


**TO:** Board Members

**FROM:** Kevin Patteson, Executive Administrator 

**DATE:** May 19, 2014

**SUBJECT:** Resolution of the Interregional Conflict between the 2011 Region C and the Region D Regional Water Plans

## ACTION REQUESTED

Resolve the interregional conflict between the 2011 Region C and Region D regional water plans by instructing the Region C Regional Water Planning Group to readopt its current regional water plan with Marvin Nichols Reservoir as a recommended water management strategy and instructing the Region D Regional Water Planning Group to amend its plan to reflect that the conflict has been resolved.

## BACKGROUND

### *Region C Planning Area*

The Region C Regional Water Planning Area (Region C) includes all or parts of 16 counties. Overlapping much of the upper portion of the Trinity River Basin, Region C also includes smaller parts of the Red, Brazos, Sulphur, and Sabine river basins. The Dallas-Fort Worth Metropolitan area is centrally located in the region, and its surrounding counties are among the fastest growing in the state. Major economic sectors in the region include service, trade, manufacturing, and government.<sup>1</sup>

The population of Region C counties is expected to increase 96 percent by 2060 to 13 million people. The area contains approximately 26 percent of the Texas population. The 2011 Region C Plan estimates that by 2060 an additional 1.7 million acre-feet of water per year will be needed to serve the region's population (a total 2060 demand of 3.3 million acre-feet of water per year). Conservation accounts for 12 percent of the projected 2060 volumes; reuse accounts for another 11 percent. Currently, the Marvin Nichols Reservoir (Marvin Nichols) is projected to provide 490,000 acre-feet per year, or 28 percent of the projected additional water needed.<sup>2</sup>

<sup>1</sup> Texas Water Development Board, *Water for Texas 2012 State Water Plan*, pg. 44.

<sup>2</sup> *Id.* at 46-50.

### Our Mission : Board Members

To provide leadership, planning, financial assistance, information, and education for the conservation and responsible development of water for Texas : Carlos Rubinstein, Chairman | Bech Bruun, Member | Kathleen Jackson, Member

: Kevin Patteson, Executive Administrator

### *Region D Planning Area*

The North East Texas Regional Planning Area (Region D) encompasses all or parts of 19 counties in the north-east corner of the state. Largely rural and characterized by numerous small communities and some medium-sized municipalities, the region includes the cities of Longview, Texarkana, and Greenville. The planning area overlaps large portions of the Red, Sulphur, Cypress, and Sabine river basins and smaller parts of the Trinity and Neches river basins. The main economic base in the North East Texas Region is agribusiness, including a variety of crops as well as cattle and poultry production. Timber, oil and gas, and mining are significant industries in the eastern portion of the region. In the western portion of the region, many residents are employed in the Dallas-Fort Worth metropolitan area.<sup>3</sup>

Approximately 3 percent of the state's population resides in Region D. By 2060, Region D's population is projected to grow 57 percent, to 1.2 million. The 2011 Region D Plan estimates that by 2060 an additional 278,000 acre-feet per year will be needed to serve the region's population (a total 2060 demand of 839,000 acre-feet of water per year). Because of high costs relative to the small amounts of water involved, the Region D Plan does not recommend conservation as a water management strategy. Select major water management strategies include increasing existing surface water contracts, or 60 percent of projected 2060 volumes, new surface water contracts for another 33 percent, and new groundwater supplies for 7 percent of projected 2060 volumes.<sup>4</sup>

### *Marvin Nichols Reservoir in the State Water Plan*

Senate Bill 1 (SB 1) in 1997 created the current state water planning process.<sup>5</sup> Before the implementation of SB 1, Marvin Nichols was recommended as a water management strategy in the 1968 State Water Plan, the 1984 State Water Plan, and the 1997 State Water Plan. Under SB 1, the first Region D Regional Water Plan in 2001 recommended that Marvin Nichols be developed to provide a source of future water supply for water users both within Region D and in Region C. The 2001 Plan was later amended to remove support for the development of Marvin Nichols, however. The 2006 Region D Regional Water Planning Group took the position that Marvin Nichols should not be included in any regional plan or in the State Water Plan as a water management strategy. Further, the Region D Regional Water Planning Group expressed the opinion that the inclusion of Marvin Nichols in the Region C Regional Water Plan constituted an interregional conflict.<sup>6</sup> Following the policy established with the first series of water plans, the Texas Water Development Board (TWDB) approved both the Region C and Region D 2006 Regional Water Plans because it did not find an over-allocation of a source of supply—the TWDB's definition of an interregional conflict.

---

<sup>3</sup> Texas Water Development Board, *Water for Texas 2012 State Water Plan*, pg. 50.

<sup>4</sup> *Id.* at 52-54.

<sup>5</sup> Tex. S.B. 1, 75<sup>th</sup> Leg., R.S., 1997 Tex. Gen. Laws 1010.

<sup>6</sup> Copies of the previous regional and state water plans are available on the TWDB website, <http://www.twdb.texas.gov/waterplanning/rwp/plans/index.asp> and <http://www.twdb.texas.gov/waterplanning/swp/index.asp>.

In 2007, the 80<sup>th</sup> Legislature established a study commission on Region C Water Supply that consisted of members appointed by the regional water planning groups of Regions C and D.<sup>7</sup> The Study Commission was charged with reviewing the water supply alternatives available to the Region C Regional Water Planning Area. But the Study Commission was unable to reach a consensus on its findings and recommendations, so a final report was not delivered to the 82<sup>nd</sup> Legislature.<sup>8</sup>

In 2011, the Region C Regional Water Planning Group again adopted Marvin Nichols as a recommended strategy and Region D reiterated concerns it had raised previously. Region D again expressed the opinion that including Marvin Nichols in the Region C Regional Water Plan constituted an interregional conflict. The TWDB approved the Region D Regional Water Plan in October 2010, and the Region C Regional Water Plan in December 2010, finding again that there was no over-allocation of supply sources. To date, Marvin Nichols has not been constructed and no permits for its development have been sought from the Texas Commission on Environmental Quality (TCEQ) or the U.S. Corps of Engineers.

#### *The Ward Timber Case Procedural History*

Private parties in Region D filed suit in District Court in Travis County in January 2012, seeking judicial review of the TWDB's decision approving the Region C Regional Water Plan.<sup>9</sup> In its order issued on December 5, 2011, the District Court declared that an interregional conflict existed, reversed the TWDB's decisions approving the two regional plans, and remanded the case to the TWDB for resolution. The TWDB appealed. The 11<sup>th</sup> Court of Appeals heard the case and affirmed the district court's ruling on May 23, 2013.<sup>10</sup> No further motions were filed.

The TWDB contracted for a mediator and arranged for a mediation between Region C and Region D members appointed by their respective regional planning groups. The mediator reported on December 17, 2013 that the parties did not reach agreement in the mediation. Thus, under the statute and the Court's Order, the TWDB is to resolve the conflict.

The core dispute between Region C and Region D is whether Marvin Nichols should be developed in the north-central part of Region D to serve the water needs in Region C. Region C already contains more than a quarter of the state's population and will increase by almost 100 percent by 2060. At 28 percent of the projected additional water needed for the Region, Marvin Nichols is a major water strategy to serve Region C by 2060.

Region D does not want Marvin Nichols constructed because it is concerned about the potential socioeconomic, environmental, and private property impacts of the reservoir. Estimated at 66 to 70 thousand acres in size, Marvin Nichols is projected to impound thousands of acres of forest

---

<sup>7</sup> Tex. S.B. 3, § 4.04, 80<sup>th</sup> Leg., R.S., 2007 Tex. Gen. Laws 1430.

<sup>8</sup> *Final Draft Report to the 82<sup>nd</sup> Legislature*, Study Commission on Region C Water Supply, December 2010. The Draft Report and other documents related to the work of the Study Commission are available on the TWDB website at <http://www.twdb.texas.gov/waterplanning/rwp/regions/C/studycommission.asp>.

<sup>9</sup> *Ward Timber, Ltd.; Ward Timber Holdings; Shirley Shumake; Gary Cheatwood; Richard LeTourneau; and Pat Donelson v. Texas Water Development Board*, No. D-1-GN-11-000121 (126<sup>th</sup> Dist. Ct., Travis County, Tex., Dec. 5, 2011).

<sup>10</sup> *Texas Water Dev. Bd. v. Ward Timber, Ltd.*, 411 S.W.3d 554 (Tex. App.—Eastland 2013, no pet.).

and wetlands. In addition, thousands more acres would be required for environmental mitigation—all for a project that does not serve and is not needed by the residents of the region.

## ANALYSIS

### *What is a Conflict?*

This is the first time the TWDB has been asked to resolve a conflict under the statute. As the 11<sup>th</sup> Court of Appeals noted, Section 16.053(a) of the Water Code requires that a regional plan provide for the development of water resources in preparation for and in response to drought conditions in order that sufficient water will be available at a reasonable cost to ensure public health, safety, and welfare; to further economic development; and to protect the agricultural and natural resources of that particular region.<sup>11</sup>

Section 16.053(h)(7) provides that the TWDB may approve a regional plan only after it has determined that:

- (A) all interregional conflicts involving that regional water planning area have been resolved;
- (B) the plan includes water conservation practices and drought management measures incorporating, at a minimum, the provisions of Tex. Water Code §§ 11.1271 and 11.1272 (relating to water conservation and drought contingency plans); and
- (C) the plan is consistent with long-term protection of the state's water resources, agricultural resources, and natural resources as embodied in the guidance principles adopted under Tex. Water Code § 16.051(d).

Section 16.0519(d) of the Water Code requires the TWDB to adopt guidance principles for the state water plan that reflect the public interest of the entire state. The guidance principles must give due consideration to the construction and improvement of surface water resources and the application of principles that result in voluntary redistribution of water resources.

Both the Plaintiffs/Appellees in the *Ward Timber* case and the 11<sup>th</sup> Court of Appeals discussed resolution of an interregional conflict and long-term protection of the state's resources together. They are, in fact, however, two different determinations as set out in the statute. A dispute between regions on protection of the state's resources, or on conservation and drought management, does not necessarily equate to an interregional conflict over allocation of resources among strategies.

“Conflict” is not defined in the statute. The definition employed by the TWDB beginning in 2001 and used consistently through the development of three state water plans was that an interregional conflict exists when more than one regional water plan relies upon the same water source, so that there is not sufficient water available to fully implement both plans, creating an

---

<sup>11</sup> *Ward Timber*, 411 S.W.3d at 558.

over-allocation of that source.<sup>12</sup> This definition was codified in TWDB's rules in 2012. The decision of the Court of Appeals in 2013 questioned the sufficiency of the definition to address what it determined to be an interregional conflict between Region C and Region D and declined to follow that definition. The Court did not suggest an alternative definition, however.

Under the statutory scheme relating to regional water planning and interregional conflicts, the TWDB decides whether an interregional conflict exists.<sup>13</sup> The definition used by the TWDB over three cycles of water planning and adopted as a rule is consistent with the language of Texas Water Code Section 16.053 in defining "interregional conflicts" as conflicts arising between two or more defined water-management strategies that are necessary to ensure the implementation of all plans. The TWDB does not consider every difference between regional water plans to be a "conflict" as contemplated by the statute, nor does it recognize the geographic location of the water source as an aspect of the conflict. Instead, this definition focuses on resolving those conflicts that hinder full implementation of the state water plan by rendering an identified supply strategy inadequate for two or more regions.

The definition of interregional conflict adopted by the TWDB also recognizes that the legislature intended for the TWDB to address conflicts between actual water management strategies, not general objections to projects that are properly reserved for agencies other than the TWDB if and when permit applications for projects are filed.

Unlike the water uses addressed directly in the state and regional water plans (municipal, manufacturing, irrigation, steam electric power generation, mining, and livestock), water needed to protect environmental and natural resources is difficult to quantify. TWDB rules require that regional water planning groups evaluate each recommended strategy for social and economic impacts of not meeting needs, impacts to agricultural resources, consideration of third-party social and economic impacts, and evaluations of effects on environmental flows.<sup>14</sup> Thus, protection of agricultural and natural resources and economic interests is considered in the regional plans in relation to specific, quantifiable strategies. At the planning stage, it should be sufficient that all regions affected by a particular strategy have identified those impacts.

### *The Regional Water Plan Review Process*

In addition to ensuring that all interregional conflicts have been resolved, the TWDB must also determine that the plan includes water conservation practices and drought management measures, and that the plan is consistent with long-term protection of the state's water, agricultural, and natural resources. The TWDB's guidance principles, embodied in its rules instruct the regional water planning groups in how to address these requirements.<sup>15</sup>

The guidelines adopted by the TWDB in compliance with the statute are currently found in 31 Tex. Admin. Code §§ 357.20, 358.3, and 358.4. These rules are based on Tex. Water Code §§ 16.051(d), and 16.053(e) and (h)(7). The TWDB reviews the regional water plans and

---

<sup>12</sup> 31 Tex. Admin. Code § 357.10(15).

<sup>13</sup> Tex. Water Code § 16.053(h)(4), (5), and (6).

<sup>14</sup> 31 Tex. Admin. Code § 357.34.

<sup>15</sup> See 31 Tex. Admin. Code §§ 357.22, 357.34-.35, and 357.40-.42.

prepares the state water plan based on these guidelines and requirements.

Under these principles, in reviewing the regional water plans the TWDB provides technical assistance to the regional planning groups, works with regional planners to address inconsistencies, to seek clarification, to note mistakes in citations, and to identify where the plan does not follow the guidance principles or does not adhere to the formatting guidelines. But the TWDB does not evaluate the sufficiency or validity of strategies presented in a plan. It does not do alternative analyses or redirect recommended strategies. This approach is in keeping with the philosophy behind SB 1 that each plan reflect the efforts of the local regional planning group and others in the region to evaluate and implement the planning decisions for their particular region.

### *Options Considered Related to the Conflict Over Marvin Nichols*

Staff considered three options in analyzing possible recommendations to resolve the conflict over Marvin Nichols.

1. One recommendation proposed a smaller reservoir. Reducing the footprint of Marvin Nichols would mean that less property would be needed for the reservoir; but less water would be provided. Therefore, Region C would need to find alternatives to meet any remaining needs. Future rounds of planning could incorporate future changes, and creative problem-solving in the planning process might address concerns for both regions.

Staff ultimately rejected this proposal, however. To propose reducing the size of Marvin Nichols means interjecting the TWDB in the engineering specifics of a particular strategy in a region's plan—something the TWDB has not done before. This approach would be a change in the TWDB's State Participation Program policy of supporting the optimal sizing of a facility. It would also mark a shift away from the planning process as locally driven.

2. The second option Staff considered was removing Marvin Nichols from Region C's Plan for this planning cycle. Removing it now would resolve the conflict but does not eliminate the possibility of including it at a later date if conditions warrant. The regional plan is just that—a planning document. Strategies may come and go from one plan to another. Just because a strategy is in the plan does not mean that it will become reality. Just because it is deleted from the plan does not mean that it has no future. Marvin Nichols is included in Region C's Plan as a water source beginning in 2030. Yet it is not clear what steps are being taken to have the resource in place by then. Marvin Nichols has been part of a state water plan since 1968. It has not been built, in part because it is a potential strategy to meet needs beginning at a future date. Project sponsors have yet to apply for a permit.

