

## Groundwater Conservation District's Role in Protection of Water Quality

### I. Introduction

While most consider regulation of groundwater production to be the primary mission of a groundwater conservation district (GCD or district), protection of water quality also plays a key role in the functions of a GCD. This paper details the GCD's general authority relating to water quality protection, reviews water quality authority of a number of individual GCDs, describes water quality projects and programs employed by a number of GCDs, and provides case studies of individual GCD's efforts to protect water quality relating to injection wells, landfill siting, and wastewater discharges.

### II. Texas Water Code Chapter 36 provides General Authority Relating to Water Quality

Chapter 36 of the Texas Water Code is the general law governing GCDs. Protection of water quality is expressed under the "purpose" section of Chapter 36 in terms of "waste prevention." That is, GCDs are created to provide for, among other things, the prevention of waste of groundwater.<sup>1</sup> "Waste" is defined as, among other things, "pollution or harmful alternation of groundwater in a groundwater reservoir by saltwater or by other deleterious matter admitted from another stratum or from the surface of the ground."<sup>2</sup> Thus, a GCD is charged with the prevention of pollution. While pollution is not defined under Chapter 36, it is defined elsewhere in the Water Code to mean:

The alteration of the physical, thermal, chemical, or biological quality of, or the contamination of any water in the state that renders the water harmful, detrimental, or injurious to humans, life, vegetation, or property or to the animal public health, safety, or welfare, or impairs the usefulness or the public enjoyment of the water for any lawful purpose.<sup>3</sup>

Chapter 36 authorizes GCDs to address "waste" (i.e. pollution) and water quality under many circumstances including in rulemaking, field inspections, spacing, regional planning, and permitting. GCDs are authorized to make and enforce rules that prevent degradation of water quality or prevent waste of groundwater.<sup>4</sup> Before granting or denying a permit, or a permit amendment, a GCD must consider, among other things, whether the applicant has agreed to avoid "waste" and that applicant use reasonable diligence to protect groundwater quality.<sup>5</sup> Such permits and permit amendments are subject to GCD rules with reference to the drilling, equipping, completion, alteration, operation, or production of groundwater from, wells or pumps that may be necessary to prevent "waste." Most districts adopt well construction guidelines to safeguard water quality.<sup>6</sup> GCDs may adopt spacing rules and limit groundwater production to prevent degradation of water quality or to prevent "waste."<sup>7</sup> District employees and agents are entitled

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<sup>1</sup> TEX. WATER CODE § 36.0015(b).

<sup>2</sup> *Id.* at § 36.001(8)(d).

<sup>3</sup> *Id.* at § 26.001(14).

<sup>4</sup> *Id.* at § 36.101(a).

<sup>5</sup> *Id.* at § 36.113(d)(6) and (7).

<sup>6</sup> *Id.* at § 36.113(f).

<sup>7</sup> *Id.* at § 36.116(a)(1) and (2).

to enter public or private property at any reasonable time for the purpose of inspecting and investigating conditions relating to water quality.<sup>8</sup>

Water quality is also a consideration in GCDs planning. GCDs must adopt a management plan that addresses management goals, including controlling and preventing “waste” of groundwater.<sup>9</sup>

Water quality and prevention of “waste” are also considered by districts when joint planning. GCDs are required to meet annually with other districts in management areas to review each district’s management plan. The review shall consider the effectiveness of the measures established by each district’s management plan for preventing “waste” and any other matters that the boards consider relevant to the prevention of “waste” in the management area.<sup>10</sup>

The desired future conditions adopted by districts in each GMA must provide a balance between the highest practicable level of groundwater production and the conservation, preservation, protections, recharging, and prevention of “waste” and control of subsidence in the management area.<sup>11</sup> Moreover, in the context of joint planning, GCDs may contract to jointly study groundwater quality.<sup>12</sup>

In connection with water quality protection, a GCD may require landowners to permanently close or cap an unused well.<sup>13</sup> If a landowner fails or refuses to close or cap a well, the district may close or cap the well and place a lien on the land on which the well is located to effectuate the recovery of reasonable expenses incurred by the district.<sup>14</sup>

### III. Water Quality Protection addressed in Enabling Legislation of several GCDs

Water quality protection and waste prevention are addressed in some, but not all, of the enabling legislation of individual GCDs.

