

District Regulatory Plan Phase II (B)



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Background and Purpose

Since its creation by the Texas Legislature and subsequent confirmation by the citizens of Montgomery County in 2001, the District has worked tirelessly to be an effective and prudent manager of the groundwater resources underlying Montgomery County and to otherwise meet its obligations under the law. The Gulf Coast aquifer serves as the primary source of all consumptive water uses within Montgomery County, and based on the most recent data available to the District, has a sustainable yield of approximately 64,000 acre-feet per year.

Sustainable yield, in this case, is the amount of groundwater each year that is reintroduced into the Montgomery County area of the aquifer as recharge. Any amount of groundwater withdrawn from an aquifer that is in excess of the sustainable yield has the effect of taking more water from the aquifer than can be replenished naturally through recharge. This condition is often referred to as “mining” the aquifer.

The District has rejected any groundwater management strategy that would encourage mining of the Gulf Coast aquifer. Instead, the District committed to managing water in the Gulf Coast aquifer on a sustainable basis early after its creation, and remains so today. Its commitment is reflected in the District’s Management Plan, which was updated and readopted in accordance with State law in 2008. The sustainable yield of the Gulf Coast aquifer thus became an important regulatory marker for the District.

As of August 2009, the District had authorized the production of approximately 87,000 acre-feet per year of groundwater from the Gulf Coast aquifer through permits issued by the District. In addition to permitted production, state law and District rules provide exemptions to the District’s permitting and metering requirements for certain groundwater users—*i.e.*, those that use limited amounts of groundwater for individual domestic purposes or for watering livestock or poultry. Through a recent study commissioned by the District, it has learned that exempt uses account for at least 7,700 acre-feet of groundwater production each year from the Gulf Coast aquifer.

Thus, as of August 2009, approximately 94,700 acre-feet of groundwater is authorized for production from the Gulf Coast aquifer each year from within the District under permits issued by the District or under an exemption to permitting. This exceeds the currently recognized sustainable yield of the Gulf Coast aquifer by 30,700 acre-feet. Because Montgomery County is one of the fastest growing counties in the United States, the disparity between the Gulf Coast aquifer’s sustainable yield and the total volume of groundwater that is produced from the aquifer will continue to grow—unless significant efforts are made to permanently reduce the county’s reliance on groundwater.

In 2006, the District formally adopted Phase I of what is a multi-phased regulatory plan designed to require a comprehensive conversion from groundwater to surface water in an effort to reduce total annual groundwater production within Montgomery County to a level that does not exceed, on average, the sustainable yield of the Gulf Coast aquifer. In the 2006 District Regulatory Plan (“DRP”) Phase I, the District established January 1, 2015, as the deadline by which total annual groundwater production within Montgomery County had to be reduced to an amount equal to or less than the sustainable yield of the Gulf Coast aquifer—64,000 acre-feet.

In February 2008, the District adopted Phase II(A) of the DRP to insure that water producers and users in the District were making incremental progress toward compliance with the 2015 groundwater reduction requirement. Phase II(A) required certain Large Volume Groundwater Users (“LVGUs”), either individually or jointly with other LVGUs, to submit a Water Resources Assessment Plan (“WRAP”) to the District. Through the WRAPs, LVGUs were required to describe (a) their current and projected water demands through 2045, and (b) their plans for substituting not less than 30 percent of their total groundwater demands with an Accepted Alternative Supply by January 1, 2015. Phase II(A) defined a Large Volume Groundwater User to be any non-exempt and non-agricultural groundwater producer subject to the District’s regulatory jurisdiction that, through a single well or a combination of wells, actually produced or was authorized by any permit issued by the District to produce 10 million gallons or more of groundwater annually on or after January 1, 2008.

Today, in its continuing conversion effort that formally began in 2006, the District adopts Phase II(B) of the DRP, which is designed to provide the actual regulatory requirements for achieving a sustainable rate of groundwater production within Montgomery County by January 1, 2015, and beyond. As part of those requirements, Phase II(B) requires each LVGU in the District to submit a Groundwater Reduction Plan (“GRP”), either individually or jointly with other LVGUs, and it otherwise establishes regulatory milestones designed to allow for the conversion of groundwater dependency to an Alternative Water Supply, consistent with the underlying conversion assumptions set out in Phase I of the DRP.

