LAW OFFICES OF

MCCARTHY & MCCARTHY, L.L.P.

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

September 13, 2023

Board of Directors
Brazos Valley Groundwater Conservation District
c/o Alan Day, General Manager
112 W 3rd St
Hearne, Texas 77859

Via E-mail &
Hand Delivery

Re: Proposed Brazos Valley Groundwater Conservation District Rule Amendments to be considered September 14, 2023

Dear Mr. Day:

On behalf of clients of the Firm, we have been reviewing and discussing with hydrogeologic experts the District's latest draft of proposed rule changes. We appreciate the opportunity to provide these comments for the Board's consideration.

A copy of our comments on specific rule amendments is attached hereto as **Appendix "A."** We also want to take this opportunity to provide general comments that address the voluminous rule changes proposed by the District.

The proposed rule changes reflect a substantial amount of work affecting numerous rules. As you know, in recent months we have worked with you and your team on behalf of multiple landowner clients who have voluntarily agreed to implement a number of the proposed rule changes as part of permit applications they filed pre-rule adoption.

Our clients continue to appreciate the District's efforts to manage production of groundwater from the aquifers subject to its jurisdiction to address scientifically supported concerns related to permitting and the current climatic conditions. Some of the proposed changes to the District's Rules, however, exceed the limited authority granted to the District by Chapter 36, Texas Water Code, and its enabling legislation in Chapter 8849, Texas Special District Local Laws Code. Accordingly, they are objectionable, and legally problematic because they impose undue restrictions on the right of a landowner to beneficially use their groundwater and, thereby, their overall enjoyment of their land.

The District is a creature of statute. It is a member of the "executive department" of state government perched in the hierarchy of "bodies politic" just below counties in terms of the level of control and regulatory powers they wield. As Texas Courts and the Texas Attorney General have held repeatedly, special purpose districts like BVGCD have only those powers expressly granted by the Legislature, or necessarily implied. *E.g., 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.); *see* Tx Atty. Gen. Op. KP-0247.

Even if the District were able successfully to characterize the resultant takings as being for a legitimate public purpose, to be a lawful exercise of the District's police powers, the "taking" would require the District's payment of "just compensation" to avoid a violation of Article I, Section 17 of the Texas Constitution. *See Barshop v. Medina County Underground Water Conservation District*, S.W.2d 618, 628, 631(Tex. 1996) ("State still can take the property for a public use as long as adequate compensation is provided").

Additionally, a more nuanced aspect of the rulemaking processes the BVGCD is undertaking currently is the fact that the applicability of the proposed rules, if and when adopted, must be limited in the manner in which the rule(s) affect existing permits. Specifically, rulemaking must be prospective in nature. Newly adopted rules must only affect applications, rulings, etc. which are filed, or come after the rules are adopted. As drafted, some of the proposed rule changes could be interpreted to affect existing permits and applications, which have already been filed at the District and, in some instances, acted upon. At a minimum, the rules should be clearly drafted in a manner which confirm they will only be "future facing," and will <u>not</u> retroactively impact existing permits and applications filed and in process at the District.

Thank you for your consideration of the recommendations on this matter.

Sincerely,

McCarthy & McCarthy, LLP

Edmond R. McCarthy, Jr.

ERM/tn
Encl.

APPENDIX A

McCarthy & McCarthy, LLP's comments on Brazos Valley Groundwater Conservation District Proposed Rules set for hearing September 14, 2023

RULE SPECIFIC COMMENTS TO DRAFT RULES POSTED ON WEBSITE ON 8/9/23

Rule 5.2: Joint Planning in Management Area

No substantive comment to the proposed changes. As we understand these are primarily statutorily required. There is however a typo in the redline language of 5.2(g), in the fourth line, the newly added language "for a join planning meeting" should instead read "for a joint planning meeting."

Rule 6.1: Required Spacing

The new proposed 6.1(b)(2) adds "or is by applied for to the District by the applicant." The first "by" should be removed as the sentence does not make sense as drafted.

This rule also includes the 2 ft/gpm spacing rule for the aquifers outside of the Brazos River Alluvium. The Board has had multiple conversations about the impact this will have, requiring applicants to have 4 times as much acreage for the same amount of production applied for, as well as the possibility of using 1.5 ft/gpm, which would only require 2.25 times as much acreage for the same production. This is going to be a massive change with huge implications, especially combined with the new "no overlap" criteria proposed later in the rules with the removal of exceptions in Rule 6.2 and the added language to Rule 7.1. We suggest that the Board fully investigate the implications these rule changes will have, and the roadblocks it will place for landowners to use their constitutionally protected groundwater rights going forward.