Like the district “purpose” language in Chapter 36, some district’s enabling legislation describes the general “nature” and “purpose” of the district to provide for, among other things, the prevention of waste and pollution of the district’s groundwater.<sup>15</sup> Unlike Chapter 36, some GCDs’ enabling legislation includes the protection of surface water.<sup>16</sup> At least two districts, Irion County Water Conservation District and Sterling County Water Conservation District, are authorized under enabling legislation provisions to have a professional engineer conduct studies and surveys of groundwater and *surface water* supplies and the facilities available for use in the prevention of waste and pollution of those water

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<sup>8</sup> *Id.* at § 36.123(b).

<sup>9</sup> *Id.* at § 36.1071(a)(2).

<sup>10</sup> *Id.* at § 36.108(c)(2) and (3).

<sup>11</sup> *Id.* at § 36.108(d-2).

<sup>12</sup> *Id.* at § 36.1086.

<sup>13</sup> *Id.* at § 36.118(a).

<sup>14</sup> *Id.* at § 36.118(c) and (d).

<sup>15</sup> Special District Local Laws Code § 8805.002 (Lipan-Kickapoo Water Conservation District; § 8845.02 (Irion County Water Conservation District); § 8814.002 (Sterling County Underground Water Conservation District).

<sup>16</sup> *Id.*

resources.<sup>17</sup> These two districts are also required to develop and implement comprehensive plans for, among other things, prevention of waste and pollution of groundwater and surface water in the district.<sup>18</sup>

The investigation of groundwater pollution is required in the context of regional cooperation under Water Code § 36.108 for five GCDs: Panola County GCD, Coastal Bend GCD, Fayette County GCD, Goliad County GCD, and Lost Pines GCD. Specifically, these districts are charged with providing for “regional continuity” as a part of their § 36.108 joint planning obligations including the requirement to “investigate any groundwater or aquifer pollution with the intention of locating its source” and notifying other GCDs in their designated GMAs and all appropriate agencies of any groundwater pollution detected.<sup>19</sup>

Three GCDs have single provisions relating to pollution prevention not found in the enabling legislation of other districts. For example, the Trinity Glen Rose GCD is required to adopt rules regarding the issuance of appropriate “recharge credits” to persons in the district who enhance, supplement, improve, or prevent pollution of recharge of the Trinity Aquifer.<sup>20</sup> The Anderson County Underground Water Conservation District is authorized to prohibit the pumping or use of groundwater if the district determines that the pumping would present an unreasonable risk of pollution.<sup>21</sup> The Bluebonnet GCD’s enabling legislation provides that the district was created for a number of purposes including “to prevent pollution or waste of groundwater.”<sup>22</sup>

The enabling legislation of both Fort Bend Subsidence District and the Harris-Galveston Subsidence District includes “pollution prevention” in the definition of “water conservation.”<sup>23</sup>

#### IV. GCD Water Quality Protection Programs and Pollution Prevention Projects

GCDs operate programs to protect water quality and prevent pollution including well monitoring, water testing, and plugging of abandoned wells. Several districts maintain a monitor well network throughout the district’s territory, which is used to periodically measure water levels and conduct water quality sampling to detect changes in water quality and aquifer contamination.<sup>24</sup> This trend monitoring

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<sup>17</sup> § 8845.111(a) (Irion County Water Conservation District); § 8814.113.

<sup>18</sup> § 8845.113(a) (Irion County Water Conservation District); § 8814.115(a) (Sterling County Underground Water Conservation District).

<sup>19</sup> § 8819.105(b)(5) and (6) (Panola County GCD); §8829.102(c)(4) and (5) (Coastal Bend GCD); § 8836.102(5) and (6) (Fayette County GCD); §884.102(c)(4) (Goliad County GCD) and § 8849.106(5) and (6) (Lost Pines GCD).

<sup>20</sup> § 8870.154(2). According to Section 12.6 of the Trinity Glen Rose GCD’s rules, a person who pays production fees to the District shall receive recharge credits if the District determines that the person enhances, supplements, improves, or prevents pollution of recharge of the Trinity Aquifer. The amount of the recharge credit shall be determined by the District’s Board of Directors on a case-by-case basis. Trinity Glen Rose GCD’s Rules, October 14, 2013.

