

State Office of Administrative Hearings



Lesli G. Ginn
Chief Administrative Law Judge

July 23, 2018

Emily Rogers
Bickerstaff Heath Delgado Acosta, L.L.P.
3711 Mopac Expressway, Bldg. 1, Ste. 300
Austin, TX 78746

VIA REGULAR MAIL

**RE: Docket No. 957-17-2582; NEEDMORE WATER LLC v. BARTON
SPRINGS EDWARDS AQUIFER CONSERVATION DISTRICT**

Dear Ms. Rogers:

Please find enclosed a Proposal for Decision on Summary Disposition in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 Tex. Admin. Code § 155.507(c), a SOAH rule which may be found at www.soah.texas.gov.

Sincerely,

Stephanie Frazee
Administrative Law Judge

SF/ls

Enclosure

xc: Ed McCarthy, McCarthy & McCarthy, LLP, 1122 Colorado Street, Ste. 2399, Austin, TX 78701 – **VIA REGULAR MAIL**
Bill Dugat, III, Bickerstaff Heath Delgado Acosta, LLP, 3711 S. Mopac Expressway, Building 1, Ste. 300, Austin, TX. 78746 – **VIA REGULAR MAIL**
Vanessa Puig-Williams, P. O. Box 160971, Austin, TX 78716 – **VIA REGULAR MAIL**
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SOAH DOCKET NO. 957-17-2582

NEEDMORE WATER LLC	§	BEFORE THE STATE OFFICE
	§	
v.	§	OF
	§	
BARTON SPRINGS EDWARDS	§	
AQUIFER CONSERVATION DISTRICT	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION ON SUMMARY DISPOSITION

In 2015, the Texas Legislature passed House Bill 3405 (HB 3405), which expanded the jurisdiction of the Barton Springs Edwards Aquifer Conservation District (District); created an expedited process for granting temporary permits to wells that were located in the District’s new jurisdiction; and provided a process for converting a temporary permit into a regular permit. The expanded jurisdiction included a well located at Needmore Ranch. The District granted a temporary permit to Needmore Water LLC (Needmore) on November 19, 2015. This case arose from Trinity Edwards Springs Protection Association’s (TESPA) challenge to the conversion of Needmore’s temporary permit to a regular permit.

Needmore and TESPAs filed cross-motions for summary disposition. The District opposed TESPAs motion and agreed with Needmore’s motion.

As set forth below, the Administrative Law Judge (ALJ) concludes that Needmore’s motion for summary disposition should be granted and that TESPAs motion should be denied.

I. PROCEDURAL HISTORY

On September 19, 2015, in accordance with HB 3405, Needmore applied to the District for a temporary permit and a regular permit to produce 289,080,000 gallons of groundwater per year from the Trinity Aquifer. The District issued a temporary permit to Needmore on November 19, 2015. On November 22, 2016, the District’s General Manager published a Preliminary Decision recommending that the District grant Needmore’s regular permit with

authorization to produce 289,080,000 gallons of groundwater per year. The General Manager also recommended including Special Provisions in the permit designed to avoid unreasonable impacts to existing wells. Needmore objected to those Special Provisions.

On December 19, 2016, TESPAs requested that the District refer its challenge to the issuance of Needmore's regular permit to the State Office of Administrative Hearings (SOAH) as a contested case. On January 12, 2017, Needmore submitted a brief to the District arguing that HB 3405 does not permit third parties to contest permit applications. The District considered Needmore's arguments at its January 12, 2017 Board meeting, and on February 3, 2017, the District referred this case to SOAH.

The ALJ convened a telephonic prehearing conference on March 6, 2017, during which Needmore indicated that it contested TESPAs standing to participate as a party in the case. A briefing schedule was set, and the parties briefed the issue of standing. Additionally, Needmore filed a Plea to the Jurisdiction, which was opposed by the District and TESPAs. On May 19, 2017, the ALJ issued Order No. 3, which denied Needmore's Plea to the Jurisdiction and set a prehearing conference to address TESPAs standing as a party to this case.

