

Cynthia Lopez

From: Jim Mathews <jmathews@mandf.com>
Sent: Wednesday, August 31, 2016 4:35 PM
To: Alan Day
Cc: Cynthia Lopez; Barfnecht, Jayson E
Subject: City of Bryan's mt. for rehearing
Attachments: City of Bryan Mt. for Rehearing.pdf

RECEIVED
8-31-16
AM

Alan and Cynthia, attached please find the City of Bryan's Motion for Rehearing concerning the rules adopted August 11, 2016 pertaining to static water level measurements affecting the enforcement of adopted desired future conditions. This is being sent to you today by fax, email and regular mail. Please distribute to the Board Members.

Jim Mathews
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August 31, 2016

Via facsimile 979-279-0035, email, and U.S. Mail

Mr. Alan Day
General Manager
Brazos Valley Groundwater Conservation District
112 W. 3rd Street
Hearne, Texas 77859

Re: BVGD Rule Adopted August 11, 2016

Dear Mr. Day,

Enclosed please find the City of Bryan's Motion for Rehearing concerning the BVGCD Rule pertaining to "static water level measurements affecting the enforcement of adopted desired future conditions" adopted on August 11, 2016. On behalf of the City of Bryan I request that you distribute copies of this motion to the members of the BVGCD Board.

Sincerely,



Jim Mathews

Cc Jason Barfknecht
City of Bryan
300 South Texas Avenue
Bryan TX 77803-3937

AMENDMENTS TO THE BRAZOS VALLEY GROUNDWATER CONSERVATION DISTRICT'S RULES ADOPTED ON AUGUST 11, 2016 § § § § § BEFORE THE BRAZOS VALLEY GROUNDWATER CONSERVATION DISTRICT

CITY OF BRYAN'S MOTION FOR REHEARING

TO THE HONORABLE BOARD MEMBERS OF THE BRAZOS VALLEY GROUNDWATER CONSERVATION DISTRICT (the "BOARD"):

The City of Bryan ("Bryan") respectfully submits this Motion for Rehearing in this matter and requests that the Board reconsider and withdraw its decision to adopt amendments to its rules pertaining to "static water level measurements affecting the enforcement of adopted desired future conditions".

I. STATEMENT OF FACTS

Prior to its July 14, 2016 board meeting the District published notice concerning the consideration of rule amendments related to: (1) implementation of rules regarding §36.1132 of the Texas Water Code addressing permits based on modeled available groundwater and enforcement of adopted desired future conditions, (2) static water level measurement protocols relating to enforcement of the adopted desired future conditions and (3) required rule changes pursuant to acts of the 84th Legislative Session. During the July 14, 2016 meeting the Brazos Valley Groundwater Conservation District Board adopted the amendments to its rules relating to items 1 and 3. However, the Board received substantial written and oral comments from the City of Bryan and others on item 2, its proposed rule described as a "static water level measurement protocol relating to the enforcement of the adopted desired future conditions". Accordingly, the Board declined to take action on those proposed rules at that time. The amendments to the District's Rule 7.2 adopted pursuant to item 1 during the July 14, 2016 meeting stated that a "protocol to measure static water levels shall be adopted through the District's rulemaking procedures in Section 14 of the District's Rules".

Prior to the District's August 11, 2016 board meeting it issued a notice and invitation to file comments on proposed amendments to the District's rules or policies related to static water level measurement protocols affecting the enforcement of the desired future conditions. The City of Bryan again filed extensive written and oral comments on the District's proposed rule

amendments. Following the conclusion of the public testimony on August 11, 2016 the Board of the Brazos Valley Groundwater Conservation District adopted rules, in the guise of policies, described as “static water level measurement protocols related to the enforcement of adopted future conditions”. These rules govern the collection of data that the District will use to calculate the district-wide average aquifer drawdowns through a methodology that has not yet been proposed or approved. These district-wide average aquifer drawdown levels will serve as triggers for regulatory action by the District under Rule 7.2 to curtail the rights of a permitted well owner to withdraw and use his privately owned groundwater.

II. REASONS FOR RECONSIDERATION

The Board should grant Bryan’s Motion for Rehearing and withdraw its decision to adopt the amendments to its rules because: (A) the rules are unconstitutionally vague; (B) the rules were not based on best available science as mandated by Chapter 36 of the Texas Water Code; (C) the rules are arbitrary and capricious and unlawfully discriminatory; and (D) the rules were not adopted based on lawful procedure and exceed the Districts authority.

A. The Rules are unconstitutionally vague.

The Rules purport to establish protocols for measuring “static water levels” that will be used in calculating the “district-wide average aquifer drawdown” through an as yet un-proposed and un-adopted methodology. Wells that are actively used for groundwater production will create a cone of depression as water flows into the well bore. When the production stops, this cone of depression will gradually recover until it reaches equilibrium. Because the district’s measurements are generally made on wells that are actively used for groundwater production, the meaning of “static water level” will be critically important because it will define the conditions under which the data used to calculate “district-wide average aquifer drawdown” may be collected.

