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October 16, 2019

Rick Broun, General Manager
Hays Trinity Groundwater Conservation District
P.O. Box 1647
Dripping Springs, Texas 78620

Re: Proposed Jacob's Well Management Zones and New or Amended District Rules Nos. 2, 10, 13, 15 & 16

Dear Mr. Broun:

On behalf of several Clients of the Firm, including Black Market Investments, Inc., we have been reviewing and discussing with hydrogeologic experts the District's proposed Jacob's Well Groundwater Management Zone ("JWGMZ") and draft proposed new or amended Rule Nos. 2, 10, 13, 15 and 16. We appreciate the opportunity to provide these comments for the Board's consideration.

While we appreciate the District's efforts to coordinate the efforts of the task force and the amount of work put into the studies which led to the proposed JMGMZ, we are concerned that the District's Rule proposal to adopt new and amended rules to implement the objectives of those studies oversteps the authority granted to the District by Chapter 36 and its enabling legislation in Chapter 8843, Texas Special District Local Laws Code.

The District is a creature of statute and, therefore, only has those powers granted to it by the Legislature, or necessarily implied. Tx Attny. Gen. Op. KP-0247@2; *see, e.g., See Tri-City Freshwater Supply District No. 2 v. Mann,* 142 S.W.2d 945, 948 (Tex. 1940); *South Plains Lamesa Railroad v. High Plains UWD No. 1,* 52 S.W.3d 770, 776 (Tex. App.-Amarillo 2001, no pet.). For these reasons, we suggest to the District that the creation of the JMGMZ, while a step that the District can take which could have many beneficial impacts in the future, the District should reassess its proposed new or amended Rule Nos. 2, 10, 13, 15, and 16. Adoption of the new or amended Rules would be imprudent and lead the District into costly and unnecessary litigation.

RULE No. 2: As drafted, the Rule (i) appears in part to contemplate events which might be foreseeable under certain circumstances, and (ii) do not contemplate a number of events that are truly beyond the control of the permittee and for which a permittee should not be penalized. In general, the proposed definition appears to contemplate what lawyers would refer to as an "event of force majeure," or what is commonly known as an act of God. In other words, events which are

completely beyond the control of the affected person and for which the affected person should not be penalized. Fires and battling fires to extinguish them should not be events for which failure to maintain curtailment requirements should be penalized, nor should a permittee be penalized for utilizing more water than is authorized by the permit irrespective of any curtailment that might be in place. Accordingly, the definition should be reviewed and possible expanded to cover more acts of nature or acts of God.

RULE No. 10: The primary problem with the proposed rule amendments for Rule 10, specifically to subsection 10.1.3 of the penalty schedule, is the tying of a penalty in the penalty schedule to the exceedance of a monthly baseline production amount which is established assuming the passage of proposed amendments to Rule 13.

RULE No. 13: The proposed modification or amendments to Rule 13 which would establish a monthly baseline production amount are flawed in several respects. First, the baseline production amount is based upon actual production rather than permitting authorization. To begin to adopt any rule or curtailment which is premised upon actual use versus permitted use adversely impacts the property rights of the owners with interest in the groundwater subject to the Rule. Second, use of the year 2017 for determining baseline production is both arbitrary and discriminatory. 2017, according to comments made by Directors during recent Board meetings, was considered a "wet year." In other words, permittees were not producing at maximum levels because there was sufficient rainfall to avoid the need for beneficial uses including irrigation of lawns and shrubbery. Again, during those same meetings, comments were made that that type of irrigation use is a primary use of groundwater and the most effective way to reduce production is to eliminate that kind of irrigation. By selecting 2017, the District was not using an "average year" or "typical year" but rather a year in which production was the lowest it most likely would be because of adequate rainfall. Under these circumstances, permittees would be "conserving their groundwater" under their permit by producing less. As a result, with this retroactive Rule, to be adopted without warning, the landowner would be penalized for not having used their groundwater in 2017. The Rule also assumes that a permittee had a well in 2017 and was producing any groundwater. Respectively, any landowner who comes in to permit a new or additional well, or who permitted a well in mid-2017, 2018 or 2019, that was not in place and producing, and had no actual production in 2017, would have, based on how the rule is drafted, a monthly baseline production amount of "zero." The proposed Rule makes no accommodation for these kinds of circumstances. As applied, that Rule would go beyond merely penalizing landowners for conserving their water under the example cited above, it would take their right to produce any water during periods of monthly baseline production curtailment. The drastic negative impacts of the proposed Rule have no basis in legislative authority granted to the District either in Chapter 36 or its enabling legislation. Further, the retroactive usage of 2017 production for setting a baseline is arbitrary and capricious. As a result, the District has no authority to approve the Rule and should reconsider its intent and objectives and find another manner in which to preserve available groundwater during periods of demonstrated shortage or strain on the aquifer.

