

June 15, 2021

Board President Mike Talbot

General Manager James Totten

Lost Pines Groundwater Conservation District

Via email

Dear President Talbot and Mr. Totten:

Environmental Stewardship and the Simsboro Aquifer Water Defense Fund have collaborated on a review of the pending Manville permit application, which was noticed by the District on May 25, 2021, for public hearing on Wednesday, June 16, 2021.

We each have inquired on various levels about what the two organizations considered important lines of inquiry, as part of our own internal “due diligence” review of permit applications pending before the District.

We appreciate your help, Jim, in finding the information we were looking for that we could not find on the District’s website after May 25.

For the reasons stated below, we believe the General Manager, as assisted by the District’s hydrological consultant and its legal advisors, have not processed the Manville permit application in compliance with Chapter 36 of the Texas Water Code, and the District’s Rules. This failure rises to the level of an inadequate and defective determination of the administrative completeness of the application, and/or a defective process in evaluating the permit application, rendering in either case, the application *not ripe for review by either the public or the Board on June 16.*

Specifically, we believe that the technical review required by **District Rule 5.2.A**<sup>1</sup> and **District Rule 15.1**<sup>2</sup>, did not adequately consider, or failed to consider at all, the required elements to be included in a permit application required by **Tex. Water Code Sec. 36.113(c)(8)**<sup>3</sup> and **District Rule 5.1.B(13)**<sup>4</sup> in order to be administratively complete, and eligible to be considered by the board for possible issuance of a permit.

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<sup>1</sup>Rule 5.2 Processing of Operating Permit Application

- A. Processing. Except as provided in Rule 5.2.B. and Rule 5.2.C, an application for an Operating Permit will be processed as provided in Rule 15.1. If an applicant files more than one application for an Operating Permit at the same time, the District shall process those applications together, unless the applicant requests otherwise.

Rule 5.2.B and Rule 5.2.C are not applicable to this application; Rule 15.1 governs the processing of the application.

<sup>2</sup>SECTION 15: PROCEDURES FOR APPLICATIONS AND OTHER MATTERS

Rule 15.1 Permit Applications Requiring Public Hearing ... B. **Technical review.** Upon receipt of an Application, the General Manager will conduct a technical review as follows: Upon receipt of an Application, the General Manager will conduct a technical review as follows: (1) Within 60 days of the receipt of an Application, the General Manager will notify the applicant if the Application is incomplete or if any additional information or documentation is useful or necessary to address the factors that the Board will consider in making a decision on the Application under these Rules. If the applicant has not supplied the additional information or documentation within 180 days following the date that the General Manager notified the applicant of the need for the additional information or documentation, the Application shall expire. Any additional information or documentation timely submitted by an applicant will be considered a part of the Application.

(2) Within 180 days of the later of the date the District receives an Application or the date that the applicant supplies the additional information or documentation requested under Rule 15.1.B(1), the General Manager will complete the technical review of the Application, and notify the applicant in writing that the Application has been declared Administratively Complete. The written notice will contain a summary of the General Manager's recommendation on the Application, and, if the General Manager recommends that a permit, an amendment, or a renewal be granted, may include a draft permit. The General Manager may extend the 180-day period for technical review for a reasonable period upon written notice to the applicant if the General Manager determines that some specific aspect of the application requires a technical review period of more than 180 days.

<sup>3</sup> Tex. Water Code Sec. 36.113(c) provides in pertinent part:

(c) A district may require that only the following be included in the permit or permit amendment application, as applicable under the rules of the district:

..., (8) other information:

- (A) included in a rule of the district in effect on the date the application is submitted that specifies what information must be included in an application for a determination of administrative completeness; and
- (B) reasonably related to an issue that a district by law is authorized to consider.

<sup>4</sup> District Rule 5.1.B provides in pertinent part:

B. For applications for Operating Permits other than applications described in Rule 5.2.B and Rule 5.2.C, the applicant shall provide the following information:

(13) any other information deemed necessary by the District to comply with the requirements of Texas Water Code chapter 36, its enabling statutes, and general law.

