

APPLICATION OF CHAPTER 36 AND THE DISTRICT'S RULES AND MANAGEMENT PLAN TO THE OPERATION AND MANAGEMENT OF THE DISTRICT

LOST PINES GROUNDWATER CONSERVATION DISTRICT

MAY 19, 2018 WORKSHOP

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Overview

- Origins of Texas Groundwater Law
- Applicable Authorities
- Creation and Purpose
- Rulemaking and Rules
- Management Plan
- Permitting
- Enforcement



Types of Water

surface water: "water of ... every river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed." Tex. Water Code Sec. 11.021.

groundwater: "water percolating below the surface of the earth." Tex. Water Code Sec. 36.001(5).



Water Laws in Texas



<http://www.afcec.af.mil/>

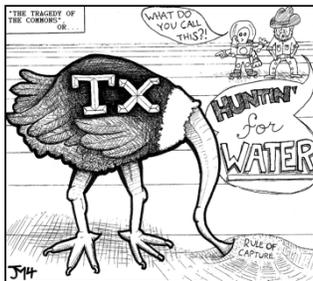
Surface Water: Owned in trust by the State

Groundwater: Owned by the surface owner

G D
H M
GRAVES
DOUGHERTY
HEARON &
MOODY



Origins of Texas Groundwater Law



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Origins of Texas Groundwater Law

The East Case (1904)

- Dispute between railway and neighbors
- Railway drilled a well – pumping 25,000 GPD
- Neighbors claimed well drained their residential wells
- Texas Supreme Court upheld the *rule of capture* favoring the railway.

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Origins of Texas Groundwater Law

Government interest in groundwater:

- 1917 - drought led to a constitutional amendment, the conservation amendment. Tex. Const. art. XVI, Sec. 59.
- 1949 – authority for groundwater districts with the Groundwater Conservation District Act (Act).
- Courts reluctant to rule on groundwater cases after Legislative action.
- Texas follows *rule of capture* instead of *reasonable use* or *the American rule*.



Continued Development of the Law



Photo credit: Texas State Library and Archives

Some time later...

Barshop v. Medina County Underground Water Conservation District (1996) - the Texas Supreme Court allowed the Legislature wide latitude to define the power of GCDs.

Amendments to the Act (now Ch 36 of the Texas Water Code) to define power of GCDs: 1995, 1997, 2001, 2005, 2007, 2011, and 2015.



Applicable Authorities

Creation & Operation

- Enabling Legislation
- General Statutory Law – Chapters 36 and 49 Tex. Water Code; and Tex. Gov' t Code (several chapters)
- Case Law
- District Rules
- Texas Water Development Board Rules (31 TAC Ch. 356) – State's "water planner" and "keeper of science"
- TCEQ – District Supervision (30 TAC Ch. 293)



Applicable Authorities

Planning

- Tex. Water Code Chapters 16 and 36
- TWDB Rules – 31 TAC Ch. 356
- District Rules
- District Management Plan



Applicable Authorities

Judicial Review

- DFCs – Water Code 36.10835
- Generally – 36.251-.254
 - rule adoptions
 - enforcement
 - permit decisions
 - coloring outside the lines, *ultra vires*
 - substantial evidence



District Creation

LPGCD was born on Sept. 1, 1999 by the 76th Legislature.

S.B. No. 1911

"the boundaries are coextensive with the boundaries of *Bastrop* and *Lee Counties*..."

"governmental agency"

"Created under and is essential to accomplish the purposes of Section 59, Article XVI, Texas Constitution."

"this Act controls if there is a conflict with Ch. 36".

AN ACT

relating to the creation, administration, powers, duties, operation, and financing of certain groundwater conservation districts.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. CREATION. (a) The following groundwater conservation districts are created:

- (1) Cow Creek Groundwater Conservation District;
- (2) Brazos Valley Groundwater Conservation District;
- (3) Crossroads Groundwater Conservation District;
- (4) Hays Trinity Groundwater Conservation District;
- (5) Lone Wolf Groundwater Conservation District;
- (6) Lost Pines Groundwater Conservation District;



Chapter 36

Purpose

“conservation, preservation, protection, recharging, and prevention of waste of groundwater.”

