

Response to Representative Kuempel's letter to the EAA (March 31, 2010). The Representative's statements are italicized. Our bulleted comments follow the Representative's statements.

Enrique Valdivia and George Rice

Dear Ms. Danielson:

It has recently come to my attention that the Edwards Aquifer Authority is proposing to impose a 20 percent impervious cover limit on all developable property within the aquifer's recharge and contributing zone. I would like to take this opportunity to express my sincere concerns regarding this proposal, and would appreciate your responses to the questions stated below.

- The EAA is considering rules that would limit impervious cover to 20% - 30% on the recharge zone and the near-by contributing zone (within five miles of the recharge zone). The rules would apply throughout the EAA's jurisdiction (Uvalde, Medina, Bexar, Comal, and Hays counties).
- The EAA's rules would not apply to grandfathered properties.

My first question relates to the impact of the proposed rules on property in Guadalupe County, which is in my House district. Currently, under TCEQ's rules, landowners can develop 20 percent of their property; however, they can develop 25 percent, 30 percent or more by utilizing water quality ponds and other best management practices (BMPs). Do the proposed EAA rules impose a "hard" 20 percent impervious cover standard that cannot be exceeded through the use of BMPs? If so, this would drastically devalue the property of my constituents, and also reduce the valuations on the County's tax rolls.

For example, a 100-acre residential subdivision could only have 20 acres covered by homes, driveways, streets and the like, and the remaining 80 acres would have to be set aside for yards, green belts and other forms of open space. Farmers who wish to sell their pastureland for development would be especially disappointed to learn that the EAA has slashed the market value of their property. On the other hand, the TCEQ rules would, in most cases, allow a significantly larger percentage of the property to be developed by using BMPs.

- The EAA is still in the process of developing it's rules. The current thinking is that up to 30% could be developed (covered with impervious cover) if BMPs were incorporated into the development.
- The EAA's impervious cover rules would not apply to Guadalupe County because neither the recharge zone nor the contributing zone of the Edwards Aquifer extends into Guadalupe County.

Secondly, does the EAA have the statutory authority to restrict impervious cover? As you are aware, State Senator Ken Armbrister passed the legislation creating the Authority. As the person

who wrote the actual words of the EAA law, Sen. Armbrister has stated, unequivocally, that the Authority does not have the power to enforce impervious cover limits.

In a letter to the EAA dated May 6, 2003, Sen. Armbrister stated the following: "Regarding water quality rules, it was never my intent, or the intent of the legislature, for the Edwards Aquifer Authority to regulate the water quality of the aquifer." In the same letter, the Senator also expressed his opinion that the EAA is subject to the state law governing vested development rights. (See attached letter.) While I would not presume to speak for Sen. Armbrister, it is reasonable to believe that he would reiterate, in a court of law, his statements regarding water quality regulations and vested development rights, should the EAA's actions in these two areas be challenged by affected landowners.

As you also may know, Sen. Armbrister now manages Governor Rick Perry's legislative staff. Have the differences of opinion between the EAA and the Senator over impervious cover and vested rights been resolved? Has the EAA consulted with the Governor's Office with regard to its plans to regulate impervious cover?

- To my knowledge, the EAA has not consulted with Senator Armbrister or the Governor's Office.
- The legislation that created the EAA (S.B. 1477) states: *The authority has 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.* (§ 1.08 (a)). The Texas Supreme Court in *Bragg v. Edwards Aquifer Authority* commented that "the legislature created the [Authority] for the express purpose of ... managing the water in the aquifer... It provided the Authority with 'all of the powers, rights, and privileges, necessary to protect the aquifer and to ... prevent the ... pollution of water in, the aquifer.'" 71 SW 3rd 729, 736 (Tex. 2002)
- The Act defines "pollution" as "the alteration of the physical, thermal, chemical, or biological quality of any water in the state, or [its] contamination ... that renders the water harmful, detrimental, or injurious to humans ... or public health, safety or welfare, or that impairs the usefulness of the public enjoyment of the water for any ... purpose." Act section 103(17) The phrase "any water in the state" is broad enough to include aquifer water and surface water recharging the aquifer.
- Under its statutory power to prevent the pollution of the aquifer, the EAA may prohibit pollution by activities impacting the quality of surface water that recharges the aquifer, the quality of source water that artificially recharges the aquifer, and spills and releases into the aquifer. This statutory power includes the power to regulate land use activities that generate non-point source pollution of surface waters that recharge the aquifer. The types of measures taken to regulate non-point source pollution often include impervious cover limits.

