

SUBJECT: Edwards Aquifer Authority board expansion and revisions

COMMITTEE: Natural Resources — committee substitute recommended

VOTE: 5 ayes — Counts, Yost, Combs, R. Lewis, Puente

3 nays — Corte, King, Walker

1 absent — Stiles

WITNESSES: For — Mary Arnold, League of Women Voters; Tristan Castaneda, Jr.

Against — Sterling Fly, III, Uvalde County Underground Water Conservation District; Luana Buckner, Medina County Underground Water Conservation District; Kirk Patterson, Carol Patterson

On — Cliff Morton, San Antonio Water System, Jerri Martin

BACKGROUND: The Edwards Balcones Fault Zone Aquifer, generally referred to as the Edwards Aquifer, an underground, water-bearing geologic formation stretching from Kyle to Bracketville, is the primary water source for 1.5 million people, including residents of San Antonio. The aquifer, through Comal and San Marcos Springs, also provides a substantial portion of the Guadalupe River Base Flow. Regulatory efforts to manage groundwater use to preserve aquifer flow have collided with municipal demands for water and the traditional right of landowners to pump an unlimited amount of groundwater.

In January 1993 U.S. District Judge Lucius Bunton of Midland gave the Legislature until May 31, 1993, to produce a satisfactory plan to limit water withdrawals from the Edwards Aquifer in order to protect endangered species that rely on the aquifer's flow. The judgment was in response to a lawsuit filed by the Sierra Club in 1991, (*Sierra Club v. Manual Lujan Jr. et al.*, now *Sierra Club v. Babbitt*). The suit alleges that the Secretary of the Interior and the U.S. Fish and Wildlife Service failed to protect endangered species dependant on the aquifer in violation of the federal Endangered Species Act.

During the 1993 regular session the 73rd Legislature enacted SB 1477 by Armbrister, establishing a new Edwards Aquifer Authority to regulate groundwater use. However, the status of the new authority remains

uncertain due to U.S. Justice Department objections under the federal Voting Rights Act.

The U.S. Department of Justice determined that SB 1477 does not meet the requirements of Sec. 5 of the federal Voting Rights Act because it would abolish a board elected by districts, the Edwards Underground Water District, that allows Hispanic voters an opportunity to choose some members and create a wholly appointed board for the new Edwards Aquifer Authority

In March 1994 the state filed suit (*Texas v. United States* No. 94-0465 (D.D.C.) in the U.S. Court for the District of Columbia seeking judicial preclearance of the bill, rather than administrative preclearance that the Justice Department had denied. The court granted the state's request to appoint a three-judge panel to consider the issue. The trial date has been set for June 5.

With implementation of SB 1477 delayed, the Sierra Club requested that Judge Bunton appoint a monitor to oversee the aquifer. Judge Bunton granted that request and appointed Joe G. Moore as monitor for the Edwards Aquifer in March of 1994 and strongly urged TNRCC to submit an aquifer management plan to the monitor.

In February 1995 the Sierra Club filed a motion for post-judgment relief in Judge Bunton's court, asking the court to order the Texas Natural Resource Conservation Commission to take over management of the aquifer, and implement the monitor's emergency withdrawal reduction plan. Judge Bunton has set a date for an evidentiary hearing on the motion for May 19.

SB 1477 by Armbrister. SB 1477 by Armbrister, enacted by the 73rd Legislature but never implemented because of Justice Department objections, limits withdrawal of groundwater from the Edwards Aquifer, requires permits for certain withdrawals and creates the Edwards Aquifer Authority, governed by a nine-member appointed board, which has broad powers to manage, conserve and protect the Edwards Aquifer. The Edwards Underground Water District and its elected board were to be abolished by SB 1477 as of the bill's effective date of September 1, 1993.

Under the permit system existing users may apply to the authority for initial permits to pump groundwater based on historical withdrawals from the aquifer. The cost of reducing withdrawals is to be borne by aquifer

users and downstream water rights holders. The authority may assess user fees to cover administrative expenses and programs and special fees based on permitted aquifer rights to finance the retirement of rights necessary to meet overall pumpage requirements. Fees are to be equitable between users.

The authority must implement a comprehensive water management plan by 1995, reduce annual usage first to 450,000 then to 400,000 acre feet in 15 years and ensure continuous springflows of San Marcos and Comal Springs by 2012.

