

BILL ANALYSIS

Senate Research Center

H.B. 2729
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Water & Rural Affairs
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Engrossed

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

S.B. 1477, 73rd Legislature, Regular Session, 1993, created the Edwards Aquifer Authority Act (Act), which established the Edwards Aquifer Authority (EAA) to manage the Edwards Aquifer (aquifer) in South-Central Texas and to avoid a potential takeover of the aquifer by the federal government due to then pending federal Endangered Species Act litigation. Since its adoption, the Act has provided a sound and effective policy framework for the aquifer's management and the development of a federally-approved plan to protect endangered species associated with the aquifer (the Edwards Aquifer Habitat Conservation Plan). Outside of the Act, the EAA has relied upon provisions in Chapters 36 and 49 of the Texas Water Code (Chapter 36 or 49) to guide the organization in its administrative matters (Chapter 36 deals specifically with groundwater conservation districts; Chapter 49 deals generally with all types of water districts).

Over the past 25 years, it has become apparent that general management of groundwater throughout the State of Texas was incompatible with the management directives imposed upon the aquifer through the Act. Because of this incompatibility, the EAA has been granted multiple exemptions from provisions throughout Chapter 36 of the Water Code, including a complete exemption from permitting requirements. These exemption requests are often required to be made at times when the legislature is considering broad, statewide changes to groundwater management.

Therefore, in order to: (1) eliminate confusion between the requirements in Chapter 36 and the EAA Act; (2) avoid the EAA's unique management requirements from hindering statewide groundwater policy development; and (3) provide certainty to EAA permit holders and interested stakeholders in the Edwards Aquifer Habitat Conservation Plan, it seems prudent to remove the applicability of Chapter 36 from the Act, and instead, place directly into the Act the few essential, applicable administrative requirements derived from Chapter 36.

H.B. 2729 amends the Act to provide that Chapter 36 does not apply to the Authority, while directly incorporating language from certain sections that are not otherwise contained in Chapter 49. The bill also removes two provisions within the Act that have become obsolete. The first section deals primarily with the EAA's critical period management program (drought management process), which was formally adopted through a legally mandated implementation program in 2013. The Act, however, contains additional plan provisions, initially established in 1993, that were not adopted through the program; and therefore, are no longer necessary or legally applicable to the EAA. The second obsolete section deals with a regional water planning provision that was superseded by the State Water Planning Process. The EAA participates in that state process; therefore, the EAA-specific process is no longer a necessary element to the EAA Act. H.B. 2729 removes both provisions from the Act.

H.B. 2729 amends current law relating to the administration, duties, and operation of the Edwards Aquifer Authority, and authorizes a fee.

RULEMAKING AUTHORITY

Rulemaking authority previously granted to the Edwards Aquifer Authority is modified in SECTION 7 (Section 1.26, Chapter 626, Acts of the 73rd Legislature, Regular Session, 1993) of this bill.

Rulemaking authority previously granted to a groundwater conservation district is modified in SECTION 15 (Section 36.101, Water Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 1.03(20), Chapter 626, Acts of the 73rd Legislature, Regular Session, 1993, to redefine "underground water" or "groundwater" as water percolating beneath the earth.

SECTION 2. Amends Section 1.07, Chapter 626, Acts of the 73rd Legislature, Regular Session, 1993, as follows:

Sec. 1.07. OWNERSHIP OF UNDERGROUND WATER. Prohibits action taken pursuant to this Act from being construed as depriving or divesting the owner or the owner's lessees and assigns, including holders of recorded liens or other security interests in the land, of these ownership rights or as impairing the contract rights of any person who purchases water for the provision of potable water to the public or for the resale of potable water to the public for any use, subject to the rules adopted by the Edwards Aquifer (authority) under this Act, rather than adopted by the authority, or a district exercising the powers provided by Chapter 36 (Groundwater Conservation Districts), rather than 52 (Underground Water Conservation Districts), Water Code.

SECTION 3. Amends Section 1.08(a), Chapter 626, Acts of the 73rd Legislature, Regular Session, 1993, as follows:

(a) Provides that the authority has all of the rights, powers, privileges, authority, functions, and duties provided by the general law of this state, including Chapters 49 (Provisions Applicable to All Districts) and 51 (Water Control and Improvement Districts), rather than 50 (Provisions Generally Applicable to Districts), 51, and 52, Water Code, applicable to an authority created under Article XVI, Section 59 (Conservation and Development of Parks and Recreational Facilities; Conservation and Reclamation Districts; Indebtedness and Taxation Authorized), of the Texas Constitution. Provides that Chapter 36, Water Code, does not apply to the authority.

SECTION 4. Amends Section 1.09, Chapter 626, Acts of the 73rd Legislature, Regular Session, 1993, by amending Subsection (d) and adding Subsections (i) through (k), as follows:

(d) Provides that Section 41.008 (Effect of Holding Election on Improper Date), rather than Sections 41.003 and 41.008, Election Code, does not apply to an election held under this article. Makes a conforming change

(i) Provides that a member of a governing body of another political subdivision is ineligible for appointment or election as a director of the board of directors of the authority (director; board). Provides that a director of the authority is disqualified and vacates the office of director if the director is appointed or elected as a member of the governing body of another political subdivision.

