

Minutes of the Headwaters Groundwater Conservation District Board of Directors Regular Meeting on Wednesday July 10, 2024 Immediately following the Public Hearing for HGCD Drought Contingency Plan – Revised July 10, 2024 at the Guadalupe Basin Natural Resources Center – Boardroom 125 Lehmann Dr., Kerrville, Texas.

1. **Call to Order, Pledge of Allegiance, Roll Call, and Certification of Quorum in Compliance with Texas Open Meetings Law.**

Directors Present: Tom Jones – Precinct 1, President
Laurie Lowe – Precinct 4, Vice-President
John Elliott – At-Large, Secretary/Treasurer (Partial)
Kenneth Wilke – Precinct 3

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Staff Present: Gene Williams, Monica Thibodeaux, Deneise Harris, Michael Mann

Directors Absent: Chris Childs – Precinct 2

Other: Richard Mosty, HGCD Attorney

2. **Public Comment - Any person may address the Board at any time on any agenda item of this meeting. Non-agenda items may only be addressed during the Public Comment section of this meeting; no formal action will be taken on the non-agenda items.**

N/A

3. **Consent Agenda**

- **Approval of the Regular Meeting Minutes** (April 10, 2024)
- **Approval of the Rules Workshop Meeting Minutes** (April 25, 2024)
- **Approval of Paying of the Bills**
- **Receiving the Treasurer’s Report** (April 2024, May 2024, June 2024)
- **Public Funds Investment Policy Reporting** (April 2024, May 2024, June 2024)
- **Receiving the Groundwater Report**

Director Elliott motioned to accept the Consent Agenda. Director Lowe seconded the motion. Director Jones, Director Lowe, Director Elliott, and Director Wilke all voted in favor. Director Childs was absent. The motion passed.

4. **Discussion and Response to Petition for Rulemaking regarding Rule Changes to Rule #1. S in the Headwaters Groundwater Conservation District Rules (Revised January 17, 2024).**

Petition Request: For the Contiguous Rule 1.S. the Petition requested the rule be revised to require the distance of 1320 feet in Rule 1.S.2) be reduced to 660 feet in the East Kerr Management Zone.

Recommendation by Rules Committee As read into the Minutes by Richard Mosty, HGCD Attorney:

Rules Committee Comments

1. The proposed new Rule I-T current rule has been shortened and revised to remove the 1320 foot distance requirement.

New Rule I-T

T. "Contiguous Acreage" shall mean adjacent tracts of land within the District that are owned or legally controlled for the purpose of Groundwater withdrawal by the Owner or Operator, and are separated only by a road, highway, or watercourse.

2. The Committee recommends granting the requested change in part by adopting new Rule I-T removing any reference to distance, and on behalf of the Committee, I so move.

Director Elliott motioned to grant the Petition for Rulemaking regarding Rule Changes to Rule #1. S. Director Lowe seconded the motion. Director Jones, Director Lowe, Director Elliott, and Director Wilke all voted in favor to grant the Petition. Director Childs was absent. The motion passed.

5. **Discussion and Response to Petition for Rulemaking regarding Rule Changes to Rule #7. G in the Headwaters Groundwater Conservation District Rules (Revised January 17, 2024).**

Petition Request: For the Adjustment of Production Caps Rule 7.G.; the Petition requested any adjustments to the Production Cap apply to not only new Permits after the effective date of the adjustment, but to all Permit renewals and amendments effective from the date of the rule change.

Recommendation by Rules Committee As read into the Minutes by Richard Mosty, HGCD Attorney:

Rules Committee Comments:

1. Texas Water Code Section 36.1145 requires the District to approve an application to renew an operating permit if the application and applicable fees are timely paid, unless the Permittee is otherwise in violation of District Rules. Proposed District Rule 8B incorporates the language of Texas Water Code Section 36.1145.
2. The proposed rule change could result in liability claims against the District for a "takings claim" due to investment backed expectations of an existing Permittee.
3. The Committee recommends that the proposed change be denied, and, on behalf of the Committee, I so move.

