

**BEFORE THE
EDWARDS AQUIFER AUTHORITY
State of Texas**

**IN THE MATTER OF THE FILING AND PROCESSING OF)
APPLICATIONS TO CONVERT BASE IRRIGATION)
GROUNDWATER BASED ON LAND USE CHANGES UNDER)
SECTIONS 711.340 AND 711.342(6)(B) OF THE EAA’S RULES)
)**

**ORDER ISSUING A TEMPORARY MORATORIUM ON THE
FILING AND PROCESSING OF APPLICATIONS TO CONVERT
BASE IRRIGATION GROUNDWATER BASED ON CHANGES IN LAND USE
PURSUANT TO SECTION 711.342(6)(B) AND BASED ON EVIDENCE RELATED TO
LIMITATIONS ASSOCIATED WITH SECTION 711.342(6)(B)(i)(b) OF THE EAA
RULES**

ON THIS DAY CAME ON TO BE HEARD the above-styled matter. The Board of Directors (“Board”) of the Edwards Aquifer Authority (“EAA”), after having reviewed and considered the materials contained in the Board Packet, and the arguments and presentations of the General Manager and other interested parties who may have appeared before the Board, is of the opinion and finds that, with reference to the above-styled matter, the facts necessary to support issuance of this Order Issuing A Temporary Moratorium on the Filing and Processing of Applications to Convert Base Irrigation Groundwater Based on Changes in Land Use pursuant to Section 711.342(6)(B) of the EAA Rules and based on evidence related to limitations associated with Section 711.342(6)(B)(i)(b) (“Order”) have been established. Accordingly, the Board is of the opinion and finds that the Order should be **ISSUED**. In support of this Order, the Board makes its Findings of Fact and Conclusions of Law as follows:

I. FINDINGS OF FACT

1. Pursuant to the Edwards Aquifer Authority Act (“Act”),¹ and the rules of the EAA,

¹ Act of May 30, 1993, 73rd Leg., R.S., ch. 626, 1993 Tex. Gen. Laws 2350, as amended.

the EAA has the authority to accept for filing and processing certain applications. Among these are Applications to Convert Base Irrigation Groundwater. *See* EDWARDS AQUIFER AUTHORITY RULES (“EAA RULES”) §§ 711.338, 711.340, and 711.342 (2016). There are generally two types of applications to convert Base Irrigation Groundwater (“BIG”) – those that involve the installation of conservation equipment and those that involve a change in land use. *Id.* § 711.342(5) and (6), respectively.

2. Applicants for a conversion of BIG based on land use are required to present evidence demonstrating that there has been a change in land use whereby at least 75% the land has been physically developed as non-agricultural land, or it is no longer practicable to farm because it has not been irrigated for five or more years and it meets two of the following conditions: it is within a city’s corporate limits or extraterritorial jurisdiction; it is sufficiently bordered by development; or it has been re-zoned such that it can no longer be used for agriculture. *Id.* § 711.342(6).

3. Under Section 1.34(c) of the Act, BIG is made permanently appurtenant to the land originally irrigated during the historical period that provided the basis for the issuance of an Initial Regular Period for irrigation purposes (“historically irrigated lands” or “HIL”). *See also Herrmann v. Lindsey*, 136 S.W. 3d 286 (Tex. App.—San Antonio 2004, no pet.). Although not expressly authorized by the Act, land use conversion applications are authorized under Sections 711.338, 711.340, and 711.342(6) of the EAA’s rules. *See also Persyn Family LP v. Edwards Aquifer Auth.*, No. 2007-CI-18500 (407th Dist. Ct., Bexar County, Tex.) (affirming the validity of the BIG conversion rules). The general purpose of the land use conversion rules is to provide a remedy to the owner of HIL in the event the lands are developed such that they will no longer be irrigated. Section 1.34(c) of the Act seems to contemplate that HIL will remain in irrigation in perpetuity. It does not

otherwise offer a remedy in the event that HIL is developed and no longer able to be irrigated.

4. The EAA is generally charged with interpreting the Act and resolving issues that arise in its administration of the Act.² In exercising this authority, the EAA considered the various policy alternatives to deal with this issue and settled on the conversion policy option. In light of the Legislature's intent to create a water market for Edwards Aquifer groundwater rights, the EAA did not find it consistent with the intent of the Act to enforce the appurtenancy of BIG for HIL after it had been developed. To do so would result in BIG being forever "locked up" due to the development process and would cause the BIG rights to be inaccessible and unavailable to the Edwards water market. However, the impact of the BIG conversion rules may very well result in the development of farm land that is HIL merely in order to "strip off" the BIG for entry into the municipal and industrial sectors of the water market.

5. In order to give additional time to consider appropriate policy options and avoid the situation in which new BIG conversion applications based on land use changes are filed prior to fully vetting these considerations, the General Manager recommends that the Board issue an order imposing a moratorium on the acceptance and processing of new BIG conversion applications based on land use changes under Section 711.342(6)(B) and based on evidence related to limitations associated with Section 711.342(6)(B)(i)(b) (relating to impracticability to farm). In so doing, the EAA

² The EAA's interpretation of the Act should be given deference. It is a well-settled rule of statutory construction that, when construing the meaning of a statute, the courts are to give "great weight" to a reasonable construction made by the administrative agency charged with enforcement of the statute. *Osterberg v. Peca*, 12 S.W.3d 31, 51 (Tex. 2000). This judicial deference to the statutory construction given by the agency charged with its enforcement is particularly appropriate when "the statute is ambiguous due to the complexity of the subject matter" or "the statute involves a complex subject matter." *Ford Motor Co. v. Motor Vehicle Bd. of Tex. Dep't of Transp.*, 21 S.W.3d 744, 762 (Tex. App.—Austin 2000, pet. denied); *Equitable Trust Co. v. Fin. Comm'n*, 99 S.W.3d 384, 387 (Tex. App.—Austin 2003, no pet.). "[D]eference is particularly important" in such cases because "agencies have a unique understanding" of the statutes and regulatory schemes agencies administer. *R.R. Comm'n of Texas v. Texas Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 629–30 (Tex. 2011).

may review other policy options, carry out its statutory purposes to protect and provide groundwater rights for the irrigation of HIL as may be required by the Act, and provide for the appropriate administration of BIG rights in the event that HIL is developed.

