Water Issues Update:
Current Issues Involving Groundwater

Texas City Attorneys Association Summer Conference
South Padre Island - June 6-8, 2012

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Table of Contents

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I. Introduction

The 2011 legislative session resulted in an unexpectedly high number of enacted bills concerning groundwater. The judiciary has also been active in this area: In October 2011, the Texas Supreme Court issued its decision in *Rolling Plains Groundwater Conservation District v. City of Aspermont*, 353 S.W.3d 756 (Tex. 2011) ("*City of Aspermont*"). *City of Aspermont* concerns the governmental immunity of municipalities with respect to past due fees, civil penalties, and costs related to the violation of the rules of groundwater conservation districts ("GCDs") by municipalities. In February 2012, the Texas Supreme Court issued its long-awaiting decision in *Edwards Aquifer Authority v. Day*, --- S.W.3d ----, 2012 WL 592729 (Tex. Feb. 23, 2012) (motion for rehearing pending) ("*Day*"), regarding ownership of groundwater in place and whether regulations that limit or prohibit the drilling of water wells or the production of groundwater may be the subject of regulatory takings claims. *Day* is likely to be considered one of the Court's most important groundwater case in decades. The Texas Attorney General has also recently issued important opinions regarding groundwater including one concerning competing amendments to a provision in Chapter 36, Water Code (the State's general law governing GCDs), that provides an exception from regulation by GCDs for certain water wells used to supply qualifying municipalities.

Generally speaking, Texas municipalities are major users of groundwater. Many of those who are not, are or will soon be looking to develop groundwater as additional or alternative water supplies in order to meet future needs. As such, municipalities have interests to be represented and advanced in the planning processes concerning groundwater, and in the development of groundwater management strategies and GCD rules. Municipalities also often must or will soon need to apply for and obtain permits from GCDs for the drilling and operating of water wells, and for the production and/or transport of groundwater. Accordingly, lawyers for municipalities need to stay up-to-date on the legal issues and developments involving groundwater planning, management and regulation, and must regularly consider how such issues and developments will and may affect municipalities in general and their clients in particular. The prospect of increasing scarcity and demand for groundwater resources and continuing drought will only increase this need.

II. Legislation (2011)

A. SB 332 (Act of May 27, 2011, 82nd Leg., R.S., ch. 1207, 2011 Tex. Gen. Laws 3224)

During the eighty-second session of the Texas Legislature, when this legislation was being debated and ultimately passed, the question of whether landowners have a vested property interest in groundwater prior to capture entitled to constitutional protection under the takings clause was pending before the Texas Supreme Court in the *Day* case. *Day* has since been decided by the Texas Supreme Court. *See infra* at 4-5. The Court quoted the text of SB 332 in support of its holding in *Day*.

Proponents of private ownership of groundwater in place (beneath the surface and based on land ownership) sought to have the vested rights question pending in *Day* legislatively answered in their favor, which lead to heated debate. The resulting bill amended Chapter 36 to recognize that a landowner *owns* the groundwater below the surface as real property and that such ownership entitles landowners to drill for and produce the groundwater below the surface, but that a landowner is *not*

entitled to capture a *specific amount* of groundwater. Language also states that this law does not prohibit groundwater districts from limiting or prohibiting the drilling of a well for failure to comply with minimum well spacing or tract size requirements, and does not affect the ability of a groundwater district to regulate groundwater, including to protect historic or existing use.

B. SB 313 (Act of May 28, 2011, 82nd Leg., R.S., ch. 886, 2011 Tex. Gen. Laws 2259)

This bill extends the planning horizon for *priority groundwater management areas* ("PGMAs") – *i.e.*, areas of the state that are recognized as experiencing or expecting groundwater problems – from 25 to 50 years. The bill also clarifies that the rulemaking power of the Texas Commission on Environmental Quality ("TCEQ") over PGMAs applies to areas designated as critical prior to 1997, and adds procedures that clarify financing issues when a PGMA area is added to an existing groundwater district.

C. SB 660 (Act of May 29, 2011, 82nd Leg., R.S., ch. 1233, 2011 Tex. Gen. Laws 3287)

This bill served as the main reauthorization bill for the Texas Water Development Board ("TWDB") under "sunset" review. SB 660 amends the Texas Water Code so as to expressly make groundwater districts part of the state water planning process. It also amended Chapter 36 to codify the criteria to be used by groundwater districts in developing Desired Future Conditions ("DFCs") and establish new procedures to be used by districts in adopting DFCs. The criteria include a requirement that DFCs provide a balance between the "highest practicable level of groundwater production" and conservation, preservation, protection, recharging and prevention of waste and control of subsidence. The law also states that requiring this balance does not prohibit the establishment of DFCs that provide for reasonable long-term management of groundwater resources. SB 660 also makes changes to the process for appeals of DFCs to TWDB and TCEQ.

