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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

April 6, 2018

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

**RE: FRED C. RUSSELL'S PETITION FOR INQUIRY REGARDING POST
OAK SAVANNAH GROUNDWATER CONSERVATION DISTRICT
TCEQ DOCKET NO. 2018-0194-MIS**

Dear Ms. Bohac:

Enclosed for filing is the Office of Public Interest Counsel's Response to 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

Enclosure

TCEQ DOCKET NO. 2018-0194-MIS

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|-----------------------------|----------|-------------------------|
| PETITION FOR INQUIRY | § | BEFORE THE TEXAS |
| | § | |
| FILED BY | § | COMMISSION ON |
| | § | |
| FRED C. RUSSELL | § | ENVIRONMENTAL |
| | § | QUALITY |

THE OFFICE OF PUBLIC INTEREST COUNSEL’S RESPONSE TO FRED C. RUSSELL’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 February 14, 2018, Fred C. Russell (“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 77th Legislature, Regular Session, 2001 (pursuant to the provisions of Article XVI, Section 59 of the Texas Constitution and Chapter 36 of the Texas Water Code), and a local confirmation election held in November 2002. 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.”¹ Located in Milam and Burleson counties, the District is a member of Groundwater Management Area (“GMA”) 8 and GMA 12.

The petition provides two reasons for the Commission to act: (1) the groundwater in the management area is not adequately protected by the rules adopted by the District; and (2) the groundwater in the management area is not adequately protected due to the failure of the District to enforce substantial compliance with its rules and abide by their District Mission. The Commission received responses from POSGCD as well as from two groundwater conservation districts (“GCDs”) within GMA 12.² The Commission also received a sur-reply from Petitioner. 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 or it may 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 not sufficient to show that the groundwater in the management area is not adequately protected by the rules adopted by the District or that the District has failed to enforce substantial compliance with its rules.³ 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 “conserv[e] and develop[] . . . all of the natural resources of this State” and vests the Legislature with authority to “pass all such laws as

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

² The Commission received responses from the Brazos Valley GCD and the Fayette County GCD.

³ OPIC notes that Petitioner has also alleged that the District failed to “abide by their District Mission.” (Pet. at 3). However, this is not an authorized grounds for inquiry under Tex. Water Code § 36.3011(b).

may be appropriate thereto.” The Legislature enacted Chapter 36 of the Texas Water Code to provide for the management of groundwater through the creation of groundwater conservation districts, “[i]n order to provide for the conservation, preservation, protection, recharging, and prevention of waste of groundwater, and of groundwater reservoirs or their subdivisions, and to control subsidence caused by withdrawal of water from those groundwater reservoirs or their subdivisions, consistent with the objectives of Section 59, Article XVI, Texas Constitution[.]” Tex. Water Code § 36.0015(b). “Groundwater conservation districts created as provided by this chapter are the state's preferred method of groundwater management . . . through rules developed, adopted, and promulgated by a district in accordance with the provisions of this chapter.” *Id.* Chapter 36 goes on to, among other things, delineate the powers and duties of GCDs.

Petition for Inquiry

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

- (1) a district fails to submit its management plan to the executive administrator;
- (2) a district fails to participate in the joint planning process under Section 36.108;
- (3) a district fails to adopt rules;
- (4) a district fails to adopt the applicable desired future conditions adopted by the management area at a joint meeting;
- (5) a district fails to update its management plan before the second anniversary of the adoption of desired future conditions by the management area;

- (6) a district fails to update its rules to implement the applicable desired future conditions before the first anniversary of the date it updated its management plan with the adopted desired future conditions;
- (7) the rules adopted by a district are not designed to achieve the adopted desired future conditions;
- (8) the groundwater in the management area is not adequately protected by the rules adopted by a district; or
- (9) the groundwater in the management area is not adequately protected due to the failure of a district to enforce substantial compliance with its rules.

Tex. Water Code § 36.3011(b).

The petition must include supporting documentation for each of the individual reasons the affected person identifies that demonstrates that a Commission inquiry is necessary. 30 Texas Administrative Code (“TAC”) § 293.23(c). Furthermore, the petition must include a certified statement from the affected person that describes why the petitioner believes that a Commission inquiry is necessary. 30 TAC § 293.23(d). The petitioner shall provide a copy of the filed petition to all GCDs within and adjacent to the GMA within five days of the date the petition was filed and shall file within 21 days evidence that a copy of the petition was mailed to all GCDs within and adjacent to the GMA. 30 TAC § 293.23(e).

In this context, only an “affected person” may file a petition with the Commission.

Tex. Water Code § 36.3011(b). The statute defines an “affected person” as:

- (1) an owner of land in the management area;
- (2) a GCD or subsidence district in or adjacent to the management area;
- (3) a regional water planning group with a water management strategy in the management area;
- (4) a person who holds or is applying for a permit from a district in the management area;

- (5) a person with a legally defined interest in groundwater in the management area; or
- (6) any other person defined as affected by commission rule.

Texas Water Code § 36.3011(a).