DRP Phase II(B) Requirements

Based on the District’s review of the WRAPs submitted in compliance with Phase II(A) of the DRP, and the continuing recognition that groundwater depletion remains a county-wide concern, the District has determined that maintaining the single, county-wide management zone regulatory approach established in the DRP Phase I is the most appropriate approach for developing, administering and enforcing the initial conversion requirements (“Conversion Obligation”) as set forth and defined herein. In addition, only Large Volume Groundwater Users are subject to the obligations set forth in this DRP Phase II(B). The District may expand the definition of “Large Volume Groundwater User,” as defined herein, in the future to include other groundwater users in the District if it determines such an amendment is warranted in its efforts to conserve, preserve, and protect the groundwater resources of Montgomery County.

An LVGU that owns or operates two or more otherwise independent public water supply systems or commercial operations under separate permits issued by the District that are not tied to a common distribution system is not subject to the Conversion Obligation of this DRP Phase II(B) for any of its independent systems or operations that would not, on their own, qualify as a Large Volume Groundwater User. For example, an investor owned utility that owns numerous separate and distinct public water systems for separate platted subdivisions is not required to submit a GRP for a particular public water supply system that: (1) is authorized under its own permit, (2) is not interconnected to a larger aggregated system, and (3) is permitted for, and produces, less than 10,000,000 gallons per year.

Based on these premises, the DPR Phase II(B) requirements include the following:

1. By January 1, 2015, each LVGU in the District must use an Alternative Water Supply to meet no less than 30 percent of its Total Qualifying Demand.
2. For any growth in water demand experienced by an LVGU after January 1, 2015, such increased demand must be met using a source or sources of water supply other than groundwater, unless:
 - A. the LVGU did in fact timely meet or exceed its Conversion Obligation; and
 - B. the LVGU's overall groundwater use, when averaged over the planning period of 2015-2045, complies with the Conversion Obligation.
3. To ensure that necessary progress is made by each LVGU to appropriately plan, finance, design, construct, and otherwise have an Alternative Water Supply available for use by January 1, 2015, each LVGU must submit a Groundwater Reduction Plan ("GRP") to the District in accordance with the provisions herein.
4. Two or more LVGUs may enter into contractual agreements to share costs, to increase efficiencies in the development, planning and construction of water supply infrastructure, to increase efficiencies in the distribution and delivery of groundwater alternatives and to otherwise cooperate under the framework of a single, Joint GRP. In these instances, individual LVGUs will satisfy the requirements of the DRP if they are included in a Joint GRP that, as an aggregated group, achieves full regulatory compliance with all applicable provisions of this DRP Phase II(B).
5. Notwithstanding anything in this DRP Phase II(B) to the contrary, an LVGU may include groundwater produced in a county adjacent to the District as an Alternative Water Supply for purposes of meeting its Conversion Obligation only if each of the following conditions are met:
 - A. the LVGU provides retail water service in a distribution system located both within the District and in an adjacent county that is supplied by groundwater or surface water produced or diverted from locations both within the District and the adjacent county;
 - B. the LVGU included as an element of its WRAP, and by April 1, 2009, did accomplish, a reduction of groundwater production in the District so that the user's total annual volume of groundwater produced in the District was reduced by no less than 35 percent from its 2008 calendar year production within the District, if annualized at the rate of production after April 1, 2009, and if the LVGU thereafter does not exceed that total annual volume;
 - C. No less than 100 percent of groundwater used by the LVGU as an alternative supply in the adjacent county is subject to the surface water conversion requirements of a

subsidence district or a groundwater conservation district other than the District that are at least as stringent as the Conversion Obligations set forth in this DRP Phase II(B); and

