

Jon Niermann, *Chairman*  
Emily Lindley, *Commissioner*  
Bobby Janecka, *Commissioner*  
Toby Baker, *Executive Director*



*Vic McWherter, Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

April 29, 2022

Laurie Gharis, Chief Clerk  
Texas Commission on Environmental Quality  
Office of the Chief Clerk (MC-105)  
P.O. Box 13087  
Austin, Texas 78711-3087

**RE: PETITION FOR INQUIRY REGARDING THE POST OAK  
SAVANNAH GROUNDWATER CONSERVATION DISTRICT  
TCEQ DOCKET NO. 2022-0299-MIS**

Dear Ms. Gharis:

Enclosed for filing is the Office of Public Interest Counsel's Response to Dr. Curtis Chubb's Petition for Inquiry Regarding the Post Oak Savannah Groundwater Conservation District.

Sincerely,

A handwritten signature in black ink, appearing to read "Sheldon P. Wayne".

Sheldon P. Wayne, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

**TCEQ DOCKET NO. 2022-0299-MIS**

|                              |          |                         |
|------------------------------|----------|-------------------------|
| <b>PETITION FOR INQUIRY</b>  | <b>§</b> | <b>BEFORE THE TEXAS</b> |
| <b>REGARDING THE</b>         | <b>§</b> |                         |
| <b>POST OAK SAVANNAH</b>     | <b>§</b> | <b>COMMISSION ON</b>    |
| <b>GROUNDWATER</b>           | <b>§</b> |                         |
| <b>CONSERVATION DISTRICT</b> | <b>§</b> | <b>ENVIRONMENTAL</b>    |
|                              | <b>§</b> | <b>QUALITY</b>          |

**THE OFFICE OF PUBLIC INTEREST COUNSEL’S RESPONSE TO DR. CURTIS  
CHUBB’S PETITION FOR INQUIRY REGARDING THE  
POST OAK SAVANNAH GROUNDWATER CONSERVATION DISTRICT**

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this Response to Petition for Inquiry in the above-referenced matter and respectfully shows the following:

**I. INTRODUCTION**

On March 9, 2022, Dr. Curtis Chubb (Petitioner), filed a petition requesting the Commission inquire into the activities of the Post Oak Savannah Groundwater Conservation District (the District). The District is a conservation and reclamation district created by House Bill 1784, Acts of the 77th Legislature, Regular Session, 2001 (pursuant to the provisions of Article XVI, Section 59 of the Texas Constitution and Chapter 36 of the Texas Water Code), and a local confirmation election held in November 2002. It was created “in order to protect and recharge groundwater and to prevent pollution or waste of groundwater in the central Carrizo-Wilcox area, to control subsidence caused by withdrawal of water from the groundwater reservoirs in that area, and to regulate the transport of water out of the boundaries of the districts.”<sup>1</sup> Located in Milam

---

<sup>1</sup> Central Carrizo-Wilcox Groundwater Management Act, 77th Leg., R.S., ch. 1307, § 1.02, 2001 Tex. Gen. Laws 3199.

and Burleson counties, the District is a member of Groundwater Management Area (GMA) 8 and GMA 12.

The Petition alleges that the Commission should act because the groundwater in the management area is not adequately protected because the District has failed to enforce substantial compliance with its rules. The Commission received a timely response from the District. The Commission may dismiss the Petition if it finds that the evidence is not adequate to show that any of the conditions alleged in the Petition exist, otherwise it may select a review panel to conduct an inquiry and prepare a report.

After review of the Petition and its Response, OPIC finds that the evidence is not sufficient to show that the District has failed to enforce substantial compliance with its rules. Accordingly, OPIC recommends denial of the Petition, dispensing with the need for further inquiry.

## **II. APPLICABLE LAW**

Section 59, Article XVI of the Texas Constitution authorizes the creation of conservation and reclamation districts to conserve and develop the natural resources of the state and vests the Legislature with authority to pass laws as may be appropriate for such purposes. The Legislature enacted Chapter 36 of the Texas Water Code to provide for the management of groundwater through the creation of groundwater conservation districts (GCD), “[i]n order to provide for the conservation, preservation, protection, recharging, and prevention of waste of groundwater, and of groundwater reservoirs or their subdivisions, and to control subsidence caused by withdrawal of water from those groundwater reservoirs or their subdivisions, consistent with the objectives of Section 59, Article XVI, Texas Constitution[.]” Tex. Water Code § 36.0015(b). “Groundwater conservation districts created as provided by this chapter are the state's preferred method of groundwater management . . . through rules developed, adopted, and promulgated by a district in

accordance with the provisions of this chapter.” *Id.* Chapter 36 goes on to, among other things, delineate the powers and duties of GCDs.