D. SB 692 (Act of April 27, 2011, 82nd Leg., R.S., ch. 32, 2011 Tex. Gen. Laws 62)

SB 692 amends the section in Chapter 36 that provides exemptions from permitting requirements for water used for domestic and livestock purposes and for oil and gas exploration, clarifying that these exemptions apply to the particular purpose of use and not to the well itself.

E. SB 693 (Act of April 27, 2011, 82nd Leg., R.S., ch. 32, 2011 Tex. Gen. Laws 62)

SB 693 amends sections within Chapter 36 that relate to hearings on permit applications before a groundwater district to provide that, if requested by an applicant or other party, a district must contract with the State Office of Administrative Hearings ("SOAH") to conduct the hearing. The party requesting the hearing before SOAH is required to pay all costs associated with the contract for the hearing.

F. SB 737 (Act of April 14, 2011, 82nd Leg. R.S., ch. 18, 2011 Tex. Gen. Laws 39)

SB 737 changed the term *MAG* – Managed Available Groundwater, as previously used in Chapter 36 – to *Modeled* Available Groundwater. MAG formerly was the amount of water that may be

permitted by a groundwater district and was calculated based upon the applicable DFC. In its new form, MAG represents the amount of water that may be produced on an average annual basis to achieve a DFC – thus including exempt uses. SB 737 also amends Chapter 36 so that in issuing permits, a district shall manage groundwater production to achieve an applicable DFC by considering the MAG amount along with an estimate of exempt use, the amount of production authorized under issued permits, an estimate of the amount of groundwater that is actually produced under issued permits, and yearly precipitation and production patterns.

G. HB 3109 (Act of May 29, 2011, 82nd Leg., R.S., ch. 1042, § 1, 2011 Tex. Gen. Laws 2660, 2660-61)

Prior to the 2011 legislative session, § 36.121, Water Code, required all GCDs created after September 1, 1991, to exempt, from regulation, a well and any water produced by well that is located in a county that has a population of 14,000 or less if

(1) the water is to be used solely to supply a municipality that has a population of 121,000 or less;

(2) the rights to the water produced from the well are owned by a political subdivision that is not a municipality, or by a municipality that has a population of 100,000 or less; and

(3) the municipality or political subdivision owner of the water rights purchased, owned, or held rights to the water before the date on which the district was created, regardless of the date the well is drilled or the water is produced.

HB 3109 amended § 36.121 to raise the population ceiling for a municipal owner of water rights related to a qualifying well and any water from that well (see criteria (2) above) from 100,000 to 115,000.[1]

[1] The Eighty-second Legislature also passed a competing amendment. *See* HB 2702 (Act of May 25, 2011, 82nd Leg., R.S., ch. 1163, § 181, 2011 Tex. Gen. Laws 3024, 3054). HB 2702 purports to amend § 36.121 to similarly raise the population ceiling for a municipal owner of water rights related to a well or any water that could qualify for this exemption from 100,000 to 115,000, but would also add a *floor.* In order to qualify for the exemption, the water would need to be used to supply a municipality with a population *greater than 100,000* (but equal to or less than 121,000), and the municipal owner of the water rights would need to have a population *greater than 100,000* (but equal to or less than 115,000). Under this amendment, a much narrower class of municipalities would benefit from the § 36.121 exemption than under the terms the amendment as set forth in HB 3109 (or pre-existing § 36.121). However, in January 2012, the Attorney General concluded: (1) that HB 2702 is in conflict with HB 3109; and (2) because HB 2702 provides that, to the extent it conflicts with another bill enacted during the 2011 legislative session, the other bill prevails, HB 3109 prevails and thus amends § 36.121, Water Code. *See* Tex. Atty. Gen. Opin. No. GA-0904 (2012).

II. Judicial

A. *Edwards Aquifer Authority v. Day,* --- S.W.3d ----, 2012 WL 592729 (Tex. Feb. 23, 2012) (motion for rehearing pending)

In February 2012, the Texas Supreme Court issued its landmark decision in *Edwards Aquifer Authority v. Day*. In that case, and for the first time, the Texas Supreme Court held that landowners have a property interest in groundwater prior to capture that may be the subject of a regulatory takings claim. The obvious and immediate result of the *Day* decision is that landowners may assert regulatory takings claims against the Edwards Aquifer Authority ("EAA"), Chapter 36 groundwater conservation districts, ***and other governmental entities*** in response to regulation that limits or prohibits access to, or production of, groundwater. Whether and to what extent such claims will succeed under the facts of each case, including the situation of the particular claimant and the nature of the regulation at issue, is much less clear.

