TESPA
Trinity Edwards Springs Protection Association

FOR IMMEDIATE RELEASE **June 9, 2021**

TESPA Enters Settlement with Barton Springs Edwards Aquifer Conservation District Over Needmore Water LLC Permit

The Trinity Edwards Springs Protection Association (TESPA) today announced a litigation agreement has been reached from the organization's challenge to a decision made by the Barton Springs Edwards Aquifer Conservation District (BSEACD) to issue a groundwater permit to Needmore Water, LLC in Hays County near Wimberley, Texas.

TESPA has been opposing this permit since its application in 2015. In 2019, the BSEACD board voted to grant the permit application as requested by Needmore for use for agricultural irrigation and wildlife.

In February 2020, TESPA attorney Jeff Mundy, filed suit in Travis County state district court challenging the BSEACD decision to grant the permit. This legal action followed numerous administrative challenges by TESPA's prior attorney, Vanessa Puig-Williams.

In the agreement reached with BSEACD and the permit applicant, Needmore Water LLC, the settlement language is clear: "Neither Needmore Water LLC, its successors, or any other person or entity seeking to use the water authorized for production by the Permit cannot seek to amend, convert, or otherwise change the use of the water authorized in the Permit before May 19, 2027."

If Needmore or its successors or assigns seek to convert or amend the permitted use, TESPA has the right to bring suit again challenging the permit on the same basis as the suit filed in 2020.

The recent positive developments in the litigation are related to the ElectroPurification permit which has been the subject of re-evaluation by the BSEACD staff. These new proposed EP permit conditions mark an important new mindset by BSEACD of being far more protective of the aquifer and the people that depend on it.

Given this mindset, TESPA believes it can achieve better outcomes for groundwater protection by working more collaboratively with BSEACD's new general manager, Vanessa Escobar. We are appreciative of her and her staff's efforts. TESPA looks forward to working with Ms. Escobar, the BSEACD staff, and board of directors in the future on new science, methods, and ways to proactively protect the water resources in this area, rather than having to be reactive.

(cont.)

The litigation originally arose out of HB 3405 passed by the Texas Legislature in 2015. This bill gave jurisdiction to BSEACD over previously unregulated portions of the Trinity Aquifer in Hays County including the land now giving rise to the Needmore Water LLC permit application.

TESPA is a non-profit organization whose mission is to protect aquifers from over pumping, the springs that flow from this interconnected system, and the property rights of landowners who depend on and wish to conserve this precious natural resource. www.TESPAtexas.org

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Attachment: Rule 11 Settlement Agreement between TESPA, BSEACD, Needmore Water LLC
In the District Court of Travis County, Texas, 250th Judicial District

Media Contact: Patrick Cox, PhD, Executive Director, TESPA
patrickcox7@gmail.com
512-217-2279

CAUSE NO. D-1-GN-20-000835

TRINITY EDWARDS SPRINGS PROTECTION ASSOCIATION, *Plaintiff*	§	**IN THE DISTRICT COURT OF**
vs.	§	
	§	**TRAVIS COUNTY, TEXAS**
BARTON SPRINGS EDWARDS AQUIFER CONSERVATION DISTRICT, *Defendant*	§	
NEEDMORE WATER, LLC, *Necessary Party/Defendant*	§	**250TH JUDICIAL DISTRICT**

AGREEMENT

1. This Agreement ("Agreement") is entered into between Trinity Edwards Springs Protection Association ("TESPA"), Barton Springs Edwards Aquifer Conservation District ("BSEACD" or the "District") and Needmore Water, LLC ("Needmore"). Together, TESPA, BSEACD, and Needmore are referred to as the "Parties," and each individually as a "Party". This Agreement shall be effective as of May 19, 2021, once the same is fully executed (the "Effective Date").

2. **A** dispute exists among the Parties regarding the final decision of BSEACD to issue Permit No. M024-18-02 with Special Provisions ("Permit") to Needmore Water, LLC authorizing the production of 289,080,000 gallons of groundwater per annum (approximately 887 ac-ft/yr) from a groundwater well known as Well "D" pursuant to the provisions of House Bill 3405, 84th Leg., R.S. Ch.975, 2015 Tex. Gen. Laws 3426-29.

3. A true and correct copy of the BSEACD letter dated January 9, 2020, transmitting the Permit, including a copy of the Permit, is attached hereto as Exhibit "A," and incorporated by reference for all purposes.

4. TESPA contested the Permit before SOAH and, thereafter, the District's Board when Needmore's application was presented for decision. TESPA filed a motion for rehearing in response to the District Board's decision to grant the Permit. The District's Board denied the motion for rehearing on December 12, 2019, in an open and duly noticed public meeting.

5. On February 10, 2020, TESPA filed a lawsuit in Travis County District Court in Cause No. D-1-GN-20-000835, pursuant to Section 36.251, Texas Water Code, appealing the District's decision to grant the Permit (the "Lawsuit"). A true and correct copy of TESPA's file-marked original petition, including exhibits, is attached as Exhibit "B".

6. BSEACD and Needmore have both filed answers in Cause No. D-1-GN-20-000835; and the hearing on the merits of the appeal has been scheduled for August 19, 2021, but the Parties have not yet filed briefing in support of their respective positions in the Lawsuit**.**

7. In an effort to resolve the issues in dispute, and to avoid the cost, inconvenience, and burdens on all Parties associated with continuing the prosecution of the Lawsuit and subsequent appeals, and without either the District or Needmore admitting wrong doing or liability in response to any of TESPA's claims in the Lawsuit, but each continues to deny each and every one of them, the Parties have agreed to compromise the dispute in the Lawsuit, pursuant to the terms and conditions of this Agreement.

Agreement Terms

8. In consideration of the following mutual promises, agreements, and other good and valuable consideration contained herein, the Parties agree as follows.

9. Within three business days of the date this Agreement is fully executed, the Parties will file a joint motion and proposed order to dismiss without prejudice the Lawsuit in the form attached hereto as Exhibit C.

10. If Needmore Water LLC, its successors, assigns, or any other person or entity seeking to use the water authorized for production by the Permit, files an application to amend, convert, or otherwise change the use of the water authorized in the Permit before May 19, 2027, TESPA has the right to raise all objections asserted in the Lawsuit attached as Exhibit B, including refiling of the Lawsuit. After May 18, 2027, TESPA shall no longer have any right to raise the issues and objections asserted in the Lawsuit, and shall have no right to refile the Lawsuit.

11. In the event TESPA refiles the Lawsuit, both BSEACD and Needmore may raise their objections and defenses in response thereto, including without limitation any claims for attorney's fees.

12. So long as TESPA's refiling of the Lawsuit occurs prior to May 18, 2027, and as the result of Needmore's actions identified in paragraph 10, the Parties agree not to raise as a defense any applicable statute of limitations.

13. No party is required to file suit, or to assert any such objections asserted in the Lawsuit or Answers to the suit.

14. All Parties will bear their own costs of court and attorneys' fees incurred up to the time of signing of the order of dismissal without prejudice.

15. Each Party's signatory to this Agreement hereby warrants and represents to the other Parties the following:

(i) such person has authority to bind the Party for whom such person acts;

(ii) the claims, suits, rights, and/or interests that are the subject matter hereof are owned by the Party asserting same, have not been assigned, transferred or sold, and are free of encumbrance; and

(iii) such person has executed it freely and without duress, after having consulted with, or having had the opportunity to consult with, the attorneys of such person's choice.

16. The original signed copy of this Agreement shall be filed with the Court in Cause Number D-1-GN-20-000835, and be enforceable as an agreement pursuant to Texas Rule of Civil Procedure 11, as well as a contractual agreement.

17. This Agreement constitutes the sole agreement between the Parties.

18. All prior oral statements, representations, and agreements, if any, are merged into this Agreement.

19. The Parties are relying solely on their own decision after consultation with their attorneys, and not relying on any representations of the opposing parties.

20. This Agreement may be executed in multiple counterparts with each counterpart constituting an original provided that the Agreement shall become enforceable on the date when the last signatory signs this agreement

SIGNATURES FOLLOW ON NEXT PAGES

TRINITY EDWARDS SPRINGS PROTECTION ASSOCIATION

By: _____ DATE: May 7, 20 21

James Blackburn
President, Board of Directors

BARTON SPRINGS/EDWARDS AQUIFER CONSERVATION DISTRICT

By: Blayne Stansberry
Blayne Stansberry
President, Board of Directors

DATE: June 2, 2021

ATTEST TO SIGNATURE OF BLAYNE STANSBERRY:

By: Tammy Raymond
Tammy Raymond
Assistant Secretary to the Board of Directors

DATE: June 2, 2021

APPROVED AS TO FORM:

By: Bill Dugat III
William D. Dugat III
Attorney for Barton Springs/Edwards
Aquifer Conservation District

DATE: May 31, 2021

NEEDMORE WATER, LLC

By: _____
Greg LaMantia, Manager

DATE: May June 2nd, 2021

Exhibits

Exhibit	Description
A	BSEACD letter dated January 9, 2020, transmitting Permit No. M024-18-02, Issued to Needmore Water LLC pursuant to HB 3405
B	TESPA's Original Petition in Cause No. D-1-GN-20-000835
C	Form Joint Motion for Dismissal Without Prejudice and Proposed Order Granting Dismissal Without Prejudice

Exhibit "A"

BSEACD letter dated January 9, 2020, transmitting Permit No. M024-18-02, Issued to Needmore Water LLC pursuant to HB 3405

Barton Springs Edwards Aquifer
CONSERVATION DISTRICT

January 9, 2020

Sent via regular mail and email

Mr. Greg LaMantia
Needmore Water LLC
3900 N. McColl Rd.
McAllen, TX 78501

RE: Board Approval of a Regular Production Permit Application submitted by Needmore Water LLC to produce from the Middle Trinity Aquifer for the purpose of agricultural use.

Dear Mr. LaMantia:

This letter is to inform you that your production permit application request was **approved by the Board on December 12, 2019**. Your Historical Trinity Production Permit is immediately effective for an authorized volume of **289,080,000 gallons per year.**

Enclosed is a copy of the permit certificate and special provisions. You are also receiving an invoice for an amount of $2,500.00 that will be dedicated to support the monitoring and implementation efforts associated with this permit. All production permits are effective for one year and expire on August 31st of each year. These permits are automatically renewed if the Permittee does not have any outstanding compliance issues or outstanding unpaid invoices. On or around September 1st of each year a renewed permit certificate reflecting the full permit volume will be mailed to you. Production permit fees will also be assessed annually in September of each year and are based on the authorized permit volume at a rate of $1.00 per acre-foot for Agricultural Wells. You have been previously invoiced and have timely paid your production fees for fiscal year 2020.

All permittees are required to submit monthly meter reading forms to the District by the 5th of each month. A meter reading form should be completed for each metered and permitted well. Failure to submit a meter reading will lead to a $50 late fee. I have enclosed a copy of your Drought Target Chart and your signed User Drought Contingency Plan (UDCP) for your records. It is important to reference the monthly allocations of the Drought Target Chart in order to efficiently manage your usage throughout the year. Additionally, all facility personnel should be aware of the complete curtailment requirements during drought.

If you have any further questions or need clarification regarding the information, please feel free to contact Vanessa Escobar or Kendall Bell-Enders by phone at 512/282-8441 or by e-mail at vescobar@bseacd.org or kbellenders@bseacd.org

Sincerely,

Vanessa Escobar
Assistant General Manager

Enclosed:
Permit Certificate with Special Provisions; Drought Target Chart; UDCP; UCP

CC:
Mr. Edmond McCarthy Jr.
McCarthy & McCarthy L.L.P
1122 Colorado St, Suite 2399
Austin, TX 78701

Kaveh Khorzad
Wet Rock Groundwater Services, LLC
317 Ranch Rd 620 South, Suite 203
Austin, TX 78734

Barton Springs/Edwards Aquifer Conservation District
1124 Regal Row Austin, TX 78748
(512) 282-8441

Historical Production Permit

Permit No: M024-18-02

Owner: Needmore Water, LLC

System: Needmore Water, LLC (Well D)

Mail Address: 3900 N. Coll Road
McAllen, TX 78501

Management Zone: Middle Trinity

Number of Wells: 01

State Well No(s): **68-08-306**

Terms: Expires August 31 following the date of issuance. Failure to pay fees, report pumpage, or abide by Rules, Bylaws, or Special Provisions of issuance, will subject this agreement to revocation. Permittee is subject to the enforcement mechanisms available to the District including but not limited to those set out in Rules 3-1.11, 3-1.13, 3-7.11, 3-8.5, 3-8.9 for noncompliance with District Drought Rules including but not limited to mandatory reduction goals.

Authorized Groundwater Withdrawal: Only that amount of water which is required without being wasteful during the term of this agreement, but not to exceed 289,080,000 gallons.

Special Provision: See attached

This Permit is hereby issued this 12th day of December, 2019.

By: Alicia Reynaud-Martinez, General Manager

PERMIT CONDITIONS AND REQUIREMENTS.

All permits are granted subject to the Rules, regulations, Orders, special provisions, and other requirements of the Board, and the laws of the State of Texas. In addition, each permit issued shall be subject to the following conditions and requirements:

1. The permit is granted in accordance with the provisions of S.B. 988 of the 70th Texas Legislature in conjunction with Chapter 36, Texas Water Code, and the Rules, regulations and Orders of the District as may be in effect from time to time, and acceptance of the permit constitutes an acknowledgment and agreement that the permittee will comply with all the terms, provisions, conditions, requirements, limitations, and restrictions embodied in the permit and with the Rules, regulations, and Orders of the District.

2. The permit confers no vested rights in the holder and the permit is non-transferable. Written notice must be given to the District by the permittee prior to any sale or lease of the well covered by the permit. The permit may be revoked or suspended for failure to comply with its terms, which may be modified or amended pursuant to the requirements of the Act and any applicable Rules, regulations and Orders of the District.

3. A permit shall be subject to amendment by the District of the amount of water authorized for pumpage based upon a review of the District's sustainable yield model and a determination by the District that an amendment is necessary after considering adequate water levels in water supply wells and degradation of water quality that could result from low water levels and low spring discharge.

4. The drilling and operation of the well for the authorized use shall be conducted in such a manner as to avoid waste, pollution, or harm to the aquifer.

5. The permittee shall keep accurate records and meter readings, on a monthly basis, of the amount of groundwater withdrawn, the purpose of the withdrawal, and, for any transporting of water outside the District, the amount of water transported and the identity and location of the recipients. Such records shall be submitted to the District office on a monthly basis, unless some other reporting period is specified in the permit, even if there is zero pumpage or transport for the time period and shall also be available for inspection at the permittee's principal place of business by District representatives. Immediate written notice shall be given to the District in the event a withdrawal or transporting of water exceeds the quantity authorized by the permit or Rules. Unless the permittee can present evidence that the pumpage or transport which exceeded the permitted amount is due to an isolated incident that is not likely to be repeated and/or would not result in continued higher demands, the permittee must immediately submit an application to increase the permitted pumpage or transport volume based on the amount of pumpage or transport which exceeded the permitted amount projected for the remainder of the fiscal year.

6. The well site or transport facilities shall be accessible to District representatives for inspection during normal business hours and during emergencies. The permittee agrees to cooperate fully in any reasonable inspection of the well site or transport facilities and related monitoring or sampling by District representatives. The well owner shall provide a 24-hour emergency contact to the District.

7. The application pursuant to which a permit has been issued is incorporated therein, and the permit is granted on the basis of and contingent upon the accuracy of the information supplied in that application and in any amendments thereof. A finding that false information has been supplied shall be grounds for immediate revocation of a permit. In the event of conflict between the provisions of the permit and the contents of the application, the provisions of the permit shall prevail.

8. Driller's logs must be submitted within 60 days of the drilling of a well.

Printed on: 1/9/2020

9. For all new public water supply wells, a 150-feet radius sanitary control easement around the well must be recorded with county of record and evidence of said easement or a variance from TCEQ shall be provided to the District 60 days upon completion of the well.

10. Monitoring of groundwater pumpage is to be accomplished in the manner specified in the District's metering policy and any modifications thereto.

11. Violation of the permit's terms, conditions, requirements, or special provisions, including pumping amounts in excess of authorized withdrawal or transporting amounts outside of the District in excess of the amount authorized for transport, shall be punishable by civil penalties as provided by the Act and these Rules.

12. If special provisions are inconsistent with other provisions or regulations of the District, the Special Provisions shall prevail.

13. A Transport Permit may contain any term, condition, or limitation determined to be warranted by the District's Board based on the factors set forth in Rule 3-1. 6(A), and Section 36.122(d) of the Act.

14. Permittees will notify the District upon filing an application with the TCEQ to obtain or modify CCN to provide water or wastewater service in a service area that lies wholly or partly within the District or for which water shall be supplied from a well located inside the District.

15. Upon request of the District, permittees that are water utilities and that are not in compliance with their permit conditions concerning water use, are required to furnish the District the individual monthly water usage of all end-user customers that exceed the presumptive excessive-use criteria set forth in Section 3-3.7(C) of these Rules.

16. Permittees holding Class B or Class C Conditional Production Permits under Rule 3-1.24(D)(E) must maintain at all times the certain ability and binding commitment to switch from the to-be-permitted volume of groundwater to some alternative water supply source(s) on a 100% basis, including (a) all necessary physical infrastructure and supporting agreements, rates, and tariffs required for such substitution, and (b) the commitment to use the alternative supply as warranted by District-declared drought conditions.

17. A Permit does not authorize use on property within the District other than the well owner's property without prior approval from the District for Multi-user Wells. For Permits approved for Multi-user Wells, the well owner shall be considered the sole permittee and shall be solely responsible for compliance with all applicable rules, permit conditions, and requirements including the multi-user well metering and reporting requirements pursuant to District Rule 3-2.

18. After notice and an opportunity for a hearing, the Permit may be reduced if the authorized withdrawal volume is deemed to be no longer commensurate with reasonable non-speculative demand or if actual production from a well is substantially less than the authorized permit amount for multiple years without any rationale that reasonably relates to efforts to utilize alternative water supplies, conserve, or improve water use efficiency.

19. After notice and an opportunity for a hearing, the Permit may be reduced or curtailed if the authorized withdrawal volume is determined to cause unreasonable impacts or failure to achieve the applicable DFC of the aquifers.

20. Wells must be maintained in good non-deteriorated condition and in compliance with Rule 5 related to District Well Construction Standards.

21. After receiving official notification from the District, the permittee shall implement the approved mitigation plan.

Needmore Water LLC, Well D Permit Application
Special Provisions

Board Action on Permit 7/29/19
Final and Appealable Board Order Granting Permit on 12/12/19

Rule 11 Agreement - Executed 10/31/17
Supplement to Rule 11 Agreement - Executed 7/29/2019

SPECIAL PROVISIONS

SECTION 1. DEFINITION OF TERMS

"Baseline Curtailment Rate (BCR)" - is a calculated annual volume based on the actual metered and reported monthly pumping volumes of the previous 12 months. The previous 12-month total is used to establish an annual volume rate referred to as the Baseline Curtailment Rate (BCR). All required temporary curtailments specified in these special provisions are applied to the BCR on a monthly basis until the drawdown in the index well recovers to the specified water level threshold. The BCR is further described in Section 4 of these provisions.

"Index Well(s)" – is a designated observation or monitoring well that is used to measure the water level and/or quality of water within the aquifer. For the purpose of these provisions, "Amos Index Well" and "Catfish Index Well" are designated as compliance index wells; "Amos Index Well" is the primary index well and "Catfish Index Well" is the secondary index well. Details describing these index wells are found in Section 3 of these provisions.

"Response Action(s)" – is a mandatory measure that the Permittee must comply with and implement per the terms and conditions of this permit and its special provisions. Specific response actions are described in Section 4 of these provisions.

"Trigger" – is a designated water level that prompts a response action once the measured water level is reached. For compliance purposes, the measured water level shall be calculated as a 30-day rolling average of the minimum daily water level (measured depth to water, in feet, from land surface) measurements. Once a Trigger has been reached, the Permittee must implement the appropriate response action. Specific Triggers are described in Section 4 of these provisions.

"Mitigation" – for the purpose of these provisions, this term means any proactive or reactive measures taken by a designated party to prevent, reduce, or remedy actual unreasonable impacts on an operational and adequate well that are unanticipated and unavoidable through reasonable avoidance measures.

"Unreasonable Impacts" – The District interprets unreasonable impacts to mean significant drawdown of the water table or reduction of artesian pressure as a result of pumping from a well or well field, which contributes to, causes, or will cause:

1. well interference related to one or more water wells ceasing to yield water at the ground surface;

2. well interference related to a significant decrease in well yields that results in one or more water wells being unable to obtain either an authorized, historic, or usable volume or rate from a reasonably efficient water well;

3. well interference related to the lowering of water levels below an economically feasible pumping lift or reasonable pump intake level; or

4. the Desired Future Condition (DFC) to not be achieved.

SECTION 2. GENERAL

1. In response to the District's review of the submitted Hydrogeological Report and the subsequent preliminary finding identifying unreasonable impacts resulting from permitted pumping (289,080,000 gallons/yr) of Needmore Well D, the District requires permit-specific Response Actions to be implemented in order to avoid unreasonable impacts. These actions are identified in Section 4 of these provisions. The Permittee must comply with the Response Actions associated with Permit Compliance Level (defined in Section 4 below).

2. These provisions designate the use of a primary index well for which Permit Compliance Levels, Triggers and mandatory Response Actions will be established and monitored for compliance. Section 3 of these provisions further describes the details of each index well. In the event that the primary index well is no longer an adequate well for compliance purposes, the permit may be amended to designate the secondary index well (Catfish Well) to serve as the primary index well.

3. As drawdown in the primary index well approaches each Permit Compliance Level, the District will coordinate an evaluation of the data to assess the actual impacts as compared to the modeled impacts of pumping. The District will coordinate with the permittee to schedule a meeting and to review the data. This meeting will also serve to communicate details about the relevant Response Actions in place, as well as to communicate the need for the Permittee to prepare for the upcoming Response Actions that will be required if subsequent Compliance Levels arereached.

4. When the water level in the primary index well reaches a designated Trigger, the District will notify the Permittee via certified mail within ten business days ("Mailed Notification Letter"). This notification will include a revised pumping chart that reflects the BCR and the mandatory temporary curtailments applied to that volume. Upon receipt of the notification and the revised pumping chart, the Permittee must comply with the curtailed monthly pumping allocation to begin on the first day of the month following notification.

5. The Permittee may submit an amendment application to request revisions or modifications to the permit volume or the permit special provisions. The Board will consider such requests as major amendments and will be processed in accordance with District Rule 3-1.4 B(1) and Rule 3-1.4 C(2) related to notification, Board action, and public hearings.

6. If the District determines through its own coordinated evaluation and investigation that production from the permitted well is causing actual unreasonable impacts (as defined in Section 1 of these Special Provisions) to either the index wells or any other operational well that is adequately equipped, maintained, and completed, then the District may require temporary cessation of pumping until the Board, after notice and opportunity of a hearing, approves a staff-initiated amendment to partially reduce the full permit volume to a rate that will reasonably avoid recurrence of unreasonable impacts.

7. In lieu In lieu of permit reductions required by provision No. 6, the District may consider voluntary Mitigation measures pursuant to any agreement in effect between the District and the Permittee related to Mitigation to remedy the unreasonable impacts. Such Mitigation measures shall be reserved only after all reasonable preemptive avoidance measures have been exhausted, and shall serve as a contingency for the occurrence of unreasonable impacts that were unanticipated and unavoidable through reasonable measures.

8. If the District determines that new pumping centers or large-scale groundwater production within the area of influence are significantly affecting drawdown relative to the permit Compliance Levels, then the District shall consider revision of these permit provisions and permit Compliance Levels. For drawdown significantly affected by production located outside of the jurisdiction of the District, the District's General Manager, with Needmore Water LLC's input, will determine the amount of drawdown not related to Well D and, as appropriate, the General Manager will recommend to the Board adjustment to the permit conditions relative to the amount of draw down. Any permit revisions must be approved by the Board through a permit amendment.

9. Data collected from the index wells that have been determined by the District to be inaccurate shall not be used to determine compliance with these permit provisions.

10. Needmore shall pay the Distinct $2,500 within 60 days of December 12, 2019, which is the date that the Order granting this Permit became final and appealable and thereafter pay the District $2,500 on or before September 1st beginning September 1, 2020 and every September 1st thereafter for so long as the Permit continues in effect consistent with terms of the Settlement Agreement as memorialized in the October 31, 2017, Rule 11 Agreement, as supplemented August 1, 2019 unless the Permit is otherwise amended.

SECTION 3. INDEX WELLS

The District has designated a primary index well (Amos Well) and secondary index well (Catfish Well) for the purpose of monitoring aquifer conditions in the Middle Trinity Aquifer. These provisions further define the Permit Compliance Levels, Response Actions, and Triggers specific to the primary index well. The secondary index well will be monitored to establish correlated data with the primary index well. In the event that the primary index well is no longer an adequate or accessible well for compliance purposes, the permit may be amended to designate the Catfish Well to serve as the primary index well. The District is responsible for compiling, collecting, and archiving data from the monitor wells. Table 1 describes the two index wells.

The Amos Index Well is part of the Hays Trinity Groundwater Conservation District (HTGCD) well monitoring network. It is a domestic well that is operational and in use as an exempt well. The well is completed as a Middle Trinity well located in Hays County approximately two miles from the permitted Well D. An agreement has been secured between the District and the well owner of the Amos Index well granting access and authority to utilize the well as a monitoring and index well. The Catfish Index Well is located in the HTGCD on the Permittee's property referred to as Needmore Ranch. The well is operational and in use as an exempt livestock well. The well is completed to produce from the Middle Trinity Aquifer and is located in Hays County approximately one mile from the permitted Well D.

Table 1. List of index wells for the Needmore Well D production permit.

Index Well	Well Name & Well Number	Coordinates	Physical Address	Well Owner Contact
Primary Index Well	Amos Well	29.961399, -98.064977	600 Mission Trail Wimberley, TX 78676	Stephen & Sharon Amos
Secondary Index Well	Catfish Well	29.970093, -98.052253	Needmore Ranch	Needmore Water, LLC

Amos Index Well Provisions

1. Within 90 days of the effective date of the permit, the District, in coordination with the Permittee and well owner, shall be responsible for purchasing and ensuring the proper installation of monitoring equipment necessary to collect and transmit water level data to a website accessible to the Permittee and the District for the purpose of evaluating compliance with the Section 4 of these Special Provisions.