Rule 6.2: Exceptions to Spacing Requirements

As discussed in the comments to 6.1 above, the proposed rule amendments remove many of the exceptions to spacing requirements, leaving only the former subsection (f). I want to clarify that the effect going forward with only the former subsection (f), when read in conjunction with the newly proposed Rule 7.1(c), in particular the language that "assigned contiguous acreage circle footprints under this formula shall not overlap between wells," is that in a hypothetical scenario where a landowner's property may be wholly enveloped by the circle footprints of wells from neighboring properties, that the landowner will still be able to drill a well.

It seems like that is the purpose of the remaining 6.2 paragraph after the other subsections have been removed, and would track with the Texas Supreme Court's decision in Marrs v. R.R. Com., 142 Tex. 293, 294, 177 S.W.2d 941, 943 (1944), where the Supreme Court held that the Texas Railroad Commission could *not* bar a landowner from drilling a well just because a strict reading of the proration rules would block a landowner from drilling a well on their property, leaving the landowner's property confiscated entirely.

The rule needs to allow for an exception that will allow a landowner who would otherwise *not* be able to secure a well permit based upon the new rules would (not could) be allowed to get a well permitted.

Based on the comments from Mr. Day at the various rulemaking workshops, it has been clear that the District only intends for these changes to be prospective in their application, *i.e.,* they would apply only to new applications filed after the rule changes are adopted. However, this is not clear

from the drafted language. An easy fix could be to add the following language to the end of Rule 6.2's last remaining subsection:

> 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.

Rule 7.1: Maximum Allowable Production

While the discussion in the various rule workshops has been clear that the intent of the "no overlap" rule is to protect wells in the same aquifers, the Rule does *not* say anything to limit the application of the Rule that way. A strict reading of the Rule amendment could argue that the circle footprint of a well in the Simsboro Aquifer would not just preclude any other Simsboro wells with a footprint which may overlap from being drilled, but that ANY well in ANY aquifer which footprint may overlap would be banned. A simple addition of "in the same aquifer" at the end of the new language in 7.1(c) would clear this up. Without this addition, however, the rule would be overreaching and could lead to many future problems, including litigation by landowners attempting to use their constitutionally protected groundwater in a certain aquifer, but being blocked by a well in a completely different formation.

Also, similar to rule 6.2 above, it is not clear as drafted that this Rule amendment will only apply to permit applications filed after these new rules are adopted. Again, an easy fix would be to add the following language to the end of Rule 7.1(c):

> 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.

Rule 8.4: Applications

The proposed change to subsection (b)(3) adds language requiring a "notarized original" of any legal document affecting legal authority to produce groundwater be filed with the county deed records. A potential issue is with requiring a "notarized original" when a notarized copy should suffice. Property transactions and closings, the type of things which may affect the legal authority to produce groundwater, often are finalized in parts, so keeping track of what is an original vs a legally sufficient notarized copy could be tricky. This is an unnecessarily specific change that could lead to confusion or issues. It would be easier to just state a "notarized copy" is required to be filed, which still accomplishes the clear goal of the rule and provides the necessary notice.

With respect to the proposed changes to 8.4(b)(7)(B), the changes to the requirement to 8.4(b)(7)(B)(3) are unnecessarily onerous. Requiring drawdown estimates 20 years out serves no purpose given the length of time and amount of unknowns which will take place in the interim.

The data that will be gathered in the intervening 20 years will be far more useful than estimates today.

The requirement to measure out to ten miles is similarly onerous and unnecessary. In light of the other rule changes requiring far greater acreage be owned for production, this is an unnecessary step which will likely lead to unnecessary protests from landowners that would not have a justiciable interest, but may be within the 10 miles.

During the workshop meetings the District asserted these changes are made in the goal of "transparency." However, the line between transparency and fear-mongering can be quite thin. 10 miles is an incredibly long distance. Many people may not understand why they are getting these notices. This will likely lead to unnecessary challenges by people without standing, which will then require applicants, and the District to waste limited resources fighting about. Transparency is always a good thing, but inviting trouble where none should exist is not. Finally, the last sentence of the second redlined portion begins with a typo: "Application" should be "Applicant."

The changes to 8.4(b)(7)(B)(4) require an evaluation be done regarding the effects that applied for production could have on the applicable DFCs. This is problematic for multiple reasons. First, the DFCs, as set in GMA 12, reflect additional pumping, when calculating all existing pumping being done at 100% at all times, the result will always be the DFC drawdown being exceeded per the GAM. As such, this puts an unfair "blemish" on an Application. There should be a way for Applicants to show in the evaluations the difference between actual pumping occurring and measurements based on the full permitted amounts. The proposed amendment does *not* consider this unfair effect.

