Barton Springs
Edwards Aquifer
CONSERVATION DISTRICT

September 1, 2016

The Honorable Charles Perry
Chair of Texas Senate Agriculture, Water, and Rural Affairs Committee
P.O. Box 12068-Capitol Station
Austin, Texas 78711-2068

Re: District Response to Testimony Provided by Edmond R. McCarthy, Jr at the July 25, 2016 Committee Hearing on Texas Groundwater

Dear Senator Perry,

As the General Manager of the Barton Springs/Edwards Aquifer Conservation District (District), I would like to express appreciation for your attention to the matter of groundwater management in the state. Your leadership through this interim period as Chairman of the Senate Agriculture, Water, and Rural Affairs Committee has been integral to providing a much needed forum for information exchange and open debate on this matter that is of such importance to our state.

That said, the District observed the testimony of Mr. McCarthy at the July 25th hearing which was focused entirely on the Needmore Ranch experience with our District since the passage of H.B. 3405 and I feel compelled to provide corrections to the information provided. The District has a very different perspective and asks that you consider the matter from our point of view. Please note that Needmore, through the Needmore Water LLC, has a pending application that has not been considered by the District Board of Directors (Board). Therefore, this letter and enclosed response has not been reviewed by the Board. The points raised in Mr. McCarthy's testimony are addressed point-by-point in the attached document. The District respectfully requests your consideration of the responses.

Please understand that the District recognizes that groundwater in Texas is a private property right that must be preserved and protected. The Texas Legislature has affirmed that the most effective and preferred method of protecting those rights is through management of our groundwater resources via Groundwater Conservation Districts. Our District has established a well-respected reputation of developing policies on the basis of sound science. We are committed to maintaining this representation through fair and equitable application of these science-based policies that balance our region's demand for groundwater with maintaining long-

term availability of water supplies to existing well owners and all others dependent on the resource.

The District very much appreciates the opportunity to provide our perspective on the matters raised in Mr. McCarthy's testimony. We stand ready to assist you in any way we can and we intend to continue to work cooperatively with Mr. McCarthy and Needmore to resolve any misunderstanding of the District's rules and policies. Please feel free to contact me by email at john@bseacd.org or by phone at (512) 282-8441 if you have any questions or would like to discuss this matter further.

Sincerely,

John T. Dupnik, P.G.
General Manager

CC: The Honorable Judith Zaffirini
The Honorable Brandon Creighton
The Honorable Bob Hall
The Honorable Juan "Chuy" Hinojosa
The Honorable Lois Kolkhorst
The Honorable Jose R. Rodriguez
The Honorable Donna Campbell
The Honorable Kirk Watson
Representative Jason Isaac
Representative Paul Workman
Representative Donna Howard
Representative Eddie Rodriguez
Representative Elliott Naishtat
Director: Jeremy Hagan

BSEACD Response to Testimony Provided by Ed McCarthy at the Senate Agriculture, Water, and Rural Affairs Committee Hearing on July 25, 2016

The points raised in Mr. McCarthy's written testimony are provided below in *italics* followed by the District's response.

Point No. 1: *5,000 contiguous acres of land overnight went from (i) unregulated to regulated, and (ii) land got split between two districts. Result, now landowner is subject to paying "transport fees" to move and use his groundwater from one side of his ranch to the other. Land is contiguous.*

District Response: Needmore Ranch II, Ltd (Needmore) has not been assessed any transport fees and with the new rule change, will not be subject to transport permitting or payment of fees. When H.B. 3405 was passed, the new boundary created an immediate transport situation at the Needmore property as defined by statute since the producing well was located within the District and the receiving area was located out of the District. Without a request from Needmore, the District took the initiative to adopt new rules that specifically provide an exemption that allows Needmore, and any other similarly-situated well owner, to continue with current and planned use without the requirement to permit the transport or pay transport fees. This was consistent with the Board adopted rules to allow continued use of existing wells in newly annexed area.

Point No. 2: *The District is imposing substantial substantive fees and other costs on the landowner beyond what is clearly authorized by statute, and beyond what is charged or imposed on other permittees even though the intent is to benefit/protect third-party permittees/landowners, not the impacted/affected landowner, e.g., monitoring wells.*

District Response: This is simply not true. The Board deliberately waived all application fees for all new Temporary Permit applicants including Needmore in an effort to smooth the transition of existing well owners from unregulated to permitted. Further, Needmore was issued a Temporary Permit for all existing and planned agricultural uses and invoiced for production fees at the highly discounted agricultural rate of $0.003/$1,000 gallons and a total annual production fee of $552.

