

Middle Pecos Groundwater Conservation District

Minutes of June 23, 2009

On this the 23rd day of June, 2009, a Regular Session of the Middle Pecos Groundwater Conservation District, of Pecos County, Texas, met in the Courtroom of the Pecos County Courthouse, Fort Stockton, Texas located at 103 West Callaghan with the following members present, to-wit:

John Dorris	Vice President, Precinct 3
M. R. Gonzalez	Secretary/Treasurer, Precinct 2
Jack McIntyre	Precinct 1
Lynn Holland	Precinct 3
Alvaro Mandujano, Jr.	Precinct 4
Gregg McKenzie	City of Fort Stockton/Resigned at this meeting
S. Evans Turpin	City of Iraan
Houston McKenzie	At Large

Board Members absent: Glenn Honaker, Bart Reid and Merrell Daggett

Others Present: Paul Weatherby/General Manager, Melissa Mills/Office Manager, Bob Varmette/Fort Stockton Pioneer, Jeff Williams, Dr. Jim Duke, Gary Bryant, Mike Gershon/MPGCD attorney and Randy Williams/MPGCD Hydrogeologist.

Call to Order. The Rulemaking Hearing was called to order at 1:15 pm and led by Vice President John Dorris. Quorum is present.

II Public hearing to receive public input and for the District's Board of Directors and General Manager to review proposed amendments to the District's rules to conform to statutory amendments and to modify definitions, application and hearings procedure, well registration and permitting requirements, the enforcement program, and to address the authority to adopt emergency rules, desired future conditions, managed available groundwater, management zones, and measures to protect groundwater quality. Formal action to adopt rules amendments will be taken at a subsequent Board meeting.

Recess called by Vice President John Dorris at 1:20 pm.
Reconvene Rulemaking Hearing at 1:30 pm.

The public was invited to make comments, as none were received, the hearing continued with Board discussion.

MPGCD attorney Michael (Mike) Gershon was given the floor.

Statute 36.101 governs the type of hearing we are having today. The MPGCD rule that goes beyond the statute and explains how we do things, is section 7. The proposed rule changes were available at the MPGCD office 20 or more days prior to today's meeting. District's website had been malfunctioning, and posting to the District's website was unsuccessful until approximately 2 weeks

ago. The statute requires that you have at least one rule hearing before you adopt any rule change. Mr. Gershon informed the Board that written comments have been received from Mr. Paul Latham, of Fort Stockton Holdings, L.P. earlier this morning via facsimile and will be addressed at today's meeting.

A list of proposed changes presented by Lloyd Gosselink, Attorneys at Law, represented by Michael Gershon is intended to bring the current rules into compliance with changes in statutory and case law, to delete obsolete procedures, and simplify and make the rules more practical and easier to review and comply with. Changes proposed are also a reflection of situations and comments that have been compiled over several years time.

1. *Change the current 30-day notice of permit hearing requirement to a 10-day notice, as allowed by statute.* Reference MPGCD Rule 11.10.2
2. *Remove the requirement for issuing notice of the filing of a permit application.* We have been requiring 2 notices, and the statute only requires one. Reference MPGCD Rule 11.9.1(a)(13)
3. *Simplify the protest process-delete the 15-day deadline and allow protestants to show up at a hearing to protest.* Reference MPGCD Rule 11.10.4(a)(i)
4. *Add the statutorily mandated criteria for determining when a party is qualified to protest an application.* This is language adopted by the legislature and we are proposing to have the same language. Reference MPGCD Rule 6.3 (e)
5. *Authorize the District to adopt emergency rules if needed.* There is statutory language that gives you the authority to adopt these rules in an emergency situation without going through a rulemaking hearing. Reference Sect. 7 (MPGCD Rule 14.4.2 is discussed here, it is #12 on list to be discussed)

The following is an excerpt from the letter of concerns from Mr. Paul Latham: Proposed Rule 14.4.2. allowing the Board President or his designee to enter an order without notice or a hearing also appears to exceed the District's rulemaking and enforcement powers. Assuming the type of emergency contemplated by the proposed rule were to exist, the District's authority to act would be governed by Section 36.102(a), Texas Water Code. Specifically, to prevent or terminate the waste or pollution of groundwater, the District could pursue injunctive relief in a Court of competent jurisdiction.

