

# Attachment A



April 11, 2013

Please deliver to the Board immediately upon receipt.

Board of Directors and General Manager  
Lost Pines Groundwater Conservation District  
908 Texas 230 Loop  
Smithville, TX 78957

**Re: Lost Pines Groundwater Conservation District's Permitting Process and current applications being considered by the Board.**

Dear Board and General Manager,

We are very much in agreement with the resolution passed by the Bastrop County Commissioners Court earlier this week. We, too, greatly appreciate the cautious and careful management of the groundwater resources that the District has exhibited in the past and urge you to continue your efforts to be a conservative guardian of our water resources. Your Mission Statement in your Management Plan demonstrates your commitment to sustainability of the aquifer. New legislation has caused you to qualify what was once a straightforward statement of "conserve, preserve and protect" with the further statement that your efforts to do so must also address "statutory goals and requirements."

*However, these are not mutually exclusive requirements.* For the reasons discussed herein, we encourage and urge that the District, in considering the applications currently before the Board, adhere to and comply with the District's Management Plan and Mission Statement. In short, we believe you must make every effort to identify ways to protect and conserve our precious groundwater and surface water resources in your permitting process. To do so under the current circumstances does *not*, we believe, cause you to violate or ignore State water law; in fact, we believe the process of permitting should mirror the process under which DFCs are determined --- that is, the Water Code requires that districts set DFCs that achieve a *balance* between conservation, preservation and protection and the highest practicable level of production; State law does not require that you abandon this balancing effort in the permitting process once DFCs are established. Consequently, we urge you to stand tall in the face of these applications.

Section 36.1132 of the Water Code, as amended in 2011 by SB737, now defines "modeled available groundwater" as a replacement for the earlier "managed available groundwater," apparently in an effort to better reflect the intent of the phrase. MAG, now defined as the amount of water that TWDB determines may be produced on an average annual basis to achieve a DFC, becomes, in effect, the "regulatory availability" of the aquifer, to insure that something less than the amount which is *physically* available will be withdrawn from the aquifer (physical availability being the entire amount that may actually be withdrawn, constrained only by hydraulics of the aquifer and available technologies --- potentially, down to the last drop in the aquifer.) §36.1132 also requires that districts should, to the extent possible, issue permits so that exempt and permitted production achieves applicable DFCs, considering five factors: (1) MAG, which we characterize as *the regulatory availability of the aquifer*, (2) exempt groundwater use; (3) previously authorized withdrawals; (4) actual production; and (5) yearly precipitation and production patterns.

The District's Management Plan incorporates these and other statutory and regulatory requirements, and further in Section 2, Policy 2, the District resolves to *manage* District aquifers on a *sustainable basis*, to the extent consistent with statutory and regulatory requirements (emphasis added). The District defines sustainability as development, use, and reasonable long-term management of groundwater resources so that those resources can continue to be used by future generations. Sustainability in these terms surely falls under the umbrella of "conserve, preserve and protect" to be *balanced against* and not *sacrificed to* any statutory and regulatory regime.

Factoring in the MAG should assist accomplishment of the intent of the first sentence of Paragraph 4 of Appendix A of the Management Plan, which amplifies District Policy 1 and 2. That is, the District should issue permits "up to the point that total volume of exempt and permitted production will achieve an applicable DFC." MAG is the factor that tells us how much average annual pumping will achieve that DFC. However, neither SB737, nor §36.1132, nor the District's Management Plan requires that the statutory direction to issue permits, considering those five factors, *compels* issuance of all permits for which applications are submitted or issuance of any permit in any pre-ordained amount, including in the entire amount requested.

