

# TERRILL & WALDROP

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May 12, 2020

## VIA EMAIL

Mr. Gary Westbrook  
General Manager  
Post Oak Savannah Groundwater Conservation District  
310 E. Avenue C  
Milano, Texas 76556  
gwestbrook@posgcd.org

Re: Blue Water Vista Ridge LLC Comments on Proposed District Rules Revisions.

Dear Mr. Westbrook:

Blue Water Vista Ridge LLC ("Blue Water"), as permit administrator for Vista Ridge LLC, ("Vista Ridge") submits the following comments on the Post Oak Savannah Groundwater Conservation District's (the "District") proposed revisions to District Rules that are scheduled for the Board of Directors' consideration at the public hearing scheduled for May 12, 2020.

### **I. Proposed New Rule 4.3:**

New Rule 4.3 generally appears to be an attempt to codify monitoring requirements that the District has requested of Vista Ridge. Blue Water has committed to providing the District with requested monitoring data and that commitment remains. As written, however, proposed Rule 4.3 contains several redundant, unnecessary and confusing sections.

Moreover, as written, proposed Rule 4.3.5(b) which purports to require collection and reporting of measured data at least one week prior to production, could be interpreted to apply retroactively. While Blue Water has provided historical information, the process for data collection, verification and transmission to the District related to the Vista Ridge project continues to be developed. If the District were to attempt to apply its proposed new Rule 4.3.5(b) retroactively to Vista Ridge and determine that its rules were violated, such action would be unconstitutional under Article I, Section 16 of the Texas Constitution.

Blue Water further notes that proposed Rule 4.3.7, which purports to exempt wells producing from the Brazos or Little River Alluviums from the monitoring requirements, has the practical effect of making proposed Rule 4.3 applicable *solely* to Blue Water and not to any other permittee. In other words, the new rule appears to be targeted to a single permittee and is arguably discriminatory. Texas Water Code Section 36.101 specifically limits a groundwater district's rulemaking authority to the adoption of rules that are "fair and

impartial.” Blue Water questions whether proposed Rule 4.3 complies with that statutory mandate.

Blue Water suggests a more simplified alternative Rule 4.3 as follows:

**Rule 4.3.1.** A well permitted to produce 1,000 or greater gallons permit or that is part of an operating permit with an aggregate withdrawal of 10,000 or greater acre-feet per year shall be designated as a District Monitoring Well and shall be equipped with:

1. an electronic sensor/data logger that automatically records water level measurements at hourly (or smaller) intervals with an accuracy of 0.1 feet (or less);
2. an electronic inline totalizing water meter that automatically records cumulative flow measurements at hourly (or smaller) intervals and satisfies Rules 11.2.2, 11.2.3, 11.2.4; and
3. a water sampling port on the discharge pipe.

**Rule 4.3.2.** The District shall have access to each Monitoring Well for inspection and water sampling purposes. The District shall give the permittee a notice for inspection and/or water sampling not less than seven calendar days prior to the date of the inspection. If the District conducts water sampling and analysis, the District shall be responsible for all associated collection and laboratory costs and shall provide the permittee with documentation of the collection procedures/protocols and the analysis results.

**Rule 4.3.3.** Monitoring data shall be reported to the District as follows:

1. Data shall be provided in spreadsheet format approved by the District.
2. Water levels and cumulative flow data shall be reported for the same times and at hourly intervals for each well.
3. Data collection and reporting shall begin at least one week prior to the start of production for all wells subject to this Rule 4.3 and completed after the effective date of Rule 4.3 (May 12, 2020). All wells subject to this Rule 4.3 and completed prior to the effective date of this rule shall begin data collection and reporting as soon as reasonably practicable after the effective date.
4. Data shall be submitted to the District via email on a monthly basis. Data recorded during each month shall be provided to the District by the 15<sup>th</sup> day of the following month.



5. Monthly submittals shall include a statement that the permittee has reviewed and processed the data using appropriate quality assurance procedures.

**Rule 4.3.4.** The District may consider amending or modifying the requirements of this Rule 4.3 based on written permittee requests.

## **II. Proposed New Rule 8.6.2 and 8.6.3:**

Blue Water questions the necessity of proposed Rules 8.6.2 and 8.6.3, which attempts to impose new reporting requirements on transport permit holders whenever there is change in an ownership interest held through a lease and imposes a new annual reporting requirement related to all leases held by a transport permittee in the District. As with proposed Rule 4.3, these proposed rules appear to be discriminatory in that they are targeted solely to transport permit holders and solely to permittees whose groundwater rights are held by a lease rather than fee ownership. As such, proposed Rule 8.6.2 and 8.6.3 do not appear to be fair and impartial. Rather, they appear to be discriminatory and in violation of the limits on a District's rulemaking authority prescribed by Texas Water Code Section 36.101(2) and 36.122(c) and (q).

As a practical matter, it makes no sense to apply these new requirements solely to *transport permit* holders because water production is authorized through *operating permits* that are based on assigned acreage, regardless of whether that acreage is based on a deed or on a lease. If the District wants to be sure that the permitted production is supported by sufficient acreage, then its proposed rules should require notification of change of ownership of all regular production permittees, not solely transport permit holders and not solely permittees whose groundwater rights are subject to a lease. Yet by targeting transport permittees, the proposed rules constitute a clear violation of Texas Water Code Section 36.122(c), which mandates "the district may not impose more restrictive permit conditions on transporters than the district imposes on existing in-district users." Proposed Rules 8.6.2 and 8.6.3 further violate the mandate in Texas Water Code Section 36.122(q) which mandates with respect to transportation of water outside of a district that "a district must be fair, impartial and nondiscriminatory. The District Board of Directors should reject these proposed rules.

## **III. Proposed Revisions to Rule 16.7.3**


The proposed revision to Rule 16.7.3 to allow a reduction in the volume of water authorized to be produced in a management zone to "begin as soon after a decision by the Board that such reduction is reasonably required..." could be interpreted and implemented by the Board in a manner that is not practical from the perspective of large-scale public supply reliability. The immediate reduction of authorized production following a Board decision could have a material adverse impact on public water supply reliability. Rule 16.7.3 was appropriate as written and the revisions to Section 16.7.3 beginning with "this reduction shall begin..." should be rejected. Blue Water does not take issue with the other proposed changes to Rule 16.7.3.

#### **IV. Proposed Revisions to Rule 16.7.4:**

Blue Water opposes the inclusion of "the protective drawdown limits" into Rule 16.7.4. If included, the effect of this phrase would be to authorize the Board of Directors to reduce maximum allowable production per acre or permitted production in a Management Zone solely for the purpose of accomplishing the protective drawdown limits. Texas Water Code Chapter 36 charges the District with managing to the desired future conditions. In contrast, there is no mention of protective drawdown limits in Chapter 36. As a practical matter, the protective drawdown limits are not always consistent with the desired future conditions. Therefore, the reference to cutbacks tied solely to the protective drawdown limits should be eliminated. Blue Water does not oppose any of the other proposed changes to Rule 16.7.4.

Thank you for your consideration of Blue Water's comments in the District's evaluation of the proposed rules revisions.

Sincerely,



Shan S. Rutherford  
**TERRILL & WALDROP**

cc: Barbara Boulware, POSGCD General Counsel  
Ross Cummings, Blue Water Vista Ridge LLC  
Pat Reilly, Blue Water Vista Ridge LLC  
Scott Parrish, Vista Ridge LLC  
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