**Petition for Inquiry**

Texas Water Code § 36.3011(b) provides that an affected person may file a petition with the Commission to inquire into the activities of a GCD if it fails to satisfy or implement the various requirements of Chapter 36. Section 36.3011(b) provides that an affected person may file a petition if one of nine conditions exist:

- (1) a district fails to submit its management plan to the executive administrator;
- (2) a district fails to participate in the joint planning process under Section 36.108;
- (3) a district fails to adopt rules;
- (4) a district fails to adopt the applicable desired future conditions adopted by the management area at a joint meeting;
- (5) a district fails to update its management plan before the second anniversary of the adoption of desired future conditions by the management area;
- (6) a district fails to update its rules to implement the applicable desired future conditions before the first anniversary of the date it updated its management plan with the adopted desired future conditions;
- (7) the rules adopted by a district are not designed to achieve the adopted desired future conditions;
- (8) the groundwater in the management area is not adequately protected by the rules adopted by a district; or
- (9) the groundwater in the management area is not adequately protected due to the failure of a district to enforce substantial compliance with its rules.

Tex. Water Code § 36.3011(b).

The petition must include supporting documentation for each of the individual reasons the affected person identifies that demonstrates Commission inquiry is necessary. 30 Texas Administrative Code (“TAC”) § 293.23(c). Furthermore, the petition must include a certified statement from the affected person that describes why the petitioner believes that a Commission inquiry is necessary. 30 TAC § 293.23(d). The petitioner shall provide a copy of the filed petition

to all GCDs within and adjacent to the GMA within five days of the date the petition was filed and shall within 21 days file evidence that a copy of the petition was mailed to all GCDs within and adjacent to the GMA. 30 TAC § 293.23(e).

In this context, only an “affected person” may file a petition with the Commission. Tex. Water Code § 36.3011(b). The statute defines an “affected person” as:

- (1) an owner of land in the management area;
- (2) a GCD or subsidence district in or adjacent to the management area;
- (3) a regional water planning group with a water management strategy in the management area;
- (4) a person who holds or is applying for a permit from a district in the management area;
- (5) a person with a legally defined interest in groundwater in the management area; or
- (6) any other person defined as affected by commission rule.

Texas Water Code § 36.3011(a).

**Responses to and Review of Petition for Inquiry**

Any GCD that is within and adjacent to the GMA that is the subject matter of the petition may file a response to the validity of the specific claims raised in the petition. 30 TAC § 293.23(f). The responding entity shall file its response with the chief clerk of the Commission within 35 days of the date that the petition is filed, and shall also on the same day serve the petitioner, the executive director, the public interest counsel, and any other GCD in and adjacent to the GMA. *Id.*

The Commission shall review the petition and any timely filed responses, no sooner than 35 days, but not later than 90 days after the date the petition was filed. 30 TAC § 293.23(g). The Commission shall either: (1) dismiss the petition if it finds that the evidence is not adequate to show that any of the conditions alleged in the petition exist; or (2) select a review panel. Tex. Water Code § 36.3011(c). TCEQ rules likewise provide that the Commission may dismiss the

petition if it finds that the evidence required by 30 TAC § 293.23(c) or (d) is not sufficient to show one or more of the conditions listed in 30 TAC § 293.23(b)(1)-(9) exist. 30 TAC § 293.23(g).

If a review panel is selected, the Commission shall appoint a five-member panel to conduct any public hearings ordered by the Commission, review the petition and relevant evidence, and consider and adopt a report to be submitted to the Commission. Tex. Water Code § 36.3011(g), (h); 30 TAC § 293.23(g). The review panel's report must be submitted to the Executive Director no later than 120 days after the review panel was appointed. 30 TAC § 293.23(h). The Executive Director or the Commission shall take action to implement any or all of the review panel's recommendations if a cause contained in 30 TAC § 293.23(b)(1)-(9) applies. 30 TAC § 293.23(i). Procedures for Commission review and action regarding GCD noncompliance with the requirements Chapter 36 of the Texas Water Code are found in 30 TAC § 293.22(b)-(h). Authorized actions include initiation of a noncompliance review and facilitation of a compliance agreement by the Executive Director.

