Barton Springs/Edwards Aquifer Conservation District's
Response to Comments Regarding its Proposed Rules
(April, 2016)

Comments regarding Barton Springs/Edwards Aquifer Conservation District's ("District") proposed HB 3405 rules were provided by Edmond R. McCarthy, Jr. ("McCarthy"), on behalf of multiple clients who are groundwater owners and/or lessees within the District, the City of Buda ("City" or "Buda"), Save Our Springs Alliance ("SOS"), and the Trinity Edwards Springs Protection Association ("TESPA"). The District appreciates the comments provided by each of the commenters and provides these responses to the comments the District received.

1. **Comment:** McCarthy comments that the proposed definition of "Beneficial Use" runs afoul of the legislatively mandated definitions of "beneficial use" and "waste," which McCarthy suggests is an attempt to impose restrictions and limitations on beneficial use not authorized by or consistent with those allowed by the legislature.

Response: It is unnecessary to include in the definition of beneficial use or beneficial purpose "non-speculative" uses and uses that do not constitute "waste" because "non-speculative" use and "waste" are addressed elsewhere in the District's rules. Therefore, the District is amending its definition of "Beneficial Use" to mean "use for a beneficial purpose" as defined by Texas Water Code § 36.001(9).

2. **Comment:** TESPA comments that the proposed definition of "Agricultural Use" would allow Needmore to change the use type under its HB 3405 permit without triggering a permit amendment. TESPA says that the District has expanded the definition of Agricultural Use to include wildlife management and thus Needmore could engage in any of the activities defined as Agricultural Use without triggering an amendment to the type of use.

Response: No change is made to the rules in response to this comment. The definition for "Agricultural Use" was amended to conform to Texas Water Code Chapter 36 and existing statutes with similar purposes. The existing use indicated in the permit application for Needmore Ranch, which includes wildlife management, fits within this revised definition, therefore, it is appropriate to apply this use type designation.

Further, the amendments to this term and other terms describing use types is part of greater effort to create clear distinctions between primary use types. These distinctions are integral to implementation of other rules related to historical use designations, use type changes that trigger major amendments, permit volume right sizing, and the overall permitting framework that requires authorized permit volumes to be commensurate with reasonable non-speculative demand.

3. **Comment:** McCarthy comments that the Texas Department of Licensing and Registration defines "Capped Wells" in 17 Tex. Admin. Code § 76.10(9) and thus the District's definition is unnecessary.

Response: No change is made to the rules in response to this comment. The Texas Department of Licensing and Registration's definition of "Capped Wells" does not include what it means to cap an artesian well, which is included in the District's definition.

4. **Comment:** McCarthy comments that at end of the new definition for "Commercial Use," the rule states that even if something is defined by the TCEQ as a "public water system," it will not constitute a "public water system" under the District's rules. If a project has already been defined as a public water system by TCEQ, according to McCarthy, it should be classified the same by the District.

Response: The District is under no obligation to define certain uses in the same manner that the TCEQ would define those uses for TCEQ purposes. However, to eliminate confusion, the District is amending its proposed rules to delete the phrase "Commercial businesses may also be classified by TCEQ as a 'public water system' but for purposes of these rules are not considered 'Public Water Supply' use types." *See also* the Response to Comments Nos. 7, 13, and 14.

5. **Comment:** McCarthy comments on the District's definition of "Maximum Production Capacity," and states that District should adopt the definition in HB 3405.

Response: The definition of "maximum production capacity" has limited applicability to wells issued a temporary permit in the shared territory under H.B. 3405. The statutory definition provides maximum production capacity *may* be based on a 36-hour pump test conducted at the time the well was initially constructed or placed into to service. The statutory definition permits the District discretion to consider other factors so long as they are rationally-based and scientifically-supported. Therefore the District is amending the definition to tract the language of HB 3405.

6. **Comment:** McCarthy comments on the definition of "Production Fee," contending that the fee should only be charged on actual production, not authorized production. If the permit is phased, then the fee should be limited to the maximum amount a permittee is authorized to produce at a given time.

Response: No change is made to the rules in response to this comment. Special District Local Laws Code § 8802.104 (b)(3) and HB 3405 authorize the District to asses a user fee based upon authorized pumpage.