For reference, an equivalent amount of permitted production at the rate paid by all other Temporary Permit holders ($0.17/$1,000 gallons) would be assessed at total annual production fee of $30,594. In other words, the amount charged to Needmore was assessed at a rate that is less than 2% of the rate charged to all other non-agricultural permit holder.

The production fee rates for both nonexempt agricultural and non-agricultural uses are clearly authorized in both the Chapter of the Texas Water Code (§36.205) and the District's enabling legislation (Special Districts Local Laws 8802.104 and 8802.1045). Therefore, all of the evidence is in direct contradiction to the allegation that the District is charging unauthorized fees or substantial fees beyond those charged to others.

Point 3. *The District has portrayed a permit application for approximately 895 ac-ft/year for agricultural use on 5,000 acres as presumptively going to have an "unreasonable negative impact" on neighboring permittees/landowners. The potential for negative impact" is statutorily prescribed. It is not founded on any real science. The District is primarily relying upon a hypothetical model (Theis Equation) that does not acknowledge the existence of recharge to the aquifer either from rainfall or lateral recharge from storage of other aquifers or areas of the same aquifer.*

District Response: Mr. McCarthy is evidently referencing the Needmore application to convert the Temporary Permit to a Regular Permit under the HB 3405 process based on the results of an Aquifer test conducted to support the application. Please recognize that it would be premature to discuss the review and findings of a specific application that has not been presented or considered by the District Board. In terms of the general policy, however, the District has recently adopted a permitting framework through new rules that prescribes a scientific evaluation of the potential impacts of a proposed large-scale pumping project on existing wells and the aquifer using aquifer test data and best available science/analytical tools (See rule excerpt attached). Conceptually, the permitting process would involve prescribing conditions for requested pumping with potential to cause unreasonable impacts, as determined by the scientific evaluation, which would be triggered by actual measured aquifer conditions, not modeled or "hypothetical", as described by Mr. McCarthy.

The District staff has been closely coordinating with Mr. McCarthy on the review of the Needmore application and the proposed permit terms and anticipated staff recommendations. This characterization of the District's permitting approach is somewhat surprising as it is completely contradictory to communications with Mr. McCarthy where he has expressed appreciation to the District on behalf of his client, Needmore, for developing this permitting framework and applying a permitting concept that is based on "reliance upon science and actual measured data."

Finally, the District takes exception to Mr. McCarthy's portrayal of the District's use of analytical models as being "not founded on any real science." Absent a numerical model, the application of analytical models using the Theis Equation, a well-established analytical tool and hydrogeological equation, to predict the effects of pumping is an accepted methodology and standard practice for any competent hydrogeologist. To indicate otherwise ignores the best available science in the field of hydrogeology and is not founded on any credible basis.

Point 4. *Imposition of special conditions that are not uniformly applied or imposed on other permittees. Focus appears to be on what are perceived to be "large permits" defined by the District to be permits authorizing production of greater than 2,000,000 gallons per year (approximately 6 ac-ft/years).*

District Response: Again, Mr. McCarthy appears to be referencing the District staff's review of the Needmore application which is ongoing and has not been presented or considered by the District Board. As such, any discussion of this specific application is premature.

As a general policy, however, there is a well-established precedent for stair-stepping or tiering regulatory requirements to scale with the magnitude of the project and the potential for impacts. The District has established rules and aquifer testing guidelines with defined tiers and increasing degrees of required information and testing requirements to be proportionate to the increasing degree of potential impacts associated with larger-scale pumping projects. These requirements are uniformly applied to all permit applications on the basis on the amount of pumping requested.

Permit conditions are developed consistent with the District's permitting policy and the scientific evaluation of the supporting aquifer test and potential for unreasonable impacts to the aquifer and existing wells. The District relies on aquifer testing to evaluate each individual application to reflect the highly variable conditions of the Edwards and Trinity Aquifers in the District and the variable responses to pumping. To apply a one-size-fits-all approach would be much easier but simply does not work with these aquifers.

Point 5. *Notwithstanding statutory prohibition in Section 8802.106 on exempting wells capable of pumping less than 10,000 gpd the District "exempted" by rule, without making any investigation of whether they meet the statutory criteria, 100s of permits simply because their primary use in purportedly D&L.*

District Response: There is a long-standing historical precedent for establishing exemptions for certain domestic and livestock groundwater uses. Such exemptions are provided in the Texas Water Code and enabling legislation of individual Groundwater Conservation Districts (GCD) and are also commonly recognized in other states and international water law. These exemptions are established in state law to reflect a minimum set of criteria for certain wells that cannot be required to obtain a permit for operation. GCDs have the authority and discretion to expand these exemption criteria beyond statutory minimum dependent on the circumstances specific to each individual GCD.

