

**DOCUMENTATION RELATED TO THE REGULATORY
ASPECTS OF GROUNDWATER**

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	DETERMINING THE DISTRICT’S REQUIREMENTS	1
	A. Finding the Governing Documents.	1
	B. Exemptions from Permitting and other Requirements.	2
	C. Existing Wells.	2
	1. Existing Exempt Well - Change of Ownership and Registration.	2
	2. Existing Non-Exempt Well.	3
	D. New Wells.	3
	1. Exempt Qualification.....	3
	2. Non-Exempt Wells.	3
	E. Application Requirements for Specific Situations.	4
	1. Replacement Wells.	4
	2. Transport Applications.	4
III.	PROCEDURE.....	5
	A. Application and Procedure	5
	B. Permit Renewal	5
	C. Permit Considerations	5
IV.	OTHER REQUIREMENTS AND PROCESSES THAT MAY BE APPLICABLE.....	6
	A. Metering and Reporting requirements.....	6
	B. Variances and exceptions	6
	C. Capping and Plugging Requirements	6
	D. Well Log.....	6
V.	CONCLUSION	6

DOCUMENTATION RELATED TO THE REGULATORY ASPECTS OF GROUNDWATER

I. INTRODUCTION

This paper describes the steps to take in determining whether a permit is needed from a groundwater conservation district (“district”), some of the common documentation required when interacting with a district, and the information a district considers when evaluating a permit application.¹ It is intended for landowners or attorneys unfamiliar with districts who nonetheless sense there may be rules out there that they or their clients need to comply with in drilling and producing from a groundwater well. Their sense in that regard is likely to be correct, as there are 100 confirmed districts in the state as of February 2016,² overlying a majority of the counties in the state, so the chance is high that any given use of groundwater will be regulated by a district.

One premise of this paper is that any transaction in an appreciable amount of land is also a transaction in groundwater. That’s true whether groundwater is the purpose of the transaction or not. The only reason a transaction in land wouldn’t also be a transaction in groundwater is if there really is NO groundwater under the property. Even a transaction in which a seller severs the groundwater estate is a transaction in groundwater, actually especially so, because the parties contemplated groundwater and its value in their transaction. And because of the prevalence of district regulation, if a landowner or groundwater-right holder intends to use the groundwater, he will need to interact with a district at some level.

This paper begins at the less complicated interactions – existing, exempt wells, and proceeds to the more complex – applying for permits.

Groundwater is privately owned by the owner of the underlying surface estate.³ However, the Texas Legislature has authorized the creation of districts as local regulatory bodies that “provide for the conservation, preservation, protection, recharging, and prevention of waste of groundwater . . . and [] control

subsidence”⁴ Districts created pursuant to the authority in Chapter 36 of the Texas Water Code “are the state’s preferred method of groundwater management”⁵

This paper is intended for landowners and groundwater-rights holders located within a district. Outside the boundaries of a district, the common law applies to groundwater ownership and withdrawals. In these “white areas,”⁶ groundwater use is only fettered by prohibitions on waste, malicious pumping, and negligently-caused subsidence.⁷ The concerns relevant to groundwater use in such areas are largely non-regulatory, and are beyond the scope of this paper.

II. DETERMINING THE DISTRICT’S REQUIREMENTS

A. Finding the Governing Documents.

The website of the Texas Water Development Board (TWDB) is a good place to start researching the existence of a district and its pertinent governing documents. On the TWDB website you can find the district’s website, enabling legislation, management plan, and current rules. Additional forms and information are usually available on a district’s website, or if the district does not have a website, a quick call to district staff should secure you an emailed copy of the district’s rules.

To become familiar with a district’s regulation, start with the district’s enabling legislation. Some district enabling acts contain specific provisions that will govern the district’s powers and duties. Other enabling acts are short and general, leaving the details of regulation to the district’s rules. Anything not addressed in the district’s enabling legislation is governed by Chapter 36 of the Texas Water Code, but conversely, more specific provisions of district enabling legislation will prevail over Chapter 36.

Because there are so many districts in the state, and their enabling acts, rules, and management plans all differ from one another, this paper’s approach is general.⁸ *Always consult* the specific governing

¹ Anything in this paper that could be deemed an opinion or comment is solely that of the author and is not meant to reflect the position of Branscomb | PC or its clients.

² Available at <https://www.tceq.texas.gov/assets/public/permitting/watersupply/groundwater/maps/gcdmap.pdf> (last visited Feb. 7, 2016).

