

Jon Niermann, *Chairman*
Bobby Janecka, *Commissioner*
Catarina R. Gonzales, *Commissioner*
Kelly Keel, *Executive Director*



Garrett T. Arthur, *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

July 30, 2024

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: **IN THE MATTER OF THE PETITION FOR INQUIRY FILED BY BILL
BERAN SEEKING A REVIEW OF THE LONE STAR GROUNDWATER
CONSERVATION DISTRICT
TCEQ DOCKET NO. 2024-0967-MIS**

Dear Ms. Gharis:

Enclosed for filing is the Office of Public Interest Counsel's Response to the
Petition for Inquiry in the above-entitled matter.

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. 2024-0967-MIS

PETITION FOR INQUIRY	§	BEFORE THE TEXAS
REGARDING THE	§	
LONE STAR	§	COMMISSION ON
GROUNDWATER	§	
CONSERVATION DISTRICT	§	ENVIRONMENTAL QUALITY
	§	

**OFFICE OF PUBLIC INTEREST COUNSEL’S RESPONSE TO THE
PETITION FOR INQUIRY REGARDING
THE LONE STAR GROUNDWATER CONSERVATION DISTRICT**

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

I. INTRODUCTION

On June 11, 2024, Bill Beran (Petitioner), filed a petition requesting the Commission inquire into the activities of the Lone Star Groundwater Conservation District (Lone Star or the District). The District is a single county 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). The District is located entirely in Montgomery County and is a member of GMA (Groundwater Management Area) 14.

The petition alleges that the Commission should act because the groundwater in the management area is not adequately protected by the rules adopted by the District. 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. *See Texas Water Code (TWC) § 36.3011(c).*

After review of the petition and the District's response, OPIC finds that the evidence proffered by Petitioner is not sufficient to show that the groundwater in the management area is not adequately protected by the rules adopted by the District. 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..." TWC § 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.

TWC § 36.3011(b).

Commission rules require that the petition 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 must 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 must 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).

Only an “affected person” may file a petition with the Commission. TWC § 36.3011(b). In this context, an “affected person” is defined 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.

TWC § 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 must file its response with the chief clerk of the Commission within 35 days of the date that the petition is filed, and must 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 must 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 must 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. TWC § 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 must 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. TWC § 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 must 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 of 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 of TCEQ.

III. DISCUSSION

As a threshold matter, OPIC finds that Petitioner, as an owner of land in the management area, is an affected person. *See* TWC § 36.3011(a)(2). Further, OPIC finds that Petitioner has satisfied the notice requirements contained in 30 TAC § 293.23(e). Petitioner submitted a letter with attached evidence showing that the petition was mailed to all GCDs within and adjacent to the GMA within five days of the date the petition was filed.¹

Petitioner signed the petition but did not include a certified statement describing why he believes that Commission inquiry is necessary as required by 30 TAC § 293.23(d). While a petitioner is required by rule to provide a certification, this requirement is not statutory. Further, while the rule states that the petition *must* include a certified statement, it does not provide a consequence for failure to certify, nor does it suggest that proof of compliance is a predicate to Commission consideration of the petition, and OPIC cannot find that lack of

¹ OPIC notes that Petitioner did not include a return receipt or other evidence showing that Lone Star GCD (the subject of this petition) was served with a copy of the petition, however, Lone Star GCD has filed a response brief, wherein it notes that it was served with a copy of the petition. OPIC finds this sufficient to show compliance with the requirements of 30 TAC 293.23(e). Additionally, Lone Star’s response states that the petition it was served with did not contain a graph referenced by Petitioner and included with his filed petition. However, Lone Star also stated that it discovered the graph using TCEQ’s filing system and discussed the graph in its response. As such, Lone Star was not prejudiced by this omission, and OPIC does not find that this defect is fatal to the petition.

certification prejudiced any interested party. Therefore, OPIC is reluctant to recommend that the petition be barred based upon a form requirement, and instead believes it appropriate to consider the merits of this pro-se Petitioner's arguments.

Allegations of Petitioner

Mr. Beran alleges that the Commission should act because the groundwater in the management area is not adequately protected by the rules adopted by the District. Specifically, he alleges that groundwater production pursuant to the District's Desired Future Conditions (DFC) greatly exceeds aquifer recharge rates. He states that many wells in the area have had to lower their screens to continue producing water. He also notes that Montgomery County's population is currently growing and is expected to continue to increase in the near future. Mr. Beran is concerned that if groundwater production is not limited, aquifer pressure will decline, aquifer soils will be compacted, and subsidence will occur.

