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| LONE STAR GROUNDWATER       | § |                        |
| CONSERVATION DISTRICT'S     | § |                        |
| APPEAL OF THE TEXAS WATER   | § | PURSUANT TO TEX. WATER |
| DEVELOPMENT BOARD'S         | § | CODE § 36.1072         |
| EXECUTIVE ADMINISTRATOR'S   | § |                        |
| DECISION NOT TO APPROVE THE | § |                        |
| MANAGEMENT PLAN             | § |                        |

**LONE STAR GROUNDWATER CONSERVATION DISTRICT'S APPEAL  
OF THE TEXAS WATER DEVELOPMENT BOARD'S  
EXECUTIVE ADMINISTRATOR'S DECISION NOT TO APPROVE  
THE DISTRICT'S MANAGEMENT PLAN**

TO MR. JEFF WALKER, Executive Administrator of Texas Water Development Board ("Executive Administrator"), 1700 N. Congress Ave., Austin, TX 78701

Pursuant to Tex. Water Code § 36.1072 and 31 Tex. Admin. Code §§ 356.50-356.57 and after giving timely notice of intent to appeal,<sup>1</sup> Lone Star Groundwater Conservation District ("District") appeals the Texas Water Development Board's ("TWDB") Executive Administrator's decision not to approve the District's management plan and submits these points of appeal addressing each of the reasons for denial of approval of the plan.

**I. SUMMARY OF APPEAL AND REQUESTED RELIEF**

1. The Executive Administrator determined the District's March 12, 2019 management plan ("Management Plan") was not administratively complete (and therefore, not approved) because the plan does not include the 2010 desired future conditions applicable to the District ("2010 DFCs") and corresponding 2010 modeled available groundwater ("2010 MAGs") from the first round of joint planning (collectively, "2010 Information"). Instead, and per TWDB's prior instructions and pre-

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<sup>1</sup> Ex. A-1, A-2. This appeal is one of first impression for TWDB and subject to *de novo* judicial review. Tex. Water Code § 36.1072(f).

review comments, the District included in its plan the 2016 desired future conditions applicable to the District (“2016 DFCs”) and the corresponding 2016 modeled available groundwater (“2016 MAGs”) from the most recently completed second round of joint planning (collectively, “2016 Information”). Even though the 2016 DFCs were determined to be no longer reasonable, Chapter 36 of the Texas Water Code (“Chapter 36”) and 31 Tex. Admin. Code §§ 356.50-356.57 (“TWDB Rules”) require the District to include the most recent DFCs and MAGs (here, the 2016 Information) with an explanation as to their applicability and dictate that the Executive Administrator shall approve the plan.

2. The Executive Administrator’s decision, while alarming and blatantly contrary to TWDB’s recommendations based on the District’s known unique circumstances, also exceeds TWDB’s statutory authority and results in prohibited conduct. Chapter 36 does not authorize TWDB to reinstate the 2010 DFCs (which were superseded upon adoption of the 2016 DFCs), as the Legislature granted the authority to determine DFCs exclusively to the districts in the groundwater management areas (GMAs). Not only does Chapter 36 give TWDB zero authority to reinstate DFCs, it prohibits reinstatement of lapsed DFCs by any entity even the districts in the GMAs. His novel, contradictory decision to force reinstatement of expired DFCs yields inconsistent (and frankly, absurd) scientific, legal, and policy results, and is consequently, unreasonable.

3. For these reasons, the District respectfully requests that TWDB reverse the Executive Administrator’s decision and deem the District’s Management Plan, containing the 2016 Information, administratively complete.

## II. FACTUAL AND PROCEDURAL BACKGROUND

4. The following factual and procedural background on the District's regulatory plan and adoption of the 2010 and 2016 DFCs describes the backdrop within which the Management Plan was created, adopted and submitted. Understanding how and why the Management Plan (currently denied approval) was developed and adopted with the language and information it currently contains is critical to evaluating TWDB's limited authority, the implications of the Executive Administrator's decision, and why his decision must be reversed.

### **A. The District's Entire Regulatory Program Was Based on a 64,000 AFY Pumping Cap Calculated Without Science and Never Authorized Under Chapter 36.**

5. Shortly after the District was formed in 2001, the District adopted an initial management plan to manage groundwater in a sustainable manner designating the groundwater availability as the amount of effective annual recharge in the District. The District then determined that recharge to the entire Gulf Coast Aquifer system (Chicot, Evangeline and Jasper aquifers) in the District was estimated by multiplying 1.1 inches per year times the area of the county without regard to actual hydrologic function of the aquifers involved.<sup>2</sup>

6. After determining the total amount of groundwater available for use in Montgomery County was 64,000 acre-feet per year (AFY) based solely on recharge within the county boundary, the District then developed a regulatory plan based exclusively on that conclusion. The authorized production at the time (78,000 AFY) had

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<sup>2</sup> See original management plan adopted 10/14/2003, pp. 3,7-8, publicly available on the District's website, <https://www.lonestargcd.org/district-rules-1>. This information is incorporated by reference as if set forth in full herein. Ex. A-39, pp. 3, 8-9.

already exceeded the 64,000 AFY “available groundwater” and the water demand in Montgomery County was projected to increase significantly over the next forty years. In December 2006, the District formally adopted and began implementing a multi-phased regulatory plan that called for specific large users to cut back usage by 30% by January 1, 2016, to ensure production would not exceed the 64,000 AFY cap (“Reduction Rule”).<sup>3</sup>

7. The District developed the 64,000 AFY available groundwater number and used it as a pumping limit without utilizing scientific analysis or studies even though there were scientific methods routinely employed to calculate recharge<sup>4</sup> and the District was required to use the best available data in developing its management plan.<sup>5</sup> The sustainable recharge rate of 64,000 AFY with a contributing pumping zone comprised of the county boundary, although historically claimed in the District’s records, has not been documented in any scientific paper or study that has been signed and sealed by a professional groundwater scientist.<sup>6</sup> Further, the approach was never authorized in Chapter 36 after the institution of the DFC joint planning process in 2005. In 2005, the Legislature enacted House Bill 1763 requiring GMAs to establish what the aquifers

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<sup>3</sup> See management plan re-adopted 10/14/2008, p. 19, and District Regulatory Plan Phase II(B), pp. 3-4, both of which are publicly available on the District’s website, <https://www.lonestargcd.org/district-rules-1>. This information is incorporated by reference as if set forth in full herein.

<sup>4</sup> Ex. A-39, pp. 2, 8-9.

<sup>5</sup> Tex. Water Code § 36.1071(b) (2001 version) (“After January 5, 2002, a district management plan, or any amendments to a district management plan, shall be developed by the district using the district’s best available data and forwarded to the regional water planning group for consideration in their planning process.”). The requirement to use best available data has continued through all subsequent versions of the statute.

<sup>6</sup> Ex. A-39, pp. 2, 8-9.

should look like in the future (i.e., DFCs) and mandating that the managed available groundwater be based on those DFCs.<sup>7</sup>

8. Before H.B. 1763 and the institution of GMAs and joint planning, many districts, Lone Star GCD included, used recharge within a district's county boundary to determine available groundwater based on misconceived regional water planning constructs.<sup>8</sup> This approach to groundwater management was problematic because aquifers do not begin and end at county lines, and prudent management necessarily requires an aquifer-based approach. HB 1763 and other legislation reflected the understanding that aquifer wide management was necessary therefore mandating districts within a management area to engage in joint planning to *first* determine the future conditions of the aquifer and *then use those condition(s) to determine the available groundwater*. HB 1763 gave districts in a GMA until September 1, 2010 to determine the desired future condition of the aquifers.

**B. The 2010 DFCs Were Engineered to Yield a MAG of 64,000 AFY and Adopted Under An Old Statute That Did Not Require Use of the Best Available Science and Effectively Provided No Due Process.**

9. Notwithstanding the noted and obvious problems with using pre-determined MAG calculations based on recharge in a single county boundary when the joint planning process mandates districts to determine the DFCs first, the District pursued 64,000 AFY as the District's available groundwater in the first round of joint planning by proposing that the District's management area ("GMA 14") adopt a DFC applicable to the District that would yield 64,000 AFY of available groundwater. The GMA 14

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<sup>7</sup> Act of May 30, 2005, 79th Leg., R.S., ch. 970 (H.B. 1763), § 8.