AND GCDs are:
“the state’s preferred method of groundwater management”



Chapter 36

GCDs:

- issue permits for drilling wells,
- limit production and spacing, and
- may protect historic use.



<http://wdl.water.ca.gov/groundwater/wells/standards.cfm>

Primary regulators for well permitting and groundwater production.



District Administration

District Administration (Makeup)

- The Board of Directors - Governing body: 5 - 11 directors.
- Conducting Business – Acts presumed valid.
- Officers - President, Vice President, Secretary, and any other officers or assistant officers.
- General Manager and District Staff
- Consultants



District Administration

General Manager

Board specifies duties. Can be delegated full authority to manage and operate the district subject board to orders. GM can employ and compensate staff.



Accountability

Meetings, Records, Regulatory

- Meetings at least quarterly; District operations and public input.
- Notice is per Open Meetings Act with a quorum expected.
- Records subject to the Public Information Act.
- Performance Review and Dissolution – TCEQ



Powers and Duties

What can Districts do?

- Rulemaking Sec. 36.101
- Enforcement Sec. 36.102
- Improvements Sec. 36.103
- Eminent Domain Sec. 36.105
- Surveys Sec. 36.106
- Research and Science 36.107; 36.109
- Public Education
- Management Plan Sec. 36.1071
- Joint Planning with GMAs (chs. 35 and 36) (DFCs) Sec. 36.108
- Well Permitting Sec. 36.113 and Elements 36.1131
- Well Monitoring 36.112
- Hearings on Applications Sec. 36.114
- Permit Renewal Sec. 36.1145 and Change in Operating Permits 36.1146
- Spacing and Production 36.116
- Allow Exemptions 36.117
- Transfer Permits 36.122



Rulemaking

Adopt and enforce rules to:

- manage groundwater production
- protect the groundwater
- prevent degradation of water quality
- prevent waste



Adopting Rules

When adopting rules, Board has to:

- consider all groundwater uses and needs;
- be fair and impartial;
- consider the groundwater ownership;
- consider the public interest and constitutional objectives;
- consider the District goals; and
- not be discriminatory.



Rulemaking Process

- Subcommittee of the Board
- Advisory or Stakeholder Committee
- Notice - Post notice 20 days, and 72-hours
- Publication - proposed rules or amendments
- Comment Period
- Hearing
- Revisions (if any)
- Adoptions - by Order.
- Judicial Review - Appeal of rules from the effective date in of the Order
- Emergency Rules – imminent threat to public health



District Management Plan

<http://findwaterfirst.com/>

GD
HM
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MOODY

Management Plan Goals

- efficient use
- preventing waste
- conjunctive surface water issues - encourage surface water use
- natural resource issues
- drought conditions
- conservation, recharge enhancement, rainwater harvesting, precipitation enhancement, or brush control
- the DFCs

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Management Plan

Who's involved:

- District – policy + science
- TWDB - groundwater availability modeling; and review and comment.
- Public – notice, comment period, and hearing

Challenges:

- Balancing act - *Day, Bragg*
- complex framework

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Joint Planning in the GMA

- District reps (presiding officer or designee) participate in the GMA planning
- Meet at least annually
- Review management plans and proposals for amendments to achieve the DFCs
- Adopt DFCs every 5 years for the aquifers in the GMA
- TWDB technical assistance available in advisory role



DFC Reasonableness Factors

District Reps must “consider” these in setting DFCs 36.108(d)

- * (1) aquifer uses or conditions;
- * (2) the water supply needs and water management strategies included in the state water plan;
- * (3) hydrological conditions, including TERS provided by TWDB, annual recharge, inflows, and discharge;
- * (4) other environmental impacts, including spring flow and other interactions between groundwater and surface water;
- * (5) subsidence;
- * (6) socioeconomic impacts reasonably expected to occur;
- * (7) the impact on the interests and rights in private property
- * (8) the feasibility of achieving the DFC; and
- * (9) other.



