

December 11, 2024

Brazos Valley Groundwater Conservation District
Board Members
General Manager Alan Day
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Re: Comment on Timeliness of Requests under BVGCD Rule 8.3(j) and, in the Alternative, Contested Case Hearing Requests

Dear BVGCD Board Members Lisa Rolke, Chris Zeig, Jeff Kennedy, Gary Mechler¹, Stephen Cast, Mark Carraba, John Elliot, and Jayson Barfknecht¹ and General Manager Day:

As you know, there is a pending lawsuit filed by TAMU, *Texas A&M University System vs. Brazos Valley Groundwater Conservation District*, in which TAMU seeks to force the District to contract with the State Office of Administrative Hearings (“SOAH”) to conduct contested case proceedings based on a request TAMU submitted on September 5, 2024, years after BVGCD properly noticed, heard, and issued the permits that TAMU now seeks to challenge. UWBFV and its landowner partners intervened in that lawsuit and sought to uphold all District actions taken between January 2023 and approximately July 2024, which would protect the dozens of landowners who received and relied on permits or permit amendments from the District during this time. TAMU’s mandamus action remains pending against the District.

TAMU’s position in its lawsuit is as follows: the District, in trying to remedy purported ineligibility issues through Rule 8.3(j), “opened the door” to TAMU’s September 5, 2024 request, allowing for after-the-fact contested case hearings on final, signed permits. UWBFV maintains that the *de facto* officer doctrine renders Rule 8.3(j) unnecessary, as the final, signed permits are valid as issued under Texas law. Separately, UWBFV urges the District to apply the plain language and intent of Rule 8.3(j) to bar late-filed contested case hearing requests on prior-issued permits. Following the plain language and intent of the rule results in the only sensible and fair outcome: **all** final, signed permits issued by the District remain final, signed permits, despite any after-the-fact hearing request.

¹ Board President Jayson Barfknecht and Board Member Gary Mechler have an obligation to recuse themselves from action, discussion, or involvement with existing project permits that the Cities have challenged by their intervention in the TAMU litigation and the transport permit applications BVTP-002 through BVTP-008, which they have protested. We object on an ongoing basis to their participation in any action, discussion, or involvement with any deliberation regarding the project permits.

Should the District disregard the plain language and intent of Rule 8.3(j), UWBVF, in the alternative, formally submits contested case hearing requests as outlined below. UWBVF's hearing request—which is contingent on the District accepting and acting upon TAMU's interpretation of Rule 8.3(j)—illustrates how TAMU, the City of Bryan, and the City of College Station's legal maneuvering undermines *all* District permits, not just those issued to UWBVF and its landowner partners.

I. The plain language of Rule 8.3(j) does not authorize years-late hearing requests.

Rule 8.3(j), as adopted on September 12, 2024, does two things. First, it authorizes the General Manager “to grant and issue” certain administratively complete permit and permit amendment applications. The General Manager has yet to exercise his authority under this new authorization.² Second, Rule 8.3(j) notes that “the Board hereby ratifies the General Manager’s prior issuance” of those certain applications.

These two mechanisms apply to certain applications, including those for permit or permit amendments that:

- (a) the District deemed that the permit or permit amendment application(s) were administratively complete under the District’s Rules;
- (b) the District provided notice(s) to the public of the permit or permit amendment application(s) under Rules 14.1 and 14.2 during the time period from January 1, 2021, to July 1, 2024; and
- (c) the District did not receive any written notices of intent to contest the permit or permit amendment application(s) under rule 14.3.5(a) (emphasis added).

The plain language of subsection (c) bars as untimely any hearing request submitted after the original application, notice, and hearing timelines for applications noticed between January 1, 2021 and July 1, 2024. Subsection (c) uses past tense—the District “*did not receive*” any written notices of intent to contest the applications—meaning, written notices received in the original window for doing so. This phrase is also limited by the words “under rule 14.3.5(a),” which requires a request to be submitted “at least five (5) calendar days prior to the date of the hearing” (under the Rules at the time) or “by 5:00 p.m. the day before the permit hearing” (under current Rules). The entire purpose of Rule 8.3(j) is to issue certain permits “*without a permit hearing*.” Therefore, “under rule 14.3.5(a)” must refer to a hearing request submitted prior to the originally scheduled hearing, because no other relevant “hearing” exists. Reading Rule 8.3(j)(2)(c) to contemplate requests submitted *after* the only hearing would render “under rule 14.3.5(a)” meaningless.