The Edwards Aquifer Authority. SB 1477 provides for abolition of the Edwards Underground Water District (EUWD), which is governed by a 12-member elected board, and creates the new Edwards Aquifer Authority, governed by a nine-member appointed board. The new district contains all of Uvalde, Medina and Bexar counties and parts of Atascosa, Caldwell, Comal, Guadalupe and Hays counties. (The EUWD contained Bexar, Comal and Hays counties.) The assets of the EUWD were to be transferred to the new authority, upon abolition of the EUWD. The authority was created under Article 16, sec. 59, of the Texas Constitution.

The authority is to be governed by a board of nine members appointed by locally elected bodies to four-year terms. The appointees are to include:

- Three Bexar County members, two appointed by the San Antonio City Council and one by the Bexar County Commissioners Court, reflecting the ethnic composition of Bexar County;
- One member appointed by the Comal County Commissioners Court;
- One member from Hays County appointed by the San Marcos City Council;
- One member from Medina County appointed by the Medina County Underground Water Conservation District;
- One member from Uvalde County appointed by the Uvalde Underground Water Conservation District;
- One member from Atascosa, Medina or Uvalde County appointed in rotation by the Uvalde County Underground Water Conservation District, the

Medina County Underground Water Conservation District and the Evergreen Underground Water District.

- One member appointed by the South Central Texas Water Advisory Committee, a downstream users' advisory committee created by SB 1477;

The initial directors would draw lots to determine their terms, with four serving terms expiring June 1, 1995, and five serving terms expiring June 1, 1997. Subsequent directors would serve staggered four-year terms. Acts of the board would be valid only if adopted by majority vote of the members.

DIGEST:

CSHB 3189 would repeal provisions for the nine-member appointed board of the Edwards Aquifer Authority and establish a temporary appointed 17-member board, which would eventually be replaced by a 17-member board with 16 elected and one appointed member.

The temporary appointments would have to be made by September 1, 1995. The temporary board would be required to order an election of 16 initial permanent directors to be held in May 1996. The bill would establish fifteen single-member election districts and define the geographical boundaries of each district. The temporary board would adopt rules governing the procedures for the board and the authority.

The terms of initial permanent directors elected from odd-numbered single-member districts would expire June 1, 1997. The terms of initial permanent directors elected from even-numbered single member districts would expire on June 1, 1999. The board would order elections to replace those whose terms were nearest expiration in May of each odd-numbered year.

Fifteen of the permanent board of directors would be elected from single-member districts, one member would be appointed by the governor from the South Texas Water Advisory Committee and one member would be elected alternately from Uvalde County or from an area including Medina County and the portion of Atascosa County within the authority. Elected directors would serve staggered four-year terms expiring June 1 of each odd-numbered year, except for the member to be elected alternately.

The member to be elected alternately would be elected, at large, in May 1996, from the area of Medina and the portion of Atascosa county that is within the authority. In May 1999, the director for the seat would be

elected for a four-year term from Uvalde County. Directors would be elected from the two areas in alternation in subsequent elections.

The appointed member would serve a four-year term expiring June 1 of the fourth year following the date of the member's appointment.

The board could act only on an affirmative vote of a majority of the directors. At the first meeting of the board, the directors would select one director to serve as the presiding officer, who would serve a term set by the board, not to exceed two years. Directors would not receive compensation for board service but could be reimbursed for necessary and actual expenses incurred in the performance of the director's duties.

The 17-member temporary appointed board of the Edwards Aquifer Authority would consist of:

- two residents of Uvalde County, appointed by the Uvalde County Underground Water Conservation District;
- three residents of Medina County or the area of Atascosa County that is in the authority, appointed by the Medina County Underground Water conservation District;
- five residents of Bexar County appointed by the governing body of the city of San Antonio;
- two residents of Bexar County appointed by the commissioners court of Bexar County;
- two residents of Comal County appointed by the commissioners court of Comal County;
- two residents of Hays County appointed by the governing body of the city of San Marcos and
- one resident, appointed by the governor, from one of the cities or counties who are members of the South Central Texas Water Advisory Committee.

The membership of the South Central Texas Water Advisory Committee would be changed. The advisory committee would consist of one member

appointed by the governing body of each of the following cities and counties:

Calhoun, DeWitt, Goliad, Gonzales, Karnes, Nueces, Refugio, San Patricio, Victoria, Wilson, the City of Victoria, the City of Seguin and the City of Corpus Christi.

CSHB 3189 would add the city of Seguin and remove the following cities and counties from the South Texas Water Advisory Committee: Atascosa, Caldwell, Comal, Guadalupe, Hays, Medina, Uvalde, the City of San Antonio.