<sup>8</sup> Ex. A-3, R. Petrossian, C. Ridgeway, & A. Donnelly, *Balancing the Groundwater Checking*

districts approved DFCs applicable to the District that yielded a MAG of 64,000 AFY even though the DFC, by statute, was to first be determined on a GMA wide level and then the available groundwater calculated specifically based on that DFC.<sup>9</sup>

10. Presumably, the GMA 14 districts continued on this course because the District had built its entire regulatory plan on the 64,000 AFY groundwater availability number and had already been implementing the plan requiring significant cutbacks needed to achieve the DFC that was reverse engineered to deliver that level of available groundwater. Under this flawed approach, the District's 64,000 AFY pumping limit became a self-fulfilling mandate for years to come.

11. It is undisputed that the GMA 14 districts used a backward approach of plugging the desired pumping into the model and then adopting the DFC that correlated with that pumping.<sup>10</sup> The GMA 14 districts used this approach for all DFCs because they concluded that "adjust[ing] the pumpage to match a particular DFC would be very work intensive."<sup>11</sup>

12. At the time the 2010 DFCs were adopted, the Legislature authorized a petition of the DFCs to TWDB where, if successful, TWDB could then request a district to "reconsider" a DFC.<sup>12</sup> Importantly, TWDB did not (and still does not) have the

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*Account Through House Bill 1763* (April 3, 2007), pp. 1-3.

<sup>9</sup> See management plan re-adopted 11/12/2013, pp. 8-12, which is publicly available on the District's website, <https://www.lonestargcd.org/district-rules-1>. This information is incorporated by reference as if set forth in full herein. The District adopted the approved DFCs applicable to the District.

<sup>10</sup> GMA 14's 2010 DFC Submission Packet is publicly available on TWDB's website, at <http://www.twdb.texas.gov/groundwater/dfc/2010jointplanning.asp>. This information is incorporated by reference as if set forth in full herein.

<sup>11</sup> Ex. A-4, City of Conroe Letter p. 2, and minutes from GMA 14 June 26, 2013 meeting, p. 3.

<sup>12</sup> Tex. Water. Code § 36.1083, Acts 2011, 82nd Leg., ch. 1233 (S.B. 600), § 17, repealed by Acts

authority to determine the DFCs. The 2010 DFCs were not petitioned under the old process.

13. Notably, in 2011, the Legislature adopted a significant rewrite of the statutory provisions governing the joint planning process. After the Sunset Commission and the Texas Legislature recognized significant problems with the 2010 DFC process across the state, the Legislature passed S.B. 660, which mandated the districts to consider new scientific and technical factors and prepare an explanatory report to document the science and rationale for the adopted DFCs.<sup>13</sup> S.B. 660 also mandated that adopted DFCs “must provide a balance between the highest practicable level of groundwater and the conservation, preservation, protection, recharging and prevention of waste of groundwater and control of subsidence in the management area.” The 82nd Legislature also changed the term “managed available groundwater,” which acted as a cap on total production, to “modeled available groundwater,” which was not a cap and was now one of several factor districts consider in managing production on a long-term basis.<sup>14</sup>

14. After much criticism that the “appeal” process, involving TWDB’s ability to request a district to reconsider a DFC, effectively deprived due process, the 84th Legislature took action. In 2015, the Legislature amended section 36.1083 requiring a DFC petition to be heard as a contested case by the State Office of Administrative

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2015, 84th Leg., Ch 993 (H.B. 200), § 6.

<sup>13</sup> Acts 2011, 82nd Leg., ch. 18 (S.B. 660) § 17.

<sup>14</sup> Tex. Water Code § 36.1132, Acts 2005, 79th Leg., ch 970 (H.B. 1763) (2005 version referring to “managed available groundwater); Acts 2011, 82nd Leg., ch. 18 (S.B. 737), § 4 (2011 version changing terminology to “modeled available groundwater” and making MAG one consideration); *See also* Tex. Water Code § 36.1084.

Hearings (“SOAH”).<sup>15</sup> The 84th Legislature also amended section 36.0015 to define “best available science” and mandate that GCDs use the best available science in carrying out their duties.<sup>16</sup>

15. As stated below in section II.D., the District’s Reduction Rule (and entire regulatory plan) on which the 2010 DFCs were based was later called into question and ultimately found to be statutorily invalid by a court.

**C. The 2016 DFCs, Also Engineered to Yield a 64,000 AFY MAG, Were Successfully Petitioned Under the New Statute Providing Due Process, Yet GMA 14 Has Refused to Revise the 2016 DFCs Despite a Statutory Mandate to Do So.**

16. During the second round of joint planning, the GMA 14 districts adopted DFCs for aquifers within GMA 14 on April 29, 2016.<sup>17</sup> On August 9, 2016, the District adopted the approved DFCs applicable to the District, which were likewise based on the 64,000 AFY MAG and substantially similar to the 2010 DFCs.<sup>18</sup> The Cities of Conroe and Magnolia timely filed a petition on December 2, 2016, appealing the reasonableness of the 2016 DFCs. Quadvest, L.P., timely filed a petition on December 6, 2016,

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<sup>15</sup> Tex. Water Code § 36.1083, Acts 2015, 84th Leg., ch 993 (H.B. 200), §§ 4, 6.

<sup>16</sup> Tex. Water Code § 36.0015, Acts 2015, 84th Leg., ch 993 (H.B. 200)(subsection(a) "best available science" means conclusions that are logically and reasonably derived using statistical or quantitative data, techniques, analyses, and studies that are publicly available to reviewing scientists and can be employed to address a specific scientific question.")(subsection(b) mandating the districts to use the best available science). The definition and mandate have not changed.

<sup>17</sup> Ex. A-5, Resolution for the Approval of Desired Future Conditions for All Aquifers in Groundwater Management Area 14 dated April 29, 2016.

<sup>18</sup> Ex. A-6, Resolution for Adoption of the Desired Future Conditions For the Gulf Coast Aquifer that Apply to the Lone Star Groundwater Conservation District dated August 9, 2016.



appealing the reasonableness of the 2016 DFCs. The District provided TWDB with copies of the petitions on December 12 and December 14, 2016, respectively.<sup>19</sup>

17. On December 15, 2016, and after receiving the two petitions of the 2016 DFCs, the Executive Administrator provided the District's General Manager with the 2016 MAGs (GAM Run 16-024 MAG) based on the 2016 DFCs. The Executive Administrator reminded the General Manager that the "MAGs reported in the regional water plans and groundwater management plans must not be in conflict."<sup>20</sup>

18. The District contracted with SOAH to conduct a hearing on the merits of the DFC petitions, and Administrative Law Judge Casey Bell consolidated the cases and scheduled the merits hearing for November 6-10, 2017.<sup>21</sup> On April 10, 2017, TWDB prepared a scientific and technical analysis of the DFCs and the Executive Administrator delivered the report to Judge Bell to be used at the merits hearing.<sup>22</sup> TWDB designated various staff, including Mr. Larry French, as expert witnesses, and TWDB, as a party, if requested.<sup>23</sup>

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<sup>19</sup> GMA 14's entire 2016 DFC submission packet, TWDB MAG information and the petitions of the 2016 DFCs are publicly available on TWDB's website, at <http://www.twdb.texas.gov/groundwater/dfc/2016jointplanning.asp>. This information is incorporated by reference as if set forth in full herein.

<sup>20</sup> Ex. A-7, Letter f. J. Walker to K. Jones dated Dec. 15, 2016.

<sup>21</sup> All filings in the consolidated DFC Petitions, SOAH Docket No. 958-17-3121, are publicly available on SOAH's website, <https://cis.soah.texas.gov/dmwebbasic/>. All filings in the proceeding are incorporated by reference as if set forth in full herein.

<sup>22</sup> This analysis is publicly available on TWDB's website at [http://www.twdb.texas.gov/groundwater/petitions/doc/lsgcd/TWDB%20Technical%20Evaluation%20Report%2004\\_10\\_17.pdf?d=-1589](http://www.twdb.texas.gov/groundwater/petitions/doc/lsgcd/TWDB%20Technical%20Evaluation%20Report%2004_10_17.pdf?d=-1589). This information is incorporated by reference as if set forth in full herein.

