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Mr. John Dupnik, General Manager
Barton Springs/Edwards Aquifer Conservation District
1124 Regal Row
Austin, Texas 78748

Re: Proposed Rule Changes

March 22, 2016

Dear Mr. Dupnik,

The City of Buda would like to thank the Barton Springs/Edwards Aquifer Conservation District for the opportunity to comment on the proposed rule changes that are to be considered by the District Board on March 24, 2016. The City is cognizant of the time and energy District Staff has invested in this endeavor and would like to commend their efforts. Recognizing that some aspects of the proposed rules are attempted to be defined in a way that will allow collaboration between the District and future applicants, there are some areas that warrant clarification to provide a level of certainty for those considering future large volume permit applications. The City of Buda respectfully submits the following comments for the District's consideration.

Notification Requirements

In describing the required mailing list, the word "registered" should not be removed as proposed in section 3-1.4,7.g.ii (pg. 44). Besides allowing the District to monitor and manage overall use of groundwater resources, well registration is also a means for the District to help protect existing wells from possible impacts of future permitted projects. If a well owner has not properly registered their well as required by District rules, they are by default forfeiting this level of protection. Therefore, mailing lists for any notification required by the district should be confined to owners of wells that have been properly registered with the District.

Also, the current cost of certified mail with return receipt is approximately $6.74. The proposed, incrementally expanded notification requirements for permit applications of 200 MGY and above can result in significant cost depending on the density of private wells in the project area. The District may consider relaxing the requirement for return receipts in order to offset some of the costs that may be incurred from expanded notification requirements.

Unreasonable Impacts
In the definition of Unreasonable Impacts (pg. 27), item 6 establishes the "depletion of groundwater supply over a long term basis" as an unreasonable impact. In the absence of defining what "long term" means in the context of a requested permitted volume, virtually any existing large volume permit as well as the aggregated withdrawals of existing exempt wells could be argued to be contributing to the depletion of groundwater supply over a long term basis in some formations. The broadly defined nature of this item makes it problematic to use as an indicator of unreasonable impact.

Aquifer Test Plan/Hydrogeological Report
The proposed revised definition of the required hydrogeological report includes a component to assess the response of an aquifer to pumping over time and the potential for unreasonable impacts as defined in the proposed rules. Depending on the level of analysis required to meet the District's expectation and standards, this could add appreciable consulting costs to produce a report that will be deemed satisfactory. Determining long ranging temporal effects to the aquifer could be interpreted as requiring advanced research efforts such as numeric modeling. It would be appreciated if the District could more clearly define the level of effort and analysis required to produce the newly defined hydrogeological report.

Monitoring Well/Compliance Well Networks
The necessity to monitor surrounding wells during a required pump test is understood, but the establishment of a permanent monitoring well network could lead to substantial project costs and complexity. By creating a source of data that can be used in long-term project operation, permanent monitor wells can benefit the permittee as well as the District. But the cost can be significant in terms of easement acquisition, drilling, and monitoring equipment purchase. In addition to these fixed costs, additional budget for staff time and water quality sampling will be required for each monitor well required. Some immediate questions that come to mind are:

- Will each monitor well be required to be outfitted with a permanent pump for sampling purposes?
- Will the District require monitor wells in multiple aquifers for a drilling/permit application?
- Will the District require each monitor well to be outfitted with a transducer for capturing water level data, or will manual data collection be acceptable? If a transducer is required, does it need to be compatible with District equipment? Also, will the District require real-time reporting of water level data?
- What is the frequency of water quality sampling that will be required? Will the sampling be required at regular intervals, will it be event-triggered, or both?

In order for a perspective permit applicant to be able to estimate total project costs, greater detail is needed on the minimum construction specifications for required monitor wells, the type of monitoring equipment that will be required, and the frequency and nature of water quality sampling that will be required by the District.

The option to use existing wells in monitoring efforts may be an avenue to offset some drilling costs, but it can also be problematic in some ways. Some existing private wells may not be easily monitored without appreciable effort and expense. Permit applicants are exposed to significant liability when required to monitor private wells, especially if they are required reconfigure these wells to accommodate a transducer for temporary or permanent data collection. The potential exists for private well owners to attribute any future well malfunction to the permit applicant's monitoring efforts, even

if the well or pumping equipment had existing deficiencies prior to the permit applicant's actions. This could inadvertently create an environment where private well owners expect the permit applicant to provide ongoing service support for normal operation and maintenance issues that would ordinarily be addressed by the well owner.

Section D.3.d (pg. 55) under Hydrogeological reports and Aquifer Testing states that an established monitor well network may be converted to a compliance well network as a permit provision. Permit applicants cannot guarantee the District access to private wells that may fall into this scenario as required in previous section D.3.c) iv. (pg. 55). If a private well owner stops allowing the use of their well for a compliance network purposes, will the permit applicant be required to drill a monitor well to replace the lost data point?

Mitigation Plan

The City of Buda recognizes that private well owners should be able depend on their wells to reliably provide them groundwater and has been a proponent of mitigation planning in the recent past. The City also realizes this type of planning effort represents a monumental effort by all parties involved. However, there are concerns with the amount of future liability that a permit applicant may be exposed to by the mitigation plan requirements that are currently proposed.

Mitigation should only be required for existing wells that are properly registered with the District and in operation at the time the permit application is approved. Upon permit approval, large volume pumping projects become a known factor and influence on an area's water resources. If mitigation is required for wells that are drilled in a project's determined impact area after the permit approval date, permittees are subjected to a constantly moving target for mitigation compliance. Part of the premise for requiring mitigation is to protect existing wells from large volume projects that are permitted later in time. A similar spirit of protection should be provided to permit holders with an approved mitigation plan in the form of shielding from mitigation claims for wells that are drilled after the project is permitted and in operation.

The proposed mitigation requirements dictate a great deal of responsibility for permit applicants, but do not address the expectations of private well owners in distinguishing normal well operation and maintenance problems from alleged impact caused by a permittee's pumping. This potentially sets the stage for private well owners in a defined impact area to have the expectation that permit holders must provide around the clock well and pump service work in perpetuity. For example, if a submersible pump in a private well reaches the end of its normal life cycle and ceases to function, will the permit applicant be expected provide on-demand services to remove the pump and investigate the cause of failure? Permit holders should not be subject to mitigation claims for poorly constructed wells, improperly installed pumping equipment, or poorly maintained systems. Although these situations cannot be predicted, the proposed mitigation requirements should include language recognizing that the mitigation does not obligate permit applicants to become full time well services providers, and that problems attributed to the normal operation and maintenance of private well system are the sole responsibility of the well owner.

As currently proposed the mitigation requirements seem to create a great deal of open-ended liability for applicants even after they have a District-approved mitigation plan in place. Linking required mitigation expectations and efforts to permit approval dates as well as establishing responsibilities for

private well owners in addition to permit applicants would serve to stem at least some of the uncertainty that is implicit with an effort of this nature.

In closing, the City would once again like to thank the District for the opportunity to comment on the proposed rule changes. The City recognizes the District's effort to create rules in a manner that will allow maximum flexibility and collaboration between the District and permit applicants to address the complicated issues that are specific to large volume permit requests. However, the City is hopeful that the District will give serious consideration to the submitted comments and find ways to provide clarity in the areas mentioned. In doing so, potential large volume permit applicants will be better equipped to plan projects in a manner that will meet the applicant's needs while fulfilling the District's efforts to balance beneficial use with the protection and preservation of groundwater resources. If you have any questions regarding these comments, please do not hesitate to call.