2. The District shall be responsible for operating, maintaining, repairing, and replacing all monitoring equipment such as pressure transducers, related telemetry equipment, and cell/web hosting fees. All materials and equipment shall be new, free from defects, and fit for the intended purpose. Any expenses for the above described work will be incurred by the District at no cost to the Permittee.

3. The well owner is solely responsible for normal wear and tear, well maintenance, pump servicing or other repairs resulting from the well owner's normal use of the well.

4. The District may consider cost sharing or incurring cost associated with repairs or replacement of any part of the index well that is reasonably necessary or convenient for the continuous and adequate performance of the well for monitoring purposes.

Catfish Index Well Provisions

1. Within 90 days of the effective date of the permit, Permittee shall convey a binding access agreement acceptable to the District for Catfish Index Well that allows the District access for equipment maintenance and repair, and data collection, if warranted.

2. Within 90 days of the effective date of the permit, Permittee shall install, at its own expense, a one-inch conductor pipe to enable the measurement of water level in the Catfish Index Well. In addition, a pressure transducer capable of storing water level data will be installed and data downloaded and provided to the District quarterly. Alternatively, Permittee may assume the expense for the installation of telemetry equipment hosted by the TWDB (assuming TWDB is interested and available). If telemetry equipment is installed and hosted by the TWDB, prior to the telemetry installation, manually collected monthly water level data shall be provided to the District by the fifth of each month along with the required meter reading.

3. The Permittee bears all responsibility and expenses associated with installation, routine maintenance, replacement, repair, or inspection of the pressure transducers or any related telemetry equipment and cell/web hosting fees not covered by the TWDB. All associated work shall be completed by a contractor or contractors selected by Permittee and approved by the District. All materials and equipment shall be new, free from defects, and fit for the intended purpose.

4. The Permittee shall provide notice to the District at least five days in advance of any installation, routine maintenance, replacement or repair of equipment; and shall maintain and submit, upon request by the District, copies of any or all calibration or repair logs. This notice requirement is for both the pumping well and the Catfish Index Well.

5. The Permittee shall be responsible for repairing and replacing any part of the Catfish Index Well. If repairs or replacement of any part of the index well are reasonably necessary or convenient for the continuous and adequate performance of the well, the District shall provide notice and the Permittee shall make repairs and replacements as soon as practicable.

SECTION 4. PERMIT COMPLIANCE ACTIONS

The following Permit Compliance Levels, Response Actions, and Triggers apply to the Amos Index Well as the designated primary index well.

Permit Compliance Level 1 – Evaluation

Trigger 1 - A 30-day rolling average water level equal to or greater than 525 ft below land surface (bls).

Response Action – When drawdown in the Amos Index Well reaches a sustained average water level that is equal to or greater than 525 ft bls, the District will conduct an evaluation of the data to assess the actual impacts of pumping. The evaluation will utilize best available science and methods to consider factors and data including, but not limited to:

a. Manual confirmation of water level data;
b. Calibration and drift of pressure transducer;
c. Actual pumping rate and associated drawdown;
d. Drought conditions;
e. New local interference from pumping both inside and outside of District;
f. Water level trends in monitor wells; and,
g. Revised aquifer parameters (e.g. transmissivity, storativity).

Permit Compliance Level 2 – Avoidance Measures

Trigger 2 - A 30-day rolling average water level equal to or greater than 558 ft bls.

Response Action A - Establish a Baseline Curtailment Rate (BCR)
When drawdown in the Amos Index Well reaches a sustained average water level that is equal to or greater than 558 ft bls, the District will establish a BCR. The BCR is a calculated annual volume based on the actual monthly pumping volumes of the previous 12 months. The previous 12-month total is used to establish an annual volume rate referred to as the BCR. All mandatory temporary curtailments specified in these special provisions are applied to the BCR on a monthly basis.

Response Action B – When drawdown in the Amos Index Well reaches a water level that is equal to or greater than 558 ft bls, the Permittee shall comply with a mandatory temporary monthly curtailment of 20% off the BCR. When the drawdown in the Amos Index Well recovers to a 30-day rolling average water level that is less than 558 ft bls, the mandatory monthly curtailment of 20% shall be completely relaxed. Upon that recovery, authorization for the full permit volume will be restored provided that drought-triggered curtailments do not apply.

Permit Compliance Level 3 – Maximum Drawdown Allowable

Trigger 3 - A 30-day rolling average water level equal to or greater than 575 ft bls.

Response Action – When drawdown in the Amos Index Well reaches a sustained average water level that is equal to or greater than 575 ft bls, the Permittee shall comply with a temporary monthly curtailment of 40% of the BCR. When the drawdown in the Amos Index Well recovers to a 30-day rolling average water level that is greater than 558 ft bls and less than 575 ft bls, the mandatory temporary monthly curtailment of 40% shall be relaxed to 20%.

Permit Compliance Level 4 – Unreasonable Impacts to Existing Wells

Trigger 4 - A 30-day rolling average water level equal to or greater than 580 ft bls.

Response Action – Continued drawdown of water levels that are equal to or greater than 580 ft bls will be considered by the District as evidence of unreasonable impacts to the Amos Well. When drawdown in the Amos Index Well reaches a sustained average water level that is equal to or greater than 580 ft bls, the Permittee shall comply with a temporary cessation of pumping. When the drawdown in the Amos Index Well recovers to a 30-day rolling average water level that is greater than 575 ft bls and less than 580 ft bls, the mandatory temporary cessation of pumping shall be relaxed to temporary monthly curtailment of 40%.

If the District determines through its own coordinated evaluation and investigation that production from the permitted well is causing actual unreasonable impacts (as defined in Section 1 of these Special Provisions) to either the index wells or any other operational well that is adequately equipped, maintained, or completed, then the District may require temporary cessation of pumping until the Board, after notice and opportunity of a hearing, approves a staff-initiated amendment to partially reduce the full permit volume to a rate that will reasonably avoid recurrence of unreasonable impacts.

SECTION 5. DROUGHT CHART & BCR PUMPING CHART

When drawdown in the primary index well reaches the Compliance Level 2 Trigger (558 ft bls), the District will establish a BCR reflected as an annual volume. The Permittee will be issued a revised pumping chart that reflects an annual volume referred to as the BCR. Once the Compliance Level 2 Trigger is reached, this revised pumping chart shall replace all other previous pumping charts or drought target charts in place. Upon receipt of the Mailed Notification Letter and the pumping chart, the Permittee must comply with the curtailed monthly pumping allocation to begin on the first day of the month following notification.

As the drawdown in the primary index well recovers to a water level less than 558 ft bls, the Permittee will no longer be required to comply with the revised pumping chart and may return to following the initially issued drought curtailment chart.

If at any point during the term of the permit, the water level reaches the Compliance Level 2 Trigger (558 ft bls) again after having previously recovered to less than 558 ft bls, the District will recalculate a new BCR and the Permittee will be issued a new revised pumping chart that reflects an annual volume based on a new BCR. For each occurrence of receding water levels reaching the Compliance Level 2 Trigger, a revised pumping chart reflecting a revised BCR shall replace all other previous pumping charts or drought target charts in place. Upon receipt of the Mailed Notification Letter and the pumping chart, the Permittee must comply with the curtailed monthly pumping allocation to begin on the first day of the month following notification.

Drought Target Chart

Historic Trinity Production Permit - Needmore Water LLC

Water Use: Agricultural Livestock
Permitted Pumpage (GPY): 179,965,440

UDCP Approved in Fiscal Year: FY 2016

		Trinity Management Zone Pumpage Volume Targets During Drought Stages					
Fiscal Year	Monthly Volume Allocation	No Drought Baseline No Reduction	Stage I Water Con. Period (Voluntary) 10% Reduction	Stage II Alarm (Mandatory) 20% Reduction	Stage III Critical (Mandatory) 30% Reduction	Stage IV Exceptional (Mandatory) 30% Reduction	Emergency Response Period (Mandatory) 30% Reduction
September	11.00%	19,796,198	17,816,579	15,836,959	13,857,339	13,857,339	13,857,339
October	10.50%	18,896,371	17,006,734	15,117,097	13,227,460	13,227,460	13,227,460
November	9.80%	17,636,613	15,872,952	14,109,290	12,345,629	12,345,629	12,345,629
December	4.00%	7,198,618	6,478,756	5,758,894	5,039,032	5,039,032	5,039,032
January	1.60%	2,879,447	2,591,502	2,303,558	2,015,613	2,015,613	2,015,613
February	1.30%	2,339,551	2,105,596	1,871,641	1,637,686	1,637,686	1,637,686
March	4.80%	8,638,341	7,774,507	6,910,673	6,046,839	6,046,839	6,046,839
April	9.00%	16,196,890	14,577,201	12,957,512	11,337,823	11,337,823	11,337,823
May	12.00%	21,595,853	19,436,268	17,276,682	15,117,097	15,117,097	15,117,097
June	10.80%	19,436,268	17,492,641	15,549,014	13,605,387	13,605,387	13,605,387
July	12.00%	21,595,853	19,436,268	17,276,682	15,117,097	15,117,097	15,117,097
August	13.20%	23,755,438	21,379,894	19,004,350	16,628,807	16,628,807	16,628,807
Annual Totals:	100.00%	179,965,440	161,968,896	143,972,352	125,975,808	125,975,808	125,975,808

Template Updated: 081515

District Representative — Date: 3/25/16

Permittee Signature — Date: 3-14-16

Barton Springs
Edwards Aquifer
CONSERVATION DISTRICT

Historic Trinity
User Drought Contingency Plan
For

Needmore Water, LLC

Agriculture Permittee
(Agriculture Irrigation, Livestock, Wildlife & Aquaculture)

Table of Contents

INTRODUCTION

This UDCP will enable Needmore Water. LLC *(the "Permittee")* to manage its water system and water resources in a conscientious, fair, and appropriate manner during certain situations when water use reductions are necessary. It is not designed to punish, stigmatize, or criticize anyone about their usage of water. Its sole intent is to maintain an adequate supply of water during the various stages of drought conditions or other water supply emergencies, which may occur from time to time.

The Permittee believes that significant reductions in water usage can be achieved through drought triggered water use restrictions and voluntary efforts. Implementation of voluntary water conservation measures and conscientious water use practices are encouraged at all times; however, additional water use restrictions are required in cases of extreme drought, periods of abnormally high usage, system contamination, or extended reduction in ability to supply water due to equipment failure. During drought, these efforts, if sufficiently effective, may delay the depletion of aquifer water levels until sufficient recharge is available to replenish the aquifer(s). Should drought conditions reach more severe levels, the permittee has planned and is prepared to restrict or curtail certain types of usage.

SECTION 1. Declaration of Policy, Purpose, and Intent

Needmore Water, LLC *(permittee)*, in its continuing effort to maintain an adequate supply of high quality water, has prepared this UDCP with the guidance of the Barton Springs/Edwards Aquifer Conservation District (District). In order to maintain supply, storage, or pressure; or to comply with regulatory requirements, temporary restrictions may be instituted to limit nonessential water usage. This UDCP satisfies and complies with District Rules 3-7.5 and 3-7.7 related to Drought Management.

I, Greg LaMantia *(print name)*, being the responsible official for Needmore Water, LLC *(permittee)*, agrees to comply with all the applicable District Rules and the measures of the enclosed User Drought Contingency Plan, and to officially adopt the enclosed plan through the appropriate vehicle (i.e. ordinance, TCEQ tariff amendment, resolution, policy amendment, etc.)

_____**(Signature of Responsible Representative)** __7-19-19__**(Date)**

SECTION 2. Drought Notice

The District will notify permittees of the implementation or termination of each stage of the water restriction program. Permittees must then inform all facility personnel and/or tenants prior to implementation or termination of each stage of the water restriction program. Notice of the District declaration must be provided at least 72 hours prior to the start of water use restrictions. Notice posted onsite at the facility should contain the following information:

1. the date restrictions will begin
2. the circumstances that triggered the restrictions
3. the stages of response and explanation of the restrictions to be implemented

Upon notification of a Drought stage declaration by the District, the permittee will activate the respective response measures of its UDCP. The Permittee will perform the recommended and mandatory actions specified in this UDCP. The Permittee will curtail pumpage according to the following curtailment schedule:

Drought Curtailment Chart

	Edwards Aquifer					Trinity Aquifer
	Historical	Conditional				Historical
		Class A	Class B	Class C	Class D	
No Drought	0%	0%	0%	0%	0%	0%
Water Conservation (Voluntary)	10%	10%	10%	10%	10%	10%
Alarm	20%	20%	50%	100%	100%	20%
Critical	30%	30%	75%	100%	100%	30%
Exceptional	40%	50%[1]	100%	100%	100%	30%
Emergency Response Period	50%[3]	>50%[2]	100%	100%	100%	30%

1. Only applicable to Edwards LPPs and existing unpermitted nonexempts after A to B reclassification triggered by Exceptional Stage declaration
2. Curtailment > 50% subject to Board discretion
3. ERP (50%) curtailments are effective as of October 11, 2015. ERP curtailments to be measured as rolling 90-day average after first three months of declared ERP.

SECTION 3. Alternate Water Sources

The current available alternate water sources and contingency sources for the Permittee include:

Source: N/A

Source: N/A

SECTION 4. Facility Information

The permittee will periodically provide facility staff, employees, personnel and/or ranch hands/managers with information about this Plan, including information about the conditions under which each stage of the plan is to be initiated or terminated and the drought response measures to be implemented in each stage. This information will be provided by means such as employee training/meetings, via email, websites, or print notice. Permittee must notify facility personnel and/or grounds maintenance crews of the initiation or termination of drought responses stages. Documentation of these efforts shall be kept by the Permittee for record and provided to the District upon request.

SECTION 5. Enforcement Procedure

The UDCP must include a means of implementation and enforcement in accordance with District Rule3-7.5 (E). Specifically, each permittee must: 1) develop and implement procedures for enforcing this UDCP and 2) inform Permittee customers or facility personnel of the intent to enforce the measures of the UDCP.

SECTION 6. Drought Stage Triggers and Responses

Permit Type: Historic Middle/Lower Trinity	
No Drought	No curtailment
Stage I Water Conservation (Voluntary)	10% curtailment
Stage II Alarm	20% curtailment
Stage III Critical	30% curtailment
Stage IV Exceptional	30% curtailment
Emergency Response Period	30% curtailment

STAGE I: WATER CONSERVATION PERIOD

INITIATION:
The Permittee will recognize that Stage I Water Conservation Period exists when the District issues a Stage I Water Conservation Period declaration. This water conservation period will be in effect between May 1 and September 30 every year when not already in a declared drought period. The permittee will be expected to follow voluntary water use measures during this water conservation period. This status will be prominently noted on the next regular billing cycle but not more than 20 days following May 1.

TERMINATION:
The Permittee will recognize that Stage I Water Conservation Period may be rescinded when the District issues a No-Drought declaration or has declared a different drought stage. This water conservation period will not be effective during October 1 and April 30 every year.

RECOMMENDED ACTIONS:
Voluntary overall 10% monthly reduction.

RESPONSE MEASURES:
Continue measures of User Conservation Plan.

- All meters throughout the facility shall be read as often as necessary to ensure compliance with monthly curtailments.
- Install float device on livestock water troughs to reduce waste and overflow. Check existing floats for proper functioning.
- Adopt a practice of water use which saturates soils and reduces plant stress.
- Stop regular washing of farm or ranch vehicles and wash only when actually needed.
- Conduct a monthly Leak Detection Survey and immediately repair all identified leaks in the system.
- Monitor any construction activity and require contractors to report line breaks immediately or shutoff flow if possible.
- Maximize process recycled water where possible.

- Employee personnel and system operators should regularly monitor the service area for occurrences of waste or excessive usage.
- Implement employee and personnel awareness efforts by providing training and placing signage in visible places throughout the onsite facility in order to inform employees of the prospective drought stage.
- Utilize the District's drought stages then utilize the correct terminology on all outreach signage, "Stage I Water Conservation Period".

STAGE II: ALARM DROUGHT

INITIATION:
The Permittee will recognize that Stage II Alarm Drought exists upon receiving notification from the Barton Springs/ Edwards Aquifer Conservation District that the District has declared the aquifer to be in a Stage II Alarm Drought; the permittee will activate the **Stage II Alarm Drought** measures of its UDCP.

TERMINATION:
The Permittee will recognize that Stage II Alarm Drought may be rescinded upon receiving notification from the Barton Springs/Edwards Aquifer Conservation District that the District has declared No-Drought or has declared a different drought stage.

MANDATORY ACTIONS:
Mandatory overall minimum 20% monthly reduction.

RESPONSE MEASURES:
Continue measures of User Conservation Plan.

- In an effort to maintain compliance with drought curtailments, the Permittee should establish procedures to adopt and implement the recommended agricultural drought stage measures listed in Appendix A.
- All meters throughout the facility shall be read as often as necessary to ensure compliance with monthly curtailments.
- Install float device on livestock water troughs to reduce waste and overflow. Check existing floats for proper functioning.
- Adopt a practice of water use which saturates soils and reduces plant stress.
- Stop regular washing of farm or ranch vehicles and wash only when actually needed.
- Conduct a monthly Leak Detection Survey and immediately repair all identified leaks in the system.
- Monitor any construction activity and require contractors to report line breaks immediately or shutoff flow if possible.
- Maximize process recycled water where possible.

- Employee personnel and system operators should regularly monitor the service area for occurrences of waste or excessive usage.
- Implement employee and personnel awareness efforts by providing training and placing signage in visible places throughout the onsite facility in order to inform employees of the prospective drought stage.
- Utilize the District's drought stages then utilize the correct terminology on all outreach signage, "Stage II Alarm Drought".

STAGE III: CRITICAL DROUGHT

INITIATION:
The Permittee will recognize that Stage III Critical Drought exists upon receiving notification from the Barton Springs/ Edwards Aquifer Conservation District that the District has declared the aquifer to be in a Stage III Critical Drought; the permittee will activate the **Stage III Critical Drought** measures of its UDCP.

TERMINATION:
The Permittee will recognize that Stage III Critical Drought may be rescinded upon receiving notification from the Barton Springs/ Edwards Aquifer Conservation District that the District has declared No-Drought or has declared a different drought stage.

MANDATORY ACTIONS:
Mandatory overall minimum 30% monthly reduction.

RESPONSE MEASURES:
Continue measures of User Conservation Plan.

- In an effort to maintain compliance with drought curtailments, the Permittee should establish procedures to adopt and implement the recommended agricultural drought stage measures listed in Appendix A.
- All meters throughout the facility shall be read as often as necessary to ensure compliance with monthly curtailments.
- Install float device on livestock water troughs to reduce waste and overflow. Check existing floats for proper functioning.
- Adopt a practice of water use which saturates soils and reduces plant stress.
- Stop regular washing of farm or ranch vehicles and wash only when actually needed.
- No lawn or landscape watering.
- No non-essential use.
- Conduct a monthly Leak Detection Survey and immediately repair all identified leaks in the system.
- Monitor any construction activity and require contractors to report line breaks immediately or shutoff flow if possible.

- Maximize process recycled water where possible.
- Employee personnel and system operators should regularly monitor the service area for occurrences of waste or excessive usage.
- Implement employee and personnel awareness efforts by providing training and placing signage in visible places throughout the onsite facility in order to inform employees of the prospective drought stage.
- Utilize the District's drought stages then utilize the correct terminology on all outreach signage, "Stage III Critical Drought".

STAGE IV: EXCEPTIONAL DROUGHT

INITIATION:
The Permittee will recognize that Stage IV Exceptional Drought exists upon receiving notification from the Barton Springs/ Edwards Aquifer Conservation District that the District has declared the aquifer to be in a Stage IV Exceptional Drought; the permittee will activate the **Stage IV Exceptional Drought** measures of its UDCP.

TERMINATION:
The Permittee will recognize that Stage IV Exceptional Drought may be rescinded upon receiving notification from the Barton Springs/ Edwards Aquifer Conservation District that the District has declared No-Drought or has declared a different drought stage.

MANDATORY ACTIONS:
Mandatory overall minimum 30% monthly reduction.

RESPONSE MEASURES:
Continue measures of User Conservation Plan.

- In an effort to maintain compliance with drought curtailments, the Permittee should establish procedures to adopt and implement the recommended agricultural drought stage measures listed in Appendix A.
- All meters throughout the facility shall be read as often as necessary to ensure compliance with monthly curtailments.
- Install float device on livestock water troughs to reduce waste and overflow. Check existing floats for proper functioning.
- Adopt a practice of water use which saturates soils and reduces plant stress.
- Stop regular washing of farm or ranch vehicles and wash only when actually needed.
- No lawn or landscape watering.
- No non-essential use.
- Conduct a monthly Leak Detection Survey and immediately repair all identified leaks in the system.
- Monitor any construction activity and require contractors to report line breaks immediately or shutoff flow if possible.

- Maximize process recycled water where possible.
- Employee personnel and system operators should regularly monitor the service area for occurrences of waste or excessive usage.
- Implement employee and personnel awareness efforts by providing training and placing signage in visible places throughout the onsite facility in order to inform employees of the prospective drought stage.
- Utilize the District's drought stages then utilize the correct terminology on all outreach signage, "Stage IV Exceptional Drought".

EMERGENCY RESPONSE PERIOD

INITIATION:
The Permittee will recognize that Stage V Emergency Response Period exists upon receiving notification from the Barton Springs/ Edwards Aquifer Conservation District that the District has declared the aquifer to be in a Emergency Response Period; the permittee will activate the **Emergency Response Period** measures of its UDCP.

TERMINATION:
The Permittee will recognize that Emergency Response Period may be rescinded upon receiving notification from the Barton Springs/ Edwards Aquifer Conservation District that the District has declared No-Drought or has declared a different drought stage.

MANDATORY ACTIONS:
Mandatory overall minimum 30% monthly reduction.

RESPONSE MEASURES:
Continue measures of User Conservation Plan.

- In an effort to maintain compliance with drought curtailments, the Permittee should establish procedures to adopt and implement the recommended agricultural drought stage measures listed in Appendix A.
- All meters throughout the facility shall be read as often as necessary to ensure compliance with monthly curtailments.
- Install float device on livestock water troughs to reduce waste and overflow. Check existing floats for proper functioning.
- Adopt a practice of water use which saturates soils and reduces plant stress.
- Stop regular washing of farm or ranch vehicles and wash only when actually needed.
- Use water displacement device in toilet tank.
- No non-essential use.
- Conduct a monthly Leak Detection Survey and immediately repair all identified leaks in the system.

- Monitor any construction activity and require contractors to report line breaks immediately or shutoff flow if possible.
- Maximize process recycled water where possible.
- Employee personnel and system operators should regularly monitor the service area for occurrences of waste or excessive usage.
- Implement employee and personnel awareness efforts by providing training and placing signage in visible places throughout the onsite facility in order to inform employees of the prospective drought stage.
- Utilize the District's drought stages then utilize the correct terminology on all outreach signage, "Emergency Response (ERP) Drought".

- Utilize water reuse where possible.
- Properly distribute small ponds or troughs throughout grazing area.

Aquaculture/ponds

- Understand stockwater requirements to minimize pond size.
- Minimize evaporative losses by designing and constructing reservoirs with smaller surface areas and greater depths.
- Locate ponds in areas that maximum the capture of runoff.
- Select sites for ponds where soils have high clay content to reduce seepage or place a pond liner over the pond bottom when clay soil is unavailable.
- Utilize nighttime aeration of ponds instead of daytime aeration to reduce evaporative loss.
- Fill ponds at night to reduce evaporative loss.
- Compact soils on the pond bottom and sides to reduce seepage.
- Maintain the pond water level several inches below drain pipes so spring and summer rain can be stored.
- Balance stocking rates with available water.
- Utilize supplemental water sources where possible (e.g. collected rainwater, etc.).
- Utilize water reuse where possible.

Permittee Actions:

- Post signs using District terminology at all faucets, sinks, outdoor spigots, and other water sources to remind visitors, customers, facility personnel, grounds maintenance crews and employees of the current drought stage curtailments (not an applicable requirement for residential irrigation).
- Inform employees or grounds maintenance crews of need to reduce water use.
- Monitor for occurrences of waste.
- Visually inspect lines and repair leaks on a regular basis.
- Monitor any construction activity and require contractors to report line breaks immediately or shutoff flow if possible.
- Evaluate system pressure needs and reduce pressure where excessively high.

The following uses of water are defined as **nonessential** and should be limited:

- wash down of any sidewalks, walkways, driveways, parking lots, tennis courts, or other hard-surfaced areas
- use of water to wash down buildings or structures for purposes other than immediate fire protection
- use of water for dust control unless required for mandatory regulatory compliance
- flushing gutters or permitting water to run or accumulate in any gutter or street
- failure to repair a controllable leak(s) within a reasonable period after having been given notice directing the repair of such leak(s) and any waste of water.

Appendix A

Recommended Agricultural Drought Stage Measures

Agricultural Irrigation

- Avoid watering on windy days
- Irrigate only between the hours of 8:00 p.m. and 5:00 a.m.
- Use efficient Low Pressure Center Pivot (LPCP) Irrigation Systems (80% efficiency or higher) such as Low Energy Precision Application (LEPA), Low Elevation Spray Application (LESA), Low Pressure in Canopy (LPIC), or Mid Elevation Spray Application (MESA).
- Low pressure center pivot and linear sprinkler irrigation systems are more water efficient and energy efficient than high pressure systems.
- Where applicable, consider using sub-irrigation systems or using ebb and flood or capillary matt irrigation technologies that incorporate water capture and reuse systems for additional water conservation.
- Line irrigation canals with materials such as concrete, plastic liners, or geomembranes or replace with pipeline.
- Install furrow dikes where possible to reduce runoff and increase infiltration of water.
- Use soil cultivation techniques such as spiking, slicing and core aerification to improve water infiltration and minimize runoff during irrigation or rainfall events.
- Implement an irrigation schedule to ensure efficient and optimal application.
- An irrigation control system shall operate to achieve optimal irrigation efficiency of a crop field using on-site weather station inputs to determine minimum irrigation volumes. The irrigation system shall also be maintained in accordance with the manufacturer's specifications.
- An irrigation control system operated for agricultural irrigation shall have their controllers manually set to achieve optimal irrigation efficiency and to program runtimes to be consistent with recommended watering practices.
- Conduct regular irrigation audits to identify opportunities to improve water use efficiency.
- Implement crop residue management and conservation tillage to improve the ability of the soil to hold moisture, reduce runoff and evaporation of water from soil surface.
- Utilize supplemental water sources where possible (e.g., collected rainwater, etc.).
- Implement brush control/management where applicable.
- Utilize dry-land farming where possible (e.g. permanent pasture, grass seed and/or forage crop mix).
- Utilize water reuse where possible.
- Reference BMPs for Agricultural Water Users: https://www.twdb.texas.gov/conservation/BMPs/Ag/index.asp

Livestock Management

- Balance stocking rates with available forage
- Dry cows need about 8 to 10 gallons of water daily. Cows in their last 3 months of pregnancy may drink up to 15 gallons a day.
- Utilize supplemental water sources where possible (e.g., collected rainwater, etc.).
- Evaporative losses of rainfall can be reduced by maintaining sufficient plant cover to shade the soil surface.
- If applicable, use water efficient irrigation systems and/or reuse water for dust control.
- Avoid setting water troughs to overflow during winter months to prevent freezing.

