



Needmore and the GM subsequently requested that the ALJ amend its PFD to specifically recommend issuing the Regular Permit. *See* August 6, 2017 Needmore Letter to ALJ; GM Motion to Recommend Permit Issuance. On September 10, 2018, the ALJ declined to amend the PFD keenly recognizing that there *“is no stipulation to the necessary facts nor is there evidence on the substantive issues needed to support a recommendation on issuance of the regular permit.”* ALJ Exceptions Letter at 1 (emphasis added). Dissatisfied that the ALJ declined to amend the PFD, the District remanded the matter back to SOAH. The District requests a hearing to develop an evidentiary record to enable the ALJ to issue a revised PFD that includes recommendations for Board action on the Needmore Application.

This remand is an improper attempt to circumvent the prior rulings of the ALJ. To make matters worse, the hearing is procedurally unnecessary, and the District seeks to burden TESPAA with the cost of a SOAH hearing by requesting the hearing be conducted pursuant to the “existing contract” under which TESPAA originally deposited funds. *See* District Order Remanding Application of Needmore Water, LLC. The ALJ should dismiss the remand and maintain the holdings in the PFD and Exceptions Letter, which satisfy Section 36.410(b)(3) of the Texas Water Code by unequivocally stating that the District may proceed to issue the regular permit, if it is satisfied that adequate information has been submitted by the Applicant.

## **ARGUMENT**

In the Remand Order the Board explains, “while the Board appreciates the complexities of the procedural issues involved in this matter and understands the position taken by the ALJ not to amend the PFD on the motion of the General Manager because of the insufficiency of the evidence in the record before the ALJ, it is the opinion of the Board of Directors that the Proposal for Decision in this matter must include all of the elements set forth in District Rule 4-9.8(B) and Section 36.410(b)(3), Water Code, including the ALJ’s recommendations for Board action on the

Needmore Application, and that the ALJ is better positioned to further develop the evidentiary record through stipulations of the parties, testimony, or otherwise to enable the ALJ to make such recommendations for Board action.” The Board’s Remand Order attempts to cure the “insufficiency” of evidence with an uncontested evidentiary hearing. In addition to the inefficiency and waste of resources, the Remand Order completely neglects that the ALJ also held that SOAH no longer has jurisdiction over the case.

The PFD specifically identified the two issues relevant to issuance of the regular permit, which are whether the permit will cause: (1) a failure to achieve the applicable adopted desired future conditions for an aquifer; or (2) and unreasonable impact on existing wells. The ALJ dismissed this case because neither of these issues were contested, and, therefore, were no longer the subject matter of contested case before SOAH. Exceptions Letter at 3. Although TESPAs disagrees with the ALJ’s decision to dismiss the contested case, TESPAs believes that based on this decision, the ALJ’s decision not to recommend Board action on the permit application is legally correct.

#### **1. SOAH may only conduct hearings on contested matters.**

Tex. Gov’t. Code Section 2003.021(b) provides SOAH the power to hear and resolve contested case proceedings under Chapter 2001 of the Government Code (APA). A person only has a right to a contested case proceeding *if a law other than the APA grants them the right to such hearing*.<sup>1</sup> In this case, HB 3405 prohibits hearings on temporary permits. BSEACD Rule 3-1.55.2(B)(2). There is no statutory right to a hearing before the issuance of a temporary permit (TESPAs believes there are Constitutional issues with this prohibition). The statute and District

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<sup>1</sup> *Foster v. Teacher Ret. Sys.*, 273 S.W.3d 883 (Tex. App. Austin 2008); *Tex. Dept. of Ins. v. State Farm Lloyds*, 260 S.W.3d 233, 243 (Tex. App. Ausin 2008).

rules do, however, provide for a hearing to challenge the issuance of a regular permit. HB 3405, Section 4(e) and BSEACD Rule 3-1.55.4. But the hearing is provided only if there are challenges to the regular permit pending before SOAH. Tex. Gov't Code 2003.021(b).

**2. There are no remaining contested issues in this case.**

Originally, Needmore and TESPAs asserted challenges to the regular permit, and therefore, it was lawful for the District to refer the case to SOAH. Then, due to the Rule 11 Agreement between all parties and the subsequent settlement agreement between Needmore and the District, all challenges to the regular permit were withdrawn. According to the ALJ, the only remaining challenges were related to the issuance of the temporary permit. (Again, TESPAs disagree with this finding and believes it raised challenges to the regular permit). At that point, SOAH lost jurisdiction to conduct the hearing the District now requests because there are no contested matters regarding the regular permit and **there is no statute allowing SOAH to hold a contested case proceeding for a temporary permit.** Moreover, under 36.416 of the Water Code, SOAH only has jurisdiction to hear *contested* matters that are referred by a groundwater district at the request of the applicant or a party. There are no remaining contested issues in this case.

**3. SOAH's Proposal for Decision Complies with Tex. Water Code 36.410(b)(3) and BSEACD Rule 4-9.8**

The Board's Remand Order states, "it is the opinion of the Board of Directors that the ALJ's Proposal for Decision in this matter must include all of the elements set forth in District Rule 4-9.8(B) and Section 36.410(b)(3), Water Code, including the ALJ's recommendations for Board action on the Needmore Application, and that the ALJ is better positioned to further develop the evidentiary record through stipulations of the parties, testimony, or otherwise to enable the ALJ to make such recommendations for Board action." The ALJ's PFD did include all elements that are set forth in District Rule 4-9.8(B) and Section 36.410(b)(3) of the Texas Water Code, which state, "the proposal for decision must include the presiding officer's recommendations for

board action *on the subject matter of the hearing.*” District Rule 4-9.8(B) and Tex. Water Code 36.410(b)(3) (*emphasis added*). According to the ALJ, the subject matter of the hearing was related to the temporary permit. Neither the GM nor the Applicant offered any evidence related to the merits of the application or issuance of the regular permit, although they certainly had the opportunity to do so. Moreover, the ALJ *recommended* to the District, “[a]s the substantive challenges to the regular permit were withdrawn from this case, it appears the District may issue the regular permit.” Exceptions Letter at 2. The ALJ should dismiss the District’s remand of an uncontested matter to SOAH for an unnecessary hearing and merely an advisory opinion. Legally, SOAH may only hear *contested* cases. Tex. Gov’t. Code Section 2003.021(b).

### CONCLUSION

The ALJ has already held that the PFD satisfies Section 36.410(b)(3) of the Texas Water Code. The District has not presented any new arguments of procedural error. SOAH should dismiss the remand and its request for an evidentiary hearing because SOAH does not have jurisdiction to hear an uncontested matter. The ALJ made clear there are no legal impediments to the District issuing the regular permit. A hearing is unnecessary and a waste of resources. The Board should schedule a final hearing to consider the PFD and take final action as the Board deems appropriate.

Respectfully Submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing TESPAs Response to BSEACD Board of Director’s Remand Order has been sent to all parties of record via e-mail on this the 26th of November, 2018, addressed as follows:

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