The prehearing conference was held on July 31, 2017, and the parties presented extensive evidence and argument regarding the issue of standing. The ALJ determined that TESPAs had standing and granted its request for party status, and the hearing on the merits was scheduled.

On February 20, 2018, Needmore and TESPAs filed cross-motions for summary disposition, and the parties filed a Joint Motion to Modify the Hearing Schedule.¹ The Joint Motion to Modify the Hearing Schedule stated that the parties had entered into a Rule 11 agreement on February 16, 2018, which resulted in a narrowing of the issues being contested by TESPAs in this case. Specifically, TESPAs agreed that it was challenging only the issues raised in its Motion for Summary Disposition: whether Needmore was eligible to obtain a temporary

¹ The Joint Motion to Modify the Hearing Schedule was granted in Order No. 9, issued on February 22, 2018.

permit pursuant to HB 3405, Section 4(c) and (d). TESPAs withdrew the prefiled testimony of two of its witnesses as a result of the Rule 11 agreement.

On February 23, 2018, the District filed a response opposing TESPAs motion. On February 26, 2018, Needmore filed a response opposing TESPAs motion, and on March 2, 2018, TESPAs filed a response opposing Needmores motion. Also on March 2, 2018, the District filed a response in support of Needmores motion. On March 5, 2018, the ALJ convened a prehearing conference on the motions, during which the parties presented additional arguments.

On June 6, 2018, the ALJ issued Order No. 10, which granted summary disposition in favor of Needmore and denied TESPAs motion for summary disposition. The record closed on that date.

II. APPLICABLE LAW

The District is a groundwater conservation district created under Section 59, Article XVI of the Texas Constitution. Chapter 8802 of the Texas Special District Local Laws Code (Chapter 8802) governs the District.² Except as provided by Chapter 8802, the District has the rights, powers, privileges, functions, and duties provided by the general law of this state, including Chapter 36 of the Texas Water Code, applicable to groundwater conservation districts created under Section 59, Article XVI of the Texas Constitution.³ The Board of the District must adopt and enforce rules to implement Chapter 36 of the Texas Water Code, including rules governing procedure before the Board.⁴ The Board adopted rules implementing HB 3405.⁵

² Tex. Spec. Dist. Code ch. 8802.

³ Tex. Spec. Dist. Code § 8802.101.

⁴ Tex. Water Code § 36.101(b).

⁵ See District Rules and Bylaws, available at https://bseacd.org/uploads/081816FINAL-BSEACD-Rule_MASTER.pdf, Tex. H.B. 3405, 84th Leg., R.S. (2015).

HB 3405 sets forth the process for permitting of wells located in the territory added to the District through passage of that bill. Section 4(c) of HB 3405 provides the following:

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 to drill or operate a well that is or will be located in the territory described by Subsection (b) of this section and subject to the jurisdiction of the district under Section 8802.0035, Special District Local Laws Code, as added by this Act, shall file an administratively complete permit application with the district not later than three months after the effective date of this Act for the drilling, equipping, completion, or operation of any well if the well requires a permit under the rules or orders of the district. The person may file the permit application for an amount of groundwater production not to exceed the maximum production capacity of the well.⁶

Under Section 4(d) of HB 3405, “[t]he [D]istrict shall issue a temporary permit to a person who files an application under Subsection (c) of this section without a hearing on the application not later than the 30th day after the date of receipt of the application.”⁷ The District’s rule at 3-1.55.2B(2) further provides that if the application meets certain requirements, “the General Manager shall approve and issue a Temporary Permit for the requested permit volume not to exceed the maximum production capacity without notice or hearing and within 30 days of the date of receipt of the application.”⁸

Under Section 4(e) of HB 3405, a hearing may be held on the conversion of a temporary permit to a regular permit.⁹ According to that section, the District shall issue an order granting the regular permit unless the District finds that authorizing groundwater production in the amount set forth in the temporary permit will cause: “(1) a failure to achieve the applicable adopted desired future conditions for the aquifer; or (2) an unreasonable impact on existing wells.”¹⁰

⁶ Tex. H.B. 3405, 84th Leg., R.S. (2015).

