

REGION C WATER PLANNING GROUP

Senate Bill 1 Fourth Round of Regional Water Planning - Texas Water Development Board

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June 20, 2014

Office of the General Counsel
ATTN: Mr. Les Trobman
Texas Water Development Board
Austin, Texas 78711-3231

RE: Conflict between Regional Water Plans for Regions C and D

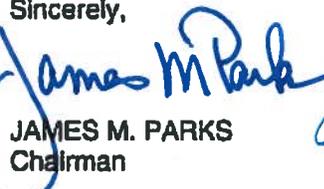
Dear Mr. Trobman:

On behalf of the Region C Water Planning Group, please find attached a brief relating to the TWDB Executive Administrator's May 19, 2014, Final Recommendation on the Conflict between Regional Water Plans for Regions C and D. This brief was authorized by vote of the Region C Water Planning Group at a publicly posted meeting held on May 19, 2014. At this meeting, the planning group designated the current Region C officers, who are the signatories to this letter, to prepare the draft. The officers were further authorized to prepare and submit to the TWDB a response to briefs by 5:00 p.m. on Monday, July 7, 2014. In addition, the officers were authorized to appear and give testimony at a public TWDB Board meeting concerning this matter, when scheduled.

Copies of this letter and brief have been sent to all parties listed on the mailing list provided in the May 20, 2014, TWDB letter of instruction. A copy has also been provided to all voting members of the Region C Water Planning Group.

Thank you for this opportunity to respond. If you have any questions, please contact Mr. Jim Parks at (972) 442-5405.

Sincerely,



JAMES M. PARKS
Chairman



JODY PUCKETT
Vice Chairman



RUSSELL LAUGHLIN
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Enclosure

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IN RE THE INTERREGIONAL CONFLICT BETWEEN THE REGION C AND REGION D REGIONAL WATER PLANNING GROUPS	§ § § §	BEFORE THE TEXAS WATER DEVELOPMENT BOARD
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**BRIEF OF THE REGION C REGIONAL WATER PLANNING GROUP ON
THE RESOLUTION OF INTERREGIONAL CONFLICT**

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I. The Texas Water Development Board should resolve any conflict regarding the proposed Marvin Nichols Reservoir water supply strategy by supporting Region C’s position on the project.

The Texas Water Development Board has broad discretion in resolving interregional conflicts that cannot be resolved by the pertinent regions.¹ The mediation between the Region C and Region D Regional Water Planning Groups² regarding the proposed Marvin Nichols Reservoir project (“Marvin Nichols”) was unsuccessful. The Board must now resolve the conflict.³ May the Board resolve the conflict by supporting Region C’s position on the Marvin Nichols Reservoir project?

It unquestionably may, and it should.

II. The law and sound public policy direct the Texas Water Development Board to support the position of Region C regarding the proposed Marvin Nichols Reservoir water supply strategy.

The standard by which the Board must resolve the conflict is one of reasonableness.⁴ Region C’s recommendation of Marvin Nichols as a water supply strategy is consistent with all applicable statutory and administrative criteria for regional water planning. Conversely, Region D’s position that Marvin Nichols should be excluded from the 2011 Region C Regional Water Plan (and, therefore, the 2012 State Water Plan) is inconsistent with the applicable statutory and administrative criteria for regional water planning. As discussed in greater detail below, the only reasonable way the Board can resolve this conflict is to support Region C’s position on Marvin

¹ TEX. WATER CODE § 16.053(h)(6).

² The Region C and D Regional Water Planning Groups, Regional Water Planning Areas, and Regional Water Plans will be interchangeably referred to herein as “Region C” and “Region D”, respectively.

³ TEX. WATER CODE § 16.053(h)(6).

⁴ See *Gilder v. Meno*, 926 S.W.2d 357, 365 (Tex. App.—Austin 1996, writ denied).

Nichols. Adopting Region D’s recommendation would simply be unreasonable, if not arbitrary, capricious, or unlawful.⁵

A. Marvin Nichols is an indispensable component of the Region C Regional Water Plan because there are no reasonable alternatives to such a large potential source of supply.

The Marvin Nichols Reservoir project is not a new concept.⁶ The proposed reservoir has been recommended in some form or another in every State water plan since 1968.⁷ Even as recently as 2001, both Region C and Region D agreed that Marvin Nichols should be constructed to meet the growing water demands of the North Texas region.⁸

The reason is straightforward. It is hardly a secret—and not subject to any reasonable debate—that Marvin Nichols accounts for approximately 28 percent of the additional water supply that must be developed to bridge Region C’s projected 50-year supply-demand gap.⁹ With an anticipated annual firm yield for Region C of approximately 489,840 acre feet, the Marvin Nichols Reservoir project is unrivaled in scale of reliable yield.¹⁰ As the 2011 Region C Regional Water Plan (“Region C plan”) demonstrates, the Region C stakeholders have been unable to find any meaningful comparison in their efforts to identify a reasonable alternative to the Marvin Nichols Reservoir project.

In response to critics that suggest Region C should consider more conservation, water reuse, and expansion of existing supplies to address its projected water supply deficit, the 2011

⁵ See *G.E. American Comm’n v. Galveston Cent. Appraisal Dist.*, 979 S.W.2d 761, 765 (Tex. App.—Houston [14th Dist.] 1998, no pet. h.).