Mr. Gershon feels that the District needs the President to have the authority to go to the court house and get a temporary restraining order which doesn't require notice or a hearing in the event of an emergency. The temporary order will continue in effect for 15 calendar days or until a hearing can be conducted by the Board. This modification to the draft rules should satisfy Mr. Latham's concern.

6. *Recognize and provide implementing rules for time when “Managed Available Groundwater” is applicable.* Reference MPGCD Rule Sect. 8 and Sect. 10.3
7. *Update Definitions section.* Reference MPGCD Rule 1.1. Added Desired Future Conditions (DFC), Managed Available Groundwater (MAG), Personal Justiciable Interest and Standby Wells.

Mr. Latham provides comment on rules for standby wells. The proposed rules for defining, and recognition and grandfathering of “stand-by wells”, e.g., Rules 1.1 and 15.5.2., have no apparent basis in statute. Accordingly, the proposed rules appear to exceed the District’s authority. To the extent the rules are only intended to cover wells enrolled in an authorized historic conservation program, the proposed rules should be redrafted to track the applicable provisions of Chapter 36, Texas Water Code.

Stand-by wells are wells that are not in use. They may or may not have been registered. Once they are brought on-line and want to be used, it will be determined if they are exempt or non-exempt. If non-exempt they will need to request a Production (Operating) permit. Mr. Gershon agrees and advised that the current rules already require this. It was suggested by a Board Member that the term Temporary Abandoned Well should replace Standby Well. Mr. Gershon was of the opinion that if any change is desired to deal with Standby Wells, and if the Board wants to grant permits to these wells, it will be important to classify the permits in a way that is consistent with Chapter 36 of the Water Code. He suggested classifying them as some form of Production Permits, which would require further discussion and work on the rules to address some obstacles for Standby Wells in the current rules, or preferably, as Historic and Existing Use Permits—although there would need to be some additional rules and probably amendment to the Historic and Existing Use Period to accomplish this.

8. *Delete the Financial Policies and Procedures section – these procedures can remain in the policies* (Previously MPGCD Rule section 5)
9. *Update Historic and Existing Use permit amendment and transfer provisions to comply with recent case law.* MPGCD Rule Sect. 11.1 As the Historic and Existing Use permit application process is over, we will be deleting the unnecessary language that explains the process to obtain that permit, and language will be inserted that will reference the Historic and Existing Use Permit program.

The recent ruling by the Texas Supreme Court in the Guitar Holding Company v. Hudspeth County Underground Water Conservation District No. 1 Case states that the “purpose of use” on an “Historic and Existing Use Permit” cannot be changed when, under the circumstances present in the Hudspeth County Underground Water Conservation District No. 1, a Historic and Existing User seeks to export groundwater outside the district.

The following is an excerpt from the letter of concerns from Mr. Paul Latham. Proposed Rule 11.1. appears to allow existing and historic permits to be amended to be transferred within the boundaries of the District on a limited basis, but not outside of the District. Specifically, proposed MPGCD Rule 11.1.2. provides that an amount of water authorized for a particular use pursuant to an existing or historic use permit may be relocated and applied to the same use elsewhere within the District. It cannot, however, be relocated for the same use to a place outside of the District's boundary. This is clearly a discriminatory practice with respect to similarly situated permits based solely upon whether the water would be applied to a beneficial use inside or outside of the District. Such inconsistent treatment of permits and groundwater rights is prohibited by the unambiguous language of Sections 36.101(a) and 36.122(c), Texas Water Code. The cited provisions of Chapter 36 contemplate that the District will develop and adopt of rules (i) that are "fair and impartial" and, that with respect to water transported for use outside of the District, (ii) the rules will "not impose more restrictive permit conditions on transporters than the district imposes on existing in-district users." As drafted, the proposed rule would violate both of these principles.

