Quadvest Utility Company Criticizes Groundwater Management Area 14 Proposed Regional Groundwater Regulations

By admin on July 15, 2021 · No Comment

Simon Sequeira, President of Quadvest, LP, January 15, 2019. VIVA OCHO LOCO. NO A SJRA. Sequeira is one of the most powerful people in Montgomery County and a genuine hero on groundwater-property rights issues

Publisher's Note: *The Golden Hammer*, Montgomery County's leading daily newspaper, obtained a copy of the letter from Quadvest, L.P., a major local utility company and groundwater producer, to Groundwater Management Area 14 (GMA 14) of the Texas Water Development Board. GMA is the regional regulatory body overseeing groundwater conservation districts, including the Lone Star Groundwater Conservation District (LSGCD), which regulates groundwater production in Montgomery County. While this letter has some references to technical issues, its an important letter nonetheless, which explains many of the critical matters before LSGCD and GMA 14.

The author of the letter is attorney Marvin Jones of Sprouse Shrader Smith law firm, which represents Quadvest. The recipients of the letter were four groundwater conservation districts, which sit on the GMA 14 Board. Interestingly, the date of the letter is July 16, 2021.

The letter in its entirety follows.

Re: Groundwater Management Area 14 ("GMA 14")

We are writing at the request of our clients Quadvest, LP d/b/a Quadvest Water and Sewer Utility and Woodland Oaks Utility, LP. We write to each of you in your capacities as the presidents of the groundwater conservation districts ("GCDs") that make up Groundwater Management Area 14 ("GMA 14") under Tex. Water Code Sec. 36.108.

We have reviewed the letter reporting the Desired Future Conditions (DFC) approved by the district representatives of GMA 14. We offer the following comments regarding those DFC's:

1. While we applaud your effort to comply with the intent of Sec. 36.108(d-1) by approving a single DFC for the aquifers you jointly manage, we find the effort to fall short.
2. You have approved a DFC "for the Gulf Coast Aquifer" of 70% median available drawdown remaining in 2080, without distinguishing between the aquifers that make up the Gulf Coast Aquifer. As you well know, there are important differences between the various aquifers in the Gulf Coast Aquifer, differences which GMA 14 recognized in prior versions of the DFCs approved by the GCDs of GMA 14. To now omit any reference to those differences is therefore puzzling. Worse, your consultant did modeling in which he apparently lumped all of the aquifers together without distinguishing between them, an approach that is scientifically unsupportable.
3. Setting a single DFC for all aquifers in GMA 14 is a pedantic interpretation of the statutory requirement of having a DFC for each aquifer or subdivision of an aquifer or geographic area. Merely setting a common DFC for all aquifers across all of GMA 14 is insufficient to meet the substance of our objection to the approach you have consistently taken. Until the GCDs in GMA 14 adopt a single, uniform set of production and spacing limits, the problems we have raised will persist. If each GCD has a different production limit, for example, then owners of groundwater in County A are subject to being affected by production by their neighbors in County B for the only reason that the two counties lie in different GCDs. We continue to state that adopting different rules and production limitations for the same aquifer can only be justified where there are discernible and substantial differences in uses or conditions that happen to be delineated by groundwater district or county political lines. That circumstance would be rare.

Bluntly put, the existence of different GCDs in GMA 14 is based on political vagary, not hydrogeological reality. The history of GCD development in Texas and the legal ramifications of groundwater ownership point to the need for a single entity with authority over each aquifer or subdivision of an aquifer. The existence of multiple separate government entities attempting to manage pieces of common aquifers based on political lines poses potential problems of a constitutional nature. There are no demonstrated discernible and substantial differences in uses or conditions with respect to the Gulf Coast Aquifer subdivisions within GMA 14 that are delineated by any political subdivision lines. Moreover, any discernible and substantial differences in uses or conditions of the subdivisions of the Gulf Coast Aquifer do not just happen to all exist along the exact political boundaries of the GCDs within GMA 14. In fact, there is absolutely no hydrogeological evidence to support such a notion.