⁶ See Texas Water Development Board, *The State Water Plan*, November 1968, at 53.

⁷ *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 474 (Tex.2012).

⁸ Executive Administrator’s Recommendation Memorandum to the Board Members, May 19, 2014, at 2.

⁹ TEX. WATER DEV. BD., 2012 WATER FOR TEXAS (2012), http://www.twdb.state.tx.us/publications/state_water_plan/2012/2012_SWP.pdf, at 46; 2011 REGION C WATER PLAN, Vol. 1, at 47-48 [hereinafter *2012 State Water Plan*].

¹⁰ FREESE AND NICHOLS, INC., ET AL., 2011 REGION C WATER PLAN (2011), https://www.twdb.state.tx.us/waterplanning/rwp/plans/2011/C/Region_C_2011_RWPV1.pdf Vol. 1, at 4D.8 [hereinafter *2011 Region C Water Plan*].

Region C Regional Water Plan includes the development of more municipal supplies through conservation and reuse than any other regional water plan in Texas.¹¹ Simply stated, the Marvin Nichols Reservoir project is a critical component of Region C's plan for the future.¹²

Conversely, Region D has no anticipated water supply deficit to overcome. In fact, the Region D stakeholders all seem to agree that the volume of their existing supplies will exceed their anticipated demands for the next 50 years.¹³ Indeed, Region D does not complain that it needs the water supplies to be provided by Marvin Nichols Reservoir to satisfy any unmet demands. Nor does it complain that the development of Marvin Nichols Reservoir will somehow undercut the existing supplies in that region.

The importance of the Marvin Nichols Reservoir to the economy of North Texas is truly indisputable.¹⁴ The North Texas economy is, in turn, vitally important to Texas and the national economy as a whole.¹⁵ Dallas-Fort Worth is the fourth largest metropolitan area in the nation.¹⁶ The population of the North Texas region has grown by 2.7 percent annually, on average, from 1940 to 2008, and it is still growing rapidly.¹⁷ One example of Region C's robust economy is the recent decision of the North American subsidiary of Toyota, the largest automaker in the world, to move its corporate headquarters, and approximately 4,000 employees, to North Texas within

¹¹ See *2011 Region C Water Plan*, *supra* note 10, at ES.7-8. A graph illustrating relative total current and planned reuse among all regions is attached.

¹² See *2012 State Water Plan*, *supra* note 9, at 47-48.

¹³ *Id.* at 53.

¹⁴ *2011 Region C Water Plan*, *supra* note 10, at ES.7.

¹⁵ Consider that the Dallas/Fort Worth metropolitan area has the largest concentration of corporate headquarters in the United States. Steve Brown, *Vacant Plano building to become data center*, Dallas Morning News, May 17, 2011, <http://www.dallasnews.com/business/commercial-real-estate/20110517-vacant-plano-building-to-become-data-center.ece>.

¹⁶ NORTH TEXAS COMMISSION, *Top Metropolitan Areas*, <http://www.ntc-dfw.org/northtexas/poplargestmetro.html> (last visited June 10, 2014).

¹⁷ *2011 Region C Water Plan*, *supra* note 10, at 1.1.

the next two years.¹⁸ Failure to meet water supply demands from entities like Toyota and their employees would potentially result in denials of service from water suppliers, which would chill economic growth throughout Region C, and possibly throughout all of Texas.

If Region C does not develop sufficient additional water supply to meet its anticipated water demands, it stands to suffer a devastating \$64 billion annual impact to its economy.¹⁹ Marvin Nichols represents over a quarter of the water needed by Region C to address the projected shortfall in water supplies during the 50-year planning period.²⁰ This enormous volume of water cannot be replaced in any reasonably efficient way.

B. The Board may resolve the conflict with Region D by supporting Region C's position on Marvin Nichols because the Legislature has granted the Board broad discretion to do so.

Chapter 16 of the Texas Water Code directs the Board to “prepare, develop, formulate, and adopt a comprehensive state water plan that incorporates the regional water plans” every five years.²¹ Further,

“The state water plan shall provide for the orderly development, management, and conservation of water resources and preparation for and response to drought conditions, in order that sufficient water will be available at a reasonable cost to ensure public health, safety, and welfare; further economic development; and protect the agricultural and natural resources of the entire state.”²²

State water planning begins at the regional planning group level, ensuring that the process is shaped to a large degree by the economic interests prevailing in the designated regional planning areas. Consequently, the State Water Plan is largely a compilation of the 16 regional water plan

¹⁸ Steve Brown, *Toyota's Plano move to bring 4,000 jobs from California, New York, Kentucky*, Dallas Morning News, April 28, 2014, <http://www.dallasnews.com/business/business-headlines/20140428-toyota-s-plano-move-to-bring-4000-jobs-from-california-new-york-kentucky.ece>.

¹⁹ *2011 Region C Water Plan*, *supra* note 10 at ES.7.

²⁰ *2012 State Water Plan*, *supra* note 9, at 47-48.

²¹ TEX. WATER CODE § 16.051(a).