³ This is generally true, but severances of the groundwater from the surface estate are becoming more common. Further discussion of groundwater severances is beyond the scope of this paper, but this growing trend is something to be aware of going forward as it will have big implications for use of the land from which the water has been severed.

⁴ Tex. Water Code § 36.0015(b).

⁵ *Id.* Note that this paper applies generally to Chapter 36 districts. The rules outlined in this paper often do not apply to the Edwards Aquifer Authority, which has its own detailed enabling legislation, available at <http://www.edwardsaquifer.org/legislation-and-rules/the-eea-act> (last visited Feb. 8, 2016).

⁶ So-called because these areas show up as white on the district map cited at footnote 2.

⁷ *Sipriano v. Great Springs Waters of Am., Inc.*, 1. S.W.3d 75, 76, 78 (1999).

⁸ The district rules I consulted while writing this article include the rules of the following districts, all in their most updated form as of December 29, 2015: High Plains Underground Water Conservation District No. 1, Wintergarden Groundwater Conservation District, Kinney

documents of the district you're located in before making decisions.

B. Exemptions from Permitting and other Requirements.

A district may, through its rules, provide for exemptions from permitting.⁹ Once you have located and reviewed the district's enabling legislation, next consult the district's rules to determine if your intended groundwater use is exempt from permitting and other district requirements. This applies whether there are existing wells on the property or you plan to drill a well. Under Chapter 36, a district is *required* to exempt from permitting:

- (1) drilling or operating a well used solely for domestic use or for providing water for livestock or poultry if the well is:
 - (A) located or to be located on a tract of land larger than 10 acres; and
 - (B) drilled, completed, or equipped so that it is incapable of producing more than 25,000 gallons of groundwater a day;
- (2) drilling a water well used solely to supply water for a rig that is actively engaged in drilling or exploration operations for an oil or gas well permitted by the Railroad Commission of Texas provided that the person holding the permit is responsible for drilling and operating the water well and the water well is located on the same lease or field associated with the drilling rig; or
- (3) drilling a water well authorized under a permit issued by the Railroad Commission of Texas under Chapter 134, Natural Resources Code, or for production from the well to the extent the withdrawals are required for mining activities regardless of any subsequent use of the water.¹⁰

Some districts' enabling legislation, however, narrows the exemption parameters described in Chapter 36, for example, by exempting wells that produce no more

than 10,000 gallons per day of water.¹¹ Always check the rules. Note that generally the statutory exemptions do not apply if the groundwater supplies water for a subdivision requiring platting.¹²

The general rule is that in the absence of an applicable exemption, a permit is required to drill, equip, operate, or complete a well or to substantially alter the size of a well or well pump.¹³ So if your planned groundwater use falls outside the bounds of the above-enumerated exemptions or any specific exemptions in a district's rules, the district will require you to obtain a permit.

A district may also cancel a previously granted exemption if the well uses change or the amount of water increases past that necessary for the exempt use.¹⁴ For example, increasing the rate of production of a well may cause the well to lose the exemption and require a permit or permit amendment. Changing the purpose of use, re-equipping, re-drilling, or replacing a well, and transporting water out of the district are other activities that may trigger permitting and other requirements. A district might specify by rule the timeframe in which a well owner must give notice to the district if such a change happens and there's an ensuing requirement to apply for a permit. The timeframe and procedures following it may differ between districts, so always check the rules.

An exemption from permitting or a partial exemption from some requirements does not necessarily mean that a well is exempt from regulation. Even if your well meets the tests to be exempt from permitting requirements, districts must require well registration in accordance with their rules.¹⁵ A district may also require that well owners report water usage, pay fees, participate in public hearings, comply with spacing requirement, or other activities required by the district. Always check the rules. The information requested for **registration** can vary in quantity and may be similar to the information required for new well permit applications, described below.

C. Existing Wells.

1. Existing Exempt Well - Change of Ownership and Registration.

If you are considering acquiring or have already acquired a new property with existing exempt wells, and you intend to continue to use them for their exempt uses and quantities, then your interaction with the district might be quick and straightforward. Many

County Groundwater Conservation District, Middle Pecos Groundwater Conservation District, Barton Springs Edwards Aquifer Conservation District, Post Oak Savannah Groundwater Conservation District; Guadalupe County Groundwater Conservation District, Cow Creek Groundwater Conservation District, and Medina County Groundwater Conservation District.

⁹ Tex. Water Code § 36.117(a).

¹⁰ Tex. Water Code § 36.117(b).

