TERRILL & WALDROP
ATTORNEYS and COUNSELORS

810 West 10th Street
Austin, Texas 78701
Tel (512) 474-9100
Fax (512) 474-9888

July 14, 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 130 Project, LP and Blue Water Vista Ridge LLC -- Comments on Proposed District Rules Revisions.

Dear Mr. Westbrook:

These comments addressing Post Oak Savannah Groundwater Conservation District's (the "District") proposed new Rule 1.1.2 are submitted on behalf of Blue Water 130 Project, LP ("Blue Water 130") and Blue Water Vista Ridge LLC ("Blue Water Vista Ridge") (collectively, "Blue Water") for the District's consideration at the scheduled July 14, 2020 public hearing.

As you are aware, Blue Water 130 is the groundwater rights owner and permittee of District operating and transport permits that support the Blue Water 130 public water supply project to Travis County, Texas that has been in production since July 2011. Blue Water Vista Ridge is the groundwater lease and permit administrator for the District operating and transport permits dedicated to the *$3 Billion* Vista Ridge project that commenced operations on April 15, 2020. The Blue Water 130 and Vista Ridge permits form the basis of hundreds of millions of dollars in investment in groundwater rights, permits and infrastructure. As the District knows, the permit fees alone paid to the District for these projects are over $ 20 million.

Against this background of property rights and investment-backed expectations, Blue Water strongly opposes proposed new Rule 1.1.2 on numerous grounds. If adopted, Rule 1.1.2 would:

- Unlawfully interfere with Blue Water's vested property rights by inserting the District into real property title disputes in violation of Texas law;

- Establish a legal standard contrary to Texas law by requiring an *existing permittee* to "clearly demonstrate" its real property rights to the District—not an authorized state district court—*after* the District has issued a permit based on a mere allegation of a title dispute;

- Require a District permittee to initiate and arguably resolve litigation within 6 months for an alleged real property title dispute;

- Authorize the District to revoke a District-issued permit (upon which hundreds of millions of dollars have been invested) in the event these unlawfully-imposed Rule 1.1.2 conditions were not met—even in the absence of a final court judgment adjudicating the title dispute—which would constitute an unlawful taking of vested property ownership rights in groundwater in violation of *both* the U.S. and Texas Constitutions.

Despite Blue Water's *repeated* admonitions, the District continues to unlawfully interject itself into real property title matters. This area of law is plainly beyond the District's statutory authority and is, instead, within the exclusive jurisdiction of Texas courts. Worse still, the District has attempted to "officiate" real property title disputes any time it is approached by a person asserting an alleged real property title dispute.[1] The District has no such obligation. In fact, the District is *legally prohibited* from adjudicating or even "officiating" real property title matters. Nor can the District require parties to negotiate and litigate real property disputes. If the District is informed of an alleged real property title dispute, the only appropriate response is to instruct such person that the District is not authorized to adjudicate or officiate title disputes. If a person believes they are somehow aggrieved, their only remedy under Texas law is to pursue such matters in the appropriate court.

The District *does not and cannot have any role in interpreting or determining real property rights*, yet that is precisely what Rule 1.1.2 attempts to do. Texas courts have long recognized that a statutorily-created political subdivision such as the District "has no inherent authority, and instead has *only the authority that the Legislature confers upon it*."[2] The Legislature has not authorized the District to adjudicate or officiate real property title disputes either through Chapter 36 of the Texas Water Code or the District's enabling act, and thus the District is *prohibited* from purporting to exercise a power it does not have.[3]

This issue was squarely addressed in *Rosenthal v. Railroad Commission of Texas*,[4] in which the claimed owner of a mineral estate challenged the Texas Railroad Commission's grant of a saltwater disposal injection well permit to the alleged owner of the surface estate of the subject tract. Noting that there is *no legal requirement* that a permittee *prove* its title or right of possession as a condition of obtaining a permit, the court found that, *to the contrary*, "it is well established that the commission does not have jurisdiction to decide disputes over title or rights of possession in property that is the subject of a permit request."[5] That "well established" principle applies to the District's proposed Rule 1.1.2.