²² *Id.*

recommendations. The criteria by which regional water plans are to be developed are also outlined in Chapter 16.²³ The Board is charged with approving a Regional Water Plan, but only after determining that 1) all interregional conflicts involving a regional water planning area have been resolved, 2) the plan includes appropriate water conservation and drought contingency provisions, and 3) the plan is consistent with long-term protection of the state's water resources, agricultural resources, and natural resources as embodied in guidance principles adopted by the Board.²⁴ Where an interregional conflict exists, "the board shall facilitate coordination between the involved regions to resolve the conflict. If conflict remains, the board shall resolve the conflict."²⁵

After initially recommending the Marvin Nichols Reservoir project in its 2001 Regional Water Plan, Region D later changed that plan to reflect a newfound opposition to the project.²⁶ That opposition persists to date.²⁷

As observed by the Executive Administrator in his recommendation memorandum, the conflict falls outside of the Board's current definition of a conflict. The Eastland Court of Appeals has determined that an interregional conflict exists, nevertheless.²⁸ It must be resolved pursuant to Tex. Water Code § 16.053. The Texas Legislature has granted the Board broad discretion in resolving interregional conflicts when a coordinated resolution cannot be achieved. "If an interregional conflict exists, the board shall facilitate coordination between the involved

²³ *Id.* § 16.053(e).

²⁴ *Id.* § 16.053(h)(7).

²⁵ *Id.* § 16.053(h)(6).

²⁶ Executive Administrator's Recommendation Memorandum to the Board Members, May 19, 2014, at 2.

²⁷ BUCHER WILLIS & RATLIFF CORPORATION, ET AL., REGIONAL WATER PLAN PREPARED FOR REGION D – NORTH EAST TEXAS REGIONAL WATER PLANNING GROUP (2010), https://www.twdb.state.tx.us/waterplanning/rwp/plans/2011/D/Region_D_2011_RWPV1.pdf, Vol. 1, at 8-33, 8-36 [hereinafter *2011 Region D Water Plan*].

²⁸ *Ward Timber*, 411 S.W.3d at 575.

regions to resolve the conflict. If conflict remains, *the board shall resolve the conflict.*²⁹ This provision cannot be read as anything other than an investiture in the Board of full discretion in resolving interregional conflicts.

The Executive Administrator identified three alternative options for resolution:

- 1) Reduce the proposed footprint of Marvin Nichols;
- 2) Remove Marvin Nichols from the Region C plan for the current planning cycle; and
- 3) Retain Marvin Nichols as a recommended strategy, instruct Region C to revise its plan to acknowledge the steps taken to resolve the conflict, and direct Region D to remove references to the conflict from the Region D Regional Water Plan.

The Executive Administrator rejected option one. Region C agrees with the Executive Administrator's position here. The first option simply would not resolve the conflict. Region D is particularly concerned with the alleged loss of agricultural resources consumed by the footprint of the reservoir and potential related mitigation areas. Assuming such losses would occur, a smaller reservoir would still consume those resources, while serving only to create a greater deficit in Region C planning. Meanwhile, the Region C plan would be undermined because its projected demands would not be satisfied.

The Executive Administrator also rejected option two. Region C agrees with the Executive Administrator's position here. The second option is simply not reasonable because efforts to replace Marvin Nichols in the Region C plan would be extraordinarily costly both economically and environmentally.

The Marvin Nichols Reservoir project is obviously not the only water supply strategy identified or recommended in the Region C plan. The plan identifies a number of strategies for the development of new large supplies to meet projected demands of numerous water suppliers and users in North Texas. The Executive Administrator's recommendation names a few of those

²⁹ TEX. WATER CODE § 16.053(h)(6) (emphasis added).

supplies: George Parkhouse Reservoirs I and II, Toledo Bend Reservoir, and increasing the conservation level of Wright Patman Lake. However, none of the strategies identified in the Region C plan, including those mentioned by the Executive Administrator, could serve to replace Marvin Nichols. For starters, the Toledo Bend and Wright Patman projects are already recommended strategies for new water development in Region C.³⁰ The George Parkhouse projects would capture water already allocated to other recommended strategies, including Marvin Nichols Reservoir,³¹ but would yield less than half the amount of supply for Region C than would Marvin Nichols.³² Similarly, obtaining water from Lake Texoma is already a recommended supply³³ and, as such, cannot substitute for Marvin Nichols. While additional water could be obtained from Lake Texoma in the future, reallocating the currently unused water in that reservoir would literally take an act of Congress.³⁴ Region C simply cannot plan on such an uncertain supply.

Under the second option, rather than constructing one reservoir, Region C would be forced to recommend construction or expansion of a series of reservoirs and other infrastructure that would be considerably more expensive and would be more environmentally costly than the current proposal. That environmental toll is unnecessary because of Marvin Nichols. It would be unreasonable to shift the environmental impact of Marvin Nichols to one of greater scale at greater expense. The costliness of alternatives in comparison with Marvin Nichols makes them impractical if not unfeasible. The Region C plan includes every feasible water supply strategy available to meet the needs of the region. Stated simply, without Marvin Nichols, the Region C plan would not be nearly as good of a plan.

³⁰ *Region C Water Plan, supra* note 10 at 4D.7-.10.

³¹ *Id.* at 4D.15

³² *Id.* at 4D.5-.6.