Respectfully,

Brian Lillibridge
Water Specialist
City of Buda

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March 23, 2016

Board of Directors
Mr. John Dupnik, General Manager
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1124 Regal Row
Austin, Texas 78748

via E-mail & Regular U.S. Mail

Re: Preliminary Comments on the District's proposed rule amendments – as posted for hearing on March 24, 2016

Dear Board Members & Mr. Dupnik:

I am writing to you on behalf of multiple clients who are groundwater owners and/or lessees whose real property rights became subject to and affected by the District's jurisdiction following the passing of HB 3405. We appreciate this opportunity to review and comment on the Barton Springs/Edwards Aquifer Conservation District's ("BSEACD") proposed rule revisions. We trust that these preliminary comments will be received in the spirit offered, *i.e.*, to assist the District in protecting both the property rights of affected groundwater rights owners and their lessees while preserving to the greatest extent possible the qualitative and quantitative characteristics of the aquifers within the District's jurisdiction, particularly with respect to the Trinity Aquifers; and we look forward to participating at the Public Hearing on March 24th.

Our objective in presenting these comments is to assure the adoption of lawful, equitable and defensible amendments to the District's Rules that provide for the sound and fair management of the groundwater resources in the Trinity Aquifers beneath Travis and Hays Counties in a uniform and nondiscriminatory manner that both protects the sustainability of the groundwater resources, and facilitates the maximum beneficial production and use of the same. We appreciate the difficult position that the District finds itself in to implement timely a piece of legislation that was quickly drafted and not thoroughly vetted with respect to the significant adverse impacts and curtailments it had on the constitutional rights of the people and entities who were abruptly subjected to it. The District, however, must find a way to navigate the implementation of the legislation in a manner that balances the mandate of the Conservation Amendment (Tex. Const. Art. XVI, §59) and protects the property rights of landowners.

Early this week I had the opportunity to sit down with Mr. Dupnik and his staff and provide an overview of our concerns with the proposed rules as drafted. I commend your Staff

for being patient, good listeners, as well as for their earnest efforts to meet the challenges presented by HB 3405. I am hopeful that our discussion was fruitful and provided them with an understanding of why the proposed rules, as drafted, do not accomplish the goal of codifying guidelines that all permit applicants and interested persons to know what standards will apply to permit applications and how the interests of existing well owners along with the permittee's property rights will all be protected based upon the "best available science" developed using actual measured data, rather than theoretical methodologies, and sometimes flawed, calculations.

A. General Comments on BSEACD's proposed rule amendments:

In submitting these comments we are cognizant of the fact that the Legislature has imposed certain duties and deadlines upon BSEACD in HB 3405. We are also aware that HB 3405 failed to provide BSEACD with specific guidelines and/or direction in fulfilling those duties. For example, HB 3405 articulates as a "standard" for determining whether to grant an applicant a "regular permit" in the "shared territory" the consideration of whether granting a permit for production of the requested volume of water will cause an "unreasonable impact on existing wells." *See* Act of 2015 84th Leg, R.S., Ch. 975, § 4.(e)(2) 2015 Tex. Gen Laws 3425, 3427. The Legislature failed, however, to define the term "unreasonable impact."

Assuming that the failure to define the critical standard does not cause the statute to be unconstitutionally vague, whether or not intentional, that legislative failure places the BSEACD in the difficult position of divining a definition for the standard that provides for both (i) the protection of landowners' procedural and substantive due process rights as well as their constitutionally protected property rights in their groundwater (*See* Tex. Water Code § 36.002; *EAA v. Day*, 369 S.W. 814, 831-32 (Tex. 2012)) and (ii) the BSEACD's constitutional duty to provide for the preservation, conservation *and* development of the affected aquifer (Trinity Aquifer) as mandated by Article XVI, § 59, TEX. CONST.

In fulfilling the mandate, the BSEACD should maintain as its guiding beacon the following principles:

1. As a creature of statute, BSEACD is limited to exercising only those powers that have been expressly granted by the Legislature or are necessarily implied pursuant to the express powers granted by the Legislature. *See Tri-City Freshwater Supply District No. 2 v. Mann,* 142 S.W.2d. 945-948 (Tex. 1940); *South Plains La Mesa Railroad v. High Plains UWD No. 1,* 52 S.W.3d. 770 (Tex. App.-Amarillo 2001, no writ). Those powers and authority do not include the adoption of rules and the exercise of powers simply because they are convenient or make it easier for the District to exercise control. Similarly, the Legislature has not authorized the adoption of rules which are clearly contrary to Texas Jurisprudence and mandates of the Texas Water Code. The broad discretion allowed in the BSEACD's proposed rules will very likely lead to discrimination, as different applications are put to different standards, a circumstance explicitly prohibited by the Texas Water Code. Discretion will result in discrimination and, thereafter, litigation – an undesirable result for all affected Parties as well as a waste of their limited resources.

2. In 2011, the Texas Legislature expressly recognized Texas landowners' ownership rights in groundwater underlying their property in amendments to Section 36.002 (*see* SB 332), which fact was expressly noted by the Supreme Court in its *Day* decision. Texas Water Code § 36.002; *see Day*, 369 S.W.3d *supra* at 832, 842. While the amendments to Section 36.002 also acknowledged the authority of groundwater districts like BSEACD to regulate groundwater production (*see* 36.002 (d)(1)), as the Supreme Court reasoned in *Day* with respect to the "tension" between the provisions of subsections (c) and (e) of Section 36.002 relating to the EAA's required authority, the Legislature's recognition of landowners' property rights and the limitations on districts' authority to regulate the same in light of the amendments to subsections (a) and (c) must be balanced in favor of landowners' property rights such that the regulatory authority cannot be exercised in a manner that results in a deprivation or divesture of those property rights constituting an unlawful taking absent the payment of adequate compensation as constitutionally guaranteed. *Day,* 369 S.W.3d, *supra* at 842-43; *see* TEX. CONST. ART. I § 17; U.S. CONST. Amend 5, 14; Texas Water Code § 36.002 (a), (c).

3. As the Supreme court noted in the *City of Corpus Christi v. City of Pleasanton*, 276 S.W.2d 798 (Tex. 1955):

> [U]nder the common-law rule adopted in this state [in *East*] an owner of land could use all of the percolating water he could capture from wells on his land for whatever beneficial purposes he needed it, on or off of the land, and could likewise sell it to others for use off of the land and outside of the basin where produced, just as he could sell any other species of property.

City of Corpus Christi, 276 S.W.2d *supra* at 802. This statement of the law quoted from the *Corpus Christi* decision actually dates back to the Supreme Court's 1927 decision in *Texas Company v. Burkett* wherein the court distinguished the characteristics of a landowner's right to the percolating groundwater beneath his property from the rights to surface water, including riparian rights as being his "exclusive property" with "all rights incident to them [the groundwater] that one might have as to any other species of property." *Texas Company v. Burkett*, 296 S.W. 273, 278 (Tex. 1927). This principle was not changed by the 2011 amendments to Section 36.002.

While HB 3405 places the burden on the permitted applicant to show that the District's determination that granting a Regular Permit will cause an "unreasonable impact" on a neighboring well, the burden to provide adequate notice to a permit applicant of the standards and criteria for what constitutes an "unreasonable impact" is on the Legislature operating, at this time, through its delegation of powers to the BSEACD. As presented in the proposed rules, the District will only be required to show a potential for a theoretical unreasonable impact on a neighboring well. There is no measurable criteria presented in the proposed rules as a standard against which an applicant can knowingly measure the impact of its production and determine if the permitted well would cause an unreasonable impact, and/or whether there are ways to manage production that would avoid such an unreasonable impact.

We believe that the District's Staff's intent is to use actual measured conditions in the aquifer to evaluate and determine whether an unreasonable impact has in fact occurred. The rules, however, are drafted in a way that never allows actual measured criteria, or any real scientific data, to establish whether an unreasonable impact has, or has not, occurred. Instead, the rules, as drafted, present a theoretical set of parameters based upon calculations using models, as discussed hereinafter, that are flawed when applied to the characteristics of the aquifer involved, *i.e.*, the Trinity Aquifer.

