

TCEQ DOCKET NO. 2018-0194-MIS

PETITION FOR INQUIRY OF	§	BEFORE THE TEXAS COMMISSION
POST OAK SAVANNAH	§	
GROUNDWATER CONSERVATION	§	ON
DISTRICT SUBMITTED BY	§	
FRED RUSSELL	§	ENVIRONMENTAL QUALITY

EXECUTIVE DIRECTOR’S RESPONSE TO THE PETITION FOR INQUIRY

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission), files this Response to the Petition for Inquiry (Petition) of Post Oak Savannah Groundwater Conservation District (Post Oak) filed by Fred Russell (Petitioner). Petitioner asserts that the groundwater in Groundwater Management Area (GMA) 12 is not adequately protected by Post Oak’s rules, and the groundwater in the management area is not adequately protected due to Post Oak’s failure to enforce substantial compliance with its rules and mission.¹ The ED recommends that the Petition be dismissed because Post Oak’s rules are protective of groundwater and Post Oak has not failed to enforce substantial compliance with its rules. Additionally, the Commission does not have jurisdiction to govern what is in Post Oak’s Groundwater Well Assistance Program (GWAP) because the development of a GWAP is not required or mentioned in TCEQ rules, and is not required by Chapter 36 of the Texas Water Code.

GROUNDWATER LAW

Groundwater Conservation Districts

The Texas legislature recognizes that a landowner, along with his lessees, heirs, and assigns, owns the groundwater below the surface of the landowner’s land as real property. Tex. Water Code § 36.002(a). Local Groundwater Conservation Districts (GCDs) shall meet at least annually to conduct joint planning and review management plans, accomplishments, and new or amended existing desired future conditions

¹ In 2015, another petition for inquiry was filed against the Post Oak Savannah GCD. The petitioner for that inquiry alleged three grounds for the inquiry, including the two grounds alleged in this petition. The arguments in that petition are very similar to the arguments here. The commission dismissed the 2015 petition on August 26, 2015.

(DFCs). Tex. Water Code § 36.108(c). A GMA is an area designated and delineated by the Texas Water Development Board (TWDB) under Chapter 35 of the Water Code as “an area suitable for management of groundwater resources.” Tex. Water Code § 36.001(13). GCDs shall consider groundwater availability models and other data or information for the GMA and shall propose for adoption DFCs for the relevant aquifers within the GMA. Tex. Water Code § 36.108(d). DFCs are a quantitative description of the desired condition of the groundwater resources in a GMA at one or more specified future times. Tex. Water Code § 36.001(30).

The GCDs in a GMA must adopt DFCs by considering several criteria, including uses or conditions within a GMA, water supply needs in the State Water Plan, hydrological conditions, environmental conditions, subsidence, ownership rights, socioeconomic impacts reasonably expected to occur, and the feasibility of achieving the DFC. Tex. Water Code § 36.108(d). The DFCs must also provide a balance between the highest practicable level of groundwater production and the conservation, preservation, protection, recharging, and prevention of waste of groundwater and control of subsidence in the management area. This subsection does not prohibit the establishment of DFCs that provide for the reasonable long-term management of groundwater resources consistent with the management goals under Section 36.1071(a). Tex. Water Code 36.108(d-2).

After all the GCDs have submitted district summaries relating to the DFCs, the GCD representatives shall reconvene to review the reports, consider any GCD’s suggested revisions to the proposed DFCs, and finally adopt the DFCs for the GMA. The DFCs must be approved by a resolution adopted by a two-thirds vote of all the GCD representatives. The GCD’s representatives shall file an explanatory report of the proposed DFCs for the GMA to the TWDB. Tex. Water Code § 36.108(d-3). After a district receives notification from the TWDB that the DFC’s explanatory report is administratively complete, the district shall adopt the applicable DFCs, Tex. Water Code § 36.108(d-4). Each GCD in the GMA “shall ensure that its management plan contains goals and objectives consistent with achieving the DFCs of the relevant aquifers as adopted during the joint planning process.” Tex. Water Code § 36.1085. All rulemaking shall consider the goals in the Water Management Plan. Tex. Water Code § 36.101(5).

Groundwater Ownership and GCDs

The groundwater ownership right entitles the landowner to drill for and produce the groundwater below the surface but does not entitle a landowner the right to capture a specific amount of groundwater. Tex. Water Code § 36.002(c) and (d). The Texas Water Code authorizes GCDs to place limitations on the right to produce groundwater in an effort to conserve and protect the sustainability of aquifers. Texas Water Code § 36.116(2). The Texas Water Code also allows a GCD to issue production permits up to the point that the total volume of exempt and permitted groundwater production will achieve a DFC. Tex. Water Code § 36.1132. To ensure that the groundwater levels do not recede below the DFCs, the Water Code authorizes a GCD to promulgate rules to regulate the withdrawal of groundwater by setting production limits on wells and limiting the amount of water produced based on acreage or tract size. Tex. Water Code § 36.116(2).