The "subsidence DFC" you approved is without merit.

There is no reasonable scientific basis for imposing a subsidence DFC on Montgomery County. Based on the best available science, the "70%" drawdown DFC will be the limiting factor for production in

that county long before the subsidence limitation will be reached.

The best available science indicates that there are hydrogeological reasons that The Woodlands experiences subsidence. Its position between two specific fault areas has been identified as having substantial consequences for that township. Indiscriminately imposing a subsidence DFC across all of GMA 14 does not comport with the best available science.

The subsidence discussion at GMA 14 has been driven primarily by complaints from residents of The Woodlands. Yet, the residents of that township are uniquely positioned to solve the problem they perceive. That's true because there is one primary groundwater producer for The Woodlands: SJRA. And that same groundwater producer, SJRA, owns a pipeline by which it can deliver surface water to The Woodlands. To the extent the issue can be resolved by action in Montgomery County, the subsidence problem can be solved by SJRA outside of the GMA process and in the absence of draconian regulation. The residents of The Woodlands should channel their energies into persuading SJRA to switch their township to surface water.

Assuming that the township of The Woodlands lacks the resolve to solve its own problem, and assuming that LSGCD adopts the subsidence DFC, could LSGCD draw a subsidence management zone around The Woodlands of, for example, no more than one inch of additional subsidence over 2009 levels, with a separate management zone for the balance of Montgomery County of no more than an average of 1.5 feet of additional subsidence? Such a management zone would actually be supported by the hydrogeological science. LSGCD could then restrict groundwater pumping within that management zone if the one inch subsidence DFC was exceeded. But the question is why should LSGCD have to implement that type of management structure when the citizens of The Woodlands could solve their issue themselves?

The more fundamental question is whether LSGCD (or any other GCD anywhere) has the statutory authority to establish a "subsidence DFC." Chapter 36 of the Texas Water Code defines "Desired Future Condition" as a "quantitative description, adopted in accordance with Section 36.108, of the desired condition of the groundwater resources in a management area at one or more specified future times." Texas Water Code §36.001(3). A DFC based on subsidence is not a "quantitative description" of "groundwater resources." Furthermore, section 36.108(d) of the Water Code requires GMA 14 to "propose for adoption desired future conditions for the relevant aquifers within the management area." Again, a DFC purporting to measure land subsidence is not a DFC for "relevant aquifers." Although the "impact on subsidence" is one factor GMA 14 must consider when adopting DFCs under section 36.108(d), nothing in the statute suggests that one factor may be elevated to a separate DFC, standing alone. The Legislature established "subsidence districts" specifically for Harris, Galveston and Fort Bend Counties, giving those districts specific statutory authority to deal with with subsidence. That authority is absent with respect to DFCs.

While we understand that the GCDs in GMA 14 do not have any control over the production of groundwater in Harris County, a subsidence DFC is questionable unless limitations are placed on such pumping. In fact, GMA 14's approach to subsidence illustrates why management by abstract political subdivisions is inappropriate and ineffective. The best available science indicates that subsidence in The Woodlands is caused, in large measure, by pumping in northern Harris County. Harris Galveston Subsidence District is a subsidence district charged with managing subsidence in Harris County, including northern Harris County. In the past 16 years, it has allowed 10 feet of subsidence in some areas within its actual jurisdiction. Its representatives have argued stridently for a subsidence DFC in the adjoining counties as part of the GMA 14 process, yet HGSD has allowed increased amounts of pumping in Harris County year after year. If HGSD is concerned about subsidence in The Woodlands, it should take action on its side of the Harris/Montgomery County line. Because it has not done so effectively, its strident calls for restrictions on the GCDs of GMA 14 should be judged accordingly.

