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# Groundwater Conservation District Protection of Water Quality: Planning, Rulemaking and Permitting

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# Planning, Rulemaking and Permitting

by

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## I. Introduction

Discussions of future water availability generally focus on the issue of water quantity, comparing projected water consumption volumes with available water volumes. But, water quality could well come to play an important role in how the state is able to meet its water needs. In some cases, the quality of water in its natural state will play a role in the availability of water to meet demands, such as our ability to desalinate brackish water, saline water or sea water. This paper focuses on the separate issue of the authority of groundwater conservation districts to consider and address groundwater quality.

Human contamination of water could also significantly influence water availability in the future by rendering potential groundwater resources unusable, or usable only with significant additional treatment. From a regulatory perspective, the state has addressed this issue in the *surface water* context by declaring certain stream reaches as intended for domestic water supply, and establishing regulatory schemes focused primarily on preventing or minimizing the contamination of surface waters.[1] The Texas Pollution Discharge Program, which is the state's primary means of controlling surface water quality, reflects something of a "top down" regulatory approach wherein a statutory mandate exists in federal law,[2] that is then implemented through federal regulations[3] and a state regulatory scheme that must conform with these federal statutory and regulatory requirements. Local governments maintain a regulatory role with regard to surface water quality, but the primary regulatory scheme originates at the state and federal level.

No similar federal regulatory scheme has been imposed for the general protection of groundwater quality. In fact, Texas has implemented a regulatory structure that focuses on local groundwater districts. In the Water Code, the Legislature has provided that, "[g]roundwater conservation districts created as provided by this chapter are the state's preferred method of groundwater management through rules developed, adopted, and promulgated by a district in accordance with the provisions of this chapter."[4] The Legislature has charged groundwater districts with preventing waste of groundwater,[5] which statutorily includes "pollution or harmful alteration of

[1] *See, e.g.* 30 TAC Chapter 307 (Establishing Surface Water Quality Standards), *particularly* 30 TAC § 307.7(b)(2) (Defining "Domestic water supply" uses).

[2] At the federal level, the control of surface water pollution is primarily addressed by the Clean Water Act, 33 U.S.C § 1251 *et seq.*

[3] *See, Code of Federal Regulations,* Title 40, Chapter I, Subchapter D. The Clean Water Act recognizes that states bear primary responsibility to prevent, reduce and eliminate pollution. 33 U.S.C. § 1251. Thus, the interaction between federally-established minimum requirements and state level regulatory programs is complex within the surface water quality context.

[4] Tex. Water Code § 36.0015.

[5] Tex. Water Code § 36.0015.

groundwater in a groundwater reservoir by saltwater or other deleterious matter admitted from another stratum or *from the surface of the ground*."[6] By statute, a groundwater conservation district may make and enforce rules to "prevent degradation of water quality."[7] Certainly, other governmental entities play a role in the protection of groundwater quality, but groundwater conservation districts have a central responsibility to protect groundwater quality. This paper seeks to explore that role with respect to the planning, rulemaking, and permitting activities of groundwater districts, with a particular emphasis on rulemaking.[8]

## II. Consideration of Water Quality in Groundwater Planning, Rulemaking, and Permitting

A. Planning

1. Consideration of Water Quality in Development of Regional Water Plans

Groundwater Districts participate as stakeholders in the Regional Planning Process, which includes the consideration of groundwater quality impacts in developing groundwater strategies.[9] In particular, when identifying and evaluating potentially feasible water management strategies for recommendation in a Regional Water Plan, the Rules of the Texas Water Development Board ("TWDB") require that a regional water planning group consider the impacts of water management strategies on water quality, without limitation to surface water quality.[10] For example, in its 2011 Regional Water Plan, Region K recognized that "some aquifers are more susceptible to drawing in water of lower quality as the upper strata are dewatered and other water begins to flow into the wells" and went on to consider that "[t]his is the case for the Simsboro formation and the Carrizo Wilcox aquifer which extends in the Bastrop and Fayette counties in Region K.."[11] As the understanding between the interaction of groundwater levels and water quality becomes better understood, groundwater quality impacts may prove to be an increasingly important factor in the selection of water management strategies.

2. Consideration of Water Quality in Desired Future Conditions Planning Process

Groundwater Districts also work collaboratively in Groundwater Management Areas (GMA's) to develop Desired Future Conditions.[12] In doing so, the Water Code requires groundwater districts consider hydrological conditions and environmental impacts including those related to interactions between groundwater and surface water.[13] In general, contaminants discharged into a

[6] Tex. Water Code § 36.001(8)(D), *emphasis added*.
[7] Tex. Water Code § 36.101.
[8] Planning, rulemaking, and permitting are not the only means by which a groundwater district may act to protect water quality. For instance, a groundwater district may participate as a party in administrative proceedings undertaken by other regulatory agencies.
[9] 31 TAC § 357.11(d)(10) &(12).
[10] 31 TAC 357.40(b)(5).
[11] Lower Colorado Regional Water Planning Group, 2011 Region K Water Plan, Volume II, 5-12 (2010).
[12] Tex. Water Code § 36.108(d).
[13] Tex. Water Code § 36.108(d)(4).

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