<sup>23</sup> This letter is publicly available on TWDB's website at [http://www.twdb.texas.gov/groundwater/petitions/doc/lsgcd/TWDB%20Letter%20to%20SOAH%2004\\_10\\_17.pdf?d=-1589](http://www.twdb.texas.gov/groundwater/petitions/doc/lsgcd/TWDB%20Letter%20to%20SOAH%2004_10_17.pdf?d=-1589). This information is incorporated by reference as if set forth in full herein.

19. On October 10, 2017, during the pendency of the DFC appeal and before the merits hearing, the District's prior Board of Directors received the results of the three-year Strategic Water Resources Planning Study (the "Planning Study") conducted by LBG-Guyton Associates that it was commissioned to do beginning in October 2014.<sup>24</sup> The Planning Study evaluated the impacts of the District's groundwater reductions to local aquifers and concluded that additional groundwater withdrawals could be achieved if the District allowed measured aquifer declines. The prior Board approved the study and: 1) adopted a new policy goal that allowed for measured aquifer level declines over time; 2) adopted groundwater availability model "Run D" from the final report for Task 3 of the Planning Study as the District's recommended model scenario, which increased allowable pumping volumes from 64,000 AFY to 100,000 AFY through 2070 and included the resulting aquifer conditions; and 3) recommended that the District's General Manager and consultants present the results of the Planning Study, including the prior Board's recommendation for Run D, to GMA 14 with a request that Run D be considered in the joint planning process as either an amendment to the DFCs previously adopted in 2016 or as a new proposal. The hearing on the merits scheduled to begin on November 6, 2017 was continued and ultimately cancelled.<sup>25</sup>

20. On November 6, 2017,<sup>26</sup> the District's prior Board entered into a settlement agreement and an Agreed Proposal for Decision with the Cities of Conroe and Magnolia

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<sup>24</sup> The Planning Study is publicly available on the District's website at <https://static1.squarespace.com/static/58347802cd0f6854e2f90e45/t/5a0dabef71c10b9cec9e1498/1510845426777/Task+3+Strategic+Planning+Summary+Results.pdf>. This information is incorporated by reference as if set forth in full herein.

<sup>25</sup> Ex. A-8, Minutes and Resolution from District's Meeting dated Oct. 10, 2017.

<sup>26</sup> Ex. A-9, Minutes from District's Meeting dated Nov. 6, 2017.

ending the contested case on the reasonableness of the 2016 DFCs.<sup>27</sup> The Agreed Proposal for Decision, prepared by Judge Bell, included the following specific Findings of Fact.

- a. Findings consistent with the District's actions approved on October 10, 2017 regarding the Planning Study.
- b. "Based on results of the Strategic Water Resources Planning Study and the District's Board of Directors actions, the District's Board of Directors changed its policy goal to move away from 'sustainability,' which is one of the primary bases for the DFCs that are the subject of the petitions in this proceeding, to a groundwater management policy and goal that allows measured aquifer level declines over time."
- c. "Because the District Board of Directors has changed its policy goal for aquifer management as set forth above and has already voted unanimously to pursue changes to the DFCs that are the subject of the DFC appeal, those DFCs are no longer reasonable."

21. On November 6, 2017, the District signed a Final Order adopting in full Judge Bell's Proposal for Decision and declaring the DFCs no longer reasonable.<sup>28</sup> The District's order instructed the General Manager to transmit a copy of the Final Order to all districts in GMA 14 and convey to those districts the Board's request that GMA 14 promptly convene as required by section 36.1083(p) & (q) to begin the process of adopting new or amended DFCs applicable to the District. The District then submitted a request on November 20, 2017, to the GMA 14 districts seeking a change in the 2016 DFCs for the aquifers to be consistent with the aquifer conditions as modeled in the "Run D" scenario approved by the prior Board of Directors.<sup>29</sup>

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<sup>27</sup> Ex. A-10, Agreed Proposal for Decision. Quadvest, L.P. did not object to the agreement or proposal for decision.

<sup>28</sup> Ex. A-11, Final Order dated Nov. 6, 2017.

<sup>29</sup> Ex. A-12, Letter from K. Jones to the GMA 14 district representatives dated November 20, 2017.

22. On December 8, 2017, the voting district representatives of GMA 14, unanimously approved taking up “Run D” for formal consideration as new DFCs for the third five-year joint planning cycle of DFCs, but would not support a more surgical approach to amend only the District’s second-cycle DFCs.<sup>30</sup> At least one representative voiced concern that a change in the DFC for the District would, by necessity, require new DFCs to be adopted for their district, as well. This would require a full rework of the necessary explanatory report.<sup>31</sup> Further, in response to Conroe’s January 2018 request for the GMA 14 districts to provide an update on the DFCs applicable to the District in light of Judge Bell’s proposal and the District’s final order, Bluebonnet GCD, responding on behalf of the GMA 14 districts, reiterated that “DFCs cannot be changed in isolation,” and any change in a DFC would require following the process in Section 36.108 including reanalyzing the statutory factors, notice, hearing, and an explanatory report, etc.<sup>32</sup> The Bluebonnet GCD letter further states that the GMA 14 districts contend they have a right to adopt new DFCs as part of changing the DFCs applicable to the District, and they must evaluate the impact of changing one DFC on the other DFCs from adjoining counties.

23. The District continued to work with the GMA 14 district representatives in early 2018 to request that they take up the “Run D” request only as an amendment to the second-cycle DFCs on an expedited basis. On March 27, 2018, the GMA 14 district representatives voted down a motion to consider “Run D” only as an amendment to the second-cycle DFCs, but unanimously approved “Run D” for formal consideration both

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<sup>30</sup> Ex. A-13, Minutes from GMA 14 Meeting dated Dec. 8, 2017.

<sup>31</sup> Ex. A-14, Minutes from GMA 14 Meeting dated Jan. 24, 2018.

(1) in response to the District's request from the appeal of the second joint planning cycle DFCs, and (2) to develop the third cycle DFCs.<sup>33</sup>

24. TWDB representatives, Mr. Larry French and/or Mr. Robert Bradley, attended the monthly GMA 14 meetings including those from December 2017 (the meeting immediately following resolution of the DFC petitions) and April 2018 (the meeting immediately before TWDB sent out its renewal e-mail on the District's management plan). During each of these meetings, the DFCs applicable to the District were extensively discussed including GMA 14's refusal to revise just the DFCs applicable to the District and GMA 14's decision to consider Run D in the third round of planning when it considered all other DFCs.<sup>34</sup>

25. On February 21, 2018, the City of Conroe's outside counsel, Mike Powell, met with TWDB's Larry French and Kendal Kowal regarding the City's concerns that GMA 14 is taking no action on revising immediately the DFCs applicable to the District and instead has decided to address the District's DFCs when it addresses all DFCs in the third round of planning. Mr. Powell also wrote TWDB's French a letter on the matter in anticipation of the meeting.<sup>35</sup> TWDB took no action in response to the letter or the meeting.

26. On May 9, 2018, and with full knowledge of the resolution of the 2016 DFC petitions and GMA 14's refusal to address the DFCs applicable to the District until the third round of planning, TWDB's Stephen Allen e-mailed the "Data packet for the Lone

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<sup>32</sup> Ex. A-15, Letter from Z. Holland with Bluebonnet GCD to Mayor T. Powell dated Feb. 6, 2018.

<sup>33</sup> Ex. A-16, GMA Resolution dated March 27, 2018.

<sup>34</sup> Ex. A-13 through A-14 and Ex. A-17 through A-19.