³³ *Id.* at 4D.12.

³⁴ *Id.* at 4D.5.

The Executive Administrator recommends the third option. Region C agrees with the Executive Administrator's position here. Retaining Marvin Nichols Reservoir as a recommended strategy for Region C is the only feasible way to resolve the conflict in a manner that provides sufficient water to ensure public health, safety, and welfare concerns in Region C, furthers economic development in both Regions C and D, and protects the agricultural and natural resources of the entire state.³⁵

The Eastland Court of Appeals emphasized that the Board, in resolving the interregional conflict, should act in the manner that is most consistent with protecting the state's agricultural and natural resources.³⁶ The Court also recognized that the Legislature intended for the Board to balance water planning strategies with impacts on agricultural, economic, and natural resources.³⁷ The conflict between Regions C and D presents the Board with an opportunity to do precisely that—balance water supply needs, economic interests, agricultural resources, and natural resources. While Marvin Nichols will doubtlessly impact some amount of agricultural and natural resources—as any new reservoir would, the vast majority of agricultural and natural resources in Region D will not be affected by the project. Conversely, the elimination of Marvin Nichols as a water supply strategy would severely impact the economy of the entire Region C planning area and the state.

The Executive Administrator's recommendation memorandum suggests that Marvin Nichols could be treated as an alternative strategy pending an accelerated evaluation of developing other water supply strategies, including Wright Patman Reservoir, Toledo Bend Reservoir, and George Parkhouse Reservoir. Those strategies are only included as alternatives in the Region C plan because they are considerably more costly both economically and

³⁵ See TEX. WATER CODE § 16.051(a).

³⁶ *Ward Timber*, 411 S.W.3d at 575.

³⁷ *Id.* at 570.

environmentally than Marvin Nichols. Again, shifting the economic and environmental tolls of Marvin Nichols to projects that would result in greater economic and environmental cost for the same amount of water is simply unreasonable. The Region C plan already identifies every feasible water supply strategy it anticipates will be available to meet expected demands. Additionally, removing Marvin Nichols from the 2012 State Water Plan, or even converting it to an alternative strategy, would likely permanently undermine the project because it could become eligible for federal mitigation bank permitting.³⁸ Were that to happen, Marvin Nichols could succumb to the same fate as the Lake Fastrill and Waters Bluff Reservoir projects.³⁹

The Executive Administrator also recommends that the Board instruct Region C to accelerate consideration of alternative strategies to meet needs where uncertainties exist regarding current strategies. So long as Marvin Nichols remains part of the Region C and State Water Plans, no uncertainties exist. The purpose of the regional planning process is to assure adequate water supplies for a region through the drought of record. Region C has done that. Moreover, Region C has identified potential alternative strategies to ensure that water remain available even if a drought were to persist to a point worse than the drought of record. Nevertheless, the five year regional planning cycle continues to require Region C to conduct a near constant process of evaluating the feasibility of every reasonable alternative supply strategy.

C. The regional water planning process is not the legally proper venue for challenging Marvin Nichols because the Legislature has delegated that responsibility exclusively to the Texas Commission on Environmental Quality.

The Board is the state agency responsible for water planning and administering water financing in the state.⁴⁰ The Board does not regulate water use. As such, the Board is not charged

³⁸ See *Hearts Bluff*, 381 S.W.3d at 475.

³⁹ See *Sabine River Auth. v. U.S. Dep't of the Interior*, 951 F.2d 669, 673 (5th Cir. 1992); see *City of Dallas v. Hall*, 562 F.3d 712, 716 (5th Cir. 2009).

⁴⁰ TEX. WATER CODE § 6.011.

with determining the technical merits of any particular water supply project. Rather, the Board is charged by the Legislature with establishing guidance principles for the development of the regional water plans and with reviewing the plans to determine whether they comply with the requirements of Tex. Water Code § 16.053(e).⁴¹ If the Board finds that a regional water plan was developed in accordance with the statutory requirements and administrative guidance principles, then it incorporates the recommended strategies into the state water plan making those strategies eligible for funding assistance.⁴²

Region D's opposition to Marvin Nichols amounts to nothing more than a protest of the merits of Marvin Nichols. The Board is not an adjudicative agency that may hear disputes over proposed water supply projects. The Legislature expressly and exclusively vested the Texas Commission on Environmental Quality with jurisdiction to consider such disputes.⁴³ An entity proposing the construction of a recommended water supply project must seek a permit from the TCEQ and, if authorized by TCEQ, may begin construction without the Board's further involvement or approval.⁴⁴ A challenge to the merits of a particular water supply project is a wholly separate procedure from regional and state water planning.

The Legislature crafted a set of criteria by which each regional water plan shall be developed.⁴⁵ The Legislature directed that each plan:

- 1) be consistent with guidance principles adopted by the Board;
- 2) provide information based on data provided by the Board;
- 3) be consistent with desired future conditions for groundwater;

⁴¹ *Id.* § 16.051(a), (d).

⁴² *Id.* §§ 16.051(a), 16.053(h)(7).