7. **Comment:** McCarthy comments on the definition of "Public Water Supply Use," stating that "public water supply is public water supply," and to differentiate between retail and wholesale public water supply is unnecessary and discriminatory.

Response: The existing definition of "Public Water Supply Use" is broad and requires further clarification to adequately describe the use type. The District attempted to provide

clarification within this definition as well as further define the differences between "Retail Public Water Supply Use" (Retail PWS) and "Wholesale Public Water Supply Use" (Wholesale PWS). However, the three definitions together can create confusion and therefore, the District's response to the comment is to delete the definition of "Public Water Supply" (PWS) and rely only on the other two definitions of "Retail Public Water Supply Use" and "Wholesale Public Water Supply Use." The District believes that these remaining two definitions adequately encompass the realm of public water supply uses and provide further clarification on the differences between "Retail PWS" and "Wholesale PWS" uses types. *See also* the Response to Comments Nos. 13 and 14.

8. **Comment:** McCarthy comments on the definition of "Substantial Alteration." McCarthy states that no definition is given for "substantial well repairs," and thus there is no way to know whether or not a repair is substantial. McCarthy also asks if definition applies to alternations only done by choice to an applicant's own well and whether it includes situations where the District forces an applicant to do work on another person's well.

Response: The District believes that the definition is clear. The word "substantial" has been removed from the definition (relating to well repair) because it is repetitive. If, during routine maintenance or a repair, the well owner encounters a situation which involves reaming, pulling and setting casing, or grouting casing, a minor amendment application will be required to ensure the alteration is consistent with District well construction standards. It is unlikely that the District would require an applicant to perform a "substantial alteration" on another person's well because it is analogous to a repair; indicating there was an issue with the well to begin with. However, if a well is deepened or replaced as part of a mitigation agreement the appropriate applications (well drilling or modification) and associated fees will be required.

9. **Comment:** McCarthy and Save Our Springs Alliance comment on the definition of "Sustainable Yield." McCarthy states that the definition does not define what constitutes a "significant depletion of the aquifer." McCarthy also says that 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.

Comment: Save Our Springs Alliance states that it believes the phase "after taking into account a recurrence of the drought of record" should be revised to read "under a recurrence of the drought of record."

Response: The District agrees with SOS's comment referring to a "recurrence of the drought of record" and the rule has been amended accordingly. The definition has been revised for grammar and readability and the phrase "significant depletion of the aquifer" has also been removed from the definition. The regional water planning process (Texas Water Code § 16.035(a)) requires water planning to be based on drought-of-record conditions to ensure future water needs are met during times of severe drought.

10. **Comment:** McCarthy comments on the definition of "Unreasonable Impacts." McCarthy says that the definition is vague and will require the District to show only theoretical unreasonable impacts on neighboring wells. He says there is no measurable criteria presented in the proposed rules as a standard against which an applicant could determine if a proposed well will have an unreasonable impact. McCarthy also states that the proposed rules will not allow actual measured criteria, or real scientific data to establish whether an unreasonable impact has, or has not, occurred, but instead requires the use of theoretical calculations using flawed models. McCarthy also says that the rules do not reflect the principles that provide the foundation for the recent settlement between the Lost Pines Groundwater Conservation District and Forestar, which allows Forestar to produce ever increasing volumes of groundwater while monitoring the impacts, and which curtails or delays production if the monitoring demonstrates long term negative impacts to the aquifer. McCarthy also lists specific concerns for each of the factors listed in the definition of "Unreasonable Impacts" that will be used to determine if a well will contribute to, cause, or will cause an unreasonable impact. McCarthy also asserts that the unreasonable impact definition conflicts with: (1) individual property rights in groundwater codified under Texas Water Code § 36.002; (2) the Texas Supreme Court decision in *EAA v. Day;* and, (3) the rule of capture.

Comment: The City of Buda expresses concern about the use of the term "long-term" in item 6 of the definition of "Unreasonable Impacts," stating the broad nature of the item makes it problematic to use as an indicator of unreasonable impact.