What is the statutory rationale for allowing Harris Galveston Subsidence District and Fort Bend Subsidence District to have a "seat at the table" at GMA 14 meetings? The Texas Water Code provisions relating to DFC planning mention only districts, meaning groundwater conservation districts. While it is appropriate to hear from concerned stakeholders, HGSD and FBSD enjoy disproportionate influence over this DFC process where they get to participate freely in deliberations without the limitations placed on other members of the general public. If your rationale is grounded on Sec. 36.1081(b), then the "advisory" members of GMA 14 should include more than just subsidence districts and "white area" counties in GMA 14.

In that same vein, your adopted DFCs purport to apply to counties that are not burdened with a groundwater conservation district at all. How will Liberty County meet the DFCs you have adopted for it? Worse, do your DFCs tend to make the groundwater resources in Liberty County more valuable on the open market than groundwater resources in adjoining Montgomery County? Put differently, do your adopted DFCs devalue groundwater resources in Montgomery County as compared to those in Liberty County, and if so, what is the reasoned justification for that diminution in value? On a different level, do your adopted DFCs tend to increase the value of surface water resources in Montgomery County at the expense of groundwater resources? And what entity benefits from that situation?

The participation of "white area" counties and two subsidence districts in the DFC process illustrates yet again that the current model of groundwater management is antiquated and insufficient. Groundwater issues raised by the participants in the DFC process could be more efficiently handled if there was a regional aquifer authority for each managed aquifer, in this case the Gulf Coast aquifer system. Until a regional model is implemented, management of groundwater will continue to be ad hoc, fragmented and inconsistent. The people of this State deserve better.

We object to Wade Oliver's participation in the GMA 14 DFC process. Mr. Oliver has an irreconcilable conflict of interest in that he has performed services for SJRA, whose agenda is contrary to the interests of our clients and their customers. That his loyalties may have compromised his independent engineering judgment is demonstrated by his failure to model subsidence and drawdowns for each relevant aquifer, instead lumping them together in his analysis.

We bring these cases to your attention because they state what reasonable groundwater conservation district board members ought to understand the law to be as of this date. Stratta holds that Texas law clearly establishes that groundwater rights are property rights subject to constitutional protection ("What is 'unsettled' about [EAA v.] Day's interpretation of the common law and statutory rights of groundwater owners?"), and that such rights, when violated under color of state law, may be redressed in federal court under 42 U.S.C.A. Sec. 1983.

Cedar Point Nursery reiterates that protection of private property is indispensable to the promotion of individual freedom, and that regulatory restrictions that "go too far" amount to a taking. The Cedar Point majority noted that "The essential question is not . . . whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree). It is whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property." Id. at ___ U.S. ___. There, the Court found that a regulation that prevented a landowner from excluding third parties from his property amounted to a taking per se. In that regard, Marrs v. Railroad Commission establishes that my clients have a remedy to being drained by wells in Harris County or Liberty County, which is to erect a barrier to drainage by creating an equal and opposite cone of depression. Depriving them of that remedy is a taking under the U.S. and Texas Constitutions ("It is the taking of one man's property and the giving it to another." Marrs at 948).

And the Pakdel decision teaches that exhaustion of administrative remedies is not a formulaic precondition to bringing a takings case. Instead, the Court tells us that the finality requirement before filing suit is "relatively modest. All a plaintiff must show is that 'there [is] no question . . . about how the regulations at issue apply to the particular land in question,'" and that "nothing more than de facto finality is necessary." The Pakdel opinion concludes "Whatever policy virtues this doctrine might have, administrative 'exhaustion of state remedies' is not a prerequisite for a takings claim when the government has reached a conclusive position." Id. at __ U.S. __. We mention Pakdel in light of Tex. Water Code Sec. 36.1083(p) and its admittedly pointless and ineffective DFC appeal process.

Thank you for your kind consideration of our comments. If you have any questions at all regarding these comments, please not hesitate to contact me directly.

Respectfully,

Marvin W. Jones

c: Bob Harden

Mike Thornhill

Mike Stoecker

Simon Sequeira

Mike Powell

GMA 14, Groundwater Regulation, Lone Star Groundwater Conservation District, Quadvest, San Jacinto River Authority, Texas Water Development Board

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