Janet Buchert – 425 Dove Valley, Center Point read the following into the minutes:

July 10, 2024

Gene Williams, General Manager
Headwaters Groundwater Conservation District
125 Lehmann Drive, Suite 202
Kerrville, Texas 78028

We have previously addressed the District Board and Management a number of times in the last year with regard to several rules (Rule 7 and Rule 12). In April 2024, we submitted petitions on these rules on behalf of a group of folks including ourselves. We also gave oral comments regarding these rules at the April 25, 2024 District Workshop, and further communicated with you thereafter. I will comment on the Rule 7A/ & 7B/C rule changes, and Ronnie Buchert will comment on Rule 12 and more.

Before I comment on the proposed 7A and 7B/C rule changes, I would like to give a little history and context to the Production Cap changes over the years.

- The district adopted the 80,000 gallon/acre/year production cap in March 2007.
 - Rule 8A stated: "A Non-exempt (Permitted Well) are allowed a maximum Production Cap up to 80,000 gallons per year per Permit Acre. A system does not automatically receive 80,000 gallons for every acre owned. The total production allowed on an Operating Permit is determined by service need, service area, Beneficial Purpose, and Historic Use. An exception to the Production Cap requires approval from the Board of Directors."
 - At that time, the Board did not choose to have a grandfather rule added to the rules, which would lock in the 80,000 gallons/acre/year going forward. This is clear in the pre-June 15, 2022 Rule 7G (previously Rule 8F) as well as the permits signed by the District and the permit holder (see Item #9).
 - Rule 7G (previously 8F) stated: "Production caps shall be reviewed by the District in the month of January and may be adjusted at any time by the District Board. In the event that a production cap is adjusted or a new production cap is set, the new production cap shall only apply to Applications for Permitted Wells, including Renewal Applications, filed after the date the Board adopts the new production cap..."
 - Permit Item #9: "Permittee understands that this permit is granted for a period up to five (5) years and is subject to renewal at the end

of the time specified on the permit. Application for renewal will be subject to the Pumping Limits applicable at that time."

- It is also clear in newspaper articles back in 2007: in fact, the production cap would not have been adopted by the Board without the understanding that there be no grandfather clause in order for the Board to have flexibility to adjust the production cap up or down in order to manage the aquifers as the 80,000 production cap was an arbitrary number.
- That all changed in 2022, when the Board adopted the new East Kerr Management Zone ("Zone") in Rule 7A, and made changes to Rule 7G. At that time, the Zone was created based on the findings of the Beach Report (Report), as requested by the District Board, to study the state of the aquifers in East Kerr County. The Report found historic declines in the aquifers of 2% average/year/over 20 years (Middle Trinity) and 1% average/year/over 20 years (Lower Trinity). The declines were attributed to water overproduction as well as geologic issues in East Kerr County. The Report did not take into account the negative impact on the aquifers of future droughts (i.e., the historic drought in 2023), new development, or the CP to Comfort sewer system that went on-line in 2023. The Production Cap for the Zone was reduced from 80,000/acre/year to 65,000/acre/year (Rule 7A) as of the effective date (June 15, 2022). But that wasn't the end of the story: at the same time, the District purportedly created a grandfather rule in Rule 7G for the whole county that would preserve the current 80,000/acre/year production cap for existing permits, and only apply the 65,000/acre/year production cap to new permits in the Zone. Why would they do this? We have yet to hear an answer. This is NOT what they led the residents of Kerr County to believe.
- Starting in 2023, we questioned the new Rule 7G grandfather rule, including the District's interpretation of Texas law with regard to grandfather rules. We noted that while the District has the discretion to include a grandfather clause in its rules, the District must follow the Texas Water Code and Supreme Court interpretations thereon. In other words, the District must "write it (grandfather rule) right" by focusing on both amount and historic/existing use, as well as exclude both new and amended permits from the application of the grandfather rule. This they have not done.
- Instead, the District has interpreted the Texas Water Code to mean that "historic or existing use" is optional, because of the use of "may" in Section 36.116(b):

"in promulgating any rules limiting groundwater production, the district may preserve historic or existing use before the effective date of the rules...and as provided by section 36.113."

