

PERALES, ALLMON & ICE, P.C.

ATTORNEYS AT LAW

1206 San Antonio Street
Austin, Texas 78701
(512) 469-6000 • (512) 482-9346 (facsimile)
info@txenvirolaw.com

Of Counsel:
David Frederick
Richard Lowerre
Brad Rockwell

June 3, 2021

Sidney Youngblood, President
Post Oak Savannah Groundwater Conservation District Board of Directors

Via e-mail: admin@posgcd.org

RE: Role of non-exempt pumping in development of desired future conditions.

Dear Mr. President and Board Members:

In the development of the currently-proposed desired future conditions (“DFC”), claims have been made by water marketers such as Blue Water Vista Ridge LLC and others that the DFC *must* be set at a level that enables pumping of the maximum amounts identified within all issued non-exempt permits with no allowance for the governing districts to employ an adaptive management strategy in the future and no effective balancing of other statutorily-mandated factors. Environmental Stewardship offers these comments to aid Post Oak Savannah Groundwater Conservation District (the “District”) in a more balanced consideration of the DFCs. Accepting water marketers’ approach, embodied in the currently-proposed DFCs, would not merely be unwise – it would be unlawful.¹

The District must give consideration to all relevant statutory factors in developing a DFC.

The Texas Water Code sets forth a number of factors which a district is required to consider when adopting a desired future condition, including:

- Aquifer uses or conditions within the management area;
- The water supply needs and water management strategies included in the state water plan;
- Hydrologic conditions for each aquifer in the management area, including recharge, inflows, discharge and total recoverable storage;

¹ By this submission, Environmental Stewardship does not waive its right to submit further comments as the process moves forward.

- Other environmental impacts, including impacts on spring flow and other interactions between groundwater and surface water;
- The impact on subsidence;
- Socioeconomic impacts reasonably expected to occur;
- The impact on the interests and rights in private property, including ownership and the rights of management area landowners and their lessees and assigns in groundwater.
- The feasibility of achieving the desired future condition; and,
- Any other information relevant to the specified desired future conditions.²

Ultimately, in adopting a DFC, the districts are statutorily charged with, “provid[ing] 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.”³

This statutory structure establishes a complex process by which a wide range of occasionally conflicting factors are weighed by the Districts prior to the adoption of a DFC. Achieving *balance* is the key goal of the DFC process. It would be impossible to simultaneously and completely protect every consideration identified by the Legislature. Just as the district must “consider” impacts on private property, the district is equally charged with considering spring flow and aquifer discharge. These are competing interests, and the furtherance of one will often come at the expense of the other. Balancing these interests is a value judgment, purposefully delegated to districts primarily responsible to their local electorates.

The Texas Supreme Court has noted that by employing groundwater districts as the primary means of groundwater regulation, “the Legislature has chosen a process that permits the people most affected by groundwater regulation in particular areas to participate in *democratic* solutions to their groundwater issues.”⁴ A *democratic* groundwater management strategy requires weighing *all* of the factors set forth in statute.

Some water marketers would have the District delegate the decision on a DFC to a modeling program based upon a mere “reverse engineering” of the drawdown resulting from permitted wells. Disregarding the statutory structure in this manner would be unlawful, as it would

² Tex. Water Code § 36.108(d).

³ Tex. Water Code § 36.108(d)(2) (emphasis added).

⁴ *Sipriano v. Great Spring Waters of America*, 1 S.W.3d 75, 80 (Tex. 1999)(emphasis added).

effectively preclude consideration of factors that the districts are required to incorporate in their DFC decisions.

In fact, maximizing drawdown in order to accommodate all non-exempt permitted pumping would render the District's DFC decision arbitrary. An agency acts in an arbitrary manner if it fails to consider a factor the legislature directs it to consider, considers an irrelevant factor, or weighs only relevant factors and reaches a completely unreasonable result.⁵ If non-exempt pumping controls the DFC to the disregard of other considerations, such as environmental impacts and the interaction of surface water and groundwater, then the districts will have failed to adequately consider factors that the Legislature has directed the districts to consider.

Surface water impacts require more limited DFCs than the DFCs proposed.

