

***A Short Review of Pennsylvania
Water Law***

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CONSTITUTION
of the
COMMONWEALTH OF PENNSYLVANIA
Article I, Section 27
Natural Resources and the Public Estate

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

WATER USE IS GOVERNED BY THE COMMON LAW

No Comprehensive legal or institutional approach to water use
Common law is judicial or court-made law

- Based on particular facts, involves private litigants
- Guided by general principles and legal precedent (“stare decisis”), not hydrogeology
- Subject to modification, refinement (reversal) by the next case
- Harm generally can not be prevented
- Involves expensive, time-consuming, unpredictable litigation

4 CLASSIFICATIONS OF WATER RESOURCES

With Separate, Inconsistent Rules

1. Surface Waters in defined streams and lakes
2. Diffused surface waters
3. Ground waters in subterranean streams
4. Percolating ground waters

COMMON THEMES

1. Property law and tort law, primarily
2. Water is not subject to absolute ownership
3. Based upon the relationship between water and land
4. Landowner may hold certain “usufructuary rights” in the water
5. Usufructuary rights cannot be severed from the land

RIPARIAN RIGHTS DOCTRINE

- Riparian owner – one who owns land bordering a stream or through which a stream runs
- Right to make use of water flowing on or next to the land
- No property right in the water itself

RIPARIAN RIGHTS DOCTRINE

(CONTINUED)

- Nonexclusive right to use the water –
Usufructuary right
- No right to withdraw a specific amount, no
quantification
- All rights to use water depend on the equal,
correlative rights of other riparians to use the
common resource

RIPARIAN RIGHTS DOCTRINE

(CONTINUED)

- Riparian may withdraw all water necessary for household and “domestic” use
- Domestic use (drinking, bathing, cooking, laundry, livestock) has the highest priority, if conflict arises
- Other withdrawals are subject to “reasonable use” doctrine - balancing
- Don’t harm other users unreasonably

RIPARIAN RIGHTS DOCTRINE

(CONTINUED)

- “Extraordinary” uses -- not incident to land for ordinary purposes
- Diversions off-land are prohibited
- Statutory authorization necessary for public water suppliers – eminent domain powers
- Public right of navigation has priority (except domestic use)

GROUNDWATER LAW

(Percolating groundwater)

- Landowner may withdraw all groundwater beneath his land
- For “natural and ordinary” uses (“beneficial uses”) located on the land
- “Doctrine of reasonable user” – if used for a lawful purpose, no liability for withdrawal
- Unless malicious or negligent use and causes foreseeable harm to neighbor’s use

GROUNDWATER LAW

(CONTINUED)

- Off-land uses are unreasonable and unlawful per se if interfere with other users
- Those harmed may be entitled to damages or an injunction
- Deepest well, biggest pump often wins
- No quantification of water right

STATE REGULATION OF WATER USE

- **Water Rights Act, 32 P.S. §631 *et seq.* (1939)**
Allocation permit for surface water withdrawals by public water supply agencies
- **Limited Power and Water Supply Act, 32 P.S. §592 *et seq.* (1923)**
State permit for hydroelectric and thermal-electric projects in non-navigable waters

STATE REGULATION OF WATER USE

(CONTINUED)

- Dam Safety and Encroachments Act,
32 P.S. §693.1 *et seq.* (1978)
State permit for dams and encroachments
Submerged lands licenses (Section 514 of The
Administrative Code, 71 P.S. §194)
- Water Well Drillers License Act,
32 P.S. §645.1 *et seq.* (1956)
Annual license for drillers and rigs
Collection of groundwater information

STATE REGULATION OF WATER USE

(CONTINUED)

- PA Safe Drinking Water Act,
35 P.S. §721.1 *et seq.* (1984)
State permit for public water systems
Review of groundwater withdrawal includes evaluation of
impact to nearby water resources
*Oley Township, et al. v. DEP and Wissahickon Spring
Water, Inc.*, 1996 EHB 1098
- Emergency Management Services Code,
35 Pa.C.S. §7101 *et seq.* (1978)
Governor authorized to declare natural resource shortages
Drought regulations, 4 Pa. Code Chapters 118, 119 & 120

STATE REGULATION OF WATER USE

(CONTINUED)

- Municipalities Planning Code, 53 P.S. §10101 *et seq.*
Zoning boards, municipalities have powers akin to equity court to allow conditional use (off-land)
State College Borough Water Authority v. Benner Township, 645 A.2d 394 (Pa. Cmwlth. 1994)
- Water Resources Planning Act, 27 Pa.C.S. Chapter 31 (Act 220 of 2002)
State Water Plan authorization
Registration of all withdrawals exceeding 10,000 GPD
Political subdivisions prohibited from allocating water resources

INTERSTATE COMPACTS

- Delaware River Basin Compact,
32 P.S. §815.101 *et seq.* (1961)

Project review triggered by withdrawals of
100,000 GPD or more (ground or surface water)

Southeast (PA) Groundwater Protected Area:
Groundwater withdrawals of 10,000 GPD or more

INTERSTATE COMPACTS

(CONTINUED)

- Susquehanna River Basin Compact,
32 P.S. §820.1 *et seq.* (1970)
Project review triggered by withdrawals of 100,000 GPD
or more (ground or surface water) or
Consumptive uses of 20,000 GPD or more

Municipal regulation of water withdrawals preempted by
SRBC, if conflict

Levin v. Benner Township, 669 A.2d 1083
(Pa. Cmwlth. 1995), *aff.* 689 A.2d 224 (Pa. 1997)

GREAT LAKES WATER MANAGEMENT

- *Boundary Waters Treaty of 1909 (US and Canada)*
Created International Joint Commission

Jurisdiction over applications for use, obstruction or diversion of boundary waters

Powers to investigate and study at request of U.S. and Canada (References)

GREAT LAKES WATER MANAGEMENT (CONTINUED)

- *Great Lakes Basin Compact*,
32 P.S. § 817.1 *et seq.* (1956)
Created Great Lakes Commission, a consultative agency
Water Resources Development Act of 1986,
- *WRDA 1986*, as amended 2000, 42 U.S.C. § 1962d-20
No diversion or export of water from Great Lakes basin or
tributaries unless approved by 8 Great Lakes Governors

GREAT LAKES WATER MANAGEMENT (CONTINUED)

- *Great Lakes Charter of 1985*
 - Good Faith agreement among 8 states and 2 provinces
 - Prior notice and consultation process for diversions/consumptive uses exceeding 5 MGD
 - Annex 2001 called for new standard and agreements

GREAT LAKES WATER MANAGEMENT (CONTINUED)

- *Great Lakes – St. Lawrence River Basin Sustainable Water Resources Agreement (12/2005)*

Good Faith agreement among 8 states and 2 provinces

Creates Regional Body of governors and premiers

Diversions will be prohibited

Withdrawals will be managed by each jurisdiction

States to adopt interstate Compact to implement