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BY *First Class* U.S. Mail and Email (*gwestbrook@posgcd.org*)

Gary Westbrook
General Manager
Post Oak Savannah Groundwater Conservation District ("POSGCD" or "District")
310 E Ave C
Milano, TX 76556

RE: POSGCD Revisions to Procedural Rules

Dear Mr. Westbrook:

On behalf of SLR Property I, LP ("SLR"), I appreciate this opportunity to provide comments on the proposed revisions to the POSGCD rules. I limit my comments here to the procedural rules affecting permit processing, notices of application, hearing requests, and hearings as those topics are ones with which I am intimately familiar. SLR will be separately submitting technical comments on your proposed rule revisions. SLR supports efforts to clarify your rules to avoid unnecessary conflicts, especially about procedural steps. We would be glad to participate in one or more work sessions with you and/or your legal counsel, suggest specific language, or otherwise provide additional input in whatever manner you believe would be most helpful.

Based on our recent and ongoing permitting experience with POSGCD and our review of your proposed revisions, it is clear to us that the District generally is proposing to change the words of its Rules to match the unusual process you have historically attempted to follow. We suggest the better approach would be to first streamline the District's desired process so it follows more standard approaches in administrative law jurisprudence. That normalization would result in simplifying and clarifying the administrative review steps, easing the burden on you, your staff, the applicant and interested parties, and avoiding oversights, misunderstandings and missteps. I attempt to summarize below certain aspects of your administrative processing of permit applications that are in need of such a normalization.

**Permit Application Completeness**

In your revised Rule 7.4, particularly subsections 8, 9 and 10, and revised Rule 7.5, subsection 2, the General Manager is allowed 90 days to decide if an application is complete, but only 30 days for an applicant to respond to a notice of incompleteness. Under your interpretation of that rule, a failure by an applicant to meet that brief deadline means you have no choice but to consider the application expired yet to nevertheless retain all fees paid by the applicant, resulting in unnecessary work by the applicant to prepare and refile a hybrid new application and the District

to review and otherwise administer the refiling, unnecessary delays in getting to the point where the Board can consider granting the application, and an unnecessary double payment of fees by the applicant. That draconian result seems unnecessary, and inconsistent with what is the current practice of other permitting agencies. For example, the Texas Commission on Environmental Quality ("TCEQ") simply states that such a failure **MAY** result in return of the application, but any request for more time – whether such request is made before or after the deadline – is routinely granted. Presumably, the TCEQ recognizes the impossibility of the TCEQ itself being able to meet all self-imposed response-time requirements that may arise during a months-long or years-long application review process, as well as the additional work it would cause itself by returning an application. We suggest the District adopt a similar rule and approach. To avoid misunderstandings, the opportunity for the applicant to request an extension for good cause, and the General Manager authority to grant it, should be stated clearly every time the 30-day deadline is mentioned, and not just buried in Rule 7.9, which we understand the District is not proposing to amend.

Also, we suggest addition of a provision that explicitly requires the General Manager to submit one or more follow up requests for information within a defined period of time if the applicant in good faith attempts to timely respond to a request for information but the General Manager believes the response lacks something. Finally, we request a statement in the Rules to the effect that the General Manager shall attempt in good faith to minimize any requests for additional information, limiting requests to only those materials and information that are truly needed to make an application administratively complete and not including things the District's hydrologist would like to see (e.g., downhole camera surveys of all existing permitted wells).

**Notices, Hearings, and Decisions on Applications**

Revised Rule 7.5.1 appears in part to be designed to assure timely consideration of administratively complete applications and to give an applicant ample notice to submit a request to the District, such as a request under Section 36.416 of the Texas Water Code to refer the matter to State Office of Administrative Hearings. Both are important issues but, as drafted, the general requirement for prompt consideration is eliminated, and a 35 day notice of the scheduling of a hearing, possibly before interested persons have submitted hearing requests, potentially rearranges the logical sequence of events embodied in most administrative hearing processes. Additionally, it has the potential to present scheduling conflicts which are unnecessary if the process is normalized to provide first for publication of the notice of application.

The TCEQ has after decades of trial and error adopted a streamlined process with effective results. Translating the information required in all TCEQ notices of application for which there is an opportunity for a contested case hearing from TCEQ lingo to District vernacular would result in the following basic information in the Notice of Application:

- Technical details

- One single, clear deadline for an affected person to deliver – to both the General Manager and the applicant – written notice of his or her intent to contest the Application and evidence of his or her claimed basis for affected party status; and
- a date for the public hearing before the Board at which the application will be considered, and notice of the opportunity at that public hearing for the public to present comment to the Board on the application.

Publication of such notice should be required at least 45 days before the public hearing at which the application would be considered. In this instance, so long as the deadline for requesting a contested case hearing is at least 30 days prior to the date of the public hearing stated in the published notice, an applicant would have some time to visit and potentially compromise with a protester, present to the Board its written rebuttal to the protestant's standing evidence, and, if the applicant so choses, to timely seek referral to SOAH, either before or after the Board takes up preliminary hearing matters.

Unfortunately, the Board's proposed revised rules do not present a clear path for these steps in logical sequence.

**Notice and Scheduling of Hearings on Applications**

Provisions of Chapter 14 of the District's rules overlap internally as well as with provisions of Chapter 7. Again, the proposed revisions fail to paint a clear picture for those who wish to protest an application or applicants trying to predict their path forward through the Rules.

