

Edwards Aquifer Authority **Permit Reductions Effective January 1, 2004**

Summary

The Edwards Aquifer Authority (the “EAA”) was created a decade ago. Pursuant to the EAA Act¹, the primary mission of the EAA is to regulate withdrawals of water from the Edwards Aquifer. The essential first step in fulfilling this mission is the issuance by the EAA of “initial regular permits” to those who beneficially used water during the 21-year historical period from June 1, 1972 through May 31, 1993. The EAA has not yet completed that essential first step.

The EAA Board long ago made an affirmative decision not to follow a process similar to surface water adjudications, whereby there would be only one order defining the terms and conditions of all permits, and that order would be issued only after the conclusion of hearings on all applications (declarations of historical use). If the EAA had adopted an adjudication form for its permitting process, the need to reduce permitted amounts could have been deferred for some additional period of time, so long as the order defining the terms and conditions of all permits were entered by the December 31, 2007 deadline. Instead, the EAA chose to follow a piecemeal process whereby each permit would be issued as it became final, without regard to the status of other declarations. In the piecemeal process adopted by the EAA Board, each permit issued does not become effective until January 1 of the following year.

The EAA has issued sufficient permits thus far so that, effective January 1, 2004, the total of all permitted amounts for permits in effect on that date will exceed the statutorily-imposed permitting cap of 450,000 acre-feet per year. The permitted amount in each permit is defined in the permits and the EAA rules as the “Groundwater Withdrawal Amount.”

The EAA has not entered any order or issued any notice to date that calculates the specific reduction made to the permitted amount under each permit pursuant to the detailed formulas set forth in the EAA’s rules so that, on January 1, 2004, the total of all Groundwater Withdrawal Amounts will be less than or equal to 450,000 acre-feet per year, and there is some concern that the EAA may choose not to enter such an order or issue such notice. The concern is that the EAA may do nothing at all, or it may take some affirmative action inconsistent with respecting the 450,000 acre-foot-per-year permitting cap.

The EAA is a governmental regulator, and as such it obviously has a duty to follow the law. In addition, in order to protect and promote the welfare of the region, the EAA should do all it can to provide certainty to those it regulates as well as to all others in the region for whom proper regulation is important. The EAA should enter a reduction calculation order or otherwise

¹ Act of May 30, 1993, 73rd Leg., R.S., ch. 626, 1993 Tex. Gen. Laws 2350; as amended by Act of May 29, 1995, 74th Leg., R.S., ch. 261, 1995 Tex. Gen. Laws 2505; Act of May 16, 1995, 74th Leg., R.S., ch. 524, 1995 Tex. Gen. Laws 3280; Act of May 6, 1999, 76th Leg., R.S., ch. 163, 1999 Tex. Gen. Laws 634; Act of May 28, 2001, 77th Leg., R.S., ch. 966, §§ 2.60 – 2.62 and 6.01 – 6.05, 2001 Tex. Gen. Laws 1880, 1910 and 1961 - 62; Act of May 23, 2001, 77th Leg., R.S., ch. 1192, Tex. Gen. Laws 2552; and Act of June 1, 2003, 78th Leg., R.S., ch. 1112, § 6.01(4), 2003 Tex. Gen. Laws 3193.

give notice of the calculated reductions before January 1, 2004, because such reductions are required by the EAA Act and the EAA's rules. The EAA should take such action as quickly as possible, because quick action is needed to provide certainty to all pumpers and the region.

Doing nothing, or taking some affirmative action inconsistent with respecting the 450,000 acre-foot-per-year permitting cap, would be *contrary* to law and it would *create* unnecessary uncertainty. Neither result should be allowed by the EAA.

The analysis set forth below concludes that each of the affirmative actions the EAA Board may be considering that would be inconsistent with respecting the 450,000 acre-foot-per-year permitting cap would be contrary to the EAA Act and the EAA's duties and responsibilities under the Act.