However, in the shortness of time, *we only are concerned in this letter with apparent flaws in the District's process of conducting the required technical review of this non-exempt permit, that in turn resulted in a flawed recommendation of the permit, upon which the Board would be intended to rely in making its determination on the permit under District Rule 5.2.D.*

A determination that the District and its advisors determined administrative completeness of the application in error is not necessary in order to conclude that the *Board* currently is not in a position to deliberate the issuance of the proposed permit in accordance with **District Rule 5.2 D. Processing of Operating Permit Application, which provides in pertinent part:**

**D. Consideration.** In deciding whether to grant an application for an Operating Permit, approve the Operating Permit with terms other than those requested in the application, or deny the application, the Board shall consider the requirements of Texas Water Code chapter 36 and the District Rules, including, but not limited to, the following:

...(8) whether granting the application is consistent with the District's duty to manage total groundwater production on a long-term basis **to achieve an applicable Desired Future Condition**, considering:

(a) **the Modeled Available Groundwater determined by the TWDB executive administrator**;... (emphasis added)

That is, we believe it is advisable and necessary for the Board to inquire into whether the application is administratively complete, but inquiring into exactly what the District requires in its permit applications to comply with **Tex. Water Code Sec. 36.113**, or the quality or completeness of the applicant's response to the District's requirements, is *moot for purposes of determining whether the permit is ripe for review by the Board on June 16, 2021*, due to the *District's flawed process* in enabling the *Board* to comply with District Rule 5.2.D.

To cut to the chase, and as further explained below, it has come to our attention that the *purported "applicable" desired future condition* (DFC) under Tex. Water Code Section 36.108 against which the District tested the Manville permit application for purposes of (1) the District's technical review under Rule 15.1; (2) preparation of Mr. Donnelly's hydrological report for the District; (3) Mr. Totten's

recommendation of the permit to the Board as, *inter alia*, satisfying the conditions of District Rule 5.2.D(8); and satisfying the requirements of the Texas Water Code for processing the Manville application, were in fact not the *currently effective* DFC for the Lost Pines District, which will remain in effect until new DFC are adopted no later than January 5, 2022.

Instead, Mr. Totten and his advisors apparently used as the applicable desired future condition, the equivalent of the DFC that were *proposed* by the member districts of Groundwater Management Area 12 (GMA-12) in March 2021, in the current round of joint planning, for potential adoption by each member district in January 2022.

We believe the Boards of each member district of GMA-12 would be among the first to point out that no district has taken any official action to *adopt* the proposed 2022 DFC

There is nothing in the Water Code or the District's Rules (or likely in the District's Management Plan<sup>5</sup>) that would authorize the use of a *proposed DFC*, prior to its adoption by the District, for any purpose other than to solicit public comment on the proposed DFC and to begin its explanatory report on the DFC process for the current joint planning period, as the required prelude to official action on new DFC.

The obvious folly of using yet to be adopted criteria is easily illustrated. How could the District "consider" the "Managed Available Groundwater " (MAG) as determined by the TWDB executive administrator" for DFC that "might" be adopted and certainly have yet to be submitted to TWDB for its determination. Yet MAG (along with other considerations in Rule 5.2.D(8)) have to be considered by the General Manager in recommending the Manville permit be issued, and by the Board in deciding whether to issue, issue with different conditions, or refuse to issue the Manville permit, as required by Rule 5.2.D(8).

We do not base the conclusion that the current DFC played no part in Mr. Donnelly's report or Mr. Totten's recommendation that the permit application essentially satisfies Rule 5.2.D, on Mr. Donnelly's report itself. The report actually

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<sup>5</sup> In the interest of expediency, we have not cited provisions of the District's current Management Plan that would track the Water Code and the District's Rules to negate the District's ability to rely on anything other than currently adopted DFCs in processing applications, but we feel sure those provisions would be easy to find.

did not specify the “applicable desired future condition” against which he was testing the Manville application.

However, that omission spurred Mr. Steve Box of Environmental Stewardship to have this email exchange with Mr. Totten on June 14 (emphasis added; the emails are in reverse order):

**Subject: Re: Manville application materials request**

**Date:** June 14, 2021 at 3:26:00 PM CDT

**To:** Steve Box <[steve.box@att.net](mailto:steve.box@att.net)>

**Reply-To:** [jtotten@lostpineswater.org](mailto:jtotten@lostpineswater.org)

Good afternoon,

**The run included all currently issued permits and used anticipated production ramp ups equivalent to the those used in PS12 for wells within Lost Pines GCD.**

Jim

On 6/14/21 12:03 PM, Steve Box wrote:

Jim,

Andy’s report did not make clear what GAM run was used in the Items 2 & 8 review. Can you provide the specifics of which run was used please.