⁷ Tex. H.B. 3405, 84th Leg., R.S. (2015).

⁸ District Rules and Bylaws, *available at* https://bseacd.org/uploads/081816FINAL-BSEACD-Rule_MASTER.pdf.

⁹ Tex. H.B. 3405, 84th Leg., R.S. (2015).

¹⁰ Tex. H.B. 3405, 84th Leg., R.S. (2015).

A groundwater conservation district must contract with SOAH to conduct the hearing if requested by a party to a contested case.¹¹ If a district contracts with SOAH to conduct a hearing, the hearing shall be conducted as provided by Subchapters C, D, and F, Chapter 2001, Texas Government Code.¹² The district may adopt rules for a hearing conducted under Texas Water Code § 36.416(a) that are consistent with SOAH's procedural rules.¹³

An ALJ may grant summary disposition if:

[T]he pleadings, the motion for summary disposition, and the summary disposition evidence show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor as a matter of law on all or some of the issues expressly set out in the motion.¹⁴

Summary disposition evidence may include deposition transcripts; interrogatory answers and other discovery responses; pleadings; admissions; affidavits; materials obtained by discovery; matters officially noticed; stipulations; authenticated or certified public, business, or medical records; and other admissible evidence.¹⁵ All summary disposition evidence offered in support of or in opposition to a motion for summary disposition shall be filed with the motion or response.¹⁶

III. EVIDENCE

For purposes of ruling on the motions for summary disposition, the ALJ considered the exhibits attached to the motions and responses.

¹¹ Tex. Water Code § 36.416(b).

¹² Tex. Water Code § 36.416(a).

¹³ Tex. Water Code § 36.416(a).

¹⁴ 1 Tex. Admin. Code § 155.505(a).

¹⁵ 1 Tex. Admin. Code § 155.505(e)(1).

¹⁶ 1 Tex. Admin. Code § 155.505(e)(3).

IV. ARGUMENTS

In its motion, TESPAs argues that Needmore did not meet the conditions for obtaining a temporary permit under HB 3405. Specifically, TESPAs asserts that Needmore was not operating a well nor had it entered into a contract to operate a well at the time HB 3405 became effective. Therefore, according to TESPAs, because the District lacked the authority to issue the temporary permit under HB 3405, the District cannot issue a regular permit to Needmore based on its current application under the HB 3405 process.

Needmore argues in its motion that (1) the statute does not allow a challenge to the temporary permit; (2) TESPAs is too late to challenge the already-granted temporary permit even if such a challenge were allowed; (3) TESPAs has no justiciable interest or standing to challenge the temporary permit; and (4) SOAH has no jurisdiction to hear a challenge to the temporary permit.

The District opposes TESPAs's motion and agrees with Needmore's motion. The District asserts that (1) TESPAs cannot challenge a matter associated with the issuance of the temporary permit; and (2) even if TESPAs could challenge the temporary permit, it was properly granted.

V. ANALYSIS

This proceeding is a hearing on the conversion of Needmore's temporary permit to a regular permit. There is no provision for notice and a hearing on an application for a temporary permit under Chapter 8802, HB 3405, or the District's rules. Rather, HB 3405 provides for a hearing on the conversion of a temporary permit to a regular permit, limited to the issues of whether issuance of a regular permit will cause (1) a failure to achieve the applicable adopted desired future conditions for the aquifer or (2) an unreasonable impact on existing wells.¹⁷ The parties have agreed that TESPAs is not contesting either of the issues set forth in Section 4(e) of

¹⁷ Tex. H.B. 3405, 84th Leg., R.S. (2015).

HB 3405. Rather, TESPAs has limited its challenge to whether the District should have issued the temporary permit to Needmore.