Additionally, the "exceptions to the Rule" prescribed in section 13.1.2 are contrary to conservation and benefit those who have a need for more water, not just a need to use the amount of water they are authorized. While the exceptions are appropriate in the sense that permittees

should be able to increase their entitlement under the monthly baseline production curtailment limits, similar opportunities to use additional water should be added to protect landowners who need the water not because they have increased demand, added demand or did not conserve during the baseline year, in this case 2017. An additional negative impact of the proposed Rule is to discourage voluntary conservation by permittees. Recognizing that the District has not yet adopted this Rule, assuming it is adopted, going forward, it would not be prudent for permittees to exercise conservation instead of utilizing maximum beneficial use of their water to avoid future curtailments based upon the arbitrary rationale of the Rule proposed for adoption. A permittee would actually be encouraged by the District to produce its full permitted amount, because the permittee would not know what year the District may choose in the future to use for new, more stringent retroactive baselines from which curtailments occur. Assuming the Rule is adopted, continued conservation would logically result prospectively in the curtailment level being increased in future rule amendments imposed retroactively by the District on landowners.

With respect to the proposed amendments to section 13.3 designating drought stages, the District has failed to present documentation establishing the scientific basis for the triggers proposed for the Skipton Well and/or the Blanco River and the benefits to be derived by the percentage cutbacks at the three stages designated in the proposed Rule. The lack of a scientific basis and/or a correlation in the relationship between the drought triggers and the curtailments and the potential benefits to the aquifer make the Rule suspect and creates potential liability for regulatory takings by the District. In addition to demonstrating how the drought triggers were determined, as well as percentage cutbacks, the District should present and be transparent on the methodology used for the calculation, the mathematical analysis that shows the cost benefit relationship in savings and protection to the aquifer achieved when the proposed curtailments occur at the proposed trigger levels. Based upon the information available published by the District to date, the content of the proposed amended Rule 13.3 appears, at best, to be convenient, expedient and desirable from the perspective of the District, but not supportable as a basis to restrict the beneficial use of private property by its owner without the payment of just compensation.

RULE No. 15: Rule 15 has the effect of serving as a permanent moratorium on the issuance of new and amended permits for certain portions of the Middle Trinity Aquifer effecting a “takings” of the property rights in that groundwater resource. While such “takings” appear to be characterizable as being for a legitimate public purpose, its implementation without the payment of just compensation violates Article I, Section 17, of the Texas Constitution. Since our initial comments, the District has now posted an option 2, with the primary difference being whether the rule should apply to Tier 2 & 3 wells, or just Tier 3 wells. These comments address the rules as a whole, regardless of which option the District may move forward with.

First, the restriction in proposed section 15.1.2(3) that a well located in the JMGMZ can no longer be aggregated with another well is discriminatory. It unequivocally prejudices well owners who may have not drilled multiple wells or aggregated wells previously because it was not needed, but had future plans to either drill new wells and aggregate, or to aggregate their production from multiple wells. Moreover, it does so without prior warning or opportunity to do so due to its retroactive applicability. Much more concerning is the restriction in proposed section

15.1.2(4) which provides that an operating permit to produce from either the Upper or Middle Trinity Aquifers can no longer be amended to increase the authorized production volume.