Experience with other reservoir development suggests that much work still needs to be done before the reservoir becomes a reality. Thus, the future of Marvin Nichols rests with those who want Marvin Nichols as a source.

Staff acknowledges, however, that Marvin Nichols is a long-term strategy. Reasonable planning involves development first of those short-term projects that cost less and are easy to implement. Long-term strategies always assume a large number of uncertainties. Therefore, striking a

strategy because of uncertainties 15, 20, even 40 years in the future is not a reasonable approach to planning.

Both Region C and Region D acknowledge the need for more study, which is a responsible approach given the size, potential expense, and timing of the strategy. The Sulphur River Basin Feasibility Study by the U.S. Corps of Engineers in conjunction with the Sulphur River Basin Authority currently underway is focused on water supply issues and water user groups in the Basin. That independent study, expected to be completed in 2015, could answer many of the uncertainties before the permit process is initiated.

3. The third recommendation Staff consider was to retain the Marvin Nichols Reservoir as a recommended strategy in the Region C 2011 Regional Water Plan. In the end, Staff chose this option. As Texas's population grows, Marvin Nichols, along with all the strategies in the Region C Plan, must continue to be considered seriously. According to the 2011 Region C Water Plan, Marvin Nichols accounts for 28 percent of the total additional acre-feet per year that will be needed to serve Region C's population. To remove Marvin Nichols from the Region C Plan would leave a substantial unmet need in Region C's water supply by 2060. TWDB data suggest that as many as 141 municipalities, communities, and water suppliers would be affected. Reassigning other recommended strategies to fill the gap created by removing Marvin Nichols would, in turn, simply create other unmet needs that would need to be addressed.

TWDB rules require that regional water planning groups identify and recommend water management strategies that meet all water needs during the drought of record.<sup>16</sup> In addition, regional water plans must include a quantitative description of the socioeconomic impacts of *not* meeting identified water needs.<sup>17</sup> The TWDB, therefore, generally will not approve a regional or state water plan that contains unmet needs. In particular, it has avoided approving a regional plan that contained unmet municipal needs in the long-term planning horizon because of the potential impacts on public health, safety, and welfare. Including Marvin Nichols responds to the facts of both the current size of Region C and its anticipated growth. Continuing to include Marvin Nichols also acknowledges the recent legislative mandate in House Bill 4 and Senate Joint Resolution 1 to develop and fund the strategies in the plan as opposed to excising strategies at a critical time for water supply development in Texas.

Some have suggested that Region C address its needs through conservation. But, as noted earlier, conservation is already included in Region C's Plan.<sup>18</sup> And, even by the most liberal estimate, conservation cannot make up all the need that the region will have over the next 50 years.

Property owners in the area where Marvin Nichols may be located are justifiably concerned about the loss of their lands and the economic value attached to those lands. Any one or more of the municipalities or water districts in Region C could sponsor Marvin Nichols.

---

<sup>16</sup> 31 Tex. Admin. Code § 357.35(d).

<sup>17</sup> 31 Tex. Admin. Code §§ 357.33(c), 357.40(a).

<sup>18</sup> See page 1.

The Texas Constitution provides in part that “No person’s property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; . . . .” Tex. Const. Art. I, § 17.

Thus, while a municipality has the right of eminent domain under Chapter 251 of the Local Government Code, and water districts have a similar right under Chapter 49 of the Water Code, the law provides for just and fair compensation for both the value of the property and damages to the landowner. The procedures for the exercise of eminent domain are set out in statute and are intended to protect the right of a property owner to just compensation. Any such evaluation of lands potentially included in Marvin Nichols is subject to those provisions and cannot be determined here.

### **PROPOSED RESOLUTION OF THE CONFLICT**

On March 4, 2014 the Executive Administrator issued a preliminary draft recommendation to resolve the conflict between Region C and Region D 2011 regional water plans. The draft recommendation was posted on the Texas Water Development Board website, along with the announcement of a public comment period and two public hearings. On April 29 and 30, 2014 public hearings were held in Region D and Region C. Approximately 450 people attended the April 29 hearing in Mt. Pleasant and 150 people attended the April 30 hearing in Arlington. The public comment period ended on May 2, 2014. More than 7,300 comments were received by the TWDB.

The TWDB reviewed the comments and has provided responses (*See* Attachment 6). Changes to the preliminary recommendation as discussed in Attachment 6 have been incorporated in the recommendations below.

### **SUMMARY**

SB 1 created an important document in the state water plan. It is to be “a guide to water policy.”<sup>19</sup> But the regional and state water plans are only plans—*guides* to water policy. TCEQ is only required to take the plan *into consideration*. It is not bound by the plan and may waive the consistency requirement if conditions warrant. The Water Infrastructure Fund (WIF), the State Implementation Fund for Texas (SWIFT), and the State Water Implementation Revenue Fund for Texas (SWIRFT), require that a project be in the State Water Plan for the TWDB to provide financial assistance to that project. If a water project to receive financial assistance under a TWDB program other than the WIF, SWIFT, or SWIRFT, it must be *consistent* with the State Water Plan, not necessarily *in* the State Water Plan. The TWDB may waive the requirement for consistency with the State Water Plan if the financial assistance is for a water project under a TWDB program other than the WIF, SWIFT, or SWIRFT, and the TWDB determines that conditions warrant the waiver.<sup>20</sup>

Regional and state water plans are planning level documents. Both the Region C and Region D planning groups acknowledge that more studies need to be done on critical strategies including

---

<sup>19</sup> Tex. Water Code § 16.051(b).

<sup>20</sup> Tex. Water Code § 16.053(k).



Marvin Nichols. The decision of whether to proceed with the development of Marvin Nichols or any other reservoir development strategy rests with the regional planners, the project sponsors, and the state and federal agencies that grant the licenses and permits necessary for the project to proceed.

The TWDB's task is to prepare a state water plan every five years that includes regional water plans adopted by regional water planning groups and approved by the TWDB in preparation for and in response to drought conditions.<sup>21</sup> None of the factors the TWDB must consider in approving a regional water plan involves a substantive analysis of the validity or sufficiency of the strategies in a plan. But allowing for any unmet needs that may affect public health, safety, and welfare in the face of another drought of record would not comply with the intent of the statute, nor would it address the legislative mandate to develop the strategies in the State Water Plan.

The Executive Administrator therefore recommends the following steps for the Board to resolve the conflict between Region C and Region D. In addition, the Executive Administrator proposes the attached timeline for public comment and consideration of this recommendation.

## **RECOMMENDATIONS**

The Executive Administrator recommends that the Board resolve the conflict between Region C and Region D by taking the following steps:

1. Applying the TWDB's definition of interregional conflict, 31 Tex. Admin. Code § 357.10(15), pursuant to Section 16.053(h)(7)(A) of the Water Code, the Executive Administrator recommends a finding that no interregional conflict as defined in TWDB rules exists between Regions C and D.

2. Regarding resolution of the conflict between Region C and Region D relating to construction of a reservoir and long-term protection of resources in the area to be impounded pursuant to Section 16.053(h)(7)(C) of the Water Code, the Executive Administrator recommends the following:

a. Instruct Region C to retain Marvin Nichols as a recommended strategy in its 2011 Water Plan, and to update Chapter 10 of its Plan, relating to the Plan Approval Process, to reflect the mediation, this TWDB action, and other actions taken to effect this decision; or, if the Board wishes to consider an alternative recommendation, the Board may consider

Instructing Region C to make Marvin Nichols Reservoir an alternative strategy and to elevate consideration and possible development of all other existing sources and water supply strategies to meet its water supply needs.

b. Instruct Region D to amend its 2011 Water Plan by removing references in the Region D 2011 Plan to the conflict as listed on Attachment 5 of this recommendation and

---

<sup>21</sup> See Tex. Water Code § 16.051(a).

updating Chapter 10 of its 2011 Plan to reflect the mediation, this TWDB action, and other actions taken to effect this decision;

c. Instruct both regions to participate in the completion of the ongoing Sulphur River Basin Study;

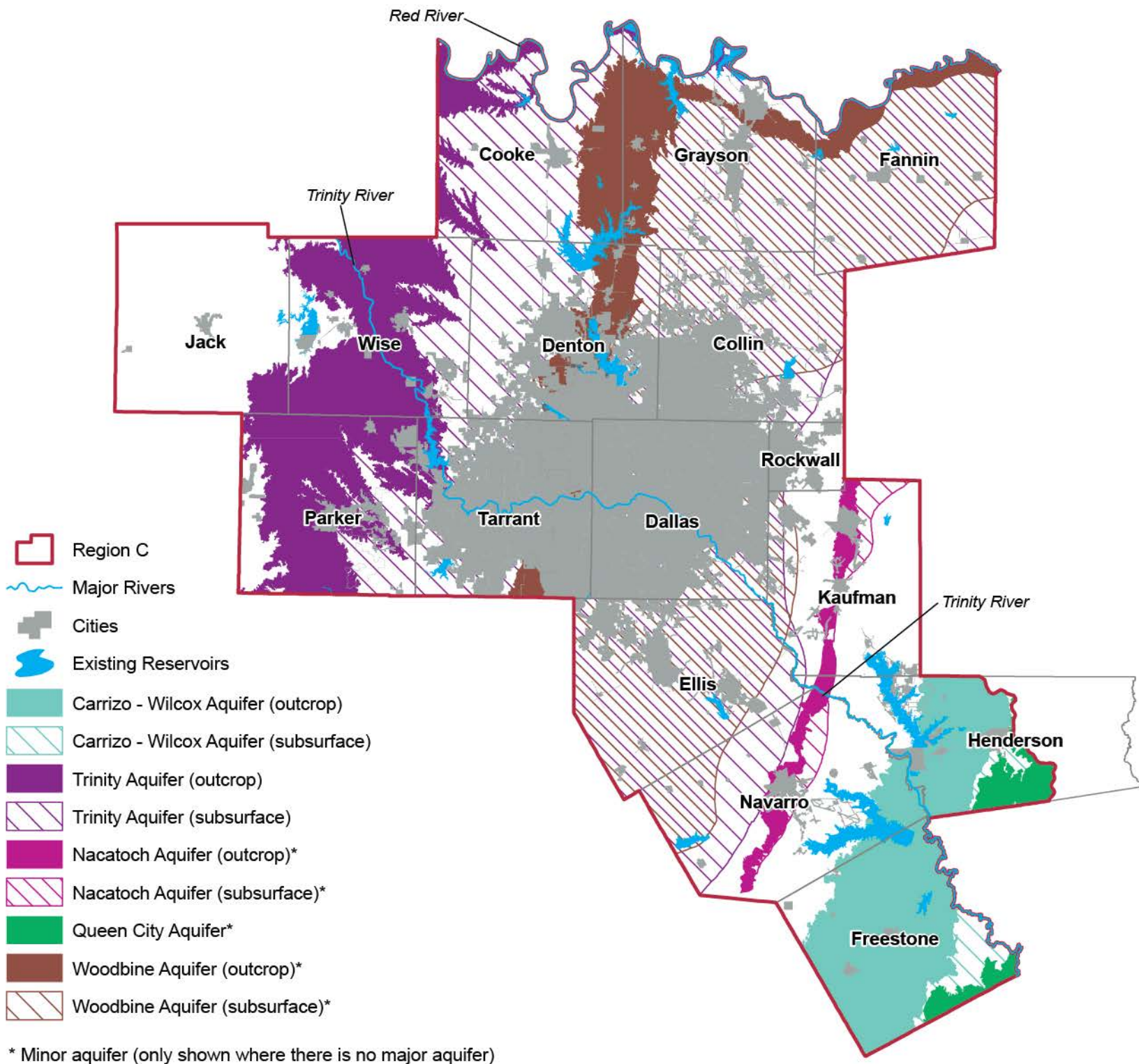
d. Instruct Region C to accelerate consideration of alternative strategies, including additional conservation measures and additional water supply alternative including Wright Patman Reservoir, Toledo Bend Reservoir, and George Parkhouse Reservoir, to meet needs where uncertainties exist regarding current strategies;

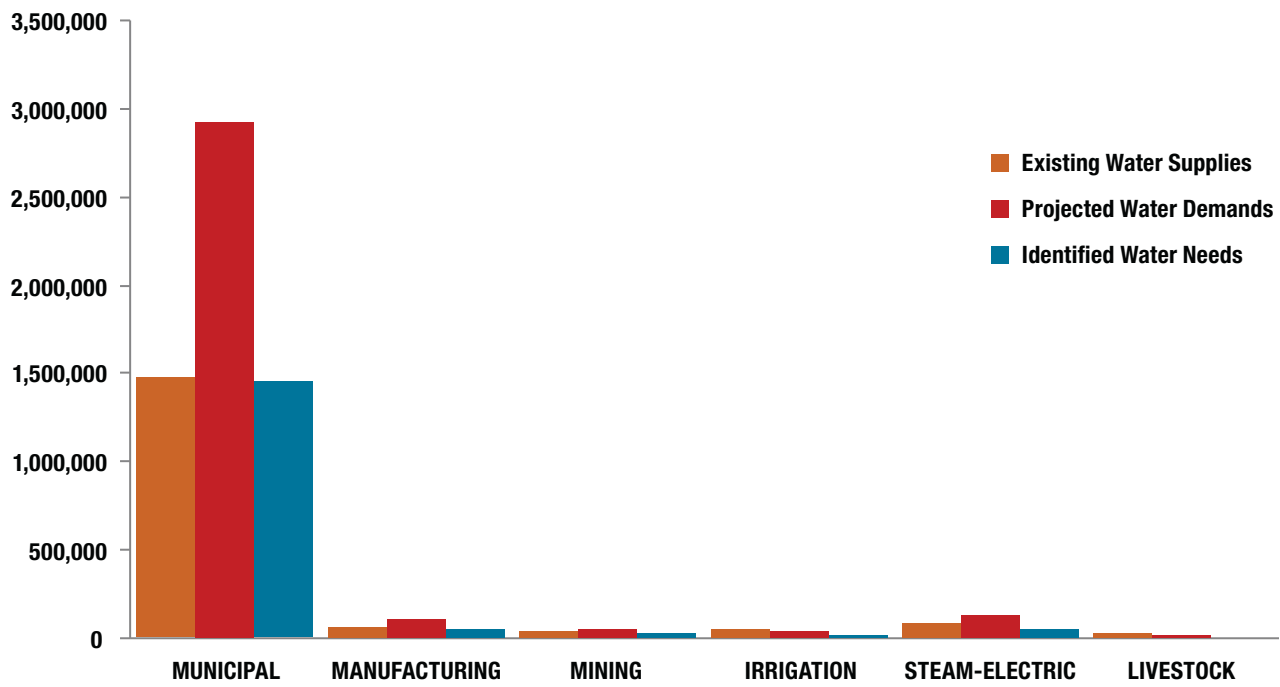
e. Encourage Region C to share mitigation measures for any project developed for Region C in Region D in proportion to the interest Region C water providers have in the water produced by the project; and