In recommending that all pending permits be granted in the full amount, the District's General Manager does not seem to be factoring in MAG at all, or at least has not presented any evidence that MAG has been considered or that the actual permitted amounts will achieve DFC. Is he taking the position that State law requires the District to permit anyone who walks in the door with an "administratively complete" application for any amount requested and then sit back and wait for irreparable harm? The General Manager's recommendations provide no accounting of any attempt to achieve a future DFC by using the five factors of §36.1132. Rather, his testimony in support of his recommendations seemed, in essence, to rely on "those factors which the District is legally allowed to consider" without specifying those factors or how they apply to the various permit applications. Further, he seemed to say we should not have to factor in everything they are asking to be *allowed* to pump since, historically, permit holders seldom pump the full amount of a permit. What guarantee do any of us have this will hold true for the future in the face of looming water shortages, and that, in the meantime, there is no need to evaluate the effect of the "worst case scenario" of pumping the full amount requested?

FACT: If you add up the permit applications and existing use, MAG becomes totally irrelevant if you permit 100% of what applicants are asking. Then why have MAG at all? The following table demonstrates this point.

MAG for Simsboro Aquifer in 2010:	29,556 acre-feet/year
Existing Simsboro Aquifer permits <sup>1</sup> :	45,365 acre-feet/year
Current Simsboro Aquifer Applications:	119,199 acre-feet/year
(Permitted + Applications)/MAG	5.7 times MAG

<sup>1</sup> Provided by LPGCD

In setting MAG as the regulatory yardstick to set average annual pumping that enables achievement of a DFC, the Legislature could not have intended that MAG be ignored in the permitting process! In fact, §36.1132 compels MAG to be factored in to the permitting process --- yet the District Manager's recommendations contain no scintilla of evidence that any consideration of how permitting 5.7 times MAG in any way achieves "permitting *up to the point* that total volume of permitted and exempt water will achieve the DFC." The statutory mandate to achieve a balance between the "highest practicable level of groundwater production versus the conservation, preservation, protection, recharging and prevention of waste of groundwater" is totally lost in the process. The word "practicable" may be defined as "feasible." Granting 100% of the applicants'



requested amounts is not feasible, and thus does not achieve the "highest practicable level of groundwater production," if the combined effect is to make the DFCs unachievable. In the face of potential legislative developments, over-permitting is an imprudent practice and sets a dangerous precedent.

Notably, if the rationale at play in the recommendations is that the District will simply rely on its Rules to impose cutbacks on pumping down the road, *without any meaningful attempt to "get it right" at the front end*, we would note that the Legislature has so far not guaranteed Districts will be able to cut producers/pipelines back when it is determined they are preventing achievable DFCs. *In fact, legislation has been introduced in the current session that would severely limit any groundwater district's authority to impose such cutbacks on the recipients of the water transfer.* The future resolution of many issues related to groundwater supply and demand is murky; in the meantime, it is reasonable to conclude that the Legislature intended that the District should apply the MAG along the way, in part to diminish the necessity of production cutbacks but more importantly, to avoid potentially irreparable damage to the water supply and unreasonable adverse impacts on the citizens (your constituents) who depend on the aquifer below them and on the District to protect it.

**CONCLUSION:** The MAG was established as a yardstick to guide permit limits so that the District may make corrections in the initial permitting process without waiting for damage to the aquifer associated with unachievable DFCs.

The Bastrop County Commissioner's Court resolution rightly urges: comply with the MAG to assure achievability as the District proceeds in cautious and careful management of the available groundwater as conservative guardians of the resources.

**RESULT: 5.6 times the MAG is not defensible.** Following the guidance of Appendix A (which is taken from §36.1132), it would appear that a defensible multiplier of the MAG that would reasonably estimate the amount of water that the District could expect to be pumped from these permits should be developed by using historical and expected pumping data as identified below:

Permitted pumping volume over last 5-10 years  
Exempt pumping volume over last 5-10 years (domestic, mining, oil & gas, etc.)  
Expected exempt pumping (e.g. fracking water if expected)  
Precipitation and production patterns over last 5-10 years.