### **III. DISCUSSION**

As a threshold matter, OPIC finds that Petitioner has satisfied procedural requirements and, therefore, the petition is properly before the Commission for consideration. As a landowner in the management area, Petitioner is an affected person. Tex. Water Code § 36.3011(a)(1). Furthermore, on March 22, 2022, Petitioner filed with the Commission evidence that the Petition was mailed to all GCDs within and adjacent to the GMA as required by 30 TAC § 293.23(e). Finally, the Petition includes the required certified statement explaining why the Petitioner believes Commission inquiry into the GCD is necessary. 30 TAC § 293.23(d).

Regarding Petitioner's allegations, Dr. Chubb alleges that the Commission should act because the groundwater in the management area is not adequately protected because of the failure

of the District to enforce substantial compliance with its rules. Specifically, he alleges that the District has violated its own rules by failing to take certain actions, such as notifying well owners, in response to exceedances of the Threshold Levels. Further, Dr. Chubb contends that the District has violated Section 36.1132 of the Texas Water Code by failing to consider modeled available groundwater (MAG) when issuing permits. He explains that the District has approved permits that allow for pumping of 460 and 270 percent of the Carrizo and Simsboro Aquifers' respective MAGs, which has resulted in an exceedance of each aquifer's Level 2 Threshold.<sup>2</sup>

As a result, Dr. Chubb argues that the District has failed to provide the notice to well owners required by District Rules 16.3 and 16.4. Rule 16.3 states, in pertinent part, that "if within a Management Zone, the drawdown based on monitored groundwater levels, or total estimated annual production, or projected average water level drawdowns, reach a threshold established in Rule 16.4, then, as determined appropriate by the Board, the District will give notice to well permittees in the affected Management Zone(s) as provided in Rule 16.4."<sup>3</sup> The rule goes on to state that, "Once a threshold level has been reached, the corresponding actions in Rules 16.4 and 16.6 will be taken irrespective of any subsequent change to the DFCs [desired future conditions] for that aquifer or Management Zone."<sup>4</sup>

Rule 16.4 states, in pertinent part, "monitoring and threshold levels will be used to initiate appropriate responses designed to help achieve the DFCs and PDLs [protective drawdown limits], conserve and preserve groundwater availability and protect groundwater users."<sup>5</sup> It further provides that additional studies will be undertaken if Threshold Level 1 is reached; if Threshold

---

<sup>2</sup> OPIC notes that while Dr. Chubb focuses his Petition on the Carrizo and Simsboro Aquifers, he additionally alleges that Calvert Bluff, Queen City, and the Sparta Aquifers have also breached their Threshold Levels.

<sup>3</sup> Rules of the District, as amended through February 15, 2022, Rule 16.3, Monitoring of Groundwater, p. 96, available at: [https://posgcd.org/wp-content/uploads/2022/03/Rules.02152022.FINAL\\_03252022.ver2\\_.pdf](https://posgcd.org/wp-content/uploads/2022/03/Rules.02152022.FINAL_03252022.ver2_.pdf).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*, Rule 16.4 Actions Based on Monitoring Results, p. 97.

Level 2 is reached, a review of the Management Plan, rules, and regulations will be initiated, and pending the results of the Threshold Level 1 studies, the District will notify well owners of possible plans for curtailing groundwater production.<sup>6</sup> The rule also requires that once Threshold Level 1 is exceeded, the District must contract with a hydrogeologist to conduct studies, the results of which will be made available to the public, and hold a public meeting allowing a minimum of 90 days for public comment.<sup>7</sup> Additionally, once Threshold Level 2 is exceeded, the District will re-evaluate its Management Plan and rules, and in conjunction with this, hold a public meeting allowing a minimum of 90 days for public comment.<sup>8</sup>

As evidence, Petitioner directs the Commission to the District's rules, available at its website, and video of the DFC Committee Meeting held on December 10, 2020, in which necessary actions in response to the breach of Threshold Level 2 were considered by the District's Board of Directors and its General Manager. During the meeting, the District stated that it had not notified permit holders of the exceedance of the Threshold Level 2 and discussed its reasons for not doing so at that time.

In its Response to the Petition, the District denies Dr. Chubb's allegations. It states that Dr. Chubb misunderstands the purpose of the MAG, and essentially, that his complaints boil down to mere disagreement with the District's approach to permitting groundwater. The District reiterates that it is operating in compliance with Chapter 36 of the Texas Water Code and its own internal rules. It emphasizes that Rule 16.3 requires notice to be issued when its Board determines it is appropriate to do so and explains that the Board has not yet made this determination. The District further explains that it is undertaking the additional studies required by Rule 16.4 to evaluate the

---

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at p. 98.

