LAW OFFICES OF

McCARTHY & McCARTHY, L.L.P.

1122 COLORADO STREET, SUITE 2399
AUSTIN, TEXAS 78701
(512) 904-2310
(512) 692-2826 (FAX)

September 25, 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 District Rule 15

Dear Mr. Broun:

On behalf of several Clients of the Firm, we have been reviewing and discussing with hydrogeologic experts the District's proposed Jacob's Well Groundwater Management Zone ("JWGMZ") and draft proposed Rule 15. 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 oversteps the authority granted to the District by Chapter 36 and its enabling legislation in Chapter 8843, Texas Special District Local Laws Code. As discussed below, 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 that "takings" appears to be characterizable as being for a legitimate public purpose, its implementation without the payment of just compensation violates Article 17, Section 1, of the Texas Constitution.

The District is a creature of statute and, therefore, only has those powers granted to it by the Legislature, or necessarily implied. *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 (Tex. App.-Amarillo 2001, no writ). 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, with the adoption of proposed Rule 15 raises issues as the same will be applied, and as potential precedent setting philosophies for management of the rest of the District prospectively.

First, the restriction in 15.1.2(3) that a well located in the JMGMZ can no longer be aggregated with another well is discriminatory and 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. Much more concerning is the restriction in 15.1.2(4) which states that an operating permit to

produce from either the Upper or Middle Trinity Aquifers can no longer be amended to increase production.

The District has always discouraged large permit requests. 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.

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.

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 is an arbitrary and capricious taking by the District. To fully restrict any new production from the Middle Trinity Aquifer without compensation to those who own a property right in the Aquifer without compensation 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). The District is tasked with an incredibly difficult job, but to fully restrict a prolific aquifer like the Middle Trinity and block it off from 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 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. 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?

There are also issues with 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. 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.

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 issues related to takings and other unconstitutional restrictions that creates a significant number of problems the District should avoid. 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.

ERM/tn