

**EDWARDS AQUIFER AUTHORITY
RULEMAKING**

Document Title: **TEXAS PRIVATE REAL PROPERTY RIGHTS PRESERVATION
ACT ASSESSMENT**

Title: **EDWARDS AQUIFER AUTHORITY RULES
Chapter 702 (Definitions)
Chapter 707 (Procedures Before the Authority)
 Subchapter E (Actions on Applications)
 Subchapter F (Procedures for Contested Case Hearings)
Chapter 709 (Fees)
 Subchapter B (Registration Fees)
 Subchapter C (Permit Application Fees)
 Subchapter D (Aquifer Management Fees)
 Subchapter E (Administrative Fees)
Chapter 711 (Groundwater Withdrawals)
 Subchapter C (Exempt Wells)
 Subchapter D (Limited Production Fees)
 Subchapter E (Groundwater Withdrawal Permits)
 Subchapter L (Administration of Permits)
Chapter 713 (Water Quality)
 Subchapter C (Well Construction, Operation and Maintenance)
 Subchapter D (Well Closures)
Chapter 717 (Enforcement)
 Subchapter E (Critical Period Management Plan)**

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**I. DUTY OF CERTAIN GOVERNMENTAL ENTITIES TO CONDUCT A TAKINGS
IMPACT ASSESSMENT FOR CERTAIN GOVERNMENTAL ACTIONS**

Chapter 2007 of the Texas Government Code¹ requires covered governmental entities, under certain circumstances, to prepare a takings impact assessment (TIA) in connection with

¹ TEX. GOV'T CODE ANN. §§ 2007.001-.045 (TPRPRPA).

certain categories of proposed covered governmental actions.²

II. APPLICABILITY OF TPRPRPA TO THE EDWARDS AQUIFER AUTHORITY

The first level of inquiry is whether the Edwards Aquifer Authority (EAA) is the type of governmental entity generally covered by TPRPRPA. The requirement of TPRPRPA to prepare a TIA applies only to a “governmental entity.”³ The term “governmental entity” is defined by TPRPRPA to include “a political subdivision of this state.”⁴ The express language of the Edwards Aquifer Authority Act⁵ creates the EAA as a “conservation and reclamation district” under Article XVI, Section 59 of the Texas Constitution.⁶ Conservation and reclamation districts created under Article XVI, Section 59 of the Texas Constitution are “political subdivisions” of the State of Texas.⁷ The EAA, therefore, is a “governmental entity” under Section 2007.002(1)(B) and, as such, is generally subject to TPRPRPA.

III. APPLICABILITY OF TPRPRPA TO EAA RULEMAKING GENERALLY

The second level of inquiry is whether rulemaking activities of the EAA are the type of governmental actions generally covered by TPRPRPA. Section 2007.003(a) of TPRPRPA states, in relevant part, that “[t]his chapter applies only to the following governmental actions: (1) the adoption or issuance of . . . a rule . . .”⁸ TPRPRPA, therefore, applies to the adoption of a rule by the EAA, unless the specific rulemaking action falls within an exclusion to TPRPRPA’s applicability as provided in Section 2007.003(b).

IV. THE EAA’S ADOPTION OF THE AMENDMENTS TO CHAPTERS 702 AND 713 OF ITS RULES IS EXCLUDED FROM THE APPLICATION OF TPRPRPA UNDER TPRPRPA’S STATUTORY EXCLUSIONS.

The third level of inquiry is whether the rulemaking activities of the EAA identified in Resolution and Order No. 12-19-957 are the type of governmental action specifically covered by TPRPRPA, or whether they are otherwise excluded. The EAA proposes to adopt amendments to its current rules in Chapters 702 (Definitions), 707 (Procedures Before the Authority), 709 (Fees), 711 (Groundwater Withdrawals), 713 (Water Quality) and 717 (Enforcement), as more specifically identified in Exhibits C and D of Resolution and Order No. 12-19-957 (Amendments). Generally, the Amendments amend existing rules related to definitions, procedures before the authority, fees, groundwater withdrawals, transfers and amendments of permitted rights, water quality, critical period management, and enforcement to provide clarity and to effectuate changes required by bills passed during the 86th Regular Session of the Texas Legislature.

² See *id.* §§ 2007.043(a), 2007.003(a)(1)-(4).

³ *Id.* § 2007.043(a).

⁴ *Id.* § 2007.002(1)(B).

⁵ Act of May 30, 1993, 73rd Leg., R.S., ch. 626, 1993 Tex. Gen. Laws 2350, as amended (EAA Act or Act).

⁶ See *id.* § 1.02(a).

⁷ See, e.g., TEX. CONST. art. XVI, § 59(b); *Bennett v. Brown Cty. Water Improvement Dist. No. 1*, 272 S.W.2d 498, 500 (Tex. 1954); *Willacy Cty. Water Control & Improvement Dist. No. 1 v. Abendroth*, 177 S.W.2d 936, 937 (Tex. 1944); *Lubbock Cty. Water Control and Improvement Dist. v. Church & Akin, L.L.C.*, 442 S.W.3d 297, 300 n. 4 (Tex. 2014); see also TEX. WATER CODE ANN. § 36.001(15); Act § 1.08(a).

⁸ TEX. GOV’T CODE ANN. § 2007.003(a)(1).

Section 2007.003(b)(1) through (14) of TPRPRPA set forth statutory exclusions that exempt certain governmental actions, including rulemaking, from TPRPRPA's coverage. The EAA proposal to adopt the Amendments, which are designed to help manage the Aquifer, falls within at least two of these exclusions as further discussed below.

A. THE EAA'S ADOPTION OF THE AMENDMENTS IS EXCLUDED FROM THE REQUIREMENT TO PERFORM A TIA UNDER SECTION 2007.003(b)(11)(C)

Section 2007.003(b)(11)(C) of TPRPRPA excludes from TPRPRPA's applicability the following governmental actions, in relevant part: "an action taken by a political subdivision . . . under the political subdivision's statutory authority to prevent waste or protect rights of owners of interest in groundwater."⁹

The Legislature has charged the EAA both generally and specifically with preventing the waste of groundwater from the Aquifer and protecting the rights of owners of interest in groundwater.¹⁰ The Texas Legislature created the EAA under the Act to carry out the Act's purposes of protecting the distinctive natural resource of the Aquifer and the "diverse economic and social interests dependent on the [A]quifer for water supply."¹¹ The Legislature declared the need for the EAA as follows:

To sustain these diverse interests and that natural resource, a special regional management district is required for the effective control of the resource to protect terrestrial and aquatic life, domestic and municipal water supplies, the operation of existing industries, and the economic development of the state.¹²

The EAA is granted "all powers, rights, and privileges necessary to manage, conserve, preserve, and protect the [A]quifer and to increase the recharge of, and prevent the waste or pollution of water in, the [A]quifer."¹³ The Act defines "waste" to include "pollution or harmful alteration of underground water in the aquifer . . . and specifically prohibits any person from wasting water withdrawn from the Aquifer and from polluting or contributing to the pollution of the Aquifer."¹⁴ To carry out its purposes, the Act directs that the EAA "shall adopt rules necessary to carry out the authority's powers and duties under this article."¹⁵

The authority to prevent waste and protect owners of interest in groundwater referred to in Section 2007.003(b)(11)(C) of TPRPRPA was held by the Texas Supreme Court in *Bragg v. Edwards Aquifer Authority (Bragg I)* to refer to the broad concept of "conserving, protecting, and preserving the aquifer through the Legislature's designated permit system."¹⁶ In other words, by

⁹ *Id.* § 2007.003(b)(11)(C).

¹⁰ *See* Act §§ 1.01, 1.02, 1.06, 1.07, 1.08, 1.081, 1.11, 1.14-1.17, 1.23, 1.31-1.32, and 1.35.

¹¹ *Id.* § 1.01.

¹² *Id.*

¹³ *Id.* § 1.08(a).

¹⁴ *Id.* §§ 1.03(21)(D), 1.35(c) and (d).

¹⁵ *Id.* § 1.11(a).

¹⁶ *Bragg v. Edwards Aquifer Auth.*, 71 S.W.2d 729, 736 (Tex. 2002).

regulating withdrawals from the Aquifer, the EAA acts to prevent waste and protect the owners of interest in groundwater.¹⁷

The reasoning in *Bragg I* applies to the Amendments. The Amendments are intended to support the EAA’s permitting, critical period management, water quality and enforcement programs in order to protect the rights of the owners of interest in groundwater, to prevent waste, and to protect the water quality of the Aquifer. In managing, conserving, preserving, and protecting the Aquifer, the EAA acts to protect the interests of groundwater users who depend on Aquifer groundwater by taking actions through rulemaking that tend to protect the quantity and quality of the groundwater in the Aquifer.

Therefore, because the proposed adoption of the Amendments is both an action taken by the EAA under its statutory authority to prevent the waste of groundwater from the Aquifer, and an action to protect the rights of owners of interests in groundwater, the proposed adoption of the Amendments is an action excluded from the requirement of TPRPRPA to prepare a TIA. The exemption from the duty to perform a TIA for EAA rules promulgated pursuant to its statutory authority to prevent waste and/or protect the rights of owners of interest in groundwater was confirmed by the Texas Supreme Court in *Bragg I*.¹⁸

B. THE EAA’S ADOPTION OF THE AMENDMENTS IS EXCLUDED FROM THE REQUIREMENT TO PERFORM A TIA UNDER SECTION 2007.003(b)(4).

The EAA’s adoption of the Amendments is also exempted from TPRPRPA under § 2007.003(b)(4) of the Texas Government Code. This section excludes from TPRPRPA’s coverage, the following governmental actions, in relevant part: “an action . . . of a political subdivision, that is . . . reasonably taken to fulfill an obligation mandated by state law.”¹⁹ The adoption of the Amendments constitutes an action reasonably taken by the EAA to fulfill its obligation, mandated by state law, to adopt rules that are necessary to manage, conserve, preserve, and protect the Aquifer.²⁰

The EAA is under a state law mandate to conserve and manage the groundwater in the Aquifer. Section 1.01 of the Act sets forth the findings and policy of the Act:

The legislature finds that the Edwards Aquifer is a unique and complex hydrological system, with diverse economic and social interests dependent on the Aquifer for water supply. In keeping with that finding the Edwards Aquifer is declared to be a distinctive natural resource in this state, a unique aquifer, and not an underground stream. To sustain these diverse interests and the natural resource, a special management district is required for the effective control of the resource to protect terrestrial and aquatic life,

¹⁷ *Id.* at 736.

¹⁸ 71 S.W.3d 729 (holding that well-permitting rules issued by the Authority are exempt from TPRPRPA as they were adopted under its statutory authority to prevent waste or to protect the rights of owners of interest in groundwater).

¹⁹ TEX. GOV’T CODE ANN. § 2007.003(b)(4).

²⁰ *See* Act § 1.11(a).

domestic and municipal water supplies, the operation of existing industries, and the economic development of the state.²¹

Significantly, the Act also directs that the EAA “*shall* adopt rules necessary to carry out [its] powers and duties.”²² In this regard, the EAA is mandated by the Act “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.”²³ This authority includes the duty to ensure compliance with permitting, metering, reporting, critical period management, and management of the construction of Aquifer wells.²⁴

Therefore, because the proposed adoption of the Amendments constitutes an action reasonably taken by the EAA to fulfill its obligation, mandated by state law under the EAA Act, to manage, conserve, preserve, and protect the Aquifer, the proposed adoption of the Amendments is an action excluded from the requirement of TPRPRPA to prepare a TIA. The EAA’s reading of the “mandated by state law” exclusion is supported by the San Antonio Court of Appeals’ decision in *Edwards Aquifer Authority v. Bragg*, which was affirmed on other grounds by *Bragg I*.²⁵ In that case, the Fourth Court of Appeals in San Antonio held that the Act expressly mandated that the EAA adopt substantive and procedural rules to implement the EAA Act and that such actions are, therefore, excepted from TPRPRPA.²⁶ In doing so, the court explained as follows:

By its terms, [TPRPRPA] excludes from its operation ‘an action of a political subdivision that is reasonably taken to fulfill an obligation mandated by state law.’ And the Edwards Aquifer Act provides the EAA’s Board of Directors ‘shall adopt rules necessary to carry out the authority’s powers and duties under [the Act], including rules governing procedures of the board and authority.’ . . . Thus, the plain language of the relevant statutory provisions excludes the EAA’s rulemaking from operation of the Property Rights Act.²⁷

The plain language of Section 1.11(a) of the EAA Act mandates that the EAA adopt rules necessary to carry out its powers and duties.²⁸ Therefore, the EAA is under a state law mandate to carry out its powers and duties to manage the water of the Aquifer and to do so through the adoption of rules.²⁹ When a political subdivision acts reasonably and as a governmental agency carrying out functions necessary to accomplish the purposes for which it was created, those acts are excluded

²¹ *Id.* § 1.01.

²² *Id.* § 1.11(a) (emphasis added).

²³ Act § 1.08(a); and see *Edwards Aquifer Auth. v. Bragg*, 71 S.W.3d at 736 (citing Act §§ 1.01, 1.06, 1.07); and *Barshop v. Medina Cty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 624 (Tex. 1996) (stating that the EAA was created “for the express purpose of conserving and managing the water in the aquifer by preventing waste and protecting the rights of owners of interests in groundwater”).

²⁴ See, e.g., Act §§ 1.11, 1.15, 1.26, 1.31, 1.32, and 1.35.

²⁵ *Edwards Aquifer Auth. v. Bragg*, 21 S.W.3d 375 (Tex. App.—San Antonio 2000), *aff’d*, 71 S.W.3d 729 (Tex. 2002).

²⁶ *Id.* at 379-80.

²⁷ *Id.* at 380.

²⁸ *Id.*

²⁹ *Id.* at 378-80.

from TPRPRPA under Section 2007.003(b)(4) of the Government Code.³⁰

V. COVERED GOVERNMENTAL ACTION DETERMINATION

Although rulemaking by the EAA is generally covered under Section 2007.003(a) of TPRPRPA, the EAA's adoption of the Amendments is excluded from the requirements of TPRPRPA under both Sections 2007.003(b)(11)(C) and 2007.003(b)(4) of TPRPRPA. Therefore, the EAA is not required by Section 2007.043 of TPRPRPA to prepare a TIA for the proposed adoption of the Amendments that are the subject of Resolution and Order No. 12-19-957.

³⁰ See *McMillan v. Nw. Harris Cty. Mun. Util. Dist. No. 24*, 988 S.W.2d 337, 340-41 (Tex. App.—Houston [1st Dist.] 1999, pet denied) (levy of a standby fee was an action “reasonably taken” to fulfill function of constructing, operating and maintaining water and sewer system); see also *Edwards Aquifer Auth. v. Bragg*, 21 S.W.3d at 379-80.