Thus, the District is attempting to preserve an existing permit holder's production cap amount based on the production cap (80,000 X acre X year), without looking to historic or existing use by the permittee. As we noted before, the "may" only relates to the discretion that the district has as to whether to use a grandfather rule or not—NOT whether the District can apply historic or existing use.

The Texas Supreme Court has held that:

"the amount of groundwater used and its beneficial purpose are components of "historic or existing use" and the district thus exceeded its rule-making authority in grandfathering existing wells without regard for both... the amount of groundwater withdrawn and its purpose are both relevant when identifying an existing or historic use to be preserved. Indeed, in the context of regulating the production of groundwater while preserving an existing use, it is difficult to reconcile how the two might be separated. See id. Section 36.0015 (purpose of groundwater conservation districts is to conserve, preserve and protect groundwater through regulations... a district's discretion to preserve historic or existing use is ordinarily tied both to the amount and the purpose of the prior use."

Thus, basing a grandfather rule only on an amount, i.e., the 80,000 production cap, and not including historic or existing use, is invalid under Texas Law. Furthermore, consistent with the above, the Texas Water Code also requires that both new and amended permits be excluded from grandfather treatment. However, the District's current rules only exclude new permits from "grandfathering application" but not new and amended permits, as required. This too would result in disqualification of Rule 7G as a grandfather rule.

- In summary, we believe that the Board exceeded its authority to adopt the purported grandfather provision (in Rule 7G) on June 15, 2022, as the rule did not meet the requirements of Texas Water Code 36.116(b) and 36.113(e), as interpreted by the Texas Supreme Court and the Attorney General's Office. As a result, Rule 7G's purported grandfather provision is invalid and without effect, and Rule 7A as written on June 15, 2022 is in effect. That rule applies a 65,000 gallon/acre/year production cap to all permits in the Zone as of the effective date of the change (June 15, 2022). Thus, all permits in the Zone are subject

similar to the above Texas Water Code §36.116(b) legal requirements for a grandfather rule, albeit it refers to investment rather than historic or existing use. The District must show "historical or existing use" and not "beneficial use" (a subset of historical or existing use). Where "historical or existing use" is not shown, the grandfather rule fails.

- On the policy argument, it should be noted that there was no grandfather rule for 15 years after the introduction of the Production Cap in 2007; as such, investment was made without any "guarantee" of an 80,000 gallon/acre/year production cap. The 80,000 Production Cap number was arbitrary, and the prior Board did not want to "tie their hands" to it. In other words, no grandfathering. This is clear in Rule 7G/8F (prior to the 2022 change) and in the signed permits (prior to the 2024 change to Item #9). The District did not (and does not) guarantee groundwater (see preface to its rules). Given all of these reasons, the use of "investment" as a rationale to support a grandfather clause in 2022 and 2024 is weak and without merit. More important is the discussion around why a District would add grandfather provisions in its rules, when the District is in a PGMA and the aquifers are declining more rapidly than per plan. The public views this as irrational, and District owes the public an explanation as to why the district is not fulfilling its mandate to conserve, preserve and manage the aquifers.
- We would also like to comment on the retroactive provision of the proposed rule changes in Rule 7A: even if the grandfather rules were viewed as valid—WHICH THEY ARE NOT—the retroactive application of the changes would also be invalid. (Of note, the "2002" reference appears to be sloppy drafting.) This further brings to mind the questionable "backdating" of the District's permits, where item #9 was removed in 2024, but the District's permit templates show this as done in 2016 and 2017. The only rational explanation one can take from ALL THE BACKDATING is that the District is papering its rules/permits to reflect its prior/existing practices; this is not acceptable nor legal. This needs to stop.
- With regard to other changes made in these proposed rules, (e.g., the fine provisions in Rule 9B.5), we believe that the Board should change the general application from "may" to "shall", and eliminate the new addition which states that "the District will consider the permit holder's past compliance history when determining if fines will be applied." If the District is serious about enforcement, fines shouldn't be a discretionary matter.
- Finally, we would note that there were many other changes that were not identified (red-lined) as changes in the proposed rules. We believe that there has NOT been proper notice to the public (as required in Rules 20 C.4 and 20D) with regard to the District's changes, and that more time is

to the 65,000 gallon/acre/year production cap from June 15, 2022 forward.

