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VIA E-MAIL (ADMIN@POSGCD.ORG)

Mr. Gary Westbrook
Post Oak Savannah Groundwater Conservation District
P. O. Box 92
Milano, Texas 76556

Re: SLR Property I, LP Comments on Proposed Rule and Management Plan Changes for Post Oak Savannah GCD's November 14, 2023 Board Meeting

Dear Mr. Westbrook:

We appreciate this opportunity to provide comments to the Post Oak Savannah Groundwater Conservation District ("POSGCD" or "District") on behalf of our client SLR Property I, LP ("SLR"). The comments on specific rules are intended to assist the District in avoiding ambiguity or inconsistencies within the District's rules or between the revised rules and specific provisions of the Texas Water Code. We have a similar goal in mind in our comments on the District's Groundwater Management Plan ("Management Plan").

A. COMMENTS ON THE DISTRICT RULES

I. As currently written, Proposed Rule 9.1(c) omits a mandatory restriction now in Chapter 36 of the Texas Water Code on the use of increased transport fees.

Proposed Rule 9.1(c) tracks the change to Texas Water Code § 36.122(e-1), pursuant to HB 3059 passed by the 88th Texas Legislature, which allows for an increase in transport or export fees; however, the proposed rule fails to codify the accompanying, important restriction the Legislature imposed on the use of such fees. This restriction is codified at Section 36.207(b) and specifies that "funds obtained from the amount that an export fee is increased" pursuant to Section 36.122(e-1) may be used by a District "***only*** for costs related to assessing and addressing impacts associated with groundwater development, including: (1) maintaining operability of wells significantly affected by groundwater development; (2) developing or distributing alternative water supplies; and (3) conducting aquifer monitoring, data collection, and aquifer science." Texas Water Code § 36.207(b).

The District's existing Rule 9.1.7 imposes very general limits on the use of transport fees—that is "paying expenses related to the enforcement of Chapter 36 or the rules, or for any other lawful purpose of the District." But this generalized statement goes well beyond the statutory limitation imposed by lawmakers. The following modification to Proposed Rule 9.1(c) addresses this inconsistency:

Effective January 1, 2024, the maximum allowable rate the district may impose for a transport fee under section b above, once the limit of $0.20 per thousand gallons is reached, may be increased by up to three percent of the total transport fee each calendar year. **The district may use funds obtained from the amount that a transport fee is increased under this Rule 9.1(c) only for costs expressly identified by Texas Water Code Section 36.207(b).**

II. Proposed Rule 14.2.3 should be amended for clarity.

To promote clarity regarding the requisite public notice a groundwater permit applicant must provide after receiving the District's draft notice under Rule 14.2.3(a), SLR suggests that the District make explicit that notice must be provided to all three groups of people. Adding an "and" and slight punctuation changes make the requirement clearer:

a. The applicant shall provide such notice by first-class mail as follows:

(1) To landowners and well owners:
   a) Within one-half mile of the proposed well location for a single non-exempt well; or,
   b) Within one mile of the proposed well locations for a well field with multiple non-exempt wells;
(2) To any holder of a certificate of convenience and necessity within which the proposed non-exempt well or well field is to be located; **and**
(3) To any other person required by these rules.

SLR offers an additional, suggested revision to Proposed Rule 14.2.3(b)(2). Texas Water Code Section 36.404(c)(1) explicitly states that "the general manager or board shall…***post*** notice in a place readily accessible to the public at the district office." (emphasis added). The District's proposed rule notes that the District "shall provide notice…at a place readily accessible to the public at the District office," but fails to specifically state who must **post** it, or that it be **posted** at all. There is a straightforward and simple fix:

b. The District shall provide notice as required by the Rules as follows:

(1) To the county clerk of Milam County and Burleson County;
(2) **By posting notice** at a place readily accessible to the public at the District office;
(3) On the District website; **and**
(4) By regular mail, facsimile or electronic mail to any person who requests copies of hearing notices, any person the Board deems appropriate, or any other person entitled to receive notice under these rules.

III. Proposed Rule 14.7.4 should clarify that the Board's decision on an application will be based on the District's rules in effect at the time the application was submitted.

