



**CHARLES SCHWERTNER**

STATE SENATOR • DISTRICT 5

COMMITTEES: HEALTH & HUMAN SERVICES, CHAIR • BUSINESS & COMMERCE • FINANCE • STATE AFFAIRS

August 1, 2018

FILE # ML-48401-18

I.D. # 48401

RQ-0241-KP

The Honorable Ken Paxton  
Office of the Attorney General of Texas  
Attention: Opinion Committee  
P.O. Box 12548  
Austin, Texas 78711-2548

Re: Authority of a groundwater conservation district to define, by rule, an “agricultural crop” as “food or fiber commodities grown for resale of commercial purposes that provide food, clothing, or animal feed” and utilize that definition to determine the applicable fee rate for “irrigating agricultural crops.”

Dear Attorney General Paxton,

With this letter, I respectfully ask that you provide a formal written opinion regarding the following question:

**Whether a groundwater conservation district has the authority to define, by rule, an “agricultural crop” as “food or fiber commodities grown for resale of commercial purposes that provide food, clothing, or animal feed” and utilize that definition to determine the applicable fee rate for “irrigating agricultural crops.”**

**Background**

The Mid-East Texas Groundwater Conservation District (“District”) is a groundwater conservation district created under the Texas Constitution<sup>1</sup> and subject to Chapter 8866 of the Special District Local Laws Code (“District’s Enabling Act”)<sup>2</sup> and Chapter 36 of the Texas Water Code.<sup>3</sup> It serves Leon, Madison and Freestone counties.<sup>4</sup> The District’s Enabling Act allows the District to impose a reasonable fee based on the actual, authorized, or anticipated amount of water

<sup>1</sup> Tex. Const. art. XVI, § 59

<sup>2</sup> Tex. Special District Local Laws Code § 8866.002

<sup>3</sup> Tex. Water Code § 36.0015

<sup>4</sup> Tex. Special District Local Laws Code § 8866.004

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to be withdrawn from the well<sup>5</sup> with a rate cap of 25 cents per acre-foot for water used for irrigating agricultural crops.<sup>6</sup>

The District rules follow the District's Enabling Act, establishing fees for groundwater used to irrigate agricultural crops.<sup>7</sup> However, neither the District's Enabling Act nor Chapter 36, Water Code, define what constitutes irrigating an "agricultural crop." In its rules, the District has defined the term "Agricultural Crop" as "*food or fiber commodities grown for resale of commercial purposes that provide food, clothing, or animal feed.*"<sup>8</sup>

Mr. Wittig, the owner of a turf farm, has objected to the definition of "agricultural crop" in the District rules and has argued that groundwater withdrawn for the purpose of watering turf may only be assessed the rate applicable to agricultural crops. Mr. Wittig recently obtained a drilling and production permit from the District and has agreed to abide by the results of this opinion request, as has the District. The District will be sending out fee bills in September, so if possible the parties would appreciate receiving an opinion response before the end of September.

### Discussion

The District fees are capped at 25 cents per acre-foot for water used for irrigating agricultural crops and 17 cents per thousand gallons for water used for any other purpose (roughly the equivalent of \$55.42 per acre-foot).<sup>9</sup> Because "agricultural crop" is not a defined term in either the District's Enabling Act or Chapter 36 of the Water Code, the District used its rulemaking authority<sup>10</sup> to adopt a definition.

Chapter 36 of the Water Code defines "agriculture" to mean "any of the following activities:

- (A) cultivating the soil to produce crops for human food, animal feed, or planting seed or for the production of fibers;
- (B) the practice of floriculture, viticulture, silviculture, and horticulture, including the cultivation of plants in containers or nonsoil media, by a nursery grower;
- (C) raising, feeding, or keeping animals for breeding purposes or for the production of food or fiber, leather, pelts, or other tangible products having a commercial value;
- (D) planting cover crops, including cover crops cultivated for transplantation, or leaving land idle for the purpose of participating in any governmental program or normal crop or livestock rotation procedure;
- (E) wildlife management; and
- (F) raising or keeping equine animals."<sup>11</sup>

<sup>5</sup> Tex. Special District Local Laws Code § 8866.151(a)(2)

<sup>6</sup> Tex. Special District Local Laws Code § 8866.151(b)(2)

<sup>7</sup> Tex. Special District Local Laws Code § 8866.151(b); Mid-East Texas Groundwater Conservation District Rule 9.1B

<sup>8</sup> Mid-East Texas Groundwater Conservation District Rule 2

<sup>9</sup> Tex. Special District Local Laws Code § 8866.151(b)

<sup>10</sup> Tex. Water Code § 36.101

<sup>11</sup> Tex. Water Code § 36.001(19)

Chapter 36 further defines "agricultural use" as "any use or activity involving agriculture, including irrigation."<sup>12</sup>

The District has taken the position that it may use its own rule specifically defining "agricultural crop" as a term separate and apart from the definition given to "agriculture" in the Texas Water Code, and that turf farming does not qualify as irrigating an agricultural crop. The landowner has taken the opposite position that the Groundwater Conservation District may not more narrowly define "agricultural crop" than the Texas Water Code's definition of "agriculture," that turf farming falls within the Water Code's definition, and that because turf farming requires irrigation it must be included in the District's definition of "agricultural crop."

The Agriculture Code makes it clear that turf grass is a nursery product, as defined in §71.041.<sup>13</sup> The Water Code defines agriculture to include "horticulture, including the cultivation of plants in containers or nonsoil media, by a nursery grower."<sup>14</sup>

Additionally, the Texas Comptroller's Manual for the Appraisal of Agriculture Land includes growing sod within the definition of an agricultural use as horticulture for the purposes of qualifying for agricultural appraisal.<sup>15</sup>

With this in mind, please provide your opinion on the following question:

Is the District required to include growing turf grass as an irrigated agricultural crop subject to the lower fee rate cap consistent with Chapter 36.19 of the Water Code or may it impose its own definition through its rulemaking authority?

Thank you very much for your time and attention to this matter. Should your office require further information to clarify the nature of this request, please do not hesitate to contact me.

Respectfully,



Charles Schwertner  
State Senator  
Chair, Senate Committee on Health and Human Services

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<sup>12</sup> Tex. Water Code § 36.001(20)

<sup>13</sup> Tex. Agriculture Code § 71.041

<sup>14</sup> Tex. Water Code § 36.001(19)

<sup>15</sup> Glenn Hegar, *Manual for the Appraisal of Agricultural Land*, (2017)