting the authority to deprive or divest a landowner ... of the groundwater ownership and rights described by this section.

(d) This section does not: ...

(2) affect the ability of a district to regulate groundwater production as authorized under Section 36.113, 36.116, or 36.122 or otherwise under this chapter or a special law governing a district; [Emphasis Added]

⁴ See: Exhibit "A" presented by Gary Westbrook, General Manager, at die University of Texas School of Law, 2014 Texas Water Law Institute, November 21,2014.

not own any of the water that may underlie his property.⁵ The District continues to view its mission as being one to protect and conserve the aquifers by actively and actually managing the aquifers and production in a manner to avoid harm to the aquifers, sustain the long-term viability and production of the aquifers, *and* allow those landowners whose water rights are retained to benefit from the long-term availability of a sustainable supply of groundwater.

As he has in the past, Petitioner continues to refuse to understand the purpose of the MAG and the fact that it is the estimated production, which is based on a model prediction that is known to be inaccurate, that can be produced every year over a period of 50 years to accomplish the Desired Future Conditions (DFCs). Petitioner simply disagrees with the District's approach of permitting the production of groundwater subject to the reserved authority to limit and decrease the volume of permitted production as more landowners seek production permits, production otherwise increases, or monitoring of actual groundwater levels evidences that authorized production should be limited to benefit the aquifer or assure the long-term sustainable yield of the aquifer is accurate. While the tone of this response is appropriately firm and direct, the Board and Staff of the District continue to encourage all stakeholders to participate in and provide comments on any and all management strategies and Rules of the District, and this response should in no way be construed as a desire to deter those efforts of any citizen. The District encourages attendance and participation by stakeholders and citizens at all public meetings which might facilitate enhanced communication and alleviate some of the concerns expressed by the Petitioner.

However, with or without comments from the public or stakeholders, the District is well aware of its charge, and is in line with the Rules it has adopted to facilitate compliance with Chapter 36, *Texas Water Code*. Each member of the Board serves on various committees that assist and facilitate the outreach to the community as well as the programs, studies, and work with the District's professionals to ensure all of its Directors are knowledgeable and engaged in the mission of the District and the mandates it operates under.

HISTORICAL BACKGROUND

The Desired Future Conditions in question were required to be adopted using the best available science, which was the State's Groundwater Availability Model (GAM). Unfortunately, the application of that previous version of the GAM has led to inaccurate predictions of DFCs and such inaccuracies ultimately and unknowingly led to adoption of unattainable DFCs by the District.

During the past five years the District has cooperated with the Texas Water Development Board ("TWDB") and other stakeholders (committing nearly \$300,000 of District funds in this effort) to make wholesale improvements to the GAM. After the updated GAM was approved by the TWDB, the District began using it, as the best available science as required by law, to perform the many evaluations discussed herein. What became evident because of the inaccuracies of that previous GAM, and what has been well documented in the many presentations and meetings referenced in this response, was that the DFCs in question were simply unattainable by the District. In essence there was no action available to the Board to consider which would achieve the DFCs in question. This is an important fact which the Board considered as it followed the correct processes in appropriately following its Rules to manage the groundwater resources under its jurisdiction.

Instances such as this have led the Board to develop the District's Management Strategies Report, a comprehensive effort, which will assist the Board in identifying and evaluating ongoing additional challenges and in meeting the District's management goals, as well as possible remedies.

⁵ See Exhibit "B," Applicant's Statement Of Position On Party Status filed during the Application Of Blue Water Vista Ridge LLC For Amendment To Drilling And Operating Permit No. POS-D&O/A&M-0001D And For Amendment To Transport Permit No. POS-T-0001B

REVIEW OF PETITION

Central to Petitioner’s assertions is that the District is failing to enforce its own Rules. In reviewing that assertion, the District notes the following from Chubb’s Petition:

1. Petitioner asserts that the District has not provided notice to well permittees upon reaching any threshold established in District Rule 16.4.