**Example Application of Appendix A.**

Permitted Simsboro pumping <sup>2</sup> (recent year):	11,272 acre-feet/yr
Exempt Alcoa pumping <sup>2</sup> (1990-1999):	24,829 acre-feet/yr average
Other exempt (domestic, etc.)	data to be provided by District
Precipitation & production patterns	data to be provided by District
TOTAL PRODUCTION:	36,101 acre-feet/yr average

Permitted Simsboro pumping (current <sup>2</sup> ):	45,365 acre-feet/yr
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Permitted divided by Total Production:	1.3
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2010 MAG times 1.3

= Available for Permitting:	38,423 acre-feet/yr.
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<sup>2</sup> Previously provided by LPGCD

**Permitted already exceeds available**

The availability of guidance from the MAG (not to mention the other 4 factors described in §36.1132) to avoid exceeding the DFC limits on drawdown makes the District's current approach seem so egregious as to be arbitrary and capricious --- permitting 100% of these applicants' requested pumping can be easily demonstrated to result in exceeding the DFC limits (see table below). One has to wonder why there would be any constraint, at the point where five permits are being granted virtually simultaneously so as to make them all "pre-existing" to one another, to apply a reasonable factor based on MAG to proportionately reduce each permit. Would that method not more reasonably and defensibly factor in the General Manager's reliance on "they never pump as much as they ask for anyway" as a rationale for cutting the permits from the outset to more realistic as well as more reasonable levels? The following information illustrates the effect on the DFC for the Simsboro Aquifer of permitting 100% of the applications:

	Project Pumping + Existing Pumping (in feet of drawdown)		
	Bastrop	Lee	District Total
End Op, LC:	<b>224</b>	<b>391</b>	<b>302</b>
Forestar Group:	123	<b>457</b>	<b>280</b>
Sum of All Applications:	<b>233</b>	<b>369</b>	<b>297</b>
Sum of Applications & Current permits:	<b>312</b>	<b>624</b>	<b>458</b>
DFC:	145	345	237

**BOLD indicates exceeds DFC**

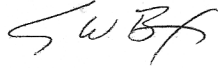
Why, we must ask, did we go through the DFC and MAG process if these carefully estimated values are not being used in the permitting process to restrain permitting to a level that balances the "highest practicable level of groundwater production" against "conservation, preservation, protection, recharging and prevention of waste of groundwater? In short, we believe the District has more than enough basis to make a determination that these permits should be proportionately reduced, or reduced according to some other equitable, non-discriminatory method, so as to achieve the mandated balance going forward.

We urge the Board to once again follow its collective conscience, as you have most recently in establishing the moratorium, and constrain the District's permitting to reasonably considered volumes that are defensibly defined by the DFC and MAG.

Last week, our counsel Mr. Eric Allmon provided you with a letter that discusses more specifically the deficiencies that we have identified in the recommendations of the General Manager and the District's permitting process. This was provided to the Board respectfully, as a means of demonstrating that there are other options available to you in this process. Specifically, we urge that you remand the recommendations back to the General Manager with instructions to apply the District's management plan along the lines described in this letter, not only with respect to application of the MAG but also with respect to the other four factors required by §36.1132 in order to provide a new recommendation to the Board with respect to each application. A finding by the Board of such irregularities in the recommendations as they now stand should be sufficient grounds to warrant tabling a vote on the pending permits until this work has been done.

And as our counsel's letter also put forth, Environmental Stewardship still believes there is additional need for scientific and technical studies to determine to what extent pumping impacts surface waters and surface water permits, and that such studies will support the District's basis for managing these precious resources. As such we stand ready to assist in finding and providing outside funding to facilitate such studies. Thank you for the opportunity to provide our comments and we hope that we are able to work with the District to balance these competing needs.

Respectfully submitted,



Steve Box  
Executive Director  
Environmental Stewardship

cc: County Judge Paul Pape, Bastrop County  
County Judge Paul Fischer, Lee County  
Bastrop County Commissioners Pina, Beckett, Klaus, and Snowden  
Lee County Commissioners Pitts, Hartfield, Bradshaw, and Kovar  
Eric Allmon, Lowerre, Frederick, Perales, Allmon & Rockwell

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.envirostewardship.org/>.