Petitioner posits that one solution would be to limit the County's groundwater withdrawal rate to 64,000 acre-feet per year (AFY)—the same rate established by the San Jacinto River Authority's (SJRA) Groundwater Reduction Plan (GRP) in 2015. He explains that this rate was previously mandated by Lone Star GCD, but since has been abandoned by the District's new board of directors. To implement its GRP, SJRA has built a water treatment plant and associated pipeline for the production of surface water from Lake Conroe. However, in 2017, Lone Star rescinded its 64,000 AFY cap and replaced it with a 97,000 AFY cap. Mr. Beran believes that the newly elected board of directors (previously the board

had been appointed) approved the higher pumping cap in bad faith. To illustrate his argument, he has attached a graph to his petition that displays his understanding of the previous and current policies' effects on aquifer levels. He also notes that a study entitled "Land, Subsidence and Aquifer Compaction in Montgomery County, Texas, U.S.: 2000-2020" shows that groundwater levels and subsidence levels were being favorably affected by SJRA's GRP. Mr. Beran concludes by emphasizing that Lone Star's current groundwater policy will result in impairment of the relevant aquifers.

Response of District

In its response brief, the District denies Mr. Beran's allegations. It observes that Mr. Baren does not cite a particular District rule that he contends is insufficient, nor does he provide evidence supporting his allegations. His complaints are essentially his disagreement with the District's groundwater policy. However, many of the District's actions have been dictated by law and court order. The District also observes that Mr. Beran did not certify his petition.

The District takes the position that many of Mr. Beran's complaints are outside of TCEQ's jurisdiction to address, such as policy decisions made by the GCDs in GMA 14, including their adoption of DFCs. It takes issue with his recitation of events, stating that it is not completely accurate. The District also highlights that the 64,000 AFY pumping cap was invalidated by a court of law and cannot be implemented. Similarly, Mr. Beran's preferred DFCs, which were derived from the 64,000 AFY pumping cap, were found to be unreasonable in an administrative proceeding and cannot be adopted. Finally, the District points out

that SJRA's GRP is a voluntary plan—one which the District has no authority to compel users to participate in.²

Regarding the 64,000 AFY pumping cap that the 2010 and 2016 DFCs were based on, the District explains that the 64,000 AFY represents the estimated annual recharge rate of the entire Gulf Coast Aquifer System and was calculated by multiplying 1.1 inches per year by the area of the county. This approach did not consider the actual hydrologic function of the affected aquifers, and while it was not contested in 2010, the 2016 DFCs were successfully challenged and declared no longer reasonable by an administrative law judge.³ Following this, the 284th District Court of Montgomery County held that Lone Star's reduction rule—in place to achieve the 64,000 AFY pumping cap—was unlawful, void, and unenforceable.⁴ Furthermore, the DFCs themselves are not unilaterally adopted by Lone Star, but instead are adopted by GMA 14 and approved by the Texas Water Development Board (TWDB). Consistent with this, the District's 2022 DFCs have been adopted by GMA 14 and approved by TWDB. The current 2022 DFCs allow for up to 97,000 AFY to be withdrawn in Montgomery County and, according to the District, Lone Star GCD is on track to achieve the DFCs.

² The District also notes that the GRP is subject to litigation and currently being challenged in both state and federal court.

³ Lone Star Response Brief, Ex. A-3; Agreed Proposal for Decision, *Petitions of the Cities of Conroe and Magnolia, Texas and Quadvest LP Appealing Desired Future Conditions of GMA 14 Adopted by Lone Star Groundwater Conservation District*, SOAH Docket No. 958-17-3121, Dated: Nov. 6, 2017.

⁴ Lone Star Response Brief, Ex. A-4; Order on Cross-Motions for Partial Summary Judgment, *City of Conroe, Texas, et al. v. Richard J. Tramm, et al.*, In the District Court of Montgomery County, Texas, 284th Judicial District, Cause No. 15-08-08942, Dated: Sept. 18, 2018.

Additionally, the District has rules in place to protect its groundwater, including permit requirements, annual production limits, spacing rules, and it has the authority to curtail production as needed to achieve the DFCs. Lone Star is also conducting a subsidence study, which will be used to update GMA 14's groundwater availability model (GAM).

Regarding Petitioner's evidence, the District takes the position that no evidence has been presented to demonstrate that groundwater is not adequately protected. It takes issue with the study cited by Petitioner, highlighting that among other things, its data contradicts its conclusions, and it has been criticized by other experts. It also questions the study's usefulness as applied to groundwater management. The District likewise critiques the graph presented by Petitioner, noting that it appears to be based on a presentation about reduction in storage of the Gulf Coast Aquifer system and cannot be applied to predict consequences of pumping levels. Additionally, the petition did not provide supporting data and both the calculations the graph is based on, and consequently, the graph itself, appear to be inaccurate.