The District has always discouraged large permit requests. The rationale espoused by the District, which has not been challenged to date, but clearly exceeds the District's legal authority granted by the Legislature, has been to require the applicant show a contemporaneous need to use the water with the one-year term of the permit. Such authority to limit the beneficial use of a landowner's private property right, however, is not a power granted to any groundwater conservation district, including HTGCD. Moreover, any such statute, if it existed, would be in derogation of the language of Article XVI, Section 59 of the Constitution that mandates the creation of special purpose districts to provide for the development and beneficial use of our natural resources in addition to providing for their conservation and prevention of waste. Current owners may have come in with a lower permit based on immediate needs at the time, an effort to conserve, or a lack of need for a larger amount at the time of their original permit, while planning to come in for an amendment later. Many groundwater districts, including the HTGCD, have often restricted how much they will permit an applicant for based on current needs, telling applicants to come back for an amendment once they have exhausted their initial allocation. To now restrict current owners from the ability to ask for an amendment for more water is not only unfair, to the extent that the Rule now prohibits any such permit it is likely an unconstitutional taking. Neither the original option, which outright bars any increase amendments, nor the Option 2 which now states there may be no amendments to increase if the amendment application is filed "after the effective date of this rule" prevent these unfair restrictions. The Option 2 addition of a few extra weeks does not "hand-wave" the new proposed rule being insufficient to allow landowners the full use and enjoyment of their constitutionally protected property right now or in the future, nor does it address the many issues discussed above.

In lieu of an outright prohibition, a request for a larger amount of production would require full vetting by the District and, potentially, a contested hearing in which any potential risks could be adequately addressed while still allowing groundwater owners the ability to enjoy their Constitutionally protected property rights. There is no reason, scientific or legal, why the District should restrict a person from even being able to request such an increase, given the full vetting process put in place to protect the aquifer in the current amendment process.

Similarly, proposed District Rule 15.1.3 is wholly unconstitutional. The "waiver" provision laid out in proposed 15.1.3(1) is not enough to avoid the takings issues by requesting the granting of a special waiver if "enforcement of this rule on a specific property will result in an arbitrary taking of property or in the practical closing and elimination of a lawful business, occupation, or activity without sufficient corresponding benefit or advantage to the public."

This provision shows in and of itself that this the proposed Rule effects an arbitrary and capricious taking of private property rights by the District. The prohibition of all new production from the Middle Trinity Aquifer without compensation to those who own a property right in the Aquifer is a taking. As the District well knows, the Texas Water Code states that "Groundwater conservation districts created as provided by [Chapter 36] are the state's preferred method of groundwater management in order to *protect property rights*, balance the conservation *and development of groundwater* to meet the needs of this state, and use the best available science in

the conservation *and development* of groundwater through rules developed, adopted, and promulgated by a district in accordance with the provisions of this chapter." Texas Water Code §36.0015(b) (emphasis added). The District is tasked with an incredibly difficult job, but to fully restrict a prolific aquifer like the Middle Trinity and prohibit its beneficial use by those with a protected property interest in the groundwater is an overstep.

Proposed District Rule 15.1.5 regarding Replacement Wells could lead to issues in the future. Allowing some flexibility on the 50-foot restriction on a case by case basis would easily avoid this issue. While 50 feet would be preferable, there are likely scenarios where this could be an unworkable solution to the detriment of the landowner. With an addition of language such as "within 50 feet of the plugged well, or further after seeking a waiver from the District due to complications…" this problem can easily be avoided.

In proposed Section 15.2 regarding Drought Curtailments, the District introduces both the ideas of a Monthly Baseline Production Amount, and that curtailments will be made not from the amount granted in a permit, but from this new Baseline. There are several issues with this section. First, proposed District Rule subsection 15.2.2 proposes that the baseline is based on use in 2017. This is another inappropriate retroactive rule making which is unduly burdensome on permittees, and a punishment on permittees who attempted to conserve groundwater, whether by finding other sources of water, or because their needs in the year 2017 were lower, either due to rainfall, economic issues, business decisions, or any number of reasons.