Barton Springs
Edwards Aquifer
CONSERVATION DISTRICT

User Conservation Plan – Part 1

For

Needmore Water, LLC

Agricultural Permittee (Print Name)

The above named permittee has adopted this User Conservation Plan as required by the Barton Springs/Edwards Aquifer Conservation District and agrees to comply with all the applicable District Rules in implementing and enforcing the measures of the enclosed plan.

Permittee Signature: _____ Date: 7/19/19

Conservation Measures

1. Investigate and implement efficient irrigation practices and utilization of alternate watering sources where possible.
2. Follow a schedule of irrigating in morning and evening times to prevent inefficient evaporation losses.
3. Continue an on-going program of irrigation system leak detection and repair which shall include the consideration and utilization of improved technology when possible.
4. Manage the agricultural areas in such a way that emphasizes precise nutrient management, soil preparation techniques, and adequate watering.
5. Install automatic irrigation systems and controllers for all new irrigation systems. Retrofit manual control systems with automatic systems when feasible.
6. Limit access to irrigation system equipment and controllers only to authorized personnel to prevent inefficient use, unauthorized use, and vandalism of equipment.
7. Implement proper soil management practices such as proper aeration, nutrient management, mowing and soil testing.
8. Implement proper irrigation management practices to prevent overwatering, flooding, pooling, evaporation, and runoff.
9. Implement water use and management practices to protect water quality by preventing organic matter, phosphorus, nitrogen and pathogens from leaching into groundwater or from entering local surface waters with stormwater runoff.
10. Install flow check valves on troughs to reduce waste and overflow.
11. Minimize surface area of stock water tanks/ ponds to reduce evaporative losses.
12. Notify all employees of User Conservation Plan and provide notification of drought stage declarations.
13. Periodically review and evaluate this conservation plan and implement District-approved revisions to the plan as necessary.

User Conservation Plan – Part 2

For

Needmore Water, LLC

Agricultural Permittee (Print Name)

The above named permittee has adopted this User Conservation Plan as required by the Barton Springs/Edwards Aquifer Conservation District and agrees to comply with all the applicable District Rules in implementing and enforcing the measures of the enclosed plan.

Permittee Signature: _____ Date: 7/19/19

User Conservation Plan Checklist - Agricultural Water Use Provide a single "type- written" descriptive statement that addresses each of the requirements.	
Requirement	**Details**
1. Description of Agricultural Uses	Provide a description of all the agricultural water uses on the property and include information about the groundwater distribution process: • List all water sources available. • Describe the overall distribution, conveyance delivery, and storage of groundwater. • Describe the groundwater uses for livestock. • Describe the groundwater uses for wildlife management. • Describe the groundwater uses for agricultural irrigation including crop/vegetation type and irrigation areas.
2. Description of Agricultural Irrigation Systems and Methods	Complete the enclosed Agricultural Irrigation Inventory Form and submit a map as described on the inventory form. Describe each existing irrigation system including system layout and design, specifics on the control system, controllers, valves, irrigation heads, and average run times. Provide a map of the irrigation distribution lines.
3. Description of Agricultural Livestock Operations	Complete the enclosed Agricultural Livestock Inventory Form, Pasture Irrigation Management Form, and submit a map as described on the inventory form. Describe the overall livestock grazing operation and pasture irrigation practices. If groundwater is used for the purposes of filling stock water tanks or ponds that support livestock operations, then include a description of the design and construction of the stock tank/ stock pond (*e.g. constructed tank liner, volume capacity of tank, surface area of tanks etc.*)
4. Description of Wildlife Management	Describe the type and quantity of wildlife supported by groundwater use. If groundwater is used for the purposes of filling stock water tanks or ponds that support wildlife management, then include a description of the design and construction of the stock tank/ stock pond (*e.g. constructed tank liner, volume capacity of tank, surface area of tanks etc.*)

5. Measuring Device/Water Accounting	Describe the methods or devices which will be used to measure and account for water used for irrigation including all meter locations within the system.
6. Specific 5 and 10 Year Water Conservation Goals	Describe specific 5 to 10 year water conservation goals for the site.
7. Irrigation System Maintenance and Leak Detection	Describe all irrigation system maintenance and monitoring practices used to insure optimum performance including leak detection and repair, and equipment and system maintenance regimes.
8. Irrigation Testing and Scheduling	Describe all irrigation testing and scheduling procedures including scheduling procedures to be utilized in the application of water (night/day), and winterization and spring startup procedures.
9. Equipment Upgrades	Describe any and all equipment upgrades installed in the last two years.
10. Agricultural Water Conservation BMPs	Please select the types of agricultural best management practices you currently implement: More detail on each BMP can be found here: http://www.twdb.texas.gov/conservation/BMPs/Ag/index.asp <u>Cropping and Management Practices</u> ☐ On-Farm Irrigation Audit ☐ Irrigation Scheduling ☐ Volumetric Measurement of Irrigation Water Use ☐ Crop Residue Management and Conservation Tillage <u>On-Farm Water Delivery Systems</u> ☐ Drip/Micro-Irrigation System ☐ Gated and Flexible Pipe for Field Water Distribution Systems ☐ Linear Move Sprinkler Irrigation Systems ☐ Lining of On-Farm Irrigation Ditches ☐ Low Pressure Center Pivot Sprinkler Irrigation Systems ☐ Replacement of On-Farm Irrigation Ditches with Pipelines ☐ Surge Flow Irrigation for Field Water Distribution Systems <u>Water District Delivery Systems</u> ☐ Lining of District Irrigation Canals ☐ Replacement of Irrigation District Canals and Lateral Canals with Pipelines <u>Land Management Systems</u> ☐ Conversion of Supplemental Irrigated Farmland to Dry-Land Farmland ☐ Furrow Dikes ☐ Land Leveling <u>Miscellaneous Systems</u> ☐ Nursery Production Systems ☐ Tailwater Recovery and Reuse System

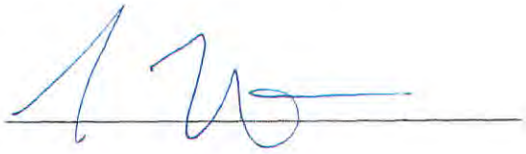
2019 Supplement to Needmore Water LLC's
User Conservation Plan Checklist - Agricultural Water Use

Requirement	Details
1. Description of Agricultural Uses	Pending receipt of its final permit pursuant to HB 3405, the Permittee has not developed a final plan or strategy for use of the 5000 acres of the Needmore Ranch available for agricultural and ranching purposes. At this time, the Permittee has plans to use the Ranch for both cultivation (irrigated agriculture) and ranching (domestic and wild livestock). Upon receipt of the final permit, Permittee will be able to develop its strategy for utilization of the volume of water authorized for production under the HB 3405 Permit across the Needmore Ranch under the special conditions included in the final permit. Tentative plans include a continuation of Permittee's current use of the water for livestock watering, both domestic and wildlife, as well as irrigation of various grains and improved grasses to utilize for feed and forage for its livestock operations. Potential additional agricultural uses may be developed depending upon the final volume of water and the special conditions approved in the HB 3405 regular permit, as well as market conditions. As agricultural and ranching uses are driven by market conditions, from year-to-year, Permittee's final utilization of the water may vary.
2. Description of Agricultural Irrigation Systems and Methods	Permittee has not yet developed, designed, engineered, nor purchased and installed its irrigation system, nor finalized its irrigation methods, pending receipt of the final permit to be issued by the District pursuant to HB 3405, including the special conditions to be included in that permit. Upon receipt of the final permit, with the knowledge of the volume of water available, together with the limitations on its use as prescribed by the special conditions, Permittee will develop a strategy for its agricultural uses of the water authorized by the Permit. Upon development of the strategy, Permittee will engage qualified engineers and other consultants to design the necessary irrigation system and, thereafter, purchase and install the irrigation system equipment necessary to implement the strategy developed based upon the final Permit issued by the District.

3. Description of Agricultural Livestock Operations	Upon receipt of the final Permit pursuant to HB 3405, Permittee will develop and formalize its plan and strategy for livestock operations on the Needmore Ranch. Permittee's affiliated entities acquired the Needmore Ranch *circa* 2012. At the time the Ranch was acquired, the conditions of the Ranch due to both grazing and other misuse by the prior owner required the Permittee to discontinue existing agricultural practices and activities, and remove all livestock from the Ranch and allow the pastures and grazing areas to recover. During the hiatus in active agricultural and livestock operations, in addition to allowing pastures to lay fallow, Permittee re-seeded the pasture areas with native and other improved grasses as part of the recovery process. In addition to removing all domestic livestock, Permittee also harvested and/or removed wildlife from the property to maximize the opportunity for pastures and other foraging areas to recover. Permittee did construct and install a pond on the property which provides dual purpose use of agricultural and livestock watering, as well as domestic and recreational purpose uses. As necessary, from time-to-time, during this interim period, Permittee has produced groundwater on a limited scale basis for watering of the few livestock that were rotated onto the Ranch from time-to-time, irrigation of re-seeded pastures, and maintaining levels in the pond for livestock and wildlife. Upon receipt of the final Permit, with the knowledge of the volume authorized for production and the special conditions limiting its use, Permittee will develop its strategy for livestock operations.
4. Description of Wildlife Management	Permittee currently has a Texas Parks & Wildlife approved Wildlife Management Program in place. The Management Program focuses largely on the management of white tailed dear and similar wildlife native to the Ranch. As noted above, due to the over-grazing and misuse of the acreage within the Ranch by the prior owner, upon acquisition of ownership Permittee harvested and/or relocated livestock, including wildlife livestock, on the Ranch to allow the pastures and other grazing areas to recover. Permittee anticipates continuing to operate under its Texas Parks & Wildlife Improved Wildlife Management Plan and, upon receipt of the final HB 3405 Permit will incorporate in its planning, design and implementation for its agricultural domestic livestock operations, appropriate conditions, measures and facilities for wildlife.

5. Measuring Device/Water Accounting	Again, depending upon the final design and strategy adopted by the Permittee based upon the final permit issued pursuant to HB 3405, inclusive of the final operating special conditions adopted by the District, other strategies, including a water accounting system, may be implemented by the Permittee.
6. Specific 5 and 10 Year Water Conservation Goals	Pending receipt of its final HB 3405 Permit, which will advise the Permittee of the total volume of water available on an annual basis, together with all applicable special conditions, the Permittee has not yet developed specific 5 and 10 year water conservation goals. Upon receipt of the final Permit, as part of its water system planning and implementation, including development of long-term strategies, Permittee will be able to develop specific 5 and 10 year water conservation goals. For the time being, Permittee's additional 5 year water conservation goal is to develop and implement a strategy for a unified water supply system that provides efficient delivery of water for all authorized beneficial uses incorporating water conservation measures. This strategy includes the purchase of permanent equipment for the efficient and effective delivery of the water available from the Permit.
7. Irrigation System Maintenance and Leak Detection	Due to the intermittent and temporary nature of Permittee's need for an irrigation system, irrigation maintenance and leak detection is conducted on an as-needed basis. During periods when Permittee is utilizing water for irrigation purposes from its system, Permittee checks its irrigation equipment on a daily basis to evaluate its condition. Upon identification of a leak, or other maintenance need, Permittee promptly addresses the same. Once Permittee has received its final HB 3405 Permit, Permittee will incorporate in its planning and strategy a more definite statement of irrigation system maintenance and leak detection protocols.
8. Irrigation Testing and Scheduling	Please see Permittee's response and details under Requirement No. 7. above.
9. Equipment Upgrades	Since acquiring the Needmore Ranch, including Well No. D, Permittee has completely rebuilt Well D to exacting specifications provided by the District as a permanent upgrade. Upon receipt of its final HB 3405 Permit, with knowledge of the volumes of water available for production and the special conditions under which the water may be produced, Permittee plans to upgrade all of its irrigation equipment. Permittee also

	plans to do design and strategy development for a system-wide upgrade with qualified professional engineers and irrigation consultants. As part of that program, Permittee anticipates the installation of permanent irrigation facilities that will facilitate the abandonment of current temporary equipment and its related inefficiencies, including aging condition. Again, final design and implementation of Permittee's irrigation system program will be developed upon receipt of the final HB 3405 Permit. As part of its upgrades, Permittee anticipates a review of all current temporary practices including its present use of delivery of water to its livestock/recreational pond utilizing a partial delivery by pipe and subsequent transport down the bed and banks of Sycamore Creek, a non-navigable watercourse owned by Permittee which is used to deliver water to its exempt livestock pond under the laws applicable to both state surface water and utilization of state watercourses.
10. Agricultural Water Conservation BMPs	Permittee is an experienced rancher and farmer with long-term knowledge of use and implementation of irrigation and water delivery systems, as well as water application practices for various types of ranching and farming use for livestock and agricultural irrigation. Permittee intends to continue to utilize that knowledge and experience, however, upon receipt of the final permit and final HB 3405 Permit, with knowledge of the volume of water authorized for production on an annual basis together with the special conditions incorporated into that Permit, Permittee will develop and implement a strategy for design, construction and utilization of the groundwater available under the Permit in an efficient, cost-effective, water conservation oriented manner. As part of the development of that strategy, Permittee anticipates review and incorporation of various best management practices for water conservation, including those practices identified by the Texas Water Development Board and adopted by reference by the District in conjunction with qualified professional engineers and irrigation system consultants.

Permittee Signature: 

Date: 7-22-19

Exhibit "B"

TESPA's Original Petition in Cause No. D-1-GN-20-000835

CAUSE NO. D-1-GN-20-000835

TRINITY EDWARDS SPRINGS PROTECTION ASSOCIATION, *Plaintiff,*	§	**IN THE DISTRICT COURT OF**
VS.	§	**TRAVIS COUNTY, TEXAS**
BARTON SPRINGS EDWARDS AQUIFER CONSERVATION DISTRICT *Defendant.*	§	
NEEDMORE WATER, LLC *Necessary Party.*	§	459TH **JUDICIAL DISTRICT**

TRINITY EDWARDS SPRINGS PROTECTION ASSOCIATION'S
PETITION FOR JUDICIAL REVIEW

To the Honorable Judge,

1. Plaintiff seeks judicial review of a water permit involving the two defendants. Plaintiff has exhausted all administrative remedies and now seeks judicial review pursuant to TEXAS WATER CODE § 36.251 which provides: "[a] person, firm, corporation, or association of persons affected by and dissatisfied with any rule or order made by a district … is entitled to file a suit against the district or its directors to challenge the validity of the law, rule, or order."

INTRODUCTION

2. Humans have many wants; they have but very few true critical needs – food, water, and shelter. This case goes to these core critical needs required to support life and maintain the habitability of family homes near Wimberley, Texas. "Indeed, the State has the responsibility

under the Texas Constitution to preserve and conserve water resources for the benefit of all Texans." Supreme Court Justice, and now Governor, Greg Abbott.[1]

3. TEXAS WATER CODE § 36.0015 mandates that the District will manage groundwater resources to protect all property rights—including landowners impacted by large volumes of nearby groundwater production/withdrawals.

4. Plaintiff, Trinity Edwards Springs Protection Association[2] ("TESPA" or "Plaintiff"), is a group of homeowners and their supporters near Wimberley, Texas. The homeowners challenge Defendant Needmore's application for an unprecedented, staggering, amount of water, 289,000,000 gallons a year for a single property owner, through a permit application from Defendant Barton Springs Aquifer Conservation District, "BSEACD."

5. These rural homeowners, neighbors of Needmore, rely on their water wells to supply the water to their homes for drinking, cooking, and bathing – their very existence and the ability to live in their homes. Defendant Needmore Water, LLC, "Needmore" is one of several shell corporations created for the goal of converting a 5,000 acre ranch on the Blanco River near the homeowners into a large development.[3] [4] Plaintiff contested Needmore's application for the unprecedented water permit before the board of BSEACD, which referred the matter to the State Office of Administrative Hearings, "SOAH." The SOAH administrative law judge, "ALJ," rendered a proposal for decision, attached as Exhibit 1. The District's Findings of Facts and

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1 *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 623 (Tex.,1996)(authored by Justice, now Governor, Abbott).

2 https://tespatexas.org

3 https://www.texasobserver.org/water-mud-and-beer-recipe-for-an-explosive-hill-country-development-fight/

4 https://www.austinchronicle.com/news/2013-05-03/wimberley-water-wars/

Conclusions of Law are attached as Exhibit 2. Plaintiff's motion for rehearing is attached as Exhibit 3.[5]

6. This case arises from a unique bill – HB 3405 (2015 legislative session) - that expanded the groundwater regulatory jurisdiction of the Barton Springs Edwards Aquifer Conservation District. In the bill, the legislature sought to "grandfather" "A ***person operating a well*** before the effective date of this Act or who has entered into a contract before the effective date of this Act." The bill provided that a well owner of an operating water well "shall file an administratively complete permit application with the district...", which once done then required the District to issue a "temporary permit". However, the unique next step is the root of the problems that are presented in this case. A well owner mandatorily issued a "temporary" permit through this bill is done without any discretion by the District in reviewing the permit application. Then, the temporary permit holder, such as defendant Needmore, can apply for a permanent "regular" permit, but which must issue without any discretion by the District to review the initial application triggering this unique permitting process that escapes review of the District's rules and normal permit review process created to protect the water resource.

7. Although the law requires that a temporary permit to be issued for an operating well, the well at issue in this case was not operating at the time of effective date of HB 3405. Further, the district staff determined that the well could not have been operating at the time the permit application was filed including a determination that the well had been "abandoned."

8. TESPA chose to challenge this wrongful issuance at the first opportunity, which by requesting a contested case hearing on the regular permit application, which is now before this Court for judicial review. The BSEACD violated HB 3405 (2015) because the well was not

[5] All pleadings, motions, and orders are in the administrative record, but also may be found here for ease of reference, review, and download. https://tespatexas.org/needmore/needmore-documents

operating at the time of the permit application. ***By filing the permit application, Needmore represented that it was operating a well, which the District staff investigated and found to be not true, yet the District issued permit anyway.*** There are numerous provisions in the law that disallow false filings, some resulting in civil penalties, some in criminal penalties. TESPA merely seeks to hold the District erred in issuing the permit for 289,000,000 gallons of water a year to Needmore based on the statement that the well was "operating" when the District's own staff explicitly found to the contrary. ***In deciding to issue the permit, the District's decision is not based on "substantial evidence" and also violates the District's own rules for decision.***

PARTIES

9. Plaintiff Trinity Edwards Springs Protection Association is a Texas non-profit corporation created to protect the health of the Trinity Aquifer. TESPA is comprised of hundreds of members, many of whom own property in Hays County, Texas, near the Needmore Well.

10. TESPA has "associational standing" to bring this suit on behalf of its impacted members.[6]

11. "The mission of The Trinity Edwards Springs Protection Association (TESPA) is to protect the Trinity and Edwards aquifers from over pumping, the springs that flow from this interconnected system, and the property rights of landowners who depend on and wish to conserve this precious natural resource."

12. Defendant Barton Springs Edwards Aquifer Conservation District is a Texas governmental agency with jurisdiction over groundwater and all water wells in certain portions of Hays County, Texas producing from the Trinity Aquifer, including the Needmore Well.

[6] https://tespatexas.org

Groundwater Conservation Districts are the State's preferred method of groundwater management.

The District may be served with process at its office through:

General Manager
Ms. Vanessa Escobar
1124 Regal Row
Austin, Texas 78748.

13. Needmore Water, LLC., named as a necessary party, is the applicant for the groundwater permit and owner of the groundwater well that is the subject of this Petition for Judicial Review.

Needmore may be served with process on its Registered Agent:

Mr. Greg LaMantia
3900 N. McColl
McAllen, Texas 78501

DISCOVERY CONTROL PLAN – LEVEL 3 & ALIGNMENT OF PARTIES

14. This case is an appeal of actions taken by a governmental agency. If discovery becomes necessary, it should be controlled by a Level 3 discovery plan. TEX. R. CIV. PROC. § 190.4.

15. Needmore and BSEACD have entered into a settlement agreement approved by the District's board of directors. See, Exhibit 2, Findings of Fact 34 – 37.

16. Therefore, Needmore and the District are aligned together as parties adverse to the homeowner members of TESPA, who are also under the jurisdiction of the District.[7] "**Definition of Side.** The term 'side' as used in this rule is not synonymous with 'party,' 'litigant,' or 'person.' Rather, 'side' means one or more litigants who have common interests on the matters with which the jury is concerned." Tex. R. Civ. P. 233.

[7] Finding of fact 34 in Exhibit 3.

17. Plaintiff requests that the Court align the Defendants as one for all purposes, discovery, briefing, scheduling, voir dire, examination of witnesses, and all other matters to preserve a balance in the adversarial process.

INCORPORATION BY REFERENCE

18. Plaintiff's Motion for Rehearing is attached as Exhibit 3 and incorporated by reference for all purposes as part of the substantive facts, law, and allegations in this pleading as provided in Texas Rule of Civil Procedure 58. All allegations of fact and law are incorporated into each cause of action.

PLEADINGS IN THE ALTERNATIVE

19. As provided in Texas Rule of Civil Procedure 48, all matters are plead in the alternative.

JURISDICTION

20. Plaintiff has exhausted all administrative remedies.

21. This Court has jurisdiction over this action pursuant to TEXAS WATER CODE § 36.251. Plaintiff's Motion for Rehearing is attached as Exhibit 3 and incorporated by reference for all purposes as part of the substantive facts, law, and allegations in this pleading as provided in Texas Rule of Civil Procedure 58.

22. This court has jurisdiction of all matters raised in the motion for rehearing.

VENUE

23. The BSEACD has its headquarters in Travis County, Texas, and the acts made the basis of this action occurred in Travis County, Texas. Therefore, venue is proper in Travis County pursuant to TEXAS CIVIL PRACTICE & REMEDIES CODE § 15.002(a)(1) & (3), and 15.038 as TEXAS WATER CODE § 36.251(c) provides venue is proper in any county in which the District

operates. Further, if the Administrative Procedure Act applies to this action, venue is proper in Travis County. TEXAS GOV'T CODE § 2001.176(b)(1).

24. Venue is proper as to defendant Needmore Water LLC as provided in TEXAS CIVIL PRACTICE & REMEDIES CODE § 15.005. Additionally, Needmore Water LLC committed acts made the basis of this action. Therefore, venue is proper pursuant to TEXAS CIVIL PRACTICE & REMEDIES CODE § 15.002(a)(1).

STANDING OF THE ASSOCIATION

25. The SOAH Administrative Law Judge found TESPA had standing and granted it party status to contest this permit. See, Exhibit 2, Findings of Fact and Conclusions of Law, Finding of Fact 33.

26. An association has standing to bring suit on behalf of its members when (1) its members would otherwise have standing to sue in their own right, (2) the interests it seeks to protect are germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested requires the participation in the lawsuit of each of the individual members. *Hunt v. Wash. State Apple Adver. Comm'n,* 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977); *Tex. Ass'n of Bus.,* 852 S.W.2d 440, 447 (Tex. 1993). Applying this three prong test, the Austin Court of Appeals found that a similar group, the Save Our Springs Alliance, met the requirement for associational standing. "The SOS Alliance's petition alleges that its members are residents of Travis and Hays counties who are concerned with water quality in the Edwards Aquifer and Barton Springs Watershed. Under *Groves,* individual members living in the affected area have standing to sue. The interest that the SOS Alliance seeks to protect by this suit—water quality in the Edwards Aquifer and Barton Springs Watershed—unquestionably

reflects the organization's expressed purpose." *Save Our Springs Alliance, Inc. v. Lowry*, 934 S.W.2d 161, 163 (Tex. App. 1996)(orig. proceeding)(internal citation omitted).

A. The First Prong: The Members of TESPA Have Standing to Sue in Their Own Right

27. The association must show that its members "have standing to sue in their own right". *Tex. Ass'n of Bus.*, 852 S.W.2d at 447 explains that the first prong of the associational standing test "should not be interpreted to impose unreasonable obstacles to associational representation.... [T]he purpose of [the first prong] is simply to weed out plaintiffs who try to bring cases, which could not otherwise be brought, by manufacturing allegations of standing that lack any real foundation".

28. Associational standing is not based on an association's direct, independent standing; it is derived from the standing of the individual members of the association. *See Warth v. Seldin,* 422 U.S. 490, 511, 95 S.Ct. 2197, 2211, 45 L.Ed.2d 343 (1975)(explaining that "[e]ven in the absence of injury to itself, an association may have standing solely as the representative of its members"); *see also, Hunt,* 432 at 340 – 42, 97 S.Ct. at 2440 - 41(rejecting contention that the association lacked standing because challenged statute had no impact on the association—the Washington State Apple Advertising Commission—but only upon Washington apple growers and dealers). To hold that only an association directly aggrieved possesses standing is inconsistent with the concept of associational standing articulated by the United States Supreme Court. *See, Hunt v. Washington State Apple Advert. Com'n*, 432 U.S. 333, 340, 97 S. Ct. 2434, 2440, 53 L. Ed. 2d 383 (1977).

