

Response to House Natural Resources Committee Formal Request for Information

Interim Charge 3: Monitor the joint planning process for groundwater and the achievement of the desired conditions for aquifers by groundwater conservation districts.

These comments are submitted on behalf of the following groundwater conservation districts:

Bandera County River Authority and Groundwater District
Blanco-Pedernales Groundwater Conservation District
Brazoria County Groundwater Conservation District
Calhoun County Groundwater Conservation District
Gonzales County Underground Water Conservation District
Jeff Davis County Underground Water Conservation District
Hays Trinity Groundwater Conservation District
Hemphill County Underground Water Conservation District
Lost Pines Groundwater Conservation District
Refugio Groundwater Conservation District
Texana Groundwater Conservation District
Trinity Glen Rose Groundwater Conservation District
Victoria County Groundwater Conservation District

Groundwater Planning

House Bill No. 1763 passed by the 79th Legislature, Regular Session, regionalizes decisions on groundwater planning, directs the groundwater conservation districts in each groundwater management area to establish desired future conditions (“DFCs”) for each aquifer in their area, requires the Texas Water Development Board to calculate the Modeled Available Groundwater (“MAG”) for each aquifer in those areas, and requires both the groundwater conservation districts and regional water planning groups to use that Modeled Available Groundwater amount for water planning purposes. These changes affect the rules and plans of groundwater conservation districts, various groundwater supply projects planned around the state, and the regional and state water plans. It also affects the ability of political subdivisions to get state loans for groundwater projects, even if those projects are in areas with no groundwater conservation districts. In 2011, the legislature added a definition for “desired future condition” to mean “a quantitative description, adopted in accordance with Section 36.108, of the desired condition of the groundwater resources in a management area at one or more specified future times.”

The Texas Water Development Board (“TWDB”) then uses the adopted DFCs to model the available groundwater, defined as “the amount of water that the executive administrator determines may be produced on an average annual basis to achieve a desired future condition established under Section 36.108.” Sec. 36.101(25), Water Code.

The planning process is found in Sections 36.1071, 36.1072, and 36.108, Water Code. First, each GCD is to complete a groundwater management plan and submit that plan to the TWDB for approval. The plan must include an evaluation of the Management Goals, Management Objectives, Performance Standards, and actions necessary to effectuate the plan. Sec. 36.1071(e), Water Code. The TWDB Executive Administrator then approves the plan as administratively incomplete when it contains the information required by Texas Water Code §36.1071(a) and (e). TAC Sec. 356.54(a) Should the Executive Administrator refuse to approve a GCD Management Plan the GCD may appeal the decision to the Texas Water Development Board and may appeal an adverse decision from the Board either to mediation or to a Travis County District Court. Sec. 36.1072(f), Water Code. That appeal will be by trial de novo, and not

treated as an appeal under the substantial evidence rule, meaning the District Court may make a decision entirely independent of the TWDB. Sec. 36.1072(f), Water Code.

Desired Future Conditions

To establish a desired future condition, Groundwater Conservation Districts (GCDs) must meet as a committee made up of each GCD's Board President or the President's designee. Sec. 36.108, Water Code. Every GCD with territory in that Groundwater Management Area (GMA) is entitled to one seat on the committee and one vote on the desired future condition decision. The committee must meet at least annually, and within five years must establish and define a desired future condition for each aquifer within the GMA. The next deadline to propose DFCs for adoption is May 1, 2021. Sec. 36.108(d), Water Code.

The desired future condition must be proposed by a two-thirds vote of all the district representatives. Sec. 36.108(d-3), Water Code. Note that the membership of the committee makes the decision on the desired future condition standard, and neither the Water Code nor the TWDB Rules require ratification or approval by the member GCDs. The proposed desired future conditions must 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," the desired future conditions may also provide for the reasonable long-term management of groundwater resources consistent with the management goals in the GCDs' management plans. Sec. 36.108 (d-2), Water Code.

Once proposed, the DFCs must be scheduled for at least a 90-days public comment period, including public hearings within each of the GMA's Districts, after which each District must compile a summary of relevant comments received, any suggested revisions to the proposed desired future conditions, and the basis for the revisions. Sec. 36.108(d-2), Water Code. The District representatives must then reconvene to review the reports, consider any district's suggested revisions to the proposed desired future conditions, prepare an explanatory report, and finally adopt the desired future conditions for the management area by a two-thirds vote of the membership. The next deadline for final adoption of the DFCs is January 5, 2022. *Id.* Following GMA adoption, each individual District must finally adopt the DFCs relevant to that District. 36.108(d-4), Water Code.

Each GCD will then use the adopted desired future conditions to amend its Groundwater Management Plan and rules, and the Texas Water Development Board will run the Groundwater Availability Models for that GMA to determine each GCD's "Modeled Available Groundwater." § 36.1084(b), Water Code.

