

1. To considering adding at the end of Section 6 (bottom of Rule 6.2) (Spacing Requirements):

For the avoidance of doubt, all new non-exempt wells completed in the District pursuant to a new well application filed with the District before [Date of New Rules Adoption] shall not be subject to the amendments to this Section 6 adopted on [Date of New Rules Adoption] and instead shall remain subject to the Section 6 spacing requirements adopted in the District's Rules published on August 21, 2020 and amended by Board action on September 10, 2020.

2. To considering adding at the end of proposed Rule 7.1 (Maximum Allowable Production):

For the avoidance of doubt, all new non-exempt wells completed in the District pursuant to a new well application filed with the District before **[Date of New Rules Adoption]** shall not be subject to the amendments to this Section 7.1 adopted on **[Date of New Rules Adoption]** and instead shall remain subject to the Section 7.1 production limitations adopted in the District's Rules published on August 21, 2020 and amended by Board action on September 10, 2020.

Alan Day
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Re: UW Brazos Valley Farm LLC comments on Brazos Valley GCD's Proposed Rule Changes for September 14, 2023 Rule-Revision Hearing

Alan,

UW Brazos Valley Farm ("UW BVF") appreciates the opportunity to provide comments to the Brazos Valley Groundwater Conservation District ("BVGCD" or "District") on the District's proposed rule changes, in advance of the September 14, 2023 rule-revision hearing. Below, UW BVF offers comments and suggestions on four of the District's proposed rules: Proposed Rule 8.7(b)(12); Proposed Rule 9.1(g); Proposed Rule 10.4(d); and Proposed Rule 14.3.5(a). UW BVF believes that its comments and suggested revisions will add clarity and uniformity to the District's proposed rules.

I. As currently written, Proposed Rule 8.7(b)(12) could unduly restrict a permittee's ability to transfer groundwater rights.

This District respects, and operates under, the overarching goal for groundwater conservation districts to "balance the conservation and development of groundwater" and "protect property rights."¹ In attempting to clarify an existing rule, however, BVGCD has unintentionally created an ambiguity that could serve to undermine the District's longstanding respect for private property rights.

Proposed Rule 8.7(b)(12) contains a broad restriction on transferability of groundwater permits that does not align with a GCD's statutory authority to conserve, preserve, and protect groundwater resources under Chapter 36 of the Water Code.² Proposed Rule 8.7(b)(12) reads:

8.7(b)(12) The permittee has provided evidence that they have the legal authority to produce the groundwater associated with the land surface and the permit application. The permittee must also provide any documents that transfers that right to own, control, or produce the groundwater rights to another person/entity that are associated with the land surface after the permit has been granted. ***The permit may be amended or revoked if the groundwater rights or right to produce related to a permit are legally transferred to another person/entity.*** (emphasis added)

This language suggests that BVGCD could "revoke" a permit solely if the permit's owner changes. Proposed Rule 8.7(b)(12) does not tether its restriction on permit transferability to any authorized topic for GCD regulation or existing BVGCD rule. Instead, it suggests BVGCD could revoke a

¹ See Tex. Water Code § 36.0015(b).

² See Tex. Water Code § 36.113(c)(8)(B) (district may impose permit restrictions "reasonably related to an issue that [it] by law is authorized to consider"); *Id.* § 36.101(a) (district may promulgate rules for "conserving, preserving, protecting, and recharging of the groundwater or of a groundwater reservoir or its subdivisions in order to control subsidence, prevent degradation of water quality, or prevent waste of groundwater").

permit if it is transferred *under any circumstance*. This open-ended restriction risks impeding a permittee's private-property rights.³ Proposed Rule 8.7(b)(12) is also in tension with BVGCD's existing rules for amending permits, which allow BVGCD's board to grant an amendment "to transfer the ownership of any permit" without notice, hearing, or further action.⁴

Although Proposed Rule 8.7(b)(12) contains language similar to a provision in current Rule 8.4(b), the current rule explicitly ties its restriction on permit transfers to BVGCD's production-acreage rules. Rule 8.4(b)(3) reads:

8.4(b)(3) [T]he applicant must provide evidence that they have the legal authority to produce the groundwater associated with the land surface and the permit application, as required by Rule 7.1(c). The applicant must also provide any documents that transfers that right to own, control, or produce the groundwater rights to another person/entity that are associated with the land surface and the permit application, as required by Rule 7.1(c). A permit may be amended or revoked ***if the groundwater rights or right to produce, related to a permit under Rule 7.1(c), are legally transferred*** to another person/entity. The applicant shall attest to the information required in this rule by a District-provided affidavit form and submit the affidavit with the permit application.

While current Rule 8.4(b)(3) limits its restriction on transferability to existing BVGCD rules involving land-based production caps, Proposed Rule 8.7(b)(12) contains no such limitation.

