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

Via e-mail &
Regular U.S. Mail

Re: Proposed Jacob's Well Management Zones and New District Rule No. 15

Dear Mr. Flatten:

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 Rule No. 15. We appreciate the opportunity to provide these comments for the Board's consideration.

While we continue to 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 JWGMZ, we remain concerned that the District's Rule proposal 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. Rule 15, as proposed, is objectionable and legally problematic as it would still effectively serve as a moratorium on the issuance of new and amended permits for portions of the Middle Trinity Aquifer, which would lead to a "taking" of the property rights in that groundwater resource. Even if the District were able to successfully characterize those takings as being for a legitimate public purpose, the implementation of the taking without payment of just compensation is a clear violation of Article I, Section 17 of the Texas Constitution.

As you know, 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-0247t 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 while the creation of the JWGMZ is a step that the District can take which could have many beneficial impacts in the future, the District should reassess its proposed new Rule No. 15. Adoption of the new Rule would be an imprudent *ultra vires* act and lead the District into costly and unnecessary litigation. While some positive changes have been made to the proposed rule, not only do the overall major issues still remain, new issues and uncertainty have been added by this draft.

First, in proposed section 15.1.2(1), the proposed Rule contradicts itself. The section begins by stating that "Each existing non-exempt use well owner must record and report the amount of groundwater produced each calendar month," but then continues "*During a curtailment period*, groundwater production reports must be submitted to the District within 5 business days after the end of the month being reported." Does this mean that in a non-curtailment period reports do not have to be submitted? Does this mean that in a non-curtailment period reports must still be made, but the deadline of "5 business days after the end of the month being reported" is no longer in place? This conflict needs to be resolved.

Next, the restriction in proposed section 15.1.2(3) that a well located in the JWGMZ can no longer be aggregated with another well is both discriminatory and unsupported by any scientific data. It unequivocally prejudices well owners who may have not drilled multiple wells or aggregated wells previously because aggregation or multiple wells were not needed at that time, even if they had future plans to either drill new wells and aggregate, or to aggregate their production from multiple wells in the future as needs changed. Moreover, the prohibition 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 within the JWGMZ 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 an applicant show a contemporaneous need to use the water within the one-year term of the permit. Such an arbitrary imposition of a limit to 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 application 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 having 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 or permit amendment, it is both an *ultra vires* act in excess of the authority granted to groundwater districts, and an unconstitutional taking.

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 to the aquifer 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 can, or should, restrict a person from even being able to request such an increase.

Similarly, proposed Section 15.1.3 of the Rule is wholly unconstitutional. The "waiver" provision laid out in proposed subsection 15.1.3(1) is not enough to avoid the takings effect of the proposed Rule by requiring an Applicant to request 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 proposed subsection is nothing more than an admission of the unconstitutional takings with an attempt to create an "escape route" for HTGCD to avoid prosecution for the taking by allowing the "squeaky wheel" applicant to get "oiled" by getting a permit.

This provision shows in and of itself that this 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 within the JWGMZ allegedly to protect the flow of Jacob's Well is a taking in the absence of payment of just compensation to those who own a property right in the Aquifer. 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 objectionable and legally actionable overstep. *See* Cf., *EAA v. Day*, 369 S.W.3d 814, 843-844 (Tex. 2012).

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 particular 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 from January 2017 through December 2019. While this is at least a larger data spread than the prior version of the proposed Rule which would base the amount on 2017 usage, the initial problems still remain. This is another inappropriate retroactive rule making action by the District which is unduly burdensome on permittees, and one that constitutes a punishment on permittees who attempted to conserve groundwater, whether by finding other sources of water, or because their needs in the years 2017-2019 were lower, either due to rainfall, economic issues, business decisions, or any number of reasons. Further, this proposed Rule now provides that "the Monthly Baseline Production Amount only applies during a curtailment period" which means the District is going to "double-cut" permits. By basing authorized production on usage during a curtailment

period, which is already cutback, to then shave off of THAT number, is a wholly unfair dual reduction of permits, in addition to being an illegally retroactive rulemaking far outside of the District's powers and jurisdiction.

Had a landowner known they would be curtailed based off actual usage in 2017-2019, permittees would have been motivated to use their full permitted amount, given that maximum usage would have been the only way to protect and maintain their property right. This proposed Rule now punishes those permittees who may have tried to conserve in 2017-2019, and proposes to allow the District to restrict a permittee up to, in all actuality, its entire permitted amount at whatever times the District decides to look at as "curtailment periods" between 2017-2019, if they were not pumping. The proposed Rule is objectionable and legally actionable on these additional grounds.

Additionally, this proposed Rule further ignores any possibility for extenuating circumstances that a permittee could have encountered in 2017-2019, 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 whether this is an amendment which could open a Permittee up to a public hearing and significant costs and delays to protect its existing permit and associated, existing rights from this new, retroactive restriction. 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 dropping their permit to what they used at a randomly determined period of time, without warning?

The new language in proposed section 15.2.3 regarding permits issued after 2016, providing that "After three calendar years of production, the District shall review the actual amount of groundwater produced and put to a beneficial use and consider modifying the Monthly Baseline Production Amount" is also objectionable and legally actionable. First, this proposed Rule is vague at best, and possibly now in conflict when compared with 15.2.1, as 15.2.1 only counts the months that are part of a "curtailment period," yet 15.2.3 only states the authorized, permitted amount. Further, this proposed Rule not only fails to encourage conservation, but actively punishes conservation because it states the District will review the amount of water actually produced and consider modifying the Monthly Baseline Production Amount. It would be foolish for any permittee who got their permit after 2016 to use a single drop less than the full permitted amount at all times, as the District in this proposed Rule now tells permittees their permit will likely be cut. This is foolhardy and completely antithetical to the District's own stated goals, not to mention objectionable and legally actionable as well.

There are also issues with proposed section 15.2.4 involving the stated cutbacks. As several commenters have already provided information to the District, the flow levels at the USGS flow mete at Jacob's Well have been under these proposed cutback levels for months. The District, in addition to the moratorium discussed above, is also now trying to "shoehorn" a curtailment on previously granted permits by attempting to enforce a brand-new special condition on those permits without any hearing or due process on the same.

Finally, the newly added proposed section 15.2.5 states first that "Each permittee shall prepare a Drought Curtailment Implementation Plan… no later than one (1) calendar year following adoption of this rule." This is, for all intents and purposes, the imposition of a new special condition to be appended to permits which have already been granted. This is yet another violation of due process, and an action far outside the authority, powers, and duties of the District. A special condition of this type must be added to a permit with a hearing opportunity. Second, the fact that the District states that it will not take any enforcement action for the first year after the proposed Rule becomes effective, is not the "olive branch" it is dressed as, but is in fact a declaration by the District that not only will a special condition be illegally added to Permits without due process or hearing, but that all permittees **WILL** be punished twelve months after this rule is adopted. Again, there is no authority for this change, and permittees have not been given due process or the opportunity for a hearing as to whether or not the special condition is needed and should be added to a permit.

The work done by the task force and District's technical team 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 Rule 15 is wrought with legal and constitutional issues related to takings and other unconstitutional restrictions that creates a significant number of problems the District should avoid. The proposed edits to the Rule have done nothing to alleviate these concerns, and as stated above, have only added new problems and further overreaches of District authority. The District needs to withdraw proposed Rule 15 and rethink its approach to managing the so-called Jacob's Well Management Zone.

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

Edmond R. McCarthy, Jr.

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