Responses to and Review of Petition for Inquiry

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

The Commission shall review the petition and any timely filed responses, no sooner than 35 days, but not later than 90 days after the date the petition was filed. 30 TAC § 293.23(g). The Commission shall either: (1) dismiss the petition if it finds that the evidence is not adequate to show that any of the conditions alleged in the petition exist; or (2) select a review panel. Tex. Water Code § 36.3011(c). TCEQ rules echo this, and provide that the Commission may dismiss the petition if it finds that the evidence required by 30 TAC § 293.23(c) or (d) is not sufficient to show one or more of the conditions listed in 30 TAC § 293.23(b)(1)–(9) exist. 30 TAC § 293.23(g).

If a review panel is selected, the Commission shall appoint a five-member panel to conduct any public hearings ordered by the Commission, review the petition and any evidence relevant thereto, and consider and adopt a report to be submitted to the Commission. Tex. Water Code § 36.3011(g), (h); 30 TAC § 293.23(g). The review panel's report must be submitted to the Executive Director no later than 120 days after the review

panel was appointed. 30 TAC § 293.23(h). The Executive Director or the Commission shall take action to implement any or all of the review panel's recommendations if a cause contained in 30 TAC § 293.23(b)(1)–(9) applies. 30 TAC § 293.23(i). Procedures for Commission review and action regarding GCD noncompliance with the requirements Chapter 36 of the Texas Water Code are found in 30 TAC § 293.22(b)–(h). Authorized actions include initiation of a noncompliance review and facilitation of a compliance agreement by the Executive Director.

III. DISCUSSION

Petitioner provides two reasons for the Commission to act: (1) the groundwater in the management area is not adequately protected by the rules adopted by the District; and (2) the groundwater in the management area is not adequately protected due to the failure of the District to enforce substantial compliance with its rules and abide by their District Mission. OPIC notes that the Petitioner inserted the language “and abide by their District Mission”, as that phrase is not found in statute or rule.

Additionally, as a threshold matter, OPIC finds that as a landowner in the management area, Petitioner is an affected person. Tex. Water Code § 36.3011(a)(1). Furthermore, given that no District’s response has raised any issue regarding the certification and notice requirements of 30 TAC § 293.23(d) and (e), OPIC is satisfied that Petitioner has fulfilled these requirements.

After review of the petition, responses, and related evidence, including supporting documentation, OPIC finds that the evidence is insufficient to show that the groundwater in the management area is not adequately protected by the rules adopted by POSGCD or due to POSGCD’s failure to enforce substantial compliance with its rules.

Petitioner alleges: (1) specific issues with the District's Groundwater Well Assistance Program ("GWAP"); and (2) unsustainable pumping of the District's aquifers by Blue Water Systems pursuant to contractual arrangements with the District.

Groundwater Well Assistance Program

Regarding the first issue, the GWAP is a program that POSGCD has voluntarily developed "in order to assist well owners whose wells are projected to experience water level declines in their wells below the pump during normal operations as a result of groundwater production in GMA 12."⁴ Petitioner alleges that the GWAP program is underfunded, contains onerous eligibility requirements, and ultimately does not benefit all groundwater users in the District.

Petitioner, however, fails to point to any provision of the Texas Water Code, Texas Administrative Code, or other rule or law that requires the District to operate a GWAP or otherwise provides operational criteria therefor. Independently, OPIC has been unable to find any authority for the proposition that TCEQ may require operation, or dictate operational requirements, of the GWAP, unless the program violates specific provisions of the Water Code or Administrative Code, which Petitioner does not allege. Outside of the District's own rules, the GWAP is not required, nor even discussed, in rule or statute. Rather, it appears that Petitioner is dissatisfied with the program and seeks to compel it to undertake substantive modifications that rest squarely within the discretion of POSGCD.

Further, the GWAP appears to be an allowable use of District funds under Texas Water Code § 36.207, which provides that "[a] district may use funds obtained from

⁴ POSGCD Groundwater Well Assistance Program, adopted Jan. 9, 2018, 1.0 Introduction, p. 3, <http://posgcd.org/gwap/>.

administrative, production, or export fees...for any purpose consistent with the district's approved management plan, including, without limitation, making grants[.]” Therefore, regarding this issue, OPIC concludes that Petitioner has failed to present sufficient evidence that the groundwater in the management area is not adequately protected by the rules adopted by the District, or by the failure of the District to enforce substantial compliance with its rules. Consequently, OPIC cannot support further Commission inquiry into the GWAP.

Modeled Available Groundwater

Concerning Petitioner's second issue, Petitioner alleges that Blue Water Systems will be allowed to pump unsustainable amounts of groundwater from the District's aquifers, resulting in exceedance of the modeled available groundwater (“MAG”)⁵ during the first year of pumping, and continuing for decades. Consequently, Petitioner alleges that the District's rules are not adequately protective of groundwater in the management area and that the District has failed to enforce substantial compliance with its rules. Petitioner cites District Rule 1.2, entitled “Purpose of Rules” and the District Mission, both of which do not discuss MAGs, but instead provide general discussion of the objectives of the District, including “to protect groundwater users.”⁶

OPIC finds that regardless of the accuracy of Petitioner's contention regarding the MAG, its exceedance is not dispositive of this issue. Districts are required to establish

⁵ The MAG is the amount of water that the Texas Water Development Board determines may be produced on an average annual basis to achieve a desired future condition. Tex. Water Code § 36.001(25).