29. The fact that the association does not possess direct, independent standing is not relevant to a determination of associational standing so long as the three prongs of the associational standing test are met. *See id.*

B. Second Prong: The interests it seeks to protect are germane to the organization's purpose.

30. This action is well within the express purposes of TESPA. The Certificate of Formation contains TESPA's stated purpose.

> "Section 5.01. The Corporation is organized exclusively for charitable and educational purposes as defined in Section 501(c)(3) of the Internal Revenue Code, ***including, but not limited to***, research, development and publication of proposals ***to protect the health of the Trinity Aquifer, Edwards Aquifer, their groundwater,*** and Hill Country artesian springs including the San Marcos Springs in San Marcos, Texas. These activities include monitoring and protecting endangered and threatened species in the San Marcos Springs and other Hill Country artesian springs; increasing public awareness and understanding of environmental issues in and around Hill Country artesian springs including the San Marcos Springs, such as the hydrologic connectivity of the Trinity Aquifer system and the Edwards Aquifer system via geologic faulting, through media and other educational programs; ***participating in common law or statutory based litigation designed to further these activities***; researching and publishing information about these issues to inform the public; and reviewing and commenting upon existing practices which may or do impact these issues."

C. Third Prong: (3) neither the claim asserted nor the relief requested requires the participation in the lawsuit of each of the individual members.

31. In this action, TESPA seeks only prospective relief to stop the development of this well permit. As no harm has yet occurred, there are no claims for damages asserted. Thus, the individuals are not necessary parties. *See Tex. Ass'n of Bus.*, 852 S.W.2d at 448 (recognizing associational standing under third prong when association sought only prospective relief and did

not need to prove the individual circumstances of its members to obtain that relief); *see also Hunt,* 432 U.S. at 343–44, 97 S.Ct. at 2441–42.

EXHAUSTION OF ADMINISTRATIVE REMEDIES
TIMELY JUDICIAL REVIEW SOUGHT

32. Plaintiff requested findings of fact and conclusions of law as required by the District's rules as a prerequisite to seeking an administrative appeal and judicial review, which the District issued. See, Exhibit 2. Also as required, Plaintiff filed a motion for rehearing, attached as Exhibit 3. The District denied the motion for rehearing on December 12, 2019. The District's rules provide that judicial review must be sought within 60 days of that date (differing from the usual APA deadline of 30 days).

33. **4-9.11. DECISION; WHEN FINAL.**

> A. decision by the Board on a matter identified in Rule 4-9.1(A) above for which a hearing is held 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, or
> 2. if a request for rehearing is filed on time, on the date:
>   1. the Board denies the request for rehearing, or
>   2. the Board renders a written decision after rehearing.
>
> B. Except as provided by Subsection (C) below, an applicant or a party to a contested hearing may file a suit against the District under Section 36.251, Texas Water Code, to appeal a decision on a matter identified in Rule 4-9.1(A) above for which a hearing is held not later than the 60th day after the date on which the decision becomes final.

https://bseacd.org/uploads/BSEACD_Rules_MASTER_032819.pdf

FACTS AND HISTORY

34. In September 2015, Needmore applied to the District for a permit to produce 289,080,000 gallons per year from the Trinity Aquifer at the Needmore Ranch in Hays County

(the "Needmore Application"). Assuming an average household usage of 150 gallons per day, this would meet the needs of 5,280 households.

35. The District's groundwater models project a 140-foot decrease in existing wells' water levels as far out as two miles within seven years of pumping at the requested volume with nearer wells suffering most from the Needmore Well (the "Needmore Well"). The District concluded that under these conditions, Needmore's proposed groundwater production, will cause unreasonable impacts to existing water wells.

36. On July 29, 2019, the District voted to issue Needmore a permit to produce 289,080,000 gallons per year.

37. The District failed to comply with the traditional, protective permitting process under Chapter 36 of the Texas Water Code ("Groundwater Conservation Districts," referred to as "Chapter 36") and the District's rules (the "District Rules") when evaluating and granting Needmore Application.

38. Chapter 36 establishes that the District will manage groundwater resources to protect all property rights—including landowners impacted by large volumes of nearby groundwater production. TEX. WATER CODE § 36.0015. The District's stated mission is being committed to "conserving, protecting, enhancing recharge, and preventing waste of groundwater and to preserving all aquifers within the District."[8] Chapter 36 grants the District rulemaking authority to accomplish this mission.

39. Under TEXAS WATER CODE § 36.251, "[a] person, firm, corporation, or association of persons affected by and dissatisfied with any rule or order made by a district ... is entitled to file a suit against the district or its directors to challenge the validity of the law, rule, or order."

[8] District Management Plan at p. 10 (Sept. 28, 2017).

40. TESPA is a Texas non-profit comprised of hundreds of members, many of whom own groundwater rights directly adjacent or near the Needmore Well.

41. TESPA opposes the Needmore application as a threat to its members' property rights, indeed, their very ability to live in their homes.

42. When the Texas Legislature created the District in 1987 its jurisdiction over groundwater management covered parts of four counties generally defined to include all the area within the Barton Springs segment of the Edwards Aquifer.

43. Effective June 19, 2015, House Bill 3405[9] ("HB 3405") expanded the District's jurisdiction to include the Trinity Aquifer in a portion of Hays County.[10]

44. The Trinity Aquifer underlies the Edwards and is a critical water resource subject to increasing development. HB 3405 and the District Rules implementing it brought all groundwater rights within this expanded jurisdiction under the District's regulatory and permitting regime. HB 3405 and the District's Rules created a two-part permitting process that included a three-month grace period for existing, ***operating*** water wells within the expanded jurisdiction to apply for a "Temporary Permit" to operate while the District processed and considered the request to convert the temporary permits into a "Regular Permit."[11]

45. The special HB 3405 permitting process is different, and far less protective, than the District's usual permitting process in place for anyone seeking groundwater production after the three-month time period or outside of the expanded territory.

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[9] ***All references to HB 3405 are from the 2015 legislative session.***

[10] Act of June 19, 2015, 84th Leg. R.S. Ch. 975, 2015 Tex. Gen. Laws 3426 (HB 3405). A copy of HB 3405 is attached as Exhibit 4.

[11] HB 3405 at Section 4(c)-(d).

46. The special HB 3405 permitting process lacks the necessary protective measures included in the District's usual permitting process for all other applicants within the District's jurisdiction.

47. Water Code chapter 36 governs the District's usual permitting process and requires districts to consider numerous factors before granting or denying a water well production permit application.[12] These factors dictate that the District carefully balance the applicant's interests with the surrounding landowners' property rights and the interest of the public.

48. The HB 3405 permitting process circumvents many of these necessary protections by prohibiting the District from considering: (1) whether the proposed use of water unreasonably affects existing surface water resources (e.g. natural springs and base flow); (2) whether the proposed use of water is dedicated to any beneficial use with a non-speculative demand; and (3) whether the proposed use of water is consistent with the District's management plan. HB 3405 ties the District's hands to protect other landowners' legitimate property rights, including those of many TESPA members.

49. ***HB 3405 limited eligibility for this accelerated "shall issue" temporary permitting process to persons "operating a well before the effective date of this Act*** or who has entered into a contract before the effective date of this Act to drill or operate a well that is or will be located in the territory."[13] (emphasis added). See, Exhibit 2, Conclusion of Law 14.

50. HB 3405 delegates to the District the critical determination of eligibility which the District determines under District Rule 3-1.55.1.

District Rule 3-1.55.1 defines the eligibility criteria for a Temporary Permit as follows:

> A. Eligibility criteria. Persons who meet the following criteria and who submit an administratively complete application on or before

[12] TEX. WATER CODE §36.113(d).
[13] HB 3405 at Section 4(c).

September 19, 2015 may be issued a Temporary Production Permit or Temporary Well Drilling Authorization.

1. The person is ***operating*** an existing nonexempt well on or before June 19, 2015;

2. The person has entered into a contract on or before June 19, 2015 to operate an existing nonexempt well; or

3. The person has entered into an existing contract on or before June 19, 2915 to drill or complete a new nonexempt well. The person would only be eligible for a Temporary Well Drilling Authorization.[14]

51. Needmore's application for a Temporary Permit was for a well on the Needmore Ranch. ***The Needmore well did not qualify for a Temporary Permit under District Rule 3-1.55.1 because the District staff found the Needmore well had been abandoned and was incapable of producing any groundwater.*** The District's board ignored this fact found by its own staff. Therefore, the District's decision is not supported by "substantial evidence." To the contrary, "substantial evidence" from the District's staff was to the contrary. Thus, the need for this judicial review of the District's act of issuing the permit under this special HB 3405 process.

52. Needmore's Temporary Permit application admitted there are no contracts committing the produced water to any use whatsoever, and the District acknowledged that it did not rely on either the second or third conditions when issuing Needmore's Temporary Permit.

53. On October 14, 2015, the District conducted a site visit and discovered the Needmore well was damaged and incapable of producing groundwater. The District concluded the Needmore Well was abandoned pursuant to State law and the District Rules, meaning the District found that the Needmore Well was not used for a beneficial purpose for at least the preceding six months.

[14] District Rule 3-1.55.1.A ("Temporary Permits") (emphasis added).

54. Based on the District's own finding, the Needmore Well had not been in use since before April 19, 2015. The Needmore Well was inoperable on June 19, 2015 when HB 3405 became effective and was thus ineligible for a Temporary Permit under HB 3405 Section 4(c) and District Rule 3-1.55.1.A.

55. The District filed a complaint with the Texas Department of Licensing and Regulation on the basis that the driller had failed to properly drill, case, and cement the annular space of the Needmore Well as required by law. Needmore claimed to be have used the water in the past to fill up a pond on the ranch, but the District also discovered that the pipeline constructed to deliver water from the Needmore Well to the pond was disconnected.

56. On October 19, 2015, the District issued Needmore a Temporary Permit in violation of District Rule 3-1.55.1.

57. The District referred Needmore's application to convert its Temporary Permit into a Regular Permit to the State Office of Administrative Hearings for consideration by an Administrative Law Judge ("ALJ"). TESPA was named a party to that proceeding on July 31, 2017.

58. The District's review of Needmore's application to convert its Temporary Permit to a Regular Permit specifically failed to confirm Needmore's requisite eligibility for the Temporary Permit.

59. The ALJ refused to consider Needmore's eligibility for the initial Temporary Permit or whether issuance of the same was proper, as such fell outside the scope of the hearing.

60. On July 29, 2019, upon conclusion of the SOAH proceeding, the District approved Needmore's application to convert its Temporary Permit to a Regular Permit and authorized production of 289,080,000 gallons per year.

61. On August 15, 2019, TESPA requested the District issue findings of facts and conclusions of law in connection with the Needmore permit. On September 12, 2019, the District issued the same.

62. On October 2, 2019, TESPA timely filed a Motion for Rehearing with the District.[15] On December 12, 2019, the District denied the motion.

63. The District's conversion of the Temporary Permit violated District Rule 3-1.55.4 ("Conversion of Temporary Production Permits to Regular Production Permits") because Needmore never had a valid Temporary Permit upon which the District could act.

64. On July 29, 2019, the Board issued a final order granting Needmore Water, LLC's ("Needmore") request to withdraw over 289 million gallons a year from the Middle Trinity Aquifer within the District's jurisdictional boundaries. On September 12, 2019, the Board issued Findings of Fact and Conclusions of Law. Exhibit 2. For the reasons discussed below, the Board's decision to grant Needmore's permit was arbitrary and capricious, an abuse of discretion, and contrary to Constitutional rights of landowners.

65. Based on the comments made by some of the Directors at the July 29th final hearing such as that the Board had "no choice", "felt hamstrung," and that the process was "ass backwards", and based on the Findings of Fact and Conclusions of Law that the Board adopted, it is obvious that the Board incorrectly interpreted House Bill 3405 (2015) and the District's rules in a way that precluded the Board from denying Needmore's permit request. The Board actually had discretion to deny Needmore's permit because based on the clear language of House Bill 3405 and District rules and based on evidence in the record, and due to these errors by the District's board, Needmore was not eligible for a permit under the unique HB 3405 process.

[15] TESPA Motion for Rehearing is attached to this Petition for Judicial Review as Exhibit 3.

STANDARD FOR REVIEW

66. "The burden of proof is on the petitioner, and the challenged law, rule, order, or act shall be deemed prima facie valid. The review on appeal is governed by the substantial evidence rule as defined by Section 2001.174, Government Code." Tex. Water Code § 36.253.

67. Tex. Gov't Code § 2001.174 (Administrative Procedure Act) provides:

If the law authorizes review of a decision in a contested case under the substantial evidence rule or if the law does not define the scope of judicial review, a court may not substitute its judgment for the judgment of the state agency on the weight of the evidence on questions committed to agency discretion but:

(1) may affirm the agency decision in whole or in part; and

(2) shall reverse or remand the case for further proceedings if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(A) in violation of a constitutional or statutory provision;

(B) in excess of the agency's statutory authority;

(C) made through unlawful procedure;

(D) affected by other error of law;

(E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or

(F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

CAUSES OF ACTION/POINTS OF ERROR

INCORPORATION BY REFERENCE

68. All allegations of fact and of law as well as Plaintiff's Motion for Rehearing, attached as Exhibit 3, are incorporated into each and every cause of action and incorporated by reference for all purposes as part of the substantive facts, law, and allegations in this pleading as provided in Texas Rule of Civil Procedure 58.

PLEADINGS IN THE ALTERNATIVE

69. As provided in Texas Rule of Civil Procedure 48, all matters are plead in the alternative.

CAUSE OF ACTION 1 / POINT 1 - The Board ERRED in its determination that TESPA is not challenging issues related to the conversion of Needmore's Temporary Permit to a Regular Permit, which is not rationally based and is contrary to landowners' Constitutional rights.

70. TESPA has long argued that the Board should never have granted Needmore a Temporary Permit because Needmore did not meet the eligibility requirements in House Bill 3405 and because Needmore falsified critical information in its application. TESPA submitted comments articulating these arguments at the time the Board considered Needmore's Temporary Permit but because House Bill 3405 prohibited hearings on the Temporary Permit, TESPA had no way of formally protesting the District staff's recommendation.

71. The District erred in determining that TESPA's challenge to Needmore's eligibility is not an issue that is relevant to the hearing on the Regular Permit. Conclusion of Law No. 28 states, "Because TESPA is not challenging any issues regarding conversion of Needmore's Temporary Permit to a regular permit, no material fact is in dispute, and as a matter of law, there is no basis for a hearing on issues relating to the granting of a Temporary permit under House Bill 3405. 30 TAC 155.505(a)."

72. To the extent that the District made findings of fact and conclusions of law regarding eligibility for the temporary permit, such issues were clearly before the board and it was legal error not to allow TESPA to challenge the eligibility determination.

73. The result of this determination is that TESPA, and the affected landowners who are members of TESPA, cannot challenge Needmore's eligibility at all. This interpretation deprives affected landowners from protecting their constitutionally protected property rights and denies them the ability to challenge a fundamental issue in this proceeding - eligibility. In reaching this conclusion, the Board misinterpreted applicable law and ignored evidence that TESPA presented, which demonstrated that TESPA is challenging issues regarding conversion of Needmore's Temporary Permit to a Regular Permit.

74. The law allows the District to consider factors related to the Temporary Permit process when evaluating whether to convert a temporary permit into a regular permit under House Bill 3405. As TESPA explained in its Motion for Summary Disposition[16], HB 3405 describes the District's actions as "converting" a Temporary Permit into a Regular Permit – one, streamlined process for the District to issue permits to eligible applicants. Only eligible applicants could apply for a Temporary Permit, and obtaining a Temporary Permit was a prerequisite to receiving a Regular Permit. This is supported by the District's own statement on page 2 of the District's Preliminary Decision to issue Needmore a Regular Permit where the District lists the factors it reviewed in making its Preliminary Decision. Under "Application Review of the *Regular* Production Permit," the third factor the District considered was to "***Confirm eligibility for a Temporary/Regular Production Permit*** (District Rule 3-1.55.1(A))."

[16] Plaintiff requests the Court to take judicial notice of its file and this motion with exhibits, which also is incorporated by reference.

75. The Board's determination in Conclusion of Law No 28. prohibits TESPA and the numerous landowners impacted by production from Needmore's well who are members of TESPA, from challenging Needmore's eligibility – an issue that the District considered pursuant to its rules when it recommended that Needmore's Temporary Permit be converted into a Regular Permit. It is absurd and unreasonable to interpret HB 3405 in a way that prohibits an affected party from challenging the basis upon which a permit was granted, yet this is exactly what the Board's determination in Conclusion of Law No. 28 does. For this reason, the Board erred.

CAUSE OF ACTION 2 / POINT 2. The Board ERRED in its conclusion of law, which led to an erroneous finding of fact that Needmore was eligible to apply for a Temporary Permit. If Needmore was not eligible for the HB 3405 Temporary Permit, then the District could not issue the Regular Permit through the HB 3405 special process.

CAUSE OF ACTION 3 / POINT 3. The District ERRED in either a misinterpretation and/or a misapplication of the law of HB 3405 and its own Rule 3-1.55.1.A, which leads to the District's erroneous conclusion in Conclusion of Law No. 19 that "Under Section 4(c) of House Bill 3405, a well is not required to be operating on the effective date of the statute." Such conclusion is an error of law and literally changes the language of HB 3405 for the benefit of Needmore. The District has no authority to rewrite statutes passed by the Legislature.

76. The District's order to issue Needmore a Temporary Permit violated HB 3405 and District Rule 3-1.55.1.A[17], which expressly require a well to be "operating" as of June 19, 2015, to be eligible for a Temporary Permit.

77. The Needmore well was not operating as of June 19, 2015.

78. In Finding of Fact No. 69, the District Board erred by making a substantive change to the words, and thus substantively changed, the law as stated in HB 3405 and its own Rule of

[17] See, page 66, https://bseacd.org/uploads/BSEACD_Rules_MASTER_032819.pdf

Law incorporating HB 3405, District Rule 3-1.55.1.A, which expressly require a well to be "**operating**" as of June 19, 2015, to be eligible for a Temporary Permit.

79. The District erred in its determination "House Bill 3405 provides that to be eligible for a Temporary Permit an applicant must ***have either been operating*** a well before the effective date, June 19, 2015, or have entered into a contract before the effective date, June 19, 2015." (emphasis added). This change in language from the bill's "operating" to the District rewrite in the Findings of Fact and Conclusions of Law to "have been operating" significantly alters the substantive meaning of the statute and District rules to allow a landowner who had operated a well at some point ever in the past, but not at the time of their application or the effective date of the statute, to apply for a Temporary Permit. ***The District's changing the language of the applicable law, is a misinterpretation and/or a misapplication of the law of HB 3405, which also leads to the Board's erroneous conclusion in Conclusion of Law No. 19 that "Under Section 4(c) of House Bill 3405, a well is not required to be operating on the effective date of the statute."***

80. The District erroneously interpreted language in House Bill 3405 and the District's own rules describing the eligibility requirements for a landowner to apply for a Temporary Permit. Section 4(c) of House Bill 3405 states, "A person **operating** a well before the effective date of this Act or who **has entered** into a contract before the effective date of this Act...shall file an administratively complete permit application with the district..."[18]

81. The District enacted rules implementing HB 3405. Rule 3-.55.1 states, "A person eligible for a Temporary Production Permit or Temporary Well Drilling Authorization may

[18] HB 3405 § 4(c). HB 3405 is codified at Special District Local Laws Code, Chapter 8802.

apply and be issued authorization to drill, operate, or perform another activity related to the nonexempt well pursuant to the following provisions." The rule goes on to state the eligibility criteria as follows:

Eligibility criteria. Persons who meet the following criteria and who submit an administratively complete permit application on or before September 19, 2015, may be issued a Temporary Production Permit or Temporary Well Drilling Authorization.

1. The person ***is operating*** an existing nonexempt well on or before

June 19, 2015;

2. The person has entered into a contract on or before June 19, 2015 to operate an existing nonexempt well; or

3. The person has entered into an existing contract on or before June 19, 2015 to drill or complete a new nonexempt well. The person would only be eligible for a Temporary Well Drilling Authorization. (emphasis added)

82. The language of Section 4(c) of HB 3405 and District Rule 3-.55.1, however, expressly require current operation of a well before the effective date, not past operation of a well before the effective date. Section 4(c) states, "A person **operating** a well before the effective date of this Act or who **has entered** into a contract before the effective date of this Act...shall file an administratively complete permit application with the district..."

83. The word "operating" is the present tense form of "to operate." This means that a person had to be presently operating a well to be eligible to apply for a HB 3405 Permit – very different from saying that a person must "have been operating a well." Furthermore, when the second clause of 4(c) related to contracts is examined, it is obvious that the intent of the Act was to permit only those persons ***currently or presently*** operating a well to apply for a Temporary Permit. This is the most reasonable and logical reading of the statute. The second clause uses the *present perfect* tense of "to enter" — "has entered." The present perfect tense is used to

describe an action that happened at an unspecified time before the present. The use of the present perfect tense makes clear that only those persons who had entered into a contract at a time before the effective date are eligible to apply for a Temporary Permit. Had the drafters intended to allow a person who had been operating a well in the past prior to the effective date of the Act to apply for a Temporary Permit, the drafters would have used the present perfect tense "has operated," just as they did for the language related to contracts or "has been operating," rather than the present tense "operating." The Board overlooks this obvious grammatical distinction in the plain language of the statute.

84. Under the District's interpretation, a person who had been operating his well in 1875 could apply for and receive a Temporary Permit – because he had been operating the well before June 19, 2015. Obviously, this was not HB 3405's intent. The District's interpretation of HB 3405 leads to an absurd result. It would allow landowners to resurrect old, abandoned wells and take advantage of the expedited, less stringent permitting process under HB 3405. Courts will "apply the plain meaning of the text unless a different meaning is supplied by legislative definition or ***is apparent from the context or the plain meaning leads to absurd results***." *Marks v. St. Luke's Episcopal Hosp.,* 319 S.W.3d 658, 663 (Tex.2010).

85. Second, the Board ignored evidence and did not consider relevant factors demonstrating that Needmore was not eligible to apply for a Temporary Permit; therefore, the Board acted arbitrarily and in a capricious manner when it granted Needmore a Regular Permit. The Board ignored the fact that staff made a legal determination that Needmore's Well was abandoned under District Rules and that as a matter of law, the well had not been in operation for six consecutive months.

86. Additionally, the Board actually determined in Finding of Fact No. 16 that "[t]he Temporary Permit contained a condition prohibiting authorized operation of the Well until it was operable and repaired in compliance with State and District Well Construction standards." This determination supports the argument that Needmore was not eligible. Based on the above errors, the Board erroneously determined in Conclusion of Law No. 20 that Needmore met all of the requirements of House Bill 3405.

87. Under case law, an agency abuses its discretion when it fails to consider legally relevant factors.[19] An agency decision—here, a decision to approve Needmore's permit—is arbitrary if it fails to follow the clear, unambiguous language of its own regulations.[20] The clear, unambiguous language of the District's rules states that an applicant must be operating a well at the time House Bill 3405 became effective. The Board's failure to consider legally relevant factors, such as the staff's determination that the well was abandoned, makes its decision arbitrary, and the Board's Order that this permit be granted lacks a rational basis in the record. For these reasons, TESPA opposes Finding of Fact No. 16 and No. 69, and Conclusion of Law No. 19 and No. 20.

CAUSE OF ACTION 4 / POINT 4. The Board ERRED as a matter of law by breaching its duty under its own rule 3-1.55.2(D)(11)[21] to revoke Needmore's permit because it submitted false information in its application.

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[19] *Kawasaki Motors Corp. USA v. Texas Motor Vehicle Com'n*, 855 S.W.2d 792, 795 (Tex. App.—Austin 1993); *see also Consumers Water, Inc. v. Pub. Util. Comm'n of Texas*, 774 S.W.2d 719, 721 (Tex.
App.—Austin 1989).

[20] *Public Utility Com'n of Texas v. Gulf States Utilities Co.*, 809 S.W.2d 201, 207 (Tex. 1991).

[21] See, page 70 of the District's Rules, https://bseacd.org/uploads/BSEACD_Rules_MASTER_032819.pdf

88. ***The Board had the legal duty*** to consider evidence about and revoke Needmore's Temporary Permit and deny the Regular Permit based on the fact that Needmore submitted false information in its application. **BSEACD Rule 3-1.55.2 (D)(11)**[22] states, **"[a] finding that false information has been supplied shall be grounds for immediate revocation of a permit."** The Board breached its duty under its own rules which direct the Board to revoke a permit when an applicant submits false information.

89. Needmore made a material misrepresentation on the application and in a supplemental response to the District that the well was not currently in operation at the time House Bill 3405 became effective. Second, in the descriptive statement on the application, Needmore stated, "[w]ell D…is used for irrigation on the ranch property." This statement is false. According to the *Application Summary and Staff Review,* which is based on statements from the ranch manager and onsite observations, the well had never been used for irrigation. Needmore representatives also led staff to believe that the well was being used for wildlife management purposes pursuant to a wildlife management plan, but there is no evidence in the record that the plan supports the well being used for this purpose.

90. Furthermore, in an in-person meeting with District staff and the Applicant's representatives, the District's General Counsel asked the Applicant's consultant, Kaveh Korzad, specifically whether the reservoir on Needmore Ranch contained any groundwater from the well. According to District's notes from the meeting, Mr. Korzad indicated that it did not. This is a false statement because District staff subsequently learned that in the past the well was used intermittently to supply water to the pond.

[22] See, page 70 of the District's Rules, https://bseacd.org/uploads/BSEACD_Rules_MASTER_032819.pdf

91. Finally, in a supplemental letter dated October 9, 2015, sent to the District, the Applicant stated that major water improvements had been made on the property to support future plans of a three pasture rotation. Specifically, the Applicant indicated that a 2.5-mile pipeline had been constructed on the ranch to provide reliable water within the pasture. However, the District discovered that the pipeline is actually a Shell Oil pipeline. Given these mischaracterizations, which are based on uncontroverted facts, a number of conclusions of law in the Order do not have a rational basis.