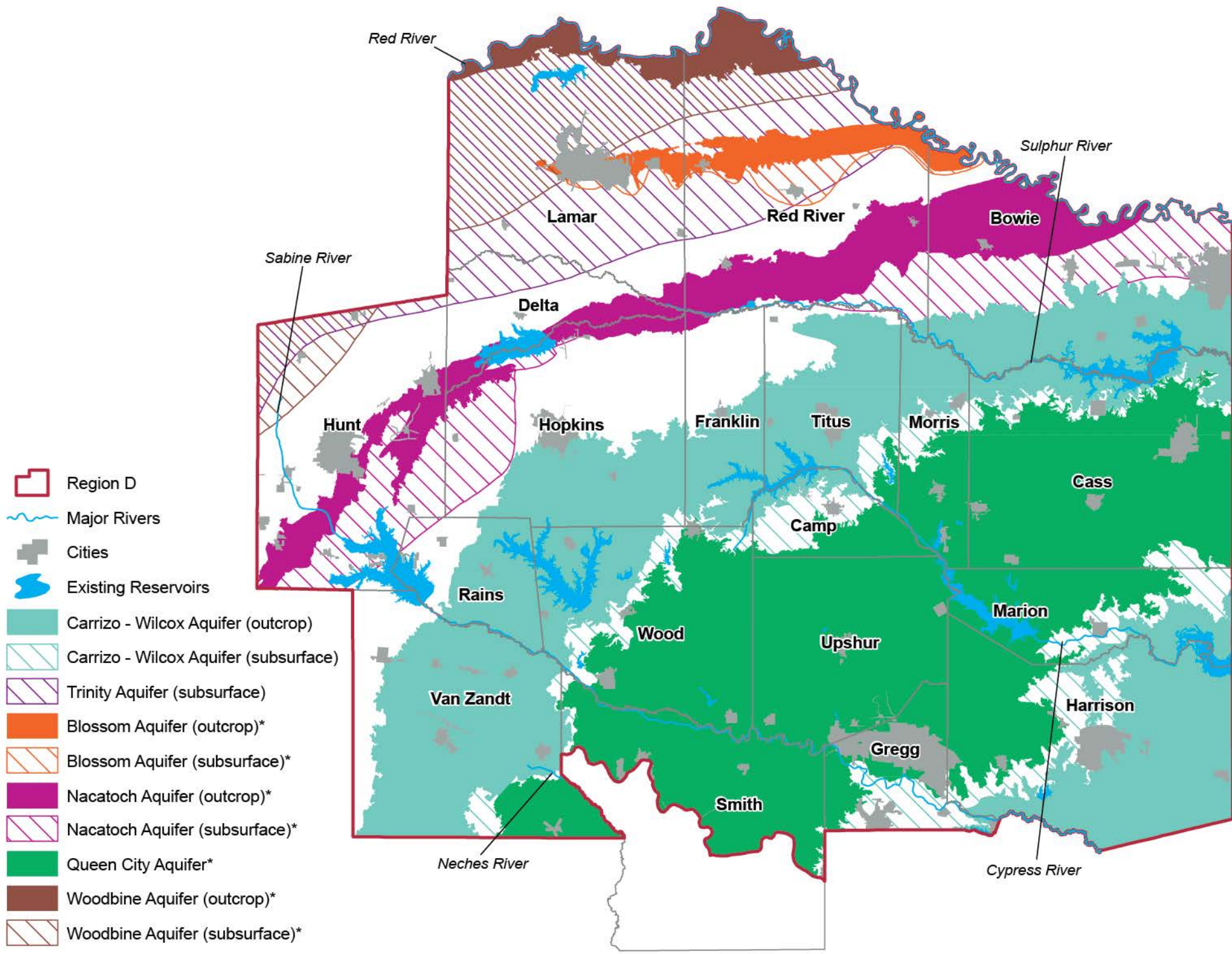
f. Instruct the Region C and Region D regional water planning groups to place review of the Board's decision and the setting of a public hearing on the next regional water planning group meeting and post notice as required by statute. Following the public hearing, each regional water planning group is to meet to adopt and submit plans amended in accordance with this directive to the TWDB for TWDB approval no later than 45 days from the date of the public hearing.

Attachment(s):

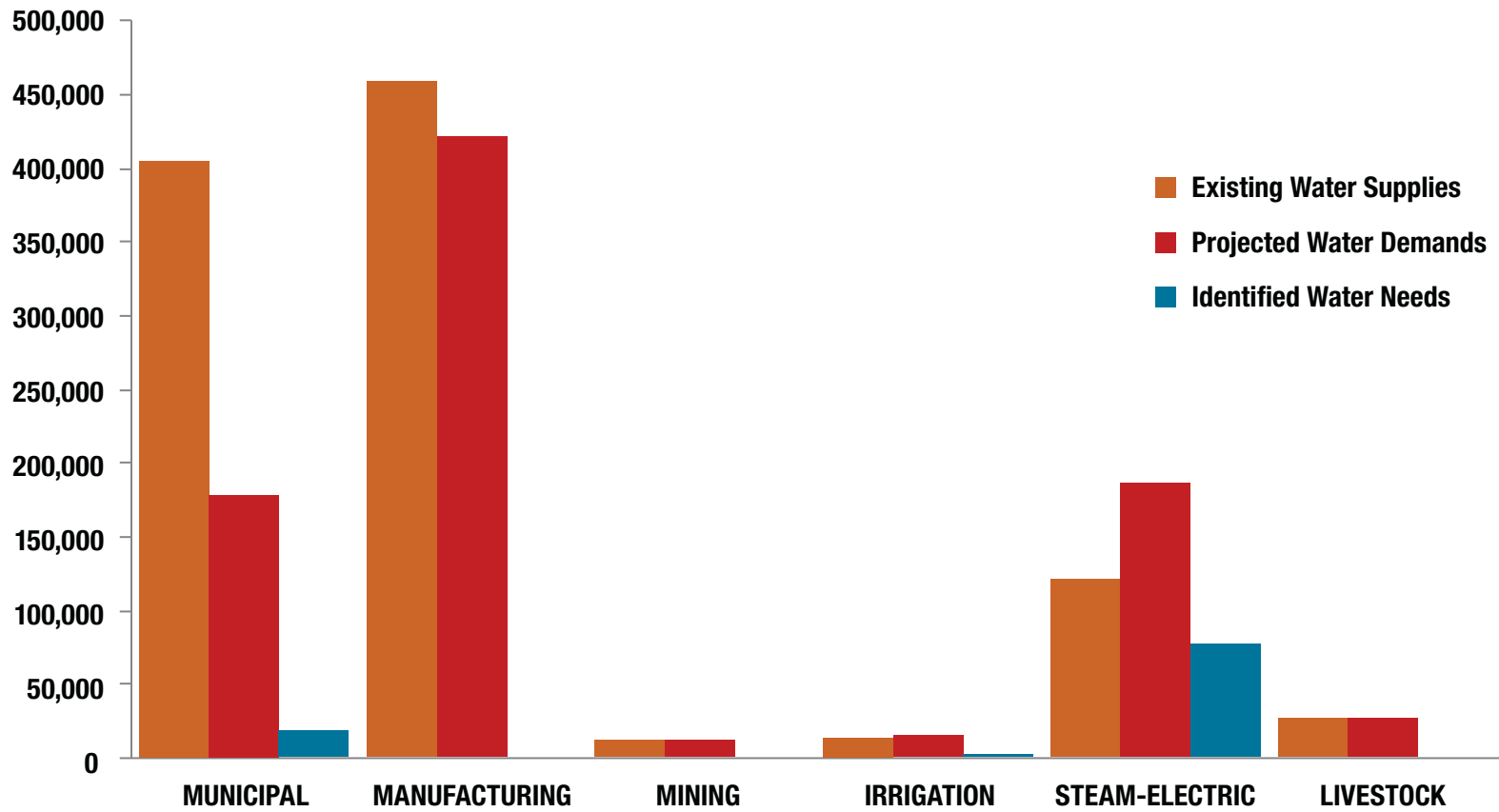
1. Region C Regional Water Planning Area Map and Summary Tables
2. Region D Regional Water Planning Area Map and Summary Tables
3. Map of Regions C and D Reservoirs—Existing and Potential
4. Revisions to be made in the Region D 2011 Regional Water Plan
5. Public Comments and Responses

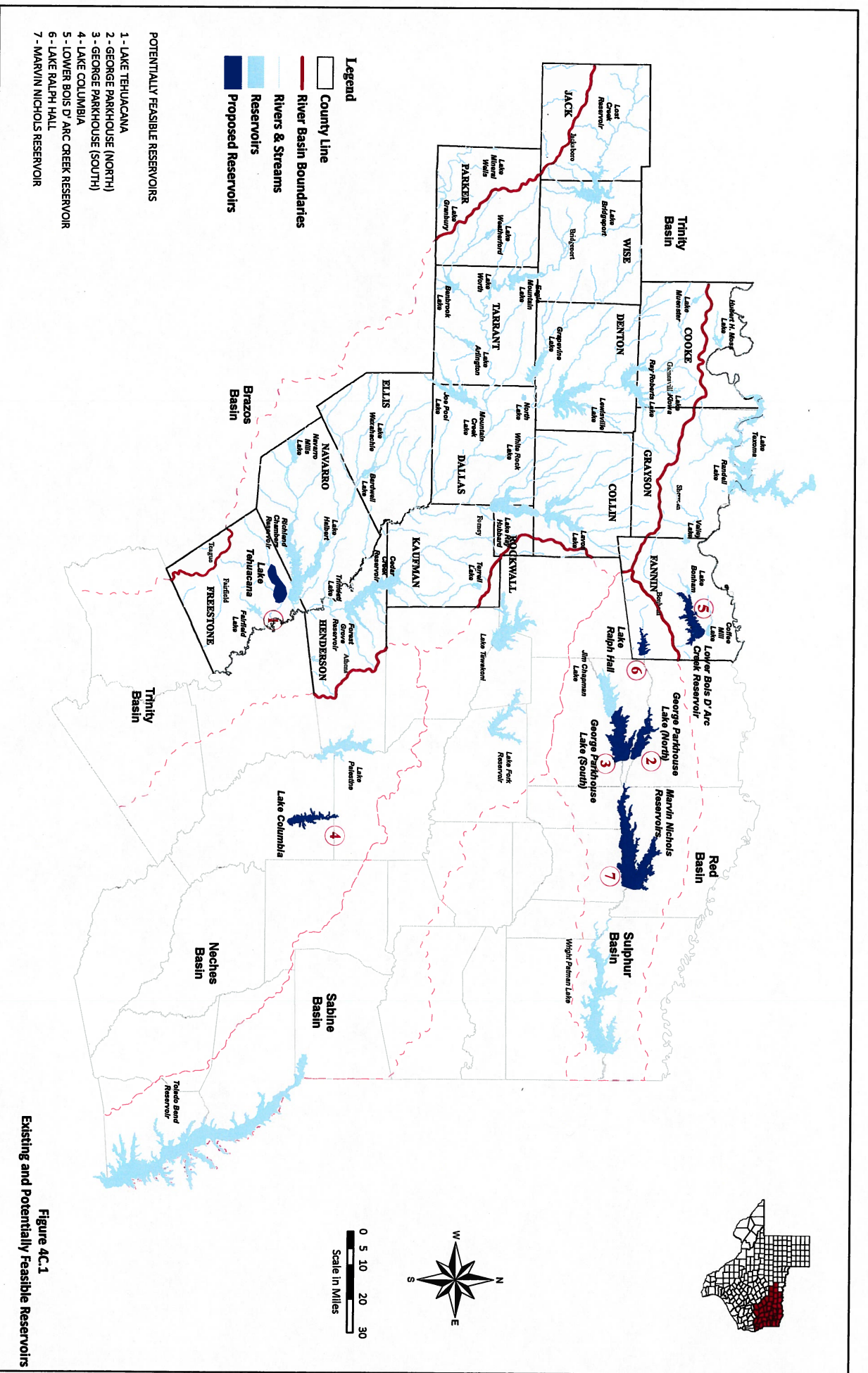






\* Minor aquifer (only shown where there is no major aquifer)





## **Revisions To Be Made In The Region D 2011 Regional Water Plan**

Delete the following portions of the Plan:

Page vi, Table of Contents, Section 7.0 Title beginning with “and the inconsistency . . .” to the end of the title

Page 7-1, Section 7.1, last paragraph, last four sentences beginning “This chapter will also address . . .”

Page 7-3, Section 7.3, second sentence in the paragraph beginning (“The Marvin Nichols I Reservoir . . . .”

Page 7-3, Section 7.4, the next-to-last sentence beginning with the phrase “although the Marvin Nichols I Reservoir . . .” to the end of the sentence.

Page 7-11, Section 7.7, Conclusion, paragraph and Note.

Page 8-6, Section 8.4, paragraph beginning “Sulphur River . . . .”

Page 8-16, Section 8.8, third paragraph beginning “It is the position . . . .”

Pages 8-32 – 8-33, Section 8.12.1, last paragraph beginning “Therefore, the North East Texas . . . .”

Page 8-35, Section 8.12.4, third paragraph beginning “The North East Texas . . . .”

Page 8-36, Section 8.13.1, last paragraph beginning “Based on the reasons set forth. . . ,” and ending on page 8-37 with “. . . of the Texas Water Code.”

Page 8-49, Section 8.13.15, NOTE



COMMENTS IN RESPONSE  
TO DRAFT RECOMMENDATION

Comments received during the comment period and at the public hearings have been organized by the issues that were raised or discussed. Because of the large number of comments received, unique points have been highlighted and similar points have been combined. Responses are shown in *italics*.

**THE RECOMMENDATION**

Commenters frequently stated that State law requires the State Water Plan to protect the water, agricultural, and natural resources of the state. The proposed Marvin Nichols Reservoir does not do so based on the detrimental impacts of proposed reservoir and required mitigation would have on Region D. Commenters suggested that the recommendation directly contradicts the decisions of the state courts in this matter. The courts have rejected TWDB's narrow definition of what constitutes an interregional conflict—which means the EA is holding to a position that ignores the decisions of the courts.

One commenter suggested that, rather than defend a rule that has already been undercut by judicial review, the Executive Administrator should be focusing on correcting, not perpetuating a rule that got us to this point in the first place.

*The Court of Appeals said “the Board can solve its dilemma by amending the rule defining an interregional conflict to include its present definition and the present situation where a region has studied the impacts and finds there is a substantial conflict.”<sup>1</sup> The Court did not tell the Board to eliminate the former definition, only to amend it to add the present situation.*

*Section 16.053(h)(7) provides that the TWDB may approve a regional plan only after it has determined that:*

- (A) all interregional conflicts involving that regional water planning area have been resolved;*
- (B) the plan includes water conservation practices and drought management measures incorporating, at a minimum, the provisions of Tex. Water Code §§ 11.1271 and 11.1272 (relating to water conservation and drought contingency plans); and*
- (C) the plan is consistent with long-term protection of the state's water resources, agricultural resources, and natural resources as embodied in the guidance principles adopted under Tex. Water Code § 16.051(d).*

*Subpart (A) addresses the allocation of water resources. The recommendation reiterates that no interregional conflict as defined in current Board rules<sup>2</sup> is present in this case. It also acknowledges the current conflict under Subpart (C) with regard to construction of a reservoir and long-term protection of resources in the area to be impounded.*

---

<sup>1</sup> *Ward Timber*, 411 S.W.3d at 573.

