

TCEQ DOCKET NO. 2015-0844-MIS

PETITION FOR INQUIRY	§	BEFORE THE TEXAS
	§	
FILED BY	§	COMMISSION ON
	§	
CURTIS CHUBB, PH.D.	§	ENVIRONMENTAL
	§	
	§	QUALITY

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO CURTIS CHUBB PH.D.'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 June 4, 2015 Curtis Chubb, Ph.D. ("Petitioner"), filed a petition requesting the Commission inquire into the activities of the Post Oak Savannah Groundwater Conservation District (POSGCD or "the District"). POSGCD is a conservation and reclamation district created by House Bill 1784, Acts of the 77<sup>th</sup> 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 in November 2002. The District 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 and Burleson counties, the District is a member of Groundwater Management Area (GMA) 12 and GMA 8.

The petition provides three reasons for the Commission to act: (1) the rules adopted by the District are not designed to achieve the desired future conditions; (2) the groundwater in the management area is not adequately protected by the rules adopted by the District; and (3) the groundwater in the management area is not adequately protected due to the failure of the District to enforce substantial compliance with its rules. The Commission received responses from POSGCD as well as from five groundwater conservation districts within and adjacent to GMA 12. The Commission may dismiss the petition if the commission finds that the evidence is not adequate to show that any of the conditions alleged in the petition exist or select a review panel to conduct an inquiry and prepare a report. After review of the petition and responses, OPIC finds that the evidence is sufficient to show that the rules currently adopted by Post Oak Savannah Groundwater Conservation District are not designed to achieve the desired future conditions and that groundwater in the management area is not adequately protected by the rules.

## II. APPLICABLE LAW

Article XVI, Section 59 of the Texas Constitution authorizes the creation of conservation and reclamation districts to “conserv[e] and develop[] . . . all of the natural resources of this State” and vests the Legislature with authority to “pass all such laws as may be appropriate thereto.” The Legislature enacted Texas Water Code Chapter 36 to provide for the management of groundwater through the creation of groundwater conservation districts “[i]n order to provide for the conservation, preservation, protection,

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

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.” Texas Water Code § 36.0015. “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 dictates the powers and duties of groundwater conservation districts.

*Petition for Inquiry*

Texas Water Code § 36.1082(b) provides that an affected person may file a petition with the Commission to inquire into the activities of a groundwater conservation district if it fails to satisfy or implement various requirements of Chapter 36. Section 36.1083(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 desired future conditions adopted by the management area during the joint planning process;
- (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.

Texas Water Code § 36.1082(b).

The petition must include supporting documentation for each of the individual reasons the affected person identifies that demonstrates that a Commission inquiry is necessary. 30 Tex. Admin. Code § 292.23(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 Tex. Admin. Code § 292.23(d). The petitioner shall provide a copy of the filed petition to all groundwater conservation districts within and adjacent to the GMA within five days of the date the petition was filed and shall file within 21 days proof that a copy was mailed to all groundwater conservation districts within and adjacent to the GMA. 30 Tex. Admin. Code § 292.23(e).

Only an "affected person" may file a petition with the Commission to challenge the rules or inaction of a district. Texas Water Code § 36.1082(a). The statute defines an "affected person" as:

- (1) an owner of land in the management area;
- (2) a 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 who has groundwater rights in the management area; or
- (6) any other person defined as affected by commission rule.

Texas Water Code § 36.1082(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 Tex. Admin. Code § 292.23(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 chief clerk shall accept a response that is filed after the deadline but shall not process the late documents. *Id.* The chief clerk shall place the late documents in the file for the petition. *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. Tex. Admin. Code § 292.23(g). The Commission shall either: (1) dismiss the petition if the commission 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. Texas Water Code § 36.1082(c). The Commission may dismiss the petition if it finds that the evidence required by Tex. Admin. Code § 292.23(c), (d) is not sufficient to show that the items contained in Tex. Admin. Code § 292.23(b)(1)-(9) of this section exist. Tex. Admin. Code § 292.23(g).