Having failed to adequately define and provide notice to permit applicants of what constitutes an "unreasonable impact", and applying a theoretical standard based upon a vague set of standards, will more than likely create problems for the District leading to litigation over takings of property rights as well as violations of substantive and procedural due process. We do not believe that that was the District's intent, and we encourage the Board to evaluate the rules in light of this threat and, thereafter, direct the Staff to review, revisit and revise the rules accordingly.

The recent court decisions in *EAA v. Day & McDaniel* and *EAA v. Bragg* have reinforced Texas common-law principles announced more than a century ago in the *East* case that groundwater belongs to the landowner. Moreover, the *Day* and *Bragg* rulings make clear the fact that groundwater conservation districts ("GCDs") cannot deny a landowner the right to produce groundwater under his property outside of the limited authority granted by the Legislature to protect and preserve our aquifers to provide for their long-term development and production.

We have heard that Staff believes these proposed rules are reflective of the principles that provide the foundation for the recent settlement reached by the Lost Pines GCD with permit applicant Forestar. Nothing could be further from the truth as the rules are currently drafted.

The Lost Pines/Forestar settlement is premised upon the legislative mandate expressed in Section 36.1132(b), Texas Water Code, that Districts grant permits, even when the "paper total" of the volumes permitted exceed the MAG (Modeled Available Groundwater) volume and, thereafter, manage actual production from the affected aquifer and the effects of such actual production on the aquifer. Specifically, the Lost Pines/Forestar settlement allows Forestar to produce ever increasing volumes of groundwater while actually monitoring the impacts. If the impacts demonstrate long term negative impacts on the affected aquifer (the Simsboro Aquifer) that will cause the District to be unable to achieve its DFC notwithstanding ongoing active management of the aquifer, including periodic temporary curtailment orders, then Forestar's move to the next stair-stepped increase in production can be delayed or precluded.

The criteria being used in the Lost Pines/Forestar Settlement are based upon actual measured activity in the affected aquifer monitored overtime. The District's proposed rules, however, particularly those rule proposals directed at limiting, if not denying production permits to new (particularly large scale) applicants are based upon (i) theoretical model calculations of long prognosticating of what long term impacts might be using the Theis Equation, and (ii) a

theoretical model which is known to be flawed in its application to the subject aquifer, *i.e.*, the Middle Trinity Aquifer.

The rules can be revised to adopt an "as measured" approach modeled on the Lost Pines/Forestar Settlement. Moreover, the theoretical approach embodied in the present draft rules can be embraced in a revised set of rules. The theoretical components, however, must clearly be positioned to serve as guideposts, rather than determinative criteria. Moreover, actual measured data must be relied upon as the ultimate determining factor of whether production from a specific permit, or set of permits, rather than the overall pumping of the aquifer or other external factors, *e.g.*, prolonged drought, is the cause of an impact to a neighboring well or wells. *See EAA v. Day*, 369 S.W.3d, *supra*, at 843 ("The Legislature's general approach to such regulation has been to require that *all relevant factors be taken into account"* (emphasis added)).

It is important in crafting rules to implement HB 3405 remember the following admonition of Justice Hecht in the Day case:

> "The Legislature can discharge its responsibility under the Conservation Amendment without triggering the *Takings Clause*. But the *Takings Clause* ensures that that problems of limited public resources -- the water supply -- are shared by the public, not foisted on a few. ... [T]he burden of the *Takings Clause* on government is no reason to excuse its applicability.

See EAA v. Day, 369 S.W.3d, *supra*, at 843-844 (emphasis in the original).

B. Specific Comments on BSEACD's proposed rule amendments:

1. **Proposed amendments to Rule 2-1 (Defined Terms):**

Set forth below are comments on specific definitions being proposed for amendment:

a. **"Beneficial Use":** The three subsections for Beneficial Use currently drafted are generally useful; however, they contain several fundamental problems that need to be addressed:

The proposed definitions run afoul of the legislatively mandated definitions of "beneficial purposes" and "waste." The proposed definitions which generally tracks the definitions found in 36.001, are drafted more narrowly than those prescribed by the Legislature. Accordingly, the District is attempting to impose restrictions and limitations on beneficial use not authorized and/or inconsistent with those allowed by the Legislature. The District lacks authority to do that. In particular, the portion of the definition in subparagraph 3., specifically, the inclusion of the phrase "non-speculative" before the word "purpose" is not contemplated nor authorized by Chapter 36. Additionally, at the end of

subparagraph 3., the addition of the phrase "that does not constitute waste." is unnecessary and suggestive of the exercise of powers beyond those authorized by the Legislature. In subsection 36.001 (8), the Legislature has identified those uses or activities which it believes to constitute waste of groundwater. Such activities are expressly prohibited by Chapter 36. There is no reason for the District to include in its definition of Beneficial Use that the activity does not constitute a waste. By definition, any activity which is a waste and prohibited by law cannot be deemed beneficial. Accordingly, we recommend the deletion of the term "non-speculative" and the phrase "that does not constitute waste."

By excluding what the District might consider to be "speculative" uses, a term which is not defined or included in any definition in Chapter 36, and, therefore, subject to blind discretion and, therefore, discriminatory and abusive in application, the District is attempting to exercise authority commonly known as "*in loco parentis*", which is an authority or level of power not generally given to districts. Moreover, it presumes the District knows better than the landowner how the landowner should beneficially use his own property. That assumption is far beyond a district's regulatory authority. Moreover, it is the equivalent of the District exercising the management and decision making prerogatives of governmental entities and/or retail utilities responsible for the development and provision of water supplies for beneficial use either to wholesale or retail customers. Finally, it constitutes a limitation on an owner's free and lawful use of his property rights.

The fact that a property owner may want to "speculate" in the use of his groundwater is a right he is constitutionally entitled to exercise. Unless that use constitutes (i) "waste," as that term is narrowly defined by the Texas Legislature, or (ii) it violates a permit term or condition, or (iii) a statute, the District has no authority to prohibit or limit a "speculative use."

The fact that the District may believe that a proposed use of water imprudent or risky does not mean that is cannot or should not be permitted. A proposed use of groundwater that otherwise meets the statutory criteria for "beneficial purpose" and/or the District's rules on "beneficial use," and/or which does not violate the statutory definition of "waste," is a lawful use of the property right that the property right owner is entitled to make. Even "stupidity" in the eyes of the District must be permitted so long as it is lawful. Otherwise, the District is violating the property rights of the affected landowner.

The other problem with the use of the term "non-speculative" is that it is an undefined term which has significant impact on a landowner's ability to use his groundwater rights. Based upon historic practice, it is our understanding, that a proposed use of groundwater for a municipal or industrial project, whether wholesale or retail, is considered to be "speculative" by the District if it is (i) not

supported by a contract or (ii) requested by an entity with a Certificate of Convenience and Necessity (CCN) or (iii) other governmental entity who has a governmental duty to provide water services within its jurisdiction to its constituents. While allowing an application for use based upon a projected need, rather than an actual current use, by any of those three types of entities is reasonable and justified, limiting it to those three types of entities is not reasonable, justified nor lawful. Moreover, adopting a rule prohibiting one to "speculate" about the lawful use of his property has not been authorized by the Texas Legislature. As a creature of statute, the District must always remind itself that whether or not it is authorized by the Legislature is the controlling factor, not whether it would be convenient or useful to the District to be able to exercise a particular power.

As an example of a type of project that would be considered "non-speculative," if requested by a municipality or CCN holder, but would likely be considered speculative by an entrepreneurial property owner or groundwater lessee is a large scale groundwater project designed for municipal and industrial water supply purposes requiring the construction and installation of expensive infrastructure with a lifetime of 30 to 50 years minimum. These types of projects are based on long-term planning.