<sup>35</sup> Ex. A-20, Letter from M. Powell to L. French dated Feb. 19, 2018

Star GCD groundwater management plan” to the District. Allen’s e-mail instructs the General Manager to use values from the 2017 Texas State Water Plan, the “recently issued GAM Run 17-023” and the MAG values from “GAM Run 16-024 MAG.” GAM Run 16-024 MAG is the same information the Executive Administrator previously provided to the General Manager on December 15, 2016 when he reminded her that the MAGs in the regional water plans and groundwater management plans must not conflict. Importantly, TWDB’s Allen instructs the District’s General Manager to use the 2016 Information (not the 2010 Information).<sup>36</sup>

27. After the newly elected board took office in November 2018, it prepared a statement to GMA 14 on the status of the DFCs applicable to the District, which included defining a common reservoir, and that the Board no longer supported Run D for the third round of planning.<sup>37</sup> When the District adopted the Management Plan in March 2019, GMA 14 had begun initial studies of the nine statutory factors the district representatives are statutorily required to consider before adopting new DFCs for the third planning cycle.<sup>38</sup> Under the current schedule, GMA 14 will have proposed DFCs for adoption by May 1, 2021.<sup>39</sup>

28. In June 2019, the District re-urged its request for the GMA 14 district representatives to revise the 2016 DFCs and/or expedite round 3 planning.<sup>40</sup> GMA 14 is

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<sup>36</sup> Ex. A-21, E-mail and 5 attachments from S. Allen to K. Jones dated May 9, 2018.

<sup>37</sup> Ex. A-22, Letter from H. Hardman to GMA 14 dated Jan. 30, 2019.

<sup>38</sup> In section seven of the Management Plan, the District explains the DFC petitions and resolution, and the District’s continued efforts to adopt reasonable DFCs through the GMA 14 joint planning process.

<sup>39</sup> Ex. A-23, GMA 14’s current schedule for adoption of DFCs.

<sup>40</sup> Ex. A-23, GMA 14’s expedited schedule for third round of joint planning and Agenda for June 26, 2019 meeting. GMA 14 has not followed this expedited schedule, which projected the

scheduled to hear the District's request at its August meeting.<sup>41</sup> Importantly, at no point during the process, did the GMA 14 representatives vote to re-adopt the 2010 DFCs as the DFCs applicable to the District.

**D. The District's Regulations, Which Form the Basis for Both the 2010 and 2016 DFCs, Were Deemed Statutorily Invalid from Initial Adoption.**

29. In August 2015, the District, the General Manager and then directors were sued by the City of Conroe, Quadvest, LP, and other investor-owned utilities (collectively, "Plaintiffs") over the validity of the Reduction Rule. In September 2018, Senior District Judge Lamar McCorkle of the 284<sup>th</sup> District Court in Montgomery County granted a partial summary judgment holding that the District's Reduction Rule is invalid and outside the District's authority granted by the Legislature.<sup>42</sup> The old Board timely filed a permissive interlocutory appeal of the summary judgment order.<sup>43</sup>

30. In January 2019, the new board voted to enter into a Compromise and Settlement Agreement with the Plaintiffs to end the protracted, expensive litigation and accept Judge McCorkle's order declaring the regulations void and unenforceable in a final judgment. On May 17, 2019, the Honorable Judge McCorkle signed the Final Judgment declaring that the Reduction Rules in the district's regulatory plan were adopted "without legal authority and consequently are, and have been, unlawful, void and

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adoption of final DFCs in spring 2019. At the June 2019 meeting, GMA 14 just now considered the hydrological conditions including TERS that was slated for consideration back in May 2018 under the expedited schedule. It is unclear why GMA 14 deviated from the expedited schedule.

<sup>41</sup> Ex. A-23, GMA 14 's August 15, 2019 agenda.

<sup>42</sup> Ex. A-24, Order on Motion for Partial Summary Judgment.

<sup>43</sup> Ex. A-25, Notice of Appeal.

unenforceable.”<sup>44</sup> Effective from the date of the Final Judgment, the Reduction Rules have been struck from the District’s rules, regulatory plan, large volume permits, and the District no longer manages the resource in accordance with those regulations. The District is in the process of adopting new rules to replace the unlawful, void and unenforceable regulations.<sup>45</sup>

**E. The Management Plan Was Adopted Per Chapter 36, TWDB’s Instructions and Approval to Use the 2016 Information, and In Accordance with the Orders from the DFC Petitions and Reduction Rule Lawsuit.**

31. In anticipation of the District’s then management plan expiring on December 17, 2018, the District held hearings in September 2018 to adopt a new management plan.<sup>46</sup> The District received opposition to adopting a new plan when a newly elected board would be taking office in November including a letter from State Legislators asking the District to defer adoption of all major policy decisions until after the elected board took office.<sup>47</sup> The District approved a draft plan for submission to TWDB for pre-approval but delayed formal adoption until after the newly elected board took office on November 16, 2018.<sup>48</sup> The draft plan the District submitted for approval to TWDB in September included the 2016 Information but explained its applicability and that the 2016 DFCs were found to be no longer reasonable.<sup>49</sup> TWDB provided “Pre-Review

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<sup>44</sup> Ex. A-26, Final Judgment.

<sup>45</sup> Ex. A-27, Minutes from the District’s June 11, 2019 meeting.

<sup>46</sup> Ex. A-28, Minutes and Resolution from District’s September 18, 2018 meeting.

<sup>47</sup> Ex. A-29, Letter from B. Sledge to J. Walker dated Nov. 27, 2018 plus enclosures.

<sup>48</sup> Ex. A-30, Letter from K. Jones to J. Walker dated Oct. 15, 2018. This letter resubmitted the September plan that was approved at the 9/18/18 meeting and on which TWDB had previously provided comment on 9/17/18 per Ex. A-31.

<sup>49</sup> Ex. A-31, Draft management approved on Sept. 18, 2018 for submission to TWDB plus September 7, 2018 pre-review comments.



Comments” on the draft plan authorizing inclusion of the 2016 Information (and not instructing the District to include the 2010 Information).<sup>50</sup>

32. On November 20, 2018, the new Board voted to delay consideration of a management plan until it had time to get up to speed on the information and policies embodied in a new plan and to determine the policies of the new board prior to re-adoption. On November 27, 2018, the District’s then General Counsel notified the Executive Administrator of the Board’s decision and its intent to revisit the matter in early 2019.<sup>51</sup> TWDB’s Executive Administrator responded on December 14, 2018 acknowledging the “challenge of developing and adopting a groundwater management plan during the period of transition between an appointed and newly-elected Board of Directors for the District.”<sup>52</sup>

33. In December 2018, the District hired new General Counsel.<sup>53</sup> After hiring new technical consultants in January 2019, the new Board immediately undertook the task of reviewing the previously adopted plans and the current draft plan, and began developing a new plan for re-adoption incorporating the final orders from the 2016 DFC and Reduction Rule litigation.<sup>54</sup>

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<sup>50</sup> Ex. A-31, e-mail chain dated August through September 2018 by and between W. Oliver, K. Jones and S. Allen, and TWDB’s “Lone Star GCD Groundwater Management Plan Pre-Review 1 Recommendation Report 09/07/2018 (SA, DT, RB).”

<sup>51</sup> Ex. A-29.

<sup>52</sup> *Id.*

<sup>53</sup> Ex. A-32, Minutes from the District’s Meeting dated Dec. 18, 2018.

<sup>54</sup> The approved minutes from all of the District’s meetings are publicly available on the District’s website, <https://www.lonestargcd.org/meetings>. This information is incorporated by reference as if set forth in full herein.

34. After hearing and adoption by the Board on March 12, 2019, the District submitted the Management Plan to TWDB for approval in March 2019.<sup>55</sup> Similar to the District's pre-approval submission in September 2018, the District included the 2016 Information in the Management Plan and explained that the 2016 DFCs have limited applicability given they were found to be no longer reasonable and GMA 14 had taken no action to update/revise the DFCs applicable to the District.<sup>56</sup>

35. After submission, TWDB received several letters in opposition, and one in support, of the District's management plan.<sup>57</sup> The District responded to the letters opposing approval of its plan reiterating that its Management Plan complied with Chapter 36 and TWDB Rules, and approval was mandatory.<sup>58</sup>

**F. Despite the Mandate in Chapter 36 and TWDB's Instructions and Approval to Use the 2016 Information, the Executive Administrator Denied Approval for Failure to Include the 2010 Information.**

36. On May 16, 2019, the Executive Administrator notified the District that the submitted plan was not administratively complete (and therefore, not approved) because the plan did not address what TWDB has concluded are the applicable desired future conditions (the 2010 DFCs) and modeled available groundwater (the 2010 MAGs in GAM Run 10-038 MAG). The Executive Administrator acknowledged the District's explanation of the limited applicability of the 2016 DFCs since they were declared "no

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<sup>55</sup>Ex. A-33, Letter from S. Reiter to J. Walker dated March 14, 2019 with March 12, 2019 Management Plan enclosed.