The TWDB determines the Modeled Available Groundwater (MAG) which is “the amount of water that the executive administrator determines may be produced on an average annual basis to achieve DFCs established under Section 36.108.” Tex. Water Code § 36.001(25). The Water Code requires that GCDs “shall consider,” among other things, the MAG for the GCD when issuing permits. Tex. Water Code § 36.1132(b)(1).

PETITION FOR INQUIRY

Texas Water Code § 36.3011 allows an owner of land within a management area to file a petition with the Commission requesting an inquiry into specific actions of a GCD. On February 14, 2018, Fred C. Russell filed a petition for inquiry of Post Oak with the Commission. Post Oak is in GMA 12. The TCEQ’s rules for an inquiry are in 30 Tex. Admin. Code (TAC) § 293.23.

Petitioner alleges that:

The groundwater in the management area is not adequately protected by the rules adopted by the District.

The groundwater in the management area is not adequately protected due to the failure of Post Oak to enforce substantial compliance with its rules and abide by their District Mission.

For an inquiry, a petitioner must meet certain requirements of 30 TAC § 293.23. Under 30 TAC § 293.23(a)(1), the Petitioner states that he owns 20.61 acres on 22 Hills Road, Gause, Texas, in Milam County, which qualifies him as an affected person. In accordance with 30 TAC §293.23(b)(8) & (9), the Petitioner requested an inquiry for two of the listed reasons in the rule. In accordance with 30 TAC § 293.23 (c), the Petitioner filed the Petition and supporting documentation. In accordance with 30 TAC 293.23(e), the Petitioner mailed copies of the Petition to seven GCDs, including all districts that are within GMA 12 and adjacent to Post Oak. These GCDs were: Bluebonnet GCD, Brazos Valley GCD, Clearwater Underground Water Conservation District, Fayette County GCD, Lost Pines GCD, Mid-East Texas GCD, and Post Oak Savannah GCD.

The Commission received responses to the Petition from three GCDs, including Post Oak. The other two GCDs are Fayette County GCD and Brazos Valley GCD. Both support Post Oak’s rules and management of groundwater and request dismissal of the Petition.

REASONS FOR PETITION FOR INQUIRY

The Petitioner’s first stated reason for filing the Petition with the commission is to request an inquiry to ascertain whether the groundwater in the GMA is adequately protected by the GCD’s rules. The second reason is to determine whether the groundwater in the management area is unprotected due to failure of the GCD to enforce substantial compliance with its rules and abide by their District Mission.

Mission statement

Concerning Petitioner’s allegation that the GCD is not following its mission statement, the GCDs’ Mission is:

“District Mission:

The Post Oak Savannah Groundwater Conservation District (POSGCD) mission is to provide for the conservation, preservation, protection, recharging, and prevention of waste of groundwater, and to protect groundwater users, by adopting and enforcing Rules consistent with state law. The District will accomplish this mission by imposing spacing requirements, regulating production, requiring permits for non-exempt wells and production,

establishing limits on water drawdown levels and monitoring groundwater levels and production, making appropriate adjustments to allowable and permitted production, and encouraging conservation.”

<http://posgcd.org/?s=mission>

The GCD’s mission statement is not in a rule. A mission statement is not required by Tex. Water Code Chapter 36. The reasons for an inquiry listed in in Tex. Water Code § 36.3011(b)(8) and (9) do not include a review of the GCD’s mission, but of only the GCD’s rules. Therefore, the ED recommends that the commission not review the GCD’s mission statement as part of this inquiry.

Groundwater Well Assistance Program

Petitioner appears to be primarily concerned about Post Oak’s Groundwater Well Assistance Program (GWAP), which was developed during years 2016 and 2017, then was adopted by the GCD on January 9, 2018. Post Oak’s GWAP states that:

“The primary purpose of the GWAP is to identify wells in the District which may require action to prevent the water level in the well from dropping below the pump due to groundwater level declines caused by aquifer-wide pumping. The intent is to identify wells which may be at risk of these adverse impacts up to ten (10) years in advance and provide assistance in preventing the loss of water supply in those wells.

Additionally, this assistance shall include restoring a water supply to those well owners should an emergency situation arise where the water level in a well has dropped below the pump before corrective action has been taken.”

http://posgcd.org/wp-content/uploads/2018/03/POSGCD-GWAP_Adopted-01.09.18.pdf, p. 3.