The bill would take effect upon approval by two-thirds of the membership of each house.

**SUPPORTERS
SAY:**

CSHB 3189 would replace the nine-member appointed board of the Edwards Aquifer Authority with a 17-member board with 16 elected members and one appointed member. Fifteen of those members would be elected from single-member districts encompassing the areas over the aquifer.

The bill would satisfy the Justice Department's objections regarding SB 1477, allow the management plan proposed by SB 1477 to go into effect and help stave off a possible federal takeover of the aquifer by Judge Bunton. Judge Bunton has indicated that SB 1477 would meet his requirements, once it is implemented. The single-member district plan for electing 16 of the members would help ensure the opportunity of minority voters to have a say in electing the board, removing the main impediment to Justice Department approval.

The management plan for the aquifer proposed by SB 1477, which would go into effect when the Justice Department approved the 17-member board proposed by CSHB 3189, would be far preferable to the court appointed monitor's plan that Judge Bunton could impose upon the state after May 19. The Sierra Club has moved for relief asking the court to order TNRCC to take over management of the aquifer.

The size and structure of the board would require consideration of all interests when making decisions unlike the current situation or alternative proposals where local interests are allowed to predominate.

By allowing implementation of the SB 1477 management plan, CSHB 3189 would provide the basis for resolving Endangered Species Act (ESA) issues that threaten the region. The court-ordered management consultation with federal agencies under sec. 7 of the ESA threatens all federal activities, funding and permits in the area, jeopardizing military bases, federal agricultural subsidies and loans and federal permits required of local governments.

CSHB 3189, by allowing implementation of the SB 1477 management plan, would protect users that have relied on the resource historically and would ensure certainty in their use. Without the management plan, and given current unlimited access to waters of the aquifer, historical users such as San Antonio and western irrigators have no assurance that quantities required for their historical use are available.

The management plan proposed by SB 1477 would preserve and protect property rights. The rule of capture, applied to a limited natural resource, means that the property rights of every existing user are diminished by every new user. If unlimited pumping is allowed, the Comal and San Marcos Springs will go dry, killing the protected species and adversely affecting the Guadalupe River. Unlimited pumping would also increase the potential for contamination of the entire aquifer.

A proposed interlocal agreement to limit use of the aquifer would have no chance of satisfying the federal requirements regarding management of the aquifer and the threatened species. U.S. Fish and Wildlife has made it clear that it would not grant an incidental take permit (known as a section 10 permit) to various entities that have scattered enforcement authority.

If Texas is to comply with federal requirements regarding the endangered species in the aquifer, it will have to acquire a section 10 permit allowing it to "take" endangered species in certain circumstances. The interlocal agreement, which encourages recharge, would also be onerous for aquifer area residents since, in the absence of a permitting system, there is no assurance that those who pay for recharge benefit would from it.

SB 1477 is written to facilitate recharge and or recirculation, if feasible, and would ensure that those who pay for recharge obtain the benefit. Judge Bunton has made it clear that recharge dams and augmentation of springflow alone would not bring the region into compliance with the federal Endangered Species Act.

Judge Bunton has the ability to order pumping limits for the aquifer to prevent violations of federal law, with or without enactment of SB 1477.

OPPONENTS
SAY:

Enacting CSHB 3189 would be an exercise in futility because it would not likely pass muster with the Justice Department. Anything less than a 15-member elected board with a "4-7-4" member spread (seven members from Bexar County and four each from the western and eastern counties) is not likely to satisfy the Justice Department's Civil Rights Division. If CSHB 3189 is enacted, the state would submit the bill to the Justice Department for Voting Rights Act preclearance, the department would refuse preclearance and the state will be back where it started; without a management plan for the aquifer, at the very time Judge Bunton is proposing to take it over.

The 17-member board proposed by CSHB 3189 would result in "retrogression" in the opportunity of minority voters to participate in the electoral process. The appointed member of the board would likely be a matter of serious concern to the Justice Department.

San Antonio, which accounts for over 90 percent of the population of the aquifer region, would be under-represented on the 17-member board. Currently, over 50 percent of the districts over the aquifer are minority controlled. When the at-large seat representing the western interests, and the appointive seat for the downstream interests are added, to the original 15 board members, possible minority representation on the board falls below 50 percent.