<sup>56</sup> Ex. A-30, A-31, draft plan at pp. 10-11.

<sup>57</sup> Ex. A-34, Letter from J. Houston to J. Walker dated March 11, 2019, Letter from J. Stinson to J. Walker dated April 10, 2019, and Letter from M. Jones to J. Walker dated April 18, 2019.

<sup>58</sup> Ex. A-35, Letter from S. Reese to J. Walker dated April 18, 2019.

longer reasonable,” but directed the District to address the 2010 DFCs and 2010 MAGs in its management plan.<sup>59</sup>

37. The Executive Administrator offered no explanation as to why TWDB previously instructed the District to use the 2016 Information (and previously authorized use of the 2016 Information in the District’s September 2018 submission for pre-review) nor did he provide the authority on which he relied to reinstate the lapsed 2010 DFCs and require the District to include the 2010 Information.

38. The Executive Administrator’s May 16, 2019 letter of non-approval encouraged the District to take advantage of TWDB’s pre-review process prior to submitting an adopted plan.

**G. The District Submitted a Revised Draft Plan in the Pre-Review Process with the 2010 information to No Avail.**

39. On May 23, 2019, the District triggered the pre-review process by submitting a cover letter, a revised draft plan with the 2010 Information with an explanation on its applicability, and a Technical Memo from the District’s engineer and hydrogeologist.<sup>60</sup> The cover letter explained the District’s desire to engage in meaningful dialogue as to why TWDB concluded the 2010 Information should be included, if there is any version of the plan containing the 2016 Information that is acceptable, and discuss the District’s proposed language if the 2010 Information is included in the plan. The Cover Letter and the Technical Memo raised several questions and concerns if the District were to include the 2010 Information. Specifically, the District explained why it did not include

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<sup>59</sup> Ex. A-36, Letter from J. Walker to S. Reiter dated May 16, 2019.

<sup>60</sup> Ex. A-37, Letter from S. Reiter to J. Walker dated May 23, 2019 with enclosed Technical Memo and revised draft plan.

the 2010 Information in the Management Plan formally adopted and submitted as follows:

- a. The 2010 DFCs were superseded and replaced with the 2016 DFCs upon adoption, and there is no express authorization in the statute and rules for TWDB to reinstate lapsed DFCs.
- b. The 2010 DFCs were adopted under an old statutory scheme intentionally amended by the Legislature to rectify scientific and due process concerns.
- c. The 2010 DFCs were derived using an almost identical methodology as, and are substantially similar to, the petitioned 2016 DFCs declared no longer reasonable.
- d. The assumed total pumping used to create both the 2010 and 2016 DFCs was essentially identical and based on void and unenforceable rules.
- e. The District is concerned that incorporating the 2010 Information could lead to litigation by any affected person under section 36.251 and creates concerns with complying with the orders and agreements in connection with the 2016 DFC and Reduction Rule litigation.

40. In the revised draft plan with the 2010 Information, the District addressed and included the requested information but also provided an explanation as to its limited applicability given all the circumstances and its concerns.<sup>61</sup>

41. On June 24, 2019, TWDB responded to the District's pre-review submittal with required changes that made it abundantly clear the TWDB intended to unilaterally reinstate the 2010 DFCs, ignore the District's explanation on their applicability, and bind the District to manage to the 2010 DFCs until new DFCs were adopted.<sup>62</sup> Realizing the District could not comply with TWDB's request for the various technical and legal reasons, the District was left with no other alternative other than to appeal.

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<sup>61</sup> Ex. A-37, pp. 7-12 in management plan.

<sup>62</sup> Ex. A-38, TWDB's "Draft Lone Star GCD Groundwater Management Plan Pre-Review 1 Recommendation Report 6/24/19" in response to June draft plan.

### III. POINTS OF APPEAL

#### A. For Purposes of this Appeal, TWDB's Powers and Duties Under Chapter 36 Are Expressly Limited to a Review for Administrative Completeness.

42. TWDB is a state agency whose primary responsibilities are state water planning and administration of water financing for the state. TWDB's general powers and duties over water planning and administration of water financing are enumerated in Chapter 6 of the Texas Water Code.<sup>63</sup> Under Chapter 6, TWDB has general powers and duties including any incidental to the conduct of its business of state water planning and water financing. Importantly, Chapter 6 expressly limits TWDB's power and duties under other chapters of the code, including Chapter 36, to only those specifically prescribed in those respective chapters.

43. As such, under Chapter 36, TWDB has only the limited, specific powers and duties to which it is expressly authorized.<sup>64</sup> With regard to this appeal, TWDB's express and limited authority is found in sections 36.1071 and 36.1072. Section 36.1071 sets out the information that a district must include in its management plan. Section 36.1072

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<sup>63</sup> Tex. Water Code §§ 6.002, 6.011.

<sup>64</sup> Section 36.1071(c),(d) (provide technical assistance in developing a management plan; train district staff on basic data collection methodology and provide technical assistance to districts); Section 36.1072(g)(provide technical assistance and facilitate coordination between an affected person who files a complaint that district's approved management plan conflicts with the state water plan; ultimately resolve conflict if not resolved through mediation; may consolidate action with 16.053(p) complaint); 36.1072 (approve management plans as administratively complete; 36.1073 (approve amendments to management plans); 36.108(d)(3) (provide TERS); 36.108(d-4) (determine whether DFC and explanatory report submission are administratively complete); 36.108-36.1081 (provide technical staff available in non voting capacity to assist with development of DFC); 36.1083 (upon receipt of DFC petition, conduct study with scientific and technical analysis; make relevant witnesses available if requested for SOAH hearing; may assist in mediation); 36.1084; 36.001(25) (determine modeled available groundwater); 36.109; 36.120 (request collected information from districts); 36.1132 (provide estimate of exempt use); 36.160 (allocate funds and provide technical and administrative assistant to newly created districts); 36.372 (establish rules for use and administration of loan); 36.015 (designate management areas under chapter 35 ).

limits TWDB's role to mandatory approval of a management plan as administratively complete if the plan contains the information in section 36.1071(a) and (e).<sup>65</sup>

44. Critically, although TWDB has some role in the joint planning process under section 36.108, TWDB is not authorized to approve DFCs as that decision is left solely to the GMAs by a 2/3 vote after notice and hearing.<sup>66</sup> Instead, TWDB's role in joint planning is limited to providing technical support, determining whether a GMA's DFC submission is administratively complete, and providing some technical information in the DFC petition process, among other duties, not directly at issue in this appeal.<sup>67</sup>

**B. Because the Management Plan Complies with the Unambiguous Statute and Rules, the Executive Administrator was Required to Grant Approval.**

45. TWDB must approve a management plan as administratively complete, if the plan "contains the information required to be submitted under Section 36.1071(a) and (e)."<sup>68</sup> TWDB has adopted rules governing its review for administrative completeness in 31 Tex. Admin. 356.50-57 ("TWDB Rules"). The relevant requirements in section 36.1071 and TWDB Rules are the provisions relating to the DFCs and MAGs.

46. Specifically, regarding the DFCs:

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<sup>65</sup> Tex. Water Code § 36.1072(b) ("[T]he executive administrator *shall* approve the district's plan if the plan is administratively complete. A management plan is administratively complete when it contains the information required to be submitted under Section 36.1071(a) and (e).") (emphasis added).

<sup>66</sup> Tex. Water Code § 36.108(d),(d-3). This is consistent with Robert Bradley and Larry French's statements in GMA 14 meetings that the "TWDB only evaluates administrative completeness of management plans."

<sup>67</sup> Tex. Water Code § 36.108 (d-3),(d-4)(review of DFC submission packet); §36.1081(technical support during joint planning); §36.1083 (technical information during DFC petition process). See also Tex. Water Code §36.1084 (determine modeled available groundwater), §36.108(d)(3) (provide TERS).

<sup>68</sup> Tex. Water Code § 36.1072(b).