The program has only existed a short time, and the GCD has the authority and latitude to make changes to the program as implementation and challenges to implementation are experienced. The GWAP is not in a Post Oak rule nor referenced by the Post Oak rules. Also, this program is not required by the Water Code and is therefore not an act that the commission has the authority or responsibility to review.

If the Commission decides to appoint a review panel to consider the GWAP, the

Executive Director disagrees with Petitioner's arguments on the program. Petitioner argues that it is unfair to exclude the larger farmers' irrigation wells and small business wells from any assistance. The Post Oak GWAP states that to participate in the program the well "must be either a low-capacity non-exempt permitted well that produces less than 50 gallons per minute OR an exempt well used for domestic and/or livestock use as defined in the District's Rules."

http://posgcd.org/wp-content/uploads/2018/03/POSGCD-GWAP_Adopted-01.09.18.pdf, p. 6.

The GWAP was created to mitigate impacts to small well owners, non-exempt or exempt. This program appears to be a reasonable approach to identify and protect small wells from large-scale pumping.

Petitioner asserts that Post Oak has difficult eligibility requirement for landowners to receive assistance because landowners' wells must be included in the well monitoring network. However, the well monitoring network is a key to Post Oak's understanding the aquifer's response to pumping and achieving the DFCs. This monitoring well requirement also appears reasonable.

Petitioner is also concerned that Post Oak's GWAP is underfunded. Post Oak responds that even if the GWAP were a program over which TCEQ had authority, the facts indicate that the program is sufficiently funded. The GCD's enabling legislation establishes the maximum combined production and transportation fee per thousand gallons of groundwater transported outside the boundaries of the District at \$0.17 per thousand gallons of groundwater.

Post Oak has been reviewing data to determine future needs of the GCD. Beginning in 2018, Post Oak will annually perform evaluations which will include the most recent information and data gathered from the District's Well Monitoring Network, including localized hydrogeological studies at monitoring locations, as well as GAM simulations, using the most recent Central Queen City/Sparta/Carrizo-Wilcox GAM, and including the most recent information on projected pumping in GMA 12. This evaluation shall be known as the GWAP Annual Needs Assessment (GANA), and be performed by the District's hydrologist. The report shall estimate the year any well may require assistance under this program, with qualified wells requiring assistance within the first

ten (10) years being addressed as soon as possible, and when possible, in the order identified in the report.

The report generated from the GANA shall be used to establish the annual budget for the projected needs of the GWAP fund, and may also be used in establishing guidelines for completions of water wells in certain areas of the District in the future. Post Oak also points out that, statutorily, the District is still required to adhere to Tex. Water Code § 36.205, Texas Water Code, which requires that in establishing fees, a district may not unreasonably exceed the cost to the district of performing the administrative function for which the fee is charged or for providing the services outside the district. While Petitioner desires that the District raise its fees to the maximum allowed \$0.17 per thousand gallons of groundwater transported, Post Oak believes that in adopting a fee that is one-half of \$0.17, it has determined that presently, that amount represents the cost to the District.

Additionally, any well owner may appeal the decision of District Staff or consultants, concerning eligibility or choice of corrective actions for their well. Such appeal shall be made by the well owner to the Board of Directors. http://posgcd.org/wp-content/uploads/2018/03/POSGCD-GWAP_Adopted-01.09.18.pdf, Rule 10.2, p. 56.

The Executive Director's position is that the Commission does not have the authority to review the GWAP, but if the commission disagrees, the ED believes that there is insufficient evidence to show that the GWAP adversely impacts groundwater.

Protection of groundwater by rules and enforcement of rules

Petitioner alleges that Post Oak is over-permitting the aquifers in the GCD. He is particularly concerned about the conservation of the Carrizo and middle Wilcox (Simsboro formation) aquifers after the Vista Ridge Regional Supply Project starts production. Petitioner states that it will be a problem because in the first year of production, this Project will exceed the MAG for the Carrizo and Middle Wilcox management zones. The Petitioner asserts that both Blue Water Systems and the Vista Ridge project have a permit for 71,000 acre feet per year, and he asserts that this will also exceed the MAG.

Post Oak responds that the Petitioner continues to misunderstand the purpose of a MAG. A MAG is the predicted estimated production that can be produced every year to

achieve the DFCs in year 2060. It was never intended to be an annual cap. Post Oak states that a primary responsibility of the District is to manage the groundwater and aquifers to comply with the year 2060 DFCs and that its rules and management of the District will accomplish that responsibility. The management of the aquifers by using actual aquifer conditions instead of estimated availability based on modeled results, such as the MAG, is supported by both the applicable law and hydro-geologic analysis.