In its *Day* decision, the Court did *not* hold that a compensable taking of Day's property had occurred but, rather, remanded that question to the trial court for a determination of the merits of Day's takings claim. In the wake of the *Day* decision, attention has been turned to the EAA's remaining defenses to, and the merits of, Day's takings claim, and to other takings claims that are pending and which are being threatened against the EAA.

1. Background

In 1994, Burrell Day and Joel McDaniel (collectively, "Day") purchased property in Bexar County upon which existed an uncontrolled, flowing, dilapidated Edwards Aquifer well with a collapsed casing and no pump. Water from the well flowed into a ditch and thereafter into a lake, which was fed by an intermittent creek, where it comingled with surface water. Later, Day sought an initial regular permit ("IRP") from the EAA pursuant to the Edwards Aquifer Authority Act ("EAA Act") (Act of May 30, 1993, 73rd Leg., R.S., ch. 626, 1993 Tex. Gen. Laws 2350, as amended), based on his predecessors' use of Edwards groundwater from the well during the Act's statutorily-mandated historic period. Following a contested case hearing in which Day was able to show that his predecessor irrigated only seven acres with Edwards groundwater during the historic period, the EAA issued an IRP to Day with a withdrawal amount of 14 acre-feet ("AF") per year. Under the terms of the EAA Act, Day was entitled to an IRP for 14 AF based on the number of acres of land that he was able to show had been irrigated with Edwards groundwater.

Day filed a lawsuit against the EAA challenging the validity of the EAA's decision to grant a permit to Day for only 14 AF per year, alleging numerous errors. The lawsuit also included a claim that the EAA's permit decision amounted to a regulatory taking of Day's vested ownership rights to the Edwards groundwater under his property therefore entitling Day to compensation. On the question of the validity of the EAA's permit decision, the Texas Supreme Court held that the decision is valid and supported by evidence in the record before the agency.

The trial court had granted summary judgment in favor of the EAA on Day's regulatory takings claim on the ground that Day had no vested right to groundwater beneath his property prior to capture. The Court of Appeals reversed on that issue, holding that Day has a vested right and remanded the case to the trial court for further proceedings on the merits of Day's takings claim. Both sides sought and were granted review by the Texas Supreme Court.

2. The Holding

The Texas Supreme Court addressed the vested rights issue – *i.e.*, whether Day has a property interest in groundwater prior to capture entitled to protection under the takings clause of the Texas Constitution. The Court repeatedly emphasized that it had never before ruled on this question. The Court then declared that the common law of ownership of oil and gas applies to groundwater. Under that law, oil and gas (and now groundwater) are owned in place. They are considered a part of the realty, and the landowner is regarded as having absolute title to these substances, which each landowner owns privately, separately, distinctly, and exclusively, as a result of his proprietorship of the land. A landowner's right in these substances prior to capture is entitled to protection under the takings clause of the Texas Constitution, and therefore may be the subject of regulatory takings claim.

3. Part IV of the Opinion

In Part IV of its opinion, the Court sets forth the standards and legal tests used by courts to determine whether a compensable taking has occurred, including the fact intensive and case-specific three-factor *Penn Central* balancing test, and discusses how these tests and factors might play-out with respect to the plaintiffs in *Day*. The Court makes no holding on whether any taking had occurred.

The Court discusses categorical or *per se* takings, which include situations where "government requires an owner to suffer a permanent *physical invasion* of her property." *Day*, 2012 WL 592729, *16 (*citing Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)). In a passage that should be of interest to many municipalities, the Court comments that "[i]t is an interesting question, and one we need not decide here, whether regulations depriving a landowner of all access to groundwater—confiscating it, in effect—would fall into the [physical takings] category." *Id.* The Court notes that where there has been a physical invasion, "however minor" the government "must provide just compensation." *Id.* Physical takings do not require a court to apply a fact-intensive *Penn Central* balancing test.

4. The EAA's Motion for Rehearing

In April, the EAA filed a motion for rehearing which: (1) asks the court to narrow its focus to Edwards groundwater and hold that any interest held by landowners *in Edwards groundwater within the jurisdiction of the EAA* beneath their property may not be the subject of a regulatory takings claim; and (2) argues that the discussion in Part IV of the Court's opinion – related to whether the EAA Act's regulatory scheme as applied to Day has resulted in a compensable taking – concerns issues that were not raised, briefed, or factually developed, are not properly before the Texas Supreme Court for decision and is unnecessary dicta, and therefore should be deleted from the opinion. As of this writing, the EAA's motion for rehearing remains pending.

