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Re: Barton Springs Edwards Aquifer Conservation District's issuance of a temporary production permit to Needmore Water LLC.

Mr. Dupnik:

The Trinity Edwards Springs Protection Association (TESPA), submits these comments with objections to the Barton Springs Edwards Aquifer Conservation District's (BSEACD or District) decision on October 19, 2015, to grant a temporary production permit to Needmore Water LLC under the provisions of House Bill 3405 and the District's rules. TESPA appreciates your consideration of these comments and objections.

TESPA's analysis leads it to conclude the District lacked legal authority under HB 3405 and the District's own rules to issue Needmore Water LLC's (Applicant) temporary permit in light of the points of law discussed below. TESPA believes the District lacked authority to grant the temporary permit, and thus, the District has the authority, and duty, to revoke the temporary permit and deny the regular permit.

Section 4(2)(c) of HB 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…if the well requires a permit under the rules or orders of the district." (emphasis added).

Section 4(2)(d) states, "The district 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." (emphasis added).

1. **The applicant is not currently operating a well; therefore, it did not qualify to apply for a temporary permit as it did not meet the requirements of Section 4(2)(c), above. The District, therefore, lacked authorization to issue the temporary permit and should have denied the application.**

According to BSEACD's Application Summary and Staff Review, the pump in the well was removed sometime in August 2015. The District states, "A documented video log provided to the District confirms the well is currently damaged and in deteriorated condition and is therefore considered an abandoned well pursuant to State law and District rules." The District goes on to say that "the well is incapable of production in this current condition."

On September 30, 2015, the District requested supplemental information from the Applicant. Among other things, the District requested that the Applicant provide more detail regarding the nature and purpose of the existing uses, which on the application the Applicant claimed was Agricultural Irrigation. In response to this request, on October 9, 2015, the Applicant described in detail the work the landowner has done to restore pastureland, including removing cattle, letting pastures remain fallow, fencing overgrazed pastures, and planting native seeds throughout the property. Nowhere in this lengthy description does the Applicant disclose that the well is currently not in operation.

Language of HB 3405

The language of the Act expressly requires current operation of a well before the effective date, not past operation of a well before the effective date. The word "operating" is the present tense form of " to operate." The Texas Code Construction Act, Texas Government Code, chapter 311.012(a), provides: "(a) Words in the present tense include the future tense." Note, that this does not include the past tense. Furthermore, when the second clause of the above language is examined, it is obvious that the intent of the Act was to permit only those persons currently operating a well to apply for a

temporary permit. 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 operated 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, rather than the present tense "operating."

These additional provisions of the Code Construction Act merit consideration:

Sec. 311.021. INTENTION IN ENACTMENT OF STATUTES. In enacting a statute, it is presumed that:
(1) compliance with the constitutions of this state and the United States is intended;
(2) the entire statute is intended to be effective;
(3) a just and reasonable result is intended;
(4) a result feasible of execution is intended; and
(5) public interest is favored over any private interest.

Sec. 311.022. PROSPECTIVE OPERATION OF STATUTES. A statute is presumed to be *prospective in its operation unless expressly made retrospective*.

Sec. 311.023. STATUTE CONSTRUCTION AIDS. In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the:
(1) *object sought to be attained*;
(2) circumstances under which the statute was enacted;
(3) legislative history;
(4) common law or former statutory provisions, including laws on the same or similar subjects;
(5) *consequences of a particular construction*;
(6) administrative construction of the statute; and
(7) title (caption), preamble, and emergency provision.

Language of BSEACD Rules

Additionally, the District's own rules under 3-1.55.1(A) describe the eligibility criteria for temporary permits as follows:

> (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.

Again, "is operating" is the present tense, meaning that the action is taking place now; whereas "has entered" is the present perfect tense, which is used to describe an action that took place at an unspecified time before the present.

This reading of the statute and BSEACD's rules is also supported by the District's own interpretation that the point of the temporary permit process is to allow someone to keep doing what they were doing on the effective date of the new law.

Based on the facts, the Applicant was not operating the well at the time the Act became effective; therefore, it was not eligible to apply for a temporary permit, and the District should have denied the request.

2. **The application was not administratively complete; therefore, the Applicant did not qualify for a temporary permit as the Applicant did not meet the requirements of Section 4(c), above. The District, therefore, was not authorized to issue the temporary permit and should have denied the application.**

HB 3405 and the District's rules require an applicant to submit an administratively complete application for a temporary permit. Under Rule 3-1.55.2(B)(1)(b), before issuing a temporary permit, the General Manager shall consider whether the application is complete. 3-1.55.1(E) describes an administratively complete application as consisting of the "original, completed, signed, and notarized application, payment of all applicable application fees; submission of any required maps, documents, ownership information, or **supplementary information required by the General Manager or the General Manager's designated representative; and any other documentation required by the District as part of the application.**" (emphasis added).

Rule 3-1.55.2(B)(2) continues, "**Provided the application conforms to the above 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. (emphasis added).

According to the *Application Summary and Staff Review* prepared by the District's staff, at the time the General Manager issued the temporary permit, the Applicant had not provided the district with a copy of the wildlife management plan as requested by the district in a letter to the applicant dated September 30, 2015. Because the applicant did not provide the district with supplemental information, the application was not administratively complete; therefore, it did not conform to the requirements of Rule 3-1.55.2(B)(1)(b) and the General Manager should not have been approved it.