<sup>2</sup> 31 TEX. ADMIN. CODE § 357.10(15).

*The rule was put in place before the appellate court rendered its opinion. Amending the rule is a separate matter from resolving the conflict. No changes in the recommendations will be made based on these comments.*

Commenters stated that requiring Region D to alter its plan is not acting in accordance with the “bottom up” water planning process. They assert that the courts remanded only Region C for resolution and thus, the TWDB has no right to instruct Region D to amend its plan.

*The courts instructed the TWDB to resolve the conflict as required by statute. The statute requires the TWDB to resolve interregional conflicts. It also requires the involved regional water planning groups to prepare revisions to their respective plans based on the Board’s recommendations. Though the courts remanded only the 2011 Region C Water Plan as unapproved due to a conflict, Region D is an “involved region” under the statute for a number of reasons. Region D has an obvious stake in the resolution of the conflict. It raised the specter of a conflict in detail in its regional plan. It has participated vigorously in this resolution process. It is the location of the proposed reservoir and will be affected by the outcome of the resolution. Thus, it is appropriate to recommend revisions to the Region D Plan that reflect the Board’s resolution of the conflict.*

*The Executive Administrator makes no changes to the recommendation based on these comments.*

Several commenters suggested making Marvin Nichols Reservoir an alternative strategy, not a recommended strategy, in the Region C Plan.

*For the reasons set out in the draft recommendation, the Executive Administrator continues to favor Recommendation 2.a. However, if the Board wishes to consider revising the recommendation, it may consider instructing Region C to make Marvin Nichols Reservoir an alternative strategy and to elevate consideration and possible development of all other existing sources and water supply strategies to meet its water supply needs.*

Commenters suggested tabling the issue until further negotiations and studies are done.

*The Executive Administrator considered this option and decided not to recommend it. The regions are already at work on their 2016 plans. It is important to put this matter before the Board for resolution as instructed by the courts so that Regions C and D can put the 2011 plans behind them and focus on the 2016 plans and future regional water planning.*

*The mediation ordered by the Board in response to the court decisions is only the most recent attempt to resolve the conflict between Regions C and D. A previous study commission, established by the 80<sup>th</sup> Legislature in 2007 and consisting of members appointed by both regional water planning groups, was charged with reviewing the water supply alternatives available. But after a year of work, the Study Commission was unable*

*to reach a consensus on its findings and recommendations. The draft recommendations of that Study Commission tried to balance the interests of both regions and provide direction for moving forward. Like the recent mediation, the Study Commission failed. No changes in the recommendations will be made based on these comments.*

One commenter asserted that the conflict is not about location of a reservoir, but about the impact. The conflict needs a compromise that takes into account both the need for water and protection of environmental, agricultural, economic, and natural resources.

*It seems, however, that the two are tied together. The potential impact is a result of the identified location. It is difficult to imagine a situation in which the location could stay the same, but the economy and natural resources would not be affected. It is also hard to see how moving the location of the reservoir would remove the issue presented of protecting local resources.*

A commenter asserted that the recommendation is inconsistent with the TWDB's own guidelines. It states that an additional 1.7 million acre-feet will be needed to meet the projected population growth by 2060. The Region C plans states that the projected growth is 6.5 million people. That comes to 234 gallons per person per day, or 94 gallons per day more than the TWDB has recommended. What gives them the right to play by a different set of rules?

*This appears to be based on the Water Conservation Implementation Task Force study that came up with a recommended statewide goal of reducing total statewide water demand to an average of 140 gallons per capita per day (GPCD). The study itself notes that the 140 GPCD was a compromise that would need to be replaced with more meaningful goals and targets as data became available. The goal was never adopted by the TWDB because of the uncertainties surrounding it.<sup>3</sup> It is not a Board recommendation.*

Several commenters expressed concern regarding Recommendation 2.g. that states the issue of Marvin Nichols should not be raised in any future Region D water plan. They noted that there is no precedent for binding future regional water planning groups in this manner.

*Recommendation 2.g. did not mean that the issue cannot be raised again in another context or before another agency, nor that Region D is unable to raise other issues in its plan. Region D may find other conflicts in future water plans, but resolution of this conflict should settle this particular matter.*

*With that said, based on the comments, the Executive Administrator is removing Recommendation 2.g. from the recommendations.*

## **ECONOMIC ISSUES**

---

<sup>3</sup> See Texas Water Development Board Special Report, Water Conservation Implementation Task Force Report to the 79<sup>th</sup> Legislature, 61, 67 (November 2004).

Comments were received that Marvin Nichols Reservoir would mean lost revenues from farming, ranching, hunting leases and timber leases in the area. Commenters stated that the timber industry is vital to the area. And that it will be irreparably damaged by taking the reservoir and associated mitigation lands.

According to speakers for the industry, development of Marvin Nichols threatens future planned expansion of International Paper and the related timber industry. They asserted that, as a result of the loss of the timber industry, other industries connected to timber will be negatively affected (8 associated jobs for every International Paper job).

Other commenters wrote that farming has diminished significantly as an economic force in the area. Ranching has not brought in the jobs needed to keep youth in the area. These commenters suggest that a large lake with 70% of the shoreline in Red River County would make Clarksville, Bogata, Cuthand, Annona, Boxelder, and many smaller, once thriving, communities thrive again. There would be jobs for home builders, plumbers, road construction, electricians, and other trades. There will be a change—an influx of development, people seeking cabins for weekend getaways, and development along the shores of one of the largest lakes in Texas. This would all contribute to the entire North Texas economy.

*Timber is currently a major industry in the area. But other options for income are available in the area that will be affected by the reservoir development. Creating the reservoir itself may also positively impact the economy. No changes in the recommendations will be made based on these comments.*

## ALTERNATIVES

A large number of commenters suggested that other options are available for water supplies to Region C that protect the natural resources of the State. They say expansion of Wright Patman Reservoir and Ray Hubbard, utilization of Lake Texoma and the Toledo Bend Reservoir, or combinations of these and other options would adequately supply Region C without the negative impacts associated with Marvin Nichols.

*Most of the options mentioned have been included as strategies in the Region C Plan.*

Other commenters noted that two hundred million acre-feet of water have flowed over Wright Patman dam on its way to the coast. Raise the water level of Wright Patman just a few feet and Region C will have all the water it needs to avoid developing Marvin Nichols. It will be less destructive to the economy and the land, even though it will have costs.

*Wright Patman is a strategy in Region C's plan. But it, too, is not without its issues. To wait until the engineering and other questions are resolved before considering Marvin Nichols as a strategy in the plan leaves an unmet need in the plan.*

Still other commenters proposed considering the Trinity River project as an alternative, and investing in the development of Lake Columbia?

*Both of these strategies are included in the Region C Plan—the main stem Trinity River Pump Station as a recommended strategy and Lake Columbia as an alternative strategy.*

Several commenters encouraged consideration of desalination of ocean water and brackish water before building a reservoir.

*As with the other options listed, desalination, especially of brackish water, is an alternative being considered not only by Region C, but by other regions of the state, as well. In fact, desalination and blending projects are already under way in some areas of Region C, and desalination of water from the Gulf of Mexico is listed as a major, potentially feasible strategy.*

One commenter observed that, since proposed in the first regional plan, the cost to develop Marvin Nichols has doubled and will likely double again before it is constructed. Commenters state that reservoirs are not a good option for water storage. Other commenters recommend looking to underground storage options for water diverted from the Sulphur River.

A commenter also observed that the aquifers continue to be depleted. By the time Marvin Nichols is actually built, there may not be any fresh water left to fill it from the nearby river or fresh water source. The commenter asserted that it is time for Texas to devise a modern, comprehensive solution to water management and develop innovative solutions rather than relying on a plan that was put in place in 1968.

*The costs of all strategies in the water plans will increase over time. One reason the 82<sup>nd</sup> Legislature took the step of passing HB 4, HB 1025, and SJR 1 was to stimulate development of strategies in the State Water Plan as costs escalate. Rising cost does not justify removal of a strategy from a plan. The fact that all water sources are being stressed argues for keeping all alternatives available over both the near and far planning horizon.*

### **CONSERVATION IN REGION C**

A number of commenters expressed in various ways the concern that Region C residents waste an enormous amount of water. Some commenters suggested that conservation and reuse measures could be implemented that would meet the needs of Region C and should be addressed before any additional reservoirs are built. And one commenter pointed to San Antonio as having reduced its water consumption over the last two decades by 42% through conservation, while Region C has the highest per capita use of any area in the state.

One commenter, however, opposed to the inclusion of Marvin Nichols in the Region C Plan noted that the water demand projections for Region C have decreased considerably since the 2011 regional plan was prepared, and recent actions and new opportunities to enhance water conservation call into question any justification for the proposed reservoir, at least within the 50-year planning horizon. Water conservation is beginning to have an impact in Region C. The commenter asserted that the water demand projections for the next round of regional water planning show that—as a result of the lower projected per capita water use and some lower

population growth projections—the demand for water in Region C in 2070 is projected to be lower than the demand for water that had been projected for 2060 in the 2011 Region C plan—by about 300,000 acre-feet of water per year.

The commenter proposed that the TWDB, as an interim measure, remove the Marvin Nichols Reservoir from the 2011 Region C Plan and require that additional municipal water conservation be included to meet any resulting shortfall in water supplies. In effect, some of that is already happening, as is demonstrated by the lowered water demand projections for the new round of planning, and more conservation is possible given recent state and local actions. Another commenter noted that conservation measures introduced by Dallas Water Utility have saved an estimated 200 billion gallons and reduced “gallons per capita per day” by 22 percent. Dallas anticipates that approximately 25 percent of its future water needs will be met by conservation and reuse.

*Current efforts made by the City of Dallas and others in Region C to reduce per capita consumption through conservation measures are having positive results. Conservation and reuse strategies could account for as much as 30 percent of projected 2060 volumes. But to assume that Region C will be able to meet its long-term needs with current supplies and increased conservation is not practical. Other commenters, even those against development of Marvin Nichols, acknowledge that Region C will need additional water supplies in the future.*

Several commenters noted that Region C (the Metroplex) has 126 billion gallons in reserve in its plan. There is no need for Marvin Nichols with such excess capacity already available. Another commenter quoted the figure as a surplus of 700,000 acre feet available.

*The Region C Plan states that the reserve is reasonable to provide for difficulties in developing strategies in a timely manner, the occurrence of droughts worse than the drought of record, greater than expected growth, and supply for needs beyond this planning horizon. Presumably, that figure will be adjusted as strategies are developed and contingencies are faced. It is important to note that the surplus is calculated on the basis of the entire region. Removing Marvin Nichols as a strategy affects only certain water user groups and water providers. There would not be a one-for-one tradeoff between removing Marvin Nichols and adjusting the amount of surplus.*

## **SOCIAL ISSUES**

The majority of commenters expressed concern that development of Marvin Nichols as projected will destroy homesteads, cemeteries, Native American burial grounds, other historic sites in the area and vital habitat. Another commenter suggested that, given the proposed location of the reservoir, it is not likely that even one residence will be disturbed.

*Until a final proposal for the reservoir is before the permitting agencies, the extent of its footprint is difficult to assess. With regard to cemeteries and historic sites, other agencies will oversee assessment of any sites and removal to other locations.*

## **ENVIRONMENTAL ISSUES**

A commenter suggested that mitigation would require an area the size of Titus County. The question was asked, “Where do we find that much available land?” Other commenters noted that the location of the reservoir *and* of likely mitigation land put the entire burden on the shoulders of Region D. Even commenters who were not opposed to development of the reservoir expressed concern regarding mitigation, suggesting that the area required for mitigation should be reduced to the least amount possible.

*Several figures were suggested for the amount of land that would be needed for mitigation, which suggests that the amount required is not known and will not be known until the issue is reviewed by the agencies that determine the amount of mitigation needed.*

## **OTHER COMMENTS**

One commenter observed that the footprint of the proposed reservoir lies over the Mexia-Talco Fault and the Luann Salt—unstable conditions for the development of a large reservoir.

*The Luann Salt is a formation that underlies much of eastern and southern Texas; it is deep below the surface and below the East Texas aquifers. The Mexia-Talco Fault is an inactive fault line that runs through the area. It is not possible at this time to tell what, if any, impacts these geologic formations may have on the viability of the development of Marvin Nichols Reservoir. This issue will be fully examined when an Environmental Impact Statement is prepared for the Clean Water Act Section 404 permit process with the U.S. Corps of Engineers. No changes in the recommendations will be made based on this comment.*

One commenter wanted to know how an acceptable fair market value is determined when there is no willing seller. Another commenter suggested that land owners be compensated for any land acquired for the development of the reservoir in accordance with the *Uniform Standards of Professional Appraisal Practice*.

*A number of tools are available for determining property values. The process for land acquisition is set out in detail in statute.<sup>4</sup> No changes in the recommendations will be made based on these comments.*

The need for Region C is in the future. The impact on Region D is immediate, not speculative.

*The Region C Plan shows that Marvin Nichols is a strategy for future needs. But the comments received do not show how the impact on Region D is immediate. The impacts are not speculative. But people and businesses will have an opportunity to make adjustments, develop new options, and prepare.*

---

<sup>4</sup> See Tex. Prop. Code Ch. 21.

A commenter suggested that the proposed reservoir may not rank high on several criteria in the new regional prioritization process, especially as certain factors in flux are likely to impact its ranking in a negative way. The commenter also observed that, even if continued in the Region C water plan, any effort to actually build the reservoir is going to involve a lengthy, protracted, and expensive permitting process that has no guarantee of success.

*Until the SWIFT rules are adopted, any assumptions regarding how prioritization will be applied and its impacts assessed are premature. Many of the projects in the regional water plans will involve lengthy processes to move from planning through design to implementation. Lack of certainty at this stage is not a reason to remove an otherwise feasible alternative from a regional plan. No changes in the recommendations will be made based on this comment.*

A commenter recommended that the TWDB clarify the last sentence in the first paragraph under “Summary” to make clear that the TWDB may only waive the consistency requirement for financing projects not necessarily identified in the SWP only when the financial assistance will not be from the WIF, SWIFT, or SWIRFT.

*The Executive Administrator agrees with this comment because of the need for clarity in stating the relationship between the statutory requirements related to the State and regional water plans and the funding programs managed by the TWDB.*

A commenter expressed concern that Region D is restricted from access to WIF, SWIFT, and SWIRFT fund due to the conflict, as the Region D 2011 Water Plan has been adopted and approved and was not in part of the District Court order.

*There may be a question as to whether the courts remanded both regional plans to the Board for further action. However, granting that the approval of Region D’s plan may not have been reversed, there is no uncertainty that the Court of Appeals saw resolution of the conflict as involving both regions.<sup>5</sup> Under Tex. Water Code § 16.053(h)(6), on resolution of the conflict, the involved regional water planning groups shall prepare revisions to their respective plans; consider all public and board comments; prepare, revise, and adopt their respective plans; and submit their plans to the Board for approval and inclusion in the state water plan. The Executive Administrator makes these recommendations in accordance with those statutory instructions. For the reasons discussed above, both plans must reflect the Board’s resolution of the conflict in order to be approved and included in the State Water Plan. Approval will determine whether projects in a region are eligible for funding from TWDB programs under the applicable statutes or that may require a waiver.*

---

<sup>5</sup> See, e.g., *Ward Timber*, 411 S.W.3d at 574 (“By complying with Section 16.053(h)(6) and facilitating coordination between the two regions to resolve the major conflict in the two plans, the Board will be carrying out the purpose of the state water plan.”); and at 575 (“The Region D planning group in its Region D plan made a preliminary case that there is a substantial interregional conflict with Region C’s plan, and that should be sufficient for the Board to require the two regional planning groups to attempt to resolve that conflict.”)