Petitioner would have you believe that the District is simply dismissing and/or disregarding the requirements of Section 36.1132, *Texas Water Code*; that is untrue. As stated above, Post Oak Savannah Groundwater Conservation District is centered in active and ongoing management of the groundwater and aquifers that it is tasked with protecting. The Board has adopted Rules that support the various statutory constructs and mandates found in Chapter 36, *Texas Water Code* and brings those provisions to life in the Post Oak Savannah Groundwater Conservation District. The Board has set up a Rules Committee that crafts, studies and reviews on an ongoing basis the District’s Rules to ensure that they are in line with Chapter 36, *Texas Water Code*, as it may be amended, together with the enabling legislation that created the District – all in an effort to ensure that nothing that the Legislature has required of it is overlooked. The Texas Commission on Environment Quality (“TCEQ”), as a regulatory body itself, is well aware that a Court will uphold an agency’s interpretation of its own Rules if the interpretation is reasonable and does not contradict the Rule’s plain language.⁶ TCEQ itself has had its own rules or construction thereof challenged from time to time; “[t]he true test for court applying the substantial-evidence rule to an agency’s decision is not whether the agency reached the correct conclusion but whether some reasonable basis exists in the record for the action taken by the agency.”⁷ In that framework, the District provides for you a record replete with instances in which it is documented to be following its Rules in the very instances the Petitioner notes it did not *and* there is a reasonable basis for the action taken.

District Rule 16.3 conditions giving notice to well permittees upon the District’s *Board* determining it is appropriate to do so. Because the Board has not yet determined it is appropriate to notify the well permittees, the District was not required to send notifications to well permittees. What the District has undertaken as set out in Rule 16.4.1 Threshold Level 1 is undertaking additional studies to evaluate the nature and extent of curtailment in groundwater production that may be required to achieve the District’s management objectives inclusive of achieving DFCs and PDLs. Extensive review of the DFCs and the District’s Management Plan has been ongoing since 2017 through 2021. The District provided regular updates at properly noticed public DFC Committee and Board meetings. Further, the District and/or its professional consultants are in contact with well permittees personnel on an ongoing basis and they were keenly aware of thresholds being reached; many of their representatives have attended all or nearly all public meetings in which DFCs and the District’s Management Plan⁸ have been discussed – from Committee meetings to Board meetings. The studies that the District has undertaken have been through the District’s professional hydrogeologist and the team at Intera. Finally, as Petitioner has noted and thoroughly utilized in crafting *this* Petition, the studies are on the District’s website, available 24/7. Numerous public meetings have been held on the very topic that Petitioner has raised; such meetings began

⁶ See, *Tex. Comm’n on Env’t Quality v. Maverick County*, --- S.W.3d ---, 2022 WL 413939, at *4 (Tex. Feb. 11, 2022).

⁷ See, [Tex. Gov’t Code Ann. § 2001.174](#).

⁸ See, POSGCD Management Plan Adopted December 5, 2017 and Appendices A and B, all attached as Exhibit “C”.

no later than August 2017 and are continuing through today. In fact, at the December 4 meeting no less than six previously reviewed reports on these matters were again revisited, reviewed, and discussed by the committee at that meeting.

This translates to ongoing studies and ongoing review and ongoing monitoring. In fact, over the last few years, the District has made a concerted effort to increase the number of its monitor wells and currently is at 370⁹ and is broken down by formation as such: Hooper 51; Simsboro 63; Calvert Bluff 64; Carrizo 102; Queen City 38; Sparta 24; Yegua-Jackson 21; and Brazos River Alluvium 7.

Petitioner also asserts that the District is not adhering the Rule 16.4.2 Threshold Level 2.

“Threshold Level 2 will be reached, and a review of the Management Plan, rules and regulations will be initiated, and pending the results of Threshold Level 1 studies, the District will notify well owners of possible plans for curtailing groundwater production. The Threshold Level 2 actions will be conducted at such time as:

- a. Total estimated annual production is greater than 70% of the Modeled Available Groundwater (MAG) value listed in Section 8 of the Management Plan;
- b. Average groundwater drawdown, calculated from monitored water levels, for an aquifer is greater than 60% of the average groundwater drawdown listed in Section 7 of the Management Plan as the DFC for that aquifer; or
- c. The average groundwater drawdown, calculated from monitored water levels, for a Shallow Management Zone, is greater than 60% of the threshold value for average drawdown listed in Section 7 of the Management Plan for that Shallow Management Zone;”

It is important to note that the presentation that Petitioner cites to in his Petition explains both studies as well as conclusions that make it incredibly clear that because of updated model files and pumping information provided by other Districts in GMA 12, there was no possible plan available for the Board to consider for curtailing groundwater production that would achieve the applicable DFCs.

As noted above, the District has implemented studies to address the concerns of reaching Threshold Levels 1 and 2, they have had ongoing meetings to address these studies, they have given public reports about their findings and they have undergone review of their Management Plan and Rules. Proof that the Board has exercised utmost concern and diligence during these ongoing efforts is the development of the District’s Management Strategies Report which will assist the Board in identifying and evaluating additional challenges in meeting the District’s management goals. These meetings and reports have been public and have taken place with public notice.