Rule 8.5: Operating Permit Term and Renewal

Rule 8.5(b)(2) should add language to clearly state that the fees charged will not only be based on the actual amount of water withdrawn, but also for the actual purpose for use of the water. Given 8.5(b)(1) contemplates permits that authorize multiple types of beneficial use will be charged the highest possible fee, to avoid confusion it should be clear in (b)(2) that upon actual production it will be charged for the actual type of beneficial use, not just the actual amount withdrawn.

Rule 8.7: Operating Permit Provisions

Newly proposed subsection (10) states that a permittee "may" enter into a mitigation agreement with the District. While this purports to be voluntary, there is concern that an Applicant may be told by the District: 1) enter into the mitigation agreement; or 2) you don't get a permit. While it technically could still be "voluntary" in an "arm-twisting way" to enter into the mitigation agreement, this would be more akin to a hostage negotiation. If this rule is going to be included, the rules should also provide that a permit will *not* be denied on the basis of not entering into a mitigation agreement. The changes in the law (HB 3059) which allow transport fees of up to $0.20 per 1000 transported to be used for mitigation provide a source of funds for the District to use even in the absence of a mitigation agreement. The rules should also provide an explanation of the consequences or ramifications of not entering into a mitigation agreement. It is important to note that other than the narrow reference and authorization to mitigate impacts to wells due to pumping, there is no statutory authority for GCDs to impose any mitigation requirement on a permittee.

Newly proposed subsection (12) is unnecessarily onerous on permittees. An applicant, as part of their application, is required to swear to the fact that they have the legal authority to produce the groundwater they have applied for. That should be sufficient for the District's purposes. The District is not the arbiter of title to property or groundwater, but is tasked with the management and regulation of the District. Should an issue arise with dueling claims to the ownership of water, that will be properly handled by an action in the court of relevant jurisdiction. The District should not require documents it has no authority to require. As drafted, the amendment likely violates the "separation of power" provisions of the Texas Constitution. *See* TEX. CONST. Art. II, § 1; *see generally Magnolia Petroleum Company v. Railroad Commission*, 170 S.W.2d 189, 191 (Tex. 1943) (Commission's function is "to adjudicate to the conservation laws"; *not* to "adjudicate questions of title or possession"); *South Plains Lamesa Railroad Ltd. v. High Plains Underground Water Conservation District No. 1*, 52 S.W.3d 770, 779-80 (Tex. App. – Amarillo 2001, no pet.) (Groundwater district can only exercise authority expressly granted by Texas Legislature); Tex. Atty Op. No. KP-0247 (Groundwater district a legislatively created political subdivision under conservation amendment (Art. XVI, Section 59); *citing South Plains Lamesa Railroad Ltd. v. High Plains Underground Water Conservation District No. 1, supra*; *Tri-City Freshwater Supply District v. Mann*, 142 S.W.2d 945, 948 (Tex. 1940)); *Cf., Nat'l Fedn. Of Indep. Bus. v. U.S. Dep't of Labor,* 2022 U.S. LEXIS 496, *6-7 (U.S. January 13, 2022) ("Applicants are likely to succeed on the merits of their claim that the Secretary lacked authority to impose the mandate. *Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided*." (emphasis added)(internal citations omitted)); *see also* Tex. Const. Art. XVI, § 59 (authorizing Texas Legislature to pass laws related to the construction, development and presentation of Texas natural resources).

Rule 8.9: Permit Amendments

The newly proposed rule 8.9(a)(3) states that if someone with an existing permit files an amendment to (i) increase their annual production OR (ii) to change permitted use, that the ENTIRE permit must then meet the production acreage rule in effect at the time the administratively complete amendment application is submitted. This has multiple problems. First, if the amendment is just for permitted use, this should have no effect or impact as to the acreage required. Nothing has changed with regard to the amount being produced, and the aquifer doesn't care how the water is used once pumped. There is no rational basis in science, law, or logic that would explain requiring a person to add, as the District has described, 4 times as much acreage just to change the proposed use.

Similarly, it is understandable that if an increase in production is sought, that there will be a need to increase some acreage. However, the increase should only be based on the new amount sought. For example, if an existing permittee with a 1000 ac-ft permit comes in for an increase of 100 ac-ft, it would make sense that the new amount require the new acreage required. In this example, whatever land is already owned for the existing 1000 ac-ft, for the new 100 ac-ft, 400 additional acres should be required (again, this is for sake of example with the 4x number the District has cited, we recognize the rule does not require 4 acres per ac-ft). It should not be required that the ENTIRE acreage required be multiplied by 4. This is an impossible requirement to put on landowners which is not based in law or science.