Mr. Gershon: The Guitar case focused on the issue of not being able to change the "purpose of use" that was granted in your "Historic and Existing Use Permit", and they ruled you cannot not change the purpose of use to transfer water out of the district. The case did not contemplate if water from a "Historic and Existing Use Permit" could change the "place of use" or the "purpose of use in-district". Examples: One farmer transferring water down the road to another farmer, or can an "Irrigation Use" permit transfer water to the City of Fort Stockton if Fort Stockton were to triple in size and need more water?

In Mr. Gershon's evaluation of Mr. Latham's letter, item #1, believes that Mr. Latham is interpreting the ruling as you cannot change the place or purpose of Historic and Existing Use Permits. Mr. Gershon feels this could be debated either way. He was of the opinion that the Supreme Court conducted an examination of Sections 36.113 and 36.122, and other applicable laws, all within the context of the unique facts and district rules in the Guitar case. Comparable facts and rules in other districts, including MPGCD, are different in significant ways. Consequently, it is arguable that the Supreme Court's logic, reasoning, and ultimate conclusion would be different in MPGCD and other districts.

Further discussion by Mr. Gershon revealed his thoughts on the possible future. Once your Hydrogeologist resolves how much water is available in the aquifer based on the modeling runs which are in turn based on decisions that will be made by the MPGCD board reflecting their views of what they want their aquifers to look like (which is referred to as Desired Future Conditions – DFC's) you may have to begin allocating water if and when water becomes scarce—or, in other words, begins to impair your DFC. The DFC will be voted on at a Groundwater Management Area meeting and filed with the

Texas Water Development Board. Using the adopted DFC the TWDB will develop a Managed Available Groundwater number. Once approved by the Texas Water Development Board this "MAG" has some significance in that statutory law requires that permits be issued in an amount up to this "MAG" aquifer number.

Mr. Gershon asked the Board for guidance on permit rule amendments when moving water around within the district. It is 100% clear that our rules need to say that you cannot change your purpose of use if you are exporting water because of the Guitar Case.

10. *Remove Historic and Existing Use permit application procedures, but recognize the existence of these permits.* Discussed with issue #9 above
11. *Add procedure explaining the statutory procedures for seeking administrative relief from a District permitting decision.* Reference MPGCD Rule 11.10.11. The insert into the rules follows the process laid out by the Legislature.
12. *Allow the Board President to issue temporary orders to prohibit waste and pollution.* Reference MPGCD Rule 14.4.2. Discussed with item #5.
13. *Adopt statute requiring rulemaking hearings registration.* Reference MPGCD Rule 6.3(e)
14. *Provide for a civil penalty fee schedule.* Reference MPGCD Rule 15.3
Legislation was passed based of the Aspermont Case which makes clear that District's have enforcement authority. In the District's beginning it was decided to educate the public without penalty. Now it is apparent that many if not most groundwater users are aware of the District and its rules. Several years have passed since the District's creation and there is good reason for considering whether it is time to provide for some degree of enforcement measures to deal with those who do not comply with rules, even after significant communications and follow-up by the General Manager. What is proposed is that there will be situations when violation letters would be sent out with or without penalty, depending where they are on the violation/penalty scale without requiring violators to come before the board. There will be other instances that will require violators to appear before the Board of Directors.
15. *Consider how best to implement current rules allowing for management zones.* Reference MPGCD Rule 10.5 Mr. Randy Williams, Hydrogeologist for MPGCD, took the floor to explain reasons for possibly establishing management zones.

There may be an area with considerable drawdown which is causing problems, this could be established as a management zone, and reduction of pumping could be issued in this management zone only, not county wide.

Good and bad areas of an aquifer may be established as a management zone. Permits issued in these management zones can be restricted or enhanced based on the yield in the area.