The analysis set forth below further concludes that, if the EAA does not enter a reduction calculation order or otherwise give notice of the calculated reductions before January 1, 2004, it is nevertheless likely that on January 1, 2004, pursuant to the applicable provisions of the EAA rules, all Groundwater Withdrawal Amounts will be automatically reduced in accordance with the detailed formulas set forth in the EAA rules so that the total equals 450,000 acre-feet per year. Thus, because of the uncertainty created by the EAA if it were to do nothing, and to avoid the potential for liability, each permittee would be responsible for performing the required calculation and insuring that withdrawals during calendar year 2004 do not exceed the reduced Groundwater Withdrawal Amount.

The analysis set forth below further concludes that the reductions to permitted amounts required to comply with the statutorily-imposed permitting cap are not takings. Therefore, contrary to the EAA rules, the EAA is not required to pay any compensation for such reductions. It appears that the EAA Board in adopting its compensation rule (Section 711.176(b)(5)) may have incorrectly concluded that compensation was required in part because of the piecemeal process it adopted for issuing permits, and in part because the Board misconstrued a key provision of the EAA Act – Section 1.16(e) -- in arriving at the Groundwater Withdrawal Amounts and in developing the detailed formulas set forth in its rules that define how such amounts will be reduced so that the total will be less than or equal to 450,000 acre-feet per year.

Permitting Status

Pursuant to Section 1.16 of the EAA Act and the decision of the Texas Supreme Court upholding the constitutionality of the EAA Act², any person seeking an initial regular permit was required to file a declaration of historical use on or before December 31, 1996. The EAA is required to grant an initial regular permit to any person who files a timely declaration and pays the necessary fees and “establishes by convincing evidence beneficial use of underground water from the aquifer.” Under the piecemeal permitting process adopted by the EAA Board, the EAA has issued numerous initial permits, but it still has not yet acted on some declarations of historical use. It is unclear when all permits will be issued and all appeals resolved.

² *Barshop v. Medina County Underground Water Conservation District*, 925 S.W.2d 618, 628-630 (Tex. 1996).

The EAA has issued permits at various times throughout the years, typically in groups. Each permit states on its face that it does not become effective until the January 1 of the following year. The exceedance of the 450,000 acre-foot-per-year cap on permitted amounts did not occur on January 1 of 2003 or any previous year but, because of the additional permits issued during 2003, the total of all Groundwater Withdrawal Amounts on January 1, 2004 will exceed the cap. The exceedance will be avoided only if the EAA issues a reduction calculation order or otherwise gives notice of the calculated reductions before that date or, in the absence of action by the EAA, all Groundwater Withdrawal Amounts are automatically reduced on that date.

Each permit defines or estimates on its face certain different amounts. All permits define the "Groundwater Withdrawal Amount," which is the permitted amount under that permit. The permits and the EAA rules make it clear that the Groundwater Reduction Amounts are provisional and subject to reduction in order to comply with the 450,000 acre-foot-per-year cap in effect through December 31, 2007, and in order to comply with the 400,000 acre-foot-per-year cap in effect after that date. Other amounts that are defined in all permits are the "Maximum Historical Use" and the "Statutory Minimum." Amounts that are merely estimated are the "Phase-1 Proportionally Adjusted Amount," the "Step-up Amount," and the "Phase-2 Proportionally Adjusted Amount."

The EAA rules relating to these different amounts are certainly complex. The rules, and the methodology by which the Groundwater Withdrawal Amounts are derived, are based upon a construction of Section 1.16(e) of the EAA Act that inevitably leads to this complexity. There may be a natural tendency to assume that the statutory construction on which the rules are based is correct, simply because of the complexity of the rules. Upon a careful review of the EAA Act and the EAA rules, however, it appears that the construction of Section 1.16(e) adopted by the EAA is incorrect.

In any event, the net result of the construction of Section 1.16(e) adopted by the EAA is that the total of all Groundwater Withdrawal Amounts set forth in the numerous permits to be effective on January 1, 2004 will exceed 450,000 acre-feet per year.

