
PRESS RELEASE



Lone Star Groundwater Conservation District

CONTACT:

Samantha Reiter, General Manager
Lone Star Groundwater Conservation District
936-494-3436

WHERE THE DISTRICT HAS BEEN AND WHERE IT IS GOING: HOW PAST REGULATION, COURT RULINGS, AND STUDIES ARE SHAPING THE DISTRICT'S FUTURE

September 25, 2020 – Last week, the District announced its series of educational press releases to help effectively communicate changes regarding the District's new rules and management plan. The first topic released last week explained the permit renewal process and what permittees should expect as their permits are renewed and reissued under the District's new rules effective September 8, 2020. This release focuses on how prior regulation, court rulings, and studies are shaping the District's policies and groundwater management. This topic also lays the foundation for future releases that will address desired future conditions (DFCs) and the joint planning process.

To fully understand the District's current policies and management, one must understand the District's history and how past events have led us to where we are today. Specifically, why the last adopted desired future conditions were found to be no longer reasonable; why the District's prior reduction and conversion regulations were declared void from the beginning; why the Appointed Board studied whether additional groundwater could be developed; and why the Elected Board is so focused on the protection of property rights. So, let's start at the beginning.

The District's Entire Regulatory Program Was Based on 64,000 AFY of Available Groundwater That the District Enforced as a Pumping Cap.

Shortly after the District was formed in 2001, with an *Appointed Board of Directors*, the District adopted an initial management plan to manage groundwater in a sustainable manner designating the groundwater availability as the amount of effective annual recharge in the District. In other words, no storage of groundwater in the aquifer would be depleted because the volume of water authorized for production would not exceed the volume of water naturally recharging the aquifer each year. The District then determined that recharge to the entire Gulf Coast Aquifer system in the District was estimated by multiplying 1.1 inches per year times the area of the county. This methodology did not consider the actual hydrologic function of the aquifers involved.

After determining the total amount of groundwater available for use in Montgomery County was 64,000 acre-feet per year (AFY) based solely on recharge within the county boundary, the District then developed a regulatory plan based on that conclusion. The authorized production at the time (78,000 AFY) had already exceeded the 64,000 AFY "available groundwater" and the water demand in Montgomery County was projected to

increase significantly over the next forty years. In December 2006, the District formally adopted and began implementing a multi-phased regulatory plan that called for specific large users to cut back usage by 30% by January 1, 2016, to ensure production would not exceed the 64,000 AFY cap (“Reduction Rule”). Coupled with the Reduction Rule, the District’s rules and management plan also called for all future increases in water needs in Montgomery County to be addressed through surface water resources. The District later acknowledged that other alternative water supplies were feasible, but several permittees had already committed to surface water supplies. The requirement that new or increased demand could not be met through traditional groundwater resources protected the property rights of owners with historic and existing use but not the property rights of owners with new use or demand who would be prevented from producing groundwater they owned.

Before the institution of groundwater management areas (GMAs) and joint planning in 2005, many groundwater conservation districts (GCDs), Lone Star GCD included, used recharge within a district’s county boundary to determine available groundwater. This approach would later become problematic when the Legislature, in 2005, instituted GMAs and joint planning in Chapter 36 of the Texas Water Code (Chapter 36). The new legislation mandated GCDs within a management area to engage in joint planning to first determine the future conditions of the aquifer and then use those condition(s) to determine the available groundwater. The legislation reflected the understanding that aquifer wide management was necessary because aquifers do not begin and end at county lines and required GCDs within a GMA to determine the initial desired future condition of their aquifers by September 1, 2010.

The 2010 DFCs Were Derived from the 64,000 AFY Pumping Cap.

The District’s pre-determined 64,000 AFY of available groundwater calculations based on recharge in a single county boundary did not sync with the joint planning requirement to first determine the future conditions of the aquifer on a GMA wide level and then calculate available groundwater based on the specific DFC. Nonetheless, the District sought, and the GMA 14 districts adopted, a DFC that would provide 64,000 AFY of available groundwater in Montgomery County because the District had built its regulatory plan on 64,000 AFY and had already been implementing significant cutbacks. The District’s 2010 DFCs were not petitioned even though it could be argued that the statutory process was not followed. However, because several other GCDs across the state who likewise struggled with the statutory process were faced with petitions, the Texas Legislature significantly rewrote the statutory provisions in Chapter 36 governing the joint planning process.