**In Table 1 he references: Manville pumping + anticipated production from existing LPGCD pumpage and other permits. This raises the question of what run was used as “anticipated production from existing LPGCD” and what “other permits” were included.**

In paragraph 1, page 5, Item 8, he states “as included in the final Groundwater Management Area 12 GMA run”. This raises the question of what run was used for this review.

Can you clarify these questions please.

Thank you,

Steve Box  
Board President & Executive Director

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In fact, the “PS-12” run Mr. Donnelly apparently relied upon for his report is the run under the new GAM (i.e. not the GAM which was utilized in setting the *current* 2017 DFC), which was in turn used by GMA-12 to set the *proposed* DFC, which allow quite different drawdowns than the current DFC. There is no indication that the *current* and therefore *official* DFC played any part in determining “whether granting the application is consistent with the District’s duty to manage total groundwater production on a long-term basis **to achieve an applicable Desired Future Condition**”, as required by District Rules, and as required by Tex. Water Code Sec. 36.1132, which provides:

**Sec. 36.1132. PERMITS BASED ON MODELED AVAILABLE GROUNDWATER.** (a) A district, to the extent possible, shall issue permits up to the point that the total volume of exempt and permitted groundwater production will achieve an applicable desired future condition under Section [36.108](#).

(b) In issuing permits, the district shall manage total groundwater production on a long-term basis to achieve an applicable desired future condition and consider:

(1) the modeled available groundwater determined by the executive administrator;

(2) the executive administrator's estimate of the current and projected amount of groundwater produced under exemptions granted by district rules and Section 36.117;

(3) the amount of groundwater authorized under permits previously issued by the district;

(4) a reasonable estimate of the amount of groundwater that is actually produced under permits issued by the district; and

(5) yearly precipitation and production patterns.

(c) In developing the estimate of exempt use under Subsection (b)(2), the executive administrator shall solicit information from each applicable district. (emphasis added).

It is our position that the Desired Future Conditions adopted by GMA-12's member districts *in 2017* are the "applicable desired future conditions" for the District unless and until new DFCs are adopted, after the requisite public comment period and district hearing, and subject to the approvals and further action by TWDB required under the Water Code.

The District simply cannot pick and choose what it wants to use at any given time to demonstrate that it is managing "total groundwater production on a long-term basis to achieve **an applicable desired future condition**," when no effort has been made to demonstrate anything that establishes that the District's management is in fact achieving the 2017 DFC.

Any argument that might be made in this particular case that, had the District's staff and advisors followed the required process, the recommendation from the District would be the same, must fail for purposes of going to hearing on June 16 based on a defective process. This would be an unfortunate precedent for the District to set.

Any other interpretation of "applicable desired future condition", which is the term used in the Water Code's provisions governing permitting, would be absurd, and the use of GMA-12 proposed DFC would be an arbitrary and capricious deviation from the clear requirements of the Water Code, and the District's Rules.

We therefore request that the hearing notice dated May 25, 2021 be rescinded, and that the hearing and any possible official action on the Manville application (Item #s 9 and 10) be removed from consideration at the June 16, 2021 meeting of the Board of the Lost Pines Groundwater Conservation District.<sup>6</sup>

Very sincerely,

Environmental Stewardship

By Michele G. Gangnes for  
Steve Box,  
Executive Director and Board President  
512.300.6609

Simsboro Aquifer Water Defense Fund

By Michele G. Gangnes  
Michele G. Gangnes, Director  
512.461.3179

cc: Andrew Wier, SAWDF Director

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<sup>6</sup> Please note, because we believe we have surfaced *fundamental questions the District should answer before going to public hearing on June 16*, we are only covering those questions in this letter, so that we can give the District ample notice of our concerns prior to the hearing. However, we may have further concerns with the application or the draft permit.

Specifically, this letter is not intended to resolve any issues SAWDF may have surfaced to the District about the pending application that are not raised in this letter. For example, Andrew Wier, SAWDF's representative, has had email exchanges with Jim that might not have been resolved; Andy Wier is on vacation, camping without internet access, so we don't know the status of his inquiry. SAWDF and ES reserve the right to address any other issues raised by the Manville permit application or draft permit.