Specifically, Petitioner provides copies of Slides 24 and 25 from the “Desired Future Committee Update” prepared by the District’s professional hydrogeologist team and presented on December 4, 2020¹⁰ as part of his claims that the District has taken no actions as a result of exceeding thresholds limits in Rule 16.4. Petitioner presented Slide 25 (see below) to list “a few of the actions required in response to Threshold Levels being breached. (pg 13 of 22)”

⁹ District records show 88 monitor wells in 2015.

¹⁰ See: *Desired Future Committee Update* prepared by the District’s professional hydrogeologist team at Intera and presented on December 4, 2020, attached as Exhibit “D.”

Rule 16.4. Actions Based on Monitoring Results

- Threshold 1**
1. Perform studies to improve quantification of pumping effects, characterization of aquifer, and prediction of changes in future water levels
 2. Evaluate options for possible curtailment to achieve management goals
- Threshold 2**
1. Evaluate the Management Plan and rules regarding management zones, collection and analysis of monitoring data, and DFCs.
 2. May notify well owners of possible curtailment of groundwater production
- Threshold 3**
1. Conduct public hearing to discuss aquifer conditions. Develop a Response Action Work Plan to achieve DFCs and PDLs.
 2. May reduce the maximum water production permitted per acre for the Management Zone and the water authorized to be produced under any permit issued by the District for that zone

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Were he to have reviewed the next slide, Slide 26 (see below), it provides a summary of District actions and studies that are in progress because of threshold exceedance. The actions listed in Slide 26 unequivocally show that considerable studies and actions have been undertaken by the District. Slides 27 through 31 (which are provided in Attachment A) provides results of curtailment studies performed in the Carrizo. In addition, Slides 32 through 37 evaluates management issues with DFCs, Slides 3 through 10 discuss results from a study to better predict changes in future water levels, and Slides 11 through 19 provides results from a POSGCD study to present a detailed analysis of pumping effects.

Summary of Actions: Hydrogeologic Studies

- Hydrogeological Studies
 - Additional Groundwater Water Level Measurements
 - Fall 2020 monitoring event
 - Addition of approximately 25 InSitu/WellIntel equipment
 - Analysis of Water Level for PDL/DFC Compliance
 - Geostatistical investigations with UT at Austin
 - Developed alternative technique
 - Compliance Report for DFCs and PDLs
 - Documents using measured water levels to assess compliance
 - Schedule completion date is December 2020
 - Improved Prediction of Future Water Level Changes
 - GMA 12 update of GAM regarding Simsboro properties near Vista Ridge wells
 - 2021 project to continually improve the GAM
 - Developed Outline for Management Strategies Report
 - Assess effectiveness of current strategies for achieving goals
 - Identify changes in strategies to improve likelihood of achieving goals

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While this is just one such documented presentation of the District's efforts to undertake studies and evaluate the outcomes, the December 4 presentation demonstrates unequivocally that Petitioner's claim that the District has not initiated any actions as required by Rule 16.4 is totally without merit.

2. Petitioner Asserts That the District Treats MAGs as Irrelevant Numbers

Petitioner states on page 4 "One of the multitudes of problems with the District is that they treat MAGs as irrelevant numbers. The degree to which the District disregards MAGs can be understood by the multiple times that the District has not adhered to the Texas Water Code 36.1132 – a State water law based on the MAG as evidenced by its title: "Permits based on Modeled Available Groundwater"" He states similar provisions on pages 5 and 6 as well. He also states that "[a] close reading of Texas Water Code 36.1132

allows one to understand that its sole purpose is to assist groundwater districts achieve the DFCs by requiring the MAGs to be considered...”

Petitioner’s claim that the District treats MAGs as irrelevant numbers is contrary to both the District’s Rules and, more importantly, the District’s actions. The District’s use of the MAGs to establish thresholds in Rule 16.4 demonstrates the MAGs are not irrelevant. In his petition and as mentioned earlier, Petitioner shows Slide 24 (see below) from the December 4, 2020 District’s DFC meeting. The slide shows that several MAG-based thresholds have been exceeded. POSGCD reporting of GAM-based threshold exceedance further demonstrates that the District does not consider the MAGs are irrelevant numbers.

3. Petitioner Asserts That the District Does Not Adhere to Texas Water Code Sec. 36.1132

Petitioner’s claim that the District does not adhere to Texas Water Code Sec. 36.1132 is also inaccurate. Texas Water Code Section 36.1132, as excerpted below, does not require a District to treat the MAG as a cap on permit amounts as implied by Petitioner. This position of Petitioner has been raised and addressed before with this body in 2015. In the District’s Response to Chubb’s Petition for Inquiry, it was noted that “[f]or example, in November 2013 just prior to the Commissioner’s Court appointing new board members, Petitioner placed an ad in a local newspaper that stated in pertinent part that; “Available Groundwater is the pumping cap set by the State based on the District’s decision...”¹¹ Larry French, Director of the Groundwater Resources Division of the Texas Water Development Board, was asked by the General Manager to clarify the issue for use before the Commissioner’s Court.