First, the revisions do not use defined terms or universally accepted terms and concepts within Administrative Law jurisprudence. In the process, they make for inherent confusion. For example, the District uses the term "initial hearing" throughout the revisions. "Initial hearing" is not a defined term in the Rules, nor is it a generally accepted term in administrative law. According to the proposed revised District rules, an "initial hearing" is something to be set by the General Manager before an application has been protested and the "schedule for the initial hearing" includes the "deadline for notice of the preliminary hearing, date for preliminary hearing, deadline for preliminary hearing motions, filing deadline for requests for a contested case or for party status, date for a pre-hearing conference and anticipated date for the hearing on the merits." Rule proposal 14.2.1. Items such as the date for the preliminary hearing, the date for the prehearing conference and the date for the hearing on the merits, do not logically fall within the term "initial hearing." Further, the task of setting a preliminary hearing date, a prehearing conference date or a hearing on the merits should not be assigned to the General Manager, who will be an interested party in those proceedings. Instead, those permit hearing matters should be decided and delegated exclusively to the hearing examiner or SOAH judge. See revised Rule 14.1.1b.

But, whatever the "initial hearing" is, it is not necessarily the hearing referenced in revised Rule 14.2.3 which states in revised form – "The General Manager is responsible for drafting the notice of hearings scheduled on permits and applications, transmitting a copy of such notice to applicant not less than fifteen (15) days prior to the date set for **the hearing** and ensuring that

applicant provides such notice in the following manner. . . .” Depending on what the District envisions being taken up at the “initial hearing,” transmittal of a notice for publication only 15 days prior to such hearing leaves little to no time for action such as the timely filing of a notice of intent to contest the application either within 5 or 7 business days in advance of that hearing.

Other inconsistencies that appear in the revised Rules include:

- As noted, Rule 14.2.3 states the GM shall set the deadline for filing protests in the schedule for the initial hearing. Rule 14.2.5 states protests must be filed at least five (5) business days prior to the hearing date (notice of the person’s intent to appear at the hearing together with evidence establishing their standing as an affected person). But Rule 14.2.8b states such notice must be given at least seven (7) business days prior to the date of the initial hearing (Notice of intent to contest must be given at least seven (7) business days prior to the date of the initial hearing scheduled on the application.). And then there is Rule 14.4.8 which states that “Unless otherwise set by the presiding officer or law, . . . communications, requests, briefs or other papers and documents by those who are or those who are seeking to be considered for party status shall be filed at the District's office not later than seven (7) business days prior to hearing date unless a different date is set by the presiding officer in a scheduling order. So, it is the date set by the GM, which is either 5 or 7 business days prior to the hearing or initial hearing, or some other deadline set by the Presiding Officer, and as noted below, the deadline to timely submit evidence of standing may be different that the deadline to specifically request a contested case hearing. Those inconsistencies should be resolved before the Rule revisions are adopted.

- Apart from and in addition to the conflicting provisions in the Rules about when protests must be filed, the standard deadline used in administrative law is a certain number of days **AFTER** a **fixed and passed event**, not a date before a predicted event, even if that event is formally scheduled. The reason is obvious—future events are subject to change…making the deadline subject to argument that it is a moving target. Thus, for example, both TCEQ, and other agencies and groundwater districts tie protest deadlines to past events, like publication of a notice. The District should do the same.

- The revised Rules also contain mixed and inconsistent information for protesters of permit applications. In typical administrative law cases, protestants have a single deadline to request a contested case **AND** supply to the deciding agency their evidence of standing. Evidence of standing is the same as stating why the requester is an affected person whose interests are different than the public at large. But Rule 14.2.8 separates the two by stating “Any person who believes they are affected **and/or** intends to contest a permit application must provide timely written notice of that intent to the applicant and to the District’s general manager.” The “and/or” conjunction is a misdirection and confusing – **BOTH** are required for persons who intend to contest an application. Similarly Rule 14.3.13 states “If the District has received requests for consideration for

party status **or** a contested case. . .". The logical requirement is that each protestant must both timely request a contested case hearing **AND** support that request with evidence that the requestor is an affected person. Certainly, that is consistent with TCEQ and other state agency processes, and that of most groundwater conservation districts. But Rule 14.5.3 appears to grant Protestants 2 bites of the apple in terms of providing evidence of standing. It requires:

> "At least an initial statement about the person's or entity's personal justiciable interest affected by the application. **If not provided at the time of filing the initial request**, all individual or entities must be prepared to provide (1) a brief, but specific written statement explaining in plain language the requestor's location and distance relative to the activity that is the subject of the application and (2) how and why the requestor believes he/she/it will be affected by the activity which is the subject of the hearing in a manner not common to members of the general public owning land with an actual well in compliance with the District's rules and within the District's boundaries of Milam and Burleson counties; and (3) provide documentation, including any scientific studies or reports, that supports or shows how the explanation set out in (2) above demonstrates a personal justiciable interest that will be resolved by participation in the contested case.

It's unclear when this second demonstration must be provided but, clearly, allowing a supplemental explanation at some random time prejudices the rights of an applicant in preparing for and responding to protests of its application.

- Finally, it appears that your Rules, even as proposed to be modified, provide for an evidentiary hearing even if there is no timely request for a contested case hearing. That concept is totally foreign to administrative proceedings, except when the applicant disagrees with the General Manager's recommended terms and conditions for a permit. But even then, that outcome should not be a last minute surprise (as in 7 business before the evidentiary hearing as allowed under Rule 14.2.8). Allowance must be made for a contest between the GM and the applicant, but only in the rarest of circumstances should that require an evidentiary hearing and, when that does arise, it should be with more than a mere 7-day notice.

In short, your draft rules relating to permit processing, notices of application, requests for contested case hearings, and such hearings, are simply not close to ready for adoption. Again, SLR offers to work with you and your legal counsel to improve these proposed rules so that they may be adopted at the earliest possible date.

Respectfully,

Molly Cagle

MC:ms

cc: Barbara Boulware-Wells
Alan Gardenhire
Roger P. Nevola