Other comments discuss the technical details of surface water interaction modeling, but the trend towards reversal of groundwater recharge into the Colorado River within the next 50 years is undisputed. Claiming that nothing should be done to address this due to a lack of certainty is akin to arguing that Texas should not prepare for an anticipated direct hit from a hurricane because it is difficult to determine whether it would be Category 4 or Category 5 in intensity. The fact that a groundwater impact is difficult to evaluate does not justify ignoring it, as the Texas Supreme Court noted in the *Day* decision.⁶

As noted above, the districts are statutorily required to consider environmental impacts in setting a DFC, including interactions between surface water and groundwater. Conservation of surface water is further consistent with the Texas Constitution's Conservation Amendment pursuant to which groundwater districts exist. A balanced DFC that does not fully incorporate all permitted non-exempt pumping is well-justified by the statutory goal of conserving surface water by mitigating the impact of a DFC upon groundwater interactions with surface water.

Consideration of *all* property rights justifies more limited DFCs than those proposed.

All landowners possess property rights in the groundwater beneath their property subject to groundwater district regulation, and *all* landowners possess an equal right to produce their fair share of that water. This was confirmed in 2020 by the Federal Fifth Circuit Court of Appeals in the case of *Stratta v. Roe*, wherein the Court held that an adjacent landowner to a permitted non-exempt well could pursue a federal takings action against the Brazos Valley Groundwater

⁵ *City of El Paso v. Public Utility Commission of Texas*, 883 S.W.2d 179, 184 (Tex. 1994).

⁶ *Edwards Aquifer Authority v. Day*, 369 S. W. 3d 814 (Tex. 2012) ("*Day*"), at 832.

Conservation District based upon the drainage of groundwater from beneath the adjacent property owner's land by the permitted pumping.⁷ The validity of that action depended in no way whatsoever upon whether the adjacent landowner possessed a water well, or a pumping permit. Rather, the Court held that the Texas Water Code has created a regulatory structure "which affords landowners their fair share of the groundwater beneath their property."⁸ This governs both the extent and the limit of the District's obligation to consider private property rights. Setting a DFC at a level that accommodates the maximum amount permitted to non-exempt permittees creates an increased risk that groundwater levels will be lowered below the level at which pumps owned by exempt well landowners can efficiently operate, makes it more difficult for persons without current wells to access their groundwater, and potentially results in greater drainage of groundwater from beneath the property of landowners who would elect to exercise their right to keep their groundwater in the ground rather than produce it.⁹ That is not a *balanced* approach to the consideration and protection of private property rights within the District. As GMA-8 previously noted in adopting its prior DFC:

GCDs must consider all private property rights when considering management plans, rules, and permit decisions. GCDs must balance the interests of historic groundwater users, landowners who desire to preserve the aquifer levels beneath their property, and property owners who may be damaged by either groundwater-level declines, reduction of water in storage, and reduced spring flow.

Achieving *balance* is the most important goal in setting a DFC.

A balanced DFC would survive a takings or statutory challenge.

The District's decision to require a balanced DFC that was not reverse-engineered to include all permitted non-exempt pumping would be defensible against a constitutional takings claim, statutory takings claim, or a suit for judicial review.

A challenge to a DFC as a constitutional taking would not be proper at this time. In order for a constitutional takings claim regarding the DFC to be proper, an *injury* as a result of the DFC decision would need to be "imminent, direct, and immediate, and not merely remote, conjectural, or hypothetical."¹⁰ Mere adoption of the DFC will not reduce the value of the water marketers'

⁷ *Stratta v. Roe*, 961 F.3d 340, 357 (5th Cir. 2020) ("*Stratta*"), at 364.

⁸ *Stratta*, quoting approvingly *Day* at 830.

⁹ See *Brown v. Humble Oil and Refining*, 83 S.W.2d 935, 940 (Tex. 1935).

¹⁰ *City of Houston v. Mack*, 312 S.W.3d 855, 862 (Tex. App. – Houston [1st Dist.], 2009).

property in any significant manner (if at all), nor will it deprive them of the use and enjoyment of their property. While the districts will have the authority to curtail pumping in the future in *consideration* of the DFCs, that potential already exists, and the process for such curtailment is discretionary, non-mandatory, and dependent upon a complicated process that includes the consideration of numerous factors.¹¹ Accordingly, the adoption of a DFC does not give rise to a valid takings claim.