**Actions the EAA Board may be considering that would be Inconsistent with
Respecting the 450,000 acre-foot-per-year Permitting Cap**

Various interests opposed to the statutorily-imposed permitting cap of 450,000 acre-feet per year have urged the EAA Board to take affirmative action to evade, and not respect, that cap. The actions urged include the following:

- ***The "Cap-on-Use" Proposal*** -- The EAA Board has been urged to construe the 450,000 acre-foot-per-year cap as a cap only on the total of all annual withdrawals, rather than a cap on the total of all permitted amounts.
- ***The "Increase-the-Cap" Proposal*** -- The EAA Board has been urged to increase the permitting cap pursuant to Section 1.14(d) of the Act.

- ***The “Bifurcated-Permits” Proposal*** -- The EAA Board has been urged to bifurcate the total amount of permitted amounts (“Groundwater Withdrawal Amounts”) under outstanding initial regular permits, so that a total of 450,000 acre-feet would be considered to be different, in some significant respect, from the amount in excess of 450,000 acre-feet. Under one proposal, the excess amount would still be considered to be “initial regular permits,” but the right to withdraw any water under that amount would be conditioned on the aquifer being above a certain (high) level or it would be otherwise subordinate to the initial 450,000 acre-feet. Under another proposal, only the initial 450,000 acre-feet would be considered to be “initial regular permits,” and the excess amount would be considered to be “term permits” under Section 1.19 of the Act.

As discussed below, each of these actions would be contrary to the EAA Act and the EAA’s duties and responsibilities under the Act.

The “Cap-on-Use” Proposal

The EAA Act is clear that the 450,000 acre-foot-per-year cap is a cap on the total of all permitted amounts.³ The Act imposes a duty on the EAA to regulate withdrawals by implementing a permitting system. If the 450,000 acre-foot-per-year cap were somehow construed to be a cap only on total annual withdrawals, and not on the total of all permitted amounts, then the EAA would be free to issue permits authorizing whatever total amount of permitted amounts it desires, and no individual permittee would know what its real limit on pumping will be in order for the EAA to meet the cap on total annual withdrawals. That result would be absurd, and completely at odds with the imposition of a permitting system and the various requirements to limit and, if necessary, reduce permitted amounts set forth in the EAA Act.

Moreover, there is a significant substantive difference between the 450,000 acre-foot-per-year cap being construed as a cap only on the total of all annual withdrawals, rather than a cap on total permitted amounts. Under any water permitting system, it is highly unlikely that all permittees will use their full authorized amounts in any given year. Thus, because the 450,000 acre-foot-per-year cap is a cap on permitted amounts, it is highly unlikely that the total of all withdrawals will actually reach 450,000 acre-feet in any year. In contrast, it would be much more likely that the total of all withdrawals each year would actually reach 450,000 acre-feet if the 450,000 acre-foot-per-year cap were somehow construed to be a cap only on total annual withdrawals. In fact, it would be likely that the total of all withdrawals each year will *exceed* 450,000, because there would be no effective mechanism available to the EAA to first define the real limit on pumping applicable to each pumper that is needed in order for the EAA to meet the cap on total annual withdrawals, and then to enforce that real limit against each pumper to insure that the cap on total annual withdrawals is met.

³ See, e.g., Section 1.14 (b); Section 1.14(c); Section 1.16(e); Section 1.18(a); Section 1.21(a).

The “Increase-the-Cap” Proposal

It would be impossible at this time to make a legitimate determination that “additional supplies are available from the aquifer” to support an increase in the permitting cap. Withdrawals of 450,000 acre-feet annually (or, more precisely, withdrawals at the level that will occur when the statutorily-imposed 450,000 acre-foot-per-year permitting cap is fully respected) certainly would result in Comal Springs drying up for years during a severe drought, and likely would also result in the cessation of springflows at the San Marcos Springs. The current EAA drought management plan and critical period management plan are inadequate to reduce withdrawals from that level to levels that are low enough, quickly enough, to prevent this result during severe droughts. Under these facts and circumstances, the EAA Board should be doing everything it can to *reduce* withdrawals. Respecting the statutorily-imposed permitting cap of 450,000 acre-feet per year is the minimum first step required by the Act toward reducing current levels of pumping. Raising the permitting cap would only result in pumping at levels that are *greater* than will occur when the statutorily-imposed 450,000 acre-foot-per-year permitting cap is fully respected.

