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November 11, 2025

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 Export Fee Schedule to be considered November 13, 2025

Dear Mr. Day:

On behalf of clients of the Firm, we have been reviewing the latest draft of the proposed 2026 Export Fee Schedule to be considered at a Public Hearing on November 13, 2025. We appreciate the opportunity to provide these comments for the Board's consideration.

There is no real issue with the proposed Export Fee Tier 2 of \$0.21218/1000 gallons on water exported, besides the continued annual price hikes. While we recognize that the Legislature authorized districts throughout the state the ability to raise export fees 3% per annum, it is our hope the District will question and explore whether a 3% raise every single year is appropriate and actually necessary. At some point in the near future export fees will reach a level that renders them "price gouging" on landowners who are simply trying to use and enjoy their constitutionally protected property rights.

The primary purpose of our comments, however, is to both raise questions and urge caution regarding the District's proposed Export Fee Tier 1. The proposed Recommended Fees, a true and correct copy of which is appended hereto as **Attachment "A,"** states that "Using both District Local Laws Code and Section 36.122 of the Texas Water Code," the District is proposing to charge an Export Fee on ALL groundwater AUTHORIZED under a transport permit, at a rate of the difference of the authorized and adopted production fee and \$0.17/1000 gallons. In more simplified terms, this means that any landowner that has a permit that authorizes both production and transport of their groundwater will be paying \$0.17/1000 gallons under Export Fee Tier 1. The proposed "export" share of the \$0.17/1000 gallons combined fee is *not* contingent on actual "export" of any water. The export component of the fee is based strictly on the "paper right" to export.

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 the level of control and regulatory powers they wield. As Texas Courts have held repeatedly, such special purpose

districts like BVGCD have only those powers expressly granted to it 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 (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)). Neither the District's enabling legislation, Special District Local Laws Ch. 8835, nor Chapter 36, specifically §36.122 of the Texas Water Code, authorizes an export fee to be charged on the "paper right" to export, *i.e.*, water which is not exported.

The District's enabling legislation discusses "Fees" in Section 8835.151, with export fees specifically discussed at subsection 8835.151(c). That subsection states:

(c) In addition to the fee authorized under Subsection (b), 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**.

Special District Local Laws §8835.151(c) (emphasis added).¹ Read in context, and applying the plain meaning of the word "used," in order for the District to charge an export fee pursuant to Section 8835.151(c) of its enabling legislation, to be "used" the groundwater must be (i) produced and (ii) exported. Simply being "authorized" on paper does not entitle the District to assess or collect an export fee.

The "for water used" language is important. It is the crux of the problem with the proposed Export Fee Tier 1. The General Manager's Recommendation states that Export Fee Tier 1 is to be charged "based on the amount of groundwater that is authorized under a transport permit but was not exported out of the District during the fiscal year (Enabling Act)." (emphasis added) Presumably, the parenthetical "(Enabling Act)" is an effort to explain or justify this provision. This purported justification or source of power, however, is a clear misstatement of the limited authority granted by the Legislature in the District's enabling legislation to charge and collect export fees. The District's enabling legislation does *not* allow for an export fee to be charged on a "paper right," *i.e.*, "water permitted" or "water authorized," as this fee schedule proposes. Instead, the District's enabling legislation, as written, clearly only and unambiguously limits the District's ability to charge an export fee for "water used."

A "plain reading" of Section 8835.151(c) makes clear that the Legislature only authorized an export fee to be charged by the District on water that is actually "used," *i.e.*, "exported." However, even in the most liberal reading of that subsection, the water must be produced to be considered "used" and, thereafter, transported outside of the District to be subject to an export fee.

¹ A true and correct copy of the District's enabling legislation, Chapter 8835, Texas Special District Local Laws Code, is appended hereto as **Attachment "B."**

The proposed fee schedule, however, would charge the Tier 1 export fee for all water “authorized,” even if a single drop is *not* produced, much less exported.

The authorization to charge a “reasonable export fee” in Section 36.122 of the Texas Water Code is even clearer on why such a fee assessment on non-exported water is *not* authorized. Export fees are authorized in Texas Water Code §36.122, specifically, subsection 36.122(e), which provides as follows:

(e) Except as provided by Subsection (e-1), the district may impose an export fee or surcharge using one of the following methods:

(1) a fee negotiated between the district and the exporter;

(2) for a tax-based district, a rate not to exceed 20 cents for each thousand gallons of **water exported from the district**; or

(3) for a fee-based district, a rate not to exceed the greater of 20 cents for each thousand gallons or a 50 percent surcharge, in addition to the district's production fee, **for water exported from the district**.