<sup>21</sup> § 8809.103(1). The Anderson County Underground Conservation District.

<sup>22</sup> § 8825(b).

<sup>23</sup> § 8801.001(b) (Harris-Galveston Subsidence District) and § 8834.001(7-a) (Fort Bend Subsidence District).

<sup>24</sup> See Fayette County GCD [www.fayettecountygroundwater.com](http://www.fayettecountygroundwater.com), Gonzales County Underground Water Conservation District [www.gcuwcd.org/waterquality.html](http://www.gcuwcd.org/waterquality.html); Sandy Land Underground Water Conservation District [www.sandylandwater.com/services.html](http://www.sandylandwater.com/services.html); North Plains Groundwater Conservation “District Hydrology and Groundwater Resources 2013-2014” at p. 16 (August 2014); Cow Creek Groundwater Conservation District [www.ccgcd.org/?page=levels](http://www.ccgcd.org/?page=levels).

establishes a baseline of information to reveal groundwater quality trends over time and serves as an initial indication of changes in water quality that may warrant further investigation.

Some GCDs offer domestic water well testing to residents of the district. For example, Central Texas GCD and Upper Trinity GCD will test for total coliform and E. Coli.<sup>25</sup> The Blanco-Pedernales GCD will test private wells for the primary and secondary drinking water standard constituents.<sup>26</sup>

A number of districts provide financial assistance to plug abandoned wells, which serve as direct conduits for contaminants to enter groundwater.<sup>27</sup>

The Barton Springs / Edwards Aquifer Conservation District has improved both water quantity and water quality through its Onion Creek recharge enhancement project. Recharge in the aquifer through Antioch Cove, located in the bed of Onion Creek, is enhanced by a structure that minimizes the amount of sediment and debris that enters the cave. The quality of recharge water is improved by an automated valve that closes during each storm pulse allowing the turbid water to flow past the cave entrance. After the “first flush” the valve opens and the relatively cleaner water enters the cave.<sup>28</sup> The District also sponsors cave and creek cleanup programs.

## V. Water Quality Protection in the Edwards Aquifer

The Edwards Aquifer Authority (EAA) is empowered by the legislature with authority to prevent pollution and protect water quality. Like Water Code Chapter 36, the Edwards Aquifer Authority Act (EAAA) defines waste to include pollution<sup>29</sup> and gives the EAA general powers to prevent the waste or pollution of water in the aquifer.<sup>30</sup> The EAA defines pollution similar to the Water Code Chapter 36 definition.<sup>31</sup> Among the general powers of the EAAA are the powers to prevent pollution and enforce water quality standards in the counties included in the EAA boundaries and within a five-mile buffer zone extending outside of those counties.<sup>32</sup> The EAAA prohibits a person from polluting or contributing to polluting the aquifer.<sup>33</sup> The EAAA includes a unique provision authorizing the EAA board to adopt rules regarding the control of fires in the aquifer’s recharge zone to protect the water quality of the aquifer.<sup>34</sup>

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<sup>25</sup> [www.centraltexasgcd.org/water-quality/](http://www.centraltexasgcd.org/water-quality/); [www.uppertrinitygcd.com/district-well-test-private-wells-for-colliform\\_bacterial](http://www.uppertrinitygcd.com/district-well-test-private-wells-for-colliform_bacterial).

<sup>26</sup> [www.blancocountygroundwater.org/](http://www.blancocountygroundwater.org/). The District samples for: coliform bacteria, fecal coliform, pH, alkalinity, conductivity, temperature, hardness, chloride, iron, fluoride, sulfate, nitrate.

<sup>27</sup> Brazos Valley GCD provides grant funding to cover 75% of the cost of plugging up to \$1000. [www.brazosvalleygcd.org/education/plugging-abandoned-wells/](http://www.brazosvalleygcd.org/education/plugging-abandoned-wells/). The Hill Country Underground Water Conservation District provides well plugging material (both bentonite chips) at no cost to landowners. [www.hcuwcd.org/abandonedwells.htm](http://www.hcuwcd.org/abandonedwells.htm). The Santa Rita Underground Water Conservation District has a program to plug more than 350 abandoned wells to prevent contamination of groundwater “Groundwater Conservation Districts: Success Stories” Texas Agricultural Extension Service Publication B-6087 (August 1999).

