

October 16, 2019

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

Re: Comments on Proposed Rule 13: Drought Management

Dear Mr. Broun:

I am submitting these comments as a concerned citizen and as Mayor pro tem of the City of Dripping Springs. Although I do not speak for the City of Dripping Springs in this matter, as a Council Member I have serious concerns about the effect Hays Trinity Groundwater Conservation District's proposed rules may have on the City, its residents, and businesses in and around the City.

The proposed changes to Rule 13 affect proposed changes to Rules 10 and 15 as well. I am most concerned about proposed rule "(13.1.2) Monthly Baseline Production Amount" (hereafter "Baseline") and proposed rule (13.3 Drought Stages"). These rules establish a Baseline that will affect curtailments (see also proposed Rule 15.2) and will provide the basis for possible penalties (proposed Rule 10.1.3).

There are several problems with the approach proposed by the District:

- 1) The Baseline is established by using actual pumping levels as opposed to permitted pumping levels;
- 2) The pumping levels appear to arbitrarily utilize 2017 as the time for establishing the Baseline; and
- 3) Curtailment from the Baseline can be as high as 40%—which appears arbitrary and could cause significant disruption.

Each of these issues is addressed more fully below.

Actual Pumping Levels vs. Permitted Pumping Levels

Without explanation or justification, the *Facilitator's Report: Jacob's Well Spring Flow Stakeholder Task Force—Final Recommendations* makes the recommendation to establish the Baseline using actual pumping levels as opposed to permitted pumping levels. A permit issued by the District includes "the conditions and restrictions, if any, placed on the rate and amount of withdrawal." Tex. Water Code § 36.1131. The permit, therefore, governs what rights a permittee has to withdraw groundwater. "[T]he government does not have unlimited power to redefine property rights. *Loretto v. Teleprompter Manhattan Catv Corp.*, 458 U.S. 419, 439 (1982). By ignoring what rights a person has and instead establishing a baseline for curtailments

on actual use in a single year, the District ignores investment backed expectations of those who have obtained permits and punishes those who have already worked hard to conserve water.

The implementation of this rule will likely run afoul of the standards set forth by the U.S. Supreme Court in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). In that case, Supreme Court identified “several factors that have particular significance” in evaluating regulatory takings. *Penn Central*, 438 U.S. at 124. Primary among those factors are “[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment backed expectations.” *Id.*

In sum, establishing the Baseline using actual pumping levels as opposed to permitted pumping levels runs afoul of both the US and State Constitutional provisions prohibiting a taking without just compensation.

In addition, the *Facilitator’s Report: Jacob’s Well Spring Flow Stakeholder Task Force—Final Recommendations* provides no explanation or justification for upsetting these investment backed expectations. It does not explain or justify ignoring the permits and basing curtailments on actual use. Because this proposal is not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole and is arbitrary or capricious, it is subject to reversal by a court.

Utilizing 2017 Data

The proposed rules establish the Baseline “on the actual amount of groundwater produced and put to a beneficial use each month of 2017.” The *Facilitator’s Report: Jacob’s Well Spring Flow Stakeholder Task Force—Final Recommendations* provides no explanation or justification for the use of 2017 data. It appears simply to be a date selected at random and it lacks a reasoned justification.

Because the District does not explain or justify its use of 2017 data, its decision to do so is arbitrary and capricious and subject to reversal by a court.

Curtailment Percentages

The proposed rules could result in a curtailment of up to 40% of a permittee’s use of its 2017 use of groundwater. This could cause substantial harm to persons who have permits. The *Facilitator’s Report: Jacob’s Well Spring Flow Stakeholder Task Force—Final Recommendations* provides no explanation or justification for the curtailment percentages. They appear simply to be percentages selected at random and they lack a reasoned justification.

Because the District does not explain or justify how it arrives at the curtailment percentages, its decision regarding these percentages is arbitrary and capricious and subject to reversal by a court.

Adoption by Reference

I support, adopt, and incorporate by reference the following comments made regarding Proposed Rule 15 and these comments should also be considered with respect to Proposed Rule 13:

- 1) September 23, 2019 letter from Davis & Associates regarding *Comments in Opposition to Proposed Rule 15*;
- 2) September 25, 2019 letter from McCarthy & McCarthy regarding *Proposed Jacob's Well Management Zones and New District Rule 15*;
- 3) October 3, 2019 letter from McGinnis Lochridge regarding *Comments in Opposition to Proposed Rule 15 and Amendments to Rule 13*.

Conclusion

I appreciate your consideration of these comments. I urge you not to adopt the Rule 13 proposal. Should you like to discuss this matter with me further, please don't hesitate to contact me.

Sincerely,