(e-1) Effective January 1, 2024, the maximum allowable rate a district may impose for an export fee or surcharge under Subsection (e)(2) or (e)(3) increases by three percent each calendar year.

(e-2) A district governed by a special law in regard to an export fee or **surcharge on water exported from the district** may charge an export fee or surcharge in accordance with that special law or in accordance with Subsections (e) and (e-1).

(e-3) An export fee or surcharge imposed under Subsection (e) or an increase in an imposed export fee or surcharge is not valid unless it is approved by the board after a public hearing.

Texas Water Code §36.122(e)-(e-3) (emphasis added).²

It is crystal clear from Chapter 36 that an “export fee” can only be charged on that volume of “water exported from the district.” Nothing in the Water Code allows for charging an export fee on water that is authorized for export, *i.e.*, the “paper right.” Texas law authorizes export fees solely to be charged on “water exported from the district.” Texas Water Code §36.122(e).

While 36.122(e-2) allows a District governed by a special law, such as the District’s enabling legislation discussed above, to charge an export fee in accordance with either the District’s special law OR in accordance with §36.122(e) and (e-1), neither the District’s enabling legislation, nor §36.122(e) or (e-1) authorizes charging an export fee on permitted volumes that are not exported.

² A true and correct copy of Texas Water Code §36.122 is appended hereto as **Attachment “C.”**

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On a basic transactional level, it makes no sense to charge someone when no service is rendered. An export fee is just that, a fee charged on water exported outside of the District. It is common sense that a landowner should not be charged for something they have not used. If no water is exported, there should be no export fee.

The District should strip the proposed Export Fee Tier 1, and simply charge all applicants, aside from those who have entered into a negotiated fee agreement pursuant to Section 36.122 (e)(1), the Export Fee Tier 2 rate on all water that is actually produced AND exported from the District based upon the authorization in Section 36.122(e)(3).

Thank you for your favorable consideration of and action on our recommendations on this matter.

Sincerely,

MCCARTHY & MCCARTHY, LLP

Edmond R. McCarthy, III.

ERM/tn
Encl.

Attachment "A"

Budget/Finance Committee/General Manager
Recommended FY 2026 Export Fee Schedule

Budget/Finance Committee/General Manager Recommendations

FY 2026 Export Fee Schedule

Export Fee:

Using both District Local Laws Code and Section 36.122 of the Texas Water Code:

- Export Fee Tier 1 is based on the amount of groundwater that is authorized under a transport permit but was not exported out of the District during the fiscal year (Enabling Act).

Export Fee Tier 1: the difference of \$0.17/1000 gallons authorized and the adopted production fee

- Export Fee Tier 2 is based on the actual amount of metered groundwater transported out of the District during the year (District Rule 9.1(c)).

Export Fee Tier 2: \$0.21218/1000 gallons

A transport permit could be charged for one or both export fee rates in a fiscal year. Export Fee Tier 1 will be charged on all transport permits that do not export water during the year. If only some water is exported, then the non-exported, but authorized amount will be prorated to the date export begins and charged at a Tier 1 rate, and the exported water will be charged at a Tier 2 rate.

Export permits approved via a mediated settlement are exempt from the above description and bound by the terms of the agreed upon mediated settlement.

Recommended FY 2026 Export Fee Rates:

Export (Tier 1) The difference of \$0.17/1000 gallons authorized and the adopted production fee or a fee negotiated between the District and the transporter – Enabling Act

Export (Tier 2) \$0.21218/1000 gals. (\$69.14/ac-ft) transported - Rule 9.1(c)(2)

Attachment “B”

BVGCD’s Enabling Legislation Chapter 8835,
Texas Special District Local Laws Code

SPECIAL DISTRICT LOCAL LAWS CODE

TITLE 6. WATER AND WASTEWATER

SUBTITLE H. DISTRICTS GOVERNING GROUNDWATER

CHAPTER 8835. ~~OBRAZOS VALLEY~~ GROUNDWATER CONSERVATION DISTRICT

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 8835.001. DEFINITIONS. In this chapter:

- (1) "Board" means the district's board of directors.
- (2) "Director" means a board member.
- (3) "District" means the ~~OBrazos Valley~~ Groundwater

Conservation District.

Added by Acts 2011, 82nd Leg., R.S., Ch. 70 (S.B. 1147), Sec. 1.03, eff. April 1, 2013.

Sec. 8835.002. NATURE OF DISTRICT. The district is a groundwater conservation district created under and essential to accomplish the purposes of Section 59, Article XVI, Texas Constitution.