Proposed Rule 14.7.4 adopts the language required by HB 1971 passed by the 88th Texas Legislature--requiring that the Board issue its final decision on an application within 180 days of receiving a final proposal for decision ("PFD") from the State Office of Administrative Hearings ("SOAH"). That addition to the District's rules is good, as far as it goes, but, with continuing rule changes by the District, the revised provision doesn't go far enough—it doesn't recognize the limitation imposed upon the Board by Tex. Local Gov. Code § 245.002(a)(1). That provision of law codifies the administrative law principle that the "approval, disapproval, or conditional approval of an application for a permit [shall be based] solely on the basis of any orders, regulations, ordinances, rules, expiration dates, or other properly adopted requirements **in effect at the time the original application for the permit is filed**". (emphasis added). To that end, SLR suggests the following addition to Proposed Rule 14.7.4:

> Notwithstanding any other law, the Board shall issue a final decision under this section not later than the 180th day after the date of receipt of the final proposal for decision from the State Office of Administrative Hearings. The deadline may be extended if all parties agree to the extension. **Any final decision by the Board on an application will be governed by the District rules that were in effect at the time the application was submitted.**

IV. Proposed Rule 14.8.9(b) should be amended to avoid unnecessary paperwork

SLR appreciates the District's efforts to establish straightforward criteria for the contents of a rule petition, recognizing both the District's role with respect to constitutionally protected private property rights in groundwater[1] and its position as a conduit of information to the public. SLR believes the District's rules, particularly those related to amending or adopting new rules, should reflect these dual interests.

In one aspect, the rules appear to unnecessarily burden petitioners when a rule petition is about a single idea but affects several intertwined District rules. In such instances, the petitioner should not be required to submit a **separate** petition for "[e]ach rule requested to be amended or adopted." As proposed, Proposed Rule 14.8.9(b)(1) ignores that some District rules do not function independently of one another. In these instances, requiring individual petitions for each cascading change appears to require a petitioner to submit multiple, largely duplicative petitions to the District when a single, combined petition would promote both efficiency and coherence. SLR therefore asks POSGCD to remove Proposed Rule 14.8.9(b)(1) in its entirety.

[1] *See Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 833 (Tex. 2012) ("Groundwater rights are property rights subject to constitutional protection").

B. COMMENTS ON THE DISTRICT GROUNDWATER MANAGEMENT PLAN

Given that "[t]he Management Plan in its entirety is to be considered" at the "Public Hearing to Consider Adopting the Management Plan," we appreciate the District's invitation to comment upon the entirety of its Management Plan.

Perhaps the District believes that its respect for private property interests is inherent or simply embedded in its Management Plan and thus need not be explicitly expressed. SLR thinks otherwise, particularly considering the emphasis in several key groundwater bills passed by the 88th Legislature recognizing the importance of groundwater ownership in Texas. SLR requests that the District specifically acknowledge in the body of its Management Plan both that it has and how it has ensured the "**highest practicable level of groundwater production**" balanced against conservation and other delineated factors set forth in the law. See HB 3278 amending, among other provisions, Section 36.108(d-2). An unequivocal statement to this end also would help assure the District's GMA colleagues abide by the requirement that they "consider…the impact [of their rules and restrictions] on the interests and rights in private property, including ownership and the rights of management area landowners and their lessees and assigns in groundwater as recognized under Section 36.002." Tex. Water Code § 36.108(d)(7).

I. The District Should Update Sections 18, 19 and 20 of the Management Plan

SLR requests that the District update Section 18 of its Management Plan to replace or at least asterisk "Alcoa" in Table 18.1 (and wherever else it appears) with "SLR Property I, LP."