Petitioner also argues that Post Oak's "approve all permits" philosophy, coupled with the District's rules that allow everyone within the District the right to apply for production permits to pump up to two acre-feet per acre per year, is not protective of groundwater. He urges that Post Oak should have rules that allow everyone the right to pump a sustainable amount of groundwater. Petitioner is also concerned about the fact that Blue Water pays a large part of the fees that the GCD receives and that he believes that Blue Water receives preferential treatment for that. He discusses the fact that Blue Water was given a deferral of payment of fees for six months.

Post Oak responds that while its Rule 5.1(2) authorizes a maximum total annual production of two acre-feet per acre per year of groundwater, that rule is subject to specific constraints. The Rules of the District and all drilling, operating and production permits issued by the District provide that permitted groundwater production can be modified and reduced as needed to protect the aquifers and achieve the DFCs. The District has "...the ability to implement specific management strategies, such as curtailment...." Post Oak's rules allow permits to be issued for the annual production of up to two acre feet/acre of groundwater until such time as total groundwater production, the monitored water levels in the aquifers, MAG and other factors indicate that permitted production should be decreased to achieve the adopted DFCs.

Specifically, Post Oak states that under Section 16 of its rules, until the time that production reaches 60% of the MAG, or 50% of the DFCs, or projected water level drawdowns indicate the DFCs listed in management plan will be exceeded within 15 years, the District will generally issue appropriate permits for up to two acre feet/acre of groundwater production. However, the rules specifically provide for the Board to lessen the production per acre based on other relevant factors and

to amend, modify and reduce the production authorized for each permittee as needed to give proper consideration to the MAG and comply with the DFCs.

Post Oak's Rule 16.4 sets out the different threshold levels and the actions that will be taken at each level. The first threshold level is triggered when the total estimated groundwater production reaches 60% of the MAG. At that point, the District's rules authorize the District to perform studies to provide information on aquifer properties, aquifer recharge, aquifer and surface water interactions, and aquifer pumping in order to improve the models, tools, and methodologies used to analyze data and predict future groundwater levels and availability. Threshold Level 2 is reached when total estimated groundwater production reaches 70% of the MAG. If this occurs, the District is authorized to re-evaluate the management plan and rules regarding management zones, recharge estimates, the collection and analysis of monitoring data, and proposed changes to DFCs. At Threshold Level 3, which is a groundwater drawdown of 75% of the adopted DFC calculated from monitored water levels, the District will conduct a public hearing to discuss the status of the aquifers and develop a Level 3 Response Action Work Plan focused on achieving the District's goals and objectives, including the DFCs.

Under Rule 16.7, to achieve the DFCs, Post Oak has the ability to reduce existing production authorized by previously issued permits by two percent annually and also to issue all subsequent permits to authorize the production of the lowered number of acre feet/acre. In addition to the rules in Section 16, the permits issued by the District include the following sentence: "The Rules are incorporated herein in their entirety by reference, as if set forth herein verbatim, including but not limited to the Rules providing for reducing permitted production." This (or an almost identical provision) has been in the District permits from the beginning of the District, and continues.

In his Response Brief, Petitioner specifically complains that the aquifer is over-permitted for a single producer by an amount that far exceeds the MAG. Additionally, he asserts that when there is a curtailment, caused by a single producer, all owners of permits will be curtailed, not just the single producer, which is unfair. It is true that if there is a curtailment, all permit holders in the Management Zone will be cut back.

Post Oak Rule 16.4(4) states that the “threshold levels will be administered and applied separately to each Management Zone.” Post Oak responds that it will consider the pumping-induced impacts to groundwater resources that occur between or among Management Zones. This will determine if pumping in one Management Zone is contributing to adverse impact on groundwater in another Management Zone. The five Management Zones are listed in Post Oak’s Management Plan. If a groundwater production curtailment is required in the future, Post Oak’s approach appears to be a fair and equitable way to regulate privately owned groundwater in each Management Zone.

Post Oak also points to District Rule 7.6 which provides Post Oak with a nonexclusive list of factors that can be considered when determining whether to grant a permit. The rule states that the District will consider Chapter 36, Texas Water Code, the District Act and rules, the application, and all other relevant factors, including, but not limited to, (1) the management plan; (2) the quality, quantity, and availability of alternative water supplies; (3) the impact on other landowners and well owners from a grant or denial of the permit, or the terms prescribed by the permit including whether the well will interfere with the production of water from exempt, existing or previously permitted wells and surface water resources; (4) whether the permit will result in a beneficial use and not cause or contribute to waste; and (5) if the applicant has existing production permits that are underutilized and fails to document a substantial need for additional permits to increase production.