If a review panel is selected, the Commission shall appoint a five-member panel to review the petition and any evidence relevant to the petition and, in a public meeting, consider and adopt a report to be submitted to the Commission. Texas Water Code § 36.1082(e); Tex. Admin. Code § 293.23(g). The adopted review panel's report must be submitted to the Executive Director no later than 120 days after the review panel was

appointed by the commission. Tex. Admin. Code § 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 Tex. Admin. Code § 293.23 (b)(1) - (9) applies. Tex. Admin. Code § 293.22 sets out the procedures for Commission review of groundwater conservation district noncompliance with the requirements of Texas Water Code, Chapter 36. Actions authorized by the rule include, but are not limited to, initiation of a noncompliance review and facilitation of a compliance agreement by the Executive Director.

### III. DISCUSSION

Petitioner provides three reasons for the Commission to act: (1) the rules adopted by the District are not designed to achieve the desired future conditions; (2) the groundwater in the management area is not adequately protected by the rules adopted by the District; and (3) the groundwater in the management area is not adequately protected due to the failure of the District to enforce substantial compliance with its rules. As a starting point, OPIC finds that Petitioner is an affected person, pursuant to Texas Water Code § 36.1082(a)(1), as a landowner in the management area. Furthermore, Petitioner satisfied the certification and notice requirements of 30 Tex. Admin. Code § 292.23(d), (e). These issues are uncontested by the responding parties and no further analysis is necessary. After review of the petition and responses, OPIC finds that the evidence is sufficient to show that the rules currently adopted by Post Oak Savannah Groundwater Conservation District are not designed to achieve the desired future conditions and that groundwater in the management area is not adequately protected by the rules.

Texas Water Code § 36.1132 provides that, “[a] district, to the extent possible, shall issue permits up to the point that the total volume of exempt and permitted groundwater production will achieve an applicable desired future condition under Section 36.108.” Furthermore, “in issuing permits, the district shall manage total groundwater production on a long-term basis to achieve an applicable desired future condition and consider: (1) the modeled available groundwater determined by the executive administrator [of the Texas Water Development Board]; (2) the executive administrator's estimate of the current and projected amount of groundwater produced under exemptions granted by district rules and Section 36.117; (3) the amount of groundwater authorized under permits previously issued by the district; (4) a reasonable estimate of the amount of groundwater that is actually produced under permits issued by the district; and (5) yearly precipitation and production patterns.” Texas Water Code § 36.1132(b).

As currently written, the District’s rules fail to provide sufficient consideration to the mandatory factors in Texas Water Code § 36.1132(b) that the law compels them to consider. When issuing permits, the Legislature instructed water conservation districts to consider five factors in order to achieve an applicable desired future condition. One such factor is the modeled available groundwater—the amount of water that the executive administrator determines may be produced on an average annual basis to achieve a desired future condition. Texas Water Code §§ 36.001(25), .1132(b). The districts are not free to issue permits with abandon, instead they must manage an aquifer’s drawdown “up to the point that the total volume of exempt and permitted groundwater production will achieve an applicable desired future condition,” using modeling and monitored data. *See* Texas Water Code § 36.1132. The desired future conditions listed in Texas Water Code §

36.1132(a) are a cap on the drawdown of aquifers. Parties insist that a groundwater conservation district can continue to permit groundwater withdrawals beyond this limit, but such an interpretation ignores the plain language of the statute, renders the provision meaningless, and contravenes the purpose of the act. A water conservation district may deny a permit request<sup>2</sup> or reduce the rate and amount of withdrawals to provide all parties with a fair share, but it cannot authorize permit withdrawals that would exceed the desired future conditions. Ultimately, because the District has failed to create rules that force consideration of the modeled available groundwater before issuing a permit—as required by Texas Water Code § 36.1132—OPIC finds that the “rules adopted by the district are not designed to achieve the applicable desired future conditions” and that “the groundwater in the management area is not adequately protected.” *See* Texas Water Code § 36.1082(b).

