



TEXAS WATER DEVELOPMENT BOARD



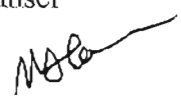
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TO: Robert Mace, Director of Groundwater Resources

THROUGH: Office of General Counsel

FROM: Robert R. Flores, Attorney 

DATE: June 1, 2007

SUBJECT: Participation by Unconfirmed Groundwater Conservation Districts

Question Presented: Must a groundwater management area's joint planning efforts identifying desired future conditions include unconfirmed groundwater conservation districts?

Short Answer: Yes, presuming that unconfirmed groundwater conservation district(s) are not otherwise restricted by their organic legislation (enabling statute) then such districts should, upon their effective date of creation be accounted for in determining desired future conditions for a groundwater management area.

Analysis: The reason the question presented is important is because Texas Water Code (Code) §36.108(d) requires districts to act and establish desired future conditions (DFCs) for relevant aquifers and §36.108(d-1) requires those conditions to be established by 2/3 vote of those present with at least 2/3 of the districts in the management area being in attendance. Also, all districts in the area must provide public notice of such a meeting in accordance with the Chapter 551 of the Government Code.

The question presented raises the issue: What constitutes a district?

Districts are defined by their authority "to regulate the spacing of water wells, the production from water wells, or both." Code §36.001(1). This language is mirrored in 31 Texas Administrative Code (31 TAC) §356.2(10) as part of Texas Water Development Board's (TWDB) rules addressing groundwater management.

Those rules refer to DFCs as being defined by "participating groundwater conservation districts". 31 TAC §356.2(8). There is no unique definition for "participating districts" as opposed to the simpler "district." DFCs are an element of the required groundwater district's management plan. 31 TAC §356.5 (a)(1)(H); and districts are specifically permitted to appeal the approval of DFCs to the TWDB. Code §36.108(I).

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Importantly, Code §36.101, addressing the rulemaking powers of a district, does not prohibit unconfirmed districts from exercising their rulemaking power and thus authority to regulate the spacing or production of water from water wells, and while Code §36.1071(f) limits some rule-making authority (including production regulations) pending an approved groundwater management plan, *it specifically permits* the adoption of rules governing spacing without any constraint. Thus by statutory interpretation an unconfirmed district may still exercise its authority related to the spacing of water wells. This is because the statutory definition of a district requires it to have authority over spacing or production, and an unconfirmed district appears to have and retain authority related to spacing regulations.

However, it is important that enabling legislation for each unconfirmed groundwater conservation district be reviewed for each groundwater management area before a final determination is made. The bill language for each district can vary greatly. In some instances it can prohibit a district from acting to exercise its powers unless and until it is confirmed by election. In that instance the unconfirmed district may not be “counted” for purposes of determining its attendance at meetings to determine a groundwater management area’s DFCs. There may be many instances where some prohibition in the bill language impedes a districts authority over spacing. On the other hand, if a district is not barred from exercising its authority over spacing requirements, then it should be included for purposes of attendance and voting.

Conclusion: Without otherwise being constrained by each district’s organic law, groundwater management area meetings to determine desired future conditions of appropriate aquifers must count unconfirmed districts for attendance and voting purposes in accordance with Code §36.108(d) and (d-1). Unconfirmed districts still have rulemaking authority even though they may not yet have a groundwater management plan. Unless they are limited by they organic law, unconfirmed districts fall within the definition of a district for rulemaking authority purposes.