- We also believe that the proposed changes in the July 10, 2024 Proposed Rule Changes fail to meet the requirements of Texas Water Code §§ 36.116(b) and 36.113(e), as interpreted by the Texas Supreme Court and the Attorney General's Office. These proposed changes to Rules 7A and 7B/C suffer from the same defect that is present in current Rule 7G: they do not limit the "grandfather clause" to the historic or existing use of the permit holder. Furthermore, they do not exclude the application of the grandfather rules to both new and amended permits, as required. In fact, the proposed rule would grandfather certain new permits based on "well status", i.e., if the well subject to the new permit is an existing well. That the District is using made-up criteria other than permit status to justify grandfathered applicants is invalid, and will also result in disqualification of the purported grandfather clause in Rule 7A. Rule 7B/C adds another provision to its grandfather clause, stating that "The Production Cap for Operating Permits that existed prior to the date of the change, will remain as originally permitted for the current permit, future renewals and amendments. Based on comments above, this change does not meet the requirements of the Texas Water Code, the Supreme Court cases thereon and the Attorney General's opinion, and is invalid. Any grandfather rule which relies only on amount and not on "historical use" is an invalid grandfather rule per Texas law. Any rule which does not exclude new and amended permits from a grandfather rule fails, and is an invalid grandfather rule per Texas law."
- In summary, Rule 7A and Rule 7B/C's purported grandfather provisions are invalid and without effect. Rule 7A as written on June 15, 2022 remains in effect, and that rule applies a 65,000 gallon/acre/year production cap to all permits in the Zone as of the effective date of the change (June 15, 2022). To be clear, ALL permits in the Zone are subject to the 65,000 gallon/acre/year production cap from June 15, 2022 forward.
- We understand that the Board is relying on "investment" as providing a sufficient policy-not legal-basis for a grandfather rule. As we have noted to you previously, we do not support the application of grandfather rules in a Priority Groundwater Management Area (PGMA)—even if they are discretionary under State law—given the need for the District to be able to manage, conserve and preserve the aquifers. It has been noted that a grandfather rule protects investment, and this may be, but is not totally accurate. A grandfather rule may protect investment if such investment is existing or historical—but it may not protect new investment. [It is a grandfather rule, not a grandson rule.] This policy consideration is

needed to evaluate all such changes. We request that the Board delay the adoption of the rules in total in order to properly give notice; and if that is not done, it should eliminate the Rule 7 grandfather rules and amendments given the defects identified previously and today. The Board is on notice: it does not have the authority to adopt invalid grandfather rules or retroactive rules, and even were they to adopt such rules, the rules would be invalid. This is not the appropriate approach to rule-making in a PGMA, and we expect better from the District Management and Board.

Respectfully,

Janet & Ronnie Buchert

Director Elliott motioned to deny the Petition for Rulemaking regarding Rule Changes to Rule #7. G. Director Lowe seconded the motion. Director Jones, Director Lowe, Director Elliott, and Director Wilke all voted in favor to deny the Petition. Director Childs was absent. The motion passed.

6. **Discussion and Response to Petition for Rulemaking regarding Rule Changes to Rule #12.C in the Headwaters Groundwater Conservation District Rules (Revised January 17, 2024).**

Petition Request: For the Distance Limitations Rule 12.C; the Petition requested a change in the distance allowed to transfer groundwater production rights from one property to another be reduced from 1320 feet to 660 feet in the East Kerr Management Zone.

