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***MIDDLE PECOS GROUNDWATER  
CONSERVATION DISTRICT***

***excerpt of  
RULES***

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Proposed Amendments to Rules  
(Set for Public Hearing on September 19, 2023)

Proposed additions reflected in underlined text, and proposed deletions reflected in ~~strike-out~~.

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*FOR CONVENIENCE OF REVIEW, ONLY THOSE RULES THAT ARE PROPOSED TO BE  
AMENDED OR REPEALED OR THAT ARE HELPFUL AND PROVIDE CONTEXT TO  
THE PROPOSED AMENDMENTS OR REPEAL HAVE BEEN INCLUDED IN THIS  
EXCERPT.*

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## **PROPOSED AMENDMENT #1**

**Objective:** To clarify the Rule is not intended to be a requirement for an appellant to exhaust administrative remedies before filing an appeal.

**Proposed Rule:** Rule 4.9 is proposed to be modified as follows:

### **RULE 4.9      REQUEST FOR RECONSIDERATION**

To appeal a decision of the District, including any determinations made by the Board or General Manager, concerning any matter not covered under any other section of these rules, a request for reconsideration may be filed with the District within 20 (twenty) calendar days of the date of the decision. Such request for reconsideration must be in writing and must state clear and concise grounds for the request. The Board will make a decision on the request for reconsideration within 45 (forty-five) calendar days thereafter. The failure of the Board to grant or deny the request for reconsideration within 45 (forty-five) calendar days of the date of filing shall constitute a denial of the request. This rule is not intended to be a prerequisite for a person to exhaust administrative remedies prior to filing suit in court.

## **PROPOSED AMENDMENT #2**

**Objective:** To create a process for a person<sup>5</sup> with a real property interest in groundwater located within the District<sup>5</sup> to petition the District to modify or adopt a District rule (required by HB 2443, 88th Leg., Regular Session), including the procedure for submission, consideration, and disposition of the petition.

**Proposed Rule:** The following language is proposed to be added as Rule 6.5:

### **RULE 6.5      PETITION TO MODIFY OR ADOPT DISTRICT RULE**

- (a) A person with a real property interest in groundwater located within the District's jurisdictional boundaries may file a petition with the District to request the adoption or modification of a rule.
- (b) Petitions under this rule must be submitted in writing on the Petition to Adopt or Modify Rules Form adopted and prescribed by the Board to the District office and must comply with the following requirements:
  - (1) A separate petition must be filed for each general topic proposed to be addressed by a rule modification or change;
  - (2) Each petition must be signed and state the full name of each person signing the petition and the person's contact information, including phone number, physical address, mailing address, and email address, if any;
  - (3) Each petition must include:

- (A) proof that the person submitting the petition has a real property interest in groundwater located within the District's jurisdictional boundaries;
  - (B) a written explanation of the proposed rule or rule modification's intended purpose;
  - (C) the text of the proposed rule prepared in a manner to indicate the words to be added or deleted from the text of the current rule, if any; and
  - (D) an allegation of injury or inequity that could result from the failure to adopt the proposed rule.
- (c) If a person is unable to comply with any procedures required under this rule, then the person must submit to the District, on the same day that the person submits a petition under this rule, a written explanation as to why compliance with the required procedure(s) is not possible and must submit a written request that the Board waive the specific procedure(s) at issue. Upon receipt of a written explanation and request as described herein, the Board may, at its sole discretion, waive any procedure set forth under this rule. A petition may be denied for failure to comply with the requirements under this rule.
- (d) The District will provide notice of the Board's consideration of and action on a petition in accordance with District Rule 6.2 at least 20 (twenty) calendar days prior to the date of the hearing.
- (e) Any person with a real property interest in groundwater located within the District may provide written public comment on the petition to the District. It is strongly encouraged that written comment be provided at least seven (7) calendar days before the petition is to be considered at a publicly noticed Board meeting.
- (f) Notice of the Board's consideration of and action on a petition shall be included on a Board agenda with three (3) calendar days' notice compliant with the Texas Open Meetings Act.
- (g) Any person desiring to testify on a petition during a hearing must so indicate on the registration form provided at the hearing. The presiding officer establishes the order of testimony and may limit the number of times a person may speak, and the time period for oral presentations. In addition, the Presiding Officer may limit or exclude questions and cumulative, irrelevant, or unduly repetitious presentations.
- (h) Within 90 (ninety) calendar days after submission of a petition that complies with this rule, the Board shall consider the petition at a Board meeting and either:
- (1) grant the petition in part or in its entirety and initiate rulemaking proceedings on the subject matter identified in the granted petition in accordance with the rulemaking procedure set forth in these rules; or

(2) deny the petition in part or in its entirety and provide an explanation for denial in the minutes of the Board meeting or in a separate written statement to be kept in the District's records.

