



June 7, 2012

Judge Jim Wither
Commissioners Pina, Beckett,
Klaus, and Dildy
Bastrop County
804 Pecan Street
Bastrop, TX 78602

Re: Lost Pines Groundwater Conservation District – Proposed Rules

Dear Judge and Commissioners,

I am writing you on behalf of the residents and natural resources of Bastrop County. Lost Pines Groundwater Conservation District (LPGCD) has proposed new rules that will be considered at their next board meeting on June 20, 2012 in Giddings. Our concern is that the rules do not contain protective covenants to ensure that the District has adequate processes in place to restrain or curtail pumping of groundwater in the event their adopted desired future conditions are exceeded or they find that the aquifers are being damaged. This could lead to groundwater shortages for Bastrop and Lee counties and long-term permanent damage to the aquifers. Environmental Stewardship is requesting that the Judge and Commissioners Court act in their “oversight” capacity to ensure that such protective covenants are added to the proposed rules. Let me explain.

Supreme Court Opinion

As you know, the Bastrop and Lee county judges, in consultation with the commissioners, appoint the LPGCD board members. The Texas Supreme Court, in its opinion in *The Edwards Aquifer Authority (EAA) v. Day and McDaniel*, reviewed the history of groundwater districts in Texas and opined: *“While districts have broad statutory authority, their activities remain under the local electorate’s supervision”* and, *“Groundwater conservation districts have little supervision beyond the local level”*¹. It is this supervisory authority that we are calling on you to exercise.

As the Supreme Court outlined in its survey of the history and current status of groundwater regulation in Texas, the Texas Constitution Conservation Amendments provide for the *“conservation and development of all of the natural resources of this State ... [and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties;”*² and the *“responsibility for the regulation of natural resources, including groundwater, rests in the hands of the Legislature”*³.

Section 59 of the Constitution also provides for the creation of “*conservation and reclamation districts as may be determined to be essential to the accomplishment of the purposes of this amendment to the constitution, which districts shall be governmental agencies and bodies politic and corporate with such powers of government and with the authority to exercise such rights, privileges and functions concerning the subject matter of this amendment as may be conferred by law*”².

The Supreme Court made clear that the protection, conservation, and development of groundwater resources rests in the hands of the legislature and groundwater conservation districts, and each of these have the authority, rights, duties and privileges to carry out the intent of the Constitution.

The Legislature, acting through the Groundwater Conservation District Act of 1949, provided for the creation of groundwater conservation districts ³ and has also clearly stated that “*groundwater conservation districts ... are the state’s preferred method of groundwater management through rules developed, adopted, and promulgated by a district in accordance with the provisions of [the Water Code]*”. The Supreme Court survey and Chapter 36 of the Texas Water Code further outline the responsibilities and regulatory authority of the Districts, including the development of management plans and rules by Districts⁴.

Quite independent of other governmental agencies such as the Texas Water Development Board (TWDB) and the Texas Commission on Environmental Quality (TCEQ), Lost Pines Groundwater Conservation District has authority, rights, duties and privileges to protect, conserve and develop the groundwater resources of Bastrop and Lee counties. Though they receive assistance and guidance in the *development* of groundwater resources from the TWDB, their responsibilities to *preserve and conserve* are directly conferred on them by the Constitution and the Legislature. Though it has not been clear in the past, it is clear now that the Supreme Court opines that the oversight of Lost Pines Groundwater Conservation District rests with the judge and commissioner’s court of each county they serve.

Lost Pines GCD Rules

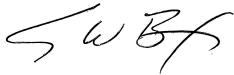
Lost Pines GCD has the responsibility to revise its management plan and rules to enable it to regulate the use of groundwater within its jurisdiction in a manner that complies with its adopted desired future conditions (which have been appealed by Environmental Stewardship). Likewise, the State Legislature in enacting Senate Bill 373 during the last legislative session, made changes in a section of the Texas Water Code that changed how groundwater is managed. SB 373 changed the definition of “Managed Available Groundwater (MAG)” to “Modeled Available Groundwater (MAG)” along with the definition itself. In so doing the legislature removed the limiting feature that existed in the former definition (the MAG being a cap), such that Districts are able to permit more water. The MAG now *means the amount of water that the executive administrator determines may be produced on an average annual basis to achieve a desired future condition*⁵.

Unfortunately, what the Legislature failed to do was to re-establish any process or procedure whereby a District is required to actually regulate the production of groundwater in the event that the desired future condition is about to be exceeded, or in the event that the aquifer is being harmed.

We believe that it is the Constitutional duty of the Lost Pines GCD to ensure that such safeguards are clearly in its rules so that such safeguards are incorporated into its permits. It is essential that such safeguards be in the rules, and not just in the permits, so that 1) the public and the regulated applicant are clearly aware of such safeguards, and 2) so that such safeguards can be amended from time-to-time without requiring amendment of all permits. As currently drafted, the rules of the District DO NOT include such safeguards⁶.

As such, we are requesting that the Bastrop County Judge and Commissioner's Court take an active role in overseeing the development of the proposed rules and request that such safeguards be added so that the groundwater supplies of the county are adequately protect.

Yours very truly,



Steve Box
Executive Director
Environmental Stewardship

cc: Gayle Wilhem
Rachel Frost
Joe Cooper

Environmental Stewardship is a charitable nonprofit organization whose purposes are to meet current and future needs of the environment and its inhabitants by protecting and enhancing the earth's natural resources; to restore and sustain ecological services using scientific information; and to encourage public stewardship through environmental education and outreach. We are a Texas nonprofit 501(c) (3) charitable organization headquartered in Bastrop, Texas. For more information visit our website at <http://www.environmentstewardship.org/>.

¹ Supreme Court of Texas. The Edwards Aquifer Authority and the State of Texas, Petitioners, v. Burrell Day and Joel McDaniel, Respondents. No. 08-0964. Argued February 17, 2010. Page 30.

² The Texas Constitution. Section 59. CONSERVATION AND DEVELOPMENT OF NATURAL RESOURCES AND PARKS AND RECREATIONAL FACILITIES; CONSERVATION AND RECLAMATION DISTRICTS.

³ Supreme Court of Texas. Pages 28-29.

⁴ Supreme Court of Texas. Pages 30-34.

⁵ Senate Bill 737 amended the Texas Water Code as follows: SECTION 1. Subdivision (25), Section 36.001, Water Code, is amended to read as follows: (25) "~~Modeled~~ ~~[Managed]~~ available groundwater" means the amount of water that the executive administrator determines may be produced on an average annual basis to achieve a ~~[permitted by a district for beneficial use in accordance with the]~~ desired future condition ~~established~~ ~~[of the aquifer as determined]~~ under Section 36.108.

⁶ Rules of the Lost Pines Groundwater Conservation District. 4/23/12 DRAFT for discussion purposes only.