The District states that ultimately the curtailment rules in Section 16 excuse this error and provide the District with both discretion and authority to meet the desired future conditions—even if they exceed them. While these rules do provide the District with authority to implement reductions, they do not compel action until the third and final threshold level (average groundwater drawdown is greater than 95% of an average groundwater drawdown adopted as a desired future condition for that aquifer) has been reached. At this point, it may be too little, too late. The District will have been granted

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<sup>2</sup> Some parties insist that the state takings clause, TEX. CONST. art. I, § 17(a), and recent case law prevents a groundwater conservation district from denying a permit. A government action that effectuates a taking is not illegal, it simply requires compensation. *Sheffield Development Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660, 669 (Tex. 2004) (“By their plain terms, the takings provisions of the state and federal constitutions do not limit the government’s power to take private property for public use but instead require that a taking be compensated.”). Texas groundwater law clearly permits groundwater conservation districts to deny a landowner a permit when it would result in the failure to achieve an applicable desired future condition, but they may be liable for a takings claim. *See Edwards Aquifer Authority v. Day*, 369 S.W.3d 814, 838 (Tex.2012). Whether a taking actually exists or whether a groundwater conservation district has the ability to pay are fact-specific questions outside the scope of this response.



permits beyond the limits of the desired future conditions—without consideration of the amount of water that may be produced on an average annual basis to achieve a desired future condition—while actual production continues to increase. At some point, the District must reconcile the amount it has permitted and the actual production levels. The current rules and permit scheme delay action until it is too late and provide no mechanism to quickly come into compliance. The District states that the two percent reduction per year authorized by Rule 16.7(3) provides sufficient protection. In its response, the District states it is “obvious regarding only one of the tools available to comply with the DFCs, annual 2% reduction in existing permitted production today would reduce the total permitted groundwater production by 90% by the year 2060.”<sup>3</sup> This response betrays a misunderstanding of the District’s own rules and mathematics. Under the Rule 16.7(3), if the District determines that reductions in permitted withdrawals are necessary, “[t]he volume of water authorized by permit to be produced in a Management Zone may be reduced by up to two percent per year. . . .” Contrary to the District’s statement in its response, a 2% reduction per year over forty-five years does not equal a 90% reduction. Each year, the actual volume of water that can be reduced is lower. For example, if the District permits 100 acre/feet per year and implements the two percent reduction plan, the first year reductions will equal 2 acre/feet, but it will not be 2 acre/feet the second year. With 98 acre/feet permitted in the second year, an additional 2% reduction only reduces the volume of water by 1.96 acre/feet. Forty-five years later, actual volume has only been reduced by 58.9% from the baseline, not 90%. Depending on the amount of water the District has and will permit, it could take a very long time for 2% reductions to bring permitted production down to levels that will achieve the desired

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<sup>3</sup> POSGCD Response to Petition for Inquiry, Page 11

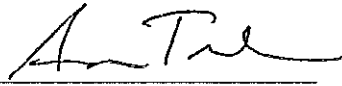
future conditions. If the District is contemplating that it will take at least forty-five years to achieve the desired future conditions after it has exceeded them, this is further evidence that the rules are insufficient. By not compelling action until the average groundwater drawdown is greater than 95% and limiting reduction to 2% per year, OPIC finds that the "rules adopted by the district are not designed to achieve the applicable desired future conditions" and that "the groundwater in the management area is not adequately protected." *See* Texas Water Code § 36.1082(b).

#### IV. CONCLUSION

For these reasons, OPIC respectfully recommends that the Commission grant Curtis Chubb, Ph.D.'s Petition for Inquiry and that a review panel be appointed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2015 the original and seven true and correct copies of the Office of the Public Interest Counsel's Response to Petition for Inquiry were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.



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Aaron B. Tucker