Added by Acts 2011, 82nd Leg., R.S., Ch. 70 (S.B. 1147), Sec. 1.03, eff. April 1, 2013.

Sec. 8835.003. FINDINGS OF PUBLIC USE AND BENEFIT. (a) The district is created to serve a public use and benefit.

(b) All land and other property included in the district will benefit from the works and projects accomplished by the district under the powers conferred by Section 59, Article XVI, Texas Constitution.

Added by Acts 2011, 82nd Leg., R.S., Ch. 70 (S.B. 1147), Sec. 1.03, eff. April 1, 2013.

Sec. 8835.004. DISTRICT TERRITORY. The district's boundaries are coextensive with the boundaries of Robertson and ~~OBrazos~~ Counties unless the district's territory has been modified under:

- (1) Subchapter J, Chapter 36, Water Code; or
- (2) other law.

Added by Acts 2011, 82nd Leg., R.S., Ch. 70 (S.B. 1147), Sec. 1.03, eff. April 1, 2013.

SUBCHAPTER B. BOARD OF DIRECTORS

Sec. 8835.051. COMPOSITION OF BOARD; TERMS. (a) The district is governed by a board of eight directors.

(b) Directors serve staggered four-year terms.

(c) A director may serve consecutive terms.

Added by Acts 2011, 82nd Leg., R.S., Ch. 70 (S.B. 1147), Sec. 1.03, eff. April 1, 2013.

Sec. 8835.052. APPOINTMENT OF DIRECTORS. (a) The Robertson County Commissioners Court shall appoint four directors, of whom:

(1) one must represent municipal interests in the county;

(2) one must be a bona fide agricultural producer who derives a substantial portion of the producer's income from agriculture in the county;

(3) one must be a director or employee of a rural water supply corporation in the county; and

(4) one must represent active industrial interests in the county.

(b) The **Brazos** County Commissioners Court shall appoint two directors, of whom:

(1) one must be a bona fide agricultural producer who derives a substantial portion of the producer's income from agriculture in the county; and

(2) one must be a director or employee of a rural water supply corporation in the county.

(c) The governing body of the City of Bryan, with the approval of the **Brazos** County Commissioners Court, shall appoint one director.

(d) The governing body of the City of College Station, with the approval of the **Brazos** County Commissioners Court, shall appoint one director.

(e) Every two years after January 1 of the second year following the district's confirmation, the appropriate governing body shall appoint the appropriate number of directors.

Added by Acts 2011, 82nd Leg., R.S., Ch. 70 (S.B. 1147), Sec. 1.03, eff. April 1, 2013.

Sec. 8835.053. BOARD VACANCY. If there is a vacancy on the board, the governing body of the entity that appointed the director who vacated the office shall appoint a director to serve the remainder of the term.

Added by Acts 2011, 82nd Leg., R.S., Ch. 70 (S.B. 1147), Sec. 1.03, eff. April 1, 2013.

Sec. 8835.054. COMPENSATION; EXPENSES. (a) A director is not entitled to receive compensation for serving as a director.

(b) A director may be reimbursed for actual, reasonable expenses incurred in discharging official duties.

Added by Acts 2011, 82nd Leg., R.S., Ch. 70 (S.B. 1147), Sec. 1.03, eff. April 1, 2013.

Sec. 8835.055. VOTE REQUIRED FOR BOARD ACTION. A majority vote of a quorum of the board is required for board action. If there is a tie vote, the proposed action fails.

Added by Acts 2011, 82nd Leg., R.S., Ch. 70 (S.B. 1147), Sec. 1.03, eff. April 1, 2013.

SUBCHAPTER C. POWERS AND DUTIES

Sec. 8835.101. GROUNDWATER CONSERVATION DISTRICT POWERS AND DUTIES. Except as provided by this chapter, the district has the rights, powers, privileges, functions, and duties provided by the general law of this state, including Chapter 36, Water Code, applicable to groundwater conservation districts created under Section 59, Article XVI, Texas Constitution.

Added by Acts 2011, 82nd Leg., R.S., Ch. 70 (S.B. 1147), Sec. 1.03, eff. April 1, 2013.

Sec. 8835.102. GROUNDWATER WELLS UNDER JURISDICTION OF RAILROAD COMMISSION. (a) In this section, "railroad commission" means the Railroad Commission of Texas.

(b) A groundwater well drilled or operated in the district under a permit issued by the railroad commission is under the exclusive jurisdiction of the railroad commission and is exempt from regulation by the district.

(c) Groundwater produced in an amount authorized by a railroad commission permit may be used in or exported from the district without a permit from the district.

