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

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

TRINITY EDWARDS SPRINGS PROTECTION ASSOCIATION'S
PETITION FOR JUDICIAL REVIEW

To the Honorable Judge,

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

INTRODUCTION

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

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

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

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

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

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

2 https://tespatexas.org

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

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

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

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

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

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

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

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

PARTIES

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

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

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

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

[6] https://tespatexas.org

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

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

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

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

Needmore may be served with process on its Registered Agent:

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

DISCOVERY CONTROL PLAN – LEVEL 3 & ALIGNMENT OF PARTIES

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

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

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

[7] Finding of fact 34 in Exhibit 3.

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

INCORPORATION BY REFERENCE

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

PLEADINGS IN THE ALTERNATIVE

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

JURISDICTION

20. Plaintiff has exhausted all administrative remedies.

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

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

VENUE

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

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

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

STANDING OF THE ASSOCIATION

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

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

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

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

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

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

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

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

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

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

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

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

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

EXHAUSTION OF ADMINISTRATIVE REMEDIES
TIMELY JUDICIAL REVIEW SOUGHT

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

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

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

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

FACTS AND HISTORY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STANDARD FOR REVIEW

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

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

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

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

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

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

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

(C) made through unlawful procedure;

(D) affected by other error of law;

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

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

CAUSES OF ACTION/POINTS OF ERROR

INCORPORATION BY REFERENCE

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

PLEADINGS IN THE ALTERNATIVE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6. raising or keeping equine animals; or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION & RELIEF REQUESTED

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

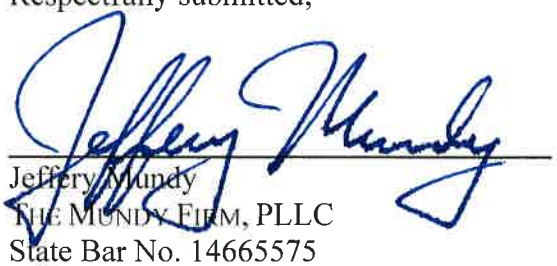
116. TESPA requests that the Court to reverse the District's order granting a permit Needmore and render judgment that Needmore was not entitled to receive a Temporary Permit and therefore, was not entitled to a Regular Permit under House Bill 3405. District staff determined that Needmore's Well was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

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

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

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

Respectfully submitted,

By: 

Jeffery Mundy
THE MUNDY FIRM, PLLC
State Bar No. 14665575
jeff@jmundy.com
4131 Spicewood Springs Rd.
Austin, Texas 78759
Tel: (512) 334-4300
Fax: (512) 590-8673

ATTORNEY FOR TESPA