To promote clarity and uniformity, UW BVF asks BVGCD to consider the following changes:

A) Omitting Proposed Rule 8.7(b)(12) because it is duplicative of the more narrowly tailored, existing requirement in Rule 8.4(b)(3);

or

B) Clearly connecting Proposed Rule 8.7(b)(12) to the production-acreage rule, such as:

8.7(b)(12) The permittee has provided evidence that they have the legal authority to produce the groundwater associated with the land surface and the permit application. The permittee must also provide any documents that transfers that right to own, control, or produce the groundwater rights to another person/entity that are associated with the land surface after the permit has been granted. The permit may be amended or revoked if the groundwater rights or right to produce related to a permit are legally transferred to another person/entity **in a manner that affects the number of contiguous acres legally assigned to a well site, as used in calculating a well's production under Rule 7.1(c).**

³ *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 833 (Tex. 2012) ("Groundwater rights are property rights subject to constitutional protection"); Tex. Water Code § 36.002(b) (groundwater rights entitle landowner to "any other right recognized under common law"); *Evanston Ins. Co. v. Legacy of Life, Inc.*, 370 S.W.3d 377, 383 (Tex. 2012) (describing "bundle of rights" associated with private property, including "the power of transmissibility by gift, devise, or descent").

⁴ BVGCD Rule 8.9(c).

II. Proposed Rule 9.1(g) imposes export fees beyond what is statutorily authorized.

Proposed Rule 9.1 updates BVGCD’s export-fee rules in accordance with House Bill 3059 (2023), which changed export-fee structures and rate caps for all GCDs.⁵ However, as currently written, Proposed Rule 9.1(g) exceeds the new authority codified in Section 36.122 by allowing BVGCD to calculate export-fees beyond water *actually exported* from the district.

Section 36.122 of the Water Code authorizes a district to charge specified rates “for water exported from the district.”⁶ Additionally, Section 36.122 allows a district “governed by a special law in regard to an export fee” to calculate rates “in accordance with that special law.”⁷ Proposed Rule 9.1(g), drawing from BVGCD’s enabling act, purports to allow BVGCD to charge export fees based on “(1) the size of column pipe used by the well; or (2) the actual, *authorized, or anticipated* amount of water to be withdrawn from the well.”⁸ Applying this language to export fees, however, is improper. The language from BVGCD’s enabling act applies to *production* fees, not export fees, as evidenced by the existence of a separate section in the enabling act that explicitly deals with export fees.⁹ Notably, the export-fees section does not authorize BVGCD to charge export rates beyond what is actually transferred out of the District.¹⁰ BVGCD currently has no “special law in regard to an export fee” that authorizes rates beyond Section 36.122’s default metric, which is water actually “exported from the district.”¹¹

UW BVF therefore asks BVGCD to consider changing Proposed Rule 9.1(g) as follows:

- (g) The above-listed fees may be based on **the volume of water actually exported from the District.**

III. Proposed Rule 10.4 includes overreaching and duplicative requirements for transport permits.

The proposed additions to Rule 10.4 (Hearing and Permit Issuance–Transport Permits) include two problematic provisions: (1) Proposed Rule 10.4(d)(6), which requires overly broad disclosure of irrelevant (and potentially confidential) business information, and (2) Proposed Rule 10.4(d)(8), which is duplicative of an existing rule. The relevant portions of the two proposed provisions are emphasized¹² below:

⁵ HB 3059, 88th Leg., R.S (codified at Tex. Water Code § 36.122) (effective Sept. 1, 2023).

⁶ Tex. Water Code Ann. § 36.122(e)(3).

⁷ Tex. Water Code Ann. § 36.122(e-2).

⁸ Tex. Sp. Dist. Loc. Laws Code Ann. § 8835.151(a) (emphasis added).

⁹ See Tex. Sp. Dist. Loc. Laws Code Ann. § 8835.151(c).

¹⁰ *Id.* (“the district may impose a reasonable fee or surcharge for an export fee using one of the following methods: (1) a fee negotiated between the district and the transporter; or (2) a combined production and export fee not to exceed 17 cents for each thousand gallons for water used.”).

¹¹ Tex. Water Code Ann. § 36.122(e)(3). The legislative history behind Section 36.122 supports this plain language, noting that a district may “impose a reasonable fee or surcharge for an export fee . . . for water *transferred out of the district.*” House Comm. on Nat. Res., Bill Analysis, Tex. S.B.2, 77th Leg., R.S. (2001).

¹² For clarity, in discussing Rule 10.4, existing rule language is shown in black text; the District’s proposed language is in blue text; and UW BVF’s suggested modifications are shown in red text, below.

10.4(d) In addition to conditions provided by Section 36.1131, Texas Water Code, the operating permit to transport water out of the District shall specify:

...

(6) the required submission of all groundwater conveyance and user agreements related to the export permit;

(7) water conservation and drought contingency plans; and

(8) periodic review and permit limitations based on aquifer conditions.

