

## The Network Note November 2021

### Focus on Texas

#### Online Water Law/Conflict Program:

##### NJC Sets Strategy for Collaboration with States

The National Judicial College has begun developing a strategy to engage state governments and the philanthropic community in building a comprehensive water law conflict program for judges. CA and UT are considering how to participate with NJC. In the months ahead, NJC will build on its relationships with other judicial leaders in creating a program that serves the needs of all judges with water cases, simple or complex.

#### TX: Petition to USEPA to Withdraw Water Quality Reg

Environmental groups recently petitioned the USEPA to revoke the authority of the TX Commission on Environmental Quality (TCEQ) to regulate water quality under the Clean Water Act. In a recent interview, TX lawyer Eric Allmon, who represents the 22 petitioners, explained alleged problems:

- **Insignificance:** TCEQ finds every pollution discharge has an insignificant effect, eliminating the need for the permittee to show necessity and lack of an alternative.
- **Burden:** When a permit is challenged, TCEQ puts the burden on the public to prove that a permit is unsafe.
- **Judicial Appeal:** TCEQ decides who can appeal its decisions to courts, and allows few judicial appeals.

The petition asks USEPA to work with TCEQ and the TX Legislature to resolve these legal issues. If TX refuses to change, then petitioners ask USEPA to start the process to withdraw TX authority under the federal Clean Water Act.

#### TX: Executive Branch Water Agencies

TX regulates groundwater and surface water differently, due to its water law. TX relies on both state and regional agencies to manage and regulate water. State agencies include:

- **TX Commission on Environmental Quality:** Issues surface water rights and regulates water quality.
- **State Office of Administrative Hearings:** Holds hearings on protests to water right applications. Its administrative law judges also may be contracted to hear appeals of local groundwater conservation district decisions.
- **TX Water Development Board:** Supports development of regional water plans and flood plans and compiles them into state water and flood plans. Provides funding to regional water districts to implement their regional plans.
- **Public Utility Commission:** Approves: water utility rate changes, certificates of convenience/necessity, and public utility sale, transfer and merger applications.

#### TX: Rule of Capture for Groundwater Rights

As the 2017 *Dividing the Waters* conference examined in detail, groundwater management remains the central issue in TX water discussions, in courts and in the Legislature. Much of TX has limited surface water available, which makes groundwater critical to its economic success. The state overlies substantial aquifers, including the Ogallala and the Edwards, which provide water for TX farms and cities.

Since 1904, TX has applied the “rule of capture” to groundwater, meaning landowners own all the water under their land. (TX applies the Appropriation Doctrine to surface water.) The TX Supreme Court held, in *Edwards Aquifer Authority v. Day*, that groundwater is a property right, subject to the 5th Amendment’s bar on takings. The government, however, can impose “reasonable” regulation.

#### Local Groundwater Regulation – Conservation Districts

In 2007, the TX Legislature created a statewide system of groundwater conservation districts to manage groundwater within their bounds by developing plans and implementing rules related to groundwater production. When a TX city buys land for its groundwater, it must obtain the district’s approval to export the water out of the district. The city has a right to a hearing and may appeal the district decision to a court. State law now requires the court to grant attorney fees to the conservation district when it prevails.

This year, the Legislature heard, but did not pass, a bill to eliminate the requirement that conservation districts receive attorney fees. The districts’ limited funding could lead them to approve more exports, in the face of cities’ resources.

#### TX: Environmental Flows

In 2007, the TX Legislature passed laws requiring TCEQ to adopt appropriate environmental flow standards for each river basin and bay system. TCEQ then requires set-asides and environmental flow protections for new applications for unappropriated water, where it still exists, and permit modifications. TCEQ has adopted environmental flow standards for most basins in the state.

Thanks to **Todd H. Votteler, Ph.D.** for his assistance in crafting this month’s edition on Texas water.

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