92. **The false statement on the initial application that the well was "operating" and the false stated purpose for the on permit for "agricultural" purposes should invalidate the application, and therefore the Temporary Permit and the Regular Permit that flowed from it as void ab initio or the "fruit of the poisonous tree."**

93. The fundamental issue before the Court emanates from a review of whether Needmore was entitled to its initial temporary permit or whether the apparently falsely claimed operating status of the well and purpose for the application stating the purpose was for agricultural purposes invalidates all that flows from it – ***as it the "fruit of the poisonous tree" as that doctrine has been held in common law. Governmental entities, especially those assigned the most grave responsibility of assuring life sustaining water to the public, cannot condone false statements to obtain substantial rights and benefits to the detriment of the public and the public resource.*** A false statement of a material fact on the application should render the application void, at a minimum, and all that flows from the application void ab initio, therefore rendering the Board's order granting the permit void.

CAUSE OF ACTION 5 / POINT 5. The District improperly designated the use type associated with Needmore's permit as Agricultural and Wildlife Management.

TESPA intended to make arguments at the hearing on the merits related to the District's improper designation of the use type associated with Needmore's permit; however, the Administrative Law Judge dismissed our case on an erroneous legal conclusion that the Board adopted in Conclusion of Law No. 28 - that TESPA was not challenging any issues related to the Regular Permit. In the Rule 11 Agreement, TESPA did not limit its challenge to whether the District should have issued a temporary permit to Needmore. TESPA agreed to narrow the focus of its contest to issues related solely to the eligibility of Needmore's application pursuant to HB 3405 § 4(c) and § 4(d). Specifically, TESPA agreed to withdraw and limit pre-filed testimony for certain witnesses and agreed to not offer or present evidence beyond evidence supporting the narrowed issues related to eligibility of Needmore's application pursuant to HB 3405 § 4(c) and § 4(d). TESPA did not limit its challenge to whether the District should have issued the temporary permit to Needmore as Conclusion of Law No. 28 erroneously holds. This Conclusion misinterprets the Rule 11 Agreement and incorrectly holds, "[b]ecause TESPA is not challenging any issues regarding the conversion of Needmore's temporary permit to a regular permit, no material fact is in dispute and, as a matter of law, there is no basis for a hearing on issues relating to the granting of temporary permit under HB 3405. 1 Tex. Admin. Code § 155.505(a). Essentially, the Board's decision is that TESPA "Rule 11'd" itself out of a hearing, which is an absurd result.

94. Furthermore, because the Board erroneously concluded that TESPA limited its argument to whether the District should have issued a temporary permit to Needmore, the Board incorrectly conflates Section 4(c) and (d) of House Bill 3405. As stated, previously, TESPA limited its challenge to Section 4(c) and 4(d) in House Bill 3405. In TESPA's Motion for Summary Disposition, TESPA focused on whether Needmore was eligible to apply for a

Temporary Permit based on the fact that Needmore was not currently operating a well under 4(c). TESPA did not, however, address any of the other issues in 4(d) that the District evaluated at the regular permit stage, such as whether the person's drilling, operating, or other activities associated with the well are consistent with the authorization sought in the permit application – issues which are relevant to a regular hearing and which under the Administrative Procedures Act, TESPA is entitled to argue. Under Section 2001.051(2) of the Government Code, "[i]n a contested case, each party is entitled to an opportunity to respond and to present evidence and argument on each issue involved in the case.

95. As stated above, the Board improperly designated the use type associated with Needmore's permit contrary to the District's rules state law. Section 4(d) of HB 3405 mandates, "The temporary permit issued under this subsection shall provide the person with retroactive and prospective authorization to drill, operate, or perform another activity related to a well for which a permit is required by the district... **if: (1) the person's drilling, operating, or other activities associated with the well are consistent with the authorization sought in the permit application**..." (emphasis added). In other words, a person could only get a Temporary Permit for a use consistent with the current operation of the well. If the person was using the well to irrigate crops, under HB 3405 he could not get a permit to sell water to a city because these are distinct, separately defined categories of uses. Likewise, if a person was using the well to provide water to a watering hole for free ranging wildlife, he could not obtain a permit to use water to irrigate crops.

96. The authorization that Needmore sought in its application was for "Agricultural Irrigation," however, as explained below, Needmore had never actually conducted any irrigation on the Ranch.

97. Under the District's rules in place at the time Needmore applied for a HB 3405 Temporary Permit, Agricultural Irrigation Use was defined as follows:

the use associated with providing water for application to plants or land in connection with cultivating the soil to produce crops for human food, animal feed, or planting seed or for the production of fibers; the practice of floriculture, viticulture, silviculture, and horticulture including the cultivation of plants in containers or non-soil media by a nursery grower; or planting cover crops, including cover crops cultivated for transplantation, or leaving land idle for the purpose of participating in any governmental program or normal crop or livestock rotation procedure.

98. When Needmore applied for a HB 3405 permit, the well had never been used for any of the activities described above in the District's definition of Agricultural Irrigation Use, effective at the time Needmore applied for its permit. Needmore did not disclose this fact to the District. In fact, Needmore falsely stated on the application that the well was an "existing irrigation well." *See* Item 6 on both the Temporary and Regular Permit Applications.

99. The District only learned that Needmore was not irrigating the property on an October 14, 2015, site visit to Needmore Ranch. District staff discovered that Needmore was not currently irrigating the property and that moreover, no irrigation had ever taken place on the ranch. Field notes taken by District staff during this site visit to the property and obtained by TESPA through an Open Records Request, explain that upon visiting the property, staff learned that groundwater had never been used for irrigation and that Needmore had never constructed an irrigation distribution system on the ranch. According to the staff notes, during the onsite visit, Needmore's hydrogeologist stated that the referenced irrigated areas on the application are actually "proposed" projects.

100. In addition, staff learned that the well on Needmore Ranch had only been used intermittently to provide water to a pond that was used for recreational purposes and, allegedly as a watering hole for wildlife. As a result of the site visit, the District determined that Needmore was engaging in Wildlife Management activities, not activities associated with Agricultural Irrigation. Under the District's rules, Wildlife Management was defined as "the watering and/or feeding of free ranging, non-caged, wild animals under a management plan approved by Texas Parks and Wildlife, US Fish and Wildlife Service, or other governmental agency with authority to approve and regulate wildlife management plans." Wildlife Management was not a specific use type under the District's rules, rather it was an activity permitted under the use type, Agricultural Livestock Use, defined as "the use associated with the watering, raising, feeding, or keeping of livestock for breeding purposes or for the production of food or fiber, leather, pelts or other tangible products having a commercial value; **wildlife management**; and raising or keeping equine animals." The District, therefore, determined that the appropriate use consistent with Section 4(d)(1) of HB 3405 was Agricultural Livestock. As a result, on October 19, 2015, the District issued a Temporary Production Permit to Needmore for "Agricultural Livestock" use. However, as stated above, there is no evidence in the record that the Wildlife Management plan supported Well D being used for wildlife purposes; therefore, the District's determination that Needmore was using Well D for Wildlife Management/Agricultural Livestock use was arbitrary.

101. In its October 19, 2015, letter issuing the Temporary Permit, the District explained, "The relevant use type for issuance of the Temporary Production Permit is determined by evaluating the period of time Well D operated before the effective date of HB 3405 (June 19, 2015). The September 19, 2015, Needmore permit application indicated both general and agricultural use

types prior to June 19, 2015, however, the information provided was insufficient to clearly designate the primary use type. Supplemental information provided in response to the District's written requests and information obtained from the District's October 14, 2015, site visit indicated that the well was used solely to supplement a ponded water feature which is used primarily for recreation (swimming, fishing, and boating) and for wildlife. On the basis of this information, the District is initially characterizing the use type for Well D as Agricultural Livestock."

102. Section 4(d)(1) of HB 3405 states that the Temporary Permit "shall provide the person with retroactive and prospective authorization to...operate...a well for which a permit is required by the district...if (1) the person's drilling, operating, or other activities associated with the well are consistent with the authorization sought in the permit application." In other words, a person would not have authorization to operate under a Temporary Permit if the person's activities associated with the well are not consistent with the authorization.

103. By issuing the Temporary Permit for Agricultural Livestock Use, which includes irrigation for cattle and not limiting the use to Wildlife Management, the District impermissibly expanded the types of activities Needmore could pump groundwater for—activities it had not been engaging in at the time it applied for a permit under HB 3405. Furthermore, it its November 15, 2016, proposal to issue Needmore a Regular Permit, the District has once again impermissibly expanded the types of activities for which Needmore can use groundwater from the well. On April 28, 2016, prior to issuing its preliminary decision to grant Needmore a Regular Production Permit, the District adopted new rules adding a new definition -- Agricultural Use, which included several types of activities, such as the cultivation of crops for

human consumption, the practice of floriculture, and horticulture, **and wildlife management**, among other uses.

104. Agricultural Use is defined as: the use of groundwater for any of the following activities, including irrigation to support these agricultural uses:

1. cultivating the soil to produce crops for human food, animal feed, or planting seed or for the production of fibers;

2. the practice of floriculture, viticulture, silviculture, and horticulture, including the cultivation of plants in containers or non-soil media, by a nursery grower;

3. raising, feeding, or keeping animals for breeding purposes or for the production of food or fiber, leather, pelts, or other tangible products having a commercial value (Commercial Livestock Use);

4. planting cover crops, including cover crops cultivated for transplantation, or leaving land idle for the purpose of participating in any governmental program or normal crop or livestock rotation procedure;

5. engaging in wildlife management as defined in the District's Rules and as referenced under a written in-effect wildlife management plan;

6. raising or keeping equine animals; or

7. aquaculture, or active farming of fish, crustaceans or mollusks.

105. Under the new rules, the definitions for Agricultural Livestock Use and Agricultural Irrigation Use are deleted, and the uses associated with these definitions are added to the definition of Agricultural Use. As explained above, under the District's previous rules in place

at the time Needmore applied for its Temporary and Regular Permit in September 2015, Wildlife Management fell under the use type Agricultural Livestock, which is why the District granted Needmore's Temporary Permit for the use type Agricultural Livestock. Wildlife Management activities are not part of the definition of Agricultural Irrigation Use, which was an entirely separate definition and use type. However, the current rules adopted on April 28, 2016, created a new definition for Agricultural Use, which includes both Agricultural Livestock and Agricultural Irrigation.

106. On November 15, 2016, the District issued a proposed Regular Production Permit to Needmore for 289,080,000 gallons of groundwater a year associated with "Agricultural Use," which as explained above combined both the old definition of "Agricultural Livestock" and "Agricultural Irrigation." The result is that Needmore can now use water from the well to grow crops, whereas before under the Temporary Permit, Needmore could only engage in Agricultural Livestock activities. This is an impermissible expansion of the use associated with the well because it is contrary to Section 4(d)(1)'s requirement that the operating activities associated with the well be consistent with the authorization sought.

107. The District's Preliminary Decision to issue the Regular Permit states, "The District has further processed the application for conversion of the Temporary Production Permit to a Regular Historical Production Permit to authorize withdrawal of an annual permitted volume of approximately 289,080,000 gallons per year of groundwater from the Trinity Aquifer. The Applicant will continue to operate the existing well for wildlife management and future agricultural uses." This statement makes clear that the Regular Permit is based on the historical use of the well, which the District determined was for Wildlife Management, thus Needmore should not be able to use groundwater from the well to conduct any type of irrigation activities

because doing so is contrary to Section 4(d)(1) of HB 3405. However, by assigning the new "Agricultural Use" definition to the proposed permit and stating that Needmore can engage in "future agricultural uses," the District is permitting Needmore to engage in uses that are not consistent with the past use of the well contrary to HB 3405. Nowhere in HB 3405 does it state that the District has the authority to change the use type in the Regular Permit that was associated with the Temporary Permit.

108. Furthermore, by applying the new definition of Agricultural Use to Needmore's Regular Permit application, the District has essentially allowed Needmore to change the use type under its HB 3405 permit without triggering a permit amendment, which is contrary to the District's rules. On March 23, 2016, prior to the District formally adopting the rules on April 28, 2016, TESPA submitted comments to the District making this argument.

109. District Rule 3-1.55.4 governs the process the District follows to convert Temporary Permits to Regular Permits. Rule 3-1.55.4(D) states, "All Regular Production Permits are granted subject to the Rules, regulations, Orders, special provisions, and other requirements of the Board and the laws of the State of Texas." Under Rule 3-1.9(A), changing the use type of a permit is considered a major amendment. Under Rule 3-1.9(B), "Major amendments shall be subject to all the requirements and procedures applicable to issuance of a Production Permit for a new well or, if applicable, a Transport Permit. Under Rule 3-1.9(C), "Amendments to change the use type of a Production Permit will require the recalculation of the permitted volume to be commensurate with the reasonable non-speculative demand of the new use type." 3-1.9(C). Because under the proposed rules the District has expanded the definition of Agricultural Use to include Wildlife Management, Needmore could engage in any of the activities defined as

Agricultural Use, for example irrigation for crops, without triggering a change in use type and recalculation of the permitted volume as described above in 3-1.9(C).

110. Needmore has argued that it can support its requested volume of 289,080,000 gallons of groundwater a year without wasting water by conducting extensive agricultural irrigation operations on the property – something that Needmore would not have been permitted to do if the District had not expanded the definition of Agricultural Use and impermissibly applied it to Needmore.

111. Moreover, the District acted arbitrarily, and thus erred, when it assigned Wildlife Management as the use type. As described above, the District assigned Wildlife Management as the use type because Needmore stated that groundwater from the well had been used to fill a pond for wildlife under a wildlife management plan approved by Texas Parks and Wildlife. However, Needmore's Wildlife Management Plan does not reference Well D at all and does not specify that Well D is used to fill a pond for wildlife management purposes. Consequently, Finding of Fact No. 9 is erroneous, and the District erred, when it ignored legally relevant evidence and acted arbitrarily when it issued Needmore's permit for Agricultural use premised on Wildlife Management.

CAUSE OF ACTION 6 / POINT 6. The District's order to convert Needmore's Temporary Permit into a Regular Permit violated District Rule 3-1.55.4.

112. District Rule 3-1.55.4.B.3.c[23] expressly requires an applicant comply with all other District rules before the District can convert a Temporary Permit into a Regular Permit.

113. Needmore was not eligible for a Temporary Permit under District Rule 3-1.55.1.A.

[23] See, page 72, https://bseacd.org/uploads/BSEACD_Rules_MASTER_032819.pdf

114. Needmore was in violation of District Rule 3-1.55.1.A when the District converted Needmore's Temporary Permit into a Regular Permit.

CONCLUSION & RELIEF REQUESTED

115. The Board's decision to grant Needmore a permit to pump an unprecedented amount of water, over 289,000,000 gallons a year when Needmore was not even eligible to apply for a permit is premised on multiple erroneous findings of fact not supported by substantial evidence and is contrary to the enabling statute and the rules of the District.

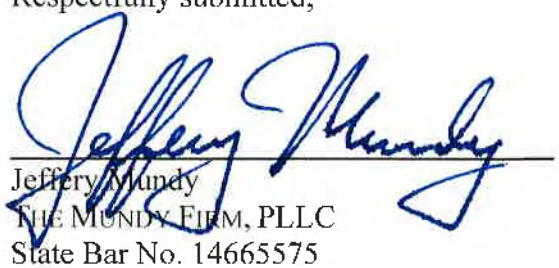
116. TESPA requests that the Court to reverse the District's order granting a permit Needmore and render judgment that Needmore was not entitled to receive a Temporary Permit and therefore, was not entitled to a Regular Permit under House Bill 3405. District staff determined that Needmore's Well was abandoned, therefore, Needmore was not eligible to apply for a permit under House Bill 3405. Moreover, Needmore took advantage of the expedited, less stringent permitting process that House Bill 3405 created for eligible wells – misrepresenting critical facts on its application. The Board has the legal duty to deny Needmore's permit, which it breached as a matter of law by failing to do so and the Court should so rule.

117. Any one of these reasons is sufficient for the Court to hold the Defendant's action of converting Needmore's Temporary Permit as arbitrary for ignoring its own rules and not supported by substantial evidence and because it was the product of an unlawful improper procedure, thereby requiring the permit to be denied and the District's grant of the permit to be reversed or voided.

118. In the alternative, should questions of fact remain necessary for determination, Plaintiff r requests the Court reverse the District's order issuing Needmore's Temporary Permit and

subsequent conversion of the same into a Regular Permit and remand this matter to the District for further proceedings pursuant to the usual and regular permitting process established by Texas Water Code, Chapter 36, and the District's. Plaintiff further requests all other relief in law or equity to which Plaintiff may be justly entitled.

Respectfully submitted,

By: 

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ATTORNEY FOR TESPA

Exhibit 1A

State Office of Administrative Hearings

Lesli G. Ginn
Chief Administrative Law Judge

July 23, 2018

Emily Rogers
Bickerstaff Heath Delgado Acosta, L.L.P.
3711 Mopac Expressway, Bldg. 1, Ste. 300
Austin, TX 78746

VIA REGULAR MAIL

RE: Docket No. 957-17-2582; NEEDMORE WATER LLC v. BARTON SPRINGS EDWARDS AQUIFER CONSERVATION DISTRICT

Dear Ms. Rogers:

Please find enclosed a Proposal for Decision on Summary Disposition in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 Tex. Admin. Code § 155.507(c), a SOAH rule which may be found at www.soah.texas.gov.

Sincerely,

Stephanie Frazee

Stephanie Frazee
Administrative Law Judge

SF/ls
Enclosure
xc: Ed McCarthy, McCarthy & McCarthy, LLP, 1122 Colorado Street, Ste. 2399, Austin, TX 78701 – **VIA REGULAR MAIL**
Bill Dugat, III, Bickerstaff Heath Delgado Acosta, LLP, 3711 S. Mopac Expressway, Building 1, Ste. 300, Austin, TX. 78746 – **VIA REGULAR MAIL**
Vanessa Puig-Williams, P. O. Box 160971, Austin, TX 78716 – **VIA REGULAR MAIL**
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SOAH DOCKET NO. 957-17-2582

NEEDMORE WATER LLC	§	**BEFORE THE STATE OFFICE**
	§	
v.	§	**OF**
	§	
BARTON SPRINGS EDWARDS	§	
AQUIFER CONSERVATION DISTRICT	§	**ADMINISTRATIVE HEARINGS**

PROPOSAL FOR DECISION ON SUMMARY DISPOSITION

In 2015, the Texas Legislature passed House Bill 3405 (HB 3405), which expanded the jurisdiction of the Barton Springs Edwards Aquifer Conservation District (District); created an expedited process for granting temporary permits to wells that were located in the District's new jurisdiction; and provided a process for converting a temporary permit into a regular permit. The expanded jurisdiction included a well located at Needmore Ranch. The District granted a temporary permit to Needmore Water LLC (Needmore) on November 19, 2015. This case arose from Trinity Edwards Springs Protection Association's (TESPA) challenge to the conversion of Needmore's temporary permit to a regular permit.

Needmore and TESPA filed cross-motions for summary disposition. The District opposed TESPA's motion and agreed with Needmore's motion.

As set forth below, the Administrative Law Judge (ALJ) concludes that Needmore's motion for summary disposition should be granted and that TESPA's motion should be denied.

I. PROCEDURAL HISTORY

On September 19, 2015, in accordance with HB 3405, Needmore applied to the District for a temporary permit and a regular permit to produce 289,080,000 gallons of groundwater per year from the Trinity Aquifer. The District issued a temporary permit to Needmore on November 19, 2015. On November 22, 2016, the District's General Manager published a Preliminary Decision recommending that the District grant Needmore's regular permit with

authorization to produce 289,080,000 gallons of groundwater per year. The General Manager also recommended including Special Provisions in the permit designed to avoid unreasonable impacts to existing wells. Needmore objected to those Special Provisions.

On December 19, 2016, TESPA requested that the District refer its challenge to the issuance of Needmore's regular permit to the State Office of Administrative Hearings (SOAH) as a contested case. On January 12, 2017, Needmore submitted a brief to the District arguing that HB 3405 does not permit third parties to contest permit applications. The District considered Needmore's arguments at its January 12, 2017 Board meeting, and on February 3, 2017, the District referred this case to SOAH.

The ALJ convened a telephonic prehearing conference on March 6, 2017, during which Needmore indicated that it contested TESPA's standing to participate as a party in the case. A briefing schedule was set, and the parties briefed the issue of standing. Additionally, Needmore filed a Plea to the Jurisdiction, which was opposed by the District and TESPA. On May 19, 2017, the ALJ issued Order No. 3, which denied Needmore's Plea to the Jurisdiction and set a prehearing conference to address TESPA's standing as a party to this case.

The prehearing conference was held on July 31, 2017, and the parties presented extensive evidence and argument regarding the issue of standing. The ALJ determined that TESPA had standing and granted its request for party status, and the hearing on the merits was scheduled.

On February 20, 2018, Needmore and TESPA filed cross-motions for summary disposition, and the parties filed a Joint Motion to Modify the Hearing Schedule.[1] The Joint Motion to Modify the Hearing Schedule stated that the parties had entered into a Rule 11 agreement on February 16, 2018, which resulted in a narrowing of the issues being contested by TESPA in this case. Specifically, TESPA agreed that it was challenging only the issues raised in its Motion for Summary Disposition: whether Needmore was eligible to obtain a temporary

[1] The Joint Motion to Modify the Hearing Schedule was granted in Order No. 9, issued on February 22, 2018.

permit pursuant to HB 3405, Section 4(c) and (d). TESPA withdrew the prefiled testimony of two of its witnesses as a result of the Rule 11 agreement.

On February 23, 2018, the District filed a response opposing TESPA's motion. On February 26, 2018, Needmore filed a response opposing TESPA's motion, and on March 2, 2018, TESPA filed a response opposing Needmore's motion. Also on March 2, 2018, the District filed a response in support of Needmore's motion. On March 5, 2018, the ALJ convened a prehearing conference on the motions, during which the parties presented additional arguments.

On June 6, 2018, the ALJ issued Order No. 10, which granted summary disposition in favor of Needmore and denied TESPA's motion for summary disposition. The record closed on that date.

II. APPLICABLE LAW

The District is a groundwater conservation district created under Section 59, Article XVI of the Texas Constitution. Chapter 8802 of the Texas Special District Local Laws Code (Chapter 8802) governs the District.[2] Except as provided by Chapter 8802, the District has the rights, powers, privileges, functions, and duties provided by the general law of this state, including Chapter 36 of the Texas Water Code, applicable to groundwater conservation districts created under Section 59, Article XVI of the Texas Constitution.[3] The Board of the District must adopt and enforce rules to implement Chapter 36 of the Texas Water Code, including rules governing procedure before the Board.[4] The Board adopted rules implementing HB 3405.[5]

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[2] Tex. Spec. Dist. Code ch. 8802.

[3] Tex. Spec. Dist. Code § 8802.101.

[4] Tex. Water Code § 36.101(b).

[5] *See* District Rules and Bylaws, *available at* https://bseacd.org/uploads/081816FINAL-BSEACD-Rule_MASTER.pdf; Tex. H.B. 3405, 84th Leg., R.S. (2015).

HB 3405 sets forth the process for permitting of wells located in the territory added to the District through passage of that bill. Section 4(c) of HB 3405 provides the following:

> A person operating a well before the effective date of this Act or who has entered into a contract before the effective date of this Act to drill or operate a well that is or will be located in the territory described by Subsection (b) of this section and subject to the jurisdiction of the district under Section 8802.0035, Special District Local Laws Code, as added by this Act, shall file an administratively complete permit application with the district not later than three months after the effective date of this Act for the drilling, equipping, completion, or operation of any well if the well requires a permit under the rules or orders of the district. The person may file the permit application for an amount of groundwater production not to exceed the maximum production capacity of the well.[6]

Under Section 4(d) of HB 3405, "[t]he [D]istrict shall issue a temporary permit to a person who files an application under Subsection (c) of this section without a hearing on the application not later than the 30th day after the date of receipt of the application."[7] The District's rule at 3-1.55.2B(2) further provides that if the application meets certain requirements, "the General Manager shall approve and issue a Temporary Permit for the requested permit volume not to exceed the maximum production capacity without notice or hearing and within 30 days of the date of receipt of the application."[8]

Under Section 4(e) of HB 3405, a hearing may be held on the conversion of a temporary permit to a regular permit.[9] According to that section, the District shall issue an order granting the regular permit unless the District finds that authorizing groundwater production in the amount set forth in the temporary permit will cause: "(1) a failure to achieve the applicable adopted desired future conditions for the aquifer; or (2) an unreasonable impact on existing wells."[10]

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[6] Tex. H.B. 3405, 84th Leg., R.S. (2015).

[7] Tex. H.B. 3405, 84th Leg., R.S. (2015).

[8] District Rules and Bylaws, *available at* https://bseacd.org/uploads/081816FINAL-BSEACD-Rule_MASTER.pdf.

[9] Tex. H.B. 3405, 84th Leg., R.S. (2015).

[10] Tex. H.B. 3405, 84th Leg., R.S. (2015).

A groundwater conservation district must contract with SOAH to conduct the hearing if requested by a party to a contested case.[11] If a district contracts with SOAH to conduct a hearing, the hearing shall be conducted as provided by Subchapters C, D, and F, Chapter 2001, Texas Government Code.[12] The district may adopt rules for a hearing conducted under Texas Water Code § 36.416(a) that are consistent with SOAH's procedural rules.[13]

An ALJ may grant summary disposition if:

> [T]he pleadings, the motion for summary disposition, and the summary disposition evidence show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor as a matter of law on all or some of the issues expressly set out in the motion.[14]

Summary disposition evidence may include deposition transcripts; interrogatory answers and other discovery responses; pleadings; admissions; affidavits; materials obtained by discovery; matters officially noticed; stipulations; authenticated or certified public, business, or medical records; and other admissible evidence.[15] All summary disposition evidence offered in support of or in opposition to a motion for summary disposition shall be filed with the motion or response.[16]

III. EVIDENCE

For purposes of ruling on the motions for summary disposition, the ALJ considered the exhibits attached to the motions and responses.

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[11] Tex. Water Code § 36.416(b).

[12] Tex. Water Code § 36.416(a).

[13] Tex. Water Code § 36.416(a).

[14] 1 Tex. Admin. Code § 155.505(a).

[15] 1 Tex. Admin. Code § 155.505(e)(1).

[16] 1 Tex. Admin. Code § 155.505(e)(3).