One commenter suggested that the TWDB take direction from the Texas Constitution, Section 49-d by encouraging optimum development of the limited number of feasible sites available for the construction of dams and reservoirs.

*The Executive Administrator agrees with the comment and notes, further, that the Legislature provided funds to encourage optimum regional development of projects including the design, acquisition, lease, construction, and development of reservoirs.<sup>6</sup>*

Another commenter urged that state water is a state resource, and asked that the TWDB not remove a vitally important strategy at this early stage of the process.

*The Executive Administrator agrees with this comment. One of the purposes of the planning process is to provide an opportunity for regions of the state to explore options, strategies, for the development of the State's waters, "which waters are held in trust for the use and benefit of the public."<sup>7</sup> From those options, the regions determine which are most appropriate for development at a given time.*

One commenter stated that resolution of the conflict is urgently needed so that the regions can move on with planning and consideration of all options.

*The Executive Administrator agrees with this comment. Some commenters have asked for more time to negotiate further. As noted above, attempts to reach a negotiated agreement between the regions have failed on more than one occasion. The Plaintiffs in Ward Timber asked the courts to instruct the Board to resolve the conflict they identified. The courts did that. This recommendation to the Board is in response to the Court's order.*

A commenter recommended that the Executive Administrator clarify the last sentence in the first paragraph under "Summary" to make clear that the TWDB may only waive the consistency requirement for financing projects not necessarily identified in the SWP only when the financial assistance will not be from the WIF, SWIFT, or SWIRFT, such as:

*"With the exception of the Water Infrastructure Fund (WIF), the State Implementation Fund for Texas (SWIFT), and the State Water Implementation Revenue Fund for Texas (SWIRFT), which require that a project be in the State Water Plan, the TWDB may provide financial assistance if a water project is *consistent* with the Plan, not necessarily *in* the Plan. The TWDB may waive the requirement for consistency with the State Water Plan if a financial assistance application is for financing under a TWDB program other than the WIF, SWIFT, or SWIRFT, and the TWDB determines that conditions warrant the waiver."*

*The Executive Administrator agrees with the commenter that this point needs to be made clear. The language in the Summary section of the recommendation has been revised with this in mind.*

---

<sup>6</sup> Tex. Water Code § 16.131.

<sup>7</sup> TEX. CONST. art. III, § 49-d(a).

# Texas Water Development Board

P.O. Box 13231, 1700 N. Congress Ave.  
Austin, TX 78711-3231, [www.twdb.texas.gov](http://www.twdb.texas.gov)  
Phone (512) 463-7847, Fax (512) 475-2053

May 20, 2014

To: Persons on the Attached Mailing List (by mail and email as indicated)

Re: Conflict between Regional Water Plans for Regions C & D

This letter is in response to the Executive Administrator's Final Recommendation ("Recommendation") on the Conflict between Regional Water Plans for Regions C & D issued on May 19, 2014. A copy of the Recommendation is located on the Texas Water Development Board's official website: <http://www.twdb.texas.gov/>.

The Office of General Counsel is requesting the submission of legal briefs or responses to the Recommendation by a representative for Region C and a representative for Region D ("parties"); and the subsequent submission of a legal reply to the responses submitted. The briefs should contain a full discussion of the parties' legal and factual reasons for their positions. Additionally, the parties should limit their argument to those germane to the issues raised in the Recommendation.

Response briefs must be received by the Office of General Counsel on or before **5:00 P.M.** on **Friday, June 20, 2014**. Replies to the response briefs must be received by the Office of General Counsel on or before **5:00 P.M.** on **Monday, July 7, 2014**. Please send both the response and reply briefs to the Office of General Counsel by U.S. Mail and Electronic Mail. The mailing address of the Office of General Counsel is: Office of General Counsel, ATTN: Les Trobman, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231 [[les.trobman@twdb.texas.gov](mailto:les.trobman@twdb.texas.gov)]. On the same day a response or reply is transmitted to the Office of General Counsel, a copy must also be sent by U.S. Mail and Electronic Mail to all other persons at their mailing address/email address listed on the attached Mailing List.

All timely written submissions on this matter will be considered and I will inform the parties by letter when the Recommendation will be set for a public Board Meeting. If you have any questions regarding the briefing schedule or related matters, please contact me at 512-463-9105.

Very truly yours,



Les Trobman  
General Counsel

## Mailing List

### Our Mission

To provide leadership, planning, financial assistance, information, and education for the conservation and responsible development of water for Texas

### Board Members

Carlos Rubinstein, Chairman | Bech Bruun, Member | Kathleen Jackson, Member

Kevin Patteson, Executive Administrator

**Mailing List**  
**Conflict between Regional Water Plans for Regions C & D**

Jim Parks  
North Texas Municipal Water District  
P.O. Box 2408  
Wylie, Texas 75098  
(972) 442-5404 (phone)  
[jparks@ntmwd.com](mailto:jparks@ntmwd.com)

Walt Sears, General Manager  
Northeast Texas MWD  
P.O. Box 955  
Hughes Springs, Texas 75656  
(903) 639-7538 (phone)  
[netmwd@aol.com](mailto:netmwd@aol.com)

Jody Puckett  
City of Dallas Water Utilities  
1500 Marilla Street, 4AN  
Dallas, Texas 75201  
(214) 670-3144 (phone)  
[jo.puckett@dallascityhall.com](mailto:jo.puckett@dallascityhall.com)

Joe Reynolds  
Texas Water Development Board  
P.O. Box 13231  
Austin, Texas 78711-3231  
(512) 936-2414 (phone)  
[joe.reynolds@twdb.texas.gov](mailto:joe.reynolds@twdb.texas.gov)

Russell Laughlin  
Hillwood Properties  
13600 Heritage Parkway, Suite 200  
Fort Worth, Texas 76177  
(817) 224-6017 (phone)  
[russell.laughlin@hillwood.com](mailto:russell.laughlin@hillwood.com)

Bret McCoy  
700 CR 3347  
Omaha, Texas 75571  
(903) 645-7367 (phone)  
[bret.mccoy@edwardjones.com](mailto:bret.mccoy@edwardjones.com)

Richard LeTorneau  
P.O. Box 12071  
Longview, Texas 75607  
(903) 918-7769 (phone)  
[richardoi@aol.com](mailto:richardoi@aol.com)

Jim Thompson  
Ward Timber, Ltd.  
P.O. Box 1107  
Atlanta, Texas 75551  
(903) 799-5331 (phone)  
[jimthompson@wardtimber.com](mailto:jimthompson@wardtimber.com)

**IN RE THE INTERREGIONAL  
CONFLICT BETWEEN THE REGION  
C AND REGION D REGIONAL  
WATER PLANNING GROUPS**

§  
§  
§  
§

**BEFORE THE TEXAS  
WATER DEVELOPMENT BOARD**

**BRIEF OF THE REGION C REGIONAL WATER PLANNING GROUP ON  
THE RESOLUTION OF INTERREGIONAL CONFLICT**

**TABLE OF CONTENTS**

- 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.....2**
  
- 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.....2**
  - A. Marvin Nichols is an indispensable component of the Region C Water Plan because there are no reasonable alternatives to such a large potential source of supply.....3**
  
  - 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..... 5**
  
  - 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..... 10**
  
- III. This proceeding is not an adjudication of rights that requires the Board to develop an evidentiary record.....14**
  
- IV. There is only one reasonable way to resolve this conflict.....15**

**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.<sup>1</sup> The mediation between the Region C and Region D Regional Water Planning Groups<sup>2</sup> regarding the proposed Marvin Nichols Reservoir project ("Marvin Nichols") was unsuccessful. The Board must now resolve the conflict.<sup>3</sup> 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.<sup>4</sup> 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

---

<sup>1</sup> TEX. WATER CODE § 16.053(h)(6).

<sup>2</sup> 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.

<sup>3</sup> TEX. WATER CODE § 16.053(h)(6).

<sup>4</sup> 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.<sup>5</sup>

**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.<sup>6</sup> The proposed reservoir has been recommended in some form or another in every State water plan since 1968.<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</sup> 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.<sup>10</sup> 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

---

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

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

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

<sup>8</sup> Executive Administrator's Recommendation Memorandum to the Board Members, May 19, 2014, at 2.

<sup>9</sup> TEX. WATER DEV. BD., 2012 WATER FOR TEXAS (2012), [http://www.twdb.state.tx.us/publications/state\\_water\\_plan/2012/2012\\_SWP.pdf](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*].

<sup>10</sup> 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](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.<sup>11</sup> Simply stated, the Marvin Nichols Reservoir project is a critical component of Region C's plan for the future.<sup>12</sup>

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.<sup>13</sup> 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.<sup>14</sup> The North Texas economy is, in turn, vitally important to Texas and the national economy as a whole.<sup>15</sup> Dallas-Fort Worth is the fourth largest metropolitan area in the nation.<sup>16</sup> 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.<sup>17</sup> 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

---

<sup>11</sup> 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.

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

<sup>13</sup> *Id.* at 53.

<sup>14</sup> *2011 Region C Water Plan*, *supra* note 10, at ES.7.

<sup>15</sup> 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>.

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

<sup>17</sup> *2011 Region C Water Plan*, *supra* note 10, at 1.1.

the next two years.<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup> 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.”<sup>22</sup>

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

---

<sup>18</sup> 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>.

<sup>19</sup> *2011 Region C Water Plan*, *supra* note 10 at ES.7.

<sup>20</sup> *2012 State Water Plan*, *supra* note 9, at 47-48.

<sup>21</sup> TEX. WATER CODE § 16.051(a).

<sup>22</sup> *Id.*



recommendations. The criteria by which regional water plans are to be developed are also outlined in Chapter 16.<sup>23</sup> 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.<sup>24</sup> 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."<sup>25</sup>

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.<sup>26</sup> That opposition persists to date.<sup>27</sup>

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.<sup>28</sup> 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

---

<sup>23</sup> *Id.* § 16.053(e).

<sup>24</sup> *Id.* § 16.053(h)(7).

<sup>25</sup> *Id.* § 16.053(h)(6).

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

<sup>27</sup> 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](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*].

<sup>28</sup> *Ward Timber*, 411 S.W.3d at 575.

regions to resolve the conflict. If conflict remains, *the board shall resolve the conflict.*<sup>29</sup> 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

---

<sup>29</sup> 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.<sup>30</sup> The George Parkhouse projects would capture water already allocated to other recommended strategies, including Marvin Nichols Reservoir,<sup>31</sup> but would yield less than half the amount of supply for Region C than would Marvin Nichols.<sup>32</sup> Similarly, obtaining water from Lake Texoma is already a recommended supply<sup>33</sup> 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.<sup>34</sup> 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.

---

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

<sup>31</sup> *Id.* at 4D.15

<sup>32</sup> *Id.* at 4D.5-6.

<sup>33</sup> *Id.* at 4D.12.

<sup>34</sup> *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.<sup>35</sup>

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.<sup>36</sup> The Court also recognized that the Legislature intended for the Board to balance water planning strategies with impacts on agricultural, economic, and natural resources.<sup>37</sup> 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

---

<sup>35</sup> See TEX. WATER CODE § 16.051(a).

<sup>36</sup> *Ward Timber*, 411 S.W.3d at 575.

<sup>37</sup> *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.<sup>38</sup> Were that to happen, Marvin Nichols could succumb to the same fate as the Lake Fastrill and Waters Bluff Reservoir projects.<sup>39</sup>

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.<sup>40</sup> The Board does not regulate water use. As such, the Board is not charged

---

<sup>38</sup> See *Hearts Bluff*, 381 S.W.3d at 475.

<sup>39</sup> 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).

<sup>40</sup> 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).<sup>41</sup> 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.<sup>42</sup>

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.<sup>43</sup> 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.<sup>44</sup> 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.<sup>45</sup> 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;

---

<sup>41</sup> *Id.* § 16.051(a), (d).

<sup>42</sup> *Id.* §§ 16.051(a), 16.053(h)(7).

<sup>43</sup> *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.

<sup>44</sup> *See* TEX. WATER CODE §§ 11.121-.134.

<sup>45</sup> *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.<sup>46</sup>

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.<sup>47</sup> 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.<sup>48</sup>

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.<sup>49</sup> This includes lists that begin with the term "including but not limited to . . ." <sup>50</sup> 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

<sup>46</sup> *Id.* § 16.053(e).

<sup>47</sup> *Id.* §§ 16.051(d), .053(e).

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

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

<sup>50</sup> *Id.*

the planning process, the provision should not be read to include items that are dissimilar from those included.<sup>51</sup> 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.<sup>52</sup>

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."<sup>53</sup> But Region D takes the position that no reservoirs should be built because they are inconsistent with protection of agricultural, environmental, and natural resources.<sup>54</sup> 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

---

<sup>51</sup> *See id.*

<sup>52</sup> *See id.*

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

<sup>54</sup> *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 . . . ." <sup>55</sup> 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. <sup>56</sup> 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. <sup>57</sup>

---

<sup>55</sup> *Id.*

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

<sup>57</sup> *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.<sup>58</sup> 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.<sup>59</sup> 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.<sup>60</sup> Similarly, the court may not simply substitute its judgment for that of the Board.<sup>61</sup> The Board, however, need not build an administrative record.<sup>62</sup> If the court finds that the Board's decision was reasonable considering all relevant facts, then it must uphold the Board's decision.<sup>63</sup>

#### **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."<sup>64</sup> The purpose of their lawsuit against the Board was "only to require the Board to follow the procedures in Section 16.053(h)(6)."<sup>65</sup> They recognize "that negotiations may fail and that the Board may resolve the conflict in favor of Region C."<sup>66</sup> 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.<sup>67</sup>

---

<sup>58</sup> See *Gilder*, 926 S.W.2d at 365.

<sup>59</sup> *Id.* at 371.

<sup>60</sup> *Id.*

<sup>61</sup> *G.E. American*, 979 S.W.2d at 765.

<sup>62</sup> See *Gilder*, 926 S.W.2d at 365.

<sup>63</sup> See *id.* at 365-366.

<sup>64</sup> *Ward Timber*, 411 S.W.3d at 559-60.

<sup>65</sup> *Id.* at 560.

<sup>66</sup> *Id.* at 562.