Additionally, issuance of the temporary permit without reviewing the terms of the wildlife management plan was arbitrary and capricious. "Wildlife management" is the basis under which the district is characterizing the use type of the well as "Agricultural Livestock." "Wildlife management" is defined as "the watering and/or feeding of free-ranging, non-caged, wild animals under a management plan approved by Texas Parks and Wildlife." BSEACD Rule 2.1. According to the District's fields notes from an October 14, 2015, site visit, the ranch manager informed District staff that he did not think the pond was mentioned in the wildlife management plan and that the pond was used for swimming and fishing. The watering of wild animals pursuant to an approved plan is required to meet the definition of "wildlife management." The General Manager's decision to issue the temporary permit without reviewing the wildlife management plan was arbitrary and capricious.

3. The Applicant's drilling, operating, or other activities associated with the well are not consistent with the authorization sought in the permit application; therefore, the General Manager should not have approved the temporary permit application.

Section 4(d) of HB 3405 states, "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).

Under Rule 3-1.55.2(B)(1)(c), before issuing a temporary permit, the General Manager shall consider whether the applicant's drilling, operating, or other activities associated with the well are consistent with the authorization sought in the permit application.

Rule 3-1.55.2(B)(2) continues, "**Provided the application conforms to the above 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. (emphasis added).

The authorization *sought* was for agricultural irrigation, but according to the District, the Applicant was neither irrigating the property on the effective date of HB 3405 nor doing so now. Field notes taken by District staff during a site visit to the property on October 14, 2015, indicate that the pond is used for recreational purposes. The ranch manager, who has managed the property for eleven years, stated "all the well has ever been used for is to fill up the pond" and that the ranch has never been irrigated and that the pond was constructed for recreational and fishing purposes. According to the District's notes, the ranch manger stated in a "certain and confident demeanor" that "there has never been any irrigation other than to fill up the pond for swimming and fishing and to enjoy."

Furthermore, there does not to appear to be evidence that the pond's use is specifically related to wildlife management on the property. As discussed above, the District changed the use authorization to Agricultural Livestock based on the rationale that the pond is being used to support wildlife. However, according to the District's fields notes, the ranch manager informed the district that he did not think the pond was mentioned in the wildlife management plan. Therefore, the District's authorization to use groundwater for Agricultural Livestock (wildlife management) is not consistent with the Applicant's prior use of the well—to supply groundwater to a recreational lake.

Finally, as discussed above, the Applicant is not currently operating the well at all. The lack of operation of the well is inconsistent with the authorization sought—for either Agricultural Irrigation or Agricultural Live Stock use.

The application did not conform to the requirements of Rule 3-1.55.2(B)(1)(c), because the authorizations sought, whether Agricultural Irrigation or Agricultural Livestock were not consistent with the Applicant's past use of the well for recreational purposes and current inoperable condition. Therefore, under Rule 3-1.55.2(B)(2), the General Manager's decision to issue the temporary permit was arbitrary and capricious.

In addition to the three arguments above, the District has grounds to revoke the temporary permit based on the fact that the Applicant has provided the District with false information.

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.”

First, the Applicant neglected to mention on the application and in the supplemental response to the District that the well was not currently in operation and that it meets the definition of an abandoned well under TCEQ rules. This omission, when coupled with the Applicant’s sworn declaration that groundwater from the well will be put to a beneficial use, makes the declaration false.

Second, in the descriptive statement on the application, the Applicant stated, “Well D…is used for irrigation on the ranch property.” This statement is incorrect. According to the *Application Summary and Staff Review,* which is based on statements from the ranch manager and onsite observations, the well has never been used for irrigation.

Third, on September 30, 2015, the District requested supplemental information from the Applicant. Specifically, the District asked the Applicant to confirm that the well is constructed as the final completion for permanent production. In response to this request, the Applicant stated in a supplemental letter dated October 9, 2015 sent to the District, “It is our understanding that the well is completed to final completion for the intended beneficial purposes described in the applications.” The District also asked the Applicant to provide information on the type of pump installed in the well. In response, the Applicant stated, “the pump currently installed in the well is Grundfos 475S500-6A .” This statement is false, as the pump had recently been removed.

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 contained any groundwater from the well. According to District’s notes from the meeting, Mr. Korzad indicated that it did not. This statement is incorrect 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.

TESPA's Request

The District erred as a matter of law in granting the temporary permit for the reasons stated, and the applicant does not meet the standards to receive a regular permit. Because the well was not in operation at the time HB 3405 became effective, the District lacked authority, as a matter of law, to issue the temporary permit. Because the Application was not administratively complete and did not comply with the District's rules related to consistency between authorization and use, the District's decision to grant the temporary permit was arbitrary and capricious.

The District has the authority to revoke the temporary permit based on the fact that the Applicant has provided the District with false information. Irrespective of the decision whether to revoke the temporary permit, TESPA requests that the District deny the Applicant's request for a regular permit. HB 3405 states that the district "shall issue an order granting the regular permit authorizing groundwater production in the amount set forth in the temporary 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. The law does not prohibit the district from denying the permit application. HB 3405 expressly recognizes the District's authority to deny a permit. Under Section 4(i) of the Act, "A person who relies on the temporary permit granted by this section to drill, operate, or engage in other activities associated with a water well assumes the risk that the district may grant or deny, wholly or partly, the permit application when the district takes final action after notice and hearing to issue a regular permit pursuant to the application."

Thank you for consideration of these comments and objections.

Respectfully submitted,

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