The new law required GCDs to consider new scientific and technical factors and prepare an explanatory report to document the science and rationale for the adopted DFCs. The new law also required the DFCs to reflect a balance between the highest practicable level of groundwater and conservation. Importantly, the Legislature also changed the term “managed available groundwater,” which previously acted as a cap on total production, to “*modeled available groundwater*.” Modeled available groundwater was not to operate as a pumping cap and was now one of several factors GCDs were to consider in managing production on a long-term basis. The Legislature also defined “best available science” and mandated GCDs to use the best available science in carrying out their duties. During the same time the Legislature was making significant changes to Chapter 36, the Texas

Supreme Court issued the *Day* opinion affirming that landowners own the groundwater beneath their land, that groundwater is a constitutionally protected private property right, and that groundwater regulation is required to provide every landowner an opportunity for a fair share.

The changes in the law prompted several questions including: (i) whether 64,000 AFY could operate as a pumping cap when the term had been changed to modeled available groundwater and was no longer a pumping cap; (ii) whether the available groundwater calculations based on recharge in a single county boundary were the best available science; (iii) whether the DFCs, which prohibited any depletion of storage, represented a balance between the highest practicable level of production and conservation; and (iv) whether the forced reduction and conversion violated the property rights of the owners who were prohibited from producing groundwater. In response, the District decided to obtain more data and science and take a fresh look at the 64,000 AFY pumping cap and accompanying regulations.

In 2014, the District commissioned LBG Guyton to perform a Strategic Water Planning Study to evaluate potential opportunities for the additional development of groundwater resources. Because the study involved three tasks and would take three years to complete, the final results on whether additional groundwater could be produced would not be available during the second round of joint planning. In the meantime, and while the study was being conducted, key stakeholders (the City of Conroe, Quadvest, LP, and other investor owned utilities (IOUs)) grew antsy and filed a lawsuit against the District challenging the Reduction Rule. The plaintiffs questioned whether Chapter 36 gave Lone Star GCD the authority to adopt the Reduction Rule and argued the regulation resulted in a taking of private property.

The 2016 DFCs, Also Engineered to Yield a 64,000 AFY MAG, Were Successfully Petitioned and Resolved With Results from the Strategic Study.

Unfortunately, the GMA 14 districts did not have the benefit of the Strategic Study's results when determining the 2016 DFCs. Instead, during the second round of joint planning in 2016, the GMA 14 districts adopted DFCs for the District that were likewise engineered to yield the 64,000 AFY pumping cap and were developed using the same process as in the first round of joint planning even though the law had changed significantly. As a result, the 2016 DFCs were substantially similar to the 2010 DFCs. Other GCDs across the state, whose DFCs from round one were petitioned, made changes to comply with the joint planning statutes, and consequently, avoided petitions during the second round of joint planning. After the same process was repeated in the second round of GMA 14's joint planning despite changes in the law, a petition challenging the District's DFCs seemed inevitable. In fact, Lone Star GCD was the only GCD in entire state to receive a petition of its DFCs from the second round of joint planning.

Shortly after the District's 2016 DFCs were adopted, the Cities of Conroe and Magnolia and Quadvest, L.P. petitioned the DFCs on several grounds including that the District's pre-determined MAG calculations based on recharge in a single county boundary was not the best available science, and that the pumping cap and forced reduction violated property rights and did not comply with the joint planning statutes. At the time the District received the DFC petition, all phases of the three-year study had not been completed.

During the DFC petition process at the State Office of Administrative Hearings (SOAH), the District received the results of the final task of the Strategic Study in October 2017. Task 3 revealed that additional groundwater could be produced without unreasonable impacts. Task 3 evaluated potential options for future pumping and had significant stakeholder input and support from SJRA, The Woodlands, and the City of Conroe. The scenarios for additional pumping in Task 3 were ultimately used to resolve the 2016 DFC petition. The administrative law judge at SOAH ultimately issued a proposal for decision finding the 2016 DFCs no longer reasonable.