DFC Appeals

During the 2015 Legislative Session, the process to appeal adoption of a Desired Future Condition was changed from an administrative appeal to the Texas Water Development Board to a judicial appeal before the local District Court. Within 120 days after the final adoption of the DFC, any affected person may file a petition with the GCD appealing the reasonableness of the desired future condition. Sec. 36.1083(b), Water Code. The District that receives the petition must contract with the State Office of Administrative Hearings ("SOAH") to conduct a contested case hearing on the reasonableness of the adopted DFC, and must also provide a copy of the petition to the Texas Water Development Board. TWDB then has 120 days to conduct an administrative review to determine whether the adopted DFC meets the criteria in Section 36.108(d), and a scientific and technical study of the DFC, including consideration of:

- (A) the hydrogeology of the aquifer;
- (B) the explanatory report provided to the development board under Section 36.108(d-3);
- (C) the factors described under Section 36.108(d); and

(D) any relevant:

- (i) groundwater availability models;
- (ii) published studies;
- (iii) estimates of total recoverable storage capacity;
- (iv) average annual amounts of recharge, inflows, and discharge of groundwater; or
- (v) information provided in the petition or available to the development board. Sec. 36.1083(e), Water Code.

The SOAH administrative law judge must then consider the TWDB study, the explanatory report, and the petition challenging the reasonableness of the DFC. Sec. 36.1083(g), Water Code. In addition to “general notice” of the hearing, the District must also provide individual notice of the hearing to:

- (A) the petitioner;
- (B) any person who has requested notice;
- (C) each nonparty district and regional water planning group located in the same management area as a district named in the petition;
- (D) the development board; and
- (E) the commission.

Sec. 36.1083(k), Water Code.

Following the contested case hearing the administrative law judge prepares a Proposal for Decision that includes findings of fact and conclusions of law. The GCD Board of Directors must then review the Proposal for Decision and render a final decision on the petition. Sec. 36.1083(n), Water Code.

If the final order finds that a desired future condition is unreasonable, within 60 days the GMA must reconvene to revise the unreasonable desired future condition by following the procedures in Section 36.108 to adopt new desired future conditions applicable to the district that received the petition. Sec. 36.1083(p), Water Code. It is important to note that a finding that one District’s DFC is unreasonable does not invalidate the DFCs for any other District in the GMA that didn’t participate in the contested case hearing. Sec. 36.1083(q), Water Code.

The District’s final order may be appealed to a District Court in the affected GCD under a substantial evidence standard of review. If the Court finds the DFC to be unreasonable it may “strike” that DFC and the GMA must reconvene to adopt a new DFC. Sec. 36.10835, Water Code. Note that the judicial appeal section does not specifically limit the appeal to parties who participated in the contested case hearing, but does cite Section 2001.174, Government Code, which is part of Subchapter G related to judicial review of contested case hearings. That subchapter requires a party to exhaust all administrative remedies before filing suit, so any potential party that did not participate in the contested case hearing before the District will not have exhausted all administrative remedies and therefore could not participate in an appeal. See Sec. 2001.171, Government Code.

Modeled Available Groundwater

Amendments to Sec. 36.1132, Water Code, adopted in 2011 significantly changed the importance of the Modeled Available Groundwater. First, the name was changed from “Managed Available Groundwater” to “Modeled Available Groundwater.” But the more significant change was the repeal of the provisions that establish the MAG as a permit limit and replaced that with provisions utilizing the MAG as a consideration. The original provision stated “A district, to the extent possible, shall issue permits up to the point that the total volume of groundwater *permitted* equals the managed available groundwater . . .” Sec. 36.1132, Water Code (repealed)(emphasis added). The new version is as follows:

Sec. 36.1132. PERMITS BASED ON MODELED AVAILABLE GROUNDWATER. (a) A district, to the extent possible, shall issue permits up to the point that the total volume of exempt and permitted groundwater *production will achieve an applicable desired future condition* under Section 36.108.

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

- (1) the modeled available groundwater determined by the executive administrator;
- (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.

Sec. 36.1132, Water Code (emphasis added).

Removing the MAG as a permit limit significantly reduces its significance in the permit process. Instead, the MAG is one of several considerations in issuing a permit, and the District's goal is not to limit permits to the MAG, but limit production enough to ensure achieving the DFC.

Are DFC Appeals Useful?