As the District knows, planning for future water needs is one of the most important things that utilities, governmental entities and other water supply entities do. To that end, we believe it would be helpful if conservation of production not currently needed were incorporated into the definition of Beneficial Use. Specifically, by granting larger permits in which the production volumes would be phased-in over time allows for the conservation of the unused portion of the water *and* the ability to finalize and construct the necessary infrastructure to meet the long term demands. We believe that incorporating the long range planning component into the rules and the permitting process is merely a subset of "municipal use." We worry, however, that without a more specific recognition of it in the District's Rules would facilitate the argument that non-use of long term demand in the early years somehow constitutes "waste" because the proposed amendment mandates "use of groundwater." Demonstration that the permitted water has been withdrawn and applied to a physical beneficial use is *not* mandated by statute. The proposed Rule also conflicts with the Texas Water Code in that regard.

Requiring multi-year signed contracts with end-users prior to permit issuance effectively prevents long-term financing of projects because both cities and finance providers need to see a permit before committing to a project. GCDs do not require signed contracts with the end-users of any other product of the use of groundwater in their districts (for example, no signed contract with a purchaser of alfalfa is required to get a permit for irrigation well), which raises equal protection

flags. Because groundwater produced at the surface may be "bartered" like any other species of property, these are impediments to commerce that are likely unconstitutional.

Another issue with this potential change is it prevents any use that may require long-term planning. As you know, many beneficial projects which utilize groundwater are not necessarily "overnight projects," which will see the groundwater produced and immediately used. Longer term projects, including those for municipal use, require planning years in advance in order to secure necessary funding for infrastructure, as well as confirming a secure supply will be available to meet future, growing needs. In fact, this provision could lead to unnecessary production just to meet a quota, again preventing valuable conservation, by creating a new "duty to pump" if someone wants to preserve their legally protected property right. As Justice Hecht wrote in the *Day* case:

> "To forfeit a landowner's right to groundwater for non-use would encourage waste."

Day, 369 S.W.3d, *supra*, at 842.

> "[A] landowner cannot be deprived of all beneficial use of the groundwater below his property merely because he did not use it during an historical period and supply is limited."

Day, 369 S.W. 3d, *supra*, at 843.

> "[T]he burden of the Takings Clause on government is no reason to excuse its applicability."

Day, 369 S.W. 3d, *supra*, at 844.

b. **"Capped Wells":** The Texas Department of Licensing and Registration, the State agency governing the standards for water well drillers pursuant to the Texas Occupation code, defines the term "Capped Wells" in Section 76.10(9) (17 TAC). It seems unnecessary to add further requirements for the District itself.

c. **"Commercial Use":** At the end of the new definition, the rule states that even if something is defined by the TCEQ as a "public water system," it will not constitute a "public water supply" under the District rules. If the project has already been defined as a public water system by the TCEQ, it should be classified the same by the District.

d. **"Maximum Production Capacity":** HB 3405 contains the definition the BSEACD must adopt. How will the District determine from a 36 hour pump test that pumping could eventually cause adverse effects to a pump "after long-term

operation" as described in this definition? This test was employed by the Legislature as a way to maximize a landowner's rights, not the District to limit them. Long range impacts should be "managed" as the Legislature contemplated in the unambiguous language of Section 36.1132(b), based upon actual maximized production from the affected aquifer to achieve the DFCs. The use of this pump test as incorporated in the proposed definition seems purely speculative and a way to limit production capacity without any proof or reason. Further, this definition of Maximum Production Capacity is not based on any industry standard and is arbitrary. In the water utility industry groundwater wells produce for varying hours per day based upon the utility's needs and the production ability of the well. The word "Maximum" on its face infers the highest or largest pumping rate that the well could achieve on an instantaneous basis. HB 3405 states that "it may be based upon a 36-hour pump test." To arbitrarily state that Maximum is actually 20% less than the Maximum disregards the meaning, and arbitrarily robs an applicant of production capacity and the exercise of his property rights.

e. **"Production Fee":** Given the District will require reporting and metering, the production fee should only be charged on actual production, not authorized production. This is especially true when production of the full permitted amount may not be utilized due to restrictions or provisions implemented by the District. At the very least, given the District later on proposes the idea of phased production, this fee should at least be limited to the maximum amount a permittee is authorized to produce at a given time, and not the amount eventually authorized when fully phased-in.

f. **"Public Water Supply Use":** As discussed in the comments related to "Commercial Use" above, the TCEQ has already defined what a "public water system" is. Public water supply is public water supply, to differentiate between "Retail Public Water Supply" and "Wholesale Public Water Supply" is not only unnecessary, but potentially discriminatory.

g. **"Substantial Alteration":** This definition is essentially any alteration in association with "substantial well repairs," but no definition is given for "substantial well repairs." Without a definition of "substantial," there is no way to know whether or not a repair or alteration is substantial. Also, are alterations only those done by choice to an Applicant's own wells, or does this include situations where the District forces an Applicant to do work on another person's well based on a "potential" for impact which are not even proven or have not yet taken place?

h. **"Sustainable Yield":** The first issue with this definition is that it includes the provision "without significantly depleting the aquifer," without a definition given for what constitutes a "significant depletion" of the aquifer. Second, the definition appears to require a calculation adding in an effect at the level of the drought of record, regardless of the actual circumstances at play.

i. **"Unreasonable Impacts":** As this is probably the most significant change stemming from HB 3405, this is probably the most important new definition the Board will pass. For that reason, it is imperative that the full implications of each part of the definition must be fully vetted, and special care taken to make sure the definition does not 1) overstep the bounds of the District's authority; 2) alienate the Constitutionally protected rights of property owners; or 3) lead the District into a situation of enforcing actions which will lead to a taking, embroiling the District in litigation. Before going into the specific subsections, there are a few assumptions behind this definition which are incredibly problematic. The major misconception that is embedded in this definition is the idea that a person has some sort of eternal and inalienable right to the well design, and pump height they chose when a well was first installed. There is nothing in the Texas Water Code which states that a well is guaranteed to work forever, in the same manner in which it was originally installed, or that aquifer levels will be unchanged to the extent that anyone coming later must be punished or responsible if that level changes. In fact, the Rule of Capture, which has been clearly held by the Courts of Texas since the beginning of the 20th Century to be the standard, explicitly argues against this idea. More specifically, Texas Water Code §36.002, as amended in 2011 recognizes a landowner's property right in the groundwater beneath their surface, specifically states that the ownership rights do not "affect the existence of common law defenses or other defenses to liability under the rule of capture." Tex. Water Code §36.002(b-1)(2). With this definition being built upon this fundamental misconception, the new rules proposed by the District fly in the face of the Texas Water Code, over a century of Texas Jurisprudence, and the recent affirmation of those ideas by the Supreme Court of Texas. We appreciate the fact that the District had a short period of time mandated by the passage of HB 3405 to try to come up with these rules and definitions. However, we are concerned that based on the faulty assumptions which have been built in to the definitions given, that the Legislature's mandate may have been unconstitutionally vague, forcing the District out on a limb, as it were. We would suggest either going back to the Legislature for a better explanation of what an unreasonable impact constitutes, while making sure that the definitions do not conflict with the plain language of the Texas Water Code, or the well-established Rule of Capture. Alternatively, we would suggest the District continue this rulemaking process, bringing in educated stakeholders in a more open process that can add to the discussion and make sure all factors are rightfully considered. We would normally like to offer ideas for how the rule should read, but given the problematic assumptions the proposed rules are built on, it is impossible at this time for us to offer suggested language without changing the entire framework. That said, we have the following comments, concerns, or questions about the specific subsections discussed below.