⁴³ *See Subaru of America, Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 221 (Tex. 2002) (explaining that exclusive jurisdiction rests with an administrative agency when a pervasive regulatory scheme, such as water rights permitting, indicates that the Legislature intended that scheme to be the exclusive means of remedying a problem); TEX. WATER CODE §§ 5.013(a)(1), 11.121-.134.

⁴⁴ *See* TEX. WATER CODE §§ 11.121-.134.

⁴⁵ *See id.* § 16.053(e).

- 4) identify a) each source of supply in the planning area, b) factors specific to each source of supply related to drought response, c) actions to be taken as part of the response, and d) existing major water infrastructure facilities to be used during water shortage;
- 5) have specific provisions for water management strategies during drought;
- 6) include but not be limited to consideration of a) any existing water or drought planning efforts, b) approved groundwater conservation district management plans, c) all potentially feasible water management strategies for the region, d) protection of existing water rights in the region, e) regional management of water supplies, f) provision for environmental needs, g) provisions for interbasin transfers, h) voluntary water transfer within the region, and i) emergency transfer of water;
- 7) identify stream segments of unique ecological value and unique value for the construction of reservoirs;
- 8) assess the impact of the plan on ecologically unique stream segments;
- 9) describe the impact of proposed projects on water quality; and
- 10) include information on a) projected water use and conservation, and b) the implementation of state and regional water plan projects.⁴⁶

The Legislature did not include opposition to otherwise feasible strategies for other regions among these criteria. Similarly, the Board has adopted 28 guidance principles for state and regional water planning. It developed the principles subject to an explicit instruction from the Legislature.⁴⁷ Like the Legislature’s directives for regional water plans, the Board’s guidance principles do not include voicing opposition to feasible water supply strategies in other regional water plans.⁴⁸

The statutory construction rule of *ejusdem generis* dictates that lists in a statute refer only to persons or things of the same kind or class.⁴⁹ This includes lists that begin with the term “including but not limited to . . .”⁵⁰ Here, even though the Legislature used the term “not limited to” when outlining the items which must be considered by regional water planning groups during

⁴⁶ *Id.* § 16.053(e).

⁴⁷ *Id.* §§ 16.051(d), .053(e).

⁴⁸ *See* 31 Tex. Admin. Code § 358.3; *see also id.* § 357.20 (adopting state water planning guidance principles for regional water planning).

⁴⁹ *City of Houston v. Cook*, 596 S.W.2d 298, 299.

⁵⁰ *Id.*

the planning process, the provision should not be read to include items that are dissimilar from those included.⁵¹ All of the items listed by the Legislature to be considered and included in the regional water planning process concern evaluation of feasible water supply projects for the relevant regional water planning area, not contravention of particular strategies recommended by other regional water planning groups. Excluding Marvin Nichols from the 2011 Region C plan and the 2012 State Water Plan would require an interpretation that the Legislature intended that regional water plans include protests to another region's feasible water supply strategies. For the reasons noted above, such an interpretation is not in keeping with the spirit of Section 16.053, and would be unreasonable.⁵²

Indeed, under that interpretation, the Board would then have to determine that Region C altogether failed to adhere to the requirements of Section 16.053(e) and the Board's guidance principles in order to exclude Marvin Nichols from the 2012 State Water Plan. However, Region C has clearly adhered to the statutory requirements and administrative guidelines. The only reasonable action the Board may take is to support Region C's recommendation of including Marvin Nichols as a strategy in the 2011 Region C plan and the 2012 State Water Plan.

Supporters of Region D's position have insisted that their purpose is merely "to have the Board resolve conflicts with a goal of a more complete and *balanced* water plan."⁵³ But Region D takes the position that no reservoirs should be built because they are inconsistent with protection of agricultural, environmental, and natural resources.⁵⁴ The Region D Regional Water Plan states that "Region D has identified other areas . . . where additional . . . reservoirs could be developed . . . to provide water for other regions" Unfortunately, the Region D Regional

⁵¹ *See id.*

⁵² *See id.*

⁵³ *Ward Timber*, 411 S.W.3d at 560 (emphasis added).

⁵⁴ *2011 Region D Water Plan*, *supra* note 27, at 8-33.

Water Plan disregards the reality that Region C has already considered every feasible strategy. Instead, Region D advocates that reservoirs should only be a last resort after any other conceivable strategy is pursued. But that belies Region D's ultimate recommendation "that no reservoir sites in the North East Texas Region be designated as unique reservoir sites" because "pursuing *any new reservoir* in the Sulphur River Basin as a water management strategy or an alternative strategy should be viewed as directly inconsistent with the protection of natural resources within the region" ⁵⁵ Such a position does not result in balance. Instead, such a position represents a wholesale rejection of otherwise feasible strategies considering, in a vacuum, only a few of the criteria required by the Legislature and the Board for regional water planning. The Board cannot reasonably accept Region D's position because doing so is not provided for by law and is not in keeping with the criteria required for regional and state water planning.

III. This proceeding is not an adjudication of rights that requires the Board to develop an evidentiary record.

The historical litigiousness of some within Region D should caution the Board to be mindful of the likely standard of review on appeal of a decision in this matter. Judicial review of the Board's resolution of an interregional conflict will likely be governed by the so-called "substantial evidence *de novo*" standard. ⁵⁶ That is, the reviewing court may conduct an evidentiary hearing on the limited issue of whether the facts, as they existed at the time of the agency's decision, reasonably lead to the decision ultimately reached by the agency. ⁵⁷

⁵⁵ *Id.*

⁵⁶ *Gilder*, 926 S.W.2d at 367; Ronald L. Beal, Texas Administrative Practice and Procedure § 13.6, at 13-39 (2009).