IV. ARGUMENTS

In its motion, TESPA argues that Needmore did not meet the conditions for obtaining a temporary permit under HB 3405. Specifically, TESPA asserts that Needmore was not operating a well nor had it entered into a contract to operate a well at the time HB 3405 became effective. Therefore, according to TESPA, because the District lacked the authority to issue the temporary permit under HB 3405, the District cannot issue a regular permit to Needmore based on its current application under the HB 3405 process.

Needmore argues in its motion that (1) the statute does not allow a challenge to the temporary permit; (2) TESPA is too late to challenge the already-granted temporary permit even if such a challenge were allowed; (3) TESPA has no justiciable interest or standing to challenge the temporary permit; and (4) SOAH has no jurisdiction to hear a challenge to the temporary permit.

The District opposes TESPA's motion and agrees with Needmore's motion. The District asserts that (1) TESPA cannot challenge a matter associated with the issuance of the temporary permit; and (2) even if TESPA could challenge the temporary permit, it was properly granted.

V. ANALYSIS

This proceeding is a hearing on the conversion of Needmore's temporary permit to a regular permit. There is no provision for notice and a hearing on an application for a temporary permit under Chapter 8802, HB 3405, or the District's rules. Rather, HB 3405 provides for a hearing on the conversion of a temporary permit to a regular permit, limited to the issues of whether issuance of a regular permit will cause (1) a failure to achieve the applicable adopted desired future conditions for the aquifer or (2) an unreasonable impact on existing wells.[17] The parties have agreed that TESPA is not contesting either of the issues set forth in Section 4(e) of

[17] Tex. H.B. 3405, 84th Leg., R.S. (2015).

HB 3405. Rather, TESPA has limited its challenge to whether the District should have issued the temporary permit to Needmore.

As the scope of a hearing in this matter is limited to whether issuance of a regular permit will cause a failure to achieve the applicable adopted desired future conditions for the aquifer or an unreasonable impact on existing wells, there are no genuine issues of material fact remaining in this proceeding because TESPA has limited its challenge to the issuance of the temporary permit. There is no legal authority for a hearing on that issue. Accordingly, the ALJ finds that Needmore's motion should be granted as a matter of law and that TESPA's motion should be denied. The granting of Needmore's motion resolves all contested issues in this case.

VI. FINDINGS OF FACT

1. Barton Springs Edwards Aquifer Conservation District (District) has territory that includes parts of Travis, Hays, and Caldwell Counties. The District's jurisdiction was expanded through the passage of House Bill 3405 (HB 3405) on June 19, 2015.

2. The expansion of the District's jurisdiction included a well located on Needmore Ranch.

3. On September 19, 2015, Needmore Water LLC (Needmore) applied to the District for a temporary permit and a regular permit to produce 289,080,000 gallons of groundwater per year from the Trinity Aquifer.

4. The District issued a temporary permit to Needmore on November 19, 2015.

5. On November 22, 2016, the District's General Manager published a Preliminary Decision recommending that the District grant Needmore's regular permit with authorization to produce 289,080,000 gallons of groundwater per year. The General Manager also recommended including Special Provisions in the permit designed to avoid unreasonable impacts to existing wells. Needmore objected to those Special Provisions.

6. On December 19, 2016, TESPA requested that the District refer the case to the State Office of Administrative Hearings (SOAH) based on TESPA's challenge to the issuance of a regular permit to Needmore. On January 12, 2017, Needmore submitted a brief to the District arguing that HB 3405 does not permit third parties to contest permit applications.

7. The District considered Needmore's arguments at its January 12, 2017 Board meeting. On February 3, 2017, the District referred this case to SOAH.

8. The Administrative Law Judge (ALJ) convened a telephonic prehearing conference on March 6, 2017, during which Needmore indicated that it contested TESPA's standing to participate as a party in the case. A briefing schedule was set, and the parties briefed the issue of standing. Additionally, Needmore filed a Plea to the Jurisdiction, which was opposed by the District and TESPA.

9. On May 19, 2017, the ALJ issued Order No. 3, which denied the Plea to the Jurisdiction and set a prehearing conference to address TESPA's standing to participate as a party in the case.

10. The prehearing conference was held on July 31, 2017, and the parties presented extensive evidence and argument regarding the issue of standing. The ALJ determined that TESPA had standing and granted its request for party status, and the hearing on the merits was scheduled.

11. On February 20, 2018, Needmore and TESPA filed cross-motions for summary disposition and the parties filed a Joint Motion to Modify the Hearing Schedule. The Joint Motion to Modify Hearing Schedule stated that the parties had entered into a Rule 11 agreement on February 16, 2018, which resulted in a narrowing of the issues being contested by TESPA in this case. Specifically, TESPA agreed that it was challenging only the issues raised in its Motion for Summary Disposition: whether Needmore was eligible to obtain a temporary permit pursuant to HB 3405, Section 4(c) and (d). TESPA withdrew the prefiled testimony of two of its witnesses as a result of the Rule 11 agreement.

12. On February 23, 2018, the District filed a response opposing TESPA's motion. On February 26, 2018, Needmore filed a response opposing TESPA's motion, and on March 2, 2018, TESPA filed a response opposing Needmore's motion. Also on March 2, 2018, the District filed a response in support of Needmore's motion.

13. On March 5, 2018, the ALJ convened a prehearing conference on the motions, during which the parties presented additional arguments regarding the motions.

14. On June 6, 2018, the ALJ issued Order No. 10, which granted summary disposition in favor of Needmore and denied TESPA's motion for summary disposition. The record closed on that date.

15. A SOAH hearing on Needmore's application is limited to whether issuance of a regular permit will cause a failure to achieve the applicable adopted desired future conditions for the aquifer or an unreasonable impact on existing wells.

16. There are no genuine issues of material fact remaining in this proceeding because TESPA has limited its challenge to whether the District should have issued the temporary permit to Needmore, and TESPA is not challenging whether issuance of a regular permit will

cause a failure to achieve the applicable adopted desired future conditions for the aquifer or an unreasonable impact on existing wells.

VII. CONCLUSIONS OF LAW

1. The District is a groundwater conservation district created under Section 59, Article XVI of the Texas Constitution.

2. Chapter 8802 of the Texas Special District Local Laws Code (Chapter 8802) governs the District. Tex. Spec. Dist. Code ch. 8802.

3. If requested by a party to a contested case, a groundwater conservation district must contract with SOAH to conduct the hearing. Tex. Water Code § 36.416(b).

4. If a district contracts with SOAH to conduct a hearing, the hearing shall be conducted as provided by Subchapters C, D, and F, Chapter 2001, Texas Government Code. Tex. Water Code § 36.416(a).

5. SOAH has jurisdiction to conduct a hearing and prepare a proposal for decision in this case. Tex. Gov't Code ch. 2003; Tex. Water Code ch. 36.

6. Except as provided by Chapter 8802, the District has the rights, powers, privileges, functions, and duties provided by the general law of this state, including Chapter 36 of the Texas Water Code, applicable to groundwater conservation districts created under Section 59, Article XVI of the Texas Constitution. Tex. Spec. Dist. Code § 8802.101.

7. The District may and must adopt and enforce rules to implement Chapter 36 of the Texas Water Code, including rules governing procedure before the Board. Tex. Water Code § 36.101(a), (b).

8. The District adopted rules implementing HB 3405. *See* District Rules and Bylaws, *available at* https://bseacd.org/uploads/081816FINAL-BSEACD-Rule_MASTER.pdf; Tex. H.B. 3405, 84th Leg., R.S. (2015).

9. The District may adopt rules for a hearing conducted under this section that are consistent with SOAH's procedural rules. Tex. Water Code § 36.416(a).

10. Summary disposition shall be granted on all or part of a contested case if the pleadings, the motion for summary disposition, and the summary disposition evidence show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor as a matter of law on all or some of the issues expressly set out in the motion. 1 Tex. Admin. Code § 155.505(a).

11. HB 3405 sets forth the process for permitting of wells located in the territory added to the District through passage of that bill. Tex. H.B. 3405, 84th Leg., R.S. (2015).

12. Under Section 4(d) of HB 3405, "[t]he [D]istrict shall issue a temporary permit to a person who files an application under Subsection (c) of this section without a hearing on the application not later than the 30th day after the date of receipt of the application."

13. If an application meets certain requirements, "the General Manager shall approve and issue a Temporary Permit for the requested permit volume not to exceed the maximum production capacity without notice or hearing and within 30 days of the date of receipt of the application." District Rules and Bylaws at 3-1.55.2B(2), *available at* https://bseacd.org/uploads/081816FINAL-BSEACD-Rule_MASTER.pdf

14. Notice and hearing on a temporary permit are not provided for in Texas Special District Local Laws Code Chapter 8802, HB 3405, or the District's rules. *See* Tex. H.B. 3405, 84th Leg., R.S. (2015); District Rules and Bylaws, *available at* https://bseacd.org/uploads/081816FINAL-BSEACD-Rule_MASTER.pdf.

15. Under Section 4(e) of HB 3405, a hearing may be held on the conversion of the temporary permit to a regular permit. The District shall issue an order granting the regular permit unless the District finds that authorizing groundwater production in the amount set forth in the temporary permit will cause: "(1) a failure to achieve the applicable adopted desired future conditions for the aquifer; or (2) an unreasonable impact on existing wells." Tex. H.B. 3405, 84th Leg., R.S. (2015).

16. Because TESPA is not challenging any issues regarding the conversion of Needmore's temporary permit to a regular permit, no material fact is in dispute and, as a matter of law, there is no basis for a hearing on issues relating to the granting of a temporary permit under HB 3405. 1 Tex. Admin. Code § 155.505(a).

17. Summary disposition should be granted in favor of Needmore, and TESPA's motion for summary disposition should be denied. 1 Tex. Admin. Code § 155.505(a).

SIGNED July 23, 2018.

Stephanie Frazee

STEPHANIE FRAZEE
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

Exhibit 1B

STATE OFFICE OF ADMINISTRATIVE HEARINGS

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DATE: **4/10/2019**

NUMBER OF PAGES INCLUDING THIS COVER SHEET: **6**

REGARDING: **ORDER NO. 11 - DISMISSING CASES**

DOCKET NUMBER: **957-17-2582**

JUDGE STEPHANIE FRAZEE

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JEFF MUNDY	VIA EMAIL

xc: Docket Clerk, State Office of Administrative Hearings
NOTE: IF ALL PAGES ARE NOT RECEIVED, PLEASE CONTACT DIANA BENITEZ(dbe) (512) 475-4993

SOAH DOCKET NO. 957-17-2582

NEEDMORE WATER LLC	§	**BEFORE THE STATE OFFICE**
	§	
v.	§	
	§	**OF**
BARTON SPRINGS EDWARDS AQUIFER CONSERVATION DISTRICT	§	
	§	
	§	**ADMINISTRATIVE HEARINGS**

ORDER NO. 11
DISMISSING CASE

On July 23, 2018, the undersigned Administrative Law Judge (ALJ) issued the Proposal for Decision (PFD) on Summary Disposition in this case, which resolved all contested matters based on evidence and arguments establishing that the substantive issues over which the State Office of Administrative Hearings (SOAH) had jurisdiction were no longer contested by any party to the case.

On August 6, 2018, Needmore Water LLC (Needmore) submitted a letter inquiring as to when the ALJ would issue a PFD recommending that the Barton Springs Edwards Aquifer Conservation District (District) issue a regular permit to Needmore. On August 7, 2018, the District filed a Motion to Recommend Permit Issuance, which requested that the ALJ issue an amended PFD recommending that the District issue the regular permit to Needmore. On August 7, 2018, Trinity Edwards Springs Protection Association (TESPA) filed exceptions to the PFD. On August 22, 2018, Needmore filed its reply to TESPA's exceptions and a request that the ALJ grant the District's motion and modify the PFD to recommend issuance of the regular permit. That same day, the District filed its reply to TESPA's exceptions. The ALJ issued a letter addressing the parties' exceptions and replies on September 10, 2018. In that letter, the ALJ set forth her reasons for declining to amend the PFD.

On October 30, 2018, the District Board of Directors (Board) issued "An Order Remanding Application of Needmore Water LLC" to the ALJ. The Board ordered the Application remanded to the ALJ "for the limited purpose of reopening and further developing the evidentiary record" to facilitate the ALJ's issuance of a revised PFD that includes additional

findings of fact and conclusions of law, including the ALJ's recommendations for Board action on the Application. In the opinion of the Board, these additional elements of the PFD are required by District Rule 4-9.8(B) and Texas Water Code § 36.410(b)(3) despite the lack of a contested case on the issuance of a regular permit.

The contested case at SOAH arose from TESPA's challenge to the conversion of Needmore's temporary permit to a regular permit. In February 2017, SOAH accepted jurisdiction in the contested case in accordance with Section 4(e) of House Bill 3405, which provides that a hearing may be held on the conversion of a temporary permit to a regular permit.[1]

The original subject matter of the contested case at SOAH was based on the issuance of a regular permit as requested in Needmore's Application. Following the parties' Rule 11 agreement of February 16, 2018, TESPA withdrew the prefiled testimony of two of its witnesses and limited its challenge to whether the District should have issued a temporary permit to Needmore. As the substantive challenges to the regular permit were withdrawn from the case, and the issuance of a temporary permit and legal challenges to the constitutionality of HB 3405 are not issues upon which a contested case hearing may be held at SOAH, summary disposition was granted. The parties have been advised of the ALJ's determination on the various arguments presented after issuance of the PFD that SOAH declines to amend the PFD, and that the District appears to have all necessary legal authority to make its own determination on the issue of whether to grant the regular permit.[2] SOAH is not empowered to issue advisory opinions for the convenience of the parties, and the Board's remand order does not otherwise create such authority or jurisdiction where none exists.[3]

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[1] H.B. 3405, 84th R.S. (2015).

[2] ALJ's Exceptions Letter of September 10, 2018. *See also*, Section 4(e) of H.B. 3405 ("the district shall issue an order granting the regular permit. . ."); Tex. Water Code, §36.4165 ("the board has authority to make a final decision on consideration of a PFD issued by an administrative law judge).

[3] The ALJ declines to opine on whether the Board's attempted remand is even authorized as a general matter. *See, Banda v. Texas Board of Nursing*, 2018 WL 237641 (Ct. App.–Corpus Christi-Edinburg 2018, no pet.) (Finding that remand to SOAH absent express statutory authority amounted to an improper exercise of additional power).

For the reasons set forth, the ALJ has respectfully determined that she lacks authority to take further action in this case and declines to do so.

Accordingly, **IT IS ORDERED** that all motions filed in this case after issuance of the PFD are **DENIED** as moot, and this matter is hereby **DISMISSED** from the Docket of SOAH.

SIGNED April 10, 2019.

Stephanie Frazee

STEPHANIE FRAZEE
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

STATE OFFICE OF ADMINISTRATIVE HEARINGS

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SERVICE LIST

AGENCY: **Barton Springs Edwards Aquifer (BSEA)**

STYLE/CASE: **NEEDMORE WATER LLC FOR HB 3405 REGULAR PERMIT**

SOAH DOCKET NUMBER: **957-17-2582**

REFERRING AGENCY CASE:

STATE OFFICE OF ADMINISTRATIVE HEARINGS	**ADMINISTRATIVE LAW JUDGE ALJ STEPHANIE FRAZEE**
REPRESENTATIVE / ADDRESS	**PARTIES**
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BARTON SPRINGS EDWARDS AQUIFER CONSERVATION DISTRICT

Diana Benitez

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Exhibit 2

NEEDMORE WATER LLC	§	**BEFORE THE BOARD OF DIRECTORS**
	§	
v.	§	
	§	**BARTON SPRINGS EDWARDS**
BARTON SPRINGS EDWARDS	§	**AQUIFER CONSERVATION DISTRICT**
AQUIFER CONSERVATION	§	
DISTRICT	§	

ORDER WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW SUPPORTING THE CONVERSION OF THE NEEDMORE WATER, LLC WELL D TEMPORARY PERMIT TO REGULAR PERMIT PURSUANT TO HB 3405

I. BACKGROUND

WHEREAS, in 2015, the Texas Legislature passed House Bill 3405[1] (HB 3405), which expanded the jurisdiction of the Barton Springs Edwards Aquifer Conservation District (District) to include the Trinity Aquifers in areas of Hays County not regulated by other groundwater conservation districts;

WHEREAS, HB 3405 created a process for granting Temporary Permits to certain wells located within the District's new jurisdiction, and for converting those Temporary Permits into Regular Permits;

WHEREAS, Well D, owned by the Applicant, Needmore Water, LLC (Needmore), located on the Needmore Ranch in Hays County, Texas, became subject to the District's expanded jurisdiction pursuant to HB 3405;

WHEREAS, Needmore timely filed its joint applications for a Temporary Permit and for conversion to a Regular Permit for Well D, as prescribed by HB 3405 and the District Rules (Needmore Application);

WHEREAS, a contested case hearing was conducted on the Needmore Application to convert the Temporary Permit to a Regular Permit at the State Office of Administrative Hearings (SOAH), at which Needmore, the Trinity Edwards Springs Protection Association (TESPA), and the District's General Manager were the parties (collectively the "Parties");

WHEREAS, the SOAH hearing on the Needmore Application resulted in a Proposal for Decision (PFD) on Summary Disposition from the Administrative Law Judge (ALJ);

WHEREAS, the Board of Directors (Board) of the District conducted a Final Hearing on the Needmore Application on July 29, 2019 (Final Hearing);

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[1] House Bill 3405, enacted by the Texas Legislature, became effective June 19, 2015, and is codified as Chapter 975, 2015 Texas Gen. Laws 3426.

WHEREAS, the BSEACD Board voted unanimously to GRANT the Needmore Application to convert the Temporary Permit to a Regular Permit pursuant to HB 3405;

WHEREAS, on August 15, 2019, TESPA filed a written request for the Board to issue Findings of Fact and Conclusions of Law pursuant to Section 36.412, Texas Water Code;

WHEREAS, the Needmore Application as presented to the Board includes both contested issues, which were before the ALJ at SOAH and included in the Findings of Fact and Conclusions of Law of the ALJ's PFD, and uncontested issues related to the Needmore Application, which were not before the ALJ at SOAH but were before the Board at the Final Hearing; and

WHEREAS, the Findings of Fact and Conclusions of Law set forth herein include findings and conclusions on both the contested issues and uncontested issues, including the ALJ's findings and conclusions from the PFD on the contested issues, two of which are changed to correct technical errors as noted herein, and also include supplemental findings and conclusions developed by the Board (as distinguished from the ALJ) on the contested and uncontested issues related to the Needmore Application.

II.
FINDINGS OF FACT

WHEREAS, on the basis of the PFD, the Final Hearing, and the record before the Board, the Board makes the following Findings of Fact:

1. Barton Springs Edwards Aquifer Conservation District (District) has territory that includes parts of Travis, Hays, and Caldwell Counties. The District's jurisdiction was expanded through the passage of House Bill 3405 (HB 3405) on June 19, 2015.

2. The expansion of the District's jurisdiction included a well located on Needmore Ranch.

3. Well D, owned by Needmore Water LLC, was drilled and completed in the Trinity Aquifer on the Needmore Ranch in Hays County, Texas, within the territory that was added to the District's jurisdiction by HB 3405 prior to the passage of HB 3405.

4. HB 3405 imposed certain requirements on the District regarding the issuance of temporary and regular permits in the territory included in the expansion of the District's jurisdiction.

5. The District adopted rules relating to the filing of applications for permits pursuant to HB 3405 on July 16, 2015.

6. On September 18, 2015, Needmore Water LLC (Needmore) applied to the District for a Temporary Permit and a Regular Permit to produce 289,080,000 gallons of groundwater per year from the Trinity Aquifer.

7. Needmore's Application for a Temporary Permit and a Regular Permit in the amount of 289,080,000 gallons of groundwater per year was based upon the maximum production capacity of Well D consistent with the provisions of HB 3405.

8. Needmore's Application indicated a use type of Agricultural Irrigation and General Irrigation.

9. Needmore has an approved wildlife management plan.

10. District staff confirmed at a site visit that Well D was used to supplement a pond for Agricultural Use (wildlife management) and recreational activities.

11. Needmore provided supplemental information that future use would include agricultural irrigation on pasture areas.

12. Needmore's application included a User Conservation Plan and a User Drought Contingency Plan dated March 15, 2016. Needmore will update the plans as irrigation systems are placed into service.

13. The District staff conducted a site visit at and a downhole video of Well D and determined that the well casing was damaged and in deteriorated condition.

14. The District issued a Temporary Permit to Needmore on October 19, 2015.

15. The Temporary Permit was issued by the District's General Manager for 179,965,440 gallons per year, which is less than the requested maximum production capacity of 289,080,000 gallons per year prescribed by HB 3405, based upon the General Manager's interpretation that maximum production capacity of the well should factor in practical operational limitations such as pumping duration and recovery. Needmore objected to the General Manager's interpretation of maximum production capacity under HB 3405.

16. The Temporary Permit contained a condition prohibiting authorized operation of the well until it was operable and repaired in compliance with applicable State and District well construction standards.

17. Needmore repaired the well to its original as-built specifications to demonstrate Well D's maximum production capacity.

18. Needmore performed a 5-day pump test on Well D and demonstrated that Well D could produce the requested maximum production capacity of 289,080,000 gallons per year.

19. The General Manager was unable to document in technical literature or industry standards support for the position taken during issuance of the Temporary Permit that the maximum production capacity of a well under HB 3405 should be limited or based on recommended practices for pumping duration and recovery.

20. The correct annual groundwater production amount that should have been included in the Temporary Permit issued by the District to Needmore is 289,080,000 gallons per year.

21. The General Manager did not issue Needmore an amended Temporary Permit for the corrected maximum production capacity of 289,080,000 gallons per year, but instead processed Needmore's pending Application for the conversion of the Temporary Permit to the Regular Permit at the requested maximum production capacity amount of 289,080,000 gallons per year that Needmore had applied for pursuant to HB 3405.

22. According to District staff's modeling analysis, at maximum production capacity and during severe drought conditions, drawdown from Well D is modeled to cause well interference on surrounding water supply wells, which District staff interprets as an unreasonable impact.

23. There is uncertainty with modeling and forecasting, and measured data is preferable to address drawdown.

24. In order to avoid unreasonable impacts from the pumping of Well D, the District's General Manager recommended including "Special Provisions" in the Needmore permit, which are tied to actual aquifer data and which include production cutbacks at specified trigger levels in a nearby well that is available for use as a monitoring well for these purposes—the Amos primary index well.

25. Total authorized production from the Middle Trinity Aquifer in the District including the Needmore production will not exceed the modeled available groundwater estimate as determined by the Texas Water Development Board, which is an indicator that production from the well will not cause a failure to achieve the applicable desired future conditions for the aquifer.

26. On November 22, 2016, the District's General Manager published a Preliminary Decision recommending that the District grant Needmore's Regular Permit with authorization to produce 289,080,000 gallons of groundwater per year. The General Manager also recommended including the previously referenced "Special Provisions" in the permit designed to avoid unreasonable impacts to existing wells. Needmore objected to these Special Provisions.

27. Needmore timely requested the District conduct a hearing to issue an order granting Needmore's Regular Permit in accordance with HB 3405 Section 4(e).

28. On December 19, 2016, TESPA requested that the District refer the case to the State Office of Administrative Hearings (SOAH) based on TESPA's challenge to the issuance of a Regular Permit to Needmore. On January 12, 2017, Needmore submitted a brief to the District arguing that HB 3405 does not permit third parties to contest HB 3405 permit applications.

29. The District considered Needmore's arguments at its January 12, 2017, Board meeting. On February 3, 2017, the District referred this case to SOAH.

30. Needmore's Application was docketed as SOAH Docket No. 957-17-2582.

31. The Administrative Law Judge (ALJ) convened a telephonic prehearing conference on March 6, 2017, during which Needmore indicated that it contested TESPA's standing to participate as a party in the case. A briefing schedule was set, and the parties briefed the issue of standing. Additionally, Needmore filed a Plea to the Jurisdiction, which was opposed by the District's General Manager and TESPA.

32. On May 19, 2017, the ALJ issued Order No. 3, which denied the Plea to the Jurisdiction and set a prehearing conference to address TESPA's standing to participate as a party in the case.

33. The prehearing conference was held on July 31, 2017, and the Parties presented extensive evidence and argument regarding the issue of standing. The ALJ determined that TESPA had standing and granted its request for party status, and the hearing on the merits was scheduled.

34. The District's General Manager and Needmore negotiated a settlement of contested issues between the General Manager and Needmore, which was memorialized in a Rule 11 Agreement executed effective October 31, 2017. On November 8, 2017, Needmore filed the Rule 11 Agreement memorializing the terms and conditions of the October 31, 2017 settlement agreement between Needmore and the District General Manager (Settlement Agreement) in the SOAH Docket and with the ALJ and TESPA.

35. Under the terms of the Settlement Agreement, the District General Manager modified his recommendations in the Preliminary Decision related to Special Provisions of Attachment G to the Preliminary Decision (Modified Special Provisions).

36. Pursuant to the Settlement Agreement, the Modified Special Provisions were to be incorporated into the Needmore Regular Permit authorizing Needmore a total maximum annual withdrawal of 289,080,000 gallons per year for its Well D, which was in existence and operated prior to the June 19, 2015, effective date of. H.B. 3405.

37. Under the terms of the Settlement Agreement, Needmore agreed to withdraw all of its contests to the issuance of its Regular Permit and accept the General Manager's recommended Regular Permit, including the Modified Special Provisions contained in Attachment G to the General Manager's Recommendation, if the District issued Needmore a Regular Permit in the form recommended by the District's General Manager in the General Manager's Preliminary Decision with the inclusion of the Modified Special Provisions in Attachment G, as prescribed by the Settlement Agreement.

38. On February 20, 2018, Needmore and TESPA each filed cross-motions for summary disposition and the Parties filed a Joint Motion to Modify the Hearing Schedule. The Joint

Motion to Modify Hearing Schedule stated that the Parties had entered into a Rule 11 Agreement on February 16, 2018, which resulted in a narrowing of the issues being contested by TESPA in this case. Specifically, TESPA agreed that it was challenging only the issues raised in its Motion for Summary Disposition: whether Needmore was eligible to obtain a temporary permit pursuant to HB 3405, Section 4(c) and (d). TESPA withdrew the prefiled testimony of two of its witnesses as result of the Rule 11 Agreement.