<sup>28</sup> [www.bseacd.org/projects/onion-creek-recharge-enhancement/](http://www.bseacd.org/projects/onion-creek-recharge-enhancement/).

<sup>29</sup> Act of May 30, 1993 73<sup>rd</sup> R.S., ch. 662, 1993 Tex. Gen. Laws 2350 as amended (EAAA) § 1.03(21)(1).

<sup>30</sup> *Id.* at § 1.08(a).

<sup>31</sup> *Id.* at § 1.03(17).

<sup>32</sup> *Id.* at § 1.08(c).

<sup>33</sup> *Id.* at § 1.35(d).

<sup>34</sup> *Id.* at § 1.081.

The EAAA provides the EAA may limit withdrawals from the aquifer to protect the water quality of the aquifer and of the surface streams to which the aquifer provides springflows.<sup>35</sup> The EAA is also authorized to conduct research to monitor and protect water quality.<sup>36</sup> The EAA may not unreasonably deny a request by a political subdivision to enter into a cooperative agreement for aquifer artificial recharge if the political subdivision agrees to provide for the protection of water quality of the aquifer.<sup>37</sup>

The Edwards Aquifer Authority has an extensive regulatory program to protect the water quality in the Edwards Aquifer Recharge Zone. In effort to protect and prevent the pollution of the Edwards Aquifer and to preserve existing and potential groundwater use, the EAA regulates the storage of regulated substances on the recharge zone and the contributing zone of the Edwards Aquifer. Facilities in these environmentally sensitive areas are required to register with the EAA if they store an aggregate quantity exceeding 1,000 gallons or 10,000 pounds of regulated substances in containers 55-gallons or less in size. In addition to the registration requirement, regulated facilities are required to have secondary containment for regulated substances and to prepare a Spill Prevention and Response Plan (SPRP)<sup>38</sup>

The EAA rules include a prohibition on the use of coal tar-based pavement sealant products after December 31, 2012, in Comal and Hays counties within areas on the Edwards Aquifer Recharge Zone and on certain, defined portions of the Edwards Aquifer Contributing Zone.<sup>39</sup>

The EAA, in an effort to protect and preserve the region's primary groundwater supply, regulates above ground storage tanks (ASTs) and underground storage tanks (USTs) located in, above, or on the Edwards Aquifer recharge zone. All regulated storage tanks located in, above, or on the recharge zone of the Edwards Aquifer must be registered with the EAA. On or after October 18, 2002, no person may install or have installed an AST or UST system for the purpose of storing or otherwise containing regulated substances in, above, or on the recharge zone of the Edwards Aquifer, unless the installation is a result of an EAA approved major modification.<sup>40</sup>

The Edwards Aquifer Authority requires notification of certain spills of regulated materials that occur over the Edwards Aquifer Recharge Zone. In addition, the EAA may make recommendations to state and local authorities and third parties regarding the level and type of response to certain types of spill that could threaten the water quality of the Edwards Aquifer. In such a situation, the EAA's role is that of a cooperative resource. However, the EAA reserves the ability to take all appropriate actions to cease or prevent the pollution of the Edwards Aquifer.<sup>41</sup>

In addition to the EAA, GCDs over the Edwards Aquifer deal with water quality. Chapter 213 of the TCEQ rules govern the regulation of certain activities having the potential for polluting the Edwards Aquifer and hydrologically connected surface streams. Rule 213.11 specifically addresses GCDs whose geographic jurisdiction includes the recharge zone or transition zone. The rule provides:

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<sup>35</sup> *Id.* at § 1.14(c)(1) and (2).

<sup>36</sup> *Id.* at § 1.27(b)(2).

<sup>37</sup> *Id.* at § 1.44(b)(2).

<sup>38</sup> Chapter 713, Subchapter F of EAA Rules.

<sup>39</sup> Chapter 713, Subchapter H of EAA Rules.

<sup>40</sup> Chapter 713, Subchapter G of EAA Rules.

<sup>41</sup> Chapter 713, Subchapter E of EAA Rules.