⁵⁷ *Board of Trustees of Big Spring Fireman's Relief & Retirement Fund v. Firemen's Pension Comm'r*, 808 S.W.2d 608, 612 (Tex. App.—Austin 1991, no writ).

A substantial evidence *de novo* standard does not require the Board to develop an evidentiary record supporting its decision.⁵⁸ The reviewing court, instead, serves as a fact-finder on the narrow issue described above. The court owes the same deference to the Board as it would if it were bound by the more traditional substantial evidence standard of review.⁵⁹ Specifically, the court may only overrule the Board's decision if it is found to be arbitrary, capricious, or unlawful, based on the facts as they exist at the time of the decision.⁶⁰ Similarly, the court may not simply substitute its judgment for that of the Board.⁶¹ The Board, however, need not build an administrative record.⁶² If the court finds that the Board's decision was reasonable considering all relevant facts, then it must uphold the Board's decision.⁶³

IV. There is only one reasonable way to resolve this conflict.

Opponents of Marvin Nichols seek “only the opportunity for the Region D water planning group to negotiate with the Region C water planning group, under the guidance of the Board, to see if there is a more acceptable alternative to Region D than the Marvin Nichols Reservoir.”⁶⁴ The purpose of their lawsuit against the Board was “only to require the Board to follow the procedures in Section 16.053(h)(6).”⁶⁵ They recognize “that negotiations may fail and that the Board may resolve the conflict in favor of Region C.”⁶⁶ Seemingly, the Region D plaintiffs have now received all they purported to seek with respect to Region C's reliance on Marvin Nichols in the 2011 Region C Regional Water Plan.⁶⁷

⁵⁸ See *Gilder*, 926 S.W.2d at 365.

⁵⁹ *Id.* at 371.

⁶⁰ *Id.*

⁶¹ *G.E. American*, 979 S.W.2d at 765.

⁶² See *Gilder*, 926 S.W.2d at 365.

⁶³ See *id.* at 365-366.

⁶⁴ *Ward Timber*, 411 S.W.3d at 559-60.

⁶⁵ *Id.* at 560.

⁶⁶ *Id.* at 562.

⁶⁷ See *id.* at 554.

Negotiations to resolve this conflict have been unsuccessful. The Board now must reasonably resolve the conflict. For the reasons cited above, the only reasonable resolution is for the Board to support Region C's recommendation that Marvin Nichols be included in the 2011 Region C Regional Water Plan and the 2012 State Water Plan. Any other action would not be in keeping with the criteria for state and regional water planning and would be contrary to applicable law. Region C respectfully recommends that the Board retain the Marvin Nichols Reservoir project in the 2011 Region C Regional Water Plan and the 2012 State Water Plan, and take all other actions deemed necessary by the Board to further and finally resolve the interregional conflict.

REGION C WATER PLANNING GROUP

Senate Bill 1 Fourth Round of Regional Water Planning - Texas Water Development Board

Board Members

James M. Parks, Chair
Jody Puckett, Vice-Chair
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David Bailey
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Drew Satterwhite
Bob Riley
Gary Spicer
Robert Scott
Connie Standridge
Jack Stevens
Kevin Ward
Dr. Tom Woodward

July 7, 2014

Office of the General Counsel
ATTN: Mr. Les Trobman
Texas Water Development Board
Austin, Texas 78711-3231

RE: Conflict between Regional Water Plans for Regions C and D

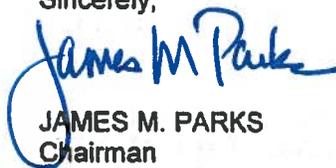
Dear Mr. Trobman:

On behalf of the Region C Water Planning Group, please find attached a reply to the brief filed by the Region D Water Planning Group on June 20, 2014, relating to the Executive Administrator's May 19, 2014, Final Recommendation on the Conflict between Regional Water Plans for Regions C and D. This reply was authorized by vote of the Region C Water Planning Group at a publicly posted meeting held on May 19, 2014. At this meeting, the planning group designated the current Region C officers, who are the signatories to this letter, to prepare this reply brief and submit same to you on or before July 7, 2014. In addition, the officers were authorized to appear and give testimony at a public TWDB Board meeting concerning this matter, when scheduled.

Copies of this letter and reply brief have been sent to all parties listed on the mailing list provided in the May 20, 2014, TWDB letter of instruction. A copy has also been provided to all voting members of the Region C Water Planning Group.

Thank you for this opportunity to respond. If you have any questions, please contact Mr. Jim Parks at (972) 442-5405.