¹¹ See, e.g. Rules of the Barton Springs Edwards Aquifer Conservation District, Rule 3-1.3, at 27, as revised June 16, 2015.

¹² Tex. Water Code § 36.117(j).

¹³ Tex. Water Code § 36.113(a).

¹⁴ Tex. Water Code § 36.117(d).

¹⁵ Tex. Water Code § 36.117(h)(1).

districts require that exempt wells be registered, and district rules often require that a well owner notify the district of a change of well ownership. Depending on the district's demographics and characteristics, it can be difficult for the districts to keep track of existing exempt-well changes of ownership. If you volunteer this information, the district will likely be grateful. **Change of ownership applications** can often be found on a district's website.

2. Existing Non-Exempt Well.

a. Same Use Contemplated.

If your chosen property includes existing non-exempt wells, determine whether the wells are registered and/or permitted, and if so, evaluate the permit and its conditions. If you plan on continuing to use the well for the permitted use and according to the conditions in the permit, then consult the district's rules regarding the procedure for completing a **change of ownership** with the district, as discussed above. A district's rules will often specify a time period after a transfer of ownership in which the new owner or permit holder must notify the district of the change. The paperwork requirements can vary from a district that does this work for its permittees to a requirement that a new well owner **file a permit application** amendment to effect the transfer.

b. Different Use or Terms Contemplated.

If you intend to change the purpose or place of water used; change the rate or quantity of water pumped; or re-equip, re-drill, replace, or alter an existing well, it is likely that you will need to either apply for a permit (in the case of the previously-exempt well) or apply for a permit amendment. Existing exempt wells will also lose their exempt status if their uses or characteristics change to non-exempt uses or characteristics.¹⁶ Consult the district's rules to determine what will be required for a permit or permit amendment application. See below section D.2.a. regarding the kind of information districts require in permit applications and what a district considers in evaluating permit applications.

D. New Wells.

1. Exempt Qualification.

- a. As discussed above, some wells will qualify as exempt from permitting under state law and district rule. Check your specific district rules to see if your contemplated well will meet the requirements for a permitting exemption.
- b. The district might impose requirements on a well owner even if the well is exempt from

obtaining an operating or production permit. Such requirements might include, among others, that a well owner or operator **obtain a drilling permit** before drilling a well that will then be exempt from the requirement of obtaining an operating or production permit. The district might provide a process by which any required registration and drilling-permit applications can be or must be filed simultaneously. Usually district rule will provide a time period in which a drilling permit is valid and provide for expiration if the well is not drilled within that time.

2. Non-Exempt Wells.

If you do not meet the district's permitting exemption requirements, you will need to obtain a permit. In certain non-exempt situations, domestic wells will also require a permit. For example, many districts only exempt domestic and livestock uses on tracts 10 acres or larger.¹⁷ Groundwater use for irrigation, industrial, commercial, and municipal purposes will generally require a permit, usually called an "operating" or "production" permit. In some districts, the categories "existing" or "historic use" permits may have significance; check the rules to see if any such distinctions will be material to your groundwater use.

a. Application Requirements.

Districts will usually require that the well owner **apply for a permit on forms promulgated by the district**; these are often available on the district's website or upon request from the district. Application requirements may include some or any of the following. The information required by the district to consider the permit application will also depend on the nature of the permit application. You might find that you submit everything enumerated in the district's rules, and the district will still have requests that fall under the category of "anything the district needs to fully consider the application." The list below is illustrative only to give an idea of the requirements of a permit application.

- i. Contact information of applicant
- ii. Contact information of landowner, if different from applicant
- iii. Evidence of legal authority to construct and operate a well and to apply for the permit if the applicant is other than the landowner [for example, if the applicant is a lessee or holder of a severed water right]

¹⁷ See e.g. Rules of the Middle Pecos Groundwater Conservation District, Rule 11.3(a)(1), at 33, as amended October 21, 2014.

¹⁶ See Tex. Water Code § 36.117(d).