In discussing the meaning of “static water level” during its August 11 meeting, the board acknowledged that the term may be new to the legal field, but asserted that it had meaning within the water well industry. Board members and staff asserted that they had a definition from a publication entitled *Groundwater and Wells, 2nd edition* by Driscoll, that was described by some as a “Bible” or “industry standard”, but that definition was not incorporated into the Districts Rules. This failure to define “static water level” in the rule governing collection of data that will

be used by the District in the exercise of its powers to curtail a permittee's private property interest in groundwater constitutes a failure to establish minimal guidelines to govern law enforcement and renders this rule unconstitutionally vague and overbroad.

B. Failure to Use Best Available Science.

The rules adopted August 11, 2016 will be used to regulate groundwater production and thus the private property rights of groundwater well owners. Groundwater conservation districts are mandated by Texas Water Code §36.0015 to use the best available science in the conservation and development of groundwater through rules promulgated by the District in accordance with provisions of Chapter 36. Best available science is defined in both Texas Water Code Chapter 36 and in the District's rules as "conclusions that are logically and reasonably derived using statistical or quantitative data, techniques, analyses, and studies that are publicly available to reviewing scientists and can be employed to address a specific scientific question". The District failed to use best available science in adopting rules described as protocols to measure static water levels. These failures include, but are not limited to:

1. The District has no scientific study or analysis concerning the amount of time required for water levels to recover after pumping from a well has ceased. Bryan filed a Public Information Act request with the District seeking this information, but no responsive documents were provided.
2. The rules provide no criteria for training to be provided to technicians who conduct the water level measurements. The District's manager noted during the August 11, 2016 meeting that there were concerns that some of the District's data collected from January 2011 until October 2015 was unreliable and that this data has now been "archived". However, during this same timeframe the District's manager conducted annual performance evaluations on the technician who conducted water level measurements and noted that he performed static water level measurements with "competence and accuracy", sometimes rating his performance as "exceeding expectations". Despite these concerns the rules governing static water level measurements provides no criteria for employee training or recordkeeping.
3. The rules provide no quality control or quality assurance procedures needed to ensure that the data obtained is reliable. For example, step 11 of the airline measuring

protocol states that the technician should have a “quality pressure gauge” available for use on a temporary basis if the installed pressure gauge fails to stabilize. However, there is no requirement to record any significant information that would allow a determination of whether the gauge provided by the technician is properly calibrated. Absent confirmation of a properly calibrated gauge, the data obtained are unreliable.

C. The rules are arbitrary and capricious and unlawfully discriminatory.

The rules for the steel tape measuring protocol and E-Line measuring protocol provide that if a second measurement made five minute following the initial measurement shows a change in the depth to water greater than 0.02 feet and 0.05 feet respectively, this is to be noted in the field log and scheduled for a water level measurement at a future date. In contrast, the rule for the Airline Measuring Protocol does not require a second measurement, but only provides that the data is to be recorded if the air gauge holds constant for five minutes. Because one pound per square inch on the air gauge reflects a water level change of 2.31 feet, this would allow use of the airline data even though the water level is recovering at a rate of 46 to 115 times greater than that required to forgo collection of the E-Line or steel tape data. Stated in more concrete terms, the water levels recovering at the rate of 0.24 feet per hour for steel tape and 0.6 feet per hour for E-Lines would not be acceptable, but water level recovering at a rate of up to 27.72 feet per hour would be acceptable if measured by the Airline method. This difference is arbitrary and capricious. Moreover, because municipal wells are most often measured by the Airline method, this is unlawfully discriminatory.

D. The rules were not adopted based on lawful procedure.

The District’s Rule 7.2 expressly provides that its protocols to measure static water levels “shall be adopted through the District’s rulemaking procedures in Section 14 of the District’s Rules”. District Rule 14.1 describes a rulemaking hearing as one “involving matters of general applicability that implement, interpret, or prescribe the law or District policy, or that describe the procedure or practice requirements of the District”. Clearly the static water level protocols adopted on August 11 , 2016 are intended to involve matters of general applicability that implement interpret or prescribe law or District policy, or that describe the procedure of the District. Such matters are properly the subject of a rulemaking hearing and, if approved by the

Board, become part of the rules of the District. If the District contends that the static water level protocols adopted on August 11, 2016 are not rules, its actions would be in violation of Rule 7.2 and would exceed its statutory authority.

III. PRAYER

For the reasons stated in this Motion for Rehearing, the City of Bryan requests that the Brazos Valley Groundwater Conservation District Board grant this Motion and withdraw its decision to adopt amendments to its rules pertaining to "static water level measurements affecting the enforcement of adopted desired future conditions". Following withdrawal of its rules, Bryan requests that the Board reconsider these rules in light of this motion and the comments filed in the rulemaking record and that the board adopt rules that are fair, equitable and consistent with its statutory authority.

Respectfully submitted,

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