    1. **"well interference related to one or more wells ceasing to yield water at the ground surface":** We have several questions and concerns about this subsection. First, is this for all wells, only

wells within the same formation as the well in question, only registered wells, only registered wells within the same formation as the well in question, or another limiting definition? This language also assumes that the existing well is in perfect working condition, what if there is an old well with an insufficient pump, motor, or other equipment that fails and leads to a cessation of water yield at the surface? Further, a well owner could have his pump set just below the static water level causing any drawdown to cause the well to cease yielding. There is also no way to tell how natural occurrences such as a drought will be factored in to this review. Most importantly, how is the correlation between wells established? How are effects of specific wells separated from effects of other wells in the area? If a well is at a point where the pump is only a minimal amount of space below the water level before a new well comes online, are other wells factored in to the total drawdown, or is it only the "straw that breaks the camel's back" that is considered to have an unreasonable impact? Finally, once again, this subsection presupposes that a well owner is guaranteed the same water level that existed at the time the pump is installed *ad infinitum*, a completely unreasonable expectation, and a circumstance that is not protected by any rule, law, or decision by the courts of Texas. More importantly, this directly conflicts with the well-established Rule of Capture recognized by the State of Texas.

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":** This subsection at least requires a "reasonably efficient water well," yet there is no definition for what constitutes a "reasonably efficient water well." This subsection still does not define what water wells are eligible (registered vs. unregistered, only those in the same formation, etc.), and without a definition of "reasonably efficient water well" there is no way to tell what this subsection contemplates. Who would decide whether a well is reasonably efficient? When is that determination made? Are wells checked for their efficiency at set intervals? Further, this subsection once again directly conflicts with the Rule of Capture, Texas Water Code §36.002, and the Supreme Court's ruling in *EAA v. Day, supra.*

3. **"well interference related to the lowering of water levels below a feasible pumping lift or reasonable pump intake level":** Is this on a "per well" basis or lowered to a level where it is no longer

feasible for anyone? If this is on a "per well" basis, there are a multitude of issues. As with the prior subsections, this flies in the face of the Rule of Capture, Texas Water Code §36.002 and *Day*. Further, there is no definition for how a "reasonable pump intake level" is determined, or what is considered feasible.

4. **"the degradation of groundwater quality such that the water is unusable or requires the installation of a treatment system:"** There is no information given for 1) who makes the determination on degradation of groundwater quality; 2) how that determination is made; or 3) what would define degradation. Further, we are unsure how this could be determined for the standpoint used later on in the rules about declaring the potential for unreasonable impacts.

5. **"the Desired Future Condition (DFC) to not be achieved":** Much like subsections above, there is no description of how the production from the well in question is considered compared to all other wells actively producing and their effects on the DFCs. Is this once again an issue of the last well that "breaks the camel's back" being the only one that is guilty of causing the DFC to not be achieved? All wells have an effect on DFCs, and the last ones through should not be held responsible for all other wells. Further, Texas Water Code §36.1132(b) mandates that a District "manage actual production" from the aquifer in a manner that will allow it to achieve its DFCs. This does not mean that the District should set a cap which once it is hit, would mean no permits could be issued without resulting in the same finding and limitation. Moreover, the DFC is a condition to be achieved 50-years out. With proper aquifer management of actual production as mandated by Section 36.1132(b), BSEACD should be able over time to insure the DFCs are met.

6. **"depletion of groundwater supply over a long-term basis, including but not limited to chronic reductions in storage or overdraft of an aquifer":** Again, this is far too vague for any permittee to know when this could occur. What constitutes "depletion," "chronic reductions," or "overdraft?" As with the earlier subsections, how are all wells taken into account as opposed to just the well in question? What predictions or models are being used, and is recharge of the aquifer being properly taken into account? If the District is just using the Theis Equation, how are the many faulty assumptions built in to the Theis Equation handled? As the district well knows, the Theis Equation assumes a

homogenous aquifer, which the Middle Trinity especially does not fit. The Middle Trinity is a heterogeneous aquifer. Further, during drought or even during normal summers, the water level in the aquifer lowers due to a reduction in precipitation. This could be taken as a chronic reduction in storage or overdrafting. Would the depletion be determined by modeling? If so, the Theis equation has issues with a lack of recharge and problems with the assumptions used in the equation for calculating drawdown. This all seems completely speculative with no real, quantitative analysis.

7. **No comment**

j. **"Well Interference":** The definition includes "measurable drawdown in the water table" on its own, not necessarily drawdown in the water table actually measured at another well. According to this definition, by strict interpretation the District could claim there is well interference whether or not another well even exists, which does not make any sense. For example, the recently drilled Onion Creek well had no wells nearby that could be impacted. Yet under this new definition, because that well undoubtedly had some level of measurable drawdown on the water table, this would now define that well as contributing well interference, even without any wells in the area.

k. **"Wholesale Public Water Supply Use":** The definition, as drafted, is too narrow as it excludes sales directly to wholesale customers. Additionally, as drafted, the definition would make more sense if it read "means the use of groundwater by a public or private entity that for compensation supplies water to a municipality, another political subdivision, or a retail water utility for resale to the ultimate retail consumer." Again, if the recommended changes are not adopted then the immediately preceding rewrite would make the definition make more sense. That said, the definition should recognize the ability to have wholesale sales made directly to wholesale customers and/or to other wholesalers who in turn may ultimately sell to the ultimate retailer.

l. General comment regarding the definitions related to **"Public Water Supply Use," "Retail Public Water Supply Use"** and **"Wholesale Public Water Supply Use"** seem somewhat unnecessary. None of those uses are defined as beneficial. The actual purposes as to which of those kinds of entities put the water are the recognized beneficial uses both by Chapter 36 and the District's rules. The problem with the District's use of the term **"Public Water Supply"** whether retail or wholesale is that it confuses the concept of beneficial use as well as the concept of service areas. Public water supply systems do not necessarily have a service area associated with them, unlike a retail provider which has a CCN. A public water supply entity which is a governmental entity such as a city could have a water supply service area coterminous with its corporate boundaries and/or its

ETJ but, may have neither or only portions thereof. Retail water purveyors who are not governmental entities, as required by Chapter 13, Texas Water Code, are required to have a CCN previously issued by TCEQ and now issued by the Public Utility Commission. That requirement does not exist on a public water supply system if it is not providing retail water. There are rules which relate to public water suppliers with respect to water quality under Chapter 290 and 291 of the TCEQ rules. Again, these are distinct from the service area concept which is an area of confusion in the District's rules. *See* Rule 3-1.4(B)(7)(g)(i). The District should reconsider all of its rules on which the term **"Public Water Supply"** appears and more narrowly use the term to ensure it is not attempting to exercise authority beyond that granted to it by the Legislature and/or interfering with or usurping the authority of either the TCEQ and/or the PUC.

2. **Proposed amendments to Rule 3-1.3.1:** The new addition of 3-1.3.1(B)(3) is an important one to protect the rights of those who saw only part of their property added to the District by HB 3405. However, subsection 3-1.3.1(B)(3)(c) is too limiting. This should include for projects in the planning phase at the time of the addition of the property to the District, or specifically allow for an exception to be granted for a project that was in early planning stages at the time of the District's addition of the property. There should be no additional permitting or fees required for a person using water on their own property. To do so would conflict with the principle of law that a person holds a constitutionally protected property right in groundwater.

3. **Proposed amendments to Rule 3-1.4(A)(7)(g):** There are a few issues with the proposed changes to the notice provision of the Well Application Rule. First, subsection 3-1.4(A)(7)(g)(ii) has removed "registered" and now requires a mailing list of all well owners within a half mile radius of the proposed well. How can an applicant find information about wells that are not registered with the District? This is an incredibly onerous requirement which could be nearly impossible for an Applicant to comply with. Well owners are under no duty to give an Applicant any contact information or well location information, and could outright refuse, making an Applicant unable to comply through no fault of their own. Even more onerous is the new requirement in subsection 3-1.4(A)(7)(g)(iv), requiring notice be sent via certified mail to all landowners within a 1 to 2 mile radius, depending on the anticipated annual pumpage volume. This distance seems arbitrary, and requiring certified mail to that many people is an expensive proposition for any applicant. Further, how is an Applicant supposed to get the addresses for everyone within an up to 2 mile radius? This is expensive, burdensome, and unnecessary.

