

**APPLICATIONS FOR TRANSPORT  
PERMITS BTVP-002, BTVP-003,  
BTVP-004, BTVP-005, BTVP-006,  
BTVP-007, BTVP-008**

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**BEFORE THE BRAZOS VALLEY  
GROUNDWATER  
CONSERVATION DISTRICT**

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**MOTION TO RECUSE BOARD MEMBERS  
JASON BARFKNECHT AND GARY MECHLER**

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UW Brazos Valley Farm, LLC (“UWBVF”), on behalf of itself and its transport permit co-applicants, James C. Brien, Cula d’Brazos LLC, Ely Family Partnership LP, Fazzino Investments LP, L. Wiese Moore LLC, RH2O LLC, and Clifford A. Skiles III (collectively, “Applicants”) hereby moves Brazos Valley Groundwater Conservation District (“BVGCD” or the “District”) Board President Jayson Barfknecht and Board Member Gary Mechler to recuse themselves from further action, discussion, or involvement with transport permit applications BVTP-002 through BVTP-008 (collectively, the “Applications”), as well as any action, discussion, or involvement with any permit the District has previously issued that is associated with the transport project contemplated by the Applications.

To ensure the District upholds the statutorily-mandated integrity of its actions, and to comply with due process requirements of state and federal law, it is imperative that Mr. Barfknecht and Mr. Mechler recuse themselves. Mr. Barfknecht is the Public Works Director for the City of Bryan. Mr. Mechler is the Water Services Director for the City of College Station. Both cities have requested a contested case hearing on the Applications. Mr. Barfknecht’s 23-year tenure with the City of Bryan has involved long-term water supply planning, regulatory decision-making, and management of the city’s water services, and he cannot plausibly deny his involvement with Bryan’s hearing request.<sup>1</sup> Mr. Mechler’s position with the City of College Station involves developing strategies for the city’s long-term water supplies and managing the city’s provision of

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<sup>1</sup> Cassie Smith, *B-CS water supply could run dry*, THE EAGLE (Apr. 20, 2009) (Mr. Barfknecht describing City’s “plans to ensure a sufficient supply of water for the next 50 years” and “positioning . . . to secure rights to as much water as possible”); TCEQ, City of Bryan Notice of Hearing for TPDES Permit No. WQ0015930001 (Sept. 15, 2022) (listing Mr. Barfknecht as City contact for permitting information); CITY OF BRYAN, *City of Bryan requests voluntary water conservation* (July 25, 2022) (Mr. Barfknecht calling upon citizens to implement voluntary water-conservation measures); Bryan City Council, Action Form (May 16, 2017) (Mr. Barfknecht requesting city council approval of water contract between City and special utility district).

water services, which similarly implicates him in College Station’s hearing request.<sup>2</sup> Given that both Mr. Barfknecht and Mr. Mechler’s positions center around defending the water interests of their respective cities, the District cannot fulfill its statutory obligation to consider the Applications in a “fair, impartial, and nondiscriminatory” manner if these board members are simultaneously deciding whether the permits should issue while actively opposing the Applications as a city officials.

Given the cities’ hearing request, Mr. Barfknecht, in his capacity as Bryan’s Public Works Director, and Mr. Mechler, in his capacity as College Station’s Water Services Director, will be deposed and subject to discovery. Both are, at a minimum, important fact witnesses in the administrative hearing on the cities’ opposition to these Applications. These evidentiary conflicts, as well their obvious personal biases and prejudices against the Applications, hinder the District’s ability to provide due process through a fair and impartial tribunal. Mr. Barfknecht and Mr. Mechler’s individual and financial ties to the cities necessitate their recusal under state law and BVGCD bylaws.

**I. State law requires recusal.**

Chapter 36 of the Texas Water Code mandates that BVGCD evaluate the Applications in a “fair, impartial, and nondiscriminatory” manner. Tex. Water Code § 36.122(q). BVGCD rules also dictate that the Board be fair and impartial in its decisions. BVGCD Rules 10.4(b), (c). The Texas Legislature established these protections in 2001, following the shift to regional water planning that contemplated groundwater moving beyond GCD boundaries to support regional projects. The bill analysis for this legislation underscores the law’s intent:

Although districts could charge export fees, they could not discriminate against applications to transfer groundwater out of the district. The bill would ensure that exporters were treated fairly and that the district did not impose more severe restrictions for export than for in-district water use. *See* Bill Analysis, Tex. S.B. 2, 77th Leg., R.S. (2001).

