



Senate Committee on Agriculture

Senator Bob Hall, Chairman

Members: Senator José Rodríguez, Vice-Chair; Senator Juan "Chuy" Hinojosa; Senator Charles Perry; Senator Charles Schwertner;

RQ-0274-KP

February 14, 2019

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

FILE # ML-48506-19
I.D. # 48506

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 proceed with RQ-0241, originally submitted by Senator Schwertner in August of 2018, 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 and subject to Chapter 8866 of the Special District Local Laws Code ("District Enabling Act") and Chapter 36 of the Texas Water Code. It serves Leon, Madison and Freestone counties. The District has the statutory right and

1 Tex. Const. art. XVI, § 59
2 Tex. Special District Local Laws Code § 8866.002
3 Tex. Water Code § 36.0015
4 Tex. Special District Local Laws Code § 8866.004



power to make and enforce rules relating to regulating groundwater production and permitting.⁵ The District's Enabling Act also allows the District to impose a reasonable fee based on the actual, authorized, or anticipated amount of water to be withdrawn from the well⁶ with a rate cap of 25 cents per acre-foot of water used for irrigating agricultural crops.⁷

The District has adopted rules governing the issuance of permits and payment of associated fees. The District may not impose property taxes.⁸

The District rules follow the District Enabling Act establishing fees for groundwater used to irrigate agricultural crops.⁹ Neither the District's Enabling Act nor Chapter 36, Water Code, define what constitutes irrigating an "agricultural crop."¹⁰ 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.*"¹¹

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 must clearly define what constitutes an "agricultural crop" to assess the proper fee rate. The District fees are capped at 25 cents per acre-foot of water used for irrigating agricultural crops and 17 cents per thousand gallons of water used for any other purpose (roughly the equivalent of \$55.42 per acre-foot).¹² 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 authority¹³ to adopt a definition.

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

⁵ See Tex. Special District Local Laws Code § 8866.101; Tex. Water Code § 36.101

⁶ Tex. Special District Local Laws Code § 8866.151(a)(2)

⁷ Tex. Special District Local Laws Code § 8866.151(b)(2)

⁸ Tex. Special District Local Laws Code § 8866.152

⁹ Tex. Special District Local Laws Code § 8866.151(b); Mid-East Texas Groundwater Conservation District Rule 9.1B

¹⁰ Note that Chapter 36 sets different fee rate caps and uses different terminology for the cap on groundwater produced for agricultural use: "Production fees shall not exceed:

(1) \$1 per acre-foot payable annually for water used for agricultural use; or
(2) \$10 per acre-foot payable annually for water used for any other purpose."

Tex. Water Code § 36.205(c)(emphasis added)

¹¹ Mid-East Texas Groundwater Conservation District Rule 2

¹² Tex. Special District Local Laws Code § 8866.151(b)

¹³ Tex. Water Code § 36.101

- (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.”¹⁴

Chapter 36 further defines “agricultural use” as “any use or activity involving agriculture, including irrigation.”¹⁵

The District’s Enabling Act only applies the lower fee rate to “irrigating agricultural crops,” which does not apply to every type of agriculture or agricultural use. For example, groundwater used for raising, feeding, or keeping animals is clearly within the definition of agriculture under Subdivision C of the definition that activity is also clearly not irrigating a crop and therefore would not qualify for the lower fee rate. Mr. Wittig has argued that turf farming is a “cover crop” within the definition in Subdivision D, and because turf grass is irrigated the District must consider his operations as raising an “agricultural crop.”

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 does not constitute a “cover crop” and therefore 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.”

I ask your opinion as to whether the District may continue to use its definition of “agricultural crop” in interpreting its own rules and Tex. Special District Local Laws Code § 8866.151(b) to determine whether the water usage fees set forth in Tex. Special District Local Laws Code § 8866.151(b)(2) and Mid-East Texas Groundwater Conservation District Rule 9.1(B)(2) applies to groundwater used for growing turf. 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 of the Water Code or may it impose its own definition through its rulemaking authority?

¹⁴ Tex. Water Code § 36.001(19)

¹⁵ Tex. Water Code § 36.001(20)

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

Respectfully,

A handwritten signature in cursive script that reads "Bob Hall".

Bob Hall
State Senator
Chair, Senate Committee on Agriculture