4. **Proposed amendments to Rule 3-1.4(A)(10):** This rule allows the General Manager to, based solely on a Hydrogeological Report and aquifer test data, unilaterally claim that a well has potential for unreasonable impact, subjecting the Applicant to considerably stricter requirements, with no opportunity to counter or defend against the determination. Further, there is no definition given for when circumstances amount to there being

"Potential for Unreasonable Impacts." An Applicant should have the ability to challenge the finding that there is "Potential for Unreasonable Impacts." We also re-urge the many issues with the definition for "unreasonable impact" above, and all of the arguments made there apply to this rule as well. Further, potential is pure speculation, and to require the expensive processes described in the rule based on speculative results that may never come to pass is both unnecessary and beyond the scope of powers given to the District by Chapter 36 of the water code. As a creature of statute, BSEACD is limited to exercising those powers that have been expressly granted by the Legislature or powers necessarily applied pursuant to the express powers granted by the Legislature. *See Tri-City Freshwater Supply District No. 2 v. Mann*, 142 S.W.2d. 945-948 (Tex. 1940); *South Plains La Mesa Railroad v. High Plains UWD No. 1*, 52 S.W.3d. 770 (Tex. App.-Amarillo 2001, no writ). This does not include adoption of rules and the exercise of powers simply because they are convenient or make it easier for the District to exercise control. This vague rule would also leave the General Manager with very broad discretion to determine when "potential" exists. This type of discretion leads to discrimination.

5. **Proposed amendments to Rule 3-1.4(A)(11):** Are the "unreasonable hydrogeologic, social, or economic impacts" listed in this subsection the same as the "unreasonable impacts" definition given above? If so, it would make more sense to use the same wording. If not, then there needs to be more definition given, as there is no way to know what an unreasonable social impact could be, for example.

6. **Proposed amendments to Rule 3-1.4(B)(1):** With this provision requiring public notice in newspapers, there is no need for the expensive and laborious individual notice proposed in Rule 3-1.4(A)(7)(g).

7. **Proposed amendments to Rule 3-1.4(D):** Along with the above concerns related to the underlying issues already raised about Unreasonable Impacts, this rule would require for any permits from 12-200 MGY *may* require installation of monitor wells and above 200 MGY will require one "or more" new monitor wells. Is there a limit to the amount of wells that may be required? How does an applicant know what may be required? Also, if there are sufficient wells for monitoring in the area, why would an Applicant be forced to go to the effort and cost of drilling new monitor wells? In subsection 3-1.4(D)(4), the rule states that an Applicant cannot rely on a previously filed report. If the report covers everything required by the District, there is no reason to not accept the previously filed report.

8. **Proposed amendments to Rule 3-1.4(G):** Again, without an opportunity to contest the decision that there is a "potential for unreasonable impacts," and with the current unacceptable definition for unreasonable impacts which features assumptions that are not based in fact or law, and frequently contradict the Texas Water Code, the property right owned in groundwater, and the well-established precedent of Texas courts, this rule allowing the District to deny, modify, or reduce permits will result in an unconstitutional taking.

9. **Proposed amendments to Rule 3-1.6(A)(4):** Again, with the current unacceptable definition for "unreasonable impacts" which features assumptions that are not based in fact or law, and frequently contradict the Texas Water Code, the property right owned in groundwater, and the well-established precedent of Texas courts, this rule allowing the District to deny, modify, or reduce permits will result in an unconstitutional taking and unwanted litigation.

10. **Proposed amendments to Rule 3-1.11(B):** While it seems the amount of wells needed for a Compliance Monitoring Well Network would be different for each example, the rule should include some idea of the maximum amount of monitoring wells that an Applicant could be required to install. More importantly, an Applicant should be able to use existing monitor wells within their Monitoring Well Network.

11. **Proposed amendments to Rule 3-1.11(C):** This new mitigation plan rule has several issues. First, as noted above, the current unacceptable definition for unreasonable impacts which features assumptions that are not based in fact or law, and frequently contradict the Texas Water Code, the property right owned in groundwater, and the well-established precedent of Texas courts, this rule allowing the District to deny, modify, or reduce permits will result in an unconstitutional taking. Further, the inability of an Applicant to somehow contest the GM determination that there is potential for unreasonable impact, which would no trigger this mitigation requirement, is unfair and prevents due process. This mitigation plan also completely contradicts the Rule of Capture. As noted above, the State of Texas clearly holds that people have a property right in groundwater. *See Edwards Aquifer Authority v. Day*, 369 S.W.3d 814 (Tex. 2012); Tex. Water Code §36.002. Further, the Rule of Capture and Texas Courts have shown that a person exercising those rights does not owe a duty to others unless waste is shown. There is no legal basis to require mitigation. Further, this proposed rule is not bound by any distance or time period, meaning an Applicant is required to give out not just a blank check, but a blank checkbook to give money to anyone that claims they have an issue after the Applicant's well has been drilled. This rule also does not require any cause be shown by a person seeking money from the mitigation plan to show 1) that the Applicant had any impact on the claimant; 2) that the Applicant is the only responsible party; 3) that the claimant's well was in perfect working order; or 4) that the claimant's well was drilled to a reasonable depth. This rule also does not take into account the effect of any other existing wells, or what happens to this Applicant's mitigation requirements if later wells are drilled and cause some impact on a claimant's well.

Conclusion:

HB 3405 is a poorly drafted piece of legislation on many levels. In addition to its clear violation of landowner's constitutionally protected property rights, as well as contract rights and due process rights, the legislation provides inadequate guidance both to the District burdened with implementing it, *i.e.*, BSEACD, and landowners burdened with being regulated by it. One of the starkest examples is the failure to define terms like "unreasonable impact" so critical to the implementation of the statute. As provided to the District in HB 3405, the term "unreasonable

impact" is the equivalent of "pornography" under "federal law" which the United States Supreme Court has said it cannot define but recognizes it when it sees it.

Generations of moral fiber ingrained in our DNA seem to "bristle" at the sight of pornography, thereby allowing one to recognize it. The courts, however, do not always agree on what constitutes pornography and, therefore, legislative guidance would be beneficial.

In the instance of the use of the term "unreasonable impact" as it relates to the granting of a permit and the resulting effect on neighboring wells, measurable standards need to be applied, particularly in light of the highly politicized and emotionally charged nature of groundwater. Specifically, an individual landowner who has been operating his well at a particular elevation in the aquifer for a number of years may consider any deviation in the aquifer level as an "unreasonable impact" irrespective of the source of the impact. Whether the effect of production by a newly permitted well is in fact an "unreasonable impact" should be evaluated on the basis of some standardized criteria which is both known and determinable by an applicant, a well owner and the District in advance of when the standard is to be applied.

As examples of why the individual landowner's reaction to a reduction in the aquifer level at his well is not reasonable include the fact that wells are completed at multiple elevations throughout the aquifer. Moreover, small domestic wells frequently are completed and the pump set at the shallowest point possible in the aquifer that the driller and/or landowner believes they will be able to secure water. This is obviously an economic decision driven by the cost of deeper drilling, particularly in a hard rock karst aquifer setting, as well as the lift cost associated with the depth at which the pump is set and water is lifted from the aquifer to the point of use.

That decision, or the circumstances which drive it, however, are not grounds for a subsequent determination of reasonableness. In fact, it is unreasonable for anyone to assume that aquifer levels will remain static, stagnant or stable.

By virtue of the construction of the original well and the placement of the pump and the production of groundwater, that individual has impacted the aquifer and continues to impact the aquifer with all future pumping. The next well owner that comes along and drills a well and sets a pump and begins pumping adds to the impact on the aquifer as well as has some impact on the first well. With each new well the pattern of impacts continues.

Accordingly, the various "shades of grey" that the District has attempted to create as a non-specific, non-standardized metric for determining whether or not a new project or proposed well would constitute an unreasonable impact is not a reasonable approach. The "shades of grey" approach has the effect, particularly with the wide discretion given to the District as the decision maker, in targeting larger projects.

In addition to being discriminatory, that perspective and/or approach violates both the Supreme Court's decisions in the *Day* case and its action in the *Bragg* case and its historic decisions beginning with the *East* case and moving forward through the *Day* decision, as well as

the Legislature's 2011 amendment to Chapter 36 and Senate Bill 332 in which the common law defenses of the Rule of Capture were expressly recognized.

To constitute an "unreasonable impact," absent some other clear legislative guidance to the contrary, the District should be looking at events of a more "catastrophic" character. For example, reductions in aquifer level either due to a reduction in quantity due to production from other wells, and/or reduction in artesian pressure should both be expected and recognized as reasonable. Production at rates or volumes that impair the aquifer's ability to recover during times of reduced pumping or traditional recharge events, *e.g.*, rainfall events. Projects and/or wells which could foul the aquifer, impair its quality and/or make it physically impossible for a well operator to be able to continue to access the aquifer and secure groundwater by either drilling deep or lowering a pump in the well bore, are more in line with what should be considered to be an "unreasonable impact" on the individual neighboring well.

To be honest, with all due respect and compliments to the District Staff's efforts to timely respond to implement this legislation, the District should express its frustration and volley the ball back to the Legislature's side of the court and ask for express guidance. Otherwise, the District is wandering off into the darkness with no light to shine the way. By definition, that is a dangerous activity. The Supreme Court has already indicated in the *Day* decision that crying "the Legislature made me do it" is likely no defense to liability for the District that carried out the directive the Legislature gave it. *See EAA v. Day*, 369 S.W.3d, *supra*, at 843-844.

Overall, the proposed rules as written are somewhat confusing, and contradictory to the provisions of both Chapter 36 and HB 3405. They also exceed the limited grant of authority provided by statute. More importantly, however, the statutory authorization for the proposed amendments discussed above is not apparent, and it appears that the proposed rules both exceed the District's legislative delegation of powers and/or adoption for the District's convenience. The potential adverse impacts to constitutionally protected property rights threatened by the proposed rule amendments are great. As a result, the threat of litigation even greater.

Accordingly, the Board should delay adoption the proposed amendments and direct the General Manager and General Counsel to carefully review the proposed amendments and the statutory enactments that gave rise to the same.

Our comments on the proposed rules are offered to aid the District in its management of the available groundwater while insuring its availability for maximum beneficial use and protection of private property rights. Again, we appreciate the opportunity to comment on proposed Rule amendments, and thank you for your consideration of these comments. If you have any questions, please call me at (512) 225-5606.

Sincerely,

Jackson, Sjoberg, McCarthy & Townsend L.L.P.

Edmond R. McCarthy, Jr.
Attorneys for Affected Landowners & Lessees

ERM/tn

cc: Bill Dugat, BSEACD Counsel

March 23, 2016

John Dupnik
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Via Email

Re: Barton Springs Edwards Aquifer Conservation District's Draft Rules

Dear Mr. Dupnik:

Save Our Springs Alliance (SOS) submits these comments regarding the Barton Springs Edwards Aquifer Conservation District's proposed rules. Given the recent enactment of House Bill 3405 expanding the District's jurisdiction and providing other requirements, SOS recognizes the need for the District to revise its rules. SOS appreciates the work of BSEACD staff to compose the draft rules and appreciates your consideration of these comments.

SOS's major concerns are thoroughly described in the comments submitted by the Trinity Edwards Springs Protection Association (TESPA). SOS shares TESPA's concerns that the District's efforts to streamline its procedures may have the effect of nullifying important safeguards in the permitting process for Needmore Water LLC and any other entities in a similar position. Thus, SOS adopts and incorporates TESPA's comments in full.

In addition, SOS has the following comments:

1. **Definition of Sustainable Yield**

"Sustainable Yield" is currently defined as "the amount of water that can be pumped for beneficial use from the Barton Springs segment of the Edwards Aquifer **under a recurrence of the drought of record** conditions after considering adequate water levels in water wells and degradation of water quality that could result from low water levels and low spring discharge." Rule 2-1 (emphasis added).

Under the proposed rules, the definition of "Sustainable Yield" is "the amount of groundwater available for beneficial uses from an aquifer on a long term basis without significantly depleting the aquifer or causing unreasonable impacts, **after taking into account a recurrence of the drought of record**, and historic data on groundwater storage, usage, recharge, water quality, and spring flow of the aquifer." (emphasis added).

SOS supports adding the language "on a long term basis" and broadening the aquifers in consideration beyond the Barton Springs segment of the Edwards Aquifer. However, SOS is concerned about changing the base standard used to determine sustainable yield—from conditions under a recurrence of the drought of record to a standard which merely *takes into account* a recurrence of the drought of record. Thus, the drought-of-record conditions do not play a central role in the determination of sustainable yield, and are only one factor among historic use and others. The drought of record is the historic worst case scenario. Recent tree ring studies tell us that droughts that preceded record-keeping were more severe. Climate change science suggests that future droughts may also be more severe than the drought of record. While current law is tied to the drought-of-record standard, the District should recognize that this standard is not fully protective of the aquifer, wells, and spring flows as it considers other factors in managing the aquifer. Additionally, in implementing its Habitat Conservation Plan for managing water withdrawals, the District is required by federal law to consider the likely effects of climate change as well as the best available science in assuring protection of endangered species. Therefore, SOS recommends keeping the language "under a recurrence of the drought of record conditions" and adding to the list of considerations to take into account the potential for drought conditions worse than the drought of record.

2. Permits and Exemptions – Considering Subsidence

The introductory paragraph for Rule 3-1.3, "Permits and Exemptions" describes a list of objectives to be achieved in issuing permits and permit amendments. Several of those objectives were deleted and replaced with "unreasonable impacts." However, among the deleted goals is "to control and prevent subsidence." Since subsidence is not in the definition of "unreasonable impacts," deleting its reference here eliminates it as a prominent objective in issuing and amending permits.

SOS acknowledges that subsidence is mentioned in other provisions on issuing permits, however, unlike the rest of the deleted language in Rule 3-1.3, "unreasonable impacts" does not cover subsidence, and its prevention should remain a stated goal at the outset of the permit rules. And while there have not been significant problems with subsidence, subsidence is possible with increased pumping pressures. Therefore, SOS recommends leaving "to control and prevent subsidence" in Rule 3-1.3.

3. Notice Requirements

Under current rules, applicants are required to give public notice of permit applications for "all new nonexempt wells not authorized by a District general permit." Rule 3-1.4.B. But under the proposed rules, applicants need only give public notice of permit applications seeking to produce more than 2 million gallons annually. SOS understands that the District would still provide notice in a local paper for nonexempt wells under 2 million gallons per year. However, SOS believes all applicants should continue to be responsible for issuing notice instead of, or in addition to, the District. This change should be deleted and the current rule left in place.

4. Application Requirements: Potential for Unreasonable Impacts

The proposed rules require an applicant to submit a mitigation plan if the General Manager determines the proposed production could cause unreasonable impacts and those impacts are "related to groundwater quality degradation **and** well interference." Rule 3-1.4.A.10(c) (emphasis added). Rule 3-1.11 contains a nearly identical requirement, but uses the conjunctive "or" between these two types of impacts. It is thus unclear whether the unreasonable impacts must relate to both or just one of these effects to warrant submitting a mitigation plan. For consistency, and to ensure mitigation plans are prepared when either type of unreasonable impact is implicated, SOS recommends changing the "and" to "or" between "degradation" and "well interference" in Rule 3-1.4.A.10(c).

5. Replacement Wells

The proposed rules add requirements for applying to drill a replacement well, essentially by moving and modifying those requirements for replacement wells under a Historic Use Status designation. Rules 3-4.6 and 3-1.22. One of the modified requirements under the proposed rules is that "the replacement well will be used to produce the same or less amount of groundwater and for the same **purpose of use** of the original well." Rule 3-4.6.A.4. The current rule regarding replacement wells in 3-1.22 framed this requirement as "the replacement well is used for the same **purpose and type of use** as the currently permitted or registered well." (emphasis added). SOS believes the intent of this requirement was not meant to change under the proposed rules and this may simply be a typographical error. To avoid confusion and ensure replacement wells will only be authorized if the type of use remains constant, SOS recommends adding the language "and type" between the words "purpose" and "of" in the new rule 3-4.6.A.4.

If any of you have any questions about these comments, please contact me at the phone number or email address provided below.

Respectfully submitted,

/s/ Kelly D. Davis

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March 23, 2016

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Re: Barton Springs Edwards Aquifer Conservation District's Draft Rules

Dear Mr. Dupnik:

The Trinity Edwards Springs Protection Association (TESPA), submits these comments regarding the Barton Springs Edwards Aquifer Conservation District's (BSEACD) proposed rules. TESPA appreciates the work done by BSEACD staff to formulate the draft rules and appreciates your consideration of these comments.

Given the recent expansion of the District's jurisdiction to include the Trinity Aquifer in Hays County, TESPA recognizes the need for the District to revise its rules to address changing circumstances. Overall, the rules set up a thorough process for the District to use in evaluating applications for Production Permits, given the likely increase in the number of applications the District will encounter as a result of the annexation. TESPA is concerned, however, that the District's desire to streamline and improve its rules is resulting in eased requirements for Needmore Water LLC (Needmore) at the expense of protections for the aquifer and offers the following comments:

1. The draft rules carve out an exception to the requirement for Needmore to obtain a Transport Permit.

The District's current rules (3-1.3.1) require an applicant to obtain a Transport Permit when it seeks to transport groundwater from a well within the District to a location outside of the District. The current rules provide for two exceptions to the requirement to obtain a Transport Permit: (1) transporting of groundwater from the District pursuant to a continuing arrangement that was in effect on or before March 2, 1997, and (2) transporting of groundwater for Incidental Use or sporadic use.

The draft rules create a new exception from the requirement to obtain a Transport Permit for a property owner who transports groundwater from a well on his property that, as a result of a boundary change is now within the District's boundaries, to a location on his property that is outside of the District's boundaries. The property must be contiguous, owned by the same property owner, and the water use type and amount must have existed prior to the boundary change. Currently, the only property in the District's boundaries that would qualify for an exception to the requirement to obtain a Transport Permit under the proposed rules is Needmore Ranch.

The intent of this new, proposed exception is to allow a property owner to continue its existing use and to be able to move groundwater on his private property without the need to obtain a Transport Permit. TESPA agrees with the rationale of permitting a landowner to continue to freely move groundwater around his property if he was doing so before the existence of an artificial boundary line. From conversations with District staff, however, it is TESPA's understanding that the District interprets this new exception to allow Needmore to transport the maximum production capacity of the well, or the permitted amount under its Temporary Permit, as opposed to the far smaller amount of groundwater Needmore was transporting prior to passage of HB 3405 when the boundary line came into existence. Based on the language of the proposed exception, which states that "the water use type and amount must have existed prior to the boundary change," TESPA disagrees with the District's interpretation that this applies to the maximum production capacity of the well on Needmore Ranch. The District granted Needmore a Temporary Permit based on the maximum production capacity in the amount of 179,965,440 million gallons per year *after* the boundary change. Prior to the boundary change, however, Needmore was transporting substantially less groundwater from the well on its property to the lake on its property.

Given the tremendous amount of groundwater that Needmore intends to transport, TESPA is concerned that carving out an exception to the requirement to obtain a Transport Permit in this case removes an added layer of analysis designed to protect the aquifer and the property rights of nearby landowners. Under the District's current rules, before granting a Transport Permit, the District shall consider the following: (1)The availability of water in the District and in the proposed receiving area during the period for which the water supply is requested; (2) The projected effect of the proposed transfer on aquifer conditions, depletion, subsidence, or effects on existing permit holders or other groundwater users within the District; and (3) The approved regional water plan and approved District Management Plan. Rule 3-1.3.1 (F). If Needmore is not required to obtain a Transport Permit, the District loses the opportunity to review these factors.

TESPA urges the District to reconsider its position that under the proposed rules, the District will permit Needmore to transport almost 180,000,000 gallons per year of groundwater on its property without the need to obtain a Transport Permit. Additionally, TESPA recommends that the District further clarify that the exception to the requirement to obtain a Transport Permit applies to an existing use *and amount prior to the existence of a boundary line*.

2. The new, proposed definition of Agricultural Use would allow Needmore to change the use type under its HB 3405 permit without triggering a permit amendment.

The proposed rules expand the definition of Agricultural Use to include 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. Under the current rules, wildlife management falls under the use type Agricultural Livestock. The District granted Needmore's Temporary Permit for the use type Agricultural Livestock, as Needmore claimed it was using the lake on its property to support wildlife management.

The District has maintained that it interprets the intent of the Temporary Permit application process to allow an applicant to maintain an existing use prior to the passage of HB 3405, and consequently, any change in use would result in a permit amendment and would allow the District to consider additional factors beyond the two HB 3405 factors – impacts to existing wells and the DFC. In the new draft rules, the District has clarified this interpretation. The draft rules state that "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)

However, 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 without triggering a change in use type and recalculation of the permitted volume as described above in 3-1.9(C).

TESPA recommends that the District define wildlife management, often a less water intensive use, as a separate use type distinct from Agricultural Use.

3. Rules need to clarify that all seven factors in the definition of Unreasonable Impacts apply to a HB 3405 permit once it has been converted into a regular Production Permit.

TESPA supports the District's efforts to develop a definition for Unreasonable Impacts, but the draft rules need to clarify that all seven factors in the definition of Unreasonable Impacts apply to a HB 3405 permit once it has been converted into a regular Production Permit. The last sentence at the end of the definition of Unreasonable Impacts states, "For permits issued under 3-1.55.1 and 3-1.55.4 (HB 3405), the District shall consider (1-5) listed above in any determination of unreasonable impacts." The intent of the sentence is to clarify that the District may only consider (1-5) when converting a Temporary Permit under HB 3405 to a regular Production Permit. However, TESPA is concerned that this sentence could be interpreted to mean that the District is limited to analyzing items (1-5) in the future. Although the current rules under 3-1.55.4(D) state that Temporary Permits converted to regular Production Permits "shall be subject to the provisions of Rule 3-1.11 related to Permit Terms and Conditions," the proposed definition of Unreasonable Impacts makes this unclear.

TESPA recommends that the District clarify that items (1-5) only apply at the time a Temporary Permit is converted to a regular Production Permit and that after a Temporary Permit has been converted, then the District may rely on all seven factors in determining whether an unreasonable impact has occurred.

Finally, TESPA recommends that under 3-1.55.4(D), the District add the following language: "Specifically, Regular Production Permits shall be subject to the provisions of Rule 3-1.11 related to Permit Terms and Conditions *and to the provisions under Rule 3.7 related to Drought.*

Thank you for the opportunity to comment with regard to the draft rules, and feel free to contact me if you have any questions.

Respectfully submitted,

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