District Adoption of DFCs

- GMA has adopted a DFC for the management area
- GMA produces explanatory report with DFCs, justifications, proof of 9 factors
- District adopts applicable DFCs after notice from TWDB
- Appeal of DFCs to SOAH – DFCs are not reasonable
 - If petition filed with the District, the District arranges setting with SOAH
 - District sends petition to TWDB.
 - TWDB provides scientific and technical analysis of DFCs
 - Hearing
 - ALJ PFD goes back to District for review
 - District final order
- Petitioner pays for DFC Appeal
- Judicial Review Appeal



Permits

A Well Permit is required for:

- drilling
- equipping
- operating
- completing
- substantially altering the size of wells or pumps
- Amendment approval – change in withdrawal or use 36.113

No permit for: - maintenance or repair if not increasing the production capabilities or similar well replacement



Types of Authorizations

- No mandate on the types of permits a district by rule may require – there is only a list of activities for which a district may require a permit.
- Registration for exempt wells Sect. 4
- Operating Permits
- Transport Permits Sect. 6
- Amendments Sect. 7
- Renewals Rule 5.7, 6.6
- No historic use permit – although can be common.



Spacing

Property Lines 36.116, Rule 8.2

- New exempt – 50 ft
- New non-exempt – 100 ft

Other wells 36.116, Rule 8.2

- registered or permitted, different owner, and same aquifer

Maximum Pump Capacity (gpm)	Simsboro and Carrizo (feet)
≤ 500	1,500
501 – 1000	2,500
> 1000	5,000

Variances: new exempt (GM), new non-exempt (Board)



Exemptions

3 classes of wells are exempt:

- Domestic or livestock wells on a tract larger than 10 acres, and max production is 25K GPD.
- Oil and gas drilling or exploration rig
- Mining

Additional exemptions per District Rules - Rule 3.1

- Domestic or livestock wells on a tract larger than 2 acres
- Agricultural with less than 200 AF/year
- Test or monitoring



Exempt Registration

Exempt Wells

- Must register with the District.
- Must equip well to prevent waste.
- Content: location, depth, screened intervals, pump size, and fee.
- Existing before 6/21/00, GM approval.
- 2000 – 2016, GM or Board approval.
- New after 4/20/16, GM or Board approval.
- New well expires if well not completed within 180 days unless extension authorized



Non-Exempt Operating Permits

Operating – Application Contents - Section 5

- Signed and sworn (Form 200).
- Well registration (Form 300)
- Location map
- Max instant and annual production rate
- 36-hour pump test for 200 AF/yr or more, unless waived
- Water conservation plan
- Drought contingency plan
- Well closure
- Fee



Exempt Transport Permits

2 types of Exemptions to Transport

1. "partly inside and partly outside" the District:
 - Water used on contiguous property partly by same owner
 - Retail Public Utility (CCN or not)
2. All outside the District with
 - Continuing arrangement effective before 3/2/1997 (and no increases)



Non-Exempt Transport Permits

Transport – Application Contents - Section 5

- Signed and sworn form (Form 200).
- Well registration (Form 300)
- Location of the use of water
- Max amount transferred outside the District annually
- Water supply needs in receiving area
- Identity of the end user if not the applicant
- Fee

Considerations: availability of water in District, impact on aquifer, Management Plan



FORM 200 Operating and Transfer Permit Application

Application Date (Date Received by LPGCD)

Well Number (assigned by LPGCD)

Return this Form to: LPGCD, PO Box 1027 (908 Loop 230), Smithville, TX 78957
Phone: 512-360-5088 FAX: 512-360-5448 Email: lpgcd@lostopineswater.org



SECTION 1 – PURPOSE FOR WATER USE: NON-EXEMPT ONLY

Type of Well: _____

List Proposed Usage of Water Produced from Well and the Amount of Usage.

Use _____ Amount used _____ af/yr.

Use _____ Amount used _____ af/yr.

Will this well be used to export water outside the boundaries of LPGCD? Yes ___ No ___

If yes to question above: af/yr _____

Maximum Annual Withdrawal: _____ af/yr.

Proposed rate at which water will be withdrawn: _____ gallons/min.

List CCN # of entity to benefit from water: _____

Number of L.U.E. to be utilized by water usage: _____



SECTION III – Plans: NON-EXEMPT ONLY
 Please attach copies of the following Schedules or Logs, if available:
 Well Closure Plan or Declaration _____ Alternative Supply Plan _____ Conservation Plan _____

AQUIFER IMPACT

SECTION IV – AFFIRMATION AND EXECUTION
 I certify that all statements and information in this application are true and correct.