“[T]he district shall ... develop a management plan that *addresses* the following management goals, *as applicable*, .. *addressing* desired future conditions adopted by the district under Section 36.108”;<sup>69</sup> and

“[T]he management plan shall contain, *unless explained as not applicable*, ... management goals ... *addressing* the desired future conditions established pursuant to Texas Water Code § 36.108.”<sup>70</sup>

47. Specifically, regarding the MAGs, the management plan must:

“*include* estimates of ... modeled available groundwater in the district based on the desired future condition established under Section 36.108;”<sup>71</sup> and

“[T]he management plan shall contain, *unless explained as not applicable*, ... *estimates* of ... modeled available groundwater in the district as provided by the executive administrator based on the desired future conditions established under Texas Water Code § 36.108.”<sup>72</sup>

48. In sum, pursuant to section 36.1071 and the TWDB Rules, the plan must, unless explained as not applicable, contain management goals addressing the DFCs, and include estimates of the MAGs. Critically, the statute and rules do not authorize TWDB to determine what is applicable or not applicable; instead, the districts are required to include the information unless explained as not applicable at their discretion.

49. These statutes and rules are unambiguous. In determining whether a regulation is ambiguous or not, a court must carefully consider the text, structure, history and purpose of the regulation.<sup>73</sup> An agency’s opinion or alternative interpretation cannot change the plain language of a statute or render the statute ambiguous.<sup>74</sup> If the statute

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<sup>69</sup> Tex. Water Code § 36.1071(a)(8) (emphasis added).

<sup>70</sup> 31 Tex. Admin. Code § 356.52(a)(1-3) (emphasis added).

<sup>71</sup> Tex. Water Code § 36.1071(e)(3)(A) (emphasis added).

<sup>72</sup> 31 Tex. Admin. Code § 356.52(a)(5) respectively (emphasis added).

<sup>73</sup> *Kisor v. Wilkie*, 139 S.Ct. 2400, 2415, 2019 U.S. LEXIS 4397 (U.S. June 26, 2019)(not yet selected for publication).

<sup>74</sup> *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 747-48 (Tex. 2006)(“An agency’s opinion can help

or rule is unambiguous, an agency's opinion or interpretation is given no deference (i.e., a court is not to afford an agency any deference unless the regulation is genuinely ambiguous).<sup>75</sup>

50. When interpreting a statute, a court may consider, among other matters, the: (1) object sought to be attained; (2) circumstances under which the statute was enacted; (3) legislative history; (4) common law or former statutory provisions, including laws on the same or similar subjects; (5) consequences of a particular construction; (6) administrative construction of the statute; and (7) title, caption, preamble, and emergency provision.<sup>76</sup>

51. Statutes are presumed to be enacted in: (1) compliance with the constitutions of this state and the United States; (2) the entire statute is intended to be effective; (3) a just and reasonable result is intended; (4) a result feasible of execution is intended; and (5) public interest is favored over any private interest.<sup>77</sup>

52. Words and phrases must be read in context and construed according to the rules of grammar and common usage unless otherwise having acquired a technical or particular meaning.<sup>78</sup>

53. When applying the rules of statutory construction, the court must carefully consider all the factors "in all the ways it would if it had no agency to fall back on"

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construe an ambiguity, but it cannot create one."); *Kisor v. Wilkie*, 139 S.Ct. 2400, 2415, 2019 U.S. LEXIS 4397 (U.S. June 26, 2019)(not yet selected for publication).

<sup>75</sup> *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 747-48 (Tex. 2006) ("Alternative unreasonable constructions do not make a statute ambiguous.").

<sup>76</sup> Tex. Gov't Code § 311.023; *Pecos County v. Fort Stockton Holdings, L.P.*, 457 S.W.3d 451 (Tex. App.—El Paso July 30, 2014, no pet.) (applying Code Construction Act, Tex Gov't Code § 311.014, to Chapter 36).

<sup>77</sup> Tex. Gov't Code § 311.021.



because “doing so will resolve many seeming ambiguities out of the box.”<sup>79</sup> Applying the rules of statutory construction, the statute and rules are *not* ambiguous.<sup>80</sup>

54. Per Chapter 36 and TWDB’s instructions and while being mindful of the final rulings from the DFC and Reduction Rule litigation, the District prepared a plan that addresses the 2016 DFCs and includes the 2016 MAGs while clearly explaining their applicability based on the final orders in the litigation.<sup>81</sup> Applying TWDB’s limited express authority in Chapter 36 to the ordinary meaning of the plain terms, “address,”<sup>82</sup> “include”<sup>83</sup> and “unless explained as not applicable”<sup>84</sup> in the unambiguous statute, the District’s Management Plan satisfies the requirements for administrative completeness because the plan contains management goals *addressing* the DFCs and *includes* estimates of the associated MAGs with explanations of their applicability.<sup>85</sup>

55. Instead of approving the District’s plan with the 2016 Information as required by the statute because it contained all the information in section 36.1072(a),(e), the Executive Administrator ignored the plain terms of the unambiguous statute and the mandate to approve, went against all prior recommendations, and instead, issued a decision that exceeds TWDB’s limited authority.

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<sup>78</sup> Tex. Gov’t Code § 311.011.

<sup>79</sup> *Kisor*, 139 S.Ct. 2400 at 2414-15.

<sup>80</sup> *Id.* (“A court cannot wave the ambiguity flag just because it found the regulation impenetrable on first read. Agency regulations can sometimes make the eyes glaze over. But hard interpretive conundrums, even relating to complex rules, can often be resolved.”).

<sup>81</sup> Ex. A-33, pp. 7-11, 18. The District has clearly defined goals, objectives and performance standards to manage the resource long-term.

<sup>82</sup> “Address” means to “deal with” or “treat.” Synonyms include “contend with” or “grapple with.” Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/address>.

<sup>83</sup> “Include” means “to contain as part of something.” Garner Legal Dictionary, 9<sup>th</sup> Ed., p. 831.

<sup>84</sup> “Applicable” means “useable, useful, workable, practicable.” Merriam Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/applicable>. Not applicable, therefore, means not workable, not useable, not useful, not practicable.”

**C. Despite Conceding It Has No Express Authority to Unilaterally Reinstate the Superseded 2010 DFCs, TWDB Reinstates Anyway Exceeding Its Authority, Circumventing the Legislature’s Intent, and Denying Due Process.**

56. TWDB denies the plan for failure to include the 2010 Information from the first round of planning. The 2010 Information was expressly superseded and replaced with the second round of 2016 DFCs and MAGs.<sup>86</sup> The 2010 DFCs exist for historical purposes only. TWDB has no authority to reinstate lapsed, superseded DFCs particularly when determination of the DFCs themselves is expressly outside TWDB’s authority and solely left to the districts in each GMA.<sup>87</sup> By requiring the District to include the 2010 information in its plan to obtain approval, the TWDB is unilaterally reviving the 2010 lapsed DFCs in contravention to Chapter 36 and due process rights.

57. TWDB concedes there is no express authority in Chapter 36 authorizing it to reinstate the 2010 DFCs.<sup>88</sup> Instead, TWDB justifies its actions because there is “no prohibition to temporarily revert to earlier DFCs in the event that the most recent DFCs have been determined to be no longer reasonable.”<sup>89</sup> If the Legislature intended for old DFCs to remain in effect and/or to give TWDB authority to “revert to them” when a management plan was out of sync with joint planning, it would have stated so. Instead, the Legislature clearly limited TWDB’s role to administrative approval (literally, a

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<sup>85</sup> Ex. A-33, pp. 7-11, 18.

<sup>86</sup> Tex. Water Code § 36.108(c). The district representatives shall meet at least annually to conduct joint planning with the other districts in the management area and to review the management plans, the accomplishments of the management area, and proposals to adopt new or amend *existing* desired future conditions. Tex. Gov’t Code § 311.022 (Statute is prospective unless expressly made retroactive). TWDB’s use of the terms “revert back” and “most recent” DFCs in Ex. A-38 implicitly acknowledge that the 2010 DFCs have been superseded.

<sup>87</sup> Tex. Water Code 36.108 (DFCs must be approved by 2/3 vote of GMA districts); 31 Tex. Admin. Code § 356.31-356.34.

<sup>88</sup> Ex. A-38, p. 2.

checklist to follow)<sup>90</sup> and left the DFC determinations solely up to the districts in each GMA. By mandating inclusion of the 2010 Information, TWDB completely exceeds its limited statutory authority to review plans for administrative completeness.