Sincerely,


JAMES M. PARKS
Chairman


JODY PUCKETT
Vice Chairman


RUSSELL LAUGHLIN
Secretary

JMP/mcf

Enclosure

cc: Mailing List – Conflict Between Regional Water Plans for Regions C and D
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IN RE THE INTERREGIONAL § BEFORE THE TEXAS
CONFLICT BETWEEN THE REGION §
C AND REGION D REGIONAL § WATER DEVELOPMENT BOARD
WATER PLANNING GROUPS §

REGION C REGIONAL WATER PLANNING GROUP'S REPLY TO
REGION D BRIEF ON RESOLUTION OF INTERREGIONAL CONFLICT

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I. Region D appears to confuse the roles assigned by the Legislature to the Board and the TCEQ in the development of water supply projects.

The Texas Water Development Board is the state agency responsible for water planning and administering water financing in the state.¹ It is a planning agency. The purpose of the statutory authority the Board was entrusted by the Legislature to administer is to ensure adequate water supply to meet the demands of the citizenry of the State of Texas. In contrast, the TCEQ is the agency responsible for implementing laws relating to conservation of natural resources and protection of the environment.² Challenges to individual water supply projects that utilize surface water, or might potentially impact environmental resources, are properly brought before the TCEQ as part of the permitting process for those projects.

The Board is not legislatively equipped to consider granting the relief that Region D seeks. The Board is not an adjudicative agency designed to hear disputes over technical issues concerning water supply projects. Rather, the Board is a planning agency that reviews and approves water plans in a bottom-up approach, wherein water strategies are designed through an intensive localized process. Through that process, the Legislature placed the task of evaluating the detailed, technical, and complicated issues related to water supply planning in the hands of regional water planning groups (RWPG) composed of widely varied and specialized interests within each region.³ If a regional water plan fails to meet the requirements of Chapter 16, the remedy is for the Board to submit comments to the RWPG prior to the RWPG's final approval of its plan.⁴

¹ Tex. Water Code Ann. § 6.011 (West 2008).

² *Id.* § 5.012.

³ *Id.* § 16.053(c).

⁴ *Id.* § 16.053(h)(4),

The Legislature tasked the Board with reviewing regional water plans to assure the plans adhere to applicable requirements in Chapter 16.⁵ But the Legislature did not authorize the Board to second-guess the recommendations of the specialized regional water planning groups concerning the need for specific water supply strategies in meeting projected demands during the planning period. Nor did the Legislature grant to the Board any authority to substitute its judgment on a recommended water supply strategy for that of a RWPG.

On the other hand, the Legislature has vested the TCEQ with authority to hear disputes over projects to develop surface water.⁶ The TCEQ may call and hold hearings, receive evidence at hearings, issue subpoenas to compel the attendance of witnesses and the production of papers and documents, and make findings of fact.⁷ While an entity proposing to build a water supply reservoir is free to finance and construct the project without any involvement from the Board, construction of a water supply reservoir project cannot begin until the TCEQ has expressly approved the project through issuance of a water rights permit.⁸ Part of that permitting process includes an opportunity for persons affected by the proposed project to request a public hearing.⁹ Upon request of any affected person, the TCEQ must hold a public hearing wherein expert evidence may be presented to challenge the technical merits of the project.¹⁰ The Legislature allows the TCEQ to refer the public hearings to a specialized administrative law judge.¹¹ The review also includes the involvement of a specialized Public Interest Counsel, who ensures that the TCEQ's decision will promote the public interest.¹²

⁵ *Id.* 16.053(h)(4).

⁶ Tex. Water Code Ann. §§ 5.013(a)(1), 11.121-.134 (West 2008); likewise, the task of vetting groundwater development projects lies with local groundwater conservation districts. *Id.* § 36.113.

⁷ *Id.* § 5.102(b).

⁸ *See id.* §§ 11.121-.134.

⁹ *Id.* § 5.556.

¹⁰ Tex. Water Code Ann. § 11.132, .133 (West 2008).

¹¹ *Id.* § 5.311.

¹² *Id.* § 5.271.

The Legislature did not vest in the Board any similar public fact-finding authority.¹³ The Legislature exclusively vested authority to publicly vet the merits of specific water supply projects in the RWPG and not the Board. The RWPG must consider public comments on the individual regional water plans as part of the regional water planning process.¹⁴ The Legislature did not authorize the Board to solicit, receive, or consider public comment when it reviews regional water plans.¹⁵

The necessary complexities of challenges to the technical merits of a project like Marvin Nichols Reservoir must be adjudicated in a completely unrelated proceeding from the Board's water planning process, and by a separate agency. Region D's challenges to the technical merits of the Marvin Nichols Reservoir project are misplaced in this venue.

II. Region D's rephrasing of Section 16.051 of the Texas Water Code strips the statute of its plain meaning as written by the Legislature in an attempt to rewrite the law that the Board is charged with administering.

Under Section 16.051(a) of the Texas Water Code, the Board must develop a comprehensive state water plan. That plan is designed to do two things, for one purpose. "The state water plan shall provide for the *orderly development, management, and conservation* of water resources and *preparation for and response to drought conditions*["]¹⁶ The statute also requires that the plan must provide for development of water resources and preparation for drought "in order that sufficient water will be available at a reasonable cost to ensure public

¹³ See *id.* at Chapter 6, Subchapter D (West 2008); Black's Law Dictionary defines "fact-finding" as "The process of *taking evidence* to determine the truth about a disputed point of fact." BLACK'S LAW DICTIONARY 671 (9th Ed. 2009) (emphasis added). Further, a "finding of fact" is "A determination by a judge, jury, or *administrative agency* of a fact supported by the evidence in the record, usu. presented at the trial or *hearing*["] *Id.* at 708 (emphasis added).