“Mr, French responded in pertinent part as follows:¹² “Modeled available groundwater (I assume that is what is meant by “available groundwater” in the advertisement) is a value (in acre-feet per year) estimated by the TWDB that achieves the desired future condition (DFC) in the aquifer. The DFC is proposed and adopted by districts in a groundwater management area. The TWDB uses the DFC statement to calculate the modeled available groundwater (MAG), which is then provided to each district. The MAG is the amount of water that the TWDB determines may be produced on an average annual basis to achieve a DFC as determined by a regional groundwater availability model (GAM). Each district - to the extent possible - is to issue permits up to the point that the total volume of permitted and exempt pumping will achieve the DFC. However, there are various other considerations that the GCDs are required to weigh in issuing pumping permits: the MAG, the amount of groundwater produced under exemptions, current pumping permits, reasonable estimates of groundwater production authorized under existing permits, and yearly precipitation and production patterns. So there is an element of flexibility introduced....and one reason it is not correct to refer to the MAG as a pumping cap. Districts may and have issued permits for more water than the MAG, but they also are responsible for achieving the DFC and may have to adjust the production allowed under those permits from time to time.”

Reiterating what was stated then: “The MAG is not an annual cap and was never intended to be!”

Sec. 36.1132. PERMITS BASED ON MODELED AVAILABLE GROUNDWATER. (a) A district, to the extent possible, shall issue permits up to the point that the total volume of exempt

¹¹ See, pgs 16-17 of filing (pgs 13-14 of Response Filing), Post Oak Savannah Groundwater Conservation District’s Response to Request for Inquiry, filed on July 6, 2015 in TCEQ Docket No. 2015-0844-MIS.

¹² Id. at pg 14

and permitted groundwater production will achieve an applicable desired future condition under Section 36.108.

(b) In issuing permits, the district shall manage total groundwater production on a long-term basis to achieve an applicable desired future condition and consider:...

Section 16.4 Threshold Exceedances

| Threshold | Description | Aquifer(s) |
|-----------|--------------------|---|
| Level 1 | > 50% of DFCs | Sparta (28 ft) |
| Level 1 | > PDLs in 15 years | Carrizo (20 ft), Calvert Bluff (20 ft), Simsboro (20 ft) |
| Level 1 | > 60% of MAG | Simsboro (38,468 AFY) |
| Level 2 | > 70% of MAG | Queen City (468 AFY), Carrizo(4,706 AFY) |

Note 1: Modeled Available Groundwater(MAG) is for 2020
 Desired Future Conditions (DFC) is for 2070
 Protective Drawdown Limit (PDL) is for 2070

Note 2: Green colored aquifers indicates exceedance anticipated before December 31, 2020

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4. Petitioner Asserts that the District Uses Average Water Level of Monitoring Wells

On page 2 of Chubb’s Petition, Chubb makes a claim that the District uses average water level of monitoring wells as DFCs. That is unquestionably inaccurate. The DFCs are established through the joint planning process that was drafted by the Legislature through the passage of HB 1763¹³. In GMA 12, the process of setting DFCs is heavily based on results from GAM predictions of water level declines based on several future pumping scenarios. To check compliance to DFC, the District uses average water levels but it does not average the water levels as suggested by Petitioner. The District checks compliance to DFCs by using mathematical algorithms that uses the measured average water levels as input to evaluate compliance with DFCs.

CONCLUSION

Post Oak Savannah Groundwater Conservation District, having demonstrated that its Rules are in line with and support Chapter 36, *Texas Water Code*, and that such Rules are being referred to and followed in substantial compliance with such Chapter, Post Oak Savannah Groundwater Conversation District requests that:

- (1) TCEQ dismiss the Petition for Inquiry pursuant to Tex. Water Code, Section 36.3011(c)(1);
- (2) TCEQ deny all other relief requested by the Petitioner; and
- (3) TCEQ grant any and other further relief to which the District may be entitled.

¹³ 79th Regular Legislative Session.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Response of Post Oak Savannah Groundwater Conservation District to the Petition for Inquiry was served by mail as indicated on the attached mailing list on April 13, 2022.


Barbara Boulware
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TCEQ Docket No. 2022-0299-MIS

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