The Legislature is struggling with how to make planning numbers relevant. In the surface water context, the projects included in the State Water Plan received priority in obtaining funding from the State. Sec. 17.125(b-2), Water Code. State funding is also contingent upon the project being "consistent with" the State Water Plan. Sec. 16.053(j), Water Code. Inclusion in a regional water plan is also a factor in obtaining a surface water right. Sec. 11.085(k). Where the original statute creating the DFC and MAG included using the MAG as a permit limit, the 2011 changes removed that provision in favor of a goal to achieve the DFCs without directly impacting a particular permit. While that certainly weakens the planning process it also lessens the need to challenge DFCs. Permit decisions should be based on the facts surrounding a particular application, and that is the best place to litigate the issues relevant to that permit. Challenging a planning number is both counter-productive, a waste of resources, and unlikely to lead to any helpful result.

Timing Makes an Appeal Irrelevant

Each GMA must adopt Desired Future Conditions every five years. A challenge to an adopted DFC begins within 120 days after final adoption. TWDB has 120 days to complete their study and then SOAH conducts a contested case hearing process. The only appeal filed under the new process (*City of Conroe et al vs. Lone Star GCD*) settled the day the hearing was scheduled to begin. The Lone Star GCD adopted the DFCs on August 9, 2016, and the petitions were filed on December 2nd and 6th, 2016. After TWDB completed its study, SOAH started the contested case hearing. On May 12, 2017, the SOAH Judge convened a preliminary hearing and adopted a hearing schedule that started with depositions beginning in May and ending with a November 2017 hearing. Following the conclusion of the hearing, the Judge would have had to produce the Proposal for Decision, which likely would have been at least an additional 90 days. The Board of Directors would then conduct the final hearing to consider and vote on the Proposal for Decision. The entire process from DFC adoption by the GCD to a final decision on the appeal by the Board of Directors would have taken at least 18 to 19 months. At that point, the GMA would have to restart the entire process to adopt revised DFCs, including running the proposed DFCs through the groundwater models, the 90-day public comment period, public hearings in each GCD, and final adoption by both the GMA and the individual GCDs. Even on an accelerated schedule, the GMA 14 representatives have been told that process will take 18-19 months.

The process to start adopting DFCs for the May 2021 deadline likely would have started in 2018 anyway. So had the appeal process completed and the Board found the DFCs to be unreasonable, the “revised” DFCs would have been adopted only slightly ahead of the next round of planning. Furthermore, because the DFC represents a planning goal to be achieved over a 50-60 year horizon, resetting the DFCs during the 5-year interim accomplishes little if anything at all.

Other Problems

After the Lone Star Groundwater Conservation District settled the dispute and agreed the 2016 Desired Future Condition was “no longer reasonable,” GMA 14 was asked to adopt a new Desired Future Condition for Montgomery County. Because the GMA had already started the 2021 planning process they decided to combine the request with the current planning process. When the Lone Star Groundwater Conservation District adopted a new management plan it stated it did not have a Desired Future Condition. The Texas Water Development Board rejected that management plan as administratively complete and commented that the district must use the Desired Future Condition approved in 2010. That dispute was settled through the mediation process but there is still an issue of what Desired Future Condition applies to a district following a successful appeal.

Conclusion

Desired Future Conditions and Modeled Available Groundwater numbers are useful tools for planning. They can help both the groundwater conservation districts and the regional water planning groups, as well as water utilities, industry, and economic development planners. All of these people are seeking certainty in future water supplies. Trying to determine how much groundwater will be available over the next five decades will never provide absolute certainty. Litigation over those planning efforts does nothing to aid in achieving the goal of certainty. Because Desired Future Conditions are reviewed, revised, and adopted every five years, any appeal process quickly becomes meaningless.

Solution

The primary means of protecting the groundwater property rights of any person is through the permit process. Landowners seeking to produce water may challenge a district's standards through the contested case process; landowners seeking to protect their wells from excessive pumping by neighbors may protest those permits through the contested case process. However, either landowners or adjoining groundwater conservation districts may want their Groundwater Management Area to change the current Desired Future Conditions for their aquifers and consider various alternatives. Those efforts are better accomplished through the next round of the planning process rather than an appeal of prior decisions.

The current appeal process should be repealed. In its place, the legislature should create a means of petitioning a Groundwater Management Area to consider a specific Desired Future Condition. The petition process could trigger the same Texas Water Development Board review of the proposed Desired Future Condition and, if necessary, a hearing conducted by the State Office of Administrative Hearings to determine if the proposed Desired Future Condition is reasonable.

The petition process could result in a requirement for the Groundwater Management Area to consider the Desired Future Condition proposed in the petition or a determination that the proposed Desired Future Condition is not reasonable and should be dismissed. This solution also resolves the issue of what Desired Future Condition applies to a particular district's management plan: the current Desired Future Condition remains in place until it is revised following a full investigation and approval by the GMA. This prospective approach would create a more useful and reasonable means of protecting minority viewpoints.