As the scope of a hearing in this matter is limited to whether issuance of a regular permit will cause a failure to achieve the applicable adopted desired future conditions for the aquifer or an unreasonable impact on existing wells, there are no genuine issues of material fact remaining in this proceeding because TESPAs has limited its challenge to the issuance of the temporary permit. There is no legal authority for a hearing on that issue. Accordingly, the ALJ finds that Needmore's motion should be granted as a matter of law and that TESPAs's motion should be denied. The granting of Needmore's motion resolves all contested issues in this case.

VI. FINDINGS OF FACT

1. Barton Springs Edwards Aquifer Conservation District (District) has territory that includes parts of Travis, Hays, and Caldwell Counties. The District's jurisdiction was expanded through the passage of House Bill 3405 (HB 3405) on June 19, 2015.
2. The expansion of the District's jurisdiction included a well located on Needmore Ranch.
3. On September 19, 2015, Needmore Water LLC (Needmore) applied to the District for a temporary permit and a regular permit to produce 289,080,000 gallons of groundwater per year from the Trinity Aquifer.
4. The District issued a temporary permit to Needmore on November 19, 2015.
5. On November 22, 2016, the District's General Manager published a Preliminary Decision recommending that the District grant Needmore's regular permit with authorization to produce 289,080,000 gallons of groundwater per year. The General Manager also recommended including Special Provisions in the permit designed to avoid unreasonable impacts to existing wells. Needmore objected to those Special Provisions.
6. On December 19, 2016, TESPAs requested that the District refer the case to the State Office of Administrative Hearings (SOAH) based on TESPAs's challenge to the issuance of a regular permit to Needmore. On January 12, 2017, Needmore submitted a brief to the District arguing that HB 3405 does not permit third parties to contest permit applications.
7. The District considered Needmore's arguments at its January 12, 2017 Board meeting. On February 3, 2017, the District referred this case to SOAH.

8. The Administrative Law Judge (ALJ) convened a telephonic prehearing conference on March 6, 2017, during which Needmore indicated that it contested TESPAs standing to participate as a party in the case. A briefing schedule was set, and the parties briefed the issue of standing. Additionally, Needmore filed a Plea to the Jurisdiction, which was opposed by the District and TESPAs.
9. On May 19, 2017, the ALJ issued Order No. 3, which denied the Plea to the Jurisdiction and set a prehearing conference to address TESPAs standing to participate as a party in the case.
10. The prehearing conference was held on July 31, 2017, and the parties presented extensive evidence and argument regarding the issue of standing. The ALJ determined that TESPAs had standing and granted its request for party status, and the hearing on the merits was scheduled.
11. On February 20, 2018, Needmore and TESPAs filed cross-motions for summary disposition and the parties filed a Joint Motion to Modify the Hearing Schedule. The Joint Motion to Modify Hearing Schedule stated that the parties had entered into a Rule 11 agreement on February 16, 2018, which resulted in a narrowing of the issues being contested by TESPAs in this case. Specifically, TESPAs agreed that it was challenging only the issues raised in its Motion for Summary Disposition: whether Needmore was eligible to obtain a temporary permit pursuant to HB 3405, Section 4(c) and (d). TESPAs withdrew the prefiled testimony of two of its witnesses as a result of the Rule 11 agreement.
12. On February 23, 2018, the District filed a response opposing TESPAs motion. On February 26, 2018, Needmore filed a response opposing TESPAs motion, and on March 2, 2018, TESPAs filed a response opposing Needmores motion. Also on March 2, 2018, the District filed a response in support of Needmores motion.
13. On March 5, 2018, the ALJ convened a prehearing conference on the motions, during which the parties presented additional arguments regarding the motions.
14. On June 6, 2018, the ALJ issued Order No. 10, which granted summary disposition in favor of Needmore and denied TESPAs motion for summary disposition. The record closed on that date.
15. A SOAH hearing on Needmores application is limited to whether issuance of a regular permit will cause a failure to achieve the applicable adopted desired future conditions for the aquifer or an unreasonable impact on existing wells.
16. There are no genuine issues of material fact remaining in this proceeding because TESPAs has limited its challenge to whether the District should have issued the temporary permit to Needmore, and TESPAs is not challenging whether issuance of a regular permit will

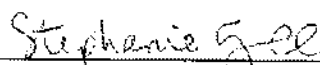
cause a failure to achieve the applicable adopted desired future conditions for the aquifer or an unreasonable impact on existing wells.