58. Further, when you read sections 36.1072 in conjunction with sections 36.108, 36.1083(p),(q) and section 36.10835, it is clear the Legislature intended to prohibit “reversion” to an old DFC when a DFC is successfully challenged by expressly contemplating how the scenario was to be resolved. Specifically, the Legislature did not authorize reversion or reinstatement; instead, it expressly instructed that an unreasonable DFC does not affect other DFCs and mandated that the districts in the GMA “shall follow the procedures in section 36.108 to adopt new desired future conditions applicable to the district that received the petition.”<sup>91</sup> If the Legislature intended for old DFCs to be resurrected, it would have said so by stating that the old DFCs apply until the next round of joint planning, which it clearly did not. Critically, if the statute prohibits the districts in the GMA from reverting to an old DFC by

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<sup>89</sup> Ex. A-38, p. 2.

<sup>90</sup> Tex. Water Code § 36.1072; Ex. A-21 (checklist).

<sup>91</sup> Tex. Water Code § 36.1083(p) (“If the district in its final order finds that a desired future condition is unreasonable, not later than the 60th day after the date of the final order, the districts in the same management area as the district that received the petition shall reconvene in a joint planning meeting for the purpose of revising the desired future condition. The districts in the management area shall follow the procedures in Section 36.108 to adopt new desired future conditions applicable to the district that received the petition.”); (q) (“A final order by the district finding that a desired future condition is unreasonable does not invalidate the adoption of a desired future condition by a district that did not participate as a party in the hearing conducted under this section.”); Tex. Water Code § 36.10835, Judicial Appeal Of Desired Future Conditions. (“If the court finds that a desired future condition is unreasonable, the court shall strike the desired future condition and order the districts in the same management area as the district that received the petition to reconvene ... for the purpose of revising the desired future condition. The districts in the management area shall follow the procedures in Section 36.108 to adopt new desired future conditions applicable to the district that received the petition.”).

mandating the GMA to instead convene promptly to revise and adopt a new DFC, the statute clearly prohibits TWDB, whose authority is limited to administrative completeness review, from reverting to an old DFC.

59. In addition to not being authorized and prohibited,<sup>92</sup> TWDB's unilateral reinstatement of the superseded 2010 DFCs completely circumvents Chapter 36 and renders the DFC petition process utterly meaningless. It thwarts the joint planning process and due process afforded those affected by the DFCs by detouring past notice and hearing, the 2/3 votes requirement, and an opportunity for affected persons to petition.

60. The GMA 14 districts have not taken action to reinstate the 2010 DFCs or instructed the District that the 2010 DFCs apply. Instead, GMA 14 has wholly rejected a single-county DFC adjustment for the District and decided to revise the 2016 DFCs, along with the other DFCs applicable to the other districts, in the third round of joint planning. Meanwhile, TWDB has taken the position that it cannot force GMA 14 to revise the 2016 DFCs as a result of the successful petition; yet, TWDB now brazenly reinstates an expired DFC. If GMA districts are not required to revise DFCs after a successful petition until the next round of joint planning when it addresses all of the districts DFCs, and TWDB can resurrect an old DFC, the DFC petition process is totally meaningless because the GMA districts and TWDB can ping pong back and forth avoiding any correction to a DFC after a successful petition. This totally circumvents the

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<sup>92</sup> In addition, TWDB's rigid approach ignores the staggered timing associated with the adoption of DFCs, a management plan and any rules implementing the management plan that occurs on a routine basis for all districts and that DFCs are long-term planning goals. Under this suggested approach, a district would be out of compliance any time its rules, management

Legislature's intent to provide due process to those affected by DFCs and express directive to have the districts in the GMA convene to revise a DFC.

61. Given the forward looking approach of the DFC joint planning process and the Legislature's continual improvements to the process, it is clear the Legislature never intended to look back with DFCs, figuratively or literally.

62. The Executive Administrator's decision will inevitably and undeniably result in a violation of the constitutional rights of those denied notice, hearing and the right to challenge the reinstated DFCs as well as those whose property rights are unnecessarily restricted via management of the aquifer to achieve the reinstated DFCs. These constitutional violations provide another basis for *de novo* judicial review and reversal of the Executive Administrator's decision.<sup>93</sup>

**D. The Executive Administrator's Novel Decision to Force Reinstatement Yields Inconsistent and Absurd Results Rendering it Unreasonable and Reversible.**

63. As previously stated, the statutes and rules are unambiguous, and the Executive Administrator has exceeded his authority. Even assuming the statute is ambiguous, the Executive Administrator's decision is unreasonable and should be given no deference. If a genuine ambiguity remains in a statute after exhausting all traditional tools of construction, the agency's reading must still be reasonable to be given deference. In other words, an agency's opinion is only afforded deference if the statute is: (1) ambiguous; *and* (2) the agency's interpretation is reasonable and consistent with the

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plan, and DFCs are not contemporaneously adopted.

<sup>93</sup> *Tex. Dept. of Transp. v. T. Brown Constructors*, 974 S.W.2d 655, 658 (Tex. App.—Austin 1997, pet. denied).

statute's plain language.<sup>94</sup> Here, the Executive Administrator's decision is unreasonable, inconsistent with the statute's plain language, and should given no deference.

64. The Executive Administrator's construction and interpretation of Sections 36.1071 and 36.1072 and the TWDB's corresponding rules mandating inclusion of the 2010 Information conflicts with numerous provisions of Chapter 36 and is unreasonable for a multitude of reasons set forth below. In summary, a forced reinstatement gives way to inconsistent and absurd scientific, legal and policy results.

65. A detailed explanation of the technical reasons discussed below is in the document titled, "Technical Review of the 2010 Desired Future Conditions," attached as Exhibit A-39.<sup>95</sup>

66. The Executive Administrator's mandate to include the 2010 DFCs is unreasonable and/or inconsistent with the statute's language because the 2010 DFCs are not based on the best available science and data. First and foremost, the 2010 and 2016 DFCs were based on an unscientific method of calculating recharge not founded in any scientific study and which glaringly ignores the very basics of groundwater science and how aquifers operate. Further, the GAM used in the 2010 DFC process (Northern Gulf Coast GAM) has been replaced with a newer version (Houston Area Groundwater

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<sup>94</sup> 2016 Tex. Op. Att'y Gen. KP-0115; *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 747-48 (Tex. 2006) (Texas state courts consider deferring to an agency's interpretation of a statute only when the agency adopts the construction as a formal rule or opinion after formal proceedings; even when the agency has formally adopted a construction, a state court will defer to that construction only upon finding that ambiguity exists in the statute at issue and that the agency's construction is reasonable. A court will give "some deference" to an administrative agency's reasonable construction of an ambiguous statute that the agency is charged with enforcing.).

<sup>95</sup> Ex. A-39.

Model) TWDB has concluded is superior. The 2010 DFCs do not incorporate the 2013 Subsidence District Regulatory Plans and the Old GAM did not properly simulate compaction.<sup>96</sup>

67. The Executive Administrator's mandate to include the 2010 DFCs is unreasonable and/or inconsistent with the statute's language because the 2010 DFCs are based on flawed and illegal rules.<sup>97</sup> The 2010 and 2016 DFCs were developed by first assuming a future pumping limit that has since been found no longer reasonable and the regulations which enforced the pumping limit were found to be statutorily invalid. TWDB ignores that its decision is based on flawed fundamental assumptions. Further, because a district must adopt and implement rules that accomplish the goals of the district's management plan, including achieving DFCs, the TWDB's requirement will make it difficult to adopt and enforce fair and impartial rules.<sup>98</sup>

68. The Executive Administrator's mandate to include the 2010 DFCs is unreasonable because the 2010 DFCs were adopted under an old statutory scheme intentionally amended by the Legislature to rectify scientific and due process concerns. For example, the 2010 DFC joint planning process did not incorporate the mandated statutory factors, or the requirements to provide an explanatory report and use the best available science.<sup>99</sup>

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<sup>96</sup> Ex. A-39, pp. 2, 5-6, 8-9.

<sup>97</sup> Ex. A-26 (ordering by final judgment that the District's large volume groundwater user reduction rules "were adopted by said District without legal authority, and consequently are, and have been unlawful, void, and unenforceable.").

<sup>98</sup> Ex. A-39, pp. 1-3.

