

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE
300 West 15th Street Suite 504
Austin, Texas 78701
Phone: (512) 475-4993
Fax: (512) 322-2061

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REGARDING: **ORDER NO. 3- DENYING PLEA TO THE JURISDICTION AND REQUIRING SUBMISSION OF DATES**
DOCKET NUMBER: **957-17-2582**

JUDGE STEPHANIE FRAZEE

FAX TO:
VANESSA PUIG-WILLIAMS

FAX TO:
VIA EMAIL

BILL D. DUGAT III

VIA EMAIL

EMILY ROGERS (BICKERSTAFF HEATH DELGADO ACOSTA, LLP)

VIA EMAIL

CHARLES R VINE

VIA EMAIL

ED MCCARTHY

VIA EMAIL

JEFF MUNDY

VIA EMAIL

cc: Docket Clerk, State Office of Administrative Hearings

NOTE: IF ALL PAGES ARE NOT RECEIVED, PLEASE CONTACT Hilary Aguirre(hag) (512) 475-4993

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SOAH DOCKET NO. 957-17-2582

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

ORDER NO. 3
DENYING PLEA TO THE JURISDICTION AND
REQUIRING SUBMISSION OF DATES

In accordance with the briefing schedule set forth in Order No. 2, Needmore Water LLC (Needmore) filed a plea to the jurisdiction, Barton Springs Edwards Aquifer Conservation District (District) and Trinity Edwards Springs Protection Association (TESPA) filed responses, and Needmore filed a reply to the responses.¹ The Administrative Law Judge has considered the parties' arguments and the applicable law and rules and determines that the plea to the jurisdiction should be denied and that a prehearing conference should be scheduled to address party status and set a procedural schedule.

House Bill 3405 (HB 3405), which amended chapter 8802 of the Special District Local Laws Code, was passed on June 19, 2015.² HB 3405 expanded the District's territory to include part of Needmore's property. HB 3405 set forth a process for entities new to the District's jurisdiction to obtain temporary and regular permits from the District. In addition to HB 3405, Texas Water Code (TWC) chapter 36 applies to permit applications filed with the District and provides for contested case hearings on permit applications.³

On September 19, 2015, Needmore applied to the District for a temporary and regular permit to produce 289,080,000 gallons of groundwater per year from the Trinity Aquifer. On

¹ On May 18, 2017, Needmore submitted a letter addressing a recent Texas Supreme Court case, *Bankdirect Capital Finance, LLC v. Plasma Fab, LLC*, No. 15-0635, 2017 Tex. LEXIS 450 (Tex. May 12, 2017).

² Act of June 19, 2015, 84th Leg. R.S. Ch. 975, 2015 Tex. Gen. Laws 3426 (HB 3405).

³ See Tex. Water Code §§ 36.416, 4165; see also H.J. of Tex., 84th Leg. R.S. 5833, 5835 (2015).

November 22, 2016, the District's General Manager issued a preliminary decision recommending that the District grant Needmore's application and issue regular permit, authorizing production of 289,080,000 gallons of water per year with special provisions designed to avoid unreasonable impacts to existing wells. The District published notice of the proposed regular permit, and TESPAA requested a contested case hearing at SOAH to protest the permit. Needmore objected to the special provisions in the permit.

In its plea to the jurisdiction, Needmore argues that HB 3405 imposes a two-hearing process for the issuance of a regular permit by the District. According to Needmore, the process requires that the District conduct a hearing on the regular permit and issue a decision before a hearing can be held at SOAH. Needmore also argues that the HB 3405 process limits participation in the SOAH hearing to Needmore and the District. Therefore, TESPAA is precluded from participating as a party in the SOAH proceeding. Needmore requests that the SOAH case be dismissed and remanded to the District due to lack of jurisdiction or, in the alternative, that this proceeding be abated pending a hearing held by the District, and that no entity other than Needmore and the District be allowed to participate as a party to this proceeding.

The District argues that SOAH is bound by the rules promulgated by the District to implement HB 3405 and that Needmore's plea to the jurisdiction should be denied. The District rules provide that an application to convert a temporary permit to a regular permit may be contested and that a contested permit is subject to the District's rules regarding contested case hearings. According to the District, under its rules and TWC chapter 36, this case was properly referred to SOAH because TESPAA requested a contested case hearing on Needmore's application for a regular permit.