(j) Provides that for liability purposes only, a director of the authority is considered an employee of the authority under Chapter 101 (Tort Claims), Civil Practice and Remedies Code, even if the director does not receive fees of office voluntarily, by authority policy, or through a statutory exception.

(k) Provides that a director of the authority is immune from suit and immune from liability for official votes and official actions. Provides that, to the extent an official vote or official action conforms to laws relating to conflicts of interest, abuse of office, or constitutional obligations, this subsection provides immunity for those actions.

SECTION 5. Amends Section 1.11(d), Chapter 626, Acts of the 73rd Legislature, Regular Session, 1993, is amended as follows:

(d) Authorizes the authority to:

(1)–(9) Makes no changes to these subdivisions;

(10) enforce inside the authority's boundaries Chapter 1901 (Water Well Drillers), Occupations Code, and rules adopted by the Texas Commission of Licensing and Regulation (TCLR) under that chapter, rather than enforce Chapter 32 (Subsurface Area Drip Dispersed System), Water Code, and Texas Natural Resource Conservation Commission (TNRCC) rules adopted under that Act within the authority's boundaries; and

(11) require to be furnished to the authority water well drillers' logs that are required by Chapter 1901, Occupations Code, rather than Chapter 32, Water Code, to be kept and furnished to the Texas Department of Licensing and Regulation (TDCR), rather than TNRCC.

SECTION 6. Amends Article 1, Chapter 626, Acts of the 73rd Legislature, Regular Session, 1993, by adding Sections 1.21 and 1.211, as follows:

Sec. 1.21. **CONTESTED CASE HEARINGS; REQUEST FOR REHEARING OR FINDINGS AND CONCLUSIONS.** (a) Authorizes an applicant in a contested or uncontested hearing on an application under this Act or a party to a contested hearing to administratively appeal a decision of the board on an application by requesting written findings of fact and conclusions of law not later than the 20th day after the date of the board's decision.

(b) Requires the board, on receipt of a timely written request, to make written findings of fact and conclusions of law regarding a decision of the board on an application under this Act. Requires the board to provide certified copies of the findings and conclusions to the person who requested them, and to each designated party, not later than the 20th day after the date the board receives the request. Authorizes a party to a contested hearing to request a rehearing before the board not later than the 20th day after the date the board issues the findings and conclusions.

(c) Requires a request for rehearing to be filed in the authority's office and to state the grounds for the request.

(d) Requires the board, if the board grants a request for rehearing, to schedule the rehearing not later than the 45th day after the date the request is granted.

(e) Provides that the failure of the board to grant or deny a request for rehearing before the 91st day after the date the request is submitted is a denial of the request.

Sec. 1.211. **DECISION; WHEN FINAL.** (a) Provides that a decision by the board on an application under this Act is final:

(1) if a request for rehearing is not filed on time, on the expiration of the period for filing a request for rehearing; or

(2) if a request for rehearing is filed on time, on the date:

(A) the board denies the request for rehearing; or

(B) the board renders a written decision after rehearing.

(b) Provides that a timely filed motion for rehearing is a prerequisite to a suit against the authority under Section 1.46 of this article challenging a decision in a contested hearing. Requires a suit under Section 1.46 to be filed not later than the 60th day after the date on which the decision becomes final.

SECTION 7. Amends Section 1.26(a), Chapter 626, Acts of the 73rd Legislature, Regular Session, 1993, as follows:

(a) Requires the authority by rule to adopt a critical period management plan consistent with Sections 1.14(a), (f), and (h) (relating to certain limitations on withdrawal of water

from the aquifer) of this article. Requires the plan to allow irrigation use to continue in order to permit the user to complete the irrigation of a crop in progress. Deletes existing text relating to review of recommendations, a deadline for plan adoption, and a written report to certain public officials describing the actions taken in response to each recommendation and, for each recommendation not implemented, the reason it was not implemented. Deletes existing text relating to requirements of the plan, makes nonsubstantive changes, and deletes the designation of Subsection (f).

SECTION 8. Amends Sections 1.29(b) and (f), Chapter 626, Acts of the 73rd Legislature, Regular Session, 1993, as follows:

(b) Prohibits the authority from increasing aquifer management fees by more than eight percent per year.

(f) Authorizes, rather than requires, the authority to impose a permit application fee not to exceed \$25. Authorizes the authority to impose fees to recover administrative costs associated with actions other than the filing and processing of applications and registrations. Prohibits the fees from unreasonably exceeding the administrative costs.

SECTION 9. Amends Article 1, Chapter 626, Acts of the 73rd Legislature, Regular Session, 1993, by adding Section 1.361, as follows:

Sec. 1.361. ABANDONED, OPEN, UNCOVERED, OR DETERIORATED WELLS.

(a) Defines, "abandoned well" and "deteriorated well" for purposes of this section.