Rule 9.1: Water Use Fees

While it is understood that the language change in 9.1(c) comes from recently passed legislation, language should be added that clarifies that permittees who have already entered into a fee agreement with the District prior to September 1, 2023, should have their fee agreement remain the same, and that any projects or permits which may be added or brought into the existing projects which have already entered into a fee agreement should also have those agreed-upon transport fees applied.

Language should be added to 9.1(f) affirmatively stating that fees may NOT be used for legal fees or expenses incurred by the District.

The additional language of 9.1(g) should strike "anticipated" as fees should only be charged for the actual amounts exported out of the District. The District has no authority to charge export fees on water not produced or exported out of the District.

Rule 10.4: Hearing and Permit Issuance:

The newly proposed language of Rule 10.4(d)(3)-(8) adds items to be included as conditions to transport permits, including reporting and metering requirements, monitoring wells, "Well Assistance provisions, if applicable;" water conservation and drought contingency plans, and periodic review and permit limitations based on aquifer conditions.

The new subsection (8) regarding "periodic review and permit limitations based on aquifer conditions" is concerningly vague and leads to multiple potential issues. Limitations based on aquifer conditions should not be done on a permit-by-permit basis, but instead District-wide. If this language is just to include a statement that the permit, like all permits, is subject to District-wide curtailments, then there is no issue. However, as drafted, this seems to allow the District to "pick and choose" and impose different curtailments for different permits. Such a discriminatory practice would be in violation of the Texas Water Code. Further, this vague description of "limitations to permits" seems like it could require a permittee to come in to amend their permit back to the level it was at, which in conjunction with other rule changes, would now require a permittee to acquire more acreage for the same amount of water, which should not be the case. The rule should be clarified to provide that "permit limitations based on aquifer conditions" are to be done District-wide.

Rule 14.2: Notice and Scheduling of Permit-Related Hearings:

The proposed additional language to Rule 14.2(a) includes language which now states that an application will ***not*** be declared administratively complete if a hydrological evaluation report is part of the application and the District's hydrologist deems the report is not yet fully responsive to the District's requirements. The existing rule only allows for 60 days from the time an "incomplete application notice" is sent to submit information or the application be deemed expired. With this added language, should the District's hydrologist send notice there is something missing from the hydrological report, that should still start a 60-day clock. However, if information is submitted in response, and the District's hydrologist finds another reason the report is not yet fully responsive, that should start another 60-day clock so long as the applicant is working in good faith to get the information. It would save time and resources for both applicants and the District to keep working

through whatever issues there may be, instead of having to throw everything away and start from scratch after 60-days from the initial request.

The proposed notice changes to 14.2(3b) raise similar concerns as the proposed changes discussed above in Rule 8.4. Having the District mail notice to all well owners within ten miles is going to invite unnecessary problems and contests. The line between transparency and fear-mongering can be quite thin. 10 miles is an incredibly long distance, and many people may not understand why they are getting these notices. This will likely lead to unnecessary challenges by people without standing, which will then require not only applicants, but the District, to waste precious time and resources fighting about. Transparency is a good thing, but this level of "transparency" invites trouble where none should exist. Given the District will be posting notice in the papers of record and on its website, this additional step, and expense, is unnecessary and only invites problems.

Rule 14.3.5: Determination of Contested Status of Permit Hearings:

The change to Rule. 14.3.5(a) from requiring notice of a written intent to contest an application from five calendar days to "5:00 PM the day before the permit hearing" is an unfair change for potential applicants. If someone turns in a notice of intent to contest an application the next day at 4:59 P.M. to the District, it is unlikely that the Applicant will get any notice or heads-up that the permit application they had believed would be uncontested is now contested. By having the five calendar days, an Applicant was able to prepare accordingly for the contest at the hearing. In light of the proposed increase in notice made in other rule changes, there is no reason to reduce the period required for someone to provide notice of intent to contest. The ability to hide behind the log until nearly the last minute as proposed here is unfair for permit applicants. Again, if the District's goal is transparency, that should flow to all parties, including applicants.

Section 16: Well Assistance Program

No specific comment to the proposed language of Section 16 itself. The issues are those raised earlier in the comments. First, this program should truly be a voluntary option to enter into, and not presented as a "hostage situation" where an applicant either "volunteers" to enter into a Well Assistance Program or they do not get their Permit. Second, as mentioned, if a permittee decides to enter into an agreement to sell or lease its water to another larger permittee that has already entered a Well Assistance Program, the smaller permittee should be brought into and under the existing larger permittee's Well Assistance Program, not enter into a new one allowing for a "double-dip."