---

[1] In the case of the supposed Pavlas "disputed lease," the party that allegedly disputes the leases in question has *never* contacted the owner of the lease production rights—Blue Water 130—or any Blue Water representative. The underlying lease history has been thoroughly explained to the District both verbally and in writing, including Blue Water 130's most recent correspondence of July 10, 2020.

[2] *See Tex. Coast Utils. Coal. v. R.R. Comm'n*, 423 S.W.3d 335, 359 (Tex. 2014) (emphasis added).

[3] Texas Water Code Chapter 36; HB 1784, 77th Legislature (2001).

[4] *Rosenthal v. R.R. Comm'n*, 2009 Tex. App. LEXIS 6522 (Tex. App. – Austin 2009) (pet. denied).

[5] *Id.* at *17 (citing *Magnolia Petroleum Co. v. R.R. Comm'n*, 171 S.W.2d 189 (Tex. 1943).

The *Rosenthal* court followed a long line of precedent established by the Texas Supreme Court in *Magnolia Petroleum*. In *Magnolia*, the Supreme Court specifically rejected the argument that the commission's power to issue permits depended on whether the permit applicant could demonstrate title in the affected property. Again, that is exactly what Rule 1.1.2 attempts to do. By its own words, Rule 1.1.2 requires a permittee to "clearly demonstrate" its ownership interest, even after the District has granted a permit. The Texas Supreme Court in *Magnolia* said otherwise:

> [I]f the applicant makes a *reasonably satisfactory showing of a good-faith claim of ownership in the property*, the mere fact that another in good faith disputes his title is not alone sufficient to defeat his right to the permit; *neither is it ground for suspending the permit* or abating the statutory appeal pending settlement of the title controversy."[6] *Id.* at 191 (emphasis added).

The *Magnolia* decision *prohibits* the District from requiring anything beyond a reasonably satisfactory showing of a good-faith claim of ownership (a standard Blue Water plainly satisfied in connection with its previous District permit applications and permit hearings). Yet Rule 1.1.2 does just that. Rule 1.1.2 forces a permittee—it is transparently aimed at Blue Water—to initiate litigation or otherwise have its permit revoked in whole or in part.[7] Revoking a previously-granted permit in such manner directly violates the holding of *Magnolia*. The clear purpose of the proposed rule is to force Blue Water to initiate real property title litigation and possibly fully resolve or adjudicate that litigation or otherwise lose some or all of its permits. Rule 1.1.2 thus attempts to obtain indirectly what the District is not entitled to consider directly in permitting decisions.

Rule 1.1.2's attempt to *require* a permittee to litigate a purported real property title dispute—after a District permit has been issued—is *unprecedented*: Blue Water has been unable to find any rule from any jurisdiction that requires a permittee to initiate and resolve real property title litigation after a permit has been issued in order to maintain its permit. Yet, Rule 1.1.2 goes even further, requiring that litigation be initiated and arguably be resolved within an arbitrary deadline in order to avoid revocation of a District permit.[8]

The most egregious aspect of Rule 1.1.2 is its purported authorization for the Board to remove the "disputed property" from a permit—effectively revoking a previously-granted permit—for supposed failure to comply with the illegal requirements embedded into the Rule. The 130 and Vista Ridge projects represent several hundred million dollars of investment. The

---

[6] *Id.* at 191.

[7] The proposed rule asserts that "if no resolution is reached within six (6) months and no efforts through the judicial process be undertaken by the parties, the Board shall consider removal of any property from a permit or program through an amendment to such permit or program until a final resolution is reached." As written, this provision is not clear as to whether it is intended merely to force initiation of litigation or to require full resolution within 6 months. Regardless, the District cannot revoke a permittee's permit either prior to or during the pendency of a lawsuit based on the mere allegation of a title dispute.