39. TESPA was required to withdraw the prefiled testimony of the two witnesses pursuant to the Parties' February 16, 2018, Rule 11 Agreement, in which TESPA agreed to limit its participation in the hearing solely to the matter of whether Needmore was eligible to obtain a temporary permit pursuant to HB 3405, Subsections 4(c) and (d).

40. On February 23, 2018, the District's General Manager filed a response opposing TESPA's motion for summary disposition. On February 26, 2018, Needmore filed a response opposing TESPA's motion, and on March 2, 2018, TESPA filed a response opposing Needmore's motion for summary disposition. Also on March 2, 2018, the District filed a response in support of Needmore's motion.

41. On March 5, 2018, the ALJ convened a prehearing conference on the motions, during which the Parties presented additional arguments regarding the motions.

42. On June 6, 2018, the ALJ issued Order No. 10, which granted summary disposition in favor of Needmore and denied TESPA's motion for summary disposition. The record closed on that date.

43. While the record was closed on June 6, 2018, by the ALJ for the contested case hearing matters before SOAH, the record remained open before the Board on the uncontested matters related to the Needmore Application.

44. A SOAH Hearing on Needmore's application is limited to whether issuance of a regular permit will cause a failure to achieve the applicable desired future conditions for the aquifer or an unreasonable impact on existing wells.

45. Pursuant to Order No. 10, the ALJ held (i) that TESPA had limited its challenge to Needmore's Application for a Regular Permit to the issuance of Needmore's Temporary Permit, (ii) there were no more genuine issues of material fact, and (iii) that according to Section 4(e) of HB 3405, the District shall issue an order granting the Regular Permit unless the District finds that authorizing groundwater production in the amount set forth in the Temporary Permit will cause "(1) a failure to achieve the applicable adopted desired future conditions for the aquifer; or (2) an unreasonable impact on existing wells."

46. On July 23, 2018, the ALJ issued a the PFD on Summary Disposition with Findings of Fact and Conclusions of Law focused on the ruling on the Dispositive Motions filed by TESPA and Needmore, but did not include a recommendation on the issuance of the Regular Permit and the terms of the Settlement Agreement.

47. The ALJ correctly held in the PFD with regard to the Dispositive Motions that "There are no genuine issues of material fact remaining in this proceeding because TESPA limited its challenge to whether the District should have issued the Temporary Permit to Needmore and TESPA is not challenging whether issuance of a Regular Permit will cause a failure to achieve the applicable adopted desired future conditions for the aquifer or an unreasonable impact on existing wells."

48. Following the ALJ's Order No. 10, however, there were still genuine issues of material fact remaining with respect to issues raised by the Applicant with respect to the conditions in the District General Manager's Preliminary Decision recommending issuance of a Regular Permit with Special Conditions contested by Needmore, which were resolved as between Needmore and the General Manager pursuant to the October 31, 2017, Rule 11 Agreement referred to as the Settlement Agreement modifying the Special Conditions in Attachment G to the General Manager's Preliminary Decision subject to the ALJ's recommendation to issue Needmore's Regular Permit with the modified version of Attachment G included in the Settlement Agreement.

49. On August 6, 2018, Needmore submitted a letter inquiring as to when the ALJ would issue a PFD recommending that the District issue a Regular Permit to Needmore.

50. TESPA filed exceptions to the PFD on August 7, 2018.

51. On August 7, 2018, the District's General Manager filed a Motion to Recommend Permit Issuance. The General Manager requested that the ALJ amend the PFD to add Findings of Fact and Conclusions of Law recommending the issuance of the Regular Permit to Needmore consistent with the ALJ's ruling and the October 31, 2017, Rule 11 Agreement entered into between the District and the Applicant, filed in this docket on November 8, 2017.

52. Needmore separately filed its reply to TESPA's exceptions to the ALJ's PFD, and the District General Manager's Motion to Recommend the Permit, on August 22, 2018.

53 On August 22, 2018, the General Manager filed its reply to TESPA's exceptions.

54. On September 10, 2018, the ALJ issued a letter responding to the General Manager's Motion to Recommend Permit Issuance and declined to amend the PFD, noting, among other things, that the ALJ cannot amend the PFD to include proposed findings of fact and conclusions of law without evidence to support them and that there is no stipulation to the necessary facts, nor evidence in the record on the substantive issues needed to support a recommendation on issuance of the Regular Permit.

55. On October 11, 2018, the Board of Directors of the District considered the ALJ's PFD in an open public meeting, and concluded that the PFD did not address the ultimate issues contemplated by District Rule 4-9.8(B) and Section 36.410(b)(3), Water Code.

56. The Board voted to authorize its President to issue an Order remanding the Needmore Application back to the ALJ for further development of the Record to allow the ALJ to make additional Findings of Fact and Conclusions of Law, including a recommendation on the issuance of Needmore's Regular Permit, necessary to provide the Board with a PFD addressing the ultimate issue of the Proposed Permit's satisfaction of HB 3405 Section 4(e).

57. On October 30, 2018, the District's Order remanding the Needmore Application to SOAH was filed with SOAH.

58. The Order remanding the matter to SOAH provided, in part, that the remand was for

> "the limited purpose of reopening and further developing the evidentiary record through stipulations, testimony, or otherwise to enable the SOAH ALJ to issue a revised PFD that includes all elements required by District Rule 4-9.8(B) and Section 36.410(b)(3), Water Code, including the ALJ's recommendations for Board action on the Needmore application."

59. On November 26, 2018, TESPA filed a Response to the Board's Remand Order.

60. On November 30, 2018, the General Manager and Needmore filed stipulations and requests to admit evidence into the record, which included stipulated Findings of Fact and Conclusions of Law supporting issuance of the Regular Permit to Needmore with the Modified Special Conditions agreed to and memorialized in the Settlement Agreement.

61. On December 3, 2018, the General Manager filed its Response to TESPA's November 26, 2018, Response to the District Board's Remand Order.

62. On December 4, 2018, Needmore filed its Response to TESPA's November 26, 2018, Response to the District Board's Remand Order.

63. On February 6, 2019, Needmore, TESPA and the GM filed a Joint Motion to Request a Status Conference as there had been no response from the ALJ since the District's Remand Order.

64. On April 10, 2019, the ALJ issued Order No. 11 dismissing the matter from the SOAH Docket, stating that the only contested issue before SOAH was TESPA's limited challenge as to whether or not Needmore was eligible to obtain a Temporary Permit pursuant to HB 3405, Subsections 4(c) and (d), and that once that substantive challenge to the permit was dismissed with the granting of Needmore's Motion for Summary Disposition, the District had "all necessary legal authority to make its own determination of whether to grant the Regular Permit."

65. On July 29, 2019, the Board held a final duly noticed public hearing on Needmore's application to convert its Temporary Permit into a Regular Permit.

66. All five members of the District's Board of Directors, constituting a quorum, were in attendance and participated in the final hearing.

67. Notice for the final hearing was timely posted at the county courthouses in Travis, Caldwell, and Hays Counties, Texas, and published on the District's website beginning on July 18, 2019, and in the Austin American Statesman, a newspaper of general circulation within the District's boundaries, on July 18, 2019, in the Hays Free Press on July 17, 2019, and in the San Marcos Daily Record and Wimberley View on July 18, 2019.

68. TESPA requested that the Board overturn the ALJ's PFD granting Needmore's Motion for Summary Disposition, arguing that the statute required an applicant under HB 3405 to be physically operating a well on the effective date of the statute, June 19, 2015.

69. HB 3405 provides that to be eligible for a Temporary Permit an applicant must have either been operating a well before the effective date, June 19, 2015, or have entered into a contract to drill or a operate a well before the effective date, June 19, 2015, and that the application be timely filed with the District.

70. Needmore's Well D, which was the subject of the applications for a Temporary Permit and conversion to a Regular Permit, was drilled and operated in 2012, and pump tests were performed in 2012.

71. Both Needmore and the GM stipulated (i) that Needmore filed its Application for both a Temporary Permit and a Regular Permit in a timely fashion as prescribed by HB 3405, Section 4(c), and (d) that, while the GM initially issued a reduced Temporary Permit, that the Temporary Permit, as well as the Regular Permit, should be issued for the demonstrated maximum production capacity of Well D of 289,080,000 gallons per year.

72. At the final hearing the General Manager presented the Modified Special Conditions sought to be included in the Regular Permit to address unreasonable impacts on existing wells that could occur without such Modified Special Conditions and, along with the amount of overall annual groundwater production from Well D and other wells in the aquifer as compared to the Modeled Available Groundwater for the aquifer, would help to address prevention of failure to achieve the applicable adopted desired future conditions as agreed to by Needmore in the Settlement Agreement.

73. At the final hearing the General Manager acknowledged that the Temporary Permit was not formally amended to the full amount requested as required by HB 3405 Section 4(c), and recommended the granting of the Regular Permit for the full amount requested in the Application with the inclusion of the Special Conditions.

74. At the final hearing the General Manager entered without objection the prefiled testimony of John Dupnik and Brian Smith into the record.

75. At the final hearing Needmore supported the General Manager's recommendation to issue Needmore a Regular Permit for the maximum production capacity of Well D, *i.e.*,

289,080,000 gallons per year, with the inclusion of the Modified Special Conditions with the modified Attachment G, as agreed to and memorialized in the October 31, 2017, Rule 11 Agreement settling disputed issues between the General Manager and Needmore, and requested the Board grant the conversion of the Temporary Permit to the Regular Permit.

76. At the final hearing Needmore presented evidence that Well D was in existence and operated prior to the effective date of HB 3405, June 19, 2015.

77. At the final hearing Needmore presented evidence that it had timely filed its applications for a Temporary Permit and Regular Permit for the maximum production capacity of 289,080,000 gallons per year, pursuant to HB 3405.

78. At the final hearing Needmore entered without objection the prefiled testimony of Greg LaMantia, Kaveh Khorzad, and Russell Persyn into the record.

79. At the final hearing Needmore confirmed it continues to support the Settlement Agreement and that it will abide by the Modified Special Conditions in the modified Attachment G requested by the General Manager.

80. In response to concerns from the Board regarding the cost of long-term monitoring of aquifer responses to production from Well D, Mr. LaMantia, General Manager of Needmore, offered that Needmore would agree to donate $2,500.00 to the District per year to assist with costs related to monitoring the Needmore Permit.

81. The Board requested that Needmore agree to memorialize the offer of a $2,500.00 per year contribution by amending the October 31, 2017, Rule 11 Settlement Agreement, to include the annual contribution by Needmore as a special condition, in addition to the prior proposed Special Conditions.

82. Needmore agreed to amend the Settlement Agreement and the Modified Special Conditions to include the $2,500.00 per year contribution from Needmore, to the District, for the purposes of helping offset costs of monitoring related to the Permit.

83. The Board determined at the final hearing that Needmore drilled and operated Well D before the effective date of HB 3405, timely filed its permit applications, and could produce groundwater from Well D at its maximum production capacity of 289,080,000 gallons per year without causing unreasonable impacts to existing wells and without causing a failure to achieve applicable desired future conditions for the aquifer because of: (1) the provisions in the amended Settlement Agreement and Modified Special Conditions that would address water level declines from Well D and trigger reductions in pumping so as to prevent such unreasonable impacts, and (2) the amount of overall pumping from the aquifer including the groundwater production from Well D as compared to the Modeled Available Groundwater for the aquifer; accordingly, the Board found that it was required under HB 3405 to approve the application as presented by the applicant and the General Manager

with the terms and conditions set forth in the amended Settlement Agreement and Modified Special Conditions.

84. At the final hearing, the Board voted unanimously, 5-0, to grant the conversion of the Temporary Permit to a Regular Permit for 289,080,000 gallons per year, with the Modified Special Conditions, including the agreement wherein Needmore agreed to include the $2,500.00 per year as a special condition.

85. Needmore and the District's General Manager executed an amendment to the October 31, 2017, Rule 11 Settlement Agreement in the form of a supplement to the same dated August 1, 2019, and filed the same with the District for inclusion in the Record.

86. TESPA filed a written request for the District to issue Findings of Fact and Conclusions of Law on August 15, 2019.

III.
CONCLUSIONS OF LAW

WHEREAS, on the basis of the PFD and Final Hearing, the Board makes the following Conclusions of Law:

1. The District is a groundwater conservation district created under Section 59, Article XVI of the Texas Constitution.

2. Chapter 8802 of the Texas Special District Local Laws Code (Chapter 8802) governs the District. Tex. Spec. Dist. Code ch. 8802.

3. If requested by a party to a contested case, a groundwater conservation district must contract with SOAH to conduct the hearing. Tex. Water Code § 36.416(b).

4. The Texas Legislature enacted HB 3405 expanding the jurisdiction of the District, and amending ch. 8802. Acts of 2015, 84th Leg., R.S., Ch. 975, 2015 Tex. Gen. Laws 3426.

5. HB 3405 became effective June 19, 2015.

6. If a district contracts with SOAH to conduct a hearing, the hearing shall be conducted as provided by Subchapters C, D, and F, Chapter 2001, Texas Government Code. Tex. Water Code § 36.416(a).

7. SOAH had jurisdiction to conduct a hearing and prepare a proposal for decision in this case. Tex. Gov't Code ch. 2003; Tex. Water Code ch. 36.

8. Except as provided by Chapter 8802, the District has the rights, powers, privileges, functions, and duties provided by the general law of this state, including Chapter 36 of the Texas Water Code, applicable to groundwater conservation districts created under Section 59, Article XVI of the Texas Constitution. Tex. Spec. Dist. Code § 8802.101.

9. The District may and must adopt and enforce rules to implement Chapter 36 of the Texas Water Code, including rules governing procedure before the Board. Tex. Water Code § 36.101 (a), (b).

10. The District adopted rules implementing HB 3405. *See* District Rules and Bylaws, *available at* https://bseacd.org/uploads/081816FINAL-BSEACD-Rule_MASTER.pdf; Tex. HB 3405, 84th Leg., R.S. (2015).

11. The District may adopt rules for a hearing conducted under this section that are consistent with SOAH's procedural rules. Tex. Water Code § 36.416(a).

12. Summary disposition shall be granted on all or part of a contested case if the pleadings, the motion for summary disposition, and the summary disposition evidence show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor as a matter of law on all or some of the issues expressly set out in the motion. 1 Tex. Admin. Code § 155.505(a).

13. HB 3405 sets forth the process for permitting of wells located in the territory added to the District through passage of that bill. Tex. HB 3405, 84th Leg., R.S. (2015).

14. Under Section 4(d) of HB 3405, "[t]he [D]istrict shall issue a temporary permit to a person who files an application under Subsection (c) of this section without a hearing on the application not later than the 30th day after the date of receipt of the application."

15. Section 4(d) of HB 3405 further provides that "[t]he district shall issue the temporary permit for the groundwater production amount set forth in the application."

16. If an application meets certain requirements, "the General Manager shall approve and issue a Temporary Permit for the requested permit volume not to exceed the maximum production capacity without notice or hearing and within 30 days of the date of receipt of the application." District Rules and Bylaws at 3-l.55.2B(2), *available at* https://bseacd.org/uploads/0818l6FlNAL-BSEACD-Rule_MASTER.pdf.

17. Section 4(a)(2) defines "maximum production capacity" of a well to be permitted pursuant to HB 3405.

18. HB 3405 does not address how the District would procedurally amend a temporary permit to increase its groundwater production amount in a situation where the groundwater production amount approved in the temporary permit by the District's General Manager was later deemed to be inconsistent with HB 3405.

19. Under Section 4 (c) of HB 3405 a well is not required to be operating on the effective date of the statute, June 19, 2015. Tex. H.B. 3405, 84th Leg., R.S. (2015).

20. Needmore timely filed an application for a Temporary Permit and Regular Permit for its Well D for 289,080,00 gallons per year from the Trinity Aquifer, pursuant to, and meeting all the requirements of HB 3405.

21. Under the July 16, 2015 District Rules, "Agricultural Well" means a well providing groundwater for agricultural livestock use or agricultural irrigation use, and "agricultural livestock use" includes use associated with wildlife management. District Rule 2-1.

22. Under Chapter 36 of the Texas Water Code, "Agricultural Use" means "any use or activity involving agriculture, including irrigation." Tex. Water Code §36.001(20).

23. Under Chapter 36 of the Texas Water Code, "'Agriculture'" means any of the following activities:

(A) cultivating the soil to produce crops for human food, animal feed, or planting seed or for the production of fibers;
(B) the practice of floriculture, viticulture, silviculture, and horticulture, including the cultivation of plants in containers or nonsoil media, by a nursery grower;
(C) raising, feeding, or keeping animals for breeding purposes or for the production of food or fiber, leather, pelts, or other tangible products having a commercial value;
(D) planting cover crops, including cover crops cultivated for transplantation, or leaving land idle for the purpose of participating in any governmental program or normal crop or livestock rotation procedure;
(E) wildlife management; and
(F) raising or keeping equine animals."

Tex. Water Code §36.001(19).

24. Under Chapter 36 of the Texas Water Code, "'Modeled available groundwater" means the amount of water that the executive administrator of Texas Water Development Board determines may be produced on an average annual basis to achieve a desired future condition established. Tex. Water Code §36.001(25).

25. Notice and hearing on a temporary permit are not provided for in Texas Special District Local Laws Code Chapter 8802, HB 3405, or the District's rules. *See* Tex. HB 3405, 84th Leg., R.S. (2015); District Rules and Bylaws, *available at* https://bseacd.org/uploads/0818l6FlNAL-BSEACD-Rule_MASTER.pdf.

26. Under Section 4(e) of HB 3405 a hearing may be held on the conversion of the Temporary Permit to a Regular Permit. The District shall issue an order granting the Regular Permit unless the District finds that authorizing groundwater production in the amount set forth in the Temporary Permit will cause: "(1) a failure to achieve the applicable adopted desired future conditions for the aquifer; or (2) an unreasonable impact on existing wells." Tex. HB 3405, 84th Leg., R.S. (2015).

27. Summary disposition was appropriately granted in favor of Needmore, and TESPA's motion for summary disposition was appropriately denied by the ALJ. 1 Tex. Admin. Code § 155.505(a).

28. Because TESPA is not challenging any issues regarding the conversion of Needmore's Temporary Permit to a Regular Permit, no material fact is in dispute and, as a matter of law, there is no basis for a hearing on issues relating to the granting of a Temporary Permit under HB 3405. 1 Tex. Admin. Code § 155.505(a).

29. The Settlement Agreement between Needmore, and the District General Manager dated October 31, 2017, set forth in the November 30, 2018, Joint Motion Stipulating to facts and to Admit Evidence filed by the District General Manager and Needmore, and admitted into the record without objection during the final hearing before the District Board on July 29, 2019, is in writing, signed and had been filed with SOAH in November 2017, and is, therefore, enforceable. 1 Tex. Admin. Code § 155.415.

30. Evidence may include the agreements of the parties contained in pleadings. 1 Tex. Admin. Code § 155.505(e).

31. Parties may stipulate to any factual, legal, or procedural matters. 1 Tex. Admin. Code § 155.417(a).

32. Because (1) TESPA is not challenging any issues regarding the conversion of Needmore's temporary permit to a Regular Permit, (2) Needmore has agreed to withdraw its contests to the issuance of the Regular Permit consistent with the General Manager's Preliminary Proposal as modified by the Special Provisions Attachment G included in the Settlement Agreement and as modified by agreement at the July 29, 2019 Hearing, (3) Needmore and the General Manager have stipulated that the issuance of Needmore's Regular Permit consistent with the General Manager's Preliminary Proposal with the Modified Special Conditions found in the Attachment G Special Conditions will satisfy the criteria set forth in Section 4(e) of HB 3405, and (4) the District General Manager and Needmore have requested issuance of the Regular Permit consistent with the terms of the Settlement Agreement, there are no material facts in dispute regarding whether the issuance of the Regular Permit with the authorization of groundwater production will cause: "(1) a failure to achieve the applicable adopted desired future conditions for the aquifer; or (2) an unreasonable impact on existing wells." Tex. H.B. 3405, 84th Leg., R.S. (2015).

33. The granting of summary disposition in favor of Needmore, the denial of TESPA's Motion for Summary Disposition, and the Settlement Agreement between Needmore and the District General Manager finally resolve all disputes relating to the issuance of the Regular Permit under Section 4(e) of H.B. 3405. Tex. H.B. 3405, 84th Leg., R.S. (2015).

34. Pursuant to the remand of the Needmore Water LLC application by the ALJ from SOAH to the District, the District Board has jurisdiction over the Application for final disposition.

35. The District is required to comply with the provisions of HB 3405, 84th Leg. R.S. (2015), which limits the Board's discretion to issue permits to existing wells unless the District finds that authorizing groundwater production in the amount set forth in the temporary permit will cause: "(1) a failure to achieve the applicable adopted desired future conditions for the aquifer; or (2) an unreasonable impact on existing wells."

36. Issuance of a Regular Permit pursuant to Needmore Water LLC in the form agreed to by the District's General Manager and the Applicant, Needmore, with the Modified Special Conditions, memorialized in the October 31, 2017, Rule 11 Agreement as supplemented on August 1, 2019, to memorialize the Applicant's offer during the July 29, 2019, Final Hearing to contribute $2,500.000 per year to the District to offset some of the District's costs of monitoring the effect of production from Well D on the aquifer and neighboring well owners is compliant with the criteria for issuance of a Regular Permit pursuant to HB 3405, 84th Leg., R.S. (2015).

37. Based upon the above Findings of Fact and Conclusions of Law, Needmore Water LLC's Regular Permit in full, with the modified Special Provisions set forth in the Settlement Agreement and as amended at the July 29, 2019, hearing, and supplemented by written agreement dated August 1, 2019, should be granted authorizing the production from Well D of up to 289,080,000 of groundwater per year from the Trinity Aquifer.

IV.
ORDERING PROVISIONS

NOW, THEREFORE, BE IT ORDERED BY THE BARTON SPRINGS EDWARDS AQUIFER CONSERVATION DISTRICT, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. The Application of Needmore Water LLC for a Regular Permit pursuant to HB 3405, 84th Leg. R.S. (2015) authorizing the production of up to 289,080,000 gallons of groundwater from the Trinity Aquifer at Well D in the form agreed to by the District's General Manager and the Applicant, Needmore Water LLC, memorialized in that certain Rule 11 Agreement dated October 31, 2017, and supplemented by written agreement dated August 11, 2019, is hereby granted.

2. The contest by and all relief requested by the Trinity Edwards Springs Protection Association (TESPA) is denied.

3. All other relief requested by any party, not herein granted is denied.

4. The Board changes the Findings of Fact numbers 3 and 4 in the PFD, corresponding to Findings of Fact numbers 6 and 14 above, to correct technical errors in the dates that Needmore filed its application for and the General Manger issued the Temporary Permit. The Board makes no other substantive changes to the Findings of Fact and Conclusions of Law of the ALJ in the PFD, but, because of the limited scope of the contested issues related

to the application that were ultimately before the ALJ and included in the ALJ's PFD, the Board supplements the findings and conclusions of the ALJ with its own supplemental findings and conclusions on both the contested issues and uncontested issues related to a determination on the Needmore Application. In doing so, the Board includes additional non-substantive clarifying language in places where deemed appropriate regarding some of the findings and conclusions of the ALJ for readability purposes, as they occurred earlier in time than the Board's consideration of the matter.

5. Needmore shall pay the Distinct $2,500.00 within 60 days of the date that this order becomes final and appealable and thereafter pay the District $2,500.00 on or before September 1st beginning September 1, 2020, and every September 1st thereafter for so long as the Permit continues in effect consistent with terms of the Settlement Agreement as memorialized in the October 31, 2017, Rule 11 Agreement, as supplemented August 1, 2019.

6. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of the same shall not affect the validity of the remaining portions of this Order.

ISSUED effective July 29, 2019, this 12th day of September, 2019.

BARTON SPRINGS EDWARDS AQUIFER
CONSERVATION DISTRICT

Blayne Stansberry
President

Attest:

Blake Dorsett
Secretary

Exhibit 3

SOAH DOCKET NO. 957-17-2582

IN RE THE APPLICATION	**§**	**BEFORE THE BARTON SPRINGS**
OF NEEDMORE WATER LLC FOR HB	**§**	**EDWARDS AQUIFER**
3405 REGULAR PERMIT	**§**	**CONSERVATION DISTRICT**

PROTESTANT TESPA'S MOTION FOR REHEARING

To: The Board of Directors ("Board") of the Barton Springs Edwards Aquifer Conservation District ("District") through its attorney, Brian Sledge, 919 Congress Ave. Ste. 460, Austin, Texas 78701:

Protestant, Trinity Edwards Springs Protection Association ("TESPA") files its Motion for Rehearing in the above referenced proceeding pursuant to Section 36.412 of the Texas Water Code. On July 29, 2019, the Board issued a final order granting Needmore Water, LLC's ("Needmore") request to produce just over 289 million gallons a year from the Middle Trinity Aquifer. On September 12, 2019 the Board issued Findings of Fact and Conclusions of Law. For the reasons discussed below, the Board's decision to grant Needmore's permit was arbitrary and capricious, an abuse of discretion, and contrary to Constitutional rights of landowners. Consequently, TESPA requests that the Board grant our Motion for Rehearing and reopen this matter for additional consideration, enabling the Board to address issues that are contrary to applicable law and policy.

INTRODUCTION

Based on the comments made by some of the Directors at the July 29th final hearing (that the Board had no choice, felt hamstrung, and that the process was "ass backwards") and based on the Findings of Fact and Conclusions of Law that the Board adopted, it is obvious that the Board interpreted House Bill 3405 and the District's rules in a way that precluded the Board from denying

Needmore's permit request. TESPA believes that this interpretation is wrong, and that the Board did not have discretion to deny Needmore's permit because based on the clear language of House Bill 3405 and District rules and based on evidence in the record, Needmore was not eligible to apply for a permit in the first place. We are asking the Board to reconsider our arguments.

ARGUMENT

A. The Board's determination that TESPA is not challenging issues related to the conversion of Needmore's Temporary Permit to a Regular Permit is not rationally based and is contrary to landowners' Constitutional rights.

TESPA has long argued that the Board should never have granted Needmore a Temporary Permit because Needmore did not meet the eligibility requirements in House Bill 3405 and because Needmore falsified critical information in its application. We submitted comments articulating these arguments at the time the Board considered Needmore's Temporary Permit but because House Bill 3405 prohibited hearings on the Temporary Permit, we had no way of formally protesting the District staff's recommendation.

While we felt that House Bill 3405's prohibition on hearings at the Temporary Permit stage raised Constitutional concerns related to due process and open courts, under our interpretation of House Bill 3405 and District Rules, we believed we could raise our arguments at the hearing on the Regular Permit as eligibility is an issue that is clearly related to conversion of Needmore's Temporary Permit into a Regular Permit. However, the Board has determined that TESPA's challenge to Needmore's eligibility is not an issue that is relevant to the hearing on the Regular Permit. Conclusion of Law No. 28 states, "Because TESPA is not challenging any issues regarding conversion of Needmore's Temporary Permit to a regular permit, no material fact is in dispute,

and as a matter of law, there is no basis for a hearing on issues relating to the granting of a Temporary permit under House Bill 3405. 30 TAC 155.505(a)."

The result of this determination is that TESPA, and the affected landowners who are members of TESPA, cannot challenge Needmore's eligibility at all. This interpretation deprives affected landowners from protecting their constitutionally protected property rights and denies them the ability to challenge a fundamental issue in this proceeding - eligibility. In reaching this conclusion, the Board misinterpreted applicable law and ignored evidence that TESPA presented, which demonstrate that TESPA is challenging issues regarding conversion of Needmore's Temporary Permit to a Regular Permit. Based on these errors, TESPA is requesting that the Board conduct a new hearing.

First, the law clearly allows the District to consider factors related to the Temporary Permit process when evaluating whether to convert a temporary permit into a regular permit under House Bill 3405. As TESPA explained in its Motion for Summary Disposition, HB 3405 describes the District's actions as "converting" a Temporary Permit into a Regular Permit – one, streamlined process for the District to issue permits to eligible applicants. Only eligible applicants could apply for a Temporary Permit, and obtaining a Temporary Permit was a prerequisite to receiving a Regular Permit. This is supported by the District's own statement on page 2 of the District's Preliminary Decision to issue Needmore a Regular Permit where the District lists the factors it reviewed in making its Preliminary Decision. Under "Application Review of the *Regular* Production Permit," the third factor the District considered was to "***Confirm eligibility for a Temporary/Regular Production Permit*** (District Rule 3-1.55.1(A))."

The Board's determination in Conclusion of Law No 28. prohibits TESPA and the numerous landowners impacted by production from Needmore's well who are members of TESPA, from

challenging Needmore's eligibility – an issue that the District considered pursuant to its rules when it recommended that Needmore's Temporary Permit be converted into a Regular Permit. It is absurd and unreasonable to interpret HB 3405 in a way that prohibits an affected party from challenging the basis upon which a permit was granted, yet this is exactly what the Board's determination in Conclusion of Law No. 28 does. For this reason, TESPA objects to Conclusion of Law No. 28.

B. The Board erroneously determined that Needmore was eligible to apply for a Temporary Permit.

First, the Board erroneously interpreted language in House Bill 3405 and the District's own rules describing the eligibility requirements for a landowner to apply for a Temporary Permit. Section 4(c) of House Bill 3405 states, "A person **operating** a well before the effective date of this Act or who **has entered** into a contract before the effective date of this Act...shall file an administratively complete permit application with the district..."[1]

The District enacted rules implementing HB 3405. Rule 3-.55.1 states, "A person eligible for a Temporary Production Permit or Temporary Well Drilling Authorization may apply and be issued authorization to drill, operate, or perform another activity related to the nonexempt well pursuant to the following provisions." The rule goes on to state the eligibility criteria as follows:

> Eligibility criteria. Persons who meet the following criteria and who submit an administratively complete permit application on or before September 19, 2015, may be issued a Temporary Production Permit or Temporary Well Drilling Authorization.
>
> 1. The person ***is operating*** an existing nonexempt well on or before

[1] HB 3405 § 4(c). HB 3405 is codified at Special District Local Laws Code, Chapter 8802.

June 19, 2015;

2. The person has entered into a contract on or before June 19, 2015 to operate an existing nonexempt well; or
3. The person has entered into an existing contract on or before June 19, 2015 to drill or complete a new nonexempt well. The person would only be eligible for a Temporary Well Drilling Authorization. (emphasis added)

However, in Finding of Fact No. 69, the Board determined "House Bill 3405 provides that to be eligible for a Temporary Permit an applicant must **have either been operating a well** before the effective date, June 19, 2015, or have entered into a contract before the effective date, June 19 2015." (emphasis added). This slight change in language from "operating" to "have been operating" significantly alters the meaning of the statute and District rules to allow a landowner who had operated a well at some point in the past to apply for a Temporary Permit. It also leads to the Board's erroneous conclusion in Conclusion of Law No. 19 that "Under Section 4(c) of House Bill 3405, a well is not required to be operating on the effective date of the statute."

The language of Section 4(c) of HB 3405 and District Rule 3-.55.1, however, expressly require current operation of a well before the effective date, not past operation of a well before the effective date. Section 4(c) states, "A person **operating** a well before the effective date of this Act or who **has entered** into a contract before the effective date of this Act...shall file an administratively complete permit application with the district..."

The word "operating" is the present tense form of "to operate." This means that a person had to be presently operating a well to be eligible to apply for a HB 3405 Permit – very different from saying that a person must "have been operating a well." Furthermore, when the second clause of 4(c) related to contracts is examined, it is obvious that the intent of the Act was to permit only those persons ***currently or presently*** operating a well to apply for a Temporary Permit. This is the

most reasonable and logical reading of the statute. The second clause uses the *present perfect* tense of "to enter" — "has entered." The present perfect tense is used to describe an action that happened at an unspecified time before the present. The use of the present perfect tense makes clear that only those persons who had entered into a contract at a time before the effective date are eligible to apply for a Temporary Permit. Had the drafters intended to allow a person who had been operating a well in the past prior to the effective date of the Act to apply for a Temporary Permit, the drafters would have used the present perfect tense "has operated," just as they did for the language related to contracts or "has been operating," rather than the present tense "operating." The Board overlooks this obvious grammatical distinction in the plain language of the statute.

Under the District's interpretation, a person who had been operating his well in 1875 could apply for and receive a Temporary Permit – because he had been operating the well before June 19, 2015. Obviously, this was not HB 3405's intent. The District's interpretation of HB 3405 leads to an absurd result. It would allow landowners to resurrect old, abandoned wells and take advantage of the expedited, less stringent permitting process under HB 3405. Courts will "apply the plain meaning of the text unless a different meaning is supplied by legislative definition or ***is apparent from the context or the plain meaning leads to absurd results***." *Marks v. St. Luke's Episcopal Hosp.,* 319 S.W.3d 658, 663 (Tex.2010).

Second, the Board ignored evidence and did not consider relevant factors demonstrating that Needmore was not eligible to apply for a Temporary Permit; therefore, the Board acted arbitrarily and in a capricious manner when it granted Needmore a Regular Permit. The Board ignored the fact that staff made a legal determination that Needmore's well was abandoned under District Rules and that as a matter of law, the well had not been in operation for six consecutive months. Additionally, the Board actually determined in Finding of Fact No. 16 that "[t]he Temporary

Permit contained a condition prohibiting authorized operation of the well until it was operable and repaired in compliance with State and District Well Construction standards." This determination supports the argument that Needmore was not eligible. Based on the above errors, the Board erroneously determined in Conclusion of Law No. 20 that Needmore met all of the requirements of House Bill 3405.

Under case law, an agency abuses its discretion when it fails to consider legally relevant factors.[2] An agency decision—here, a decision to approve Needmore's permit—is arbitrary if it fails to follow the clear, unambiguous language of its own regulations.[3] The clear, unambiguous language of the District's rules states that an applicant must be operating a well at the time House Bill 3405 became effective. The Board's failure to consider legally relevant factors, such as the staff's determination that the well was abandoned, makes its decision arbitrary, and the Board's Order that this permit be granted lacks a rational basis in the record. For these reasons, TESPA opposes Finding of Fact No. 16 and No. 69, and Conclusion of Law No. 19 and No. 20.

C. The Board acted arbitrarily and ignored evidence that Needmore submitted false information in its application.

The Board had the legal authority to revoke Needmore's Temporary Permit and deny the Regular Permit based on the fact that Needmore submitted false information in its application. BSEACD Rule 3-1.55.2 (D)(11) states, "[a] finding that false information has been supplied shall be grounds for immediate revocation of a permit." The Board, however, ignored its own rules which direct the Board to revoke a permit when an applicant submits false information.

[2] *Kawasaki Motors Corp. USA v. Texas Motor Vehicle Com'n*, 855 S.W.2d 792, 795 (Tex. App.—Austin 1993); *see also Consumers Water, Inc. v. Pub. Util. Comm'n of Texas*, 774 S.W.2d 719, 721 (Tex. App.—Austin 1989).
[3] *Public Utility Com'n of Texas v. Gulf States Utilities Co.*, 809 S.W.2d 201, 207 (Tex. 1991).

First, Needmore neglected to mention on the application and in a supplemental response to the District that the well was not currently in operation at the time House Bill 3405 became effective. Second, in the descriptive statement on the application, Needmore stated, "[w]ell D…is used for irrigation on the ranch property." This statement is false. According to the *Application Summary and Staff Review,* which is based on statements from the ranch manager and onsite observations, the well had never been used for irrigation. Needmore representatives also led staff to believe that the well was being used for wildlife management purposes pursuant to a wildlife management plan, but there is no evidence in the record that the plan supports the well being used for this purpose.

Furthermore, in an in-person meeting with District staff and the Applicant's representatives, the District's General Counsel asked the Applicant's consultant, Kaveh Korzad, specifically whether the reservoir on Needmore Ranch contained any groundwater from the well. According to District's notes from the meeting, Mr. Korzad indicated that it did not. This is a false statement because District staff subsequently learned that in the past the well was used intermittently to supply water to the pond.

Finally, in a supplemental letter dated October 9, 2015 sent to the District, the Applicant stated that major water improvements had been made on the property to support future plans of a three-pasture rotation. Specifically, the Applicant indicated that a 2.5-mile pipeline had been constructed on the ranch to provide reliable water within the pasture. However, the District discovered that the pipeline is actually a Shell Oil pipeline. Given these mischaracterizations, which are based on uncontroverted facts, a number of conclusions of law in the Order do not have a rational basis.

D. The District improperly designated the use type associated with Needmore's permit as Agricultural and Wildlife Management

TESPA intended to make arguments at the hearing on the merits related to the District's improper designation of the use type associated with Needmore's permit; however, the Administrative Law Judge dismissed our case on an erroneous legal conclusion that the Board adopted in Conclusion of Law No. 28 - that we were not challenging any issues related to the Regular Permit. In the Rule 11 Agreement, TESPA did not limit its challenge to whether the District should have issued a temporary permit to Needmore. TESPA agreed to narrow the focus of its contest to issues related solely to the eligibility of Needmore's application pursuant to HB 3405 § 4(c) and § 4(d). Specifically, TESPA agreed to withdraw and limit pre-filed testimony for certain witnesses and agreed to not offer or present evidence beyond evidence supporting the narrowed issues related to eligibility of Needmore's application pursuant to HB 3405 § 4(c) and § 4(d). TESPA did not limit its challenge to whether the District should have issued the temporary permit to Needmore as Conclusion of Law No. 28 erroneously holds. This Conclusion misinterprets the Rule 11 Agreement and incorrectly holds, "[b]ecause TESPA is not challenging any issues regarding the conversion of Needmore's temporary permit to a regular permit, no material fact is in dispute and, as a matter of law, there is no basis for a hearing on issues relating to the granting of temporary permit under HB 3405. 1 Tex. Admin. Code § 155.505(a). Essentially, the Board's decision is that TESPA "Rule 11'd" itself out of a hearing, which is an absurd result.

Furthermore, because the Board erroneously concluded that TESPA limited its argument to whether the District should have issued a temporary permit to Needmore, the Board incorrectly conflates Section 4(c) and (d) of House Bill 3405. As stated, previously, TESPA limited its challenge to Section 4(c) and 4(d) in House Bill 3405. In TESPA's Motion for Summary

Disposition, TESPA focused on whether Needmore was eligible to apply for a Temporary Permit based on the fact that Needmore was not currently operating a well under 4(c). TESPA did not, however, address any of the other issues in 4(d) that the District evaluated at the regular permit stage, such as whether the person's drilling, operating, or other activities associated with the well are consistent with the authorization sought in the permit application – issues which are relevant to a regular hearing and which under the Administrative Procedures Act, TESPA is entitled to argue. Under Section 2001.051(2) of the Government Code, "[i]n a contested case, each party is entitled to an opportunity to respond and to present evidence and argument on each issue involved in the case.

As stated above, the Board improperly designated the use type associated with Needmore's permit contrary to the District's rules state law. Section 4(d) of HB 3405 mandates, "The temporary permit issued under this subsection shall provide the person with retroactive and prospective authorization to drill, operate, or perform another activity related to a well for which a permit is required by the district... **if: (1) the person's drilling, operating, or other activities associated with the well are consistent with the authorization sought in the permit application**..." (emphasis added). In other words, a person could only get a Temporary Permit for a use consistent with the current operation of the well. If the person was using the well to irrigate crops, under HB 3405 he could not get a permit to sell water to a city because these are distinct, separately defined categories of uses. Likewise, if a person was using the well to provide water to a watering hole for free ranging wildlife, he could not obtain a permit to use water to irrigate crops.

The authorization that Needmore sought in its application was for "Agricultural Irrigation," however, as explained below, Needmore had never actually conducted any irrigation on the Ranch.

Under the District's rules in place at the time Needmore applied for a HB 3405 Temporary Permit, Agricultural Irrigation Use was defined as follows:

> the use associated with providing water for application to plants or land in connection with cultivating the soil to produce crops for human food, animal feed, or planting seed or for the production of fibers; the practice of floriculture, viticulture, silviculture, and horticulture including the cultivation of plants in containers or non-soil media by a nursery grower; or planting cover crops, including cover crops cultivated for transplantation, or leaving land idle for the purpose of participating in any governmental program or normal crop or livestock rotation procedure.

When Needmore applied for a HB 3405 permit, the well had never been used for any of the activities described above in the District's definition of Agricultural Irrigation Use, effective at the time Needmore applied for its permit. Needmore did not disclose this fact to the District. In fact, Needmore falsely stated on the application that the well was an "existing irrigation well." *See* Item 6 on both the Temporary and Regular Permit Applications.

The District only learned that Needmore was not irrigating the property on an October 14, 2015, site visit to Needmore Ranch. District staff discovered that Needmore was not currently irrigating the property and that moreover, no irrigation had ever taken place on the ranch. Field notes taken by District staff during this site visit to the property and obtained by TESPA through an Open Records Request, explain that upon visiting the property, staff learned that groundwater had never been used for irrigation and that Needmore had never constructed an irrigation distribution system on the ranch. According to the staff notes, during the onsite visit, Needmore's hydrogeologist stated that the referenced irrigated areas on the application were actually "proposed" projects.

In addition, staff learned that the well on Needmore Ranch had only been used intermittently to provide water to a pond that was used for recreational purposes and, allegedly as a watering hole for wildlife. As a result of the site visit, the District determined that Needmore was engaging in Wildlife Management activities, not activities associated with Agricultural Irrigation. Under the District's rules, Wildlife Management was defined as "the watering and/or feeding of free-ranging, non-caged, wild animals under a management plan approved by Texas Parks and Wildlife, US Fish and Wildlife Service, or other governmental agency with authority to approve and regulate wildlife management plans." Wildlife Management was not a specific use type under the District's rules, rather it was an activity permitted under the use type, Agricultural Livestock Use, defined as "the use associated with the watering, raising, feeding, or keeping of livestock for breeding purposes or for the production of food or fiber, leather, pelts or other tangible products having a commercial value; **wildlife management**; and raising or keeping equine animals." The District, therefore, determined that the appropriate use consistent with Section 4(d)(1) of HB 3405 was Agricultural Livestock. As a result, on October 19, 2015, the District issued a Temporary Production Permit to Needmore for "Agricultural Livestock" use. However, as stated above, there is no evidence in the record that the Wildlife Management plan supported Well D being used for wildlife purposes; therefore, the District's determination that Needmore was using Well D for Wildlife Management/Agricultural Livestock use was arbitrary.

In its October 19, 2015, letter issuing the Temporary Permit, the District explained,

> "The relevant use type for issuance of the Temporary Production Permit is determined by evaluating the period of time Well D operated before the effective date of HB 3405 (June 19, 2015). The September 19, 2015, Needmore permit application indicated both general and agricultural use types prior to June 19, 2015,

however, the information provided was insufficient to clearly designate the primary use type.

Supplemental information provided in response to the District's written requests and information obtained from the District's October 14, 2015, site visit indicated that the well was used solely to supplement a ponded water feature which is used primarily for recreation (swimming, fishing, and boating) and for wildlife. On the basis of this information, the District is initially characterizing the use type for Well D as Agricultural Livestock."

Section 4(d)(1) of HB 3405 states that the Temporary Permit "shall provide the person with retroactive and prospective authorization to…operate…a well for which a permit is required by the district…if (1) the person's drilling, operating, or other activities associated with the well are consistent with the authorization sought in the permit application." In other words, a person would not have authorization to operate under a Temporary Permit if the person's activities associated with the well were not consistent with the authorization.

By issuing the Temporary Permit for Agricultural Livestock Use, which includes irrigation for cattle and not limiting the use to Wildlife Management, the District impermissibly expanded the types of activities Needmore could pump groundwater for—activities it had not been engaging in at the time it applied for a permit under HB 3405.

Furthermore, it its November 15, 2016, proposal to issue Needmore a Regular Permit, the District has once again impermissibly expanded the types of activities for which Needmore can use groundwater from the well. On April 28, 2016, prior to issuing its preliminary decision to grant Needmore a Regular Production Permit, the District adopted new rules adding a new definition --

Agricultural Use, which included several types of activities, such as the cultivation of crops for human consumption, the practice of floriculture, and horticulture, **and wildlife management**, among other uses.

Agricultural Use is defined as: the use of groundwater for any of the following activities, including irrigation to support these agricultural uses:

1. cultivating the soil to produce crops for human food, animal feed, or planting seed or for the production of fibers;
2. the practice of floriculture, viticulture, silviculture, and horticulture, including the cultivation of plants in containers or non-soil media, by a nursery grower;
3. raising, feeding, or keeping animals for breeding purposes or for the production of food or fiber, leather, pelts, or other tangible products having a commercial value (Commercial Livestock Use);
4. planting cover crops, including cover crops cultivated for transplantation, or leaving land idle for the purpose of participating in any governmental program or normal crop or livestock rotation procedure;
5. engaging in wildlife management as defined in the District's Rules and as referenced under a written in-effect wildlife management plan;
6. raising or keeping equine animals; or
7. aquaculture, or active farming of fish, crustaceans or mollusks.

Under the new rules, the definitions for Agricultural Livestock Use and Agricultural Irrigation Use were deleted and the uses associated with these definitions were added to the definition of Agricultural Use. As explained above, under the District's previous rules in place at the time

Needmore applied for its Temporary and Regular Permit in September 2015, Wildlife Management fell under the use type Agricultural Livestock, which is why the District granted Needmore's Temporary Permit for the use type Agricultural Livestock. Wildlife Management activities were not part of the definition of Agricultural Irrigation Use, which was an entirely separate definition and use type. However, the current rules adopted on April 28, 2016, created a new definition for Agricultural Use, which includes both Agricultural Livestock and Agricultural Irrigation.

On November 15, 2016, the District issued a proposed Regular Production Permit to Needmore for 289,080,000 gallons of groundwater a year associated with "Agricultural Use," which as explained above combined both the old definition of "Agricultural Livestock" and "Agricultural Irrigation." The result is that Needmore can now use water from the well to grow crops, whereas before under the Temporary Permit, Needmore could only engage in Agricultural Livestock activities. This is an impermissible expansion of the use associated with the well because it is contrary to Section 4(d)(1)'s requirement that the operating activities associated with the well be consistent with the authorization sought.

The District's Preliminary Decision to issue the Regular Permit states, "The District has further processed the application for conversion of the Temporary Production Permit to a Regular Historical Production Permit to authorize withdrawal of an annual permitted volume of approximately 289,080,000 gallons per year of groundwater from the Trinity Aquifer. The Applicant will continue to operate the existing well for wildlife management and future agricultural uses." This statement makes clear that the Regular Permit is based on the historical use of the well, which the District determined was for Wildlife Management, thus Needmore should not be able to use groundwater from the well to conduct any type of irrigation activities

because doing so is contrary to Section 4(d)(1) of HB 3405. However, by assigning the new "Agricultural Use" definition to the proposed permit and stating that Needmore can engage in "future agricultural uses," the District is permitting Needmore to engage in uses that are not consistent with the past use of the well contrary to HB 3405. Nowhere in HB 3405 does it state that the District has the authority to change the use type in the Regular Permit that was associated with the Temporary Permit.

Furthermore, by applying the new definition of Agricultural Use to Needmore's Regular Permit application, the District has essentially allowed Needmore to change the use type under its HB 3405 permit without triggering a permit amendment, which is contrary to the District's rules. On March 23, 2016, prior to the District formally adopting the rules on April 28, 2016, TESPA submitted comments to the District making this argument.

District Rule 3-1.55.4 governs the process the District follows to convert Temporary Permits to Regular Permits. Rule 3-1.55.4(D) states, "All Regular Production Permits are granted subject to the Rules, regulations, Orders, special provisions, and other requirements of the Board and the laws of the State of Texas." Under Rule 3-1.9(A), changing the use type of a permit is considered a major amendment. Under Rule 3-1.9(B), "Major amendments shall be subject to all the requirements and procedures applicable to issuance of a Production Permit for a new well or, if applicable, a Transport Permit. Under Rule 3-1.9(C), "Amendments to change the use type of a Production Permit will require the recalculation of the permitted volume to be commensurate with the reasonable non-speculative demand of the new use type." 3-1.9(C).

Because under the proposed rules the District has expanded the definition of Agricultural Use to include Wildlife Management, Needmore could engage in any of the activities defined as

Agricultural Use, for example irrigation for crops, without triggering a change in use type and recalculation of the permitted volume as described above in 3-1.9(C).

Needmore has argued that it can support its requested volume of 289,080,000 gallons of groundwater a year without wasting water by conducting extensive agricultural irrigation operations on the property – something that Needmore would not have been permitted to do if the District had not expanded the definition of Agricultural Use and impermissibly applied it to Needmore.

Moreover, the District acted arbitrarily when it assigned Wildlife Management as the use type. As described above, the District assigned Wildlife Management as the use type because Needmore stated that groundwater from the well had been used to fill a pond for wildlife under a wildlife management plan approved by Texas Parks and Wildlife. However, Needmore's Wildlife Management Plan does not reference Well D at all and does not specify that Well D is used to fill a pond for wildlife management purposes. Consequently, Finding of Fact No. 9 is erroneous, and the District ignored legally relevant evidence and acted arbitrarily when it issued Needmore's permit for Agricultural use premised on Wildlife Management.

CONCLUSION

The Board's decision to grant Needmore a permit when Needmore was not even eligible to apply for a permit was flawed, and it is especially concerning because of the tremendous volume of water that Needmore now has the right to pump and the potential impacts this pumping will cause to the aquifer and nearby landowners. Needmore's permit is currently the largest groundwater permit that the Board has issued in the Middle Trinity Aquifer.

TESPA is requesting that the Board conduct a new hearing to consider our arguments again and to correct errors that the Board made, which we describe above. Needmore is not entitled to

receive a Regular Permit under House Bill 3405. District staff determined that Needmore's well was abandoned, therefore, Needmore was not eligible to apply for a permit under House Bill 3405. Moreover, Needmore took advantage of the expedited, less stringent permitting process that House Bill 3405 created for eligible wells – misrepresenting critical facts on its application. The Board has the legal authority to deny Needmore's permit.

Respectfully,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing TESPA's Response to Needmore and BSEACD has been sent to all parties of record via e-mail on this the 2nd of October, 2019, addressed as follows:

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Brian Sledge General Counsel 919 Congress Ave. Ste. 460 Austin, Texas 78701 bsledge@sledgelaw.com	Barton Springs Edwards Aquifer Conservation District, Board of Directors

By: _____
Vanessa Puig-Williams

Exhibit "C"

Form Joint Motion for Dismissal Without Prejudice and Proposed Order Granting Dismissal Without Prejudice

CAUSE NO. D-1-GN-20-000835

TRINITY EDWARDS SPRINGS PROTECTION ASSOCIATION, *Plaintiff*	§	**IN THE DISTRICT COURT OF**
vs.	§	
	§	**TRAVIS COUNTY, TEXAS**
BARTON SPRINGS EDWARDS AQUIFER CONSERVATION DISTRICT, *Defendant*	§	
NEEDMORE WATER, LLC, *Necessary Party/Defendant*	§	**250TH JUDICIAL DISTRICT**

JOINT MOTION TO DISMISS WITHOUT PREJUDICE

TO THE HONORABLE JUDGE OF THIS COURT:

The parties have reached an agreement resolving this matter and thus, jointly move to dismiss this case without prejudice with all parties to bear their own attorneys' fees and costs up to the time of signing of the Order of Dismissal without prejudice.

Respectfully submitted,

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Attorneys for Needmore Water LLC

CAUSE NO. D-1-GN-20-000835

TRINITY EDWARDS SPRINGS PROTECTION ASSOCIATION, *Plaintiff*	§	**IN THE DISTRICT COURT OF**
vs.	§	
	§	**TRAVIS COUNTY, TEXAS**
BARTON SPRINGS EDWARDS AQUIFER CONSERVATION DISTRICT, *Defendant*	§	
	§	
NEEDMORE WATER, LLC, *Necessary Party/Defendant*	§	**250TH JUDICIAL DISTRICT**

ORDER OF DISMISSAL

The parties informed the Court that they have reached an agreement resolving this case and jointly moved to dismiss this action without prejudice with the parties to bear their own attorneys' fees and costs.

Therefore, the Court GRANTS the joint motion to dismiss on the terms requested by the parties. This case is dismissed without prejudice. The parties are to bear their own attorneys' fees and costs to this date.

The district clerk is ordered to remove this case from the Court's docket.

This order disposes of all issues and parties before the Court.

Signed _____, 2021.

_____
Judge Presiding

Agreed as to form and substance:

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