The “Bifurcated-Permits” Proposal

The EAA Board has been urged to bifurcate the total amount of permitted amounts (“Groundwater Withdrawal Amounts”) under outstanding initial regular permits, so that a total of 450,000 acre-feet would be considered to be different, in some significant respect, from the amount in excess of 450,000 acre-feet. Under one proposal, the excess amount would still be considered to be “initial regular permits,” but the right to withdraw any water under those “initial regular permits” would be conditioned on the aquifer being above a certain (high) level or it would be otherwise subordinate to the initial 450,000 acre-feet. Under another proposal, only the initial 450,000 acre-feet would be considered to be “initial regular permits,” and the excess amount would be considered to be “term permits” under Section 1.19 of the Act.

Clearly, the first proposal would result in a violation of the 450,000 acre-foot-per-year statutorily-imposed permitting cap, but the second would also -- contrary to Section 711.166 of the EAA rules, the 450,000 acre-foot-per-year permitting cap applies to all permits except, perhaps, emergency permits. Section 1.14(b) of the EAA Act is clear, and absolute – it provides that, except for provisions not related to term permits, “for the period ending December 31, 2007, the amount of permitted withdrawals from the aquifer may not exceed 450,000 acre-feet of water for each calendar year.” There is no basis to carve out an exception for term permits.⁴

⁴ The reference in Section 1.21 of the EAA Act to regular permits is not inconsistent with the clear intent of Section 1.14(b) that there is no exception for term permits. The fundamental permitting issue is defining, and reducing, initial regular permits. Section 1.21 addresses only the “retirement” or the “reduction” of regular permits. Subsection (c) simply states that, if the total permitted amount of regular permits on or after January 1, 2008 is greater than 400,000 acre-feet per year, then the permitted amount of each permit shall be immediately reduced pro-rata so that the total equals 400,000. Section 1.21 does not address at all what would happen to any term permits that may exist at that time – in that event, Section 1.14(b) requires that all term permits must be terminated at that time. For example, if, on January 1, 2008, the total permitted amount of regular permits were 425,000 and the total permitted amount of term permits were 25,000, then the regular permits would be automatically reduced pro-rata to a total of 400,000, and the term permits would be terminated.

Even if term permits were somehow excepted from the 450,000 acre-foot-per-year permitting cap, however, it would be impossible at this time to make a legitimate determination that additional supplies are available from the aquifer to support the issuance of any term permits unless, perhaps, withdrawals under those permits are allowed only when the aquifer is at the highest levels. As discussed below, the minimum trigger levels established by Section 1.19 of the EAA Act (665 feet msl at J-17, and 865 feet msl at J-27) are not nearly high enough to prevent adverse consequences from the additional withdrawals.

Withdrawals of 450,000 acre-feet annually (or, more precisely, withdrawals at the level that will occur when the statutorily-imposed 450,000 acre-foot-per-year permitting cap is fully respected) certainly would result in Comal Springs drying up for years during a severe drought, and likely would also result in the cessation of springflows at the San Marcos Springs. The current EAA drought management plan and critical period management plan are inadequate to reduce withdrawals from that level to levels that are low enough, quickly enough, to prevent this result during severe droughts. Under these facts and circumstances, the EAA Board should be doing everything it can to *reduce* withdrawals at all times, so that the level of the aquifer is maintained as high as possible throughout a severe drought. Respecting the statutorily-imposed permitting cap of 450,000 acre-feet per year is the minimum first step required by the Act toward reducing current levels of pumping. Issuing additional permits that allow additional withdrawals from the San Antonio pool if the level at J-17 is above 665 feet msl, or that allow additional withdrawals from the Uvalde pool if the level at J-27 is above 865 feet msl, would only result in the aquifer dropping to those levels at earlier dates at the beginning of severe droughts, and in the aquifer being at lower levels at all times thereafter throughout the drought. The effect would be exactly the same as if pumping were allowed throughout the drought at some level that is *greater* than will occur when the statutorily-imposed 450,000 acre-foot-per-year permitting cap is fully respected.