Similar additions should be made in Chapter 19. For example Table 19.1 specifically recites information from the 2022 State Water Plan. It is accurate in its recitation. But in terms of ownership and demands in the Milam County, it is grossly inaccurate and the public would benefit from a reference to current data. For example, pursuant to TX HB 5369 (88th Legislature), the Texas Legislature voted this year to establish Sandow Municipal Utility District No. 1 (the "MUD") as a political subdivision of the State of Texas. The MUD, which currently occupies 228.1 acres within the unincorporated Milam County, is a municipal utility district operating pursuant to Chapter 49 and Chapter 54 of the Texas Water Code. The legislation creating the MUD grants a limited power of eminent domain, provides authority to issue bonds, and provides authority to impose assessments, fees, and taxes. Directors of the MUD were confirmed by election held on November 7, 2023. Now confirmed, the MUD will construct and finance water, sewer, drainage, road, and recreational facilities to promote the development of the area and serve property *within the boundaries of the POSGCD*. As development proceeds and the MUD expands, it will provide utilities to the expanded area. This reality should be reflected in POSGCD Groundwater Management Plan.

Finally, Section 20 of the District's Groundwater Management Plan needs to be updated to recognize the recently revised population forecast for Milam County, now estimated to reach a population of 140,000 by 2080. It is critical that the District recognize this significant population projection **now** and especially its corresponding effect on municipal and commercial water supply

demands within the District. Blind reliance upon antiquated population predictions serve neither the District nor its constituent counties and citizens.

II. PDLs, which are not explicitly designed to protect and achieve a DFC, are an unauthorized method of regulation.

SLR urges the District to remove its PDLs from the Management Plan and, as part of the next formal District rulemaking, propose and adopt rule revisions to remove its PDLs from the District's rules. The District's attempt to regulate groundwater production through independently created "Protective Drawdown Limits"[2] ("PDLs") lacks any foundation in law. Desired Future Conditions ("DFCs") are the sole legal means of setting aspirational future aquifer conditions, and DFCs are established at the regional Groundwater Management Area ("GMA") level. The District's rules, Management Plan, and policies must adhere to the legal boundaries in Chapter 36 of the Texas Water Code, which allow the adoption of ***DFCs*** in addition to measures to protect and achieve the DFCs. Chapter 36 does not authorize a GCD to invent limits unhinged from the DFCs that protects certain groundwater pumpers' production at the disproportional impact and expense of a targeted group of other pumpers.

The Legislature granted groundwater conservation districts ("GCDs") a limited set of tools to regulate groundwater production in relation to these DFCs. Texas governs groundwater production under the rules of absolute ownership— the rule of capture—subject to highly specific Legislative carve-outs. Tex. Water Code § 36.002(a), (d)(2) (affirming that "a landowner owns the groundwater below the surface of the landowner's land" without "affect[ing] the ability of a district to regulate groundwater production as authorized under Section 36.113, 36.116, or 36.122 or otherwise under this chapter or a special law governing a district"). The Legislative exceptions allow a GCD to require groundwater production permits (§ 36.113), to set spacing and production limits through specified methods (§ 36.116), and to put guardrails on out-of-district transfers (§ 36.122). That is all.

Further, the Legislature determined that, "[i]n regulating the production of groundwater…a district…shall select a method that is appropriate based on the hydrogeological conditions of the aquifer or aquifers in the district." Tex. Water Code § 36.116(e)(1). Groundwater science thus serves as a key guidepost on groundwater production regulation.

In accordance with law, GCDs manage groundwater production and permitting with reference to "***an applicable desired future condition***." Tex. Water Code § 36.1132. The term "DFC", not PDL, appears in statute. And although a GCD may regulate both "the spacing of water wells" and "the production of groundwater by…managed depletion" in furtherance of a goal to

[2] The District defines "Protective Drawdown Limit (PDL)" as "conditions of unconfined areas of aquifers in the District as expressed in limits of water level drawdown." POSGCD Rule 1.1.

"minimize as far as practicable the drawdown of the water table or the reduction of artesian pressure," it is bound to:

- "select a method that is appropriate based on the hydrological conditions," Tex. Water Code § 36.113(e)(1);
- Use only the tools the Legislature provided, Tex. Water Code § 36.116(a); and
- Address the DFCs in its management. Tex. Water Code § 36.1071.

Clearly, the DFC is a touchstone for a district's groundwater management plan. That plan must "address[]" the adopted DFCs. Tex. Water Code § 36.1071(a). The plan is evaluated based on "the degree to which" it "achieves the desired future conditions established during the joint planning process." Tex. Water Code § 36.108(c)(4).