- iv. Legal description of property on which well is to be drilled, including survey and abstract
- v. Location of well, including latitude and longitude
- vi. Distance from property lines
- vii. The aquifer from which withdrawals will be made
- viii. Date of drilling
- ix. Well driller's log
- x. The depth of the well
- xi. Pump size and production capacity for the well
- xii. The rate of withdrawal
- xiii. A statement of the nature and purpose of proposed use of groundwater
- xiv. Statement of the duration of the proposed use of groundwater
- xv. Installation and completion date
- xvi. A water well closure plan or a declaration that the applicant will comply with well-plugging guidelines and report closure to the TCEQ
- xvii. The location of the nearest well or wells within a certain radius of the proposed well [sometimes this duty is the district's instead of applicant's]
- xviii. Identification of neighboring wells and well owners within a certain radius of the proposed well or distance from property lines [sometimes the district can help identify these wells and landowners]
- xix. Statements regarding the anticipated effect of groundwater production on the quantity and quality of groundwater inside and outside the district
- xx. Identification of alternate sources of water or liquids and a description of how and whether they could be substituted for groundwater
- xxi. A water conservation plan and drought contingency plan
- xxii. Hydrogeological modeling or reports
- xxiii. A map or plat (drawn to scale) showing location and information about the well and any water use and facilities.
- xxiv. For utilities, descriptions of service area, metering and leak detection repair program, water storage, delivery, and distribution system, drought or emergency water management plan, information about the population served, water supply and system data, water conservation measures and goals and means for implementing and enforcing same,
- xxv. Certification that the information in the application is true and correct, that the

applicant has the legal authority to drill the well and bind the applicant to requirements of the district, will abide by the district's rules and management plan, will provide the district with completed well logs, agreement that the district may use the well for observation

- xxvi. Any other information the district deems necessary to consideration of the permit application
- xxvii. Any required permit application fee

E. Application Requirements for Specific Situations.

1. Replacement Wells.

Usually districts specify requirements for a replacement well to qualify as such. Often a permit is required, but district procedures for evaluating a permit to replace a well are often streamlined or minimal if the well is located within a small (sometimes specific) radius of the existing well, nothing else is changed, and the existing well is abandoned or capped according to the district's rules.

2. Transport Applications.

A district might require a transport permit for any groundwater transport outside the district, and the application requirements might be specifically directed toward transport.¹⁸ For example, a district might require that a transport-permit applicant already have a production/operating permit or a contract with a permittee. In a situation where the transport-permit applicant did not already have the underlying permit or contract, this adds to the documentation required initially, though the review procedure might take place simultaneously. After a permit is received and a project implemented, reporting requirements might differ for transport permits from regular operating/production permits. Always check the rules.

Specific information related to transport concerns might include:

- a. the schedule for construction and operation of the well and related transportation facilities;
- b. a technical description of the transportation facilities, including location, plans, and specs;
- c. if the water is resold, information about the applicant's service area, customer base, infrastructure, and rules and conservation enforcement;
- d. run sheets or title opinions regarding title to the underlying groundwater estate; and/or
- e. results of a pump test; and

¹⁸ See generally Tex. Water Code § 36.122.

f. hydrogeological modeling.

In considering a permit application for transfer of water outside the district, a district must consider: 1.) the availability of water in the district and in the proposed receiving area during the period for which the water supply is requested; 2.) the projected effect of the proposed transfer on aquifer conditions, depletion, subsidence, or effects on existing permit holders or other groundwater users within the district; and 3.) the approved regional water plan and approved district management plan.¹⁹

III. PROCEDURE

A. Application and Procedure

An application for a permit or permit amendment must be in writing and sworn to.²⁰

A district by rule must specify which types of permit and permit-amendment applications require a hearing.²¹ For applications that don't require a hearing, the board must act on the application at a meeting, unless the district has delegated authority to the general manager to act on the application²²

District rule might require that the applicant provide notice of the permit application by publication in specified locations or newspapers. Some districts require that notice be provided on a form or in a form required and promulgated by the district, and some district rules make a more general requirement to provide notice. The rules might specify exactly what information must appear in the notice and to whom it must be provided – for example, well owners within a certain radius of the applicant or other parties with an interest in the groundwater or land surface at the application location. A district might require proof of notice in a specific format.

The district by rule may specify the requirements for administrative completeness, such as a signed, sworn application with all required information, payment of all applicable fees, any required maps, documents, or supplementary information required by the district.

Districts usually provide for a timeframe and procedure for determining whether an application is administratively complete and allowing the applicant to submit more information if necessary. Often if the application remains incomplete after a set amount of time, the application will expire or be returned to the applicant.

Usually a determination of administrative completeness is made by the general manager or district staff. Management or staff will give the

applicant additional time to provide any missing information, and that timeframe may or may not be specified by rule. District rule might specify that incomplete applications will be returned to the applicant if they are not supplemented in timely fashion.

Often district rules provide for a streamlined review by district management or staff if the permit is uncontested and meets the application requirements. This is especially likely to be true for simple permits or changes, such as changes of ownership or decreases to authorized withdrawals.