The commission recognizes the authorities, powers, and duties of special-purpose districts, created by the Texas Legislature or by the commission under Chapter 36 of the Texas Water Code, as groundwater conservation districts to conserve, prevent waste, and protect the quality of ground water. In order to foster cooperation with local governments, the commission encourages districts to assist it in the administration of this chapter by carrying out the following functions within the areal extent of their geographic jurisdiction which includes the recharge zone or transition zone:

- (1) cooperating with licensing authorities in carrying out the provisions of this chapter;
- (2) conducting such geologic investigations as are necessary to provide updated information to the executive director regarding the official maps of the recharge zone and transition zone;
- (3) monitoring the quality of water in the Edwards Aquifer; and
- (4) maintaining maps of regulated activities on the recharge or transition zone.

Moreover, 30 TAC § 213.4 requires Edwards Aquifer Protection Plans to be filed with TCEQ and GCDs within which the proposed regulated activity will be located. GCDs may comment on the plan and the executive director of the TCEQ shall review all comments filed.<sup>42</sup>

## VI. Actions Outside Traditional Application of Chapter 36 Powers

There are a number of activities regulated by agencies other than GCDs where GCDs have participated to protect groundwater. These activities include uranium mining and the in situ injection wells permitted by the TCEQ, uranium surface mining by the Railroad Commission (RRC), landfills permitted by TCEQ, and wastewater discharges permitted by TCEQ.

Finally, Chapter 7 of the Texas Water Code provides a vehicle for GCDs to exercise authority outside Chapter 36.

### A. Uranium mining

While GCD do not have primary jurisdiction over uranium mining activities, GCDs can obtain groundwater production and quality data. Moreover, GCDs have opposed permitting of injection wells associated with uranium mining.

#### 1. Surface mining and reclamation associated with the removal of uranium

The RRC is the mining and reclamation authority for Texas and has exclusive jurisdiction for establishing reclamation requirements for mining and exploration operation associated with uranium,<sup>43</sup> except for in situ recovery processes.<sup>44</sup> Except as provided by Texas Natural Resources Code Section

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<sup>42</sup> 30 TAC § 213.4.

<sup>43</sup> Texas Natural Resources Code § 131.022(a).

<sup>44</sup> The TCEQ has regulatory authority over in situ uranium mining. *Id.* at § 131.354(a)(2); *see* discussion in section V.A.2. below.

131.154, the RRC has exclusive jurisdiction and is solely responsible for the regulation of all uranium exploration activities.<sup>45</sup>

A cased uranium exploration well used for exploration or for rig supply purposes is subject to a GCD's registration rules if the well is within a GCD, used for monitoring purposes and the cumulative amount of groundwater produced exceeds 40 acre feet per year.<sup>46</sup> The same type well is subject to a GCD's rules regarding registration, production and reporting, if the well is within a GCD, used for rig supply purposes, and the cumulative amount of water produced exceeds 40 acre feet per year.<sup>47</sup>

A person issued a uranium exploration permit authorizing exploration within a GCD shall provide to the GCD, among other things, pre-mining water quality information for each existing well tested and well completed under a RRC exploration permit.<sup>48</sup> The Kenedy County GCD has adopted rules requiring the registration, reporting, and submission of water quality data required under these provisions of the Natural Resources Code.<sup>49</sup>

## 2. Class III injection wells and aquifer exemptions associated with uranium mining

An in situ uranium mining operation must receive from the TCEQ: (1) a Class III underground injection permit to establish a mine and begin mining operations,<sup>50</sup> (2) an aquifer exemption to conduct mining activities within an aquifer,<sup>51</sup> and (3) a production area authorization, which is an administrative designation of a production area within the boundary of the approved mining area.<sup>52</sup>

Water Code § 27.024(a) provides that a person developing a production area authorization application within a GCD must provide to the GCD:

- (1) information regarding wells encountered by that person during the development of the area permit application that are not recorded in the public record;
- (2) a map showing the locations of wells that are located within one-quarter mile of the location for the proposed permit and that are recorded in the public record;
- (3) premining water quality information collected from wells described by Section 27.023(a);
- (4) on a monthly basis, the amount of water produced from the wells described by Section 27.023(a); and

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<sup>45</sup> Texas Natural Resources Code § 131.022(b).