(i) Nothing in this rule may be construed to create a private cause of action for a decision to accept or deny a petition filed under this rule.

### **PROPOSED AMENDMENT #3**

**Objective:** To create a permit exemption for a temporary use water well used for drilling a permitted groundwater production well permitted by the District (required by SB 1746, 88th Leg., Regular Session).

**Proposed Rule:** Rule 11.3(a) is proposed to be modified as follows:

#### RULE 11.3 PERMIT EXCLUSIONS AND EXEMPTIONS

(a) The District's permit requirements in these rules do not apply to:

- (1) drilling or operating a well used solely for domestic use or for providing water for livestock or poultry if the well is located or to be located on a tract of land larger than 10 acres and drilled, completed, or equipped so that it is incapable of producing more than 25,000 gallons of groundwater a day; provided, however, that this exemption shall also apply after the effective date of this rule to a well to be drilled, completed, or equipped on a tract of land equal to or less than 10 acres in size only if:
  - (A) the well is to be used solely for domestic use or for providing water for livestock or poultry on the tract;
  - (B) such tract was equal to or less than 10 acres in size prior to the effective date of this rule; and
  - (C) such tract is not further subdivided into smaller tracts of land after the effective date of this rule and prior to the drilling, completion, or equipping of the well.
    - i. A well qualifying for exemption under this subsection must observe a minimum distance of 50 feet from the property line and 50 feet from other wells.
    - ii. For purposes of an exemption under this subsection, the terms "livestock use" and "poultry use" do not include livestock or poultry operations that fall under the definition of "Animal Feeding Operation" or "Concentrated Animal Feeding Operation" set forth in District Rule 1.1.

- (2) drilling a water well used solely to supply water for a rig that is actively engaged in drilling or exploration operations for an oil or gas well permitted by the Railroad Commission of Texas provided that the person holding the permit is responsible for drilling and operating the water well and the water well is located on the same lease or field associated with the drilling rig.
- (3) drilling a water well authorized under a permit issued by the Railroad Commission of Texas under Chapter 134, Texas Natural Resources Code, or for production from the well to the extent the withdrawals are required for mining activities regardless of any subsequent use of the water.
- (4) drilling a water well for temporary use to supply water to a rig that is actively engaged in drilling a groundwater production well permitted by the District except that this exemption may not exceed 180 (one hundred eighty) calendar days but may be extended until the groundwater production well is complete.
- (54) an injection water source well permitted by the Railroad Commission of Texas for secondary or enhanced oil or gas recovery.
- (65) a well used for an ASR Project, except as provided under District Rule 18.1.
- (76) monitoring wells.
- (87) leachate wells.
- (98) dewatering wells.

**PROPOSED AMENDMENT #4**

**Objective:** HB 1971 (88th Leg., Regular Session) amended Chapter 36 to expedite the process by which a Board must issue a final decision in a contested case hearing. The following proposed amendments update the District's Rules accordingly and expressly reserve the Board's authority to remand portions of an Administrative Law Judge's (ALJ) proposed final decision (PFD) in light of changes made by HB 1971.

**Proposed Rule:** Rule 11.10.4(g) is proposed to be modified as follows:

**RULE 11.10 PERMIT HEARINGS**

11.10.4 Appearance; Presentation; Time for Presentation; Ability to Supplement; Conduct and Decorum; Written Testimony; Hearing before SOAH:

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(g) SOAH Hearing:

- (1) **Deadline, Location:** If timely requested by the applicant or other party to a contested hearing, the District shall contract with SOAH to conduct the hearing on the application. The Board shall determine whether the SOAH hearing will be held in Travis County or at the District Office or other regular meeting place of the Board, after considering the interests and convenience of the parties, and the expense of a SOAH contract.
- (2) **Costs, Deposit:** The party requesting that the hearing be conducted by SOAH shall pay all costs associated with the contract for the hearing and shall make a deposit with the District in an amount that is sufficient to pay the estimated SOAH contract amount before the hearing begins. If the total cost for the contract exceeds the amount deposited by the paying party at the conclusion of the hearing, the party that requested the hearing shall pay the remaining amount due to pay the final price of the contract. If there are unused funds remaining from the deposit at the conclusion of the hearing, the unused funds shall be refunded to the paying party.
- (3) **Referral:** Upon execution of a contract with SOAH and receipt of the deposit from the appropriate party or parties, the District's Presiding Officer shall refer the application to SOAH. The Presiding Officer's referral to SOAH shall be in writing and shall include procedures established by the Presiding Officer under Subsection (g)(4) below; a copy of the permit application, all evidence admitted at the preliminary hearing, the District's rules and other relevant policies and precedents, the District Management Plan, and the District Act; and guidance and the District's interpretation regarding its regulations, permitting criteria, and other relevant law to be addressed in a Proposal for Decision and Findings of Fact and Conclusions of Law to be prepared by SOAH. The District or Presiding Officer may not attempt to influence the Finding of Facts or the Administrative Law Judge's application of the law in a contested case except by proper evidence and legal argument. SOAH may certify one or more questions to the District's Board seeking the District Board's guidance on District precedent or the District Board's interpretation of its regulations or other relevant law, in which case the District's Board shall reply to SOAH in writing.
- (4) **Procedure before SOAH:** A hearing conducted by SOAH is governed by SOAH's procedural rules; Subchapters C, D, and F, Chapter 2001, Texas Government Code; and, to the extent, not inconsistent with these provisions, any procedures established by the Presiding Officer under District Rule 11.10.3.
- (5) **District's Receipt of SOAH's Proposal for Decision and Findings of Fact and Conclusions of Law:** The District's Board shall conduct a hearing within 45 (forty-five) days of receipt of SOAH's Proposal for Decision and Findings of Fact and