Moreover, it is clear that the EAA Act does not contemplate the EAA Board considering issuance of any permits other than initial regular permits (except, perhaps, emergency permits) until after it finally disposes of all declarations of historical use. Additionally, a person submitting a declaration of historical use has applied only for an initial regular permit, and not some combination of initial regular permit and term permit.⁵ It would be procedurally improper for the EAA to issue any permit other than the kind applied for.

Automatic Reduction on January 1, 2004

The EAA Rules clearly contemplate that the EAA Board will issue reduction calculation orders from time to time that calculate the reductions required by the rules in order to keep the total of all Groundwater Withdrawal Amounts at or below 450,000 acre-feet per year at all times. In fact, § 711.172(e) & (f) purport to impose a *duty* on the Board to issue such orders. In any case, it is clear that the EAA Board should take such action as soon as possible, but in any event before January 1, 2004, to avoid the uncertainty that inevitably would result from inaction. What is not clear, however, is what happens on January 1, 2004 in the event the EAA itself does not

⁵ Section 1.16(a) of the EAA Act; Section 711.98 of the EAA rules.

issue a reduction calculation order or otherwise give notice by that date of the calculated reduction applicable to each permit.

The EAA Act is absolutely clear that the 450,000 acre-foot-per-year permitting cap must be respected at all times through December 31, 2007⁶. There is no exception to this requirement for any failure on the part of the EAA Board to take action. This is particularly true with respect to ministerial actions that involve no exercise of discretion or the development of additional facts.

The rules of the EAA define precisely the reduction to be made to the Groundwater Withdrawal Amount set forth in each permit.⁷ There is no room for discretion on the part of the EAA Board. There is no need to acquire any additional evidence or facts. All that is needed to perform the reduction calculations are the EAA rules and the facts recited on the faces of the permits in effect on January 1, 2004. The rules and all permits are of public record. Thus, each permittee could calculate the reduction applicable to that permittee and, if the EAA chooses not to perform the calculation, each permittee is responsible for making the calculation and ensuring that withdrawals during calendar year 2004 do not exceed the reduced Groundwater Withdrawal Amount.

Presumably, the EAA will issue additional permits during calendar year 2004 that will take effect on January 1, 2005. If so, and if the EAA Board again chooses not to perform the calculations, all permittees again will need to make the calculation themselves to determine the further reduced Groundwater Withdrawal Amount effective as of January 1, 2005.

If the EAA Board chooses not to perform the calculations and distribute those calculations to all permittees prior to January 1 of this coming year or some subsequent year, then one or more permittees and/or third parties could do so in an effort to assist all permittees and the region. Those calculations certainly would not be as comforting to permittees and the region as calculations received from the EAA Board, nor would they remove all of the uncertainty that would be created by the EAA's inaction, but at least all permittees and other interested parties in the region would have the opportunity to review the same calculations and act accordingly. Distribution of such calculations would also put all permittees on notice of the reduced Groundwater Withdrawal Amounts that at least the person distributing the calculations believes must be respected.

If the EAA Board had not adopted rules setting forth precise formulas for the required reductions, that would not mean there would be no automatic reductions on January 1, 2004 in the event the EAA did not issue a reduction order or otherwise give notice by that date of the reduction applicable to each permit. In that case, there likely would still be automatic reductions based on the clear direction of Section 1.21(c) as to what would happen automatically on January 1, 2008 if the total of all permitted amounts on that day exceeded 400,000 acre-feet..

⁶ See, e.g., Sections 1.11(b); 1.14(a) and (b); Section 1.15; Section 1.16; and Section 1.29(a).

⁷ See, e.g., Sections 711.172 and 711.176.

No Compensation Required

Contrary to Section 711.176(b)(5) of the EAA Rules, no compensation is required to be paid to permittees for across-the-board, pro-rata reductions needed to meet the statutorily-imposed permitting caps. Compensation of course would be required for acquisition and retirement of specific rights, but across-the-board reductions down to the permitting caps are not takings.

Current withdrawals from the aquifer far exceed the amount that can be safely withdrawn during major droughts without risking substantial harm to the aquifer itself. Clearly, withdrawals at that level during droughts would result in substantial environmental and economic harm to the region. This is a classic case of tragedy of the commons. Withdrawals must be regulated in order to protect a common resource. Without regulation, a so-called “right” to withdraw will have little or no value. With proper regulation, rights to withdraw will have significant value.

The statutorily-imposed permitting cap that will take effect on January 1, 2008 (400,000 acre-feet per year) still far exceeds the amount that can be safely withdrawn during major droughts without risking substantial harm to the aquifer itself. Withdrawals at that level during major droughts still would result in substantial environmental and economic harm to the region. Moreover, there is not yet in place a drought management plan and a critical period management plan that come close to insuring reductions from 400,000 acre-feet per year to the *much* lower withdrawal rates needed to avoid risk of substantial harm to the aquifer itself or substantial environmental and economic harm to the region. Under these facts, across-the-board, pro-rata reductions of permitted amounts down to either the 450,000 or 400,000 permitting cap are not takings.⁸

It appears that the EAA Board in adopting its compensation rule (Section 711.176(b)(5)) may have incorrectly concluded that compensation was required in part because of the piecemeal process it adopted for issuing permits, and in part because the Board misconstrued a key provision of the EAA Act – Section 1.16(e) -- in arriving at the Groundwater Withdrawal Amounts and in developing the detailed formulas set forth in its rules that define how such amounts will be reduced so that the total will be less than or equal to 450,000 acre-feet per year. The EAA Board apparently thought that Section 1.16(e) required that permitted amounts based on the two so-called statutory minimums be considered to be vested property rights, in contrast to permits based on peak annual beneficial use. Such a construction is at odds with the clear language of the Section and the intent of the Act.

As provided by the first sentence of Section 1.16(e), the beginning point is a finding of the “maximum beneficial use of water without waste during any one calendar year of the historical period.” The EAA “shall issue the existing user a permit for withdrawal” of such amount, “to the extent water is available for permitting.” Ideally, that amount would be

⁸ This is especially true here because, as provided by the EAA rules, the reduced permitted amounts can be readjusted upwards if and when an increase in the cap is justified because adequate drought management and critical period management plans are in place and some real value is provided by allowing a greater peak annual use, even if that greater amount can be withdrawn only in very wet years.

determined for each user, and the third sentence of Section 1.16(e) then requires proportional reductions of all such amounts to reduce the total amount permitted to 450,000 acre-feet per year.

The legislature recognized three types of exceptions for which the “maximum beneficial use of water without waste during any one calendar year” could not be determined or, if it could be determined, the legislature concluded that the permitted amount should be a greater amount:

- The first exception involves users who do not have historical use for a full year. In that case, “the authority shall issue a permit for withdrawal based on an amount of water that would normally be beneficially used without waste for the intended purpose for a calendar year.” In other words, the extrapolated full-year-use amount would be *deemed* to have been beneficially used without waste.
- The second exception is for the first of the two so-called statutory minimums. It involves irrigators who either beneficially used without waste less than 2 acre-feet per acre in the maximum-use year, or who cannot determine the amount of water beneficially used without waste. In that case, the authority shall issue a permit for 2 acre-feet per acre irrigated during the year of maximum irrigated acreage. Again, in other words, this amount would be *deemed* to have been beneficially used without waste.
- The third exception is for the second of the two so-called statutory minimums. It involves users who operated a well for three or more years during the historical period, and who are able to define the amount withdrawn during each of those years but who have a problem with respect to the amount beneficially used without waste. This exception would be used if the “average amount of water withdrawn annually during the historical period” exceeds the “maximum beneficial use of water without waste during any one calendar year of the historical period,” or if the user is unable to prove the “maximum beneficial use of water without waste during any one calendar year of the historical period.” In that case, the authority shall issue a permit for the average amount of water withdrawn annually. Again, in other words, this average withdrawal amount would be *deemed* to have been beneficially used without waste.

Section 1.16(e) thus should be construed as placing on an equal footing those users who are issued permits for the “maximum beneficial use of water without waste during any one calendar year of the historical period,” and those users who are issued permits based on one of the three exceptions for amounts of water that are deemed to have been beneficially used without waste. Pursuant to the third sentence of Section 1.16(e), “the authority shall adjust the amount of water authorized for withdrawal under the permits proportionately to meet the amount available for permitting.”