In Pecos County, you have the Edwards/Trinity aquifer, a two tier aquifer. Each individual tier could be a separate management zone. Heavy pumping from one tier may be affecting the other tier and you could restrict pumping in the over pumped tier management zone.

16. *Incorporate guidance document regarding hydrogeological study into rules.* Reference MPGCD Rule 11.9.2(g) Mr. Randy Williams pointed out that we might add more clarity to rules that are already in place. Example: Our rules say to provide a pumping test, and we should specify that a 24-Hour pumping test is required.

Mr. Gershon pointed out that Mr. Latham's letter raised another point. *The following is an excerpt from the letter of concerns from Mr. Paul Latham.* Proposed Rule 15.3.4. provides as a "mandatory" matter that the District will recover its attorney's fees and costs of court, including experts' costs, in a suit to enforce its rules in which it prevails. Section 36.102(d), however, it is permissive, not mandatory, in that it allows the District to "seek" to recover such costs. The statute also provides that the Court shall set the amount of attorney's fees to be recovered, *i.e.*, the District does not automatically recover the amount its attorney billed them.

Mr. Gershon: The District will be asking the court to recover its attorney's fees and costs of court, including experts' costs, in a suit to enforce its rules in which it prevails. Therefore, wording is added to our rules to make this clear, which responds to Mr. Latham's comment.

Mr. Gershon surrendered the floor as there were no more written comments or comments from the public.

III Adjourn. John Dorris adjourned the Rulemaking Hearing at 3:30 pm.

A brief recess was called.

Regular Board Meeting was Called to Order by Vice President John Dorris at 3:40 pm.

I Consider and/or act upon **minutes May 19, 2009**

Evans Turpin made a motion that the minutes of May 19, 2009, be approved. Motion seconded by Lynn Holland, and the motion passed unanimously

II Comments from **Public and Media (limit 5 minutes per person)**

The public had no comment

III Consider and/or act upon **Accounts Payable, Treasurer's Report, Line Item Transfers For May 2009**

A motion to approve the Accounts Payable and Treasurer's Report was made by Lynn Holland, seconded by Evans Turpin. Passed Unanimously.

A motion to approve the Line Item Transfers was made by Lynn Holland, seconded by Alvaro Mandujano, Jr. Passed Unanimously.

Six separate accounts payable invoices that require a double signature were presented for payment. Alvaro Mandujano, Jr. made a motion to approve payment of the additional bills, seconded by Evans Turpin. Passed Unanimously.

IV Consider and/or act upon appointment of **Director representing City of Fort Stockton**

Mr. Gregg McKenzie submitted a letter of resignation to the Board of Directors on June 13, 2009. The letter of resignation was hand delivered to the MPGCD office. He stated the following reason in the letter: "After reading and reviewing chapter 171 of the Local Government Code, it appears that I would have to abstain/recuse myself during deliberation and voting on any business entities owned by Clayton Williams where my son-in-law serves as the chief Financial Officer. According to section 573.024-025 of the Government Code, I am related to my son-in-law in the first degree by affinity

that would require me to abstain/recuse myself on any dealings with Clayton Williams. Due to this restraint, I feel that I could not be an effective board member since it is quite evident that many issues will be on the board's agenda dealing with Mr. Williams' in the coming months."

Lynn Holland made a motion to accept Gregg McKenzie's resignation with regret. Mr. Mike Gershon stated that the secret ballot to elect Mr. McKenzie at the previous board meeting was not valid. It should have been conducted by a public vote by each Board Member. The agenda item for today is not worded in such a way as to vote on the acceptance of a resignation. Today we had planned on ratifying what we had done last month and that is why the agenda is worded that way it is worded. We are in a situation where the secret ballot is voidable, but not automatically void. The Board must recognize the defect in the secret ballot vote in order to undo the vote. It is my understanding that filling the vacancy will be discussed at the following meeting.

