

RESOLUTION NO. 02-2004-02

A RESOLUTION OF THE SOUTH CENTRAL TEXAS WATER ADVISORY COMMITTEE REQUESTING THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY TO REVIEW THE ACTION OF THE EDWARDS AQUIFER AUTHORITY BOARD OF DIRECTORS APPROVING RESOLUTION AND ORDER NO. 12-03-478 ADOPTING PERMIT RULES WITHIN CHAPTER 711 OF THE EDWARDS AQUIFER AUTHORITY RULES

WHEREAS, diverse economic and social interests are dependent on the Edwards Aquifer (“Aquifer”) for water supply;

WHEREAS, the Aquifer has been declared by the Texas Legislature to be “a distinctive natural resource in this state” and “a unique aquifer;”

WHEREAS, the Edwards Aquifer Authority (“Authority”) was created in 1993 by the Texas Legislature, Edwards Aquifer Authority Act of May 30, 1993, 73rd Leg., R.S., ch. 626, 1993 Tex. Gen. Laws 2350; as amended by Act of May 29, 1995, 74th Leg., R.S., ch. 261, 1995 Tex. Gen. Laws 2505; Act of May 16, 1995, 74th Leg., R.S., ch. 524, 1995 Tex. Gen. Laws 3280; Act of May 6, 1999, 76th Leg., R.S., ch. 163, 1999 Tex. Gen. Laws 634; Act of May 28, 2001, 77th Leg., R.S., ch. 966, §§ 2.60 - 2.62 and 6.01 - 6.05, 2001 Tex. Gen. Laws 1880, 1910 and 1961 - 62; Act of May 23, 2001, 77th Leg., R.S., ch. 1192, 2001 Tex. Gen. Laws 2552; and Act of June 1, 2003, 78th Leg., R.S., ch. 1112, § 6.01(4), 2003 Tex. Gen. Laws 3188, 3193 (“Act”);

WHEREAS, the Act requires the Authority to limit “[a]uthorizations to withdraw water from the aquifer ... to ... (1) protect the water quality of the aquifer; (2) protect the water quality of the surface streams to which the aquifer provides springflow; (3) achieve water conservation; (4) maximize the beneficial use of water available for withdrawal from the aquifer; (5) protect aquatic and wildlife habitat; (6) protect species that are designated as threatened or endangered under applicable federal or state law; and (7) provide for instream uses, bays, and estuaries.” Act § 1.14(a);

WHEREAS, the Act mandates that “for the period ending December 31, 2007, the amount of permitted withdrawals from the aquifer may not exceed 450,000 acre-feet of water for each calendar year,” and “for the period beginning January 1, 2008, the amount of permitted withdrawals from the aquifer may not exceed 400,000 acre-feet of water for each calendar year.” Act § 1.14(b) and (c);

WHEREAS, the Act provides for the appointment of the South Central Texas Water Advisory Committee (“Advisory Committee”) by the governing bodies of the counties of Atascosa, Caldwell, Calhoun, Comal, DeWitt, Goliad, Gonzales, Guadalupe, Hays, Karnes, Medina, Nueces, Refugio, San Patricio, Uvalde, Victoria and Wilson, and

the governing bodies of the cities of San Antonio, Victoria, and Corpus Christi, to “advise the board on downstream water rights and issues” and to “assess the effect on downstream water rights of the management of the aquifer” by the Authority. Act § 1.10;

WHEREAS, the Act provides that the Advisory Committee may request the Authority board of directors (“Authority Board”) to “reconsider any board action that is considered prejudicial to downstream water interests.” Act § 1.10(f);

WHEREAS, the Act provides that “[i]f the [Authority Board] review does not result in a resolution satisfactory to the [Advisory Committee],” the Advisory Committee may request the Texas Commission on Environmental Quality (“Commission”) to review the action; and if such a request is made, the Act provides that the Commission “shall review the action and may make a recommendation to the [Authority Board]” as to whether the action is “contrary to an action of the [Commission] affecting downstream interests”. Act § 1.10(f);