In construing Section 1.16(e) correctly, it is important to read the third sentence carefully. It reads as follows: “If the total amount of water determined to have been beneficially used without waste *under this subsection* exceeds the amount of water available for permitting, the authority shall adjust the amount of water authorized for withdrawal under the permits

proportionately to meet the amount available for permitting.” [Emphasis added.] The highlighted words make it clear that the second and third exceptions, even though they follow the third sentence, nevertheless should be handled the same as the first exception, which precedes the third sentence. The EAA Board apparently construed Section 1.16(e) incorrectly simply because the second and third exceptions follow the third sentence.⁹ Because the third sentence is clearly applicable to *all* determinations of amounts of water beneficially used without waste in Section 1.16(e), the fact that the second and third exceptions follow the third sentence is irrelevant. Moreover, the very first sentence of Section 1.16(e) is as unequivocal as the second and third exceptions – it states that the Board “*shall* issue the existing user a permit for withdrawal of an amount of water equal to the user’s maximum beneficial use of water without waste during any one calendar year of the historical period.” Yet the EAA in its rules treats the unequivocal “shall” in the first sentence very differently from the “shall” in each of the second and third exceptions. There is simply no basis to treat these three “shalls” differently, nor is there any reason to treat the second and third exceptions differently from the first so as to make them vested property rights exempt from across-the-board, pro-rata reductions without compensation. Not only does the plain meaning of “under this subsection” compel this conclusion, but also when 1.16(e) is put in the context with the rest of the Act, it is clear that the current rules misconstrue 1.16(e) by establishing two classes of permitted withdrawals not subject to simple across-the-board, pro-rata reductions without compensation. For example, see Section 1.14(h), which provides that the EAA *shall* require “phased reductions in the amount of water that may be used or withdrawn by existing users or categories of other users.”. There is no mention in Section 1.14(h) of any category of existing user exempt from reductions in permitted amounts.

Conclusions

- The EAA Board should issue a reduction calculation order or otherwise give notice of the calculated reductions so that the total of all Groundwater Withdrawal Amounts authorized by permits in effect on January 1, 2004 will be reduced to not more than 450,000 acre-feet per year. The EAA Board should take such action before January 1, 2004, because such reductions are required by the EAA Act and the EAA’s rules. The EAA Board should take such action as quickly as possible, because quick action is needed to provide certainty to all pumpers and the region.
- The EAA Board should resist efforts by those opposed to the statutorily-imposed permitting cap of 450,000 acre-feet per year seeking to have the EAA Board take

⁹ The Supreme Court in *Barshop* may have had the same initial reaction. 925 S.W.2d 618, fn 2 at 624. However, it is clear that the Court did not intend to address and resolve this important issue. The offhand reference in a footnote to existing users avoiding “this downward adjustment” was clearly dicta, and is so vague as to be susceptible of other meanings. For example, it may be construed as simply a statement that the two exceptions require a greater permitted amount than if the amount were based on the user’s maximum beneficial use of water during any one calendar year and, therefore, that the downward adjustment from this lesser amount is avoided. The Court carried forward its offhand initial reaction to the *Bragg* case, where its opinion included similar dicta. *Bragg v. Edwards Aquifer Authority*, 71 S.W.3d 729, 731 (Tex. 2002).

affirmative action to evade, and not respect, that cap. The EAA Board should not take any such action.

- The EAA Board should revise its rules as necessary to eliminate any requirement for compensation to be paid to permittees for across-the-board, pro-rata reductions needed to meet the statutorily-imposed permitting caps. The EAA Board should take such corrective action on its own at the earliest possible date, rather than waiting for the courts to require it to make the correction.
- The EAA Board should continue processing each outstanding application (declaration of historical use) diligently and do all it can to make sure that all remaining initial regular permits are issued before January 1, 2008. At the end of 2004 and each subsequent calendar year, the EAA Board should issue another reduction calculation order or otherwise give notice of the calculated reductions so that the total of all Groundwater Withdrawal Amounts authorized by permits in effect on January 1 of the subsequent year will be reduced to not more than the statutorily-imposed permitting cap in effect at that time.