Another option is to assume that the vote last month was valid, which is usually the case. The statute provides that technically the board should accept the resignation, but if 8 days have passed from the time the letter is submitted, then the resignation automatically becomes effective.

Lynn Holland rescinded his motion. No action taken.

Note: A quorum of the board is still present.

V Consider and/or act upon setting next **Rulemaking Hearing**

The board discussed setting another Rulemaking Hearing for July 21, 2009. They also set a workshop day to discuss the rules for June 30th at 1pm at the Pecos County Courthouse.

VI Consider and/or act upon **Contract with Bar-W Groundwater Exploration, LLC**

Lynn Holland made a motion to approve the contract presented with Bar-W Groundwater Exploration, LLC. Motion seconded by Alvaro Mandujano, Jr.. Passed Unanimously.

VII Consider and/or act upon support of **Independent Water Study**

Judge Shuster of Pecos County has requested an independent 5 county water study of the Pecos Valley aquifer. The counties affected are Reeves, Loving, Winkler, Ward, Crane and northern Pecos County.

Wade Kress with the USGS was to be here today to talk about an Independent Water Study. The item will be tabled until next month. No action taken.

VIII Discuss **Management Plan** amendment and/or resubmission due at TWDB in 2009 and consider and/or act upon setting Management Plan hearing

Randy Williams/MPGCD Hydrogeologist and Paul Weatherby/MPGCD Manager are working on the management plan. Technically our management plan is due to the

Texas Water Development Board (TWDB) by August 18, 2009. If it is not ready by that date, we will need to contact the TWDB and let them know we are currently working on the Management Plan. Mr. Williams explained that TWDB will typically allow the submission of a revised Management Plan after the deadline, as long as the District is working on it. No action taken.

IX Consider and/or act upon **Progress Reports: Well Registrations, Production Permits, Drilling Permits, Data Loggers, Water Analysis, GMA 3 and 7 and District's development of Desired Future Conditions**

Progress Reports: Well Registrations, Production Permits, Drilling Permits, Data Loggers, Water Analysis are continuing each month. We are still setting up monitor wells. SandRidge is drilling another monitor well. Monitor wells are read twice a year. Data Logger wells have recorders in them that record on an hourly schedule, and we read them monthly. Telemetry wells have information that is available on-line; you will need to know a well number to find the one you want.

Groundwater Management Area (GMA3) and GMA7: Randy Williams has already started on the Desired Future Conditions (DFC). Randy Williams took the floor:

A Desired Future Condition is a policy statement that is adopted by the board. A DFC is a philosophical statement on the aquifer expressed in such a way that it talks about something that is measurable in the aquifer. The MPGCD board will be charged with setting the DFC for GMA7 for the Edwards/Trinity aquifer, and another DFC for GMA3 for the Pecos Valley aquifer for your district. Once completed, the report goes to the GMA7 meeting and it has to be approved by 2/3 of the Groundwater Water Districts that are attending the meeting that belong to GMA7. In GMA3, MPGCD is the only voting member in the aquifer.

DFC's can be expressed in several ways, for example, maybe you want to maintain a certain amount of spring flow; or a certain level of saturated thickness; or you may want to limit draw down to a certain level. For the aquifers that have a Groundwater Availability Model (GAM), you will be charged with setting the policies.

The statute allows you to set different management zones. It is an area that you confine either strata graphically or by drawing a line around it. It has to be measurable and it has to be physically possible, and all the other Groundwater Districts in you GMA basically need to comply with the idea.

X General Manager's report on incoming **Groundwater District Correspondence**
No report

XI Consider and/or act upon **Agenda for next meeting**
Independent Water Study, District Management Plan, Rule adoption, and appoint a new director for the City of Fort Stockton position.

XII **Adjourn** Evans Turpin made a motion to adjourn, seconded by Houston McKenzie. The motion carried, and the meeting adjourned at 4:45 pm.

M. R. Gonzalez,
Secretary/Treasurer

John Dorris,
Vice President

Date Approved