VII. CONCLUSIONS OF LAW

1. The District is a groundwater conservation district created under Section 59, Article XVI of the Texas Constitution.
2. Chapter 8802 of the Texas Special District Local Laws Code (Chapter 8802) governs the District. Tex. Spec. Dist. Code ch. 8802.
3. If requested by a party to a contested case, a groundwater conservation district must contract with SOAH to conduct the hearing. Tex. Water Code § 36.416(b).
4. If a district contracts with SOAH to conduct a hearing, the hearing shall be conducted as provided by Subchapters C, D, and F, Chapter 2001, Texas Government Code. Tex. Water Code § 36.416(a).
5. SOAH has jurisdiction to conduct a hearing and prepare a proposal for decision in this case. Tex. Gov't Code ch. 2003; Tex. Water Code ch. 36.
6. Except as provided by Chapter 8802, the District has the rights, powers, privileges, functions, and duties provided by the general law of this state, including Chapter 36 of the Texas Water Code, applicable to groundwater conservation districts created under Section 59, Article XVI of the Texas Constitution. Tex. Spec. Dist. Code § 8802.101.
7. The District may and must adopt and enforce rules to implement Chapter 36 of the Texas Water Code, including rules governing procedure before the Board. Tex. Water Code § 36.101(a), (b).
8. The District adopted rules implementing HB 3405. *See* District Rules and Bylaws, *available at* https://bseacd.org/uploads/081816FINAL-BSEACD-Rule_MASTER.pdf; Tex. H.B. 3405, 84th Leg., R.S. (2015).
9. The District may adopt rules for a hearing conducted under this section that are consistent with SOAH's procedural rules. Tex. Water Code § 36.416(a).
10. Summary disposition shall be granted on all or part of a contested case if the pleadings, the motion for summary disposition, and the summary disposition evidence show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor as a matter of law on all or some of the issues expressly set out in the motion. 1 Tex. Admin. Code § 155.505(a).
11. HB 3405 sets forth the process for permitting of wells located in the territory added to the District through passage of that bill. Tex. H.B. 3405, 84th Leg., R.S. (2015).

12. Under Section 4(d) of HB 3405, “[t]he [D]istrict shall issue a temporary permit to a person who files an application under Subsection (c) of this section without a hearing on the application not later than the 30th day after the date of receipt of the application.”
13. If an application meets certain requirements, “the General Manager shall approve and issue a Temporary Permit for the requested permit volume not to exceed the maximum production capacity without notice or hearing and within 30 days of the date of receipt of the application.” District Rules and Bylaws at 3-1.55.2B(2), *available at* https://bseacd.org/uploads/081816FINAL-BSEACD-Rule_MASTER.pdf
14. Notice and hearing on a temporary permit are not provided for in Texas Special District Local Laws Code Chapter 8802, HB 3405, or the District’s rules. *See* Tex. H.B. 3405, 84th Leg., R.S. (2015); District Rules and Bylaws, *available at* https://bseacd.org/uploads/081816FINAL-BSEACD-Rule_MASTER.pdf.
15. Under Section 4(e) of HB 3405, a hearing may be held on the conversion of the temporary permit to a regular permit. The District shall issue an order granting the regular permit unless the District finds that authorizing groundwater production in the amount set forth in the temporary permit will cause: “(1) a failure to achieve the applicable adopted desired future conditions for the aquifer; or (2) an unreasonable impact on existing wells.” Tex. H.B. 3405, 84th Leg., R.S. (2015).
16. Because TESPAs 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 a temporary permit under HB 3405. 1 Tex. Admin. Code § 155.505(a).
17. Summary disposition should be granted in favor of Needmore, and TESPAs’s motion for summary disposition should be denied. 1 Tex. Admin. Code § 155.505(a).

SIGNED July 23, 2018.



STEPHANIE FRAZEE
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS