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STATE OFFICE OF ADMINISTRATIVE HEARINGS

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DATE: **6/6/2018**

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REGARDING: **ORDER NO. 10 - DENYING MOTION FOR SUMMARY DISPOSITION AND CANCELING HEARING**

DOCKET NUMBER: **957-17-2582**

JUDGE STEPHANIE FRAZEE

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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**

ORDER NO. 10
DENYING TRINITY EDWARDS SPRINGS ASSOCIATION'S MOTION FOR SUMMARY DISPOSITION, GRANTING NEEDMORE WATER, LLC'S MOTION FOR SUMMARY DISPOSITION, AND CANCELING HEARING ON THE MERITS

On February 20, 2018, the parties filed a Joint Motion to Modify the Hearing Schedule.[1] The motion stated that the parties had entered into a Rule 11 agreement on February 16, 2018, that narrowed the issues being contested by the Trinity Edwards Springs Association (TESPA) in this case. Specifically, TESPA would only be challenging the issues raised in its Motion for Summary Disposition: whether Needmore Water, LLC (Needmore) was eligible to obtain a temporary permit pursuant to HB 3405, Section 4(c) and (d). TESPA withdrew the prefiled testimony of its witnesses Doug Wierman and Stephan Nelle as part of the Rule 11 agreement.

Also on February 20, 2018, Needmore and TESPA filed cross-motions for summary disposition. On February 23, 2018, the General Manager of the Barton Springs Edwards Aquifer Conservation District (District) filed a response opposing TESPA's motion. On February 26, 2018, Needmore filed a response opposing TESPA's motion, and on March 2, 2018, TESPA filed a response opposing Needmore's motion. Also on March 2, 2018, the District filed a response in support of Needmore's motion. On March 5, 2018, the Administrative Law Judge (ALJ) convened a prehearing conference on the motions.

Having considered the summary disposition motions and responses and arguments presented at the prehearing conference, the ALJ finds that Needmore's motion should be granted and that TESPA's motion should be denied for the reasons set forth below.

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[1] The motion was granted in Order No. 9, issued on February 22, 2018.

In its motion, TESPA argues that Needmore does not meet the conditions for obtaining a temporary permit under HB 3405. Specifically, TESPA 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 TESPA, 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) TESPA is too late to challenge the already-granted temporary permit even if such a challenge were allowed; (3) TESPA 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 TESPA's motion and agrees with Needmore's motion. The District asserts that (1) TESPA cannot challenge a matter associated with the issuance of the temporary permit; and (2) even if TESPA could challenge the temporary permit, it was properly granted.

The provisions of HB 3405 do not provide an opportunity to challenge the issuance of a temporary permit. 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." (emphasis added). The District's rule at 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." Accordingly, neither the statute nor the rules provide for notice and hearing on a temporary permit.

However, under Section 4(e) of HB 3405, a hearing may be held on the conversion of the temporary permit to a regular permit. 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."

This proceeding is a hearing on the conversion of Needmore's temporary permit to a regular permit. The parties have agreed that TESPA is not contesting either of the issues set forth in Section 4(e) of HB 3405. Rather, TESPA has limited its challenge to whether the District should have issued the temporary permit to Needmore. As the purpose of this hearing 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 TESPA has limited its challenge to the issuance of the temporary permit.

Accordingly, Needmore's motion for summary disposition is **GRANTED**, and TESPA's motion for summary disposition is **DENIED**. The hearing on the merits scheduled for July 19-20, 2018, is **CANCELED**. A proposal for decision on summary disposition will be issued.

SIGNED June 6, 2018.

Stephanie Frazee

STEPHANIE FRAZEE
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

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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:

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