<sup>67</sup> 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 D BRIEF ON RESOLUTION OF INTERREGIONAL CONFLICT BETWEEN THE 2011 REGION C AND REGION D REGIONAL WATER PLANS**

**STATEMENT OF CASE**

The Region C Water Planning Group (“Region C”) has listed Marvin Nichols Reservoir as a water management strategy in each of its Regional Water Plans. The Region D Water Planning Group (“Region D”) in its first Regional Water Plan in 2001 recommended Marvin Nichols as a water management strategy but after studying the impacts of the proposed reservoir, Region D later amended its 2001 Plan and rejected the Marvin Nichols Reservoir as a water management strategy. The 2006 and 2011 Region D Plans also rejected Marvin Nichols Reservoir as a water management strategy for any regional water plan or the State Water Plan because Region D held that Marvin Nichols Reservoir was not shown to be consistent with the long term protection of the state’s water resources, agricultural resources and natural resources as required by state law.

The Texas Water Development Board (“TWDB”) approved the Region D regional water plans with the rejections of the Marvin Nichols Reservoir, including the 2011 Region D Plan that explained in detail that there would be an interregional conflict if any other region included the Marvin Nichols Reservoir as a water supply strategy. TWDB then approved the 2011 Region C plan with that reservoir as a water supply strategy. TWDB did so taking the position that there was no interregional conflict because it did not find an over-allocation of a source of supply.

Several entities and individuals filed suit in District Court in January 2012 in District Court in Travis County in a case styled *Ward Timber, Ltd, et al v. Texas Water Development Board*. The District Court found that there was an interregional conflict. TWDB appealed the decision and on May 23, 2013, the 11<sup>th</sup> Court of Appeals affirmed the District Court’s decision, holding that an interregional conflict existed, that the planning process should encompass the impacts the proposed water management strategies will have on agricultural and natural resources of the region, and that any such conflict should be resolved in the manner that is most consistent with protecting the state’s agricultural and natural resources.<sup>1</sup>

No further appeals were filed. Mediation was held in December 2013 between representatives of Region C and Region D and no agreement was reached. On May 19, 2014 Kevin Patteson, Executive Administrator of TWDB, issued a Final Recommendation to the Board. The Office of General Counsel of TWDB has requested the submission of legal briefs from Region D and Region C setting forth their positions.

---

<sup>1</sup> *Tex. Water Dev. Bd. v. Ward Timber, Ltd.*, 411 S.W.3<sup>rd</sup> 554 (Tex.App. – Eastland, no pet.)

## ISSUE PRESENTED

**How should TWDB resolve the interregional conflict**

## BRIEF ANSWER

**TWDB should:**

- 1) Adopt Region D's position that Region C has not shown that the inclusion of the Marvin Nichols Reservoir is consistent with the long-term protection of the state's agricultural and natural resources; and**
- 2) Require Region C to submit its 2011 plan with the Marvin Nichols Reservoir omitted.**

**TWDB should do so because:**

- 1) The Region C Plan fails completely at complying with the TWDB past rules and the rules currently in effect because it does not address the impacts on the agricultural and natural resources of the state by the Marvin Nichols Reservoir and the mitigation that would be required;**
- 2) The Region C Plan provides for supplies in excess of its demands and includes sufficient strategies without the Marvin Nichols Reservoir to meet its demands; and**
- 3) New 2016 Regional Water Plans will be submitted in 2 years and adoption of the recommendations of the Executive Administrator would unnecessarily delay use of the state funds for priority in Region C or Region D in the interim.**

**Comments that have been submitted to TWDB adequately explain reason Number 2. TWDB is well aware of the problems with funding that would be created by ruling that Region C and/or D plans must be amended to comply with Texas law and TWDB rules, given that either region would have to meet the requirements of the 2012 rules, rather than those in effect at the time of the initial approvals of these plans.**

**These issues will, therefore, not be addressed in this brief.**

## ARGUMENT

**The Region C Plan fails completely at complying with the TWDB past rules and the rules currently in effect because it does not address the impacts on the agricultural and natural resources of the state by the Marvin Nichols Reservoir and the mitigation that would be required.**

**Regional Water Plans and the State Water Plan are required to show that a water management strategy is consistent with the long term protection of the state's agricultural and natural resources.**

**Texas Water Code §16.051 (a) provides that "the state water plan shall.....protect the agricultural and natural resources of the entire state." §16.053(h)(7) states the TWDB may approve a regional water plan only after it has determined that:**

- (A) All interregional conflicts involving that regional water planning area have been resolved;
- (B) The plan includes water conservation practices and drought management measures incorporating, at a minimum, the provisions of Tex. Water Code §11.1271 and §11.1272 (relating to water conservation and drought contingency plans); and
- (C) the plan is consistent with the long-term protection of the state's water resources, agricultural resources, and natural resources as embodied in the guidance principles adopted under Tex. Water Code §16.051(d).

TWDB's guidance principles are set forth in the current rules at 31 Tex.Admin.Code §358.3.<sup>2</sup> §358.3(4) provides that a regional water plan shall....protect the agricultural and natural resources of the regional water planning area. §358.3(9) provides for the consideration of all water management strategies "which are consistent with the long-term protection of the state's water resources, agricultural resources, and natural resources."

The Executive Administrator's Final Recommendation, issued May 19, 2014, seems to suggest that the TWDB defer its responsibility to require that each water management strategy be consistent with the long term protection of the state's agricultural and natural resources to other agencies. The recommendation also states that "at the planning stage, it should be sufficient that all regions affected by a particular strategy have identified those impacts." That is contrary to the requirements of Chapter 16, Texas Water Code and the rules of the TWDB.

Texas Water Code §16.051 and §16.053 require a finding that a water management strategy be consistent with the long term protection of the state's agricultural and natural resources. In addition, Courts have ruled on this issue. In *Texas Water Dev. Bd. v. Ward Timber, Ltd*, the Court stated that "the Board has confused the planning process and the permitting process under the current approach to water planning. The planning process should encompass possible water strategies and the impact those water strategies will have on the agricultural and natural resources of the region involved, especially when an interregional transfer of water is involved."<sup>3</sup>

One of the key changes that Senate Bill 1 made to the water planning process was to create specific statutory criterion mandating that a regional water plan may not be approved by TWDB unless it is shown to be consistent with the long term protection of the state's agricultural and natural resources.<sup>4</sup> In addition, the Regional Water Planning Guidelines set forth in Tex.Admin.Code §357.34 require that water management strategies contained in

---

<sup>2</sup> In 2012, the TWDB repealed its rules and guidance for approval of regional water plans and replaced them with the current set of rules which now apply to any approval of the Region C Water Plan or any amendment to any regional plan.

<sup>3</sup> *Texas Water Dev. Bd*, 411 S.W. 3<sup>rd</sup> at 575

<sup>4</sup> Tex. S.B. 1, 75<sup>th</sup> Leg., R.S., 1997 Tex.Gen. Laws 1010

a Regional Water Plan must include a quantitative reporting of environmental factors and impacts on agricultural resources. For each threat to agricultural resources and natural resources identified, the Plan must include a discussion of how that threat will be addressed or affected by the water management strategies evaluated.<sup>5</sup>

Table 4D.2 of the Region C Plan lists 29 major potentially feasible water management strategies for Region C. One of the recommended water management strategies in the Region C Plan, Marvin Nichols Reservoir, is listed as “high” on environmental factors, agricultural impacts, and third party impacts and “medium high” on impacts to other natural resources. Marvin Nichols Reservoir grades out highest (most harmful) of any of the 29 potentially feasible water management strategies listed in Table 4D.2 of the Region C Plan with respect to the adverse impacts on the environment, agriculture, natural resources and third party impacts.

The Region C Plan totally fails to address these negative impacts, much less give a quantitative reporting on these impacts. It does not provide, as has always been required for regional plans, a discussion of how the threats to agricultural and natural resources will be addressed or affected by the water management strategies evaluated.

Chapters 7.3 and 5.2 of the Region C’s plan contains a discussion on “Consistency with Protection of Agricultural Resources.” The Region C Plan makes a finding that the Plan will protect agricultural water use within Region C, but it does not address the actual impacts outside of Region C. The following are the only statements made with respect to agricultural impacts outside of Region C:

**Chapter 7.3:**

“The area of the proposed Marvin Nichols Reservoir site has some agricultural activity, including cattle raising. The area is also known to have some hunting and leases for game animals.”

**Chapter 5.2:**

“The potential impacts to agricultural and rural areas are limited to the loss of land from inundation of new reservoirs. The total rural acreage that would be flooded under the 2011 Region C Water Plan is 116,300 acres. Of this amount, many acres are bottom lands that are not currently used for agriculture. Impacts from new reservoirs will be mitigated as part of the permitting process. New reservoirs also can stimulate the rural economy through new recreational business and local improvements. The new reservoirs will provide a new water source for rural activities. Each of the proposed reservoir sites includes water set aside for local water supplies.

Possible third party impacts include loss of land and timber, impacts to existing recreational business on existing lakes due to lower lake levels, and impacts to recreational stream activities. Economic studies have been conducted for two of the

---

<sup>5</sup> 31 Tex.Admin.Code §357.34(d)(5)

reservoirs proposed for Region C, and in each case they indicate a significant new economic benefit for the region of origin.”

Thus, the Region C Plan does not even treat timber as an agricultural resource, even though it is a major agricultural crop in the Region D area. The Plan addresses timber as a third party impact, not as agricultural resources that will be inundated. Thus, there is no assessment of the impacts on timber production.

The Plan also does not take into account impacts from the acreage which will be taken out of agricultural production, including timber production, as required mitigation. A fuller explanation of the mitigation issue is provided below.

There is clearly no effort to quantify or otherwise evaluate the impacts on agricultural resources (or other natural resources). There is nothing in the Plan that would allow TWDB to make its independent consideration of the impacts of the Marvin Nichols Reservoir on the state’s agricultural and natural resources. To the extent that the Region C Plan would have significant impacts to agricultural and natural resources within the state, those impacts must first be identified, which they are not in the Region C Plan, then quantitatively reported and addressed, which again they are not. The Region C Plan has failed to assess the impacts the proposed reservoir would have in the region where it is to be constructed and has therefore not met its statutory criteria for adoption by the State.

The Region D Plan discusses the impacts in detail and concludes that Marvin Nichols Reservoir is inconsistent with the state’s long-term interests in the protection of its water resources, agricultural resources, and natural resources. The Region D Plan concluded that the Reservoir cannot be approved in any regional plan. Thus, Region D found that approval of a regional water plan including the Marvin Nichols Reservoir would conflict with Texas law and would conflict with the Regional D Plan.

TWDB approved the Region D Plan with those findings.

The Region D Water Plan contains, in Chapter 7.6, four (4) pages of detailed analysis of the impacts of Marvin Nichols Reservoir on water resources, agricultural resources, and natural resources. Region D’s analysis of agricultural impacts includes timber, farming, ranching and other related industries. It includes a review of four (4) separate studies that have been conducted regarding potential impacts. It also reviewed impacts on natural resources and environmental factors. The findings of the Region D Planning Group are summed up in its conclusion in Paragraph 7.7:

“Due to the significant negative impacts upon environmental factors, agricultural resources/rural areas, other natural resources, and third parties, Marvin Nichols 1 Reservoir should not be included as a water management strategy in any 2011 regional water plan or the 2012 State Water Plan. Accordingly, inclusion of the Marvin Nichols 1 Reservoir in any regional water plan would be inconsistent with the Region’s efforts to ensure the long-term protection of the State’s water resources, agricultural resources and natural resources, also violating §16.051 and §16.053 of the Texas Water Code.”



**In contrast, the Region C Plan does not make any such assessment or provide data with which TWDB can do so. Yet, Texas law and TWDB rules require such an assessment for proposed strategies such as the Marvin Nichols Reservoir.**

**The only assessments before TWDB from the regional plans reflect that Marvin Nichols Reservoir is not consistent with protecting the agricultural and natural resources of the State.**

**The impacts resulting from the loss of important agricultural and natural resources in Region D as mitigation for the Marvin Nichols Reservoir was not addressed in the Region C Plan.**

**It is likely that most, if not all, mitigation for lands that would be inundated by the Marvin Nichols Reservoir will be in Region D and because the Region C Plan does not even address this issue, the mitigation impacts alone will require TWDB to reject the Region C Plan as proposed including the Marvin Nichols Reservoir.**

**The guidelines for mitigation requirements are set forth in the Code of Federal Regulations. §230.93(a) provides, in part, that: “The district engineer must determine the compensatory mitigation to be required in a DA permit, based on what is practicable and capable of compensating for the aquatic resource functions that will be lost as a result of the permitted activity. When evaluating compensatory mitigation options, the district engineer will consider what would be environmentally preferable. In making this determination, the district engineer must assess the likelihood for ecological success and sustainability, the location of the compensation site relative to the impact site and their significance within the watershed, and the costs of the compensatory project.”<sup>6</sup> With respect to the location of the mitigation, the guidelines state that “in general, the required compensatory mitigation should be located within the same watershed as the impact site.”<sup>7</sup> Further, “in-kind mitigation is preferable to out-of-kind mitigation because it is most likely to compensate for the functions and services at the impact site.”<sup>8</sup> In addition, the guidelines provide: “The district engineer must use a watershed approach to establish compensatory mitigation requirements in DA permits to the extent appropriate and practical.”<sup>9</sup>**

**Based on the rules and guidelines governing the federal entities that will ultimately decide the amount and location of the required mitigation, the mitigation will be forested lands (in-kind mitigation) located in the same watershed (Sulphur River) as the impacted area. As reflected in the Region D Plan, that is exactly what happened previously with the Jim Chapman Reservoir on the Sulphur River.<sup>10</sup> In that case, a site with 5,900 acres of bottomland hardwood acreage required a total mitigation of 31,980 acres throughout Northeast Texas in the Sulphur River watershed.**

**The Executive Administrator’s Final Recommendation contains a recommendation that Region C should be encouraged to share mitigation for any project developed in Region D in proportion to the interest Region C entities have in the water produced by that project.**

---

<sup>6</sup> 40 C.F.R. §230.93(a)(2010)

<sup>7</sup> 40 C.F.R. §230.93(b)(2010)

<sup>8</sup> 40 C.F.R. §230.93(e)(2010)

<sup>9</sup> 40 C.F.R. §230.93(c) (2010)

<sup>10</sup> 2011 Region D Water Plan §7.6.2(4)

Although this recommendation is appreciated, it fails to console Region D or others who would be harmed by the Marvin Nichols Reservoir for the following reasons:

- 1) As discussed previously, it runs contrary to the rules, guidelines, and practices of the federal entities that will have to sign off on the location and amount of mitigation that will be required for a project; and
- 2) There is no means of enforcement. Region C will not be required to provide lands for mitigation, even if federal law allowed the designation of lands for mitigation in the area of Region C.

As previously set forth, the Region C Plan states in Chapter 5.2 that “the potential impacts to agricultural and rural areas are limited to the loss of land from inundation of new reservoirs.” That contention is patently untrue.

Under all studies performed on this issue, it is acknowledged that substantial acreage will be required to mitigate the environmental impacts of this proposed reservoir. These studies and their mitigation impacts are discussed in the Region D Plan<sup>11</sup> and a brief summary of those findings are set forth in this paragraph. A joint study by the Texas Parks and Wildlife Department and the United States Fish and Wildlife Service concluded a minimum of 163, 620 acres would be required for mitigation and that number could be as high as 645,578 acres. A study of the Texas Forest Service concluded the total acres affected by Marvin Nichols Reservoir could be as low as 258, 000 acres or as high as 820,000 acres. Even a study commissioned by the proponents of the reservoir, despite being criticized in the Region D plan on its methodology, estimated agricultural land loss between 165,000 and 200,000 acres. As the Court states in *Texas Water Dev. Bd v. Ward Timber, Ltd*, “even at the planning stage, it is evident that the impacts would be substantial.”<sup>12</sup>

The Region C Plan states the potential third party impacts include loss of land and timber, clearly confusing the fact that timber and agricultural land impacts should be addressed under impacts to agricultural resources.