¹⁴ Tex. Water Code Ann. §§ 16.053(h)(5), (h)(6) (West 2008).

¹⁵ See *id.* § 16.051.

¹⁶ *Id.* § 16.051(a) (emphasis added).

health, safety, and welfare; further economic development; and protect the agricultural and natural resources of the entire state.”

Region D rewrote the law in its brief to the Board. According to Region D, Section 16.051(a) simply reads: “the state water plan shall.....protect the agricultural and natural resources of the entire state.” With this overly simplistic rephrasing of Section 16.051(a), Region D has inappropriately changed the meaning of the statute entirely. The Legislature expressly directed the Board to plan for the development, management, and conservation of water resources and the preparation for drought in order that *water will be available to*, among other things (including ensuring the public health safety and welfare, and furthering economic development), protect the agricultural and natural resources of the state.¹⁷

Section 16.051(a), as written by the Legislature, is essentially an assignment to the Board with three main components:

- 1) ensure development of water resources,
- 2) during extreme precipitation conditions,
- 3) for certain delineated priorities.

Region D’s rewriting of the statute essentially strips the water development and drought preparation components out of Section 16.051(a). However, the Legislature did not solely charge the Board with designing a plan to protect the agricultural and natural resources of the entire state from some suspected or unspecified threat or harm. Region D argues, under its rewritten version of Section 16.051(a), that the Board must protect the agricultural and natural resources of the entire state *from* the development of water supply strategies. But that is not what Section 16.051(a) requires. The plain language of Section 16.051(a), in its entirety, requires the Board to

¹⁷ *Id.* 16.051(a).

provide for water supply development and drought planning *in order that water will be available* to protect agricultural and natural resources.

The Legislature's directive makes sense in light of what it also required the RWPG to do in Section 16.053(a). Under that section, a RWPG for a particular region must ensure through water development and drought planning that water will be available to protect the agricultural and natural resources of that particular region. RWPG are responsible for ensuring that water supply is sufficient to protect agricultural and natural resources in the individual planning areas. Meanwhile, the Board is responsible for compiling the regional water plans into a comprehensive state water plan that, in turn, will ensure the same for the entire state.

The correct reading of Section 16.051(a) is, of course, contrary to Region D's position in this matter. Region D must rely on an incorrect and overly-simplified misconstruction of Section 16.051(a) because neither that section, nor any other legislative provision, allows the Board to remove the Marvin Nichols Reservoir project from the 2012 State Water Plan for the protection of agricultural, natural, or any other kinds of resources.

III. Region D improperly requests the Board to undertake a review process that is outside the scope of the matter presently before the Board.

Region D now challenges the Board to reconsider its decision to approve the 2011 Region C Regional Water Plan under selected statutory and administrative criteria against which the Board has already evaluated the plan. The Region C plan has endured a multitude of challenges since the Board's approval of the plan in 2011. Numerous entities and individuals opposing the plan have been heard by the Board and the courts. The only error cited by the trial court was that the Board incorrectly concluded that no interregional conflict existed between

Region C and Region D.¹⁸ The only relief sought by opponents of the Region C plan was for the Board to follow the rules requiring it to assist the regions in negotiating a resolution of the conflict.¹⁹ The Executive Administrator facilitated mediation between the RWPG for the purpose of resolving the conflict.

In its brief to the Board, and for the first time, Region D has challenged the merits of the 2011 Region C Regional Water Plan, most prevalently citing an alleged failure of the Region C RWPG to quantify potential impacts of the Marvin Nichols Reservoir project on agricultural and natural resources in the Region D planning area. The Board's adoption of the 2011 Region C Regional Water Plan into the 2012 State Water Plan demonstrates that the Board has evaluated the plan under all of the applicable regulatory requirements in Chapter 16 and the Board's rules, and has determined that the plan is satisfactory. The Board incorporated the water supply strategies recommended by Region C into the 2012 State Water Plan, accordingly.

The trial court declared simply that the Board's rules regarding interregional conflict apply to the issues of conflict identified in Region D's plan, and remanded the matter to the Board for further proceedings. The Eastland Court of Appeals then observed that the trial court's judgment remanded the case to the Board for it to follow the procedures in Section 16.053(h)(6).²⁰ That statute requires the Board to facilitate coordination between the involved regions and, if the conflict remains, resolve the conflict.²¹ The Court's directive, therefore, was not for the Board to reevaluate Region C's recommendation concerning the Marvin Nichols Reservoir project under the technical criteria in the Board's rules, but to resolve the conflict.

¹⁸ *Ward Timber, Ltd. v. Texas Water Development Bd.*, No. D-GN-11-000121 (126th Dist. Ct., Travis County, Tex. Dec. 5, 2011).

¹⁹ *Texas Water Development Bd. v. Ward Timber, Ltd.*, 411 S.W.3d 554, 569 (Tex. App.—Eastland May 23, 2013, no pet.).

²⁰ *Id.* at 560.

²¹ Tex. Water Code Ann. § 16.053(h)(6) (West 2008).