This Rule also does not contemplate what happens for users who may have been permitted in the middle of 2017, or after. Had a landowner known they would be curtailed based off actual usage in 2017, permittees would have been motivated to use their full permitted amount, given it is now the only way to protect their property right. This rule now punishes those permittees who may have tried to conserve in 2017, and proposes to allow the District to restrict a permittee up to, in all actuality, its entire permitted amount if in a month of 2017 they were not pumping. This proposed rule further ignores any possibility for extenuating circumstances that a permittee could have encountered in 2017, leading to an abnormal baseline going forward. While the proposed rule states that a Permittee may amend its Monthly Baseline Production Amount by filing an amendment application, there is no guarantee that will be granted, nor does the rule outline if this is an amendment which could open a Permittee up to a public hearing and significant costs and delays to protect its permit from this new, retroactive restriction. The Proposed Rule also fails to address how a baseline would be set for wells drilled after mid-2017, and based on a strict reading of the rule, it could be interpreted for a well drilled in 2018 or after, the baseline for curtailment purposes is ZERO gallons per year. Why would a permit holder ever pump a single gallon less than their full permitted amount throughout the District, not just the proposed JWGMZ, knowing that the District in the future might put in a new rule curtailing their permit from an arbitrarily chosen amount they used at a randomly determined period of time, without warning?

There are also issues with section 15.2.4, such as whether the District has the authority to charge the proposed penalty of $5.00/1000gallons over the "adjusted Monthly Baseline Production Amount." Once again, the issue of retroactive rulemaking, as well as how the production amount is proposed to be calculated, and a lack of explanation as to the additional civil penalty described at the end and the deadline for paying the penalty fee are all problems with the proposed rule.

Given the larger issues with the proposed Monthly Baseline Production Amount, these are secondary considerations, but need to be cleaned up considerably before being added to the District Rules.

RULE No. 16: All of the comments related to proposed Rule No. 15 regarding takings issues apply to proposed Rule No. 16 and we would adopt those comments for Rule No. 15 for proposed Rule No. 16. In addition to the clear takings issues involved with limiting all users in this proposed Regional Research Study Zone ("RRSZ"), there are several new issues specifically related to proposed Rule 16.

First, the proposed Rule notes in 16.1.2 that the RRSZ has **NOT** been studied as of yet and will be studied over the next five years. This is in and of itself an admission that any further action under proposed Rule 16 has no science behind it, or basis rationalizing the changes. At the very minimum, any further changes under proposed Rule No. 16 should be held until the Study Period has been completed and the District has the opportunity to fully evaluate the information gathered during the Study Period.

Second, even if the Study Period had already been completed, the restriction in proposed Rule 16.1.3 that all new non-exempt wells may not exceed a total of 10 acre-feet annual production is an arbitrary and capricious limitation, and a clear taking of a constitutionally protected property right. Much like with the proposed Rule 15, the language in proposed Rule 16 that a waiver may be requested does not avoid the taking issue, and in fact, admits on its face that this is a taking.

The fact that the District would impose a blanket 10 acre-foot annual production limit per well/well field, regardless of the size of property, shows that the proposed rule is arbitrary, capricious, and lacks any basis in fact, science, or law. The current rule would restrict a 10 acre tract, 100 acre tract, and even a 5000 acre tract to the same restriction of 10 acre-feet of production per year. There is no way that the District could claim there is a scientific basis for these restrictions when the larger tracts are being clearly discriminated against by this new restriction.

It is also worth noting that the proposed Rule 16 limitation of 10 acre-feet is approximately only one-third of the production allowed for an exempt well annually. Pursuant to the District's enabling legislation, wells capable of up to 25,000 gallons per day can be exempted. That amount of production equals 28 acre-feet per year. Special Dist. Local Laws §8843.104. There is, once again, no scientific or legal basis for limiting production to merely 10 acre-feet of annual production for non-exempt wells in the area when an exempt well, which the District has no control or authority over, can nearly triple that.

CONCLUSION: The work done by the "task force" and "technical taskforce" to outline how a management zone could work and where it should be located is impressive and shows the District has a lot to consider. However, the proposed District Rules are wrought with issues related to takings and other unconstitutional restrictions that creates a significant number of problems the District should avoid. The District needs to withdraw these proposed Rules and rethink its approach to managing the proposed so-called Jacob's Well Management Zone and other areas affected by this new, but ill-advised rule-making activity.

As always, we appreciate your assistance and efforts with this matter and are happy to answer any questions you may have regarding these comments.

Sincerely,

McCarthy & McCarthy, LLP

/s Edmond R. McCarthy, Jr.
Edmond R. McCarthy, Jr.

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