If CSHB 3189 were enacted and did manage to gain Justice Department approval, it would allow SB 1477 to go into effect. SB 1477 represents an all-out assault on the private property rights of those in the Edwards Aquifer region. In Texas groundwater is subject to the "rule of capture" by the landowners who own the land above it, as long as they do not waste that water. This rule has been upheld in the courts, even when challenged by surface water rights owners adversely affected by pumping.

SB 1477 would enact pumping limits, prohibit landowners in the area from drilling new wells and would limit the amount of water they could withdraw from under their own property. This is a clear violation of property rights — landowners' property would be significantly devalued without any compensation whatsoever. The pumping limits in SB 1477 are unreasonable. By setting pumping limits at all times, water is rationed

even in times of flooding and maximum aquifer recharge. Withdrawals should only be limited in times of a drought emergency.

SB 1477, would not satisfy U.S. Fish and Wildlife minimum springflow requirements, and thus would not deliver the state from the threat of federal takeover of the aquifer. The aquifer management plan proposed by SB 1477 is based on a number of faulty assumptions. There is evidence, for example, that pumping from the western regions of the aquifer has little or no immediate effect on springflow levels. The aquifer is recharged significantly every year by rainfall and is in no danger of drying up; it is not a static reservoir that would be drawn down every year until it is gone. In some wet years, recharge is higher than withdrawals from the aquifer.

SB 1477 would impose a heavy-handed centralized regulatory authority over a region that already has three Justice Department-approved local entities in place, ready and willing to take over management of the aquifer. Local entities would be more responsive to the needs and property rights of the people in the aquifer region. SB 1477 would abolish the Edwards Underground Water District, the only entity with the history, experience and technical expertise to manage the aquifer.

The Edwards, Medina and Uvalde underground water districts have overcome their longstanding differences, and concurred on an "interlocal agreement" that would allow local control of the aquifer and manage water efficiently without threatening property rights.

The three districts have closely studied strategies to augment springflow levels through augmentation, recirculation and local recharge. Recent studies have shown that the implementation of these strategies, in combination with other requirements, would meet the federal requirements far better than SB 1477 ever could. The statutory language in SB 1477 makes springflow enhancement, recirculation of surplus springflow and certain sources of water for local recharge infeasible.

Allowing SB 1477 to be implemented would give Judge Bunton the tool he needs to take over the aquifer. It would be easy for the judge to order an entity like the Edwards Aquifer Authority to implement specific pumping limits, since the authority under SB 1477 would be charged with managing the aquifer. Without SB 1477 it would be difficult for the judge to authorize TNRCC to regulate groundwater, and local court action could protect Texas groundwater from federal takeover.

OTHER
OPPONENTS
SAY:

The board of the Edwards Aquifer Authority should be composed of 15 members elected from single-member districts — seven from Bexar and four each from the eastern and western counties. That is the only board configuration that will be approved by the U.S. Justice Department.

The federal government is in the process of backing down on a number of issues, especially regarding the federal Endangered Species Act. In fact, Congress may amend the Endangered Species Act in such a way that Judge Bunton would no longer have grounds to threaten takeover of the aquifer. Texas should wait and see what will happen on the federal level before enacting a burdensome (and possible unnecessary) aquifer management plan.

NOTES:

The original version of the bill would have provided for a fifteen-member board elected from single-member districts, and would not have changed the current membership of the South Texas Water Advisory Committee.

Also on today's calendar is HB 2890 by R. Lewis, which would update certain dates that are no longer current in SB 1477, delaying most of them for two years.

A related bill, SB 418 by Armbrister, which would repeal the provision of SB 1477 that would have abolished the Edwards Underground Water District and would authorize the district to loan or grant money, passed the Senate on February 20. SB 418 was reported favorably by the House Natural Resources Committee on March 13.

A related bill, SB 3096 by Van de Putte, which would amend SB 1477 to repeal a provision that would have abolished the Edwards Underground Water District and would expand the district's powers, was reported favorably from the House Natural Resources Committee on May 3.

A related bill, HB 753 by King, which would validate the Edwards Aquifer Interlocal Agreement between the Edwards, Medina and Uvalde underground water districts, was reported favorably from the House Natural Resources Committee on May 2.

HB 3236 by Corte would implement the "interlocal contract" between the Edwards, Medina and Uvalde underground water districts as a statutory authority over the aquifer. The districts would manage the aquifer

employing management tools such as augmentation, recharge enhancement, interbasin transfers, water quality protection and drought response. HB 3236 was referred to the House Natural Resources Committee on May 6.