When the POSGCD's PDL requirements are evaluated based on the tools allowed under Texas law to infringe on the rule of capture it is apparent the PDL approach used by the District is extralegal. The reasons are many:

- The District freely concedes its PDLs were not set through the DFC process. Neither GMA 12 nor GMA 8 has established DFCs for the shallow or unconfined zones of the aquifers.
- The District's PDL "Management Areas" ignore groundwater science and critical realities of the hydrogeological conditions of the aquifers in the POSGCD.
- Far from clearly furthering achievement of the DFCs, even the District admits that their PDLs potentially contravene the DFCs ("POSGCD has been evaluating whether or not enforcement of its PDLs ***would prevent the achievement of its DFCs*** . . . Because of concerns with potential incompatibility between PDLs and DFCs, the District is considering replacing their PDLs with an alternative such as DFCs for aquifer outcrops."[3] (emphasis added)
- The purpose of the PDLs isn't to protect and achieve the DFCs, it's to ***protect the production capacity of existing wells in the shallow, unconfined portions of the aquifer***, where the water level above the well screen tends to be less than in the deep confined portions of the aquifer.[4]

[3] Draft, Post Oak Savannah Guidance Document for Evaluating Compliance with Desire Future Conditions and Protective Drawdown Limits, Dec. 2021 at 2, https://posgcd.org/wp-content/uploads/2021/12/Draft_GuidanceDocument2021.pdf.

[4] POSGCD Guidance Document for Evaluating Compliance with Desired Future Conditions and Protective Drawdown Limits (Aug. 2018), at 2 ("2018 Guidance for DFCs and PDLs").

The District's PDLs do not qualify within the narrow Legislative exceptions to the free application of the rule of capture set forth in Chapter 36. Using PDLs to "protect the production capacity" of certain existing wells at the expense of other groundwater owners impermissibly encroaches on the absolute ownership doctrine way beyond what the discrete inroads the Legislature has made to the State's rule of capture. The District has set "threshold values for average drawdown for the shallow management zones" for each aquifer at 20 feet, and has purported to give itself authority to use that PDL to curtail pumping—or decline to issue requested permits—within some of the District's specified management zones.[5] But drawdown that occurs within the top 400 feet of an aquifer underlying part of the District is a product of regional pumping. The District cannot legally curtail in-District production to protect permanent, unchanging production capacity in ***part of*** the District, in ***part of*** in the aquifer.

If POSGCD believes that having a DFC for shallow aquifers is appropriate, the proper place for that discussion is at the GMA, as part of the regional DFC process. SLR respectfully asks that the District remove PDLs from its Management Plan entirely. For avoidance of doubt, SLR also requests the following additions and revisions to Section 6.0 of the District's Management Plan:

> The District will evaluate and monitor groundwater conditions and regulate production consistent with **state law**, this plan**,** and the District Rules. Production will be regulated, **if needed**, to conserve groundwater, and protect groundwater users, in a manner not to unnecessarily and adversely ~~limit production,~~ **impair the absolute ownership rights of landowners beyond that allowed under Chapter 36 of the Texas Water Code**, or impact the economic viability of the public, landowners and private groundwater users. In consideration of the importance of groundwater to the economy and culture of the District, the District will identify and engage in activities and practices that will permit groundwater production.

III. Only a comprehensive, regional, and regionally-funded mitigation program makes sense.

On behalf of SLR, we encourage the District, in conjunction with the other GCDs of GMA 12, to support and establish a regional well mitigation program whose structure and funding track the regional nature of groundwater. Presently SLR is the only District permit holder with mitigation requirements—other pumpers enjoy the protection of the District's Well Assistance Program to take care of their potential offsite impacts. Ignoring the impact of pumping outside the District on conditions within the jurisdiction of the POSGCD is not rational and imposing mitigation requirements on one and only one pumper in the District is unfair. A rational and fair program to mitigate regional effects should be funded and managed regionally. SLR respectfully

[5] 2018 Guidance for DFCs and PDLs, at 2.

requests that POSGCD work proactively with the other districts in GMA 12 to develop a rational and fair regional mitigation program.

* * * * *

SLR again appreciates the opportunity to submit these comments to the District.

Respectfully,

Molly Cagle

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