<sup>8</sup> *Id.*



nature and extent of curtailment of groundwater production that may be necessary. The District states that it has held numerous public meetings and posts its studies on its website. Finally, the District notes that their review is ongoing, as is the monitoring of the District's aquifers by way of 370 monitoring wells.

Regarding the MAGs, the District states they are one factor considered when planning for the desired future conditions (DFCs), however, there are various other factors, such as the amount of groundwater produced under exemptions, the current pumping permits, reasonable estimates of groundwater production authorized under existing permits, and yearly precipitation and production patterns. The District stresses that the MAGs are not, and were never intended to be, caps on the annual production of groundwater.

After reviewing the filings, OPIC finds Petitioner has not established that groundwater in the management area is inadequately protected because of a failure by the District to enforce its rules. The District is taking the actions required by its rules, including commissioning studies to evaluate the possible curtailment of groundwater production necessary to achieve the DFCs, holding public meetings, and taking public comment. While the District has not provided notice to well owners at this time, this inaction appears to be reasonable given that the District has engaged a professional hydrogeologist to conduct studies and address concerns regarding the threshold exceedances. OPIC is confident that when the District completes its studies and its Board determines it is appropriate to do so, it will issue the required notice in compliance with its rules.

In regard to the MAGs, while Petitioner correctly observes that they have been exceeded, their exceedance is not, in and of itself, evidence that the District has failed to enforce substantial compliance with its rules. Districts are required to establish DFCs that provide for protection of aquifers 50 years in the future, and the MAG is one, but, importantly, not the sole factor considered,

in proposing and achieving DFCs. Specifically, the Districts “shall consider groundwater availability models *and other data or information*...and shall propose for adoption desired future conditions for the relevant aquifers.” Tex. Water Code § 36.108(d) (emphasis added). The District is required to issue permits up to the point that the total groundwater production will achieve the DFCs, not the MAGs. Tex. Water Code § 36.1132(a). In issuing permits, the District considers, among other factors, the MAGs, the estimate of groundwater that is actually produced, and yearly precipitation and production patterns. Tex. Water Code § 36.1132(b). Additionally, the District’s DFCs must “provide a balance between the highest practicable level of groundwater production and the conservation, preservation, protection, recharge, and prevention of waste of groundwater and control of subsidence in the management area.” Tex. Water Code § 36.108(d-2). \_

It is prudent management strategy, and further, is required by Chapter 36 of the Texas Water Code for a district to consider a number of factors, including the MAGs, to achieve the applicable DFCs. OPIC notes that the District’s management plan, as approved by the Texas Water Development Board, includes its stated intention to maintain at least 100 monitoring wells that provide coverage across management zones and aquifers within the District.<sup>9</sup> Here, the District has a network of 370 monitoring wells.<sup>10</sup> Furthermore, Section 16 of the District’s rules provide for reduction and curtailment of groundwater production, as necessary, to accomplish the applicable DFCs. The District has the ability to reduce authorized production, and the amount of any reduction required will be developed by a hydrogeologist and approved by the Board.<sup>11</sup> Finally, the District retains the ability to revise and adjust its rules and management plan to protect

---

<sup>9</sup> The District’s Groundwater Management Plan, adopted December 5, 2017, § 16.1 Efficient Use of Groundwater, [https://posgcd.org/wp-content/uploads/2022/04/POSGCD-Management-Plan\\_2017.pdf](https://posgcd.org/wp-content/uploads/2022/04/POSGCD-Management-Plan_2017.pdf).

<sup>10</sup> The District’s Resp. to Pet., p. 4.

<sup>11</sup> Rules of the POSGCD, as amended through February 15, 2022, Rule 16.6, Adjusting Maximum Production Permitted, p. 101.


groundwater and ensure that DFCs are met. Therefore, OPIC concludes that the evidence is insufficient to show that the District has failed to enforce substantial compliance with its rules.

#### IV. CONCLUSION

For the reasons stated herein, OPIC concludes that no further Commission inquiry into Petitioner's contentions is necessary and respectfully recommends that the Commission dismiss Dr. Curtis Chubb's Petition for Inquiry.

Respectfully submitted,

Vic McWherter  
Public Interest Counsel

By:   
Sheldon P. Wayne  
Assistant Public Interest Counsel  
State Bar No. 24098581  
(512) 239-3144 PHONE  
(512) 239-6377 FAX

#### CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2022, the foregoing document was filed with the TCEQ Chief Clerk, and copies were served to all parties on the attached mailing list via e-mail, hand delivery, facsimile transmission, inter-agency mail, or by deposit in the U.S. Mail.