<sup>46</sup> *Id.* at § 131.354(b).

<sup>47</sup> *Id.* at § 131.354(c).

<sup>48</sup> *Id.* at § 131.357(a)(2).

<sup>49</sup> Rule 9: Water Wells Associated with Uranium Exploration and Minings Kenedy County GCD Rules (July 25, 2012).

<sup>50</sup> TEX. WATER CODE §§ 27.011, 27.051-056.

<sup>51</sup> 30 TEX. ADMIN. CODE § 331.13.

<sup>52</sup> *Id.* at § 27.0513.

- (5) a record of strata as described by Section 27.053, except confidential information described by Section 131.048, Natural Resources Code.

The baseline water quality information is useful when determining whether required groundwater restoration is adequate. This was one issue in a GCD's 2009 challenge to a uranium mine application before the TCEQ.

In 2009, Goliad County GCD and others protested the applications of Uranium Energy Corporation (UEC) to conduct in situ uranium mining in Goliad County.<sup>53</sup> The GCD's main assertions were: (1) that the mining operations will unreasonably reduce the amount of groundwater available for permitting in the district; (2) the application is not sufficiently protective of water quality; (3) the proposed restoration of groundwater to baseline levels is unreasonable and inadequate; (4) and mining fluids will contaminate an underground source of drinking water which will be adversely impacted.<sup>54</sup> The ALJ recommended that the UEC applications be remanded for further groundwater pump tests to determine transmissivity of the groundwater. Alternatively, the ALJ recommended denial. The Commission ultimately granted the UEC applications.<sup>55</sup>

Even today, Goliad County GCD remains active in protecting groundwater associated with uranium mining. In 2015, the District submitted comments to the United States Environmental Protection Agency regarding a re-write of in situ uranium mining rules.<sup>56</sup>

B. GCDs and waste disposal through injection wells

1. TCEQ disposal wells

Except for injection of oil and gas waste, the TCEQ has exclusive jurisdiction over waste injection wells.<sup>57</sup> An application for a permit to dispose of industrial and municipal waste through an injection well in the territory of a GCD is submitted by TCEQ to the governing body of the GCD.<sup>58</sup> Before any testimony is heard by TCEQ in a contested case regarding an application for a permit for an injection well to dispose of industrial and municipal waste that is proposed to be located in the territory of a GCD, the record of the contested case must include evidence that a copy of the draft permit and notice of the contested case was provided to the governing body of the GCD.<sup>59</sup>

2. RRC disposal wells

Unlike disposal wells regulated by the TCEQ, the RRC rules that govern Class II disposal wells of oil and gas waste do not require the notification of GCDs. Application for a well to inject saltwater or

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<sup>53</sup> SOAH Docket No. 582-09-3064, TCEQ Docket No. 2008-1888-UIC, Application of Uranium Energy Corporation for Class III Injection Well Permit No. UR03075, for Aquifer Exemption and for Production Area Authorization No. 1 in Goliad County, Texas (UEC Application Docket).

<sup>54</sup> See Proposal for Decision in UEC Application Docket.

<sup>55</sup> TCEQ Order in UEC Application Docket, December 14, 2010.

<sup>56</sup> Docket ID EPA-HQ-OAR-2012-0788, Health and Environmental Protection Standards for Uranium and Thorium Mill Tailings (40 CFR Part 192) (April 2015).

<sup>57</sup> TEX. WATER CODE § 27.011.

<sup>58</sup> *Id.* at § 27.017(b).

<sup>59</sup> *Id.* at § 27.018(c).

other oil and gas waste must notify “affected persons” including the city and county where the well is located, the surface owner of the land on which the well is located, and operators of wells within one-half mile of the proposed disposal well.<sup>60</sup> “Affected person” is specifically defined as a person who has suffered or will suffer actual injury or economic damage other than as a member of the general public or as a competitor.<sup>61</sup> Commercial disposal well permit applicants are also required to notify adjacent surface owners.<sup>62</sup> The applicant also must publish notice of the application in a newspaper where the proposed well will be located.<sup>63</sup>

Because GCDs do not receive individual notice, GCDs must rely on the newspaper notice to learn of a pending application. Some districts, such as the Wintergarden GCD, are very active in tracking disposal well applications having challenged over 230 applications in a two year period.<sup>64</sup> Some challenges result in contested oil and gas dockets before the RRC.<sup>65</sup>