- D. the LVGU committed in writing to the District before April 1, 2009, that it would not ever increase groundwater production in the District above the levels produced in accordance with Paragraph (B) above.
6. The District encourages the use of conservation among all groundwater users within the District, and particularly among all LVGUs, in effort to reduce overall demands on the Gulf Coast aquifer. These reductions will be considered to be reductions in demand, however, and not qualify as an Alternative Water Supply unless the conservation measures are capable of being, and are actually, metered. Metered conservation measures qualify as Alternative Water Supplies for purposes of meeting the LVGU's Conversion Obligation regardless of whether such measures were implemented prior to the date of adoption of this DRP Phase II(B).
7. On or before January 1, 2010, each LVGU must submit to the District a Declaration of Intent to Submit a GRP ("DOI"). In its DOI, each LVGU must indicate whether it intends to submit an individual GRP that accounts only for its efforts to meet its Conversion Obligation, or whether it intends to participate in a Joint GRP with at least one other LVGU. For DOIs that indicate the intent to participate in a Joint GRP, the LVGU must identify each additional LVGU that will participate in the Joint GRP. For purposes of efficiency, LVGUs that intend to participate in a Joint GRP may collectively submit a single DOI that otherwise complies with this provision. The District will consider the DOIs to be binding with respect to each LVGU's declaration regarding whether it intends to submit an individual GRP or whether, and with whom, it intends to participate in a Joint GRP. Any LVGU wishing to change its declaration after submission of its DOI must show good cause to the District for such a change, and to the extent the change would affect a planned Joint GRP, the LVGU's request must include the consent of all LVGUs that declared an intention to participate in the affected planned Joint GRP.

Groundwater Reduction Plans

A GRP represents the specific plan that each LVGU will follow in developing, securing, and executing all necessary financing and other contractual agreements, land and right-of-way acquisition, infrastructure design and construction, and any additional regulatory authorizations required under the laws of the State of Texas or of the United States so that by January 1, 2015, the LVGU will have met, and will be able to continue meeting, its Conversion Obligation.

By no later than July 1, 2010, each LVGU must submit a GRP to the District, or must be included in a Joint GRP that is submitted to the District, that fully complies with the requirements set forth in this DRP Phase II(B). The District will review each GRP for compliance with the DRP and all applicable District Rules. The failure of an LVGU to submit a fully compliant GRP to the District by July 1, 2010, or to be included in a fully compliant Joint GRP that is submitted to the District by July 1, 2010, will subject each applicable LVGU to civil penalties and other enforcement measures as provided for herein.

A groundwater user within the District that becomes a new LVGU after November 1, 2009, must submit to the District a DOI as part of its permit application for the new, or increased, groundwater production. Additionally, the new LVGU must submit a compliant GRP, or become a participant in a Joint GRP, within 30 days following the date that any such permit is issued by the District, or by July 1, 2010, whichever date is later.

In order to demonstrate the requisite commitment and actual ability to meet the Conversion Obligation by January 1, 2015, each LVGU must submit a GRP, or must be included in a Joint GRP, that includes, at a minimum, the following information:

Projected Water Demand

1. Identify the projected water demand for 2015, 2025, 2035, and 2045 for each LVGU that is subject to the GRP using a methodology and data from a source that is acceptable to the District.
2. Include a water reuse feasibility assessment describing the availability of reclaimed water to serve as all or a portion of the Alternative Water Supply.
3. Provide evidence demonstrating that the Alternative Water Supply proposed in the GRP will be a source or sources of water that will be adequate in volume and feasible in availability to satisfy all applicable conversion requirements.

Plans for Meeting Conversion Obligation

1. All design, engineering, construction, legal, financial, and technical components of the LVGU's plan for meeting its Conversion Obligation, as described in the GRP, must be reasonably feasible under the applicable, professionally accepted, technical, engineering, legal, or financial standards at the time of submission. Any component of a GRP that the District determines is not feasible under the appropriate standards will render the GRP non-compliant with this DRP Phase II(B).
2. Identify all feasibility studies to be undertaken for facilities development, siting, easement acquisition, and construction.
3. Provide a preliminary engineering report of proposed facilities to be constructed through 2015, including a description of the proposed project and area maps.
4. Detailed description of how all infrastructure costs will be financed, including a demonstration of the feasibility and availability of financing options identified.
5. Identify each source of the Alternative Water Supply described in the GRP, including a disclosure of each water supplier. Each Alternative Water Supply identified in the GRP must be of sufficient reliability to provide adequate water supplies during the drought of record.

