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OPINION COMMITTEE



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BILL CALLEGARI, P.E.
STATE REPRESENTATIVE

RQ-0003-KP

FILE # M2-47679-15

I.D. # 47679

The Honorable Greg Abbott
Attorney General of Texas
Attention: Opinion Committee
PO Box 12548
Austin, Texas 78711-2548

Opinion.Committee@texasattorneygeneral.gov

Re: Request for Opinion regarding authority of Barton Springs-Edwards Aquifer Conservation District to regulate aquifers other than the Barton Springs Segment of the Edwards Aquifer, including the Trinity Aquifer, within the District's Geographic boundaries

Dear General Abbott:

Pursuant to the authority to issue advisory opinions, Article IV Section 22, *Texas Constitution* and Section 402.041 *et seq.*, *Texas Gov't Code*, I am writing this request for an opinion regarding the authority of the Barton Springs/Edwards Aquifer Conservation District ("the District") to regulate aquifers other than the Barton Springs Segment of the Edwards Aquifer, including the Trinity Aquifer. It has come to my attention that the District either has extended, or is attempting to extend, its jurisdiction beyond the Barton Springs Segment of the Edwards Aquifer to other formations in excess of the language of its creation and enabling authorizations. Perhaps the simplest example of this is from the District's website under "History" which states in relevant part:

"While the jurisdictional area is defined by boundaries of the Edwards Aquifer, the District regulates groundwater from all aquifers in this area." (Copy of "History" and "Permitting" from the website are attached as Attachment A)

Further, according to the District's website, the District requires a permit for wells that are drilled into the Trinity Aquifer (including Middle Trinity and Lower Trinity formations) that are within the District's geographical boundary.

Other examples include "Management Plans" that the District has submitted to the Texas Water Development ("TWDB" or "the Board") where the District claims its authority exceeds the Barton Springs Segment of the Edwards Aquifer and extends to "... all other relevant groundwater resources located within the District's boundaries." (Relevant portions of 2013 District Management Plan attached as Attachment B) While the Board approved that Management Plan, its effect does not include the lawful expansion of the District's jurisdiction. The District's website indicates that it requires permits for pumping in aquifers other than the Barton Springs Segment of the Edwards. This includes Middle and Lower Trinity formations. (Attachment A "Permitting")

There are many, including myself, who believe that the District's jurisdiction is limited to the aquifer identified in its creation and enabling documents, *i.e.*, the Barton Springs Segment of the Edwards Aquifer. I believe that the District's creation documents limit the District's power to that particular segment. The Texas Legislature has not acted to expand the District's powers; nor has the Texas Commission on Environmental Quality, successor agency to the TWC. Any attempted expansion by the District amounts to a fine example of self-induced, illegal, "Mission Creep".

The question presented to you is "whether the Barton Springs/Edwards Aquifer Conservation District is authorized to regulate groundwater within its geographical boundaries other than the Barton Springs Segment of the Edwards Aquifer?"

Background and District's Creation

A glaring error in the District's website under "History" is that the District claims that the 70th Texas Legislature created the District in 1987 pursuant to SB 988 as a groundwater conservation district "... under what is now Chapter 36, with a directive to conserve, protect, and enhance the groundwater resources in its jurisdictional area". This is not a correct statement of history. The Texas Water Commission ("TWC" or "Commission"), predecessor agency to the Texas Commission on Environmental Quality ("TCEQ"), created the District by TWC orders August 15, 1986 and November 19, 1986. This distinction is significant as will be discussed below. The Legislature's action in 1987 was a "nonsubstantive" codification of the TWC's creation of the District.

In 1986, the TWC, in response to a petition filed in November 1985 by various entities, including five municipalities, issued two orders related to the District's creation. The relevant TWC Orders show that the agency bifurcated the hearing process—the first hearing and Order related to designation of an underground water management area. The second phase concerned whether to create a groundwater conservation district over the underground water management area.

The TWC, on August 15, 1986, designated the Barton Springs-Edwards Aquifer Management Area. A copy of the August 15, 1986 order, Order No. 86-304, is attached as "Attachment C". In issuing the order, the Commission specifically found that the Petition requested the Commission to "...delineate the boundaries of the Barton Springs-associated Edwards Aquifer, or underground reservoir, and to create an underground water conservation district for that Aquifer." (Finding of Fact No. 1, Attachment C) The Commission further found an underground reservoir exists in the Edwards and associated limestones in Southern Travis County and northern Hays County and that the area is approximately 155 square miles. This is known as Subdivision Number One of the Edwards Aquifer as designated by the Texas Board of Water Engineers in 1957. (Finding of Facts Nos. 11 and 12, Attachment C)

On November 19, 1986, the TWC created the Barton Springs-Edwards Aquifer Conservation District (Attachment D). In issuing its creation Order, the TWC found that the Barton Springs-

Edwards Aquifer Management Area is a hydrologically discrete underground reservoir (Finding of Fact No. 6, Attachment D). Decretal Provision No. 1 of Attachment D limited the boundaries to the Barton-Springs Edwards Aquifer Management Area designated by Order No. 86-304.