(d) To the extent groundwater production exceeds railroad commission authorization, the holder of the railroad commission permit:

(1) must apply to the district for the appropriate permit for the excess production; and

(2) is subject to the applicable regulatory fees.

(e) Groundwater produced from a well under the jurisdiction of the railroad commission is generally exempt from water district fees. However, the district may impose either a pumping fee or an export fee on groundwater produced from an otherwise exempt mine well that is used for municipal purposes or by a public utility. A fee imposed by the district under this subsection may not exceed the fee imposed on other groundwater producers in the district.

Added by Acts 2011, 82nd Leg., R.S., Ch. 70 (S.B. 1147), Sec. 1.03, eff. April 1, 2013.

Sec. 8835.103. LIMITATION ON POWER OF EMINENT DOMAIN. The district does not have the power of eminent domain granted by Section 36.105, Water Code.

Added by Acts 2011, 82nd Leg., R.S., Ch. 70 (S.B. 1147), Sec. 1.03, eff. April 1, 2013.

SUBCHAPTER D. GENERAL FINANCIAL PROVISIONS

Sec. 8835.151. FEES. (a) The board by rule may impose a reasonable fee on each well that is not exempt from regulation by the district and for which a permit is issued by the district. The fee may be 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.

(b) The board shall base the amount of the initial fee on the

amount of water to be withdrawn from the well. The initial fee:

(1) may not exceed:

(A) \$0.25 for each acre-foot for water used to irrigate agricultural crops or operate existing steam electric stations; or

(B) \$0.0425 for each thousand gallons for water used for any other purpose; and

(2) may be increased at a cumulative rate not to exceed three percent for each year.

(c) In addition to the fee authorized under Subsection (b), 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.

(d) Fees authorized by this section may be:

(1) assessed annually; and

(2) used to pay the cost of operating the district.

Added by Acts 2011, 82nd Leg., R.S., Ch. 70 (S.B. 1147), Sec. 1.03, eff. April 1, 2013.

Sec. 8835.152. AUTHORITY TO ISSUE BONDS AND NOTES. The district may issue bonds and notes under Subchapter F, Chapter 36, Water Code, not to exceed \$500,000 of total indebtedness at any time.

Added by Acts 2011, 82nd Leg., R.S., Ch. 70 (S.B. 1147), Sec. 1.03, eff. April 1, 2013.

Sec. 8835.153. LIMITATION ON AUTHORITY TO IMPOSE TAXES. The district does not have the authority relating to taxes that is granted by Sections 36.020 and 36.201-36.204, Water Code.

Added by Acts 2011, 82nd Leg., R.S., Ch. 70 (S.B. 1147), Sec. 1.03, eff. April 1, 2013.

Attachment "C"

Texas Water Code §36.122

Tex. Water Code § 36.122

*** This document is current through the 2025 Regular Session and the 2nd C.S. of the 89th Legislature. ***

Texas Statutes & Codes Annotated by LexisNexis® > *Water Code* >
Title 2 Water Administration (Subts. A — F) > *Subtitle E Groundwater Management*
(Chs. 35 — 36) > *Chapter 36 Groundwater Conservation Districts (Subchs. A — N)*
> *Subchapter D Powers and Duties (§§ 36.101 — 36.125)*

Sec. 36.122. Transfer of Groundwater out of District.

- (a) If an application for a permit or an amendment to a permit under Section 36.113 proposes the transfer of groundwater outside of a district's boundaries, the district may also consider the provisions of this section in determining whether to grant or deny the permit or permit amendment.
- (b) A district may promulgate rules requiring a person to obtain a permit or an amendment to a permit under [Section 36.113](#) from the district for the transfer of groundwater out of the district to:
- (1) increase, on or after March 2, 1997, the amount of groundwater to be transferred under a continuing arrangement in effect before that date; or
 - (2) transfer groundwater out of the district on or after March 2, 1997, under a new arrangement.
- (c) Except as provided in [Section 36.113\(e\)](#), the district may not impose more restrictive permit conditions on transporters than the district imposes on existing in-district users.
- (d) The district may impose a reasonable fee for processing an application under this section. The fee may not exceed fees that the district imposes for processing other applications under [Section 36.113](#). An application filed to comply with this section shall be considered and processed under the same procedures as other applications for permits under [Section 36.113](#) and shall be combined with applications filed to obtain a permit for in-district water use under [Section 36.113](#) from the same applicant.
- (e) Except as provided by Subsection (e-1), the district may impose an export fee or surcharge using one of the following methods:
- (1) a fee negotiated between the district and the exporter;
 - (2) for a tax-based district, a rate not to exceed 20 cents for each thousand gallons of water exported from the district; or
 - (3) for a fee-based district, a rate not to exceed the greater of 20 cents for each thousand gallons or a 50 percent surcharge, in addition to the district's production fee, for water exported from the district.