6. Provide all executed contracts, proof of financial commitments, or other documentation necessary to demonstrate that every supplier of an Alternative Water Supply does in fact have sufficient supplies of, and sufficiently reliable legal rights to, the requisite volumes of Alternative Water Supply, and is contractually committed to providing the Alternative Water Supply in the volumes and rates required to satisfy the Conversion Obligation. If the contractual commitment for an Alternative Water Supply is for a term that expires before January 1, 2045, the GRP must include evidence from the supplier of an option to renew the contractual commitment through an additional term or terms until at least January 1, 2045.
7. Provide a detailed timetable that identifies the specific deadlines, by date, that must be met in order to meet the January 1, 2015, Conversion Obligation for:
 - A. securing all sources of requisite financing;
 - B. executing all water supply agreements or other contractual obligations necessary for the supply or delivery of each Alternative Water Supply identified in the GRP;
 - C. closing on all right-of-way or other necessary real property acquisitions;
 - D. finalizing, and submitting to the District, all requisite preliminary designs;
 - E. obtaining all necessary permits or other legal authorizations necessary from any applicable State or Federal regulatory authority;
 - F. initiation and completion of each necessary phase of construction; and
 - G. any other milestone related to any other design, financing, planning, construction, or legal authorization required for the LVGU to meet its Conversion Obligation.
8. The District will review each component of the timetable described above for a determination of whether the milestones are reasonably achievable.

Joint GRPs

1. As discussed above, an LVGU may satisfy its GRP requirement by participating in a Joint GRP along with one or more other LVGUs. There is no maximum number of LVGUs that may be included in a Joint GRP. However, each Joint GRP submitted to the District must include all requisite information for each LVGU that would otherwise be required of the LVGU if it was submitting an individual GRP.
2. Each Joint GRP must:
 - A. demonstrate the requisite commitment and actual ability of the aggregated LVGUs participating in the Joint GRP to collectively meet the Conversion Obligation by January 1, 2015;

- B. designate a Joint GRP participant to serve as the Joint GRP Sponsor;
 - C. include a written agreement between the participants demonstrating that the Joint GRP Sponsor is duly authorized to submit the Joint GRP and to otherwise act on behalf of all of the participants in developing, submitting, and executing the Joint GRP.
3. Notwithstanding any other provision of this DRP Phase II(B) to the contrary, a Joint GRP may provide for the over-conversion to Alternative Water Supplies of some participant LVGUs and for the under-conversion to Alternative Water Supplies by other participant LVGUs if, by January 1, 2015, no less than 30 percent of the aggregated Total Qualifying Demand of all participants in the Joint GRP is met by using an Alternative Water Supply. For example, the Joint GRP may provide that the water demands for some individual participant LVGUs will be met by using 100 percent groundwater, as long as the group as a whole achieves the required conversion amount for all participants by over-converting other participant LVGUs. The purpose of allowing this conversion flexibility within each Joint GRP is assist in reducing overall conversion costs by reducing the amount of infrastructure that must be built to achieve the required conversion.
 4. Any Safe Harbor GRP must provide an opportunity for existing LVGUs or groundwater users that become LVGUs at any time after adoption of this DRP Phase II(B) to participate in its Joint GRP under reasonable terms and conditions. Such reasonable terms and conditions may allow for other participants in the Joint GRP to recoup costs from the new LVGU that are reasonably attributable to the addition of the new participating LVGU.

Other Necessary Information

1. Include all other information that is reasonably necessary for the District to fully understand the scope, plans, and procedural milestones for the proposed project.

Regulatory Milestones

1. By no later than July 1, 2010, each LVGU must submit a GRP to the District, or must be included in a Joint GRP that is submitted to the District, that fully complies with the requirements set forth in this DRP Phase II(B).
2. The required timetable that identifies the specific deadlines, by date, that must be met in order to meet the January 1, 2015, Conversion Obligation, shall become binding on each LVGU, regardless of whether the LVGU submitted an independent GRP or is a participant in a Joint GRP, and shall be used by the District as applicable regulatory milestones that must be met to avoid the assessment of civil penalties or other enforcement action by the District.
3. By no later than January 1, 2015, each LVGU shall be included in a certified GRP that meets the Conversion Obligation.