(b) Authorizes the authority or its authorized employees, representatives, or agents, if the owner or lessee of land on which an abandoned, open, uncovered, or deteriorated well is located fails or refuses to close, cap, or plug the well in compliance with Chapter 1901, Occupations Code, and the authority's rules, to enter the land and close, cap, or plug the well safely and securely.

(c) Provides that reasonable expenses incurred by the authority in closing, capping, or plugging a well constitute a lien on the land on which the well is located.

(d) Provides that the lien as described by Subsection (c) arises and attaches on recording, in the deed records of the county where the well is located, an affidavit that is executed by any person conversant with the facts and states the following:

(1) the existence of the well;

(2) the legal description of the property on which the well is located;

(3) the approximate location of the well on the property;

(4) the failure or refusal of the owner or lessee, after notification, to close or cap the well before the expiration of 10 days after the notification, or to plug the well before the expiration of 180 days after the notification, as required by the authority's rules;

(5) the closing, capping, or plugging of the well by the authority or by an authorized employee, representative, or agent of the authority; and

(6) the expense incurred by the authority in closing, capping, or plugging the well.

(e) Provides that this section does not affect the enforcement of Subchapter A (Covering Wells, Cisterns, and Holes), Chapter 756 (Miscellaneous Hazardous Conditions), Health and Safety Code.

SECTION 10. Amends Sections 1.37(j), (n), and (r), Chapter 626, Acts of the 73rd Legislature, Regular Session, 1993, as follows:

(j) Requires a person against whom an administrative penalty is assessed to take certain actions before the expiration of, rather than within, 30 days after the date the authority's order is final as provided by Section 2001.144(a) (relating to instances in which a decision or order in a contested case is final), Government Code, rather than Subsection (c), Section 16, Administrative Procedure and Texas Register Act (Article 6252-13a, V.T.C.S.).

(n) Makes conforming changes to this subsection.

(r) Makes a conforming change to this section.

SECTION 11. Amends Section 1.38, Chapter 626, Acts of the 73rd Legislature, Regular Session, 1993, as follows:

Sec. 1.38. INJUNCTION BY AUTHORITY (a) Creates this subsection from existing text. Authorizes the authority to file a civil suit in a state district court for an injunction or mandatory injunction to enforce this article and the authority's rules, rather than for an injunction to enforce this article.

(b) Provides that in an enforcement action by the authority against a governmental entity for a violation of authority rules, the limits on the amount of fees, costs, and penalties that the authority is authorized to impose under this section constitute a limit of liability of the governmental entity for the violation. Provides that this subsection does not prohibit the recovery by the authority of fees and costs under this article in an action against a governmental entity.

SECTION 12. Amends Article 1, Chapter 626, Acts of the 73rd Legislature, Regular Session, 1993, by adding Section 1.46, as follows:

Sec. 1.46. SUITS. (a) Entitles a person, firm, corporation, or association of persons affected by and dissatisfied with any provision or with any rule or order made by the authority to file a suit against the authority or its directors to challenge the validity of the law, rule, or order.

(b) Authorizes only the authority, the applicant, and parties to a contested case hearing to participate in an appeal of a decision on the application that was the subject of that contested case hearing. Requires an appeal of a decision on a permit application to include the applicant as a necessary party.

(c) Requires a suit under this section to be filed in a court of competent jurisdiction in any county in which the authority is located. Authorizes the suit to be filed only after all administrative appeals to the authority are final.

(d) Provides that the burden of proof is on the petitioner, and the challenged law, rule, order, or act is to be considered prima facie valid. Provides that the review on appeal is governed by either Section 2001.038 (Declaratory Judgment) or Section 2001.174 (Review Under Substantial Evidence Rule or Undefined Scope of Review), Government Code, as appropriate.

(e) Authorizes the authority, if the authority prevails in a suit to enforce this article or its rules, or in a suit other than a suit in which it voluntarily intervenes, to seek and requires the court to grant, in the same action, recovery for attorney's fees, costs for expert witnesses, and other costs incurred by the authority before the court. Requires the court to set the amount of the attorney's fees.

SECTION 13. Amends Section 36.205(e), Water Code, to delete the Edwards Aquifer from a list of districts to which Subsection (c) (relating to authorizing a district to assess production fees and limits on the fees) does not apply.

SECTION 14. Repealer: Section 1.25(b) (relating to requiring the authority to develop a 20-year plan for providing alternative supplies of water to a certain region), Chapter 626, Acts of the 73rd Legislature, Regular Session, 1993.

SECTION 15. Repealer: Section 36.101(1) (relating to the requirement that a district consider all groundwater uses and needs for purposes of adopting rules), Water Code.

Repealer: Section 36.1011(e) (relating to providing that certain provisions governing emergency rules do not apply to the Edwards Aquifer Authority), Water Code.

Repealer: Section 36.125 (Edwards Aquifer Authority), Water Code.

Repealer: Section 36.419 (Edwards Aquifer Authority), Water Code.

SECTION 16. Effective date: September 1, 2019.