Furthermore, the District reiterates that Petitioner's issues primarily implicate policy decisions that lie within the discretion of the District's elected board of directors.

The District concludes by stating that it does have rules in place to protect groundwater. It is on track to achieve the 2022 DFCs, and "is committed to good management decisions that are based on science and not political conjecture."

OPIC Analysis

After consideration of the evidence and argument presented by Petitioner and the responding Lone Star GCD, OPIC concludes that the evidence is insufficient to show that groundwater in the management area is not adequately protected by the rules adopted by the District.

The District appears to be operating in compliance with Chapter 36 of the Texas Water Code and its own internal rules, which appear to be adequately implementing its DFCs. Districts are required to establish DFCs that provide for protection of aquifers at specified future times, and do so in a collaborative process involving all districts in a groundwater management area. This process includes joint planning sessions, opportunity for review and comment by the public, approval by a district's representatives and TWDB, and finally, adoption by the districts themselves. *See* TWC §§ 36.001(30) & 36.108. Additionally, DFCs are updated and re-adopted every five years. *See* TWC § 36.108(d-3). OPIC notes that if Petitioner takes issue with the DFCs themselves, he may certainly avail himself of opportunities to provide public comment or otherwise participate in their future adoptions.

There have been no allegations by Petitioner that the DFCs were not validly adopted. Further, by law, DFCs must allow the highest practicable level of groundwater production achievable while still providing for conservation, preservation, protection, recharge, and prevention of waste of groundwater and control of subsidence. *See* TWC § 36.108(d-2). Additionally, a district, to the extent possible, is required to issue permits up to the point that groundwater

production will achieve an applicable desired future condition. *See* TWC § 36.1132(a).

Because the 2022 DFCs have been adopted, the District must comply with them, and may not unilaterally revert back to the 2016 DFCs or the 64,000 AFY pumping cap they were designed to achieve. Furthermore, OPIC agrees with Lone Star that even if the District retained discretion to re-institute the 2016 DFCs of their own volition, it would be improper to do so after they were declared no longer reasonable by an administrative law judge.⁵ Similarly, and perhaps more importantly, the District's "reduction rule" designed to achieve the 64,000 AFY cap, was declared invalid by a court of law.⁶ Given these events, and the statutory obligation of the District to allow groundwater production that complies with its 2022 DFCs, OPIC cannot agree with Petitioner that the District's decision to rescind the rule implementing the 64,000 AFY cap demonstrates that groundwater in the management area is not adequately protected by the rules adopted by the District. Instead, it appears rescission was both necessary and appropriate in light of these circumstances.

In addition, OPIC notes that authorized grounds to base a petition for inquiry on include a district failing to update its rules to implement applicable DFCs, or if its rules are not designed to achieve adopted DFCs. *See* TWC

⁵ Lone Star Response Brief, Ex. A-3; Agreed Proposal for Decision, *Petitions of the Cities of Conroe and Magnolia, Texas and Quadvest LP Appealing Desired Future Conditions of GMA 14 Adopted by Lone Star Groundwater Conservation District*, SOAH Docket No. 958-17-3121, Dated: Nov. 6, 2017.

⁶ Lone Star Response Brief, Ex. A-4; Order on Cross-Motions for Partial Summary Judgment, *City of Conroe, Texas, et al. v. Richard J. Tramm, et al.*, In the District Court of Montgomery County, Texas, 284th Judicial District, Cause No. 15-08-08942, Dated: Sept. 18, 2018.

§ 36.3011(b). A district is not free to promulgate any rule it wishes, instead those rules must be designed with the adopted DFCs in mind. As such, if a district were to disregard its adopted DFCs or otherwise implement rules that conflict with them, it could find itself subject to Commission inquiry.

Further, the District's rules appear designed to both achieve the DFCs and protect groundwater. Among other things, they include permit requirements, annual production limits, and spacing requirements. The rules also provide for reduction and curtailment of groundwater production, as necessary, to accomplish the applicable DFCs.

With regard to Petitioner's evidence—his referenced graph and study—OPIC cannot find that these items are sufficient to show that groundwater in the management area is not adequately protected by the rules adopted by the District. The graph itself appears to miscalculate the effect of the District's allowable groundwater production and because of this, OPIC was unable to draw any meaningful conclusions from it. With respect to the subsidence study referenced by Petitioner, it appears to make several assumptions that call into question the veracity of its conclusions when applied to a particular aquifer. Consequently, it may not accurately depict the level of subsidence in the affected aquifers. Relatedly, the District is currently undertaking a subsidence study that will collect data from each individual aquifer (in the form of core samples from the Chicot, Evangeline, and Jasper aquifers)—something that was absent from the study relied on by Petitioner. This individualized data will then be used to update GMA 14's GAM and help shape future groundwater management in the

area. Based on the evidence presented, OPIC finds that the District's rules and actions adequately fulfill its obligation to prudently manage groundwater by both providing for its protection and allowing for reasonable production.