[8] The District also appears to be attempting to impose a *de facto* 6-month statute of limitations and override the provisions of the Texas Civil Practice and Remedies Code, which allows suit to be brought between 2 and 25 years, depending on the specific type of real property dispute at issue.

groundwater leases supporting those projects are vested property rights, and memoranda of those leases are filed of record in the official public records of Burleson and Milam counties for review by the District and any member of the public. Were the District to revoke authorized production from those permits based on the Rule 1.1.2 requirements that the District has no authority to require, the result would be an unconstitutional governmental taking in violation of the Fifth Amendment of the U.S. Constitution and Article I, Section 17 of the Texas Constitution.[9] Importantly, as Texas courts have repeatedly recognized, the District is responsible for its permitting decisions, and thus the District would also be liable for any judgment flowing from those permitting decisions.[10]

The District has an established permitting process for groundwater production. Blue Water plainly followed the District's permitting process, and in doing so provided documentation of control and/or ownership of groundwater rights, was subjected to public contested hearings, and ultimately, through numerous public hearings, obtained those permits from the District. No person, including the District's General Manager, ever challenged or even questioned the vested groundwater rights supporting the 130 and Vista Ridge permit applications during that extensive public process. Yet Rule 1.1.2 would allow any person to raise a purported real property title issue affecting the validity of the permits and underlying permitting process on a mere whim, years after the District granted the permits, and the result could be the reduction or even complete revocation of previously-permitted production. Such an approach violates basic tenets of due process, equal protection and property rights embodied in the U.S. and Texas Constitutions.

Finally, consistent with much of the District's recent rulemaking activity, proposed Rule 1.1.2 is designed to only affect large commercial projects such as the 130 and Vista Ridge projects. The District is surely aware of the recent 5th Circuit Court of Appeals decision involving its neighbor, Brazos Valley GCD, in which the federal court determined that the district had no immunity from federal takings and equal protection claims resulting from its discriminatory permitting practices.[11]

Blue Water's opposition to this rule should come as no surprise to the members of the District Rules Committee. As you will recall, our concerns were made clear at the Rules Committee meeting in February 2020 that a similar proposed rule exceeded the District's statutory

---

[9] U.S. CONST., amend. V ("No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."); TEX. CONST., Art. I, sec. 17 ("No person's property shall be taken, damaged or destroyed or applied to public use without adequate compensation being made . . ..).

[10] *Edwards Aquifer Authority v. Bragg*, 421 S.W.3d 118, 126-131 (Tex. App. – San Antonio 2013, pet. denied) (groundwater district's permitting actions deprived landowners of use of groundwater resulting in a taking of private property in violation of Article I, Section 17 of the Texas Constitution). *See Edwards Aquifer Authority v. Day*, 369 S.W.3d 814, 821 n. 24 (Tex. 2012) (holding that Texas landowner has a vested property right in groundwater protected by Article I, Section 17 of the Texas Constitution; further noting that the state took the position that a takings judgment entered against the Edwards Aquifer Authority would have to be satisfied from the Edwards Aquifer Authority's own coffers).

[11] *See Stratta v. Roe*, 961 F.3d 340 (5th Cir. 2020) (holding that Brazos Valley Groundwater Conservation District is not immune from civil rights suit in federal court and further holding that groundwater owner's claims of unequal treatment and intentional conduct toward particular landowners stated a valid federal civil rights claim).

authority. That February meeting was the last to be publicly-noticed, and Blue Water was left with the impression that the Committee would not pursue such a rule. Apparently, the Rules Committee has continued to meet, but has apparently discontinued its longstanding practice of providing the public with notice and an opportunity to participate. Blue Water respectfully urges the District to return to a more transparent model of governance and regulation which apprises the public of all meetings.

To summarize, the District has no authority under either Chapter 36 or the District's enabling act to adjudicate real property title disputes. That is the exclusive province of Texas courts. Nor is the District authorized to adopt rules that effectively revoke a permittee's permit upon a mere allegation of a real property title dispute—*i.e.*, without a court judgment fully and finally adjudicating that real property title dispute. And finally, any attempt to do so would subject the District to constitutional challenges of a governmental taking of vested real property rights without compensation wherein the damages would be a measured in relation to the investment-backed expectations of the groundwater rights owners.

We welcome any questions during the Board's consideration of proposed Rule 1.1.2 at the July 14, 2020 public hearing.

Sincerely,

Paul M. Terrill III
TERRILL & WALDROP

cc: Ross Cummings, Blue Water 130, LP, Blue Water Vista Ridge, LLC
Barbara Boulware-Ware, POSGCD General Counsel