In October 2017, based on results of the Strategic Study, the District revoked its prior goal of sustainability and adopted a new goal of measured aquifer declines. Specifically, at its October 2017 board meeting, the Appointed Board approved the increased groundwater pumping levels and resulting aquifer conditions included in Run D from Task 3 of the study. Run D, which had been developed with help from SJRA, the Woodlands, and the City of Conroe, authorized an additional 30% increase in production ramped up over time from 2020-2032. In November 2017, the District approved Run D as the resolution to the 2016 DFC petition and concluded that the 2016 DFCs were no longer reasonable. When the District took Run D to the GMA 14 Districts and requested that its DFCs be revised consistent with Run D, the GMA 14 districts declined to revise the DFCs at that time but unanimously approved Run D for formal consideration in the third round of joint planning.

The District's Reduction Rule, Which Formed the Basis for Both the 2010 and 2016 DFCs, Was Deemed Statutorily Invalid from Initial Adoption.

Even though the 2016 DFC petition was successfully resolved in November 2017, the lawsuit challenging the Reduction Rule filed by many of the same stakeholders was still pending. The lawsuit raised many of the same concerns raised in the DFC petition, among others. Conroe, Quadvest, and the other IOUs argued there was no authority in Chapter 36 for the District to adopt and enforce the Reduction Rule and that the regulation resulted in a takings of private property. Ultimately, the court agreed that there was no authority in Chapter 36 for the District to adopt and enforce the Reduction Rule but never made a determination as to whether the regulation resulted in a taking of private property. After a protracted lawsuit and two appeals, the District's Reduction Rule was ultimately declared by final judgment to be void, invalid and outside the District's statutory authority. The May 17, 2019 Final Judgment declared that the Reduction Rules in the district's regulatory plan were adopted "**without legal authority and consequently are, and have been, unlawful, void and unenforceable.**" Effective from the date of the Final Judgment, the reduction regulations were struck from the District's rules, regulatory plan, and large volume permits. The District's new rules adopted on September 8, 2020 formally repeal and replace the unlawful, void and unenforceable regulations.

In 2018, the *newly Elected Board* was focused on the protection of property rights primarily because the DFCs and the Reduction Rule did not protect the property rights of those prohibited from producing groundwater they own. Even though a court has not expressly determined that the Reduction Rule and the associated DFCs resulted in a takings of private property, both were repealed because the regulations went too far. And, the litigants, in both the DFC petition and Reduction Rule lawsuit who successfully repealed the regulations, argued both violated constitutionally protected property rights.

The District's New Management Plan Implements Results from the Strategic Study and Well Spacing Analysis Performed by the Appointed Board.

The prior Appointed Board authorized additional groundwater withdrawal and measured aquifer declines based on the results of Task 3 of the Strategic Water Planning Study, which concluded additional groundwater withdrawal would not cause unreasonable impacts. Run D was unanimously approved by the GMA 14 districts for formal consideration in the current round of planning. Run D was formally considered but ultimately did not make the cut as one of the three model scenarios. The GMA 14 districts are considering at least one model scenario that is consistent with the withdrawal in Run D. The Appointed Board also studied well spacing. That well spacing analysis was reviewed and considered by the technical consultants in developing the new spacing rules.

Given the District's past legal troubles, the Elected Board is focused on following the law and protecting the property rights of all owners whether their use is historic, existing, or new. The Elected Board feels it is their responsibility to learn from past mistakes, so it intends to use real monitoring well data to evaluate aquifer conditions and only enforce cutbacks when there is a documented scientific and legal basis to do so. The Elected Board also values the studies previously undertaken and has followed through on implementing the results of those studies by advocating for the development of additional groundwater resources and the adoption of well spacing rules. In response to concerns about potential impacts of additional groundwater withdrawals, the Elected Board committed to study subsidence within Montgomery County.

The District looks to the future and is committed to protecting the property rights of all citizens in Montgomery County.

A copy of the approved District Rules, a summary of the amendments and Frequently Asked Questions on the new rules can be found on the District's Management & Rules page. For more information on the Lone Star Groundwater Conservation District, please visit www.LoneStarGCD.org or follow us on www.Facebook.com/LoneStarWater. For questions, please contact the District at (936) 494-3436.

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