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<sup>2</sup> Bill Oliver, *College Station City Council Awards Contract To Design And Build More Water Wells*, WTAW (May 7, 2024) (Mr. Mechler discussing how new wells will “take care of College Station’s water needs through the year 2046”); Chelsea Reber, *City of College Station Update on WTAW* (July 31, 2021) (Mr. Mechler discussing aquifer conditions during interview in his official capacity of Water Services Director); City of Bryan, Water Services, Water Production & Treatment, [https://www.cstx.gov/departments\\_\\_\\_city\\_hall/csu/water/water\\_production\\_\\_\\_treatment](https://www.cstx.gov/departments___city_hall/csu/water/water_production___treatment) (last visited June 17, 2024) (describing City’s groundwater wells and distribution system).

Given a GCD's nondiscrimination mandate, BVGCD cannot fulfill its obligations when its Board President, Mr. Barfknecht, has worked for over two decades for a party actively protesting the Applications and where he personally serves in a role tied to the management of Bryan's water supply. Similarly, Mr. Mechler's over five years of employment with College Station and his role integral to the city's water-supply interests also compromises the District's ability to perform its statutory obligations. Mr. Barfknecht and Mr. Mechler's employment conflicts particularly undermine the principles of fairness, impartiality, and nondiscrimination since the District *has already authorized the relevant groundwater production*, and the sole remaining issue for consideration is the transport of the already-authorized production.

Recusal is also warranted by state and federal due process protections that "entitle[] a person to an impartial and disinterested tribunal." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); U.S. CONST. amend. XIV, § 1; TEX. CONST. art. I, § 19 ("No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land."). A fair trial in a fair tribunal is a basic requirement of due process. *State v. Volkswagen Aktiengesellschaft*, No. 21-0130, 2022 WL 17072342 at \*2 (Tex. 2022) (per curiam) (citing *In re Murchison*, 349 U.S. 133, 136 (1955)). A fair tribunal, in turn, requires a neutral and detached hearing body or officer. *Id.* Following these principles, Texas law imposes strict rules for judicial recusal and prohibits judges from serving as witnesses. Because the District's Board of Directors serves as the adjudicatory body for contested permits, rules pertaining to judicial recusal and ethics are highly relevant to its members and must be applied here to ensure fairness and impartiality in the upcoming proceedings.<sup>3</sup>

First, recusal is required where the adjudicator "has personal knowledge of disputed evidentiary facts concerning the proceeding." Tex. R. Civ. P. 18(b). Similarly, the Texas Rules of Evidence prohibit a presiding judge from testifying as a witness. Tex. R. Evid. 605. Here, Mr. Barfknecht and Mr. Mechler's roles as city officials directly involved in City water-supply management give them personal knowledge of key facts relevant to the cities' asserted concerns regarding the Applications. As Bryan's Public Works Director, Mr. Barfknecht oversees the city's

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<sup>3</sup> Texas's recusal and ethics rules apply to the BVGCD Board even when the State Office of Administrative Hearings ("SOAH") is the trier of fact because the BVGCD serves as the ultimate decisionmaker. *See* Tex. Water Code § 36.4165 ("the board has the authority to make a final decision on consideration of a proposal for decision issued by an administrative law judge").

Water Department and has knowledge of the city's groundwater production, well distribution, water demands, and other critical details. Likewise, Mr. Mechler, as College Station's Water Services Director, has knowledge of the city's well design, production, and distribution. Both board members should expect to be subject to deposition and discovery requests relevant to their positions and may be witnesses at the evidentiary hearing, whether directly or by deposition testimony. Mr. Barfknecht and Mr. Mechler's recusal is necessary to prevent conflicts arising from their factual knowledge and potential testimony.

Second, recusal is required where "impartiality might reasonably be questioned." Tex. R. Civ. P. 18(b). At the simplest level, Mr. Barfknecht and Mr. Mechler's impartiality can reasonably be questioned when one potential party in the contested case hearing pays their respective salary, and the other parties do not. The legal precedent is clear: any interest, "however small," that involves a direct pecuniary or personal interest in the outcome disqualifies the adjudicator. *Cameron v. Greenhill*, 582 S.W.2d 775, 776 (Tex. 1979). Mr. Barfknecht's continued receipt of a salary from Bryan since 2001, and Mr. Mechler's continued receipt of a salary from College Station since 2018, constitutes a significant pecuniary and personal interest sufficient to call their impartiality on these Applications into question.

Third, recusal is required where the adjudicator has "personal bias or prejudice concerning the subject matter or a party." Tex. R. Civ. P. 18(b). Mr. Barfknecht's two decades of employment with Bryan and decision-making regarding the city's own interests in groundwater and water supply indicates a "personal bias or prejudice" in favor of Bryan and against the Applications that the city seeks to challenge. Mr. Mechler's role in planning for and managing College Station's water supplies likewise indicates bias or prejudice. Moreover, because the narrow issue before the District is the transfer of *already authorized* production, the cities' protest necessitates discriminatory protectionism, and Mr. Barfknecht and Mr. Mechler's roles as city officials inevitably involve personal bias or prejudice concerning the fate of the Applications.

Finally, the cities' hearing request creates an adversarial relationship with BVGCD, whose General Manager has recommended that the District "approve the Transport permit(s) as presented." *See, e.g.*, Worksheet for a Transport Permit, BVTP-003. Should the BVGCD approve the Applications that the cities are now challenging, the cities may have the opportunity to pursue further legal action against the District. This potential for future litigation between the cities and

the District over the District's decision on these Applications decisively warrants Mr. Barfknecht and Mr. Mechler's recusal. The Texas Office of the Attorney General has directed a "public officer who is suing or planning to sue his governmental body" to "avoid using his public position to secure access to information related to the litigation, for example, by voluntarily refraining from attending executive sessions regarding the litigation and from accepting confidential documents related to the litigation." Tex. Att'y Gen. Op. No. GA-0334 (2005). The Attorney General emphasized that a public officer in Mr. Barfknecht and Mr. Mechler's position "holds a public trust, and he should discharge his duties with honesty and integrity." *Id.* (citing *Alsup v. State*, 238 S.W. 667,670 (Tex. Crim. App. 1922); *Jones v. State*, 109 S.W.2d 244, 251 (Tex. App.—Texarkana 1937, no writ).

## **II. The District's bylaws require recusal.**

To preserve the District's integrity and adhere to state law, the BVGCD bylaws strictly regulate board member conduct and address conflicts of interest. Under these bylaws, Mr. Barfknecht and Mr. Mechler are directed to recuse themselves.

First, the bylaws prohibit a board member from "accept[ing] other employment or compensation that could reasonably be expected to impair his independence of judgment in the performance of his official duties." BVGCD Bylaw 4.1(c). In the specific context of the cities' choice to directly oppose the Applications, Mr. Barfknecht and Mr. Mechler's employment with the cities, including their respective roles in water-supply planning and groundwater production, unquestionably falls into this category. Both cities are major groundwater producers in the District: Bryan is authorized to produce approximately 50,000 acre-feet of groundwater annually, and College Station is authorized to produce approximately 30,000 acre-feet annually. The cities' hearing request underscores their aggressive stance favoring their respective groundwater production, even when the District concluded, and issued final operating permits, on the basis that the already-authorized *production* supporting the transport sought by the Applications complies with relevant rules and law. Considering the cities' protectionist approach, Mr. Barfknecht and Mr. Mechler's continued employment and compensation from the cities severely compromises their independence of judgment in performing their statutory duty to treat the Applications impartially and without bias.

Second, the bylaws require each board member to “disclose any conflicts of interest that may exist between the personal interests of that board member . . . *and to avoid taking responsibility for District decisions related to areas in which those conflicts exist.*” BVGCD Bylaw 4.1 (emphasis added). Board President Barfknecht’s 23-year tenure with Bryan, his salary, and his involvement in major decisions on city infrastructure and water services creates a significant conflict of interest in this matter, where Bryan has chosen to oppose the pending Applications. His longstanding employment demonstrates significant loyalty to Bryan and its interests as well as deep knowledge of its water supplies and strategy to oppose other groundwater producers. Mr. Mechler’s over five years of employment with College Station and his involvement in well development likewise constitutes the type of personal connection creating a conflict of interest. Mr. Barfknecht and Mr. Mechler’s personal and financial ties warrant them to “avoid taking responsibility for District decisions related to areas in which [that] conflict[] exist[s].” Given the cities’ formal request to challenge the Applications, Mr. Barfknecht and Mr. Mechler’s involvement in any District decisions related to these Applications is a conflict of interest, necessitating their recusal under BVGCD bylaws.

### **III. Conclusion**

In light of the Bryan and College Station’s request for a contested case hearing on the Applications, UWBVF moves for Mr. Barfknecht and Mr. Mechler’s recusal. State law and the District’s bylaws mandate recusal because, where the cities have elected to oppose the pending transport Applications, Mr. Barfknecht and Mr. Mechler’s roles as city officials indicate bias and prejudice against the Applications and the Applicants. This bias and prejudice in turn impedes District compliance with statutory obligations and creates a conflict of interest. UWBVF requests that Mr. Barfknecht and Mr. Mechler recuse themselves from further action, discussion, or involvement with Applications, as well as any action, discussion, or involvement with any permit the District has previously issued that is associated with the transport project contemplated by the Applications.

Respectfully submitted this 18th day of June, 2024,



By:

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