The District Board made a decision to expand the exemption criteria to allow existing low production domestic wells that would not otherwise have met the minimum lot size criterion (>10 acres) in the newly annexed area to be exempt from permitting. All such wells are required to be registered. The Board allowed this expanded permit exemption consistent with the effort to provide a smooth transition for existing well owners in the newly annexed area. It is not uncommon for a newly established area in a GCD to allow such exemptions to facilitate start up efforts. Further, it is not practical or efficient to expend District resources to require permits and metering for hundreds of low capacity/low production residential wells.

BSEACD Rule Excerpt: 3-1.4.G. (emphasis added)

Adopted: April 28, 2016

G. Applications found to have potential for unreasonable impacts.

1. Policy. The District seeks to manage total groundwater production on a long-term basis while avoiding the occurrence of unreasonable impacts. The preferred approach to achieve this objective is through an evaluation of the potential for unreasonable impacts using the best available science to anticipate such impacts, monitoring and data collection to measure the actual impacts on the aquifer(s) over time once pumping commences, and prescribed response measures to be triggered by defined aquifer conditions and implemented to avoid unreasonable impacts. Mitigation, if agreed to by the applicant, shall be reserved and implemented only after all reasonable preemptive avoidance measures have been exhausted and shall serve as a contingency for the occurrence of unreasonable impacts that are unanticipated and unavoidable through reasonable measures.

Email Correspondence June 10, 2016

-----Original Message-----
From: Ed McCarthy [mailto:emccarthy@jacksonsjoberg.com]
Sent: Friday, June 10, 2016 6:36 AM
To: John Dupnik <jdupnik@bseacd.org>
Cc: Kaveh Korzad <k.khorzad@wetrockgs.com>; Vanessa Escobar <vescobar@bseacd.org>; Kendall Bell-Enders <kbellenders@bseacd.org>; Brian Hunt <brianh@bseacd.org>; Bill Dugat <bdugat@bickerstaff.com>
Subject: Re: Needmore Ranch Well D Permit

John

Thanks. Mr. LaMantia appreciated the clear reliance upon science and actual measured data in the concepts, and authorized us to move forward and work with you and your staff to develop the detailed permit conditions based there on. As always, the devil is in the details, however, Kaveh and I assured him we believed the principles embodied in the concepts you and your staff presented gave us confidence that together we would all draft a permit that protected and preserved the interests/rights on all sides.

Thanks.

Ed

On Jun 10, 2016, at 6:29 AM, John Dupnik <jdupnik@bseacd.org<mailto:jdupnik@bseacd.org>> wrote:

Good morning, Kaveh.

Thanks for following up. I take this to mean that there are no strong objections or comments on the concepts as presented thus far. If so, we will develop some draft permit conditions for you and Mr. LaMantia to review. Let me know otherwise.

We will be in touch.
Thanks,

John
John T. Dupnik, P.G.
General Manager
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From: Kaveh Khorzad [mailto:k.khorzad@wetrockgs.com]
Sent: Thursday, June 09, 2016 12:38 PM
To: John Dupnik <jdupnik@bseacd.org<mailto:jdupnik@bseacd.org>>
Cc: Vanessa Escobar <vescobar@bseacd.org<mailto:vescobar@bseacd.org>>; Kendall Bell-Enders <kbellenders@bseacd.org<mailto:kbellenders@bseacd.org>>; Brian Hunt <brianh@bseacd.org<mailto:brianh@bseacd.org>>; Bill Dugat <bdugat@bickerstaff.com<mailto:bdugat@bickerstaff.com>>; emccarthy@jacksonsjoberg.com<mailto:emccarthy@jacksonsjoberg.com>
Subject: Needmore Ranch Well D Permit

John, we would like to thank you and the staff again for the meeting last week. I know the District has worked hard in developing new rules and for maintaining a scientific basis of reviewing permits. I would personally like to thank yourself and staff for developing a measured data approach to the permit.

Ed and I have spoken to Mr. LaMantia about the meeting and the general concepts outlined for the permit. Mr. LaMantia would like to move forward to the next step in receiving more detail of the permit conditions in writing.

Thank you again.

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