Sheldon P. Wayne

Mailing List  
Post Oak Savannah Groundwater Conservation District  
TCEQ Docket No. 2022-0299-MIS

Curtis Chubb, Ph.D.  
Blue Dog Ranch  
830 County Road 330  
Milano, Texas 76556  
512/455-9180  
[texas.rain@centurylink.net](mailto:texas.rain@centurylink.net)

Gary Westbrook, General Manager  
Post Oak Savannah Groundwater  
Conservation District  
310 East Avenue C  
Milano, Texas 76556  
512/455-9900 FAX 512/455-9909  
[gwestbrook@posgcd.org](mailto:gwestbrook@posgcd.org)

Alan M. Day, General Manager  
Brazos Valley Groundwater  
Conservation District  
P.O. Box 528  
Hearne, Texas 77859  
979/279-9350  
[aday@brazosvalleygcd.org](mailto:aday@brazosvalleygcd.org)

David A. Van Dresar, General Manager  
Fayette County Groundwater  
Conservation District  
255 Svoboda Lane, Rm 115  
La Grange, Texas 78945  
979/968-3135 FAX 979/968-3194  
[david@fayettecountygroundwater.com](mailto:david@fayettecountygroundwater.com)

James Totten, General Manager  
Lost Pines Groundwater  
Conservation District  
P.O. Box 1027  
Smithville, Texas 78957  
512/360-5088 FAX 512/360-5448  
[lpgcd@lostpineswater.org](mailto:lpgcd@lostpineswater.org)

David Bailey, General Manager  
Mid-East Texas Groundwater  
Conservation District  
P.O. Box 477  
Madisonville, Texas 77864  
936/348-3212 FAX 936/348-3512  
[david\\_metgcd@att.net](mailto:david_metgcd@att.net)

Timothy T. Loftus, Ph.D., General Manager  
Barton Springs/Edwards Aquifer  
Conservation District  
1124 Regal Row  
Austin, Texas 78748  
512/282-8441 FAX 512/282-7016  
[tloftus@bseacd.org](mailto:tloftus@bseacd.org)

Zach Holland, General Manager  
Bluebonnet Groundwater Conservation District  
P.O. Box 269  
Navasota, Texas 77868  
936/825-7303 FAX 936/825-7331  
[zholland@bluebonnetgroundwater.org](mailto:zholland@bluebonnetgroundwater.org)

Laura Martin, General Manager  
Gonzales County Underground Water  
Conservation District  
P.O. Box 1919  
Gonzales, Texas 78629  
830/672-1047 FAX 830/672-1387  
[admin@gcuwcd.org](mailto:admin@gcuwcd.org)

Penny Hanson, General Manager  
Neches & Trinity Valleys Groundwater  
Conservation District  
501 Devereaux St.  
Jacksonville, Texas 75766  
903/541-4845 FAX 903/541-4869  
[manager@ntvgcd.org](mailto:manager@ntvgcd.org)

Kayla Murray  
TCEQ Environmental Law Division MC 173  
P.O. Box 13087  
Austin, Texas 78711-3087  
512/239-0600 FAX 512/239-0606  
[Kayla.murray@tceq.texas.gov](mailto:Kayla.murray@tceq.texas.gov)

Vic McWherter  
TCEQ Office of Public Interest Counsel MC 103  
P.O. Box 13087  
Austin, Texas 78711-3087  
512/239-6363 FAX 512/239-6377  
[Vic.mcwherter@tceq.texas.gov](mailto:Vic.mcwherter@tceq.texas.gov)

Docket Clerk  
TCEQ Office of Chief Clerk MC 105  
P.O. Box 13087  
Austin, Texas 78711-3087  
512/239-3300 FAX 512/239-3311  
<https://www14.tceq.texas.gov/epic/eFiling/>

Ryan Vise  
TCEQ External Relations Division MC 118  
P.O. Box 13087  
Austin, Texas 78711-3087  
512/239-0010 FAX 512/239-5000  
[pep@tceq.texas.gov](mailto:pep@tceq.texas.gov)

Kyle Lucas  
TCEQ Alternative Dispute Resolution MC 222  
P.O. Box 13087  
Austin, Texas 78711-3087  
512/239-0687 FAX 512-239-4015  
[Kyle.lucas@tceq.texas.gov](mailto:Kyle.lucas@tceq.texas.gov)