

## Water Law in Pennsylvania

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Water resources law is fundamentally about the allocation of the use of the water resources among competing users. In Pennsylvania, as in most of the Eastern United States, the right to water is not a property right to which title can be acquired, but rather a "right of use" of the water resources, called the "usufructuary right." The usufructuary right is one of those in the bundle of rights that goes with property ownership. The water right is not written down anywhere and it cannot be severed or separately sold, like mineral or timber rights that may be held as separate estates.

### Common Law

Pennsylvania's system of water allocation law is based on numerous court rulings dating back to the 1800s. This system of judicial rulemaking, called the common law, is decided on a case-by-case basis. The courts rely on previous court decisions or precedent to adjudicate the rights of competing users. There is no certainty of right since the next case can change the common law. The common law is not scientifically based but evolved before knowledge of the hydrogeologic cycle was developed. Different rules govern the use of surface water and groundwater.

#### 1. Surface Water Rules – Riparian Rights

Riparian water rights are water rights derived from ownership of real property underlying or bordering streams and rivers. The riparian right is a right to make use of the water flowing in a stream upon or next to riparian land. Pennsylvania courts have adopted what is known as the "reasonable use" doctrine, also called the "American Rule." The doctrine allows some reduction in a watercourse's natural flow, as long as other users are not unreasonably harmed. The holder of riparian rights has no property right in the water itself but only a non-exclusive right to use water. No right to divert or consume a specific quantity of water is obtained. All rights to water use depend upon the equal, correlative rights of other riparians to use the common resource. The right to divert and use surface water is generally confined to riparian land, the land along the streambank. Diverting water away from riparian land is prohibited and per se unreasonable. Rights to use water off riparian lands may only be acquired by municipalities, utilities, and other users through prescription, eminent domain, or contract with all affected riparians. A riparian may divert, use and consume all water necessary for household and general domestic use. If there is a conflict with other uses, domestic uses have priority. The riparian

rules have favored the establishment of water-consuming industries on the lower reaches of the state's major rivers.

## 2. Groundwater Rules

The riparian rules generally are followed for use of groundwater flowing in a rare "subterranean stream." But different rules govern the use of "percolating" groundwater, the vast majority of groundwater in Pennsylvania. Under the so-called "reasonable user" doctrine, a landowner may withdraw as much groundwater as can be put to "natural and ordinary" use on the overlying land, regardless of the consequences to ground water supplies, wells and springs in the vicinity. As long as there is no malicious or foreseeable interference, waste or off-land use that results in damage to adjacent owners, the use will not be enjoined. Most economic activities are considered natural and ordinary if the use of the water is confined to the overlying land. Groundwater rules are not designed to deal equitably with conflicts among users or to protect the resource. The biggest pump or the deepest well wins. Furthermore, Pennsylvania courts have held that the withdrawal of groundwater for use off the land of origin by public water suppliers is not a natural and ordinary use. Liability for damages may be imposed if the withdrawal interferes with other users, unless water is supplied to all interested injured parties.

### State Statutory Law

Superimposed on Pennsylvania's common law system are numerous statutory laws that regulate piecemeal particular uses or users. There is no statewide cohesive water resources management scheme that balances the needs of users while protecting the resource.

The *Water Rights Act of 1939* authorizes the grant to public water supply agencies of the right to acquire water rights to surface waters of the Commonwealth, thus overcoming the common law prohibition against the use of water off the land of withdrawal. The statute replaced the old eminent domain system for individual municipal water allocations, and vested allocation authority in one state agency, now DEP. The Act prohibits water suppliers from taking surface waters without a permit. The permitting process requires proof of the need for the water, and that the taking will not interfere with navigation, jeopardize public safety or cause substantial injury to the Commonwealth. DEP may condition the approval, including requiring minimum flow releases from dams and reservoirs and pass-by flows that establish minimum instream low flow that will not be allocated to any water supplier. Since public water supply agencies account for only about 10 percent of the surface water uses in Pennsylvania, the Water Rights Act is an imperfect allocation scheme.

The *Dam Safety and Encroachments Act of 1978*, which replaced the 1913 Water Obstructions Act, grants DEP the authority to regulate the construction, operation and maintenance of dams and other water obstructions. Under this authority, DEP establishes minimum stream flow requirements for dammed waterways. The Act also establishes the legal basis for Pennsylvania's regulation of activities encroaching upon or affecting wetlands. Permits are required for projects involving the fill, draining, inundation or other encroachment on all wetlands in the Commonwealth. Submerged lands licenses are required to occupy the beds of navigable rivers that are owned by the Commonwealth.

The *1923 Limited Power and Water Supply Act* established two separate programs, covering power projects and water supply facilities involving diversion of surface waters. The public water supply portion of the Act has been superceded by the 1939 Water Rights