Response: The proposed definition of unreasonable impact includes eight specific factors used to determine impact and interference. The first five factors are considered under the authority of HB 3405, Special Local Laws Code Chapter 8802, and Texas Water Code Chapter 36 including, but not limited to, § 36.002(d) of the Water Code. These five factors are applied by the District to determine the production amount when temporary permits are converted to regular permits under HB 3405. These same five factors plus the other three factors are considered under the authority of Special Local Laws Code Chapter 8802 and Water Code Chapter 36, including but not limited to, §§ 36.002, 36.101, 36.113 and 36.116. All eight factors are considered in all other permitting and for a HB 3405 permit after it has been converted to a regular permit. Whether a well will cause "unreasonable impacts" applying these factors turns on consideration of, among other things, local geology and aquifer conditions (including water quality), construction and location of the subject well, target production zone, production capacity, proposed production rate, construction of existing wells, impacts to the DFC, impacts to surface water resources, and drawdown from the pumping well, existing wells, future domestic and livestock wells, and drought conditions. Determination of unreasonable impacts lends itself to a broad definition applied in a reasonable, and non-discriminatory manner.

In applying the definition, the District addresses the protection of private property rights of both existing wells and wells to be permitted, while balancing conservation and groundwater development. The District intends to use actual data derived from comprehensive aquifer testing conducted to support a permit application, and the best available science to analyze the aquifer test data in order to determine the potential for unreasonable impacts. If necessary, the District intends

to require monitoring and data collection to measure the actual impacts on the aquifer(s) over time once pumping commences to avoid unreasonable impacts. Other external factors described above will also be considered. This is consistent with the Forestar model and is considered a reasonable and effective approach to permitting that provides for avoidance and mitigation of unreasonable impacts based on actual measured water levels and the aquifer's response to pumping.

The District acknowledges that Texas Water § 36.002(b-1)(2) incorporates the common law exceptions and defenses under the rule of capture reflected in Texas case law. However, § 36.002 (b-1)(2) does not prevents a GCD from regulating production to protect unreasonable impacts or well interference because it is inconsistent with the rule of capture. Water Code § 36.002(d) provides that groundwater ownership does *not* affect the ability of a district to regulate groundwater production. Moreover, §36.0015 of the Water Code provides that groundwater districts are the state's preferred method of groundwater management in order to protect property rights, balance the conservation and development of groundwater to meet the needs of the state, and use the best available science in the conservation and development of groundwater.

The Texas Supreme Court in *EAA v. Day* affirmed the authority of GCDs to regulate groundwater production, but recognized that such regulation can, at least theoretically, result in a compensable takings claim under the Texas Constitution. Unlike the facts in *EAA v. Day*, the District's proposed rule is based upon protecting wells and groundwater resources from unreasonable impacts and well interference rather than production limits based upon historical use.

After consideration of the comments with consideration of the above context, the District recognized a need to better describe the intent and clarify certain concepts and processes related to managing to avoid "unreasonable impacts." Changes related to the evaluation, findings, and District response the certain applications with the potential for unreasonable impacts have been made to provide additional detail and process clarity. Changes include:

<u>Rule 2-1</u>: The definition of unreasonable impacts has been changed in connection with lowering water levels by adding the word "economically" before the phrase "feasible pumping lift" and, as explained in Response to Comment No. 15, "land subsidence" has been added to the definition.

<u>Rule 3-1.4.A.10:</u>

- The conclusions of the General Manager's (GM) application evaluation of potential unreasonable impacts was changed from a GM's "determination" to a "preliminary finding" of the potential for unreasonable impacts. This change was made to better describe the preliminary nature of the GM's findings, which is subject to Board consideration before an application is approved or denied.
- The description of the avoidance and compliance measures triggered by the GM's Preliminary Finding of Potential for Unreasonable Impacts (PFPUI) was revised for clarity.

- The mitigation plan in response to the GM's PFPUI was changes from a mandatory application requirement to an optional measure and an agreement between the applicant and the District to be submitted at the applicant's discretion.
- An opportunity for direct referral of the application to the Board for consideration was provided as alternative to submitting additional application materials triggered by the PFPUI to provide enhanced due process.

Rule 3-1.4.G:

- A policy statement was included to clarify the preferred Districts approach for avoiding unreasonable impacts.
- The process for the evaluation and findings of PUI was further described to include specific factors relevant to the evaluation and possible measures to be recommended to avoid unreasonable impacts for Board consideration.
- The process for Board action on applications with PUI was further described.
- The procedure for direct referral was included and described.