Another matter of concern to me is that the proposed rules would add a second layer of impervious cover regulation over some portions of the aquifer, and a third level of regulation over other portions. Would the EAA's regulations supersede the impervious cover rules of SAWS and TCEQ, and would developers and landowners be required to comply with a second, or third, permitting process?

- TCEQ does not regulate impervious cover. However, if impervious cover exceeds 20%, best management practices (BMPs) must be employed to protect water quality. Experience has shown that BMPs are often ineffective.
- Duplication of regulatory requirements would be minimized. For projects regulated by TCEQ's 213 *recharge zone* rules, the Authority would accept submittal of TCEQ required reports as sufficient for review under the Authority's rules. For those projects regulated by TCEQ's 213 *contributing zone* rules, the developer would have to submit a combination of information required by TCEQ and additional information required by the EAA.
- Regarding SAWS, much of the land within the San Antonio's jurisdiction is grandfathered. The EAA's rules would not apply to this land. For land that is not grandfathered, the more stringent rule would apply. Thus, within San Antonio's ETJ, the City's rule would apply because it is more stringent (15%) than the EAA's proposed rule (20% - 30%). Within the city limits, the EAA's proposed rules are generally more stringent and they would apply.

In addition, I would appreciate knowing the reasons for SAWS' opposition to the proposed EAA rules. Also, since more than 60 percent of the your agency's funding is provided by SAWS, would SAWS funds be used to enforce the EAA's water quality rules and pay legal defense expenses in the event of a legal challenge(s)?

- SAWS does not fund the EAA. The fees received by the EAA are paid by the residents of the Edwards Aquifer Region. Each of these residents is represented by an elected member of the EAA Board of Directors.
- SAWS produced a memo that raised objections to the EAA's proposed rules. SAWS's memo, along with our responses to the memo, are attached.

I appreciate you considering my questions, and I look forward to hearing from you. As always, my door is open if I may be of service in any way.

- The EAA's reply to Representative Kuempel is attached.
- It should be noted that the EAA convened a Water Quality Advisory Task Force in 2004. This task force was chaired by former Texas State Senator John Sharp and was comprised of citizens and representatives from development, environmental, governmental, and municipal water purveyor organizations. This

Water Quality Advisory Task Force recommended that the EAA develop impervious cover rules.

EAA's reply to Representative Kuempel



April 30, 2010

Representative Edmund Kuempel
The State of Texas House of Representatives
P. O. Box 2910
Austin, TX 78768-2910

Dear Representative Kuempel:

I am writing in response to your letter to me dated March 31, 2010, and your earlier letter to my predecessor, Ms. Velma Danielson, regarding the potential for impervious cover rules being considered by the Edwards Aquifer Authority (the "EAA"). I appreciate your concerns regarding this issue, and I have provided copies of your letters to the Board of Directors for the EAA.

At this point, the EAA has not proposed rules that would limit or regulate impervious cover development. However, the Board of Directors is currently considering concepts for managing impervious cover over only the Contributing and Recharge zones of the Edwards Aquifer, within the jurisdiction of the EAA, for the sole purpose of reducing contaminated runoff from new impervious cover development that would otherwise flow into the Aquifer. A regulatory assessment of the impacts from EAA management of impervious cover for the purpose of protecting water quality in the Edwards Aquifer is also currently being performed. Any rules proposed by the EAA to manage impervious cover would have no effect in Guadalupe County since neither the Contributing Zone nor the Recharge Zone of the Aquifer extends into Guadalupe County.

Consideration by the EAA for managing impervious cover over the Contributing and Recharge zones of the Edwards Aquifer resulted from recommendations from the EAA Water Quality Advisory Task Force in 2004. This stakeholders group was comprised of citizens and representatives from development, environmental, governmental, and municipal water purveyor organizations.

Given your keen interest and concern regarding EAA involvement in managing impervious cover, I commit to keeping you informed as the EAA considers this issue. I am also available at your convenience to meet with you regarding this issue or any other issue related to the Edwards Aquifer.

Sincerely,



Karl J. Dreher
General Manager

KJD/sh

cc: Board of Directors, Edwards Aquifer Authority