In at least one instance, a GCD was unsuccessful in achieving party status to contest a disposal well application before the RRC. In 2014, the Gonzales County Underground Water Conservation District protested an application by Marathon Oil Company to dispose of oil field waste in the Carrizo Wilcox Aquifer. The proposed well site was located in Gonzales County four miles outside the district. Marathon filed a motion to dismiss the protest contending that a GCD is not an “affected person” and the district lacked standing because the well is located outside the district. A RRC hearings examiner found Gonzales County UWCD was an affected party but the Commission reversed the hearings examiner. The RRC did not reach the issue of whether a GCD was an “affected person.” Given the fact that Wintergarden GCD has successfully challenged disposal well permits before the RRC, GCDs are “affected persons” at least in connection with disposal wells within the boundaries of the district.

### C. Prohibition and Protest of landfills by GCDs

#### 1. Prohibition of landfills

In 2001, the Guadalupe County Conservation District adopted Rule 8.1 a rule which provides in part:

In the event that applicable statutes, requirements, or regulations require that the person generating, transporting, applying, disposing, or otherwise managing a waste or a sludge obtain a permit from an agency, and where those activities occur within the boundaries of the District, notice of the application must be provided to the District by the applicant within ten days of the date of the application. In no event may waste or sludge be permitted to be applied in any matter in any outcrop of any aquifer within Guadalupe County Groundwater Conservation District.<sup>66</sup>

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<sup>60</sup> 16 TEX. ADMIN. CODE § 3.9(5)(A).

<sup>61</sup> 16 TEX. ADMIN. CODE § 3.9(5)(E)(ii).

<sup>62</sup> 16 TEX. ADMIN. CODE § 3.9(5)(B).

<sup>63</sup> 16 TEX. ADMIN. CODE § 3.9(5)(D).

<sup>64</sup> “Groundwater Districts Seek Help Tracking Disposal Wells,” The Texas Tribune, July 29, 2015.

<sup>65</sup> The Application of CES SWD Texas, Inc. Pursuant to statewide Rule 9 for the CES Carrizo Yard Lease, Well No. 3, Evergreen Farms, NE (1<sup>st</sup> Olmos Field, Dimmit County, Texas, Oil and Gas Docket No. 01-0286223, RRC Hearings Division).

<sup>66</sup> [http://gcgcd.org/uploads/3/4/6/6/346695/gcgcd\\_rules.pdf](http://gcgcd.org/uploads/3/4/6/6/346695/gcgcd_rules.pdf).

In October 2013, Post Oak Clean Green, Inc. (Post Oak) filed a permit application with the TCEQ for a proposed municipal solid waste landfill to be constructed on the Carrizo-Wilcox Aquifer recharge zone within the boundaries of the GCGCD.

In April 2014, GCGCD filed suit seeking a declaratory judgment that the proposed landfill violates the District's Rule 8.1.

In November 2014, TCEQ filed a Petition in Intervention followed by a Plea to the Jurisdiction. TCEQ argued that it has exclusive jurisdiction over landfill permitting under the Texas Solid Waste Disposal Act, Chapter, 361, Texas Health and Safety Code. The TCEQ argued that the GCGCD rule and its declaratory judgment action is an indirect attempt to stop TCEQ from issuing a solid waste disposal permit to Post Oak.

Post Oak countersued for inverse condemnation and that the District's regulations were preempted by the Solid Waste Disposal Act. Post Oak also filed a Plea to the Jurisdiction arguing that the District's action is a collateral attack on the TCEQ's authority before the TCEQ has issued a final order subject to judicial review. The Trial Court denied Post Oak's Plea to the Jurisdiction reasoning that the District is not seeking to challenge TCEQ's jurisdiction, but enforcing its own rules.<sup>67</sup>

GCGCD sought and the court granted a motion for partial summary judgment finding that the GCD "is not preempted in prohibiting the application in any manner the waste over the aquifer it manages."<sup>68</sup> The court found that there is no express or implied preemption, that the District's rule is constitutional and not void for vagueness.<sup>69</sup>

On July 13, 2015, Post Oak filed its Notice of Appeal appealing the Trial Court's Order denying the TCEQ's Plea to the Jurisdiction. The TCEQ also has appealed and Appellants' briefs are due September 17, 2015.

