

Hays Trinity Groundwater Conservation District Board of Directors
Via email: manager2@haysgroundwater.com

Re: Comments from TESPAs and WVWA on Proposed Rule 13, 15, and 16.

October 28, 2019

To: The Hays Trinity Groundwater Conservation District Board of Directors,

The Trinity Edwards Springs Protection Association (TESPA) and the Wimberley Valley Watershed Association (WVWA) appreciate the opportunity to submit comments to you regarding the proposed rulemaking related to Rule 13, 15, and 16.

TESPA and WVWA support adoption of both Rule 15 (Option 1) and 16. Rule 15, which creates a management zone around Jacob's Well, is the result of extensive work led by a community-based stakeholder group that represented the interests of a large sector of Hays County who wish to ensure that Jacob's Well continues to flow. Although there has been some opposition to both Rule 15 and 16, based on our experience working with landowners in Hays County, this opposition is the minority. The District has a duty to protect property rights and conserve and preserve the aquifer while balancing the need for groundwater development and in fulfilling this purpose, the District must use the best available science. Rule 15 is based on the best available science, and it will result in the protection of all landowner's property rights – including the rights of those landowners who want to ensure their groundwater is conserved.

Contrary to arguments articulated by Mr. McCarthy on behalf of unknown clients, Wimberley Springs, and Dripping Springs Water Supply Cooperation, it is unlikely that a court would hold that Rule 15 or Rule 16 rise to a taking of private property. The main consideration for a court in evaluating whether a governmental regulation gives rise to a taking is whether the regulation denies a landowner all economically viable use of his property. Because Rule 15 still permits a landowner to drill a domestic well and to obtain a permit for non-exempt use from the upper and lower Trinity, any argument that Rule 15 denies a landowner all economically viable use of his property is weak. Furthermore, in the event that Rule 15 did deny a landowner all economically viable use of his property, Rule 15 has a provision where the Board may grant that landowner a waiver.

It is important to point out that the opposition's comments insinuate that because they believe Rule 15 and Rule 16 rise to a taking, that this somehow precludes the Board from adopting the rule. A governmental entity may adopt a rule that results in a taking of private property to further a legitimate state interest (the regulation of groundwater) provided that the landowner is compensated, and arguably, a landowner who has not drilled a well would have very minimal damages as under the Rule of Capture, this landowner is not entitled to any specific amount of groundwater in the first place. In the event that a court ruled that Rule 15 and Rule 16 did rise to a taking, then the District would need to seek amendments to its enabling legislation to provide a source of funding to compensate a damaged landowner – either through assessments on all other permittees or through ad valorem taxes. The economic repercussions of failing to protect spring flow from Jacob's Well are too great for the District not to consider every regulatory option.

Finally, with respect to Rule 13, TESPAs and WVWA believe that the District and various stakeholders need additional time to discuss the ramifications of the drought curtailments and associated baseline amounts (outside of the management zone). TESPAs and WVWA recommend that the Board delay adoption of Rule 13 and create a stakeholder group that will discuss what drought curtailments are feasible for impacted permittees and will still result in protection of aquifer levels across the District's jurisdiction.

Respectfully,

Vanessa Puig-Williams
TESPA, Executive Director

David Baker
WVWA, Executive Director