<sup>99</sup> Ex. A-39, pp. 1-3.

69. The Executive Administrator's mandate to include the 2010 DFCs is unreasonable because doing so creates incoherent and incongruous DFCs and MAGs not approved by the GMA districts. The GMA 14 districts have recently rejected a single-county DFC adjustment and a reversion to the 2010 DFCs prohibits proper management of the common reservoir. This undermines the very purpose of joint planning. The adoption of the 2010 DFCs would generate MAGs inconsistent with regional water plans and would not include the groundwater availability modeling information provided by TWDB in December 2015 including estimates of exempt use.<sup>100</sup>

70. The Executive Administrator's mandate to include the 2010 DFCs is unreasonable because doing so subjects the District to potential litigation. While the TWDB received letters requesting denial of the District's plan for failure to include the 2010 information, the District is aware of several affected/dissatisfied persons<sup>101</sup> whom oppose inclusion of the 2010 information including without limitation the parties who successfully petitioned the DFCs and sued the District over the invalid rules on which the DFCs are based. Specifically, see the attached resolutions from the Cities of Conroe and Shenandoah expressly opposing inclusion of the 2010 Information and committing to pursue all legal action necessary to prevent their inclusion.<sup>102</sup> The District spent nearly \$2 million dollars in legal fees in the combined litigation and cannot afford to subject itself to additional litigation. Lastly, by forcing the District to include the 2010

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<sup>100</sup> Ex. A-39, pp. 1-2.

<sup>101</sup> Tex. Water Code § 36.251 )“a person ... affected by and dissatisfied with any rule or order made by a district” is entitled to file suit against the district or its directors to challenge the validity of the order.).

<sup>102</sup> Ex. A-40, Resolution from City of Conroe dated July 11, 2019, and Resolution from City of Shenandoah dated July 24, 2019.



Information, its plan will now conflict with the state water plan against TWDB's warnings and subject the District to a potential challenge under Section 36.1072(g).

71. For these reasons, the Executive Administrator's decision must be reversed and the District's Management Plan must be deemed administratively complete.

#### **IV. Evidence in Support of Points of Appeal**

72. The following evidence is provided in support of the Points of Appeal. The District reserves the right to present additional evidence in response to the Executive Administrator's response and/or assertions or issues raised during a meeting and/or hearing.

##### **Exhibit A Affidavit of Samantha Stried Reiter**

Exhibit A-1 Letter from S. Reiter to J. Walker dated July 11, 2019

Exhibit A-2 Letter from J. Walker to S. Reiter dated July 16, 2019

Exhibit A-3 Article, *Balancing the Groundwater Checking Account Through House Bill 1763* (April 3, 2007)

Exhibit A-4 City of Conroe Letter and Resolution, May 5, 2015, and referenced minutes from GMA 14 meeting on June 26, 2013

Exhibit A-5 Resolution for the Approval of Desired Future Conditions for All Aquifers in Groundwater Management Area 14 dated April 29, 2016

Exhibit A-6 Resolution for Adoption of the Desired Future Conditions For the Gulf Coast Aquifer that Apply to the Lone Star Groundwater Conservation District dated August 9, 2016

Exhibit A-7 Letter from J. Walker to K. Jones dated Dec. 15. 2016

Exhibit A-8 Minutes and Resolution from District's Meeting dated Oct. 10, 2017

Exhibit A-9 Minutes from District's Meeting dated Nov. 6, 2017

- Exhibit A-10 Agreed Proposal for Decision dated Nov. 6, 2017
- Exhibit A-11 Final Order dated Nov. 6, 2017
- Exhibit A-12 Letter from K. Jones to the GMA 14 district representatives dated November 20, 2017
- Exhibit A-13 Minutes from GMA 14 Meeting dated Dec. 8, 2017
- Exhibit A-14 Minutes from GMA 14 Meeting dated Jan. 24, 2018
- Exhibit A-15 Letter from Z. Holland with Bluebonnet GCD to Mayor T. Powell dated Feb. 6, 2018
- Exhibit A-16 GMA 14 Resolution dated March 27, 2018
- Exhibit A-17 Minutes from GMA 14 Meeting dated Feb. 28, 2018
- Exhibit A-18 Minutes from GMA 14 Meeting dated March 27, 2019
- Exhibit A-19 Minutes from GMA 14 Meeting dated April 26, 2019
- Exhibit A-20 Letter from M. Powell to L. French dated Feb. 19, 2018
- Exhibit A-21 E-mail and accompanying attachments (1-5) from S. Allen to K. Jones dated May 9, 2018
- Exhibit A-22 Letter from H. Hardman to GMA 14 dated Jan. 30, 2019
- Exhibit A-23 GMA 14's current schedule  
GMA 14's expedited schedule for third round of joint planning  
Agenda for GMA 14's June 26, 2019 Meeting  
Agenda for GMA 14's August 15, 2019 Meeting
- Exhibit A-24 Order on Motion for Partial Summary Judgment
- Exhibit A-25 Notice of Appeal
- Exhibit A-26 Final Judgment
- Exhibit A-27 Minutes from the District's Meeting dated June 11, 2019
- Exhibit A-28 Minutes and Resolution from District's September 18, 2018 Meetings

- Exhibit A-29 Letter from B. Sledge to J. Walker dated Nov. 27, 2018 plus enclosures  
Letter from J. Walker to B. Sledge dated December 14, 2018
- Exhibit A-30 Letter from K. Jones to J. Walker dated Oct. 15, 2018
- Exhibit A-31 Draft management approved on Sept. 18, 2018 for submission to TWDB  
E-mail chain dated August through September 2018 by and between W. Oliver, K. Jones and S. Allen and TWDB's "Lone Star GCD Groundwater Management Plan Pre-Review 1 Recommendation Report 09/07/2018 (SA, DT, RB)"
- Exhibit A-32 Minutes from the District's Meeting dated Dec. 18, 2018
- Exhibit A-33 Letter from S. Reiter to J. Walker dated March 14, 2019 with March 12, 2019 Management Plan enclosed
- Exhibit A-34 Letter from J. Houston to J. Walker dated March 11, 2019  
Letter from J. Stinson to J. Walker dated April 10, 2019  
Letter from M. Jones to J. Walker dated April 18, 2019
- Exhibit A-35 Letter from S. Reese to J. Walker dated April 18, 2019
- Exhibit A-36 Letter from J. Walker to S. Reiter dated May 16, 2019
- Exhibit A-37 Letter from S. Reiter to J. Walker dated May 23, 2019 with enclosed Technical Memo and revised draft plan
- Exhibit A-38 TWDB's "Draft Lone Star GCD Groundwater Management Plan Pre-Review 1 Recommendation Report 6/24/19
- Exhibit A-39 Technical Review of the 2010 Desired Future Conditions dated August 8, 2019
- Exhibit A-40 Resolution from City of Conroe dated July 11, 2019  
Resolution from City of Shenandoah dated July 24, 2019

**Exhibit B: Select Provisions of Chapter 36 and TWDB Rules**

1. Tex. Water Code § 6.002
2. Tex. Water Code § 6.011

3. Tex. Water Code § 36.1071
4. Tex. Water Code § 36.1072
5. Tex. Water Code § 36.108
6. Tex. Water Code § 36.1081
7. Tex. Water Code § 36.1082
8. Tex. Water Code § 36.1083
9. Tex. Water Code § 36.1084
10. Tex. Water Code § 36.1132
11. 31 Tex. Admin. Code 356.50
12. 31 Tex. Admin. Code 356.51
13. 31 Tex. Admin. Code 356.52
14. 31 Tex. Admin. Code 356.53
15. 31 Tex. Admin. Code 356.54
16. 31 Tex. Admin. Code 356.55
17. 31 Tex. Admin. Code 356.56
18. 31 Tex. Admin. Code 356.57

Respectfully Submitted,

**STACEY V. REESE LAW, PLLC**

By: /s/ Stacey V. Reese

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*ATTORNEY FOR LONE STAR  
GROUNDWATER CONSERVATION  
DISTRICT*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served as indicated on August 9, 2019, to the following:

Mr. Jeff Walker  
Executive Administrator  
Texas Water Development Board

*Via E-mail & Hand Delivery*

/s/ Stacey V. Reese

STACEY V. REESE