Among the significant points is that neither the Petition to create the District, nor the TWC orders, discussed or contemplated that the District would include, manage or regulate any formations other than the Barton Springs Segment of the Edwards Aquifer. Further, the fact that TWC expressly found that the Barton Springs segment is a specific subdivision of an aquifer system is likewise vital. Texas Water Code Section 35.002(7) defines a "subdivision" as follows:

"Subdivision of a groundwater reservoir" means a definable part of a groundwater reservoir in which the groundwater supply will not be appreciably affected by withdrawing water from any other part of the reservoir, as indicated by known geological and hydrological conditions and relationships and on foreseeable economic development at the time the subdivision is designated or altered.

The TWC clearly limited the Management Area and the District to Subdivision No. 1 of the Edwards Aquifer (also referred to the Barton Springs segment of the Edwards Aquifer). *See, also*, Attachment D, Finding of Fact 8c.:

"The District will regulate pumpage of the **Aquifer** and implement other means of conservation." (emphasis added)

Nowhere in the TWC Orders was the newly created Barton Springs-Edwards Aquifer Conservation District authorized to regulate waters *outside* of the hydrogeologically discrete underground reservoir known as "the Barton Springs Segment of the Edwards Aquifer." Importantly, the term "aquifer" in the TWC Orders does not include "other lower aquifer bodies" that might lie within the geographical boundaries of the Barton Springs-Edwards Aquifer Conservation District

Yet, as discussed at the outset, the District's website claims that the 70th Texas Legislature created the District as a Groundwater Conservation District. An examination of the facts tells another story. SB 988, 70th Legislature, did not create the District. Instead, SB 988 merely affirmed, ratified and validated the creation of the District under Chapter 52, *Water Code*, (now Chapter 36), pursuant to the TWC orders of April 9, 1986, August 15, 1986 and November 19, 1986. Of course, those orders refer only to the Barton Springs Segment of the Edwards Aquifer. (SB 988 is attached as Attachment E) Even assuming legislative creation in 1987 as a "Groundwater Conservation District" it would not give the District jurisdiction over aquifers other than the Barton Springs segment of the Edwards Aquifer.

Clearly, the TWC's focus was on the Barton Springs segment of the Edwards Aquifer and in managing that formation. The TWC expressly limited the management area to the area in its August 15, 1986 and November 19, 1986 orders. SB 988 did not extend or grant the District any

additional power or authority, nor did it expand the District's limited jurisdiction to include any groundwater formation beyond the Barton Springs segment of the Edwards Aquifer.

Since SB 988 in 1987, there have been several legislative enactments involving the District. None of that legislation granted the District more authority or jurisdiction than the TWC granted upon the District's creation. Further, the District's geographical surface boundaries have changed, but the fact that they were created to regulate one specific aquifer has not.

The issue might arise that the District's current statutory framework, Section 8802.001 *et seq*, *Special District and Local Laws Code*, grants the District the powers of a groundwater conservation district provided by Chapter 36, *Water Code* (Section 8802.101, *Special District Local Laws Code*). The point might further be argued that the TWDB has approved the District's Management Plan, which arguably shows that the District regulates or "manages" certain formations in the Trinity Aquifer.

Both arguments, if made, would ignore the fact that the State of Texas created the District for one reason—to manage the groundwater in the Barton Springs segment of the Edwards Aquifer. *See* Attachments C and D. The only issue involved in the District's creation was over that formation and that formation only. The jurisdiction of the District, if it was to be created, was never at issue – it was always express limited to the Barton Springs segment of the Edwards Aquifer. Further, the November 19, 1986 TWC Order creating the District gave it powers of a groundwater district but would have been limited to that segment of the Edwards Aquifer. Similarly, SB 988 in the 70th Legislature, validated the TWC creation. It did *not* add to, or expand the District's jurisdiction to include any other groundwater formation or aquifer.

Later bills, such as HB 2015, 79th Legislative Session, codified the District in the Special District and Local Laws Code. These additional legislative changes were all non-substantive and made with conforming changes. However, being non-substantive changes, there was not any additional power or expanded jurisdiction given to the District.

In summation, I request that you issue an opinion on the question of whether the Barton Springs/Edwards Aquifer Conservation District has the authority to regulate aquifers other than the Barton Springs Segment of the Edwards Aquifer, including the Trinity Aquifer. If you have any questions or would like additional information, please do not hesitate to contact me at 512-463-0528.

Sincerely,


W.A. Callegari