Concerning Post Oak’s enforcement of its rules, it attaches an administrative fine and a default judgement that it has obtained in enforcement of its rules. Most of its enforcement has been done administratively. The two big entities are not reflected in enforcement because they have not begun producing water under their permits.

The rules adopted by Post Oak are adequately protective of the groundwater in the GCD. Post Oak has implemented rules which allow it to amend its rules and re-evaluate its management plan based on the MAG and actual groundwater levels in order to adapt its approach to achieving the applicable DFCs. The GCDs that filed

amicus briefs in response to the Petition agree that GCDs should achieve their adopted DFCs based on actual aquifer conditions and not just the MAG. Accordingly, the ED finds no evidence that demonstrates a review panel inquiry is necessary under the reasons claimed in the Petition.

REVIEW PANEL

Section 36.3011(d) of the Texas Water Code provides that if the petition is not dismissed, the commission shall appoint a review panel consisting of a chairman and four other members. The Commission must also appoint a disinterested person to serve as a nonvoting recording secretary for the review panel. The nonvoting recording secretary may be a TCEQ employee.

If the Commission elects not to dismiss the petition, the commission must issue an order appointing the members of the review panel and directing them to, not later than the 120th day after appointment, “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.” The review panel report must include a summary of evidence considered, list of findings, and recommended actions appropriate for the Commission to take under Texas Water Code, § 36.303 and 30 TAC § 293.22.

Selection Process

From March 15, 2018 to April 2, 2018, the ED received seven nominations for volunteers to serve on a potential five member review panel regarding the inquiry into Post Oak Savannah GCD. The completed nomination forms are attached as Attachment A.

The Texas Water Code requires the commission to appoint a director or general manager of a district located outside the management area that is the subject of the petition; and may not appoint more than two members of the review panel from any one district. Texas Water Code, § 36.3011(d). In 30 TAC §293.23(g)(1)(B) it states that a director or general manager that is not an affected person under the rule may be appointed. All seven of the nominees willing to serve on the review panel are from groundwater management areas other than GMA 12.

Nominees

The ED lists the following nominees for consideration by the Commission in order of tenured experience with respect to groundwater district service:

1. C. E. Williams, Panhandle GCD General Manager; more than 25 years of experience; GMA 1.
2. Roland Trees, Real-Edwards Conservation & Reclamation District President; 20 years of experience; GMA 7.
3. Mike McGuire, Rolling Plains GCD General Manager; more than 17 years of experience; GMA 6.
4. John Martin, Southeast Texas GCD General Manager; 11 years of experience; GMA 14.
5. Steven Walthour, North Plains GCD General Manager; 10 years of experience; GMA 1.
6. Joel Pigg, Real-Edwards Conservation & Reclamation District General Manager; seven years of experience; GMA 7.
7. Dirk Aaron, Clearwater Underground Water Conservation District General Manager; 7 years of experience; GMA 8. The ED would consider Mr. Aaron an affected person and unable to serve on the panel since his district is adjacent to Post Oak.

The disinterested staff nonvoting recording secretary available and willing to serve is Scott Underwood, P.G. of the Water Availability Division.

RECOMMENDATION

The Petitioner favors a different approach to the management of groundwater in GMA 12. The Petitioner's favored management approach of regulating the issuance of permits rather than by regulating the production of groundwater may be a method which could also achieve the DFCs. However, that approach is not the only or sole approach.

Post Oak's rules are designed to acknowledge a landowner's right to produce the groundwater that is below their land while protecting and conserving the groundwater in the aquifers to ensure that the desired future conditions are met. Post Oak's rules

protect the groundwater by establishing enough flexibility for the district to adapt to the changing circumstances of the actual aquifer levels and to reduce production as necessary to achieve the DFCs. Accordingly, the Executive Director respectfully recommends that this petition be dismissed.

Respectfully submitted,

Texas Commission on Environmental Quality

Stephanie Bergeron Purdue,
Interim Executive Director

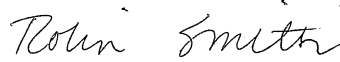
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CERTIFICATE OF SERVICE

I certify that on April 6, 2018 the Petition For Inquiry Of Post Oak Savannah Groundwater Conservation District was filed with the Texas Commission on Environmental Quality's Office of the Chief Clerk and a complete copy was served to all persons listed on the attached mailing list via First Class Mail and electronic mail.



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