Furthermore, the action in setting the DFCs is well-justified even if proper at this time (which it is not) and if *some impact* on property rights would occur (which has not been shown). The adoption of balanced DFCs furthers the statutory purposes of groundwater conservation districts to ensure the conservation and protection of groundwater. As the Texas Supreme Court has held, government serves multiple functions, and “[t]o satisfy its responsibilities, government often imposes restrictions on the use of private property, ” since, “ [a]lthough these restrictions sometimes result in inconvenience to owners, government is not generally required to compensate an owner for associated loss.”¹² A regulatory taking, as water marketers claim would exist as the result of a more limited DFC, would need to be, “a condition of use so onerous that its effect is tantamount to a direct appropriation [of property] or ouster [from property].”¹³ The permitting decision involved in the *Day* case met this high threshold, as it directly and imminently placed a severe constraint upon the landowner’s use of groundwater. The adoption of balanced DFCs does not in any way result in a direct appropriation of property nor an ouster from property. Accordingly, the adoption of balanced DFCs that do not allow for all non-exempt permitted pumping would not constitute a “taking.”

Likewise, the setting of balanced DFCs would survive a challenge alleging that the action is a statutory takings under the Texas Private Real Property Rights Act found at Texas Government Code Chapter 2007. Beyond a Constitutional taking (addressed above) that Act only applies to a government action that: (1) affects an owner’s private real property that is the subject of the governmental action in a manner that restricts or limits the owner’s right to the property that would otherwise exist in the absence of the governmental action; *and* (2) results in a reduction of at least 25% in the market value of the affected private property.¹⁴ The adoption of a DFC does neither of

¹¹ See, e.g., POSGCD Rules Section 16.

¹² *City of Houston v. Carlson*, 451 S.W.3d 828, 831 (Tex. 2014).

¹³ *Id.*

¹⁴ Tex. Gov’t Code § 2007.002(5).

these things. Thus, a suit regarding the adoption of a balanced DFC under the Private Real Property Rights Preservation Act also would not be proper.

Furthermore, a balanced DFC would be defensible against a statutory suit for judicial review. Such an appeal would be evaluated under the “substantial evidence” standard of review set forth in Texas Government Code § 2001.174.¹⁵ Under this standard of review, a reviewing court gives significant deference to the agency for decisions within the agency’s field of expertise, and an agency’s interpretation of the statute it administers is entitled to serious consideration so long as it is reasonable and does not conflict with the statute’s language.¹⁶ In this case, a balancing of the various considerations set forth in statute, including meaningful consideration of surface water impacts and all property rights impacts, would further the purposes of the statutory scheme at issue, and be fully consistent with the governing statutes. Accordingly, such a decision would be defensible against a statutory challenge. On the other hand, a decision to prioritize non-exempt pumping to the disregard of other factors *would* be problematic.

Conclusion.

For these reasons, Environmental Stewardship asks that the districts reject the DFCs currently proposed for adoption by GMA-12, and, instead, move forward with a process to develop DFCs that incorporate a balanced consideration of *all* factors that the districts are statutorily required to consider, including environmental impacts and interactions between surface water and ground water.

Respectfully submitted,



Eric Allmon
State Bar No. 24031819
PERALES, ALLMON & ICE,
P.C.
1206 San Antonio Street
Austin, Texas 78701
512-469-6000 (t)
512-482-9346 (f)

¹⁵ Tex. Water Code § 36.10835.

¹⁶ *Office of Public Utility Counsel v. Texas-New Mexico Power Co.*, 344 S.W.3d 446, 450 (Tex. App. – Austin, 2011).

COUNSEL FOR
ENVIRONMENTAL
STEWARDSHIP

- cc: Gary Westbrook, General Manager

- cc: Lost Pines Groundwater Conservation District
Mike Talbot, President
James Totten, General Manager

- cc: Brazos Valley Groundwater Conservation District
Stephen Cast, President
Alan Day, General Manager

- cc: Mid-East Texas Groundwater Conservation District
George Holleman, Vice President
David Bailey, General Manager

- cc: Fayette County Groundwater Conservation District
Leo Wick Sr., President
David Van Dresar, General Manager