 Signature of Applicant
 THE STATE OF TEXAS
 COUNTY OF _____

This instrument was acknowledged before me on _____
 By _____
 (NOTARY SEAL)
 Notary Signature _____
Can be notarized by any Notary of your choice, at the LFGCD Office, or General Manager can do the notary when he assesses your well.




Permits Considerations

Considerations when reviewing permits

- complete and fees paid;
- History of non-compliance
- unreasonable affects on groundwater and surface water;
- beneficial use;
- consistent with the district's management plan;
- avoid waste and achieve water conservation; and
- protect groundwater quality; and
- follow well plugging guidelines at the time of well closure
- consistent with the DFCs
- By Statute and rule




Permits – Key Definition

Beneficial use:

- Agricultural
- Gardening
- Domestic
- stock raising
- Municipal
- Mining
- Industrial
- Commercial
- recreational or pleasure purposes
- oil, gas, sulfur, or other minerals
- or other that is useful and beneficial to the user




Permits - Key Definition

Waste:

- To reservoirs unsuitable for agriculture, gardening, or domestic or not containing groundwater
- Water produced is not used for a beneficial purpose
- Saltwater or other contaminant pollution
- To land other than that of the owner of the well unless authorized
- Artesian well exception - run off the owner's land or percolate above




Waste Prohibited

- Groundwater cannot be used as to create waste.
- Groundwater producers and users exercise due care to prevent waste.

Additional District definitions for Waste:

- Producing without authorization.
- Producing in violation of an authorization.
- Operating a deteriorated well. Sect. 1.




Permit Application Life cycle

- Application filed
- Technical Review by GM
- Administratively complete by GM
- Hearing Notice (District, Applicant, Requested)
- Request for contested case hearing (5 days before hearing)
- Hearing – public comments
- If not contested – Take action – issue or deny
- If contested – STOP (no action on a contested application)
 - Preliminary hearing - standing
 - Decision on request for contested case hearing
 - Hearing by District Board, Hearings Examiner or SOAH




Example Permit - Forestar

All permits are issued subject to:

- District Rules
- Board Orders
- Management Plan
- Ch. 36 of the Water Code
- Permit conditions (including special conditions)




Example Permit - Forestar

Standard Conditions

- Beneficial Use
- Waste prohibited
- Metering accuracy
- District Access
- Application incorporated
- Enforcement




Example Permit - Forestar

<p>Special Operating Conditions</p> <ul style="list-style-type: none"> • Prevail if conflict with District Rules • Aggregated withdrawal annual amount for multiple wells • Demonstrate contractual obligations or reduction possible 	<p>Special Transport Condition</p> <ul style="list-style-type: none"> • Aggregated annual transport amount
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Enforcement

District Remedies for breaking District rules or Ch. 36:

- injunction
- mandatory injunction
- or other appropriate remedy in a court of competent jurisdiction – file a petition in Bastrop County (district office)
- Reasonable* civil penalties for breach of a rule – max \$10,000 per day per violation per statute.
- Attorneys' fees granted if District prevails. Amount fixed by the judge.



Enforcement

- Inspection – Reasonable Notice
- Notice of Violation (NOV) – Water Code or District Rules. 13.215.7 process)
 - Request CCH on violation (30 days)
 - Hearing with General Manager and Regulated Entity
 - If no request, NOV goes to Board. Mail notice to NOV recipient
 - Record decision in the minutes
 - Order reflecting decision
- Penalties – max \$5K/day/violation of District Rule
- Civil – get the courts involved through injunction or mandatory injunction Sect. 13



Anyone who can solve the
problems of water will be
worthy of two Nobel prizes – one
for peace and one for science.

John F. Kennedy

@kennedy



VI. Summary and Wrap-Up

🔗 Helpful Links

Chapter 36, TEX. WATER CODE

<http://www.statutes.legis.state.tx.us/Docs/WA/htm/WA.36.htm>

Lost Pines Groundwater Conservation District Rules

<http://www.lostpineswater.org/DocumentCenter/View/57>

Lost Pines Groundwater Conservation District Management Plan

<http://www.lostpineswater.org/DocumentCenter/View/63>