First, Proposed Rule 10.4(d)(6) broadly requires “submission of all groundwater conveyance and user agreements related to the export permit.” Such agreements often contain information protected under the Texas Public Information Act for public entities, as well as confidential business information that is protected for private entities. The majority of this protected information is not relevant to BVGCD or its goals of conserving, preserving, and protecting groundwater within the District. UW BVF therefore asks BVGCD to consider the following revision to proposed rule 10.4(d)(6):

(6) the required submission of a memorandum or summary document outlining all groundwater conveyance and user agreements related to the export permit that accounts for the term of the agreements, the volume of water conveyed, and the intended uses; or, alternatively, copies of the agreements themselves, which may be redacted for information protected under the Texas Public Information Act for public entities and/or containing confidential business information that is protected for private entities.

Second, Proposed Rule 10.4(d)(8) requires “periodic review and permit limitations based on aquifer conditions.” This requirement is duplicative of subsections (e) and (f) of existing Rule 10.4, which read:

10.4(e) The District may periodically review the amount of water that may be transferred under an operating permit to transport water out of the District and may limit the amount if additional factors considered, related to the factors in Subsection (b), above.

10.4(f) After conducting its periodic review, more restrictive permit conditions may only be imposed if the factors in Subsection (c), above, are met.

Proposed Rule 10.4(d)(8) unnecessarily duplicates 10.4(e) and (f) while also removing requisite context: that BVGCD’s ability to impose more restrictive permit conditions, based on

periodic review, is limited by Rule 10.4(b)¹³ and (c).¹⁴ Removing these limitations will cause confusion and risk encouraging *ad hoc* treatment of permittees. Accordingly, UW BVF asks BVGCD to consider withdrawing proposed rule 10.4(d)(8) as duplicative and unnecessary.

IV. The proposed changes to Rule 14.3.5(a) (Determination of Contested Status of Permit Hearings) would risk impairing early resolution of permit disputes.

Proposed Rule 14.3.5(a), excerpted below, disposes of a valuable window of time that has previously allowed applicants, as well as BVGCD, to evaluate and potentially resolve requests for contested case hearings. The proposed changes are as follows:

(a) Written Notice of Intent to Contest. ~~A request for contested case hearing shall be in writing and must be received by the District by 5:00 p.m. the day before the permit hearing. Any person who intends to protest a permit application and request a contested case hearing must provide written notice of the request to the District office at least five (5) calendar days prior to the date of the hearing.~~ If the Board of Directors intends to contest a permit application, the Board of Directors must provide the applicant written notice of that intent at least five (5) calendar days prior to the date of the hearing. ~~If no notice of intent to contest is received five(5) calendar days prior to the hearing, the General Manager as instructed by the Board of Directors, will cancel the hearing and the Board will consider the permit at the next regular Board meeting as an uncontested permit application.~~

Under the current rules, applicants and BVGCD have five calendar days to review, evaluate, and potentially resolve any concern raised in a request for a contested case hearing before the permit hearing actually occurs. For applicants, this window provides an opportunity for early resolution of any issue between an applicant and potential contestant. BVGCD also benefits from this window, as it can assess each request and better prepare for the hearing.

In light of these issues, UW BVF asks BVGCD to consider the following changes:

- Leaving the existing rule in place as written and preserving the five-calendar-day window between contested case hearing requests and the hearings themselves. If BVGCD wants to

¹³ “10.4(b) In determining whether to issue a permit to transfer groundwater out of the District, the Board shall be fair, impartial, and nondiscriminatory and shall consider the following factors when deciding whether to issue or impose conditions on a drilling, operating, or transport:

- (1) the availability of water in the District and in the proposed receiving area during the period for which the water supply is requested;
- (2) the projected effect of the proposed transfer on aquifer conditions, depletion, subsidence, or effects on existing permit holders or other groundwater users within the District; and
- (3) the approved Region G Water Plan and certified District Management Plan.”

¹⁴ “10.4(c) The District may not deny a transport permit based on the fact that the applicant seeks to transport groundwater outside of the District and may not impose more restrictive permit conditions on transporters than the District imposes on existing in-District users, unless:

- (1) such limitations apply to all subsequent new operating permit applications and permit amendment applications to increase use by historic users, regardless of type or location of use;
- (2) such limitations bear a reasonable relationship to the existing District Management Plan; and
- (3) such limitations are reasonably necessary to protect existing use.”

offer interested parties a longer window to submit contested case hearing requests, it could modify the time in Rule 14.2(b)(3) by which the District must give notice of a hearing from 10 days to 15 days:

14.2(b)(3) Not later than the ~~15th~~ ~~10th~~ day before the date of a hearing, the general manager or board shall:

(A) post notice in a place readily accessible to the public at the District office;

(B) provide notice to the county clerk of each county in the District; and

(C) provide notice by:

(i) regular mail to the applicant;

(ii) regular mail, facsimile, or electronic mail to any person who has requested notice under Subsection (4); and

(iii) regular mail to any other person entitled to receive notice under the rules of the District.

V. Conclusion

UW BVF thanks BVGCD for the opportunity to submit comments on the District's proposed rules. A representative of UW BVF will attend the September 14, 2023 hearing and will be available to answer questions or provide further detail on the foregoing comments, at the District's request.

David L. Lynch
Manager