## 2. Protest of landfill applications

On at least two occasions, GCDs have protested landfill applications before the TCEQ. Currently, there are two landfill applications that are subject to contested cases before SOAH that include GCDs as protesting parties.<sup>70</sup> The hearing on the merits in both of these proceedings is currently set for January 2016.

### D. GCD challenge of wastewater discharge

Texas Commission on Environmental Quality Rule 309.12 provides that TCEQ may not issue a wastewater discharge permit for a new facility or a major amendment to an existing permit unless it finds

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<sup>67</sup> Order on Defendant's Plea to the Jurisdiction, October 7, 2014.

<sup>68</sup> Order on Plaintiff's Amended Motion for Partial Summary Judgment, January 2015.

<sup>69</sup> *Id.*

<sup>70</sup> SOAH Docket No. 582-15-2082, TCEQ Docket No. 2015-0069-MWS, Application of 130 Environmental Park, LLC for Proposed Permit No. 2383, Plum Creek Conservation District; SOAH Docket No. 582-15-2498, TCEQ Docket No. 2012-0905-MSW, Application by Post Oak Clean Green, Inc. for a New Type 1 Municipal Solid Waste Landfill in Guadalupe County, Texas, Guadalupe County Groundwater Conservation District.

the proposed facility site in light of design, construction, or operation minimizes the possible contamination of surface water and groundwater. In making the determination, the TCEQ may consider groundwater conditions such as groundwater flow rate, groundwater quality, length of flow path to points of discharge, and aquifer recharge or discharge conditions.<sup>71</sup> Primarily based upon this siting criteria, the Barton Springs / Edwards Aquifer Conservation District sought and obtained party status in a SOAH contested case proceeding regarding the application of Hays County Water Control and Improvement District No. 1 for discharge into Bear Creek, a tributary of Onion Creek in Hays County, Texas<sup>72</sup> in the contributing zone on the Edwards Aquifer. BSEACD, the City of Dripping Springs, Hays-Trinity GCD and a number of individuals entered into a settlement agreement with the applicant. Under the terms of the settlement agreement, the applicant agreed to a denitrification process that limited total nitrogen to 6 mg/l. Other parties, including the City of Austin, Hays County, and Save Our Springs Association, remained in the contested case proceeding that went through a full hearing. The Administrative Law Judge determined that without the terms of the settlement agreement included in the permit, the proposed discharge would cause degradation of the Edwards Aquifer Recharge Zone.<sup>73</sup> Ultimately, the TCEQ granted the permit incorporating the terms of the settlement agreement. The permit is the most stringent discharge permit issued by TCEQ.

E. Civil suits by local governments under Subchapter H, Chapter 7 Texas Water Code

Texas Water Code Chapter 7, Subchapter 8 provides an avenue for a local government to institute a civil suit to enforce a violation or threat of violation of Chapter 16, 26, or 28 of the Water Code, Chapters 361, 371, 372, or 382 of the Health and Safety Code, as well as other laws.<sup>74</sup> The violation must occur within the jurisdiction of the local government. Local government is not defined. In a suit brought by a local government under subchapter D, TCEQ is a necessary party.<sup>75</sup> In the case of a violation of Water Code Chapter 26 or Chapter 382, Health and Safety Code, the local government must adopt a resolution authorizing the exercise of power.<sup>76</sup>

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<sup>71</sup> 30 TAC 309.12(2).

<sup>72</sup> SOAH Docket No. 582-08-00202, TCEQ Docket No. 2007-1426-MWD, In the Matter of the Application of Hays County Water Control and Improvement District No. 1 for Amendment to Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014293001 (Nov. 19, 2008) (HCWCID PFD).

<sup>73</sup> HCWCID PFD at 33.

<sup>74</sup> Texas Water Code § 7.351(a). Other laws include a provision of Chapter 401, Health and Safety Code under the TCEQ's jurisdiction and Chapter 1903, Occupation Code.

<sup>75</sup> Tex. Water Code § 7.353.

<sup>76</sup> Tex. Water Code § 7.352.