After determining that the application is administratively complete, district management or staff will usually move on to a technical review stage in which they consider the merits of the application.

B. Permit Renewal

With certain exceptions related to noncompliance,²³ a district must renew or approve an application to renew an operating permit before such permit expires if any required application is submitted timely in accordance with the district's rules and the permit holder is not requesting a change that would require a permit amendment.²⁴

C. Permit Considerations

With exceptions regarding permit renewals, state law requires that in granting or denying a permit or permit amendment, a district consider whether:

- (1) the application conforms to the requirements prescribed by [Chapter 36] and is accompanied by the prescribed fees;
- (2) the proposed use of water unreasonably affects existing groundwater and surface water resources or existing permit holders;
- (3) the proposed use of water is dedicated to any beneficial use;
- (4) the proposed use of water is consistent with the district's approved management plan;
- (5) if the well will be located in the Hill Country Priority Groundwater Management Area, the proposed use of water from the well is wholly or partly to provide water to a pond, lake, or reservoir to enhance the appearance of the landscape;
- (6) the applicant has agreed to avoid waste and achieve water conservation; and
- (7) the applicant has agreed that reasonable diligence will be used to protect groundwater quality and that the applicant will follow well

¹⁹ Tex. Water Code § 36.122(f).

²⁰ Tex. Water Code § 36.113(b).

²¹ Tex. Water Code § 36.114(b).

²² Tex. Water Code § 36.114(c).

²³ Tex. Water Code § 36.1145(b).

²⁴ Tex. Water Code § 36.1145(a).

plugging guidelines at the time of well closure.²⁵

District might also consider additional factors set forth in their rules.

District rules usually lay out permit provisions that will be included in all permits. Chapter 36 suggests that a district may include the following in a permit:

- (1) the name and address of the person to whom the permit is issued;
- (2) the location of the well;
- (3) the date the permit is to expire if no well is drilled;
- (4) a statement of the purpose for which the well is to be used;
- (5) a requirement that the water withdrawn under the permit be put to beneficial use at all times;
- (6) the location of the use of the water from the well;
- (7) a water well closure plan or a declaration that the applicant will comply with well plugging guidelines and report closure to the commission;
- (8) the conditions and restrictions, if any, placed on the rate and amount of withdrawal;
- (9) any conservation-oriented methods of drilling and operating prescribed by the district;
- (10) a drought contingency plan prescribed by the district; and
- (11) other terms and conditions as provided by Section 36.113.²⁶

IV. OTHER REQUIREMENTS AND PROCESSES THAT MAY BE APPLICABLE

A. Metering and Reporting requirements

A district's rules might require measuring or metering groundwater production. A well owner might then be subject to **reporting requirements** of such measurements or meter results. Sometimes even otherwise-exempt wells are subject to reporting requirements. Check the rules for reporting requirements, which vary from monthly to quarterly to annually, depending on the district and the type of use.

B. Variances and exceptions

A district by rule might allow for variances and exceptions, and some districts by rule set out procedures for applying for such variances and exceptions. Requirements might include information about adjoining property owners and a demonstration that the variance will not impair the groundwater rights or use of neighboring wells. Sometimes rules provide

that a variance or exception to well-spacing requirements will be granted if adjacent property owners sign a waiver to that effect.

C. Capping and Plugging Requirements

"A district may require the owner or lessee of land on which an open or uncovered well is located to keep the well permanently closed or capped with a covering capable of sustaining weight of at least 400 pounds, except when the well is in actual use."²⁷ Districts often require plugging of abandoned wells, with the requirement that the well owner submit the **plugging report** within a specified timeframe. Plugging a well might require initial notification to the district, submission of a plugging plan, and authorization from the district to plug the well.

D. Well Log

Copies of **drillers' and electric logs** must be filed with a district.²⁸ District rules often specify a timeframe in which the driller must submit the well log to the district. Well registration requirements sometimes include a copy of the well log.

V. CONCLUSION

As groundwater conservation districts continue to regulate and manage groundwater in Texas, it will become increasingly important for new landowners and groundwater users to comply with district rules and permitting schemes. Always consult the governing documents of the relevant district before taking action, and consult the district with any questions about its procedures.

²⁵ Tex. Water Code § 36.1132(d).

²⁶ Tex. Water Code § 36.1131(b).

²⁷ Tex. Water Code § 36.118.

²⁸ Tex. Water Code § 36.112.