B. *Rolling Plains Groundwater Conservation District v. City of Aspermont*, 353 S.W.3d 756 (Tex. 2011)

This case concerns a controversy between the City of Aspermont and the Rolling Plains Groundwater Conservation District ("Rolling Plains GCD") regarding the power of the district to force the City to pay groundwater export fees. The City of Aspermont obtains water from wells outside of the city limits but within the jurisdiction boundaries of the Rolling Plains GCD. Rolling Plains adopted rules assessing fees for water transported outside of the district's boundaries. The City refused to pay those fees and the district file a lawsuit against the City, seeking those fees, civil penalties, attorney's fees, and costs, as well as a declaration that the City must comply with the district's enabling act, Chapter 36, and the district's rules. The Texas Supreme Court held that the City was immune from the district's claim for fees, penalties and costs. The Court concluded that Chapter 36 does not contain a clear and unambiguous waiver of the City's governmental immunity. It should be noted that this decision referenced and analyzed only the language of Chapter 36 existing prior to the Texas Legislature's 2009 amendments. It is not clear whether language in the *current* version of Chapter 36 constitutes a clear and unambiguous waiver of the governmental immunity of cities with respect to the rules and fees of groundwater districts.

IV. Rulemaking/Administrative Action

A. Contemplated TWDB rulemaking

TWDB is currently planning a rulemaking related to its groundwater rules contained in 31 Tex. Admin. Code Chapter 356. The purpose of the rulemaking is to implement changes enacted in 2011 by SB 660, SB 727 and SB 737. A stakeholder meeting on this contemplated rulemaking was held in January 2012 and written comments were accepted until the end of that month. According to TWDB staff, possible topics to be addressed during this rulemaking process include:

- minor updates to groundwater management area boundaries and related processes;
- a new definition of DFC;
- processes related to the development of DFCs;
- appeal of a DFC to TWDB;
- notification to TWDB of adoption of a DFC;
- the changing of "managed available groundwater" to "modeled available groundwater";
- definition of MAG;
- estimates of exempt use from groundwater permitting; and
- groundwater management plans.

As of the date of this writing, TWDB has not formally issued its proposed rules. When it does there will be further opportunity for comment.

B. TCEQ Proposed Rulemaking

In March 2012, TCEQ issued proposed rules to amend §§ 293.19, 293.20, 293.22, and 293.23 of Title 30, Texas Administrative Code. 37 Tex. Reg. 2026 (Mar. 23, 2012). This rulemaking implements statutory changes made by the Legislature in 2011 via SB 313 and SB 660. The proposed rules are meant to: (1) clarify TCEQ's process to establish GCDs in PGMAs designated before September 1, 2001; (2) streamline and clarify TCEQ's processes for its review of GCD management plan adoption, readoption, and implementation compliance; (3) update TCEQ's processes to conform with statutory changes relating to petitions requesting an inquiry of a GCD in a groundwater management area; (4) clarify TCEQ's process for the evaluation of and recommendation for designation of PGMAs; (5) clarify TCEQ's process and considerations to designate a PGMA; (6) clarify TCEQ's process to create a GCD in a PGMA; and (7) update TCEQ's processes to conform with statutory changes relating to recommendations for adding a PGMA to an existing GCD. The comment period for this rulemaking closed on April 23, 2012. As of this writing, TCEQ has not yet issued a final order adopting these rules.

C. Attorney General Opinion on the Authority of Counties within a PGMA to Adopt Water Availability Requirements

Section 35.019, Water Code, allows counties within a PGMA to adopt water availability requirements governing new applications for subdivision platting under Local Government Code Chapter 232, Subchapter A. On May 31, 2012, the Attorney General's Office issued an opinion regarding the authority of a county to enact water availability requirements applicable to the part of a county that lies *outside* of a PGMA under this authority. *See* Tex. Atty Gen. Opin. No. GA-0935 (2012). The Attorney General concluded that such requirements may be applied to *any* area in an authorized county where platting is required, and that § 35.019 does not limit the application of the water availability requirements to within the boundaries of the PGMA. The Attorney General also concluded that the Legislature did not limit counties' authority under § 35.019 to instances where a groundwater district has been or is in the process of being created. The Attorney General also concluded that a county that determines that water availability requirements are necessary to prevent current or projected water use from exceeding the safe sustainable yield of the county's water supply may adopt water availability requirements without violating Water Code § 36.002, but noted that in order to do so, a county must account for the rights granted by § 36.002, and that it is possible that a county's water availability requirements could infringe on those rights. The Attorney General remarked that "[w]hether a specific county's water availability requirements comply with section 36.002 or other provisions of the Water Code will require a fact intensive review appropriate for a court . . . ." *Id.*