

Middle Pecos Groundwater Conservation District

Minutes of June30, 2009

On this the 30th day of June, 2009, a Workshop meeting 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:

Glenn Honaker	President, Precinct 1
John Dorris	Vice President, Precinct 3
S. Evans Turpin	Acting Secretary/Treasurer, City of Iraan
M. R. Gonzalez	Appointed Secretary/Treasurer, Precinct 2
Jack McIntyre	Precinct 1
Lynn Holland	Precinct 3
Bart Reid	Precinct 4
Houston McKenzie	At Large
Vacant	City of Fort Stockton

Board Members absent: Alvaro Mandujano, Jr. and S. Evans Turpin

Others Present: Paul Weatherby/General Manager, Melissa Mills/Office Manager, Jeff Williams, Dr. Jim Duke, and Mike Gershon/MPGCD attorney

Call to Order. The Rulemaking Hearing was called to order at 1:05 pm and led by President Glenn Honaker. Quorum is present.

II Review and Discuss 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.

Comments from the public and from the board were welcomed. There were none.

Paul Weatherby took the floor. 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)
Under existing procedure, you only have 15 days from notice of filing of application to respond. Proposed change gives people who might not see the notice of filing of application more of a chance to inquire about the application and make their protest. In addition, the legislature does not require the notice of filing of application, and the District will likely repeal that requirement, which will require that protest deadlines be tied to a different event.
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. Those who would like to protest need to have direct reason to protest. The presiding officer of the board meeting will decide who is a qualified protestant. Even if someone doesn't qualify as a party to protest, the Texas Water Code, the Statute, and MPGCD rules allow for you to bring relevant information and your issue to the Board's attention. Reference MPGCD Rule 6.3 (e)
5. *Authorize the District to adopt emergency rules if needed.* There is statutory language that gives the District 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)
6. *Recognize and provide implementing rules for time when "Managed Available Groundwater" is applicable.* Reference MPGCD Rule Sect. 8 and Sect. 10.3
Mike Gershon took the floor. The current MPGCD rules were put in place before the legislature added statutory provisions to talk about Desired Future Conditions (DFC) and Managed Available Groundwater (MAG). Our rules referred to sustainability of the aquifer. We referenced avoiding adverse impacts to the aquifer and adverse affects to existing users. This is similar to the Desired Future Conditions that you will present to Groundwater Management Area 7 (GMA7) and GMA 3.

There are a number of different rules to talk about. The authority the District has (both the Board and the District Manager) to cut back permitted allocations to make decisions on permit applications in light of your existing standards, pre-Managed Available Groundwater (MAG) and pre-Desired Future Conditions (DFC). We added reference to DFC and MAG in those same sections of the rules that talk about your authority to cut back and the criteria for application decisions.

Houston McKenzie: It says that the Desired Future Conditions are final and unappealable. Mike Gershon: There's a process for challenging DFC's once your Groundwater Management Areas have adopted them. The two different ways are 1) go to Texas Commission on Environmental Quality (TCEQ), or 2) go to the Texas Water Development Board, it depends on the reason.

The statute says that by September 1, 2010, every Groundwater Management Area in the state of Texas has to adopt Desired Future Conditions and submit them to the Texas Water Development Board and every five years thereafter. So at every five year interval, the Groundwater Management Areas will convene and take another look at their Desired Future Conditions to see if changes need to be made. A quorum of a Groundwater Management Area meeting is attendance of 2/3 of the Groundwater Districts in that GMA. To take action you need 2/3 vote of this quorum present.

7. *Update Definitions section.* Reference MPGCD Rule 1.1. Added Desired Future Conditions (DFC), Managed Available Groundwater (MAG), Personal Justiciable Interest and Standby Wells.
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. We also will update to reflect the recent Texas Supreme Court ruling in the Guitar Holding Company v. Hudspeth County Underground Water Conservation District No. 1 Case 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. Mike Gershon 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.

Mike Gershon asked the board to consider the following questions:

1. Will we allow a Historical and Existing Use permit that maintains the same purpose to be moved to another location within the county?
2. Will we allow a Historical and Existing Use permit that maintains the same purpose to be moved to another location outside of the county?
3. Can you change the purpose of use and transfer water within the district?

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

Recess called at 3:10 pm. Board Reconvened at 3:26 pm

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 on the Aspermont Case which makes clear that Districts 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 MPGCD Hydrogeologist Randy Williams is working on this.

16. *Incorporate guidance document regarding hydrogeological study into rules.* Reference MPGCD Rule 11.9.2(g) MPGCD Hydrogeologist Randy Williams is working on this.

Mr. Gershon stated that having had one Rulemaking Hearing on June 23, 2009, and the Workshop today to allow for public input satisfies the rule making process and suggested to the board that we could consider the draft rules for approval and/or further modification at the Board meeting on July 21, 2009. The Board could conduct another hearing on July 21st, as long as the 20-day notice requirements were met, and still act on the rules that day at the Board meeting.

Closed Session. At 4:12 pm President Glenn Honaker announced that the board would enter into Closed Session to confer with Legal Counsel under Section 551.071 of the Texas Open Meetings Act.

Upon returning from the closed session at 4:50 p.m., Mr. Honaker noted that no action was taken in Closed Session.

Note: Merrell Daggett and John Dorris left the meeting at 4:48 pm. A quorum was still present.

III Review and Discuss proposed amendments to the District's Management Plan
Item Tabled.

IV Adjourn Bart Reid made a motion to adjourn, seconded by M. R. Gonzalez. The motion carried, and the meeting adjourned at 4:51 pm.

M. R. Gonzalez
Secretary/Treasurer

Glenn Honaker
President

Date Approved