By way of clarification, Texas Agriculture Code §2.001 defines “agriculture” as:

- 1) the cultivation of the soil to produce crops;
- 2) horticulture, floriculture, or viticulture;
- 3) forestry; or
- 4) the raising or keeping of livestock or poultry.

As stated in the Region D Plan:

“The Texas Forest Service Study estimated forest industry losses based on three (3) separate mitigation options. The low end impacts were estimated to be an annual reduction of \$51.18 million output, \$21.89 million value-added, 417 jobs and \$12.93 million labor

---

<sup>11</sup> 2011 Region D Water Plan §7.6.1

<sup>12</sup> *Tx. Water Dev. Bd.*, 411 S.W. 3<sup>rd</sup> at 559

income. The high end impacts were estimated to be annual loss of \$163.91 million industry output, \$70.10 million value-added, 1334 jobs and 41.4 million labor income.”<sup>13</sup>

The proposed Marvin Nichols Reservoir would flood 66,000 to 70,000 acres across four (4) counties in Northeast Texas, including over 45,000 acres of forested lands and requiring extensive lands to be set aside for mitigation purposes. For the TWDB to take the approach of waiting for other agencies to make a determination regarding the impacts to agricultural and natural resources, as it appears the Executive Administrator is suggesting, would be a failure to comply with the established law that the State Water Plan and Regional Water Plans protect the agricultural and natural resources of the state.

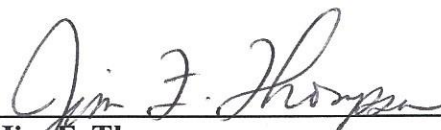
In *Texas Water Dev. Bd v. Ward Timber, Ltd*, the Court stated that if the two regions cannot agree, “the Board is in a position to resolve the conflict in the manner that is most consistent with protecting the state’s agricultural and natural resources.”<sup>14</sup> In order to comply with this holding, based on the evidence before the TWDB, Marvin Nichols Reservoir should be removed from the Region C Water Plan.

### RELIEF SOUGHT

The Region D Water Planning Group requests that TWDB rule as follows:

- 1) Leave the Region D Water Plan of 2011 as is;
- 2) Direct Region C to remove the Marvin Nichols Reservoir from its 2011 Plan based on the failure to show that it is consistent with the long-term protection of the state’s agricultural and natural resources; and
- 3) Grant such further relief as the Board deems necessary.

Respectfully submitted,

  
\_\_\_\_\_  
Jim F. Thompson  
Designated Representative for Region D

---

<sup>13</sup> 2011 Region D Water Plan §7.6.2

<sup>14</sup> *Tx. Water Dev. Bd.*, 411 S.W.3<sup>rd</sup> at 575

**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**

**TABLE OF CONTENTS**

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

**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.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

---

<sup>1</sup> Tex. Water Code Ann. § 6.011 (West 2008).

<sup>2</sup> *Id.* § 5.012.

<sup>3</sup> *Id.* § 16.053(c).

<sup>4</sup> *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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> Part of that permitting process includes an opportunity for persons affected by the proposed project to request a public hearing.<sup>9</sup> 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.<sup>10</sup> The Legislature allows the TCEQ to refer the public hearings to a specialized administrative law judge.<sup>11</sup> The review also includes the involvement of a specialized Public Interest Counsel, who ensures that the TCEQ's decision will promote the public interest.<sup>12</sup>

---

<sup>5</sup> *Id.* 16.053(h)(4).

<sup>6</sup> 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.

<sup>7</sup> *Id.* § 5.102(b).

<sup>8</sup> *See id.* §§ 11.121-.134.

<sup>9</sup> *Id.* § 5.556.

<sup>10</sup> Tex. Water Code Ann. § 11.132, .133 (West 2008).

<sup>11</sup> *Id.* § 5.311.

<sup>12</sup> *Id.* § 5.271.

The Legislature did not vest in the Board any similar public fact-finding authority.<sup>13</sup> 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.<sup>14</sup> The Legislature did not authorize the Board to solicit, receive, or consider public comment when it reviews regional water plans.<sup>15</sup>

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[.]"<sup>16</sup> 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

---

<sup>13</sup> 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).

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

<sup>15</sup> See *id.* § 16.051.

<sup>16</sup> *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.<sup>17</sup>

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

---

<sup>17</sup> *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.<sup>18</sup> 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.<sup>19</sup> 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).<sup>20</sup> That statute requires the Board to facilitate coordination between the involved regions and, if the conflict remains, resolve the conflict.<sup>21</sup> 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.

---

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

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

<sup>20</sup> *Id.* at 560.

<sup>21</sup> Tex. Water Code Ann. § 16.053(h)(6) (West 2008).

## **REGION D RESPONSE BRIEF ON RESOLUTION OF INTERREGIONAL CONFLICT BETWEEN THE 2011 REGION C AND REGION D REGIONAL WATER PLANS**

### **SUMMARY**

The position taken by the Region C Water Planning Group (“Region C”) in its brief on resolving the interregional conflict should be rejected. Region C misconstrues the significance of the conflict claimed by Region D. Region C makes the bold statement that the Board can, in essence, make any decision it wants. Then Region C argues that the Board should adopt Region C's position.

The problem with Region C's position is that it ignores the fact that Region D raised the conflict because the Marvin Nichols Reservoir has never been justified in light of the significant adverse impacts on agricultural and natural resources in Region D. Region D removed the Reservoir from its 2001 Regional Plan and has opposed the inclusion of the Marvin Nichols Reservoir in each Plan going forward for that reason. It has advised other regions that it would oppose the Reservoir in other regional plans or the State Water Plan due to those adverse impacts.

Since both the Board's decision on the conflict and its decision approving the 2011 Region C Water Plan were reversed and remanded, the Board should consider how its decision on resolving the conflict will address its need to reconsider the Region C Plan.

It makes no sense to resolve the conflict in Region C's favor if the Board cannot then legally find the Region C Plan and its proposal for Marvin Nichols comply with state law and agency rules. As the Region D brief showed, the Board should not approve the current 2011 Region C Plan with the Marvin Nichols Reservoir included because it does not comply with state law and agency rules.

### **RESPONSE TO REGION C ARGUMENTS**

#### **1. The Board's Discretion**

Region C first argues that the Texas Water Development Board (“the Board”) has broad discretion to resolve the conflict in favor of Region C, rejecting Region D's claim of conflict.

While Region D agrees that the Board does have broad discretion to resolve such conflicts, the Board must do so in a fashion that complies with Texas law and the agency's rules and does not result in a meaningless act. Region D submits that the Board, therefore, needs to resolve the conflict in a way that then allows it to approve a Region C plan.

Plaintiffs in the case that led to this conflict resolution process requested that Texas Courts reverse and remand the decisions by the Defendant [TWDB] that

1. there is no interregional conflict in the Region C and D regional water plans, and
2. approved the Region C Plan in December 2010.<sup>1</sup>

Texas courts did so, finding that there is an interregional conflict, which precluded the Board from making a valid decision to approve the Region C Plan.

The district court ruled that the two decisions of the Board must be reversed and remanded. The Attorney General appealed the rulings on both decisions. Upon review, the Court of Appeals stated:

The Board presents three issues: (1) whether the district court erred in denying the Board's plea to the jurisdiction; (2) whether the district court erred in declaring that an "interregional conflict" existed between Region C and Region D and declaring that the Board's interregional conflict rules applied to the conflict; and (3) **whether the district court erred in reversing the Board's approval of the 2011 Regional Water Plan for Region C and remanding the case back to the agency.**<sup>2</sup>

Region D's initial brief explains why a resolution of the conflict in favor of the 2011 Region C Water Plan would not resolve the matter. That Plan, with Marvin Nichols Reservoir, cannot be approved under state law and agency rules.

---

<sup>1</sup> Plaintiffs' First Amended Original Petition, page 13, Cause No. D-1-GN-11-000121; *Ward Timber, LTD., Ward Timber Holdings, Shirley Shumake, Gary Cheatwood, Richard Letourneau, and Pat Donelson vs. Texas Water Development Board*; in the 126th Judicial District, Travis County, Texas .

<sup>2</sup> *Tex. Water Dev. Bd. v. Ward Timber, Ltd.*, 411 S.W.3<sup>rd</sup> 554, 557 (Tex.App. – Eastland, no pet.).

The Board can resolve the conflict and approve the Region C Plan by simply requiring Region C to remove the Marvin Nichols Reservoir from its 2011 regional plan.

Thus, the Board has two interrelated decisions: how to resolve the conflict and whether to approve a Region C 2011 Plan. Region D has no interest in preventing Region C from having a properly approved plan. Region D's interest is that the Region C Plan comply with state law and agency rules.

## **2. Public Policy**

Region C argues that the only sound public policy for resolving the conflict is for the Board to rule in favor of Region C. Region C is wrong.

### **a. Region C's position will lead to more litigation and uncertainty.**

First, as the Region C Brief discusses in its Section III, any decision by the Board is subject to review by Texas courts. If the Board were to adopt the Region C proposal, it would likely set off another round of litigation on both the issue of conflict and the approval of the Region C Plan, once again placing the Region C Plan in limbo.

By adopting Region C's approach, the Board would not be resolving the underlying dispute over the inadequacy of the Region C Plan. It is not sound public policy to address the conflict issue without addressing the underlying dispute.

Moreover, there are better policy solutions in the short and long term.

### **b. Region C's position ignores the continuing nature of the planning process.**

Second, any decision that the Board makes now will only apply to the 2011 Region C Water Plan. Regardless of the decisions by the Board on the two pending issues, Region C will have the opportunity in its 2016 regional plan to reconsider whether to include the Marvin Nichols Reservoir if it can meet the test of the state law and agency rules for such a project. Creating a continuing dispute in the interim, when it will be moot in 2 years, is not a sound public policy.

c. The Marvin Nichols project is not an indispensable component of the Region C Plan.

Region C has continually held the position that the proposed Marvin Nichols Reservoir is indispensable to its water planning, a position that was repeated in Region C's Brief to this Board.<sup>3</sup> Region D disagrees with that premise and believes that any independent and fair review of Region C's Plan will reveal that the Marvin Nichols Reservoir is not necessary for Region C to meet its water demands for the 2011 planning cycle. The 2011 Region C Water Plan provides for supply strategies in excess of the projected needs. Only by failing to adopt reasonable strategies to meet reasonable demands can the Region C Plan show a need for the Marvin Nichols Reservoir. The Region C Plan does not show that the reservoir is indispensable in the planning period or even beyond.

In Section 4D.3 of the 2011 Region C Water Plan, the Marvin Nichols Reservoir is a recommended strategy for 3 entities: North Texas Municipal Water District (174,840 acre feet per year), Upper Trinity Water District (35,000 acre feet per year) and Tarrant Regional Water District (280,000 acre feet per year). Yet, the Reservoir is not indispensable to any of these entities. For two, the Reservoir is clearly not needed.

Table 4E.15 of the Region C Plan sets forth that the Upper Trinity Regional Water District ("UTRWD") is planning on using 17,500 acre feet from the Marvin Nichols Reservoir beginning in 2050. If the Marvin Nichols Reservoir is deleted from the plan, the UTRWD would still have more supplies than demand for both 2050 and 2060 (9,053 acre feet of excess in 2050, 19,970 acre feet of excess in 2060).

Likewise, Table 4E.7 sets forth that North Texas Municipal Water District ("NTMWD") is planning on 87,400 acre feet of supply from the Marvin Nichols Reservoir for 2030 and 2040, with that amount increasing to 174,800 in 2050 and 2060. If the Reservoir is deleted from the plan, NTMWD would still have excess supplies over demand (102,012 acre feet of excess in 2030, 23,773 acre feet of excess in 2040, 86,078 acre feet of excess in 2050, and 88,975 acre feet of excess in 2060).

---

<sup>3</sup> Region C Brief at p. 3-5

The situation for the Tarrant Regional Water District (“TRWD”) is more complex, but the Marvin Nichols Reservoir is still not indispensable or even needed. Table 4E.4 sets forth that TRWD is planning on having 140,000 acre feet of supply from the Marvin Nichols Reservoir in 2030 and 2040, with that amount increasing to 280,000 acre feet of supply in 2050 and 2060. If the Reservoir is deleted from the plan, TRWD would have an excess of 700 acre feet in 2030, but projected demands would exceed projected supplies by 83,666 acre feet in 2040, 76,346 acre feet in 2050, and 134,853 acre feet in 2060.

Therefore, based on Region C’s own figures, if the Marvin Nichols Reservoir is deleted from its Plan with no other changes, the only entity that would fail to show supplies that meet the Plan’s projected demand would be Tarrant Regional Water District in the years 2040, 2050, and 2060. Region C in its Brief said the Board should resolve this issue in a reasonable manner. Listed below are the reasons Region D believes the inclusion of the Marvin Nichols Reservoir to meet the limited needs of TRWD is not reasonable.

First, whether it was projected to be needed at the time of the 2011 Region C Plan, it is clearly not indispensable now. The good work of TRWD, and others in Region C, to implement conservation practices has led to significantly reduced projections of need in Region C by Board staff. Those figures and the ones recommended by the Region C planning group show that the Region can easily get by without the Reservoir.

Even without looking at the current situation, the Marvin Nichols Reservoir cannot be shown to be indispensable to Region C if the plan is required to meet state law and agency rules and use reasonable assumptions.

For example, as shown on Page 4E.2 of the Region C Plan, wholesale water providers have supplies between 20% and 30% more than projected demands. In other words, instead of planning for demands projected like the rules of the Board contemplate and like other regions have done, Region C speculated that it will need much more water than demands suggest.

Thus, water suppliers have overestimated their demands, claiming 1) an extra margin of safety for climate change; b) the possibility of a drought more severe than drought of record; c) that demands may grow more rapidly than projected; and d) that some proposed management

strategies might not be developed.<sup>4</sup> Rejecting such speculation makes it clear that the Marvin Nichols Reservoir is not needed.

Such speculative projections should not be allowed in any regional plan if the supply strategies involve water projects outside that region, especially if the impacts of such strategies have the type of impacts that the Marvin Nichols Reservoir will have on Region D.

Moreover, these justifications for excess supplies are for imagined shortages some 50 years out. Given the difficulty of projecting water needs in the long-term, and the ability of regions to reevaluate their demands and supplies every 5 years, such excess supply strategies for demands at the end of the planning horizon deserve close scrutiny.

If such policy reasons are not enough, such speculative demands need to be rejected as contrary to the rules of the Board. Agency rules, for example, define the drought of record at 31 TAC Section 357.10(10), and then repeatedly refer to this drought condition for use in planning. See, for example, the definition of existing supplies 357.10(12) and firm yield 357.10 (13). Board rules then provide requirements such as :

(a) RWPGs shall evaluate:

(1) source water availability during drought of record conditions; and

(2) existing water supplies that are legally and physically available to WUGs and wholesale water suppliers within the RWPA for use during the drought of record.