Comment: TESPA comments that the District needs to clarify that all seven factors in the definition of Unreasonable Impacts apply to a HB 3405 permit once it is converted to a regular production permit. TESPA recommends that the District clarify that items 1 to 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 of the "Unreasonable Impacts" definition factors to determine whether an unreasonable impact has occurred.

Response: The District agrees with TESPA that there is a need to clarify that all factors should be considered after a temporary permit has been converted to a regular permit and rule 3-1.55.4.B.4.b. and the unreasonable impact definition are amended accordingly.

11. The City of Buda comments on the definition of "Hydrological Report." Buda states that the proposed definition includes a component to assess the response of an aquifer to pumping over time and the potential for unreasonable impacts. Buda says that depending on the level of analysis required to meet the District's standards, this analysis could add to the costs of those reports. Buda asks the District to more clearly define the level of effort and analysis required to produce the newly defined hydrological report.

Response: The District has always had a requirement to assess the response of an aquifer to pumping over time in the hydrogeological report. The District is not requiring advanced research efforts such as numerical modeling; however, if the applicant is interested in using such advanced research efforts they would not be discouraged or denied. The District's *Guidelines for Hydrogeological Reports and Aquifer Test (Guidelines)* more clearly define the level of effort and analysis required in the hydrogeological report.

12. **Comment:** McCarthy comments on the definition of "Well Interference," stating that definition includes "measurable drawdown in the water table" on its own, not necessarily drawdown in the water table actually measured at another well. He says that the District could claim there is well interference whether or not another well even exists.

Response: No change is made to the rules in response to this comment. The definition proposed describes well interference to mean "measurable drawdown or reduction in artesian pressure in a well due to pumping from another well." (Emphasis added). The emphasized part of the definition clearly describes the effects of pumping from one well on another.

13. **Comment:** McCarthy comments on the definition of "Wholesale Public Water Supply Use." He states that the definition is too narrow as it excludes sales directly to wholesale customers and that the definition should recognize the ability to have wholesale sales made to wholesale customers and/or to a wholesaler who in turn may ultimately sell to the ultimate retailer.

Response: The District agrees with the McCarthy that the definition should recognize the ability of wholesale suppliers to have customers that are other wholesale suppliers and who in turn may ultimately sell to the ultimate retailer. The definition has been modified to provide that clarity. Additionally, the District has made efforts to ensure that the District's use of this term is relatively consistent with the terms found in the Texas Water Code § 13.002.

This defined use type is considered by the District to be a beneficial use. Further clarification to this defined term and other terms describing use types is part of greater effort involving future rulemaking to create more clear distinctions between primary use types. These distinctions are integral to implementation of other rules related to historical use designations, use type changes that trigger major amendments, permit volume right sizing, and the overall permitting framework that requires authorized permit volumes to be commensurate with reasonable non-speculative demand. *See also* the Response to Comments Nos. 7 and 14.

14. **Comment:** McCarthy provides a general comment regarding the definitions "Public Water Supply Use," "Retail Public Water Supply Use," and "Wholesale Public Water Supply Use," stating that the definitions seem unnecessary and none are defined as beneficial. He also states that the definition of "Public Water Supply," whether retail or wholesale, confuses the concept of beneficial use as well as the concept of service areas.

Response: The District agrees that the three terms together can create confusion and therefore, the District's response to the comment is to delete the definition of "Public Water Supply" (PWS) and rely only on the other two definitions of "Retail Public Water Supply Use" and "Wholesale Public Water Supply Use". The District believes that these remaining two definitions adequately encompass the realm of public water supply uses and provide further clarification on the differences between "Retail PWS" and "Wholesale PWS" uses types. The

definition has been modified to provide that clarity on the concept of a water supplier's service area.

This defined use type is considered by the District to be a beneficial use. Further clarification to this defined term and other terms describing use types is part of greater effort involving future rulemaking to more create clear distinctions between primary use types. These distinctions are integral to implementation of other rules related to historical use designations, use type changes that trigger major amendments, permit volume right sizing, and the overall permitting framework that requires authorized permit volumes to be commensurate with reasonable non-speculative demand. *See also* the Response to Comments Nos. 7 and 13.