Recommendation by Rules Committee As read into the Minutes by Richard Mosty, HGCD Attorney:

Rules Committee Comments:

1. The current rule has been in place for many years without issue.
2. Historically, the number of permits issued under the current Rule has been one or two
3. Changing the Rule as to existing permits could result in liability claims against the District.
4. The Committee recommends that the proposed change be denied, and, on behalf of the Committee, I so move.

Director Lowe motioned to deny the Petition for Rulemaking regarding Rule Changes to Rule #12. C. Director Elliott seconded the motion. Director Jones, Director Lowe, Director Elliott, and Director Wilke all voted in favor to deny the Petition. Director Childs was absent. The motion passed.

7. **Discussion and Possible Action, after Notice and Hearing, to Approve Resolution 2024-1, Adopting the Headwaters Groundwater Conservation District Rules - Revised July 10, 2024.**

Director Wilke motioned to Approve Resolution 2024-1, Adopting the Headwaters Groundwater Conservation District Rules - Revised July 10, 2024. Director Elliott seconded the motion. Director Jones, Director Lowe, Director Elliott, and Director Wilke all voted in favor. Director Childs was absent. The motion passed.

8. **Discussion and Possible Action, after Notice and Hearing, to Approve Adoption of the Headwaters Groundwater Conservation Drought Contingency Plan - Revised July 10, 2024.**

Director Wilke motioned to Approve Adoption of the Headwaters Groundwater Conservation Drought Contingency Plan - Revised July 10, 2024. Director Elliott seconded the motion. Director Jones, Director Lowe, Director Elliott, and Director Wilke all voted in favor. Director Childs was absent. The motion passed.

9. **Discussion and Possible Action, to Approve/Authorize the HGCD Contract for Election Services Agreement with Kerr County for the November 5th, 2024 Election.**

Director Wilke motioned to Approve/Authorize the HGCD Contract for Election Services Agreement with Kerr County for the November 5th, 2024 Election. Director Lowe seconded the motion. Director Jones, Director Lowe and Director Wilke all voted in favor. Director Elliott and Director Childs were absent. The motion passed.

10. **Discussion and Possible Action, Annual Review and Approve Resolution 2024-2, Adopting all changes or modifications to the Public Funds Investment Policy July 10, 2024.**

Director Lowe motioned to Approve Resolution 2024-2, Adopting all changes or modifications to the Public Funds Investment Policy July 10, 2024. Director Wilke seconded the motion. Director Jones, Director Lowe, and Director Wilke all voted in favor. Director Elliott and Director Childs were absent. The motion passed.

11. **Discussion and Possible Action, Approve/Authorize Auditor Engagement for HGCD's 2024 Year-end Financial Reporting.**

Director Lowe motioned to Approve the Auditor Engagement for HGCD's 2024 Year-end Financial Reporting. Director Wilke seconded the motion. Director Jones, Director Lowe, and Director Wilke all voted in favor. Director Elliott and Director Childs were absent. The motion passed.

12. **Discussion to consider updating the "Eastern Kerr County Trinity Aquifer Groundwater Availability Assessment", dated May 2022.**

No Action taken. Discussion Only.

13. **General Managers Report**

- **Drought**
- **Budget Committee**

14. **Action, if any, resulting from an executive session.**

N/A

15. **Directors Request for Agenda Items for Next Meeting.**

Director Lowe requested a revisiting of the East Kerr Management Zone Study.

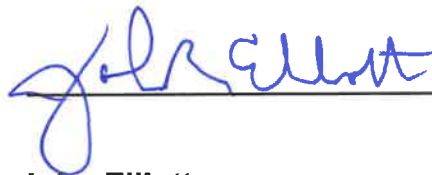
16. **Adjournment**

Director Jones motioned to Adjourn. Director Wilke seconded the motion. Director Jones, Director Lowe, and Director Wilke all voted in favor. Director Elliott and Director Childs were absent. The motion passed.

APPROVED:



Tom Jones
Board of Directors, President



John Elliott
Board of Directors, Secretary/Treasurer