6. The General Manager also recommends that the moratorium apply only to the filing and processing of applications to convert BIG based on land use changes pursuant to Section 711.342(6)(B) and based on evidence related to limitations associated with Section 711.342(6)(B)(i)(b) that have not yet been filed with the EAA prior to the effective date of this Order.

7. The Board intends to keep this moratorium in effect only as long as is necessary for the EAA to complete its review of other policy options that may be available under the Act and to complete the rulemaking process of the EAA to propose and adopt any new rules or amendments to rules in light of policy options that are adopted by the Board.

8. Imposition of this temporary moratorium is in the public interest and failure to impose the moratorium may impair the EAA's management of the Aquifer subject to its jurisdiction.

II. CONCLUSIONS OF LAW

1. The Act created the EAA under Section 59, Article XVI of the Texas Constitution. Act § 1.02.

2. The Act grants the EAA "all of the powers, rights, and privileges necessary to manage, conserve, preserve, and protect the aquifer and to increase the recharge of, and prevent the waste or pollution of water in, the aquifer. The authority has all of the rights, powers, privileges, authority, functions, and duties provided by the general law of this state, including Chapters [49], 51,

and [36], Water Code, applicable to an authority created under Article XVI, Section 59, of the Texas Constitution.” Act § 1.08(a).

3. Section 1.11(a) provides that the EAA may promulgate and enforce rules in order to carry out the EAA’s duties under the Act.

4. Section 1.34(c) requires one-half of the groundwater withdrawal amount of an Initial Regular Permit issued for irrigation purposes to remain permanently appurtenant to the lands that were irrigated during the historical period that provided the basis for the issuance of the Initial Regular Permit. It is believed that the legislative intent of this subsection is to ensure that a certain amount of groundwater rights remain in irrigation for the HIL to protect the agricultural economy of the Edwards Aquifer region.

5. The EAA is authorized to administer and regulate permits. *See generally* Act § 1.11(b); and *Herrmann v. Lindsey*, 136 S.W. 3d 286 (Tex. App.—San Antonio 2004, no pet.). Sections 711.338, 711.340, and 711.342(6) of the EAA’s rules provide that conversions to BIG based on changes in land use may be made by filing an application to convert. *See also Persyn Family LP v. Edwards Aquifer Auth.*, No. 2007-CI-18500 (407th Dist. Ct., Bexar County, Tex.) (affirming the validity of the BIG conversion rules).

6. The EAA has the legal authority to issue this temporary moratorium on the accepting for filing and processing of applications to convert BIG based on land use changes pursuant to Section 711.342(6)(B) and based on evidence related to limitations associated with Section 711.342(6)(B)(i)(b).

III. ORDERING PROVISION

The Board of Directors of the Edwards Aquifer Authority is of the opinion and **FINDS THAT** the facts necessary to support issuing this moratorium have been established. Accordingly, the Board is of the opinion and **FINDS THAT** a moratorium temporarily suspending the filing and processing of applications to convert BIG based on land use changes pursuant to Sections 711.340 and 711.342(6)(B) and based on evidence related to limitations associated with Section 711.342(6)(B)(i)(b) of the EAA's rules should be and is hereby **ISSUED. IT IS THEREFORE ORDERED, AND DECREED** that a moratorium on the filing and processing of applications to convert BIG based on land use changes pursuant to Sections 711.340 and 711.342(6)(B) and based on evidence related to limitations associated with Section 711.342(6)(B)(i)(b) of the EAA's rules for a temporary period, so that the EAA may consider other policy options and engage in rulemaking as may be appropriate, is hereby **ISSUED** and the General Manager is directed to refuse to accept and process any such applications filed under Section 711.342(6)(B) and based on evidence related to limitations associated with Section 711.342(6)(B)(i)(b) during the period in which this moratorium order is in effect. This Order does not relate to or otherwise affect the processing of any application that is currently pending before the EAA on the effective date of this Order. This Order remains in effect until lifted by order of this Board. However, the Board directs the General Manager of the EAA to place an agenda item for the reconsideration of this Order on the agenda of the Board of Directors of the EAA for no later than the December 12, 2017 Regular Board Meeting. If, after reconsideration of this Order, the Board decides not to lift this Order, then this Order shall remain in effect until lifted by the Board.

PASSED AND APPROVED BY THE BOARD OF DIRECTORS OF THE EDWARDS

AQUIFER AUTHORITY, TO BE EFFECTIVE THIS 14th DAY OF MARCH, 2017.

LUANA BUCKNER
Chairman, Board of Directors
Edwards Aquifer Authority

ATTEST:

ENRIQUE VALDIVIA
Secretary, Board of Directors
Edwards Aquifer Authority

APPROVED TO FORM

DARCY ALAN FROWNEALTER
General Counsel