Conclusions of Law, and shall act on the application at this hearing or not later than 60 days after the date that the Board's final hearing on the application is concluded in a manner consistent with Section 2001.058, Texas Government Code. At least ten (10) calendar days prior to this hearing, the Presiding Officer shall provide written notice to the parties of the time and place of the Board's hearing under this subsection by mail and fax, for each party with a fax number. The Presiding Officer shall exercise his or her authority under Rule 11.10.3 in conducting this hearing.

- (6) The Board may (i) remand an issue germane to the application or the proposed findings of fact and conclusions of law, (ii) change a finding of fact or conclusion of law made by the Administrative Law Judge, or ~~may~~ (iii) vacate or modify an order issued by the Administrative Law Judge, only if the Board determines:
  - (A) that the Administrative Law Judge did not properly apply or interpret applicable law, District rules, written policies, or prior administrative decisions;
  - (B) that a prior administrative decision on which the Administrative Law Judge relied is incorrect or should be changed; or
  - (C) that a technical error in a finding of fact should be changed.
- (7) A final decision issued by the Board must be in writing and must either adopt the findings of fact and conclusions of law as proposed by the Administrative Law Judge or include revised findings of fact and conclusions of law consistent with Rule 11.10.4(g)(6).
- (8) Notwithstanding any other rule, for hearings conducted by the State Office of Administrative Hearings, the Board shall issue a final decision not later than the 180th calendar day after the date of receipt of the final proposal for decision from State Office of Administrative Hearings. The deadline may be extended if all parties agree to the extension.
- (9) Notwithstanding any other rule, if a motion for rehearing is filed and granted by the Board under Section 36.412 of the Texas Water Code, the Board shall make a final decision on the application not later than the 90th calendar day after the date of the decision by the Board that was subject to the motion for rehearing.
- (10) Notwithstanding any other rule, the Board is considered to have adopted the final proposed for decision of the Administrative Law Judge as a final order on the 181st calendar day after the date the Administrative Law Judge issued the final proposed for decision if the Board has not issued a final decision by:
  - (A) adopting the findings of fact and conclusions of law as proposed by the Administrative Law Judge; or

(B) issuing revised findings of fact and conclusions of law as set forth in this rule and the Texas Water Code.

(11) A proposed final decision adopted under Rule 11.10.4(g)(10) is final, immediately appealable, and not subject to a request for rehearing.

#### **PROPOSED AMENDMENT #5**

**Objective:** To provide notice that a continuance for a permit hearing may not exceed the time limit for the issuance of a final decision under Section 36.4165, Texas Water Code (180 days) pursuant to HB 1971 (88th Leg., Regular Session).

**Proposed Rule:** Rule 11.10.7 is proposed to be modified as follows:

11.10.7 Continuance: The Presiding Officer may continue hearings or other proceedings from time to time and from place to place without the necessity of publishing, serving, mailing, or otherwise issuing a new notice. If a hearing or other proceeding is continued and a time and place for the hearing or other proceeding to reconvene are not publicly announced at the hearing or other proceeding by the Presiding Officer before it is recessed, a notice of any further setting of the hearing or other proceeding which shall include the date, hour, place and subject of the meeting will be provided by regular mail at a reasonable time to the parties and any other person the Presiding Officer deems appropriate, but it is not necessary to post or publish a notice of the new setting, except as required by the Texas Open Meetings Act. A continuance may not exceed the time limit for the issuance of a final decision under Section 36.4165 of the Texas Water Code. This rule applies only to permit hearings.