WHEREAS, on December 16, 2003, the Authority Board approved Resolution and Order No. 12-03-478 adopting revised permit rules (“Revised Permit Rules”) within Chapter 711 of the Edwards Aquifer Authority Rules, effective December 26, 2003;

WHEREAS, the Revised Permit Rules create a “bifurcated” system that divides regular permits into two elements, one of which (“Senior Rights”) is not interruptible unless the Aquifer is at or below certain levels (650 amsl for well J-17, and 845 amsl for well J-27), and the other of which (“Junior Rights”) are available for use when the Aquifer is at or above certain higher levels (665 amsl for well J-17, and 865 amsl for well J-27);

WHEREAS, under the Revised Permit Rules, only the Senior Rights are counted against the Act’s limitations on authorized withdrawals, and the Junior Rights (which according to current Authority staff estimates will likely amount to approximately 110,000 acre-feet per year upon completion of permit processing) will not be counted against the limitations on authorized withdrawals;

WHEREAS, the Revised Permit Rules will have the effect of increasing authorized withdrawals from the Aquifer under regular permits to a level that exceeds the Act’s 450,000 acre-foot annual limitation on authorized withdrawals by almost 25%;

WHEREAS, the Advisory Committee adopted its Resolution No. 02-2004-01 on February 12, 2004 finding the action of the Board of Directors in approving Resolution and Order No. 12-03-478 to be prejudicial to downstream water interests, and requesting the Authority Board to 1) reconsider Resolution and Order No. 12-03-478; and 2) direct the Authority staff to proceed with the process of drafting, review and adoption of rules to require proportionate reductions of all regular permits to meet the initial 450,000 acre-foot per year limitation on authorized withdrawals from the Aquifer;

WHEREAS, the Authority Board on May 11, 2004 voted to deny the Advisory Committee’s request for reconsideration;

WHEREAS, the Advisory Committee has determined that the Authority Board’s review of its action in approving Resolution and Order No. 12-03-478 did not result in a resolution satisfactory to the Advisory Committee, and on that basis, the Advisory Committee wishes to have the Commission review the action of the Authority Board in approving Resolution and Order No. 12-03-478 adopting the Revised Permit Rules;

WHEREAS, the Advisory Committee respectfully submits that the Commission’s actions in issuing, managing and monitoring (through the South Texas Watermaster) water rights held by the cities of Victoria, Seguin and Gonzales, and Dow/Union Carbide Corporation, Invista/Koch/DuPont, AEP, and the Guadalupe-Blanco River Authority, among others, along the San Marcos and Guadalupe rivers at locations that are dependent on springflow from the Aquifer at Comal Springs and San Marcos Springs for availability, especially in times of drought, are “action[s] of the Commission affecting downstream interests” under the Act § 1.10(f);

WHEREAS, the Advisory Committee respectfully submits that the action of the Authority Board approving Resolution and Order No. 12-03-478 adopting the Revised Permit Rules is contrary to actions of the Commission affecting downstream interests, in that the Revised Permit Rules will lead to increased withdrawals from the Aquifer when Aquifer levels are high and this, in turn, will cause the Aquifer to drop to low levels sooner at the beginning of severe droughts and to remain at lower levels throughout a drought, and that as a result, the ability of the holders of downstream water rights (such as those listed in the recital above) under permits issued by the Commission to rely on base flows provided by the Comal and San Marcos Springs during droughts will be substantially reduced if not eliminated by the Revised Permit Rules;

WHEREAS, the Advisory Committee respectfully submits that its position that the adoption of the Revised Permit Rules by the Authority Board is contrary to actions of the Commission affecting downstream interests is supported by the Final Regulatory Impact Assessment prepared for the Authority by Hicks & Co. dated December 2003, a copy of which is attached to this Resolution as Attachment A; the following are excerpts from that report:

1. “The use of [Junior] Rights would lower Aquifer levels, so that the well-specific water levels used to turn [Junior] Rights off would be reached more often.” (page 42)
2. “At J-17, the effect of the [Junior] Rights would lower water levels by an average of 2.9 feet. The difference is 3.2 feet at the Hondo well and 2.6 feet at the Uvalde well.” (page 42)
3. “For a repeat of historical recharge conditions, the effect of [Junior Rights] pumping compared to a steady 450,000 acre-feet per year of pumping is to reduce discharge from Comal Springs. As a result, available downstream water supplies in the Comal and Guadalupe Rivers would be reduced.” (page 43)
4. “Because exercise of [Junior] Rights would potentially lower water levels in the Aquifer, the thresholds for implementing critical period reductions would be reached more frequently.” (page 44)

5. “The model indicates that at the start of a critical period, water levels would be dropping faster if there had been [Junior Rights] pumping in the past than if there had not been such pumping. While this effect dissipates quickly, it is possible that this effect could require an amendment to the [Authority’s Drought Management/Critical Period Management] rules to require greater pumping curtailments during the early stages of a drought. If this is the case, any benefits obtained from use of [Junior] Rights might be substantially offset by greater pumping restrictions during droughts.” (pages 44-45);

NOW, THEREFORE, BE IT RESOLVED BY THE SOUTH CENTRAL TEXAS WATER ADVISORY COMMITTEE THAT:

- Section 1.** The recitals stated above are incorporated into this Resolution for all purposes.
- Section 2.** The Advisory Committee respectfully requests that the Texas Commission on Environmental Quality review the action of the Authority Board approving Resolution and Order No. 12-03-478 adopting the Revised Permit Rules, and that such review be facilitated by referral of this matter to the State Office of Administrative Hearings (“SOAH”) for an evidentiary hearing, with a report and recommendation filed by the Administrative Law Judge with the Commission within 90 days.
- Section 3.** The Advisory Committee respectfully requests that the Commission, upon receipt of the report from the SOAH Administrative Law Judge and conclusion of the Commission’s review, find and determine that the action of the Authority Board approving Resolution and Order No. 12-03-478 adopting the Revised Permit Rules is contrary to actions of the Commission affecting downstream interests, in that the Revised Permit Rules will lead to increased withdrawals from the Aquifer when Aquifer levels are high and this, in turn, will cause the Aquifer to drop to low levels sooner at the beginning of severe droughts and to remain at lower levels throughout a drought, and that as a result, the ability of the holders of downstream water rights under permits issued by the Commission to rely on base flows provided by the Comal and San Marcos Springs during droughts will be substantially reduced if not eliminated by the Revised Permit Rules
- Section 4.** The Advisory Committee respectfully requests that the Commission, based upon the finding and determination contained in Section 3 above, issue a recommendation to the Authority Board to A) rescind the action of the Authority Board approving Resolution and Order No. 12-03-478 adopting the Revised Permit Rules, and B) direct the Authority staff to proceed with the process of drafting, review and adoption of rules to require proportionate reductions of all regular permits to meet the initial

450,000 acre-foot per year limitation on authorized withdrawals from the Aquifer.

Section 5. The Advisory Committee respectfully requests the Authority Board, upon receipt of the recommendation from the Commission, to A) determine that the action of the Authority Board in approving Resolution and Order No. 12-03-478 adopting the Revised Permit Rules is contrary to actions of the Commission affecting downstream interests, B) rescind the action of the Authority Board approving Resolution and Order No. 12-03-478 adopting the Revised Permit Rules, and C) direct the Authority staff to proceed with the process of drafting, review and adoption of rules to require proportionate reductions of all regular permits to meet the initial 450,000 acre-foot per year limitation on authorized withdrawals from the Aquifer.

[Signatures on following page]

**PASSED AND APPROVED BY THE SOUTH CENTRAL TEXAS WATER
ADVISORY COMMITTEE THIS 18th DAY OF MAY, 2004.**

Gary Middleton
Chairman

ATTEST:

David Davenport
Secretary