² See BVGCD Board Agenda Item 11(b) for October 10, 2024 Meeting (summarizing September 2024) (“Wells permitted [under] District Rule 8.3(j) . . . 0 ac-ft”); BVGCD Board Agenda Item 11(b) for November 14, 2024 Meeting (summarizing October 2024) (“Wells permitted [under] District Rule 8.3(j) . . . 0 ac-ft”); BVGCD Board Agenda Item 10(b) for December 12, 2024 Meeting (summarizing November 2024) (“Wells permitted [under] District Rule 8.3(j) . . . 0 ac-ft”).

This plain language aligns with the District’s stated purpose of Rule 8.3(j)—“to ratify, *not restart*, the permitting process on affected permit applications.”³ The District has stated that Rule 8.3(j) was “*designed to maintain the status quo* by ratifying all the District’s decisions made when its Board’s quorum and actions were compromised by Director ineligibility.”⁴

Reading Rule 8.3(j) to allow TAMU’s late-filed request goes against the plain language of the rule *and* the District’s stated intention of the rule, all for the purpose of challenging permits related to only one project. Such an outcome targets these permit applicants and violates the District’s obligation under Texas law to develop and apply rules that are “fair and impartial,” as well as to treat transport projects in a manner that is “fair, impartial, and nondiscriminatory.”⁵ This outcome also amounts to a taking of distinct investment-backed expectations in groundwater permits supporting a project that is years in the making and for which well drilling has started, millions of dollars of field and engineering work are in progress, and a chain of reliance has formed.

II. In the alternative, should the District adopt TAMU’s interpretation of Rule 8.3(j), UWBFV requests additional contested case proceedings.

Should the District interpret Rule 8.3(j) to allow for late-filed contested case hearing requests on final, signed permits, *without waiving any claim that all permits remain valid under Texas law and the District’s rule*, UWBFV formally submits a contested case hearing request on the following permits applied for and noticed during the time period at issue:

- BVDO-0354 through BVDO-0357 (City of Bryan);
- BVDO-0359 through BVDO-0362 (City of College Station);
- BVDO-0390 through BVDO-0393, and permit amendment applications BVDO-0341 through BVDO-0353 (Corpora Farms);
- BVDO-0362 through BVDO-0375 (DTB Investments LP);
- BVDO-0403 through BVDO-0407 (Burnside Investments Inc.); and
- BVDO-0400 (Wellborn Special Utility District).⁶

This request is contingent on the District accepting and acting upon TAMU’s interpretation of Rule 8.3(j). The General Manager has no authority to issue permits under Rule 8.3(j) which are now “contested” (under this request), and there was no “prior issuance” of these permits by the General Manager for the Board to have “hereby ratifie[d]” when it adopted Rule 8.3(j).⁷ The

³ BVGCD’s Response to MSJ ¶ 6.

⁴ BVGCD’s Response to MSJ ¶ 5.

⁵ Tex. Water Code §§ 36.101(2), 36.122(q).

⁶ UWBFV requests that the District conduct contested case hearings on these applications and that UWBFV be named a party to those hearings. For each, UWBFV’s and its landowner partners’ legal rights, privileges, power, and economic interests in wells in the Simsboro formation are an adequate basis for affected person status.

⁷ See Cities of Bryan and College Station’s Comments on Proposed Amendments to BVGCD Rules (Aug. 8, 2024) (“The applications affected by the Board Member qualifications issue were approved by the

above-listed permits—*and every other of the 80+ permit actions taken during the ineligibility period*—remain subject to late-filed hearing requests should the District disregard the plain language of Rule 8.3(j) and instead adopt TAMU’s interpretation.

III. Conclusion

UWBVF and its landowner partners once again urge the District to do the right thing—apply the plain language of Rule 8.3(j) and stand by its original intentions in adopting the rule, thereby protecting *all* final, signed permits that the District’s landowners have relied on. Accepting and acting on TAMU’s interpretation of Rule 8.3(j), on the other hand, allows continued uncertainty on final, signed permits across the District. UWBVF urges the District to, through the General Manager’s new authority in 8.3(j), even-handedly ratify through re-issuance all final, signed permits from the time period at issue.⁸ Rejecting all after-the-fact hearing requests (including TAMU’s September 5, 2024 request) as untimely will preserve the property rights of District landowners, allow trust and reliance on District actions, and allow for responsible development of shared groundwater resources.

Sincerely,



Paulina Williams

On behalf of UW Brazos Valley Farm LLC,
RH2O LLC, Clifford A. Skiles III, James C.
Brien, Fazzino Investments LP, and Cula
d’Brazos LLC

BVGCD Board, not by the General Manager. Because the General Manager did not approve the affected application and ratification of his actions will not fix the problem”).

⁸ UWBVF also maintains its request that the District respect and apply the *de facto* officer doctrine unless otherwise directed by a court through a proper proceeding.