#### **PROPOSED AMENDMENT #6**

**Objective:** To provide notice that the Board is required to consolidate requests for rehearing filed by multiple parties to the contested case hearing pursuant to HB 1971 (88th Leg., Regular Session).

**Proposed Rule:** Rule 11.10.11 is proposed to be modified as follows:

11.10.11 Request for Rehearing and Appeal:

- (a) An applicant in a contested or uncontested hearing on an application or a party to a contested hearing may administratively appeal a decision of the Board on a permit or permit amendment application by requesting written findings of fact and conclusions of law from the Board not later than the 20th calendar day after the date of the decision.
- (b) On receipt of a timely written request, the Board shall make written findings and conclusions regarding a decision of the Board on a permit or permit amendment application. The Board shall provide certified copies of the findings and conclusions to the party who requested them, and to each designated party, not later than the 35th calendar day after the date the Board receives the request. A party to the contested case hearing



may request a rehearing before the Board not later than the 20th calendar day after the date the Board issues the findings and conclusions. A party to a contested hearing must first make a request for written findings and conclusions under District Rule 11.10.11(a) before a party to the contested case may submit a request for rehearing under this rule.

- (c) A request for rehearing must be filed in the District office and must state clear and concise grounds for the request. The person requesting a rehearing must provide copies of the request to all parties to the hearing.
- (d) If the Board grants a request for rehearing, the Board shall, after proper notice, schedule the rehearing not later than the 45th calendar day after the date the request is granted.
- (e) The failure of the Board to grant or deny a request for rehearing before the 91st calendar day after the date the request is submitted is a denial of the request.
- (f) A decision by the Board on a permit or permit amendment application is final:
  - (1) if a request for rehearing is not filed on time, on the expiration of the period for filing a request for rehearing;
  - (2) if a request for rehearing is filed on time and the Board denies the request for rehearing, on the date the Board denies the request for rehearing; or
  - (3) if a request for rehearing is filed on time and the Board grants the request for rehearing:
    - (A) on the final date of the rehearing if the Board does not take further action;
    - (B) if the Board takes further action after rehearing, on the expiration of the period for filing a request for rehearing on the Board's modified decision if a request for rehearing is not timely filed; or
    - (C) if the Board takes further action after rehearing and another request for rehearing on this Board action is timely filed, then Subsections 3(A) and (C) of this rule shall govern the finality of the Board's decision.
- (g) The applicant or party to a contested case hearing must exhaust all administrative remedies with the District prior to seeking judicial relief from a District decision on a permit or permit amendment application. After all administrative remedies are exhausted with the District, an applicant or a party to a contested case hearing must file suit in a court of competent jurisdiction in Pecos County to appeal the District's decision on a permit or permit amendment application within 60 (sixty) calendar days after the date the District's decision is final. An applicant or party to a contested case hearing is prohibited from filing suit to appeal a District's permitting decision if a request for rehearing was not timely filed.

(h) The Board shall consolidate requests for rehearing filed by multiple parties to the contested case hearing but only one rehearing may be considered per matter.

### **PROPOSED AMENDMENT #7**

**Objective:** To reflect the increase in maximum allowed export fees and automatic annual increase established by HB 3059 (88th Leg., Regular Session) and to specify how revenue from increased fees may be spent.

**Proposed Rule:** Rule 16.1 is proposed to be modified as follows:

#### RULE 16.1 GROUNDWATER EXPORT FEE

- (a) The District may impose an export fee or surcharge, established by Board resolution, for export of groundwater out of the District using one of the following methods:
- (1) a fee negotiated between the District and the exporter; or
  - (2) a rate not to exceed ~~the equivalent of the District's tax rate per hundred dollars of valuation~~ 20 (twenty) cents for each thousand gallons of water exported from the District ~~or 2.5 cents per thousand gallons of water, if the District assesses a tax rate of less than 2.5 cents per hundred dollars of valuation.~~

If a production fee is assessed, this export fee shall not exceed 10 percent of the amount of the fee assessed for the production of water for use within the District.

- (b) Payment of the Groundwater Export Fee shall be made at a time negotiated under 16.1(a)(1) or not later than the payment deadline established by the General Manager.
- (c) Effective January 1, 2024, the maximum allowable rate the District may impose for an export fee under Rule 16.1(a)(2) shall increase each calendar year in accordance with Section 36.122(e-1) of the Texas Water Code. An increase in the export fee is not valid unless it is approved by the Board after a public hearing. The District may only use funds obtained from the rate increase under this subsection for costs related to assessing and addressing impacts associated with groundwater development as provided by Section 36.207 of the Texas Water Code Section, including:
- (A) maintaining operability of wells significantly affected by groundwater development;
  - (B) developing or distributing alternative water supplies; and
  - (C) conducting aquifer monitoring, data collection, and aquifer science.

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