



# TEXAS WATER DEVELOPMENT BOARD



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**TO:** Board Members

**THROUGH:** Robert E. Mace, Deputy Executive Administrator, Water Science and Conservation

**FROM:** William R. Hutchison, Director, Groundwater Resources Division  
Kenneth L. Petersen, General Counsel

**DATE:** March 10, 2010

**SUBJECT:** Briefing and discussion on: (a) status of joint planning in groundwater management areas; and (b) use of "geographic areas" in establishing desired future conditions.

## **ACTION REQUESTED**

No action requested; this is a discussion item.

## **BACKGROUND**

Key background points are:

- Groundwater management areas are required to submit desired future conditions to the Texas Water Development Board (TWDB) by September 1, 2010.
- Once desired future conditions are submitted, Groundwater Resources Division staff develops values of managed available groundwater based on the desired future condition.
- Groundwater conservation districts are required to include the desired future condition and managed available groundwater number in their groundwater management plans and permitting.
- Regional water planning groups are required to use the managed available groundwater values in their regional water plans if they are received in a timely manner.
- Once adopted, desired future conditions can be challenged by petitioning the TWDB.
- If the Board finds that the desired future condition is reasonable, the petition process ends.
- If the Board finds that the desired future condition is not reasonable, TWDB staff issues written findings to the petitioner and the groundwater conservation districts which include a list of findings and recommended changes to the desired future condition.
- The groundwater conservation districts are then required to prepare a revised desired future condition, to hold a public hearing, and to submit the revised future condition to the Board.
- TWDB will then provide public notice of the revised desired future condition and may provide a public response to the districts' revised conditions, at which point the petition process is concluded.

### *Our Mission*

*To provide leadership, planning, financial assistance, information, and education for the conservation and responsible development of water for Texas.*

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## **KEY ISSUES**

### **(a) Status of joint planning in groundwater management areas**

The status of desired future conditions, managed available groundwater determinations, and active petitions is shown in the attachment. Progress during the first two months of 2010 includes:

- The groundwater conservation districts in Groundwater Management Area 11 adopted a set of preliminary desired future conditions that will generally result in managed available groundwater values that are about the same as the 2007 State Water Plan groundwater availability estimates. It is expected that formal adoption will occur at their April meeting after a series of public meetings being organized by individual groundwater conservation districts
- The groundwater conservation districts in Groundwater Management Area 12 adopted a set of preliminary desired future conditions. It is expected that formal adoption will occur at their April meeting.

### **(b) Use of "geographic areas" in establishing desired future conditions**

Section 36.108(d) provides that groundwater conservation districts "shall consider uses or conditions of an aquifer within the management area that differ substantially from one geographic area to another" when establishing desired future conditions. However, the law does not define "geographic area" and there is no guidance to the districts either on how to delineate a geographic area or on how to measure "substantial" differences between geographic areas in either uses or conditions. Under Section 36.108(d)(2), districts may establish different desired future conditions within a management area for "each geographic area overlying an aquifer in whole or in part ... within the boundaries of the management area."

The question has been presented whether groundwater conservation districts within a groundwater management area (GMA) may delineate different "geographic areas" within the GMA by use of county (or other political subdivision) boundaries. Staff believes this approach is legally defensible provided the districts are using the political subdivision boundaries to locate discernible and substantial differences in uses or conditions within the GMA and not for any other purposes. It should be emphasized that employing geographic areas that are not based on clear and substantial differences in uses or aquifer conditions is not supportable, regardless of how those geographic areas are drawn.

As noted, there is no definition of "geographic" or "geographic area" in Chapter 36, Water Code, nor are there any such definitions in the Code Construction Act which is generally applicable to statutory schemes. Webster's Third New International Dictionary (Unabridged, 1993) recognizes "political geography" as one form of geography (in addition to "mathematical geography," "physical geography," "economic geography," "commercial geography" and "bio-geography"). The argument that the omission of "political subdivision boundaries" from Section 36.108(d) is not

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persuasive, as long as the groundwater conservation districts do not appear to be using county or other political subdivision lines to gerrymander DFCs for purposes other than accommodating discernible, substantial differences in uses or aquifer conditions within the GMA. (Known as the doctrine of *expressio unius est exclusio alterius*, the courts have stated that this approach to statutory construction is simply an aid to determine legislative intent and that it should not be mechanically applied. *Mid-Century Insurance Co. of Texas v. Kidd*, 1999 WL 450908 (Tex. 1999).

Attachment

**Status of Desired Future Conditions, Managed Available Groundwater Determinations, and Active Petitions**

**Status of Desired Future Condition Adoptions**

Statute requires that groundwater conservation districts submit desired future conditions to the TWDB by September 1, 2010. To date, districts in four groundwater management areas have adopted desired future conditions. Districts in one area (Groundwater Management Area 8) have submitted conditions for all of its aquifers. Desired future conditions adopted thus far are:

***Groundwater Management Area 1***

- Ogallala Aquifer
- Rita Blanca Aquifer

***Groundwater Management Area 8***

- Blossom Aquifer
- Brazos River Alluvium Aquifer
- Edwards (Balcones Fault Zone) Aquifer
- Ellenberger-San Saba Aquifer
- Hickory Aquifer
- Marble Falls Aquifer
- Nacatoch Aquifer
- Trinity Aquifer
- Woodbine Aquifer

***Groundwater Management Area 9***

- Edwards Group of the Edwards-Trinity (Plateau) Aquifer
- Ellenberger Aquifer
- Hickory Aquifer
- Marble Falls Aquifer

***Groundwater Management Area 10***

- San Antonio Segment (excluding Kinney County) of the Edwards (Balcones Fault Zone) Aquifer

**Status of Managed Available Groundwater Determinations**

Statute requires that the TWDB provide managed available groundwater numbers based on the adopted desired future conditions to groundwater conservation districts and regional water planning groups. Final managed available groundwater numbers provided thus far are:

***Groundwater Management Area 8***

- Blossom Aquifer
- Brazos River Alluvium Aquifer
- Edwards (Balcones Fault Zone) Aquifer
- Ellenburger-San Saba Aquifer
- Hickory Aquifer
- Marble Falls Aquifer
- Trinity Aquifer
- Woodbine Aquifer

***Groundwater Management Area 9***

- Edwards Group of the Edwards-Trinity (Plateau) Aquifer

Groundwater Resources Division staff sends draft managed available groundwater numbers to the districts in the groundwater management area for review. Once comments are addressed and received from the districts, Groundwater Resources Division staff brings the numbers to the Board for review. As requested by the Board, this review will include a side-by-side comparison of managed available groundwater numbers with current state water plan and water use numbers as well as estimates of drainable water in place and a maximum sustained pumping level.

**Status of Active Petitions**

To date, TWDB has received two administratively complete petitions challenging the desired future conditions for the Ogallala Aquifer adopted by the districts in Groundwater Management Area 1. TWDB has also received three administratively complete petitions concerning desired future conditions in Groundwater Management Area 9. The process for Groundwater Management Area 1 is complete because the Board found the desired future conditions to be reasonable. The process for Groundwater Management Area 9 is ongoing after the Board's finding that the desired future conditions were not reasonable. The Board's recommended desired future condition has been discussed at a Groundwater Management Area 9 meeting, and a public hearing has been held. No action on the recommendation has been taken to date.