Finally, OPIC notes that many of Petitioners contentions take issue with the District's management strategy, however, the District, as governed by its duly elected Board of Directors, is allowed discretion in its policy decisions. It appears that Mr. Beran's complaints essentially boil down to disagreement with the District's approach to permitting groundwater and do not form a valid basis for the Commission to inquire further into the District's actions.

IV. CONCLUSION

Therefore, for the reasons discussed above, OPIC concludes that no further Commission inquiry into Petitioner's contentions is necessary and respectfully recommends that the Commission dismiss the instant petition.

Respectfully submitted,

Garrett T. Arthur
Public Interest Counsel

By: 

Sheldon P. Wayne
Assistant Public Interest Counsel
State Bar No. 24098581
P.O. Box 13087, MC 103
Austin, Texas 78711-3087
(512) 239-3144

CERTIFICATE OF SERVICE

I hereby certify that July 30, 2024, the Office of Public Interest Counsel's Response to Petition for Inquiry Regarding the Lone Star Groundwater Conservation District was filed with the Chief Clerk of the TCEQ and a copy was served on all persons listed on the attached mailing list via electronic mail, and/or by deposit in the U.S. Mail.



Sheldon P. Wayne

Mailing List
Lone Star Groundwater Conservation District
TCEQ Docket No. 2024-0967-MIS

Stacey V. Reese
Stace V. Reese Law PLLC
910 West Avenue, Suite 15
Austin, Texas 78701
stacey@staceyreese.law

Bill Beran
12002 Walden Rd.
Montgomery, Texas 77356-8031
wberan@consolidated.net

GMA 11

Pineywoods GCD
General Manager
P.O. Box 635187
Nacogdoches, Texas 75963

GMA 12

Mid-East Texas GCD
P.O. Box 477
Madisonville, Texas 77864

Brazos Valley GCD
P.O. Box 528
Hearne, Texas 77859

Lost Pines GCD
317 E. Hempstead St.
Giddings, Texas 78942

Post Oak Savannah GCD
P.O. Box 92
Milano, Texas 76556

GMA 14

Bluebonnet GCD
P.O. Box 269
Navasota, Texas 77868

Brazoria County GCD
111 E. Locust Street
Building A-29, Suite 140
Angleton, Texas 77515

Lone Star GCD
655 Conroe Park North Drive
Conroe, Texas 77303

Lower Trinity GCD
602 E. Church Street, #150
Livingston, Texas 77351

Southwest Texas GCD
P.O. Box 1407
Jasper, Texas 75951

Harris - Galveston Subsidence District
1660 West Bay Area Boulevard
Friendswood, Texas 77546

Fort Bend Subsidence District
301 Jackson St., Suite 639
Richmond, Texas 77469

GMA 15

Fayette County GCD
255 Svoboda Lane, Room 115
LaGrange, Texas 78945

Colorado County GCD
910 Milam St.
Columbus, Texas 78934

Costal Bend GCD
P.O. Box 341
Wharton, Texas 77488

Coastal Plains GCD
2200 7th Street, Suite 401
Bay City, Texas 77414

TCEQ

Erin Chancellor, Director
TCEQ Office of Legal Services MC 218
P.O. Box 13087
Austin, Texas 78711-3087
512/239-0600 FAX 512/239-0606
Erin.Chancellor@tceq.texas.gov

Charmaine Backens, Deputy Director
TCEQ Environmental Law Division MC 173
P.O. Box 13087
Austin, Texas 78711-3087
512/239-0600 FAX 512/239-0606
charmaine.backens@tceq.texas.gov

Cari-Michel La Caille, Director
TCEQ Office of Water MC 148
P.O. Box 13087
Austin, Texas 78711-3087
512/239-4570 FAX 512/239-4430
cari-michel.lacaille@tceq.texas.gov

Kim Nygren, Deputy Director
TCEQ Water Availability Division MC 160
P.O. Box 13087
Austin, Texas 78711-3087
512/239-4600 FAX 512/239-4430
Kim.Nygren@tceq.texas.gov

Sheldon P. Wayne
TCEQ Office of Public Interest Counsel MC 103
P.O. Box 13087
Austin, Texas 78711-3087
512/239-6363 FAX 512/239-6377
Sheldon.wayne@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
David Greer
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

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