Construction Start Date

The construction start date for infrastructure projects will be deemed to be the point in time when a construction contract has been signed, a notice to proceed has been issued, and the actual physical construction begins in accordance with the schedule. A schedule for construction with milestones tied to specific calendar dates must be in place before a project's construction start date will be acknowledged by the District.

Reclaimed Water Early Conversion Incentive

In order to promote conservation by encouraging the use of reclaimed water, the District will allow any LVGU that completes a project between November 11, 2008, and December 31, 2014, that utilizes metered reclaimed water from a wastewater treatment plant to replace local groundwater as a source of supply to apply to the District for an early conversion credit. The District shall review the application and the evidence supporting it and issue the early conversion credits in an amount equal to twice the total amount of metered reclaimed water the District determines was used or will be used during that time period, along with any appropriate terms and conditions it deems appropriate.

Notwithstanding the Conversion Obligation, an LVGU may utilize the early conversion credits to produce groundwater at any time after January 1, 2015, in excess of the amount it would otherwise be authorized to produce in a calendar year by an amount not to exceed the amount recognized in the LVGU's early conversion credits. A gallon of groundwater production authorized under an early conversion credit may only be used once before it is expended for all times. Any reclaimed water used by an LVGU on or after January 1, 2015, shall not be eligible for such credits and shall instead be considered as part of the LVGU's Alternative Water Supply for purposes of meeting its Conversion Obligation on a gallon-for-gallon ratio.

Enforcement

The District shall review all GRPs and monitor each LVGU's achievement of milestones to determine compliance with the requirements set forth herein. A person required to submit a GRP under this DRP Phase II(B) that fails to submit to the District a fully compliant GRP by July 1, 2010, or such other date as may be provided for herein, or to timely comply with achievement of milestones shall be subject to enforcement for violation of District Rules, including permit suspension or revocation and the assessment of penalties by the District. The District may assess an LVGU the following penalties in lieu of or in addition to seeking an injunction or other legal or equitable remedies available to the District:

1. a flat fee civil penalty not to exceed \$1,000.00 per day for each day of a continuing violation;
or
2. a civil penalty not to exceed \$3.00 per thousand gallons of groundwater produced after failing to comply with any applicable deadline provided for herein.

Definitions

“Alternative Water Supply” means the total supply of water, whether from a single non-groundwater source or from multiple non-groundwater sources, used to meet the Conversion Obligation.

“Aquifer Sustainable Yield” means the annual amount of groundwater, expressed in acre-feet, that is reintroduced into the Gulf Coast aquifer as recharge. The Aquifer Sustainable Yield shall be determined by the District using the most reliable information that is readily available. Thus, the Aquifer Sustainable Yield may be adjusted from time-to-time as new information regarding the depletion and recharge of the Gulf Coast aquifer is developed and published. The Aquifer Sustainable Yield is currently recognized as 64,000 acre-feet.

“Conversion Obligation” is the requirement for each LVGU to convert not less than 30 percent of its Total Qualifying Demand to a non-groundwater source.

“Joint GRP” means a GRP submitted by one or more LVGUs that have contractually agreed to abide by its terms, that includes all requisite information for each participating LVGU that would otherwise be required of the LVGU if it was submitting an individual GRP, and that allows the participating LVGU’s to achieve the Conversion Obligation as a group rather than as individuals.

“Joint GRP Sponsor” is the LVGU representative designated as such in a Joint GRP to be principally responsible for coordinating the development, submission, and execution of the Joint GRP.

“Large Volume Groundwater User” or “LVGU” is defined for purposes of this DPR Phase II(B) to mean any person or entity that, through a single well or a combination of wells, actually produces or is authorized by permit(s) issued by the District to produce 10 million gallons or more of groundwater annually from within the District on or after January 1, 2008. A Large Volume Groundwater User does not include any person or entity that produces groundwater solely for its own domestic use associated with a single family residence, agricultural use, as that term is defined by Chapter 36, Water Code, or both domestic and agricultural use.

“Safe Harbor GRP” is any Joint GRP that accounts for at least 40 percent of the total water demands within the District, and is thus required to accept new LVGUs into its Joint GRP under certain conditions.

“Total Qualifying Demand” means an LVGU’s total annual water demand for calendar year 2014.