(b) Evaluations shall consider surface water and groundwater data from the state water plan, existing water rights, contracts and option agreements relating to water rights, other planning and water supply studies, and analysis of water supplies existing in and available to the RWPA during drought of record conditions.

(c) Evaluation of the existing surface water available during drought of record shall be based on firm yield....31 TAC 357.32.

---

<sup>4</sup> 2011 Region C Water Plan at p. 4E.2



Likewise regional planning groups are directed to "plan for water supply during Drought of Record conditions." 31 TAC 357.34 (b), and to recommend water management strategies to be used during a drought of record 31 TAC 357.34 (a).

These and other rules for regional planning are mandatory requirements. They set out consistent planning requirements so that the State Water Plan is a collection of apples, not apples and oranges, and 15 other types of fruits, (i.e. different planning assumptions). In order for a state wide water plan to have meaning, the regional components that make up the plan must be based on the same definitions and protocols.

Board rules require consistency in regional planning at 31 TAC 357.60 and state in subsection (a)

RWPGs shall submit to the development Board a RWP that is consistent with the guidance principles and guidelines outlined in §357.20 of this title.

Section 357.20 then references Section 358.3 which makes it clear that it is the defined drought of record that is the basis for state and regional water plans, not some worse drought that has no basis in historic fact.

Development of the state water plan shall be guided by the following principles. ... (2)  
The regional water plans and state water plan shall serve as water supply plans under drought of record conditions....

Finally, Board rules provide:

(a) In the event the Board finds that the RWP does not meet the requirements of the Texas Water Code §16.053, this chapter, and Chapter 358 of this title (relating to State Water Planning Guidelines), the Board shall direct the RWPG to make changes necessary for compliance with legal requirements. 31 TAC 357.63.

An analysis of the other three justifications given by Region C for its speculatively high projections shows that they are also either contrary to or inconsistent with Board rules for regional water plans.

There are also other reasons for rejecting Region C's indispensability claim.

First, there are a number of entities in Region C that will have excess water in 2060 that could be used to address any short falls by TRWD or others, if proper planning for efficient use of the resources were done. There is, in total, more than enough water to make up those TRWD's short falls.

Second, a recent report by the Texas Center for Policy Studies gives several reasons why TRWD does not need Marvin Nichols. For example, that report points to the position of Region C that drought contingency plans are not reliable and therefore should not be considered as ways to cut demand or expand supplies.<sup>5</sup> The Region C plan states:

Drought management and emergency response measures are important planning tools for all water suppliers. They provide protection in the event of water supply shortages, but they are not a reliable source of additional supplies to meet growing demands. They provide a backup plan in case a supplier experiences a drought worse than the drought of record or if a water management strategy is not fully implemented when it is needed. Therefore, drought management measures are not recommended as a water management strategy to provide additional supplies for Region C.<sup>6</sup>

That position is contrary the position of the Legislature and the Board, which makes such plans mandatory and assume they will be used to reduce the peak use during drought conditions. Ignoring the role of its required drought contingency plans in stretching supplies during drought appears to be merely one more justification to keep the Marvin Nichols Reservoir in the regional plan.

The report of the Texas Center for Policy Studies explains that if Region C applied its drought contingency plans to its major supplies, such as reservoirs used by TRWD, much more water would be available during the peak use periods, i.e. times of drought. The report focuses on TRWD, its drought contingency plan and one of its reservoirs, Cedar Creek. The report shows that TRWD can reduce the demand for water from the reservoir during a drought by about 32,000 acre-feet. Using the same approach for other reservoirs used by TRWD and other major water suppliers would lead to very significant decreases in the demand-supply gap (need) during

---

<sup>5</sup> Learning from Drought: Next Generation Water Planning for Texas, May, 2014, p. 31 – 33. Available at [www.texascenter.org](http://www.texascenter.org).

<sup>6</sup> 2011 Region C Water Plan at p.6.7-6.8

drought conditions. Yet, Region C views such savings in water use as not worthy of evaluation as strategies to address peak demands.

The Region C Brief states that if Marvin Nichols Reservoir were deleted from its Plan, “rather than constructing one reservoir, Region C would be forced to recommend construction or expansion of a series of reservoirs and other infrastructures that would be considerably more expensive and would be more environmentally costly than the current proposal.”<sup>7</sup>

That contention is completely untrue. As the Region C Brief correctly asserts “the purpose of regional planning is to assure adequate water supplies for a region through a drought of record.”<sup>8</sup>

In order for the Region C Plan to assure adequate supplies through a drought of record, it needs to show that supplies will meet demands during such a period. As stated previously, if Marvin Nichols Reservoir is deleted from the Region C Plan, every water provider in Region C will have adequate supplies to meet demands with the exception of TRWD beginning in 2040 and continuing through 2060. TRWD’s deficits will be less than 85,000 acre feet in 2040 and 2050 and increase to approximately 135,000 acre feet in 2060. Is Marvin Nichols Reservoir less expensive and less environmentally costly than other measures to provide this limited amount of water supply to Tarrant Regional Water District? Region C’s own plan would indicate it is not.

According to the Region C Plan, Toledo Bend is a water supply strategy to be implemented that will provide water supply to TRWD and NTMWD.<sup>9</sup> Their plan calls for Phase 1 to provide 100,000 acre feet to each entity beginning in 2050 and Phase 2 to provide the same amount of water to each entity in 2070. Simply by moving up the timetable a decade or so and increasing TRWD’s share of Phase 2 would eliminate any water shortages in Region C for the 2011 Plan. This Reservoir is already constructed, the water is impounded and available as a water supply. In addition, if future supplies are needed by either entity after 2060, the Region C Plan on Table 4D.2 states that up to 600,000 acre feet of supplies are potentially available to Region C from

---

<sup>7</sup> Region C Brief at p. 8

<sup>8</sup> Region C Brief at p. 10

<sup>9</sup> 2011 Region C Water Plan at p. 4D.1 – 4D.7

Toledo Bend. According to the Region C Plan, agricultural and natural resource impacts are low with environmental and third party impacts medium low for this project.<sup>10</sup>

Additionally, there is water availability from Wright Patman Reservoir in Region D currently listed as three (3) separate alternate supply strategies for TRWD that would more than satisfy any potential shortage.<sup>11</sup> Again, this is a Reservoir already constructed with water impounded. Region D has consistently held the position in all negotiations with Region C that our Region is willing to work with Region C in obtaining additional water supplies from Wright Patman Reservoir and that it is a more certain supply source for Region C. Again, pursuant to Table 4D.2 of the Region C Plan, any of the Wright Patman water supply strategies would have substantially less impacts on the environment, as well as on agricultural and natural resources. These strategies are already in the Region C Plan and could simply be moved from an alternate strategy to a recommended strategy to meet any water demand shortages of TRWD.

As stated previously, there are ample supplies in the Plan as it exists now to cover any shortages of TRWD by sharing those water supplies. In each of the years that TRWD would have shortages (2040, 2050 and 2060), Dallas Water Utilities and North Texas Municipal Water District alone would have much more excess supply over demand in a drought of record than TRWD shortages.<sup>12</sup> Simply by sharing this excess, all entities of Region C would have ample supply without any change to the Region C Plan.

As set forth in the Region D Brief, the 2011 Region C Plan fails to comply with TWDB rules and state law regarding the impacts of Marvin Nichols Reservoir and the mitigation that would be required on the agricultural and natural resources of the state. The assertion in Region C's Brief that their plan is consistent with all applicable statutes and administrative criteria for regional water planning<sup>13</sup> is incorrect. Likewise, the Region C Brief claims that the Marvin Nichols Reservoir is indispensable to the Plan, when clearly it is not – removing Marvin Nichols would put only one entity (TRWD) with a small deficit of water, such deficit being easily remedied by a

---

<sup>10</sup> 2011 Region C Water Plan at 4D.5

<sup>11</sup> 2011 Region C Water Plan at 4E.21

<sup>12</sup> 2011 Region C Water Plan at p. 4E.11, 4E.18 and 4E.27

<sup>13</sup> Region C Brief at p. 2

slight restructuring of the 2011 Region C Plan. Such a remedy would allow Region C to have every water supplier with more supply than demand throughout the planning cycle.

d. Texas courts have rejected Region C's claim that Region D's dispute with its Plan belongs at another agency.

In the court case leading to this matter, the Attorney General argued for the Board essentially what Region C claims in its brief, that the dispute is one for the TCEQ's permitting process. The AG raised this argument first in arguing that the Plaintiffs lacked standing. The Court of Appeals rejected the idea that Plaintiffs could not appeal the Board's decisions because the issues belong at another agency.

The Court of Appeals returned to this issue later in resolving the Board's claim that the trial court erred in reversing and remanding the Board's two decisions. The Court stated:

From the briefs, it appears that the Board has confused the planning process and the permitting process under the current approach to water planning. The planning process should encompass possible water strategies and the impact those water strategies will have on the agricultural and natural resources of the region involved, especially when an interregional transfer of water is involved. The Region D planning group in its Region D plan made a preliminary case that there is a substantial interregional conflict with Region C's plan, and that should be sufficient for the Board to require the two regional planning groups to attempt to resolve that conflict.<sup>14</sup>

Texas Courts did not agree the AG's argument that this dispute should be resolved at the permitting process. The Board must address the conflict issue and the underlying fact situation that led to the conflict. The Board must comply fully with the law and its rules.

### **3 Adjudication and Evidentiary Record**

Region D agrees with Region C that the process for resolving the conflict and that for approval of a Region C plan is not adjudicatory in nature. The process that the Board is using is all that is required.

---

<sup>14</sup> *Tex. Water Dev. Bd.*, 411 S.W.3<sup>rd</sup> at 575

Moreover, any court review of the decision on the conflict resolution or the Region C 2011 Plan will be handled by the courts as they did the original appeal of the Board's initial decisions on these matters. A reviewing court will determine if the Board has followed state law and its own rules. It will evaluate the Region C Plan that is then approved to see if it meets state law and the Board's rules on evaluating impacts to agricultural and natural resources. As Region D's initial brief explains, the 2011 Region C Water Plan, with the Marvin Nichols Reservoir, does not comply with state law and Board rules.

#### **4. Resolution of the Conflict**

Region C's brief concludes with a bold statement that there is only one reasonable way to resolve the conflict, Region C's way. Region C is wrong. The Board has a number of options, some of which are specifically set forth herein. The simplest option, however, is the one proposed by Region D. That approach will avoid future litigation and the resulting uncertainty for Region C water suppliers during the next two years, while also complying with state law and agency rules regarding the long-term protection of the agricultural and natural resources of the state.

#### **RELIEF REQUESTED**

The Region D Water Planning Group continues to request that the Board resolve the conflict by:

- 1) Leaving the Region D Water Plan of 2011 as is;
- 2) Advising Region C that before the Board can approve its 2011 plan, Region C must remove the Marvin Nichols Reservoir from its 2011 Plan because of the failure of Region C to show that the reservoir is consistent with the long-term protection of the state's agricultural and natural resources; and
- 3) Grant such further relief as the Board deems necessary.

Respectfully submitted,

  
\_\_\_\_\_  
Jim F. Thompson  
Designated Representative for Region D

# Texas Water Development Board

P.O. Box 13231, 1700 N. Congress Ave.  
Austin, TX 78711-3231, [www.twdb.texas.gov](http://www.twdb.texas.gov)  
Phone (512) 463-7847, Fax (512) 475-2053

July 7, 2014

To: Persons on the Attached Mailing List (by mail and email as indicated)

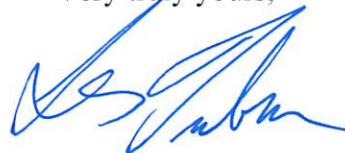
Re: Conflict between Regional Water Plans for Regions C & D

The above-referenced matter is scheduled to be considered by the Texas Water Development Board on **Thursday, August 7, 2014 at 9:30 a.m.** in Room 1-111, William B. Travis Building, 1701 North Congress Avenue, Austin Texas.

The Board will take oral argument on this matter. The time for oral argument has been established at 15 minutes for the Executive Administrator; 30 minutes for the Region C Representative(s); and 30 minutes for the Region D Representative(s). The Executive Administrator will present his Final Recommendation, followed by Region C and Region D. The parties may apportion their respective allotments as they see fit. If a party plans on apportioning time among multiple individuals, a representative of that party should contact Meghan Taack, Office of General Counsel at (512) 463-9106 by **5:00 p.m. on Tuesday, August 5, 2014** to let her know how the time will be apportioned.

Furthermore, if the Board Members need additional information, they may ask questions of the parties after oral argument is completed. In light of the written response and reply briefs and given the Board Members' ability to question the parties to clarify any issues, the General Counsel has determined that the time periods provided should be sufficient. Should you need any additional information, please contact me at 512-463-9105.

Very truly yours,



Les Trobman  
General Counsel

Mailing List

<a href="#">Our Mission</a>	:	<a href="#">Board Members</a>
To provide leadership, planning, financial assistance, information, and education for the conservation and responsible development of water for Texas	:	Carlos Rubinstein, Chairman   Bech Bruun, Member   Kathleen Jackson, Member
	:	Kevin Patteson, Executive Administrator

**Mailing List**  
**Conflict between Regional Water Plans for Regions C & D**

Jim Parks  
North Texas Municipal Water District  
P.O. Box 2408  
Wylie, Texas 75098  
(972) 442-5404 (phone)  
[jparks@ntmwd.com](mailto:jparks@ntmwd.com)

Walt Sears, General Manager  
Northeast Texas MWD  
P.O. Box 955  
Hughes Springs, Texas 75656  
(903) 639-7538 (phone)  
[netmwd@aol.com](mailto:netmwd@aol.com)

Jody Puckett  
City of Dallas Water Utilities  
1500 Marilla Street, 4AN  
Dallas, Texas 75201  
(214) 670-3144 (phone)  
[jo.puckett@dallascityhall.com](mailto:jo.puckett@dallascityhall.com)

Joe Reynolds  
Texas Water Development Board  
P.O. Box 13231  
Austin, Texas 78711-3231  
(512) 936-2414 (phone)  
[joe.reynolds@twdb.texas.gov](mailto:joe.reynolds@twdb.texas.gov)

Russell Laughlin  
Hillwood Properties  
13600 Heritage Parkway, Suite 200  
Fort Worth, Texas 76177  
(817) 224-6017 (phone)  
[russell.laughlin@hillwood.com](mailto:russell.laughlin@hillwood.com)

Bret McCoy  
700 CR 3347  
Omaha, Texas 75571  
(903) 645-7367 (phone)  
[bret.mccoy@edwardjones.com](mailto:bret.mccoy@edwardjones.com)

Richard LeTorneau  
P.O. Box 12071  
Longview, Texas 75607  
(903) 918-7769 (phone)  
[richardoi@aol.com](mailto:richardoi@aol.com)

Jim Thompson  
Ward Timber, Ltd.  
P.O. Box 1107  
Atlanta, Texas 75551  
(903) 799-5331 (phone)  
[jimthompson@wardtimber.com](mailto:jimthompson@wardtimber.com)