TESPAA argues that HB 3405 does not create a unique hearing process that is different from the hearing process set forth in TWC chapter 36. TESPAA also argues that HB 3405 allows its participation as a party to this proceeding, that the public interest supports TESPAA's right to a hearing on the application, and that TESPAA has a right to protect its private property rights through a contested case at SOAH on the application.

HB 3405 sets forth a process for a contested regular permit to be referred to SOAH. That process does not preclude the TWC chapter 36 contested case process from applying to an application to the District for temporary and regular permits. Rather, HB 3405 created an *additional* process for a permit holder to request a contested case hearing at SOAH. The plain language of the bill, as well as the legislative history, show that the HB 3405 process is not the only process to follow in these types of cases. In fact, Representative Isaac stated that TWC chapter 36 also applies to wells under the District's newly conferred jurisdiction.⁴ Accordingly, the District promulgated rules for contested case hearings at SOAH under TWC chapter 36 and HB 3405, and the District followed those rules in contracting with and referring this case to SOAH.⁵ Therefore, this case is properly before SOAH.

Under TWC chapter 36 and the District's rules, a third-party may request a contested case hearing on a permit application and be granted status as a party to the proceeding.⁶ HB 3405, in creating an additional way for a permit holder to request a contested case, does not preclude the initiation of a contested case at SOAH as a result of the protest of a third-party. Therefore, the ALJ finds that it is appropriate to schedule a prehearing conference to determine whether TESPA has standing to participate as a party in this case.

Accordingly, the parties are **ORDERED** to submit three agreed proposed dates for a prehearing conference by **May 26, 2017**. The parties should be prepared to address TESPA's standing to participate as a party in this case and to present a proposed hearing schedule at the prehearing conference.

SIGNED May 19, 2017.


STEPHANIE FRAZEE
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

⁴ H.J. of Tex., 84th Leg. R.S. 5833, 5835 (2015).

⁵ See District Rules 3-1.4.C, 4-9.1 A, 4-9.13 A.

⁶ Tex. Water Code § 36.415.

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**300 West 15th Street Suite 504
Austin, Texas 78701
Phone: (512) 475-4993
Fax: (512) 322-2061**

SERVICE LIST

AGENCY: Barton Springs Edwards Aquifer (BSEA)
STYLE/CASE: NEEDMORE WATER LLC FOR HB 3405 REGULAR PERMIT
SOAH DOCKET NUMBER: 957-17-2582
REFERRING AGENCY CASE:

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ STEPHANIE FRAZEE**

REPRESENTATIVE / ADDRESS

PARTIES

BILL D. DUGAT III
ATTORNEY AT LAW
BICKERSTAFF HEATH DELGADO ACOSTA, LLP
3711 S. MOPAC EXPRESSWAY, BUILDING ONE, SUITE
300
AUSTIN, TX 78746
(512) 472-8021 (PH)
(512) 320-5638 (FAX)
bdugat@bickerstaff.com

GENERAL MANAGER OF BSEACD

CHARLES IRVINE
IRVINE & CONNER, PLLC
4709 AUSTIN
HOUSTON, TX 77004
(713) 533-1704 (PH)
(713) 524-5165 (FAX)
charles@irvineconner.com

TRINITY EDWARDS SPRINGS PROTECTION
ASSOCIATION

EMILY ROGERS
BICKERSTAFF HEATH DELGADO ACOSTA, LLP
3711 S. MOPAC EXPRESSWAY, BUILDING ONE, STE 300
AUSTIN, TX 78746
(512) 472-8021 (PH)
(512) 320-5638 (FAX)
erogers@bickerstaff.com

GENERAL MANAGER OF BSEACD

ED MCCARTHY
MCCARTHY & MCCARTHY, LLP
1122 COLORADO ST, SUITE 2399
AUSTIN, TX 78701
(512) 904-2313 (PH)
(512) 692-2826 (FAX)
ed@ermlawfirm.com

NEEDMORE WATER, LLC

JEFF MUNDY
THE MUNDY FIRM, PLLC
4131 SPICEWOOD SPRINGS, SUITE 03
AUSTIN, TX 78759
(512) 334-4300 (PH)
(512) 590-8673 (FAX)
jeff@jmundy.com

TRINITY EDWARDS SPRINGS PROTECTION
ASSOCIATION

MANESSA PUIG-WILLIAMS
P.O. BOX 160971
AUSTIN, TX 78716
(512) 826-1026 (PH)
vanessa@puigwilliamsllaw.com

TRINITY EDWARDS SPRINGS PROTECTION
ASSOCIATION