15. **Comment:** Save Our Springs Alliance and TESPA comment on the proposed amendment to Rule 3-1.3. SOS notes that the District deleted the reference to controlling and preventing subsidence, and that subsidence does not appear in the definition of unreasonable impacts. Deleting the reference, SOS says, eliminates a "prominent objective in issuing and amending permits."

Response: The reference to "subsidence" was removed from 3-1.3 and was not included in the unreasonable impact definition because it's unlikely that occurrences of subsidence in this area would be due to groundwater pumping and water level declines. However, it can't be ruled out altogether, so "land subsidence" has been added to the unreasonable impact definition.

Comment: TESPA and McCarthy comment on Rule 3-1.3.1.B.3. TESPA comments that the proposed rules carve out an exception to the requirement for Needmore to obtain a transport permit. TESPA is concerned that the proposed rule will allow Needmore to transport the maximum production capacity of the well as opposed to the smaller amount of groundwater Needmore was moving within its property prior to the passage of HB 3405. TESPA recommends that the District revise the proposed rules to require Needmore to obtain a transport permit. TESPA also recommends that the District clarify that the exception to the requirement to obtain a transport permit only applies to existing uses and amount prior to the HB 3405.

Response: The District agrees that the current language describing the transport exception as written would limit the excepted transport to the amount being moved prior to annexation. The actual amount of water moved prior to annexation would be difficult to quantify without metered data or some other reliable data source. Further, the District interprets HB 3405 to allow authorization for "maximum production capacity" for existing wells, if requested, and any limitation on that amount may be considered inconsistent with the intent of the law. Therefore, the rules are amended to remove the conditions referencing "the amount" as a qualifier for the exception to transport.

16. **Comment:** McCarthy comments on the proposed amendments to Rule 3-1.3.1(B)(3) stating that it is too limiting and should include projects in the planning phase at the time of the

addition of property to the District. He also says that there should be no additional permitting or fee required for a person using water on his or her own property.

Response: The applicable laws addressing transport do not require the District to make this kind of exception for transport proposed in the rules. The exception as described was added as a matter of fairness and is deemed by the District to be reasonable. Changes to the rules, however, are suggested in response to comment No. 15 which have the effect of being less restrictive. *See also* the Response to Comment No. 15.

17. **Comment:** McCarthy and the City of Buda comment on the proposed amendments to Rule 3-1.4(A)(7)(g). McCarthy states that the rule now requires a mailing list of all well owners within a half mile, including both registered and non-registered wells. He is concerned about an applicant's ability to locate the non-registered well owners. He also comments that requiring mailed notice to be by certified mail to all landowners within a 2 mile radius is too onerous because the distance seems arbitrary and requiring certified mail is expensive.

Comment: Buda states that the word "registered" should not be removed from the proposed rule and that the mailing list for any notifications should be confined to owners of wells that are properly registered with the District. Buda also expresses concern about the cost mailing notices by certified mail with return receipts.

Response: The District agrees with McCarthy and the City of Buda that mailing list for individual notifications should apply to registered well owners. The District also agrees that requiring certified mail is expensive and believes that first class mail is sufficient. The rules have been amended accordingly.

18. **Comment:** McCarthy comments on the proposed amendment to Rule 3-1.4(A)(10). McCarthy states that the rule allows the General Manager to unilaterally claim that a well has potential for unreasonable impact with no opportunity to counter or defend against the determination.

Response: As with all major permit applications, the General Manager's recommendation must go before the Board of Directors for Board consideration and approval. If the applicant disagrees with the Board's decision, the applicant may request a hearing on the application. *See* Rules 3-1.4(C)(1) and 4.9. The District has amended the language in its rules to clearly provide that the permit applicant may request a hearing on the Board's consideration of the GM's PFPUI and if the applicant chooses by requesting a direct referral, without first submitting the required and optional application materials triggered by the GM's notification of the preliminary finding.

19. **Comment:** SOS suggests that the language "related to groundwater quality degradation or well interference" in Rule 3-1.4(A)(10)(c) be changed to "related to groundwater quality degradation and well interference" so that the language in Rule 3-1.4(A)(10)(c) is consistent with Rule 3-1.11.

Response: The District agrees with SOS's comment and has amended and moved the language to Rule 3-1.11. C.

20. **Comment:** McCarthy comments on the proposed amendment to Rule 3-1.4(A)(11) and asks if "unreasonable hydrologic, social, or economic impacts" is the same as the "unreasonable impacts." He suggests that it would make more sense to use the same word, or further clarify the definition.

Response: This section of the rules speaks specifically to information related to review of Transport Permit applications. The original language described the impacts as "adverse" for the purpose of considering proposed Transport. Since the considerations also includes social and economic impacts, a distinction is warranted, therefore, the proposed word change was replaced with the original language using the term "adverse."

21. **Comment:** McCarthy and Save Our Springs Alliance comment on the proposed amendment to Rule 3-1.4(B)(1). McCarthy states that, with the rule requiring newspaper notice, there is no need for individual notice.

Comment: SOS states that all applicants, not just those seeking to produce more than 2 million gallons annually, should continue to be responsible for issuing notices.

Response: Individual notices are essential in notifying registered well owners about a proposed project in the vicinity that could potentially impact their well. The District has determined that projects with anticipated pumpage for less than 2 million gallons per year have a very low risk of impacting neighboring wells and therefore, an individual notice is not warranted. This same logic is also applied with the current requirement that only requires a hydrogeological report and Board approval for applications with proposed production for greater than 2 million gallons per year. That said, the District will continue to post a newspaper notice in a local paper and via email notification for the smaller permit applications which will provide an opportunity for all interested parties to be informed.

Further, the District believes the extended notice (for over 200 million per year) for well drilling only (not production) is not warranted and recommends maintaining the ½ mile radius for all well drilling authorizations over 2 million gallons per year. Well drilling authorizations are to ensure proper well construction, not to access the effects of pumping, therefore, there is a limited scope for any type of protest.

The District did clarify the form of the notice and where the notice is to be published in proposed changes to Rules 3-1.4.B.2, 4-9.2.C.3, and 4-10.1.A.3.

22. **Comment:** McCarthy comments on proposed amendment to Rule 3-1.4.D. He asks if there is a limit to the number of monitoring wells that may be required, and why the applicant

would be forced to drill monitoring wells if there are sufficient monitoring wells in the area. McCarthy also questions why the applicant cannot rely on previously filed reports that cover the information required by the District.

Response: The number of monitoring/observation wells that are required will be determined on a case-by-case basis dependent on site- and project-specific factors. Tier 3 applications warrant a comprehensive aquifer test and the requirement for new observation wells ensures that District staff has input and confidence in the location, completion, access and use of the wells. Further, it is possible that the newly installed observation wells for the aquifer test could be converted monitoring wells for long-term compliance monitoring purposes. Identifying a sufficient number of existing wells, provided they are sufficient and accessible, in the area to be monitored for the aquifer test will also be required.

The rule language states "applicants may not rely solely on reports previously filed with or prepared by the District." The District will accept a previously filed report if it is deemed adequate to address the current application and volume or pumping rate. This determination will be made on a case-by-case basis dependent on the circumstances.

The District added additional information in proposed Rule 3-1.4.D.3.c).ii.2 that is to be submitted for existing wells used for monitoring.

23. **Comment:** McCarthy comments on the proposed amendment to Rule 3-1.4.G. He is concerned that with no opportunity to contest a decision that there is a potential for unreasonable impacts and with the current definition of unreasonable impacts, the rules will result in a taking of property.

Response: *See* Response to Comments Nos. 10 and 18.

24. **Comment:** McCarthy comments on the proposed amendment to Rule 3-1.6(A)(4), stating that the definition of unreasonable impacts will result in a taking of property.

Response: *See* Response to Comment No. 10.

25. **Comment:** McCarthy and the City of Buda comment on the proposed amendment to Rule 3-1.11(B). McCarthy recommends that the rule include some idea of the maximum number of monitoring wells that an applicant might be required to install and recommends that the applicant should be allowed to use existing monitoring wells.

Response: See Response to comment No. 22

Comment: The City of Buda expresses concern about the cost to establish a permanent monitoring well network and asks specific questions about what would be required of those wells. Buda also comments that using existing wells in monitoring may be an avenue to offset costs but

also notes that using existing wells can be problematic as well. Buda notes that permit applicants could be exposed to liability when required to monitor private wells and this could create a situation where the well owners expect the permit applicant to provide ongoing service support for normal operation and maintenance activities. Buda also notes that a permit applicant cannot guarantee the District access to private wells.

Response: Establishing a permanent (compliance) monitoring network is only required when a production permit application has a preliminary finding by the GM and a determination by the Board of the potential to for unreasonable impacts. The cost associated with installation and maintenance of the network should be seen as a required component of effective resource management and therefore, an expense on par with other cost associated with acquiring, producing or maintaining a commercial operation. Further, the compliance monitoring network is necessary to measure the actual response of the aquifer once pumping commences to avoid unreasonable impacts. These measures should also be viewed as measures necessary to maintain the long-term availability of regional groundwater supplies to the benefit of all groundwater dependents, including the permit holder. Requiring permanent installation of pumps is unlikely because water quality sampling is not anticipated to be the focus of the compliance monitoring. It is possible that monitoring wells will be needed in multiple aquifers. However, these requirements will likely be necessary only under certain circumstances and will be assessed on a case-by-case basis and required as warranted. Requiring monitoring wells to be equipped with transducers is necessary because continuous water level data is essential to the compliance monitoring plan. It's anticipated that the District would have access to the monitoring wells and will assist in the data collection, so all equipment in monitoring wells should be compatible with District equipment and programs.

If the District agrees to allow an applicant to use existing wells as part of its monitoring network, the District anticipates that the applicant will enter into one or more agreements with the owners of those wells that address liability for, maintenance of, and access to those wells for both the applicant and the District.

26. **Comment:** McCarthy and the City of Buda comment on the proposed amendment to Rule 3-1.11(C). McCarthy restates his concerns about the definition of unreasonable impacts and the inability of the applicant to contest the General Manager's determination of the potential for unreasonable impacts. McCarthy also expresses concern about what would be required in a mitigation plan. Specifically, he states that the rules do not require a person seeking mitigation to show that (1) the applicant has impacted the well, (2) the applicant is the only responsible party, (3) the person's well was in perfect working order, or (4) the person's well was drilled to a reasonable depth. He further states that the rules do not take into account the effect of any other existing wells, or what happens to the applicant's mitigation requirements if later wells are drilled and those new wells cause some impact to the person's well.

Comment: The City of Buda expresses concerns about the amount of future liability that a permit applicant may be exposed to by the mitigation plan requirements as proposed. The City also says that mitigation should be required for existing wells that are properly registered with the

District and in operation at the time the permit application is approved. Buda says that the mitigation plan requirements do not address the expectations of private well owners in distinguishing normal operations and maintenance problems from alleged impacts caused by the permit applicant. Buda states that this has the potential for establishing an expectation that applicants will be providing ongoing well and pump services to the mitigated wells in perpetuity. Buda requests that the rule make it clear that mitigation does not mean that the applicant will become full time well service providers for mitigated wells.

Response: *See* Response to Comment Nos. 10, 18 and 25. To reiterate, the mitigation plan triggered by the PFPUI has been changed to an optional measure offered by the applicant and adopted as an agreement between the District and the applicant. Additionally, the rules describing mitigation plans only describe minimum plan requirements of a plan, if submitted by the applicant, and do not preclude an applicant from submitting a plan with the plan elements described by McCarthy or the City of Buda.

27. **Comment:** TESPA recommends that under Rule 3-1.55.4(D) the District add the following language: "Specifically, Regular Production Permit 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."

Response: The District agrees with this comment and has made the relevant rule changes.

28. **Comment:** Save Our Springs Alliance comments that the language in Rule 3-4.6(A)(4) should be amended to be consistent with 3-1.22. Specifically, SOS recommends that the phrase "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" should be replaced with the following: "the replacement well will be used to produce the same or less amount of groundwater and for the same purpose and type of use of the original well."

Response: The District agrees with SOS's comment and has amended the language and renumbered the subsection in Rule 3-4.6(A) (5) accordingly. The District has also added the additional condition that the replacement well has "a cone of depression similar to that of the original well" and that an aquifer test and Hydrogeological report may be required.

29. **Comment:** TESPA commented at the March 25, 2016 public hearing on the proposed rules that the spring flow should be monitored as part of the compliance plan under proposed rule 3-1.11.B.

Response: The District agrees with TESPA that spring flow (if from the same formation and within the vicinity of the proposed project) should be monitored as part of the compliance monitoring plan under 3-1.11.B and the rule had been amended accordingly.