⁶ OPIC notes that this statement is found in the District Mission, however, the District Mission does not appear in rule, rather it is an informal statement of the District's intent. Regardless, this does not impact OPIC's analysis, because, even were the District Mission to be promulgated as a rule, it does not contain any specific directives or requirements that the Petitioner alleges have been violated, excepting the general goal of protecting groundwater users.

desired future conditions (“DFCs”) that provide for protection of the aquifers 50 years in the future, and the MAG is one, but, importantly, not the sole factor considered, in proposing and achieving DFCs. Specifically, the Districts “shall consider groundwater availability models *and other data or information*...and shall propose for adoption desired future conditions for the relevant aquifers.” Tex. Water Code § 36.108(d) (emphasis added). The District is required to issue permits up to the point that the total groundwater production will achieve the DFCs, not the MAG. Tex. Water Code § 36.1132(a). In issuing permits, the District considers, among other factors, the MAG, the estimate of groundwater that is actually produced, and yearly precipitation and production patterns. Tex. Water Code § 36.1132(b). Additionally, the District’s DFCs must “provide a balance between the highest practicable level of groundwater production and the conservation, preservation, protection, recharging, and prevention of waste of groundwater and control of subsidence in the management area.” Tex. Water Code § 36.108(d-2).

It is prudent management strategy, and further, is required by Chapter 36 of the Texas Water Code for a District to consider a number of factors, including the MAG, to achieve the applicable DFCs. OPIC notes that POSGCD’s management plan, as approved by the Texas Water Development Board, includes the District’s stated intent to maintain at least 100 monitoring wells that provide coverage across management zones and aquifers within the District.⁷ Here, POSGCD has a network of 151 monitoring wells and evaluates actual aquifer levels in conjunction with the MAG and other considerations in order to ensure that DFCs are met.⁸ Furthermore, Section 16 of POSGCD’s rules provide for

⁷ POSGCD’s Groundwater Management Plan, adopted December 5, 2017, § 16.1 Efficient Use of Groundwater, http://posgcd.org/wp-content/uploads/2017/08/POSGCD_Mgt_Plan_Adopted-12-5-2017-1.pdf.

⁸ POSGCD’s Resp. to Pet., p. 6.

reduction and curtailment of groundwater production, as necessary, to accomplish the applicable DFCs. The District has the ability to reduce production authorized by previously issued permits by two percent annually, and issue new permits with the applicable lowered production limits.⁹ The District may also reduce production at a greater percentage or more quickly if needed to accomplish DFCs.¹⁰ Finally, the District retains the ability to revise and adjust its rules and management plan to protect groundwater and ensure that DFCs are met. Therefore, OPIC concludes that the evidence is insufficient to show that the groundwater in the management area is not adequately protected by the District's rules.

Additionally, Petitioner has made no showing that POSGCD has failed to enforce substantial compliance with its rules. Petitioner does not provide the Commission with specific rules or instances where the District has been derelict in its enforcement responsibilities. Instead, Petitioner suggests the implementation of an alternative permitting methodology. However, this suggested methodology is not required by statute, rather it appears Petitioner seeks to substitute his judgment for that of the District. This is not one of the authorized grounds for an inquiry under Texas Water Code, Chapter 36. Further, POSGCD included in its response evidence that it has enforced its rules through both administrative and civil enforcement processes.¹¹ Accordingly, OPIC finds that the evidence is insufficient to show that POSGCD has failed to enforce substantial compliance with its rules.

⁹ Rules of the POSGCD, as amended through May 2017 § 16.7 Permit Limitations and Reductions, <http://posgcd.org/district-information/governing-documents/district-rules/>.

¹⁰ *Id.*

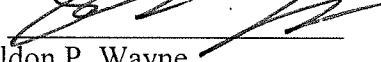
¹¹ POSGCD's Response to Petition, Exhibits "C-1" and "C-2" (Imposition and payment of administratively imposed fine), and "D" (District Court's final judgment in case filed by POSGCD).

IV. CONCLUSION

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

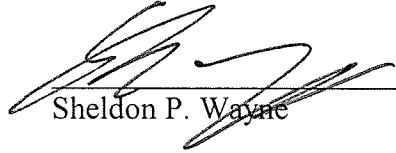
Respectfully submitted,

Vic McWherter
Public Interest Counsel

By: 
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CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2018 the original and seven true and correct copies of the Office of the Public Interest Counsel's Response to Petition for Inquiry Filed by Fred C. Russell 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.


Sheldon P. Wayne

MAILING LIST
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POST OAK SAVANNAH GROUNDWATER CONSERVATION DISTRICT
TCEQ DOCKET NO. 2018-0194-MIS**

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