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December 4, 2018

Via Facsimile (512)-455-9909 and Email

Board of Directors
Post Oak Savannah Groundwater Conservation District
c/o Gary Westbrook
310 East Avenue C
Milano, Texas 76556

Re: Blue Water Written Comments on Proposed POSGCD Aquifer Conservancy Program

To the Honorable Board of Directors:

Blue Water Systems, Blue Water 130 Project, and Blue Water Vista Ridge LLC, as permit administrator for Vista Ridge LLC, (collectively, “Blue Water”) appreciate the opportunity to submit comments regarding the Post Oak Savannah Groundwater Conservation District’s (the “District”) proposed Aquifer Conservancy Program (the “Program”). While Blue Water does not at this time take an official position either in support of or in opposition to the proposed Program, Blue Water has a number of concerns and questions related to: (a) the District’s statutory authority to implement the Program as described in the District’s Guidance Regulations and Rules; and (b) the equities and reasonableness of establishing the Program in a manner under which the increased fees necessary to the Program’s viability will be disproportionately borne by Blue Water, yet Blue Water is excluded from the Program.

The District was formed through enabling legislation codified at Special District Local Laws Code Chapter 8865. The District enabling act specifies that, “[e]xcept as otherwise provided by this chapter, the district has the rights, powers, privileged, functions, and duties provided by the general law of this state, including Chapter 36, Water Code, applicable to groundwater conservation districts created under Section 69, Article XVI, Texas Constitution.” Spec. Dist. Local Laws Code Section 8865.101 (emphasis added). As with other groundwater conservation districts of this State, this provision limits the District’s power to issues that the enabling act specifically addresses. Among those issues specifically addressed in the District’s enabling act are the collection and use of fees as set forth in Section 8865.151. Subsection (a) authorizes the board of directors to “impose *reasonable fees* on each well for which a permit is issued by the district and which is not exempt from regulation by the district.” Similarly, with regard to “export fees”, Section 8865.151(c) grants discretion to the district to “impose *a reasonable fee* or surcharge.”

Under the District’s current fee structure, transport fees (over 99% of which are paid by Blue Water) are 7.5 cents per thousand gallons, while production fees (which are more broadly paid by non-exempt well owners in the District) are 1 cent per thousand. In other words, transport

fees are currently 750% higher than production fees. To pay for the Program, the proposed budget will apparently further exacerbate this fee disparity—raising the production fee to just 1.3 cents per thousand gallons, while the transport fee will apparently be raised to 10 cents per thousand gallons, resulting in transport fees moving to almost 1000% higher than production fees. Blue Water questions whether the proposed disproportionate increase in transport fees (on top of an already disproportionate transport fee) to fund the Program meets the District enabling act's reasonableness standard. The District already has in place extensive grant programs aimed at groundwater conservation and annually expends, on average, \$1 million on these community grants, largely to water supply corporations and municipalities. While these conservation efforts have laudable aspects, Blue Water respectfully submits that the imposition of additional fees on existing users may approach the District enabling act's reasonableness limitation and that the District's disproportionate transport fee structure may exceed that limitation.

In addition to the "reasonable fees" provision, Section 8865.151(d) of the District's enabling act further limits the authorized use of well permitting and export fees to paying "the cost of operating of the district." This restriction, when read in conjunction with the "reasonable fee" requirement, raises the issue of whether the creation of an entire new regime to pay landowners for not exercising their right to produce their groundwater is a legitimate "cost of operating the district." In this regard, Blue Water is unaware of any provision of either the District enabling act or Texas Water Code Chapter 36 that addresses, much less authorizes, the type of conservation program in which landowners are paid in exchange for the relinquishment of their rights to put groundwater beneath their land to beneficial use, nor are we aware of any other Chapter 36 district that has implemented such a program.

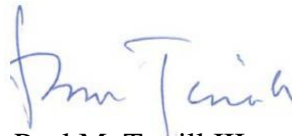
If in fact the proposed Program is consistent with the District's enabling act, such a program must not only be implemented with "reasonable fees" and constitute a legitimate "cost of operating the district," but must comply with Texas Water Code Chapter 36. The Water Code specifies with regard to export fees that "the district may not impose more restrictive permit conditions on transporters than the district imposes on existing in-district users" and that an export fee "must be fair, impartial and nondiscriminatory." TWC § 36.122(c), (p). Chapter 36 further mandates with regard to a district's rulemaking powers that any rules adopted be "fair and impartial." TWC § 36.101.

Blue Water is concerned that, as structured, the proposed Program may fall short of these statutory mandates. The proposed increase in transport fees would result in exporters paying almost ten times the proposed production fees. Because Blue Water accounts for over 99% of the permit rights to transfer water out of the District, the burden of paying for the Program will fall disproportionately and almost exclusively on Blue Water. In fact, the proposed increase in transport fees will, if approved by the District, result in Blue Water paying for an even greater percentage of the District's budget than it has for the last several years while no water has been transported from the Vista Ridge project to date. As a result, Blue Water believes that the fee structure developed to support the proposed Program could be viewed as discriminatory, neither fair nor impartial, and may in fact constitute a more restrictive permit condition on transporters than in-District groundwater users.

Finally, Blue Water questions the District's rationale for imposing land ownership as a prerequisite to participation in the Program. The Guidance Regulations and Rules offer no explanation of why this limitation exists and Blue Water does not see the connection of this limitation to the District's purposes or to conservation. If a person owns or leases groundwater rights but not the surface area, Blue Water questions why that owner/lessee should be deemed ineligible if that person agrees not to produce groundwater pursuant to its rights for a period of time. If groundwater conservation is indeed the goal, then the form of groundwater ownership—whether those rights are owned in fee simple, by severance or by lease—does not appear to be relevant. Authorizing all owners or lessees of groundwater rights to participate in the Program would appear to be consistent with the District's stated conservation goals and excluding groundwater owners/lessees may be viewed as arbitrary and discriminatory.

Blue Water looks forward to the public hearing and the Board of Directors' discussion of the issues raised by these comments.

Sincerely,



Paul M. Terrill III
TERRILL & WALDROP

cc: Gary Westbrook
General Manager, POSGCD
Ross Cummings, Blue Water