(e-1) Effective January 1, 2024, the maximum allowable rate a district may impose for an export fee or surcharge under Subsection (e)(2) or (e)(3) increases by three percent each calendar year.

(e-2) A district governed by a special law in regard to an export fee or surcharge on water exported from the district may charge an export fee or surcharge in accordance with that special law or in accordance with Subsections (e) and (e-1).

(e-3) An export fee or surcharge imposed under Subsection (e) or an increase in an imposed export fee or surcharge is not valid unless it is approved by the board after a public hearing.

(f) In reviewing a proposed transfer of groundwater out of the district, the district shall consider:

(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 regional water plan and approved district management plan.

(g) The district may not deny a permit based on the fact that the applicant seeks to transfer groundwater outside of the district but may limit a permit issued under this section if conditions in Subsection (f) warrant the limitation, subject to Subsection (c).

(h) In addition to conditions provided by [Section 36.1131](#), the permit shall specify:

(1) the amount of water that may be transferred out of the district; and

(2) the period for which the water may be transferred.

(i) The period specified by Subsection (h)(2) shall be:

(1) at least three years if construction of a conveyance system has not been initiated prior to the issuance of the permit; or

(2) at least 30 years if construction of a conveyance system has been initiated prior to the issuance of the permit.

(j) A term under Subsection (i)(1) shall automatically be extended to the terms agreed to under Subsection (i)(2) if construction of a conveyance system is begun before the expiration of the initial term.

(j-1) A district shall extend a term under Subsection (i)(2) or (j) on or before its expiration in the manner prescribed by [Section 36.1145](#):

(1) to a term that is not shorter than the term of an operating permit for the production of water to be transferred that is in effect at the time of the extension; and

(2) for each additional term for which that operating permit for production is renewed under [Section 36.1145](#) or remains in effect under [Section 36.1146](#).

(j-2) A permit extended under Subsection (j-1) continues to be subject to conditions contained in the permit as issued before the extension.

(k) Notwithstanding the period specified under Subsection (i),(j), or (j-1) during which water may be transferred under a permit, a district may periodically review the amount of water that may be transferred under the permit and may limit the amount if additional factors considered in Subsection (f) warrant the limitation, subject to Subsection (c). The review described by this subsection may take place not more frequently than the period provided for the review or renewal of regular permits issued by the district. In its determination of whether to renew a permit issued under this section, the district shall consider relevant and current data for the conservation of groundwater resources and shall consider the permit in the same manner it would consider any other permit in the district.

(l) A district is prohibited from using revenues obtained under Subsection (e) to prohibit the transfer of groundwater outside of a district. A district is not prohibited from using revenues obtained under Subsection (e) for paying expenses related to enforcement of this chapter or district rules.

(m) A district may not prohibit the export of groundwater if the purchase was in effect on or before June 1, 1997.

(n) This section applies only to a transfer of water that is permitted after September 1, 1997.

(o) A district shall adopt rules as necessary to implement this section but may not adopt rules expressly prohibiting the export of groundwater.

(p) Subsections (e), (e-1), and (e-2) do not apply to a district that is collecting an export fee or surcharge on March 1, 2001.

(q) In applying this section, a district must be fair, impartial, and nondiscriminatory.

(r) The district may grant or deny an application to extend a term under Subsection (i)(2) or (j) submitted under this section only using rules that were in effect at the time the application was submitted.

(s) An application to extend a term under Subsection (i)(2) or (j) is governed solely by district rules consistent with Subsection (j-1).

History

Enacted by [Acts 1997, 75th Leg., ch. 1010 \(S.B. 1\), § 4.33](#), effective September 1, 1997; am. [Acts 2001, 77th Leg., ch. 966 \(S.B. 2\), § 2.52](#), effective September 1, 2001; am. [Acts 2011, 82nd Leg., ch. 17 \(S.B. 727\), § 6](#), effective April 29, 2011; [Acts 2015, 84th Leg., ch. 415 \(H.B. 2767\), § 8](#), effective June 10, 2015; [Acts 2019, 86th Leg., ch. 96 \(H.B. 1066\), § 1](#), effective September 1, 2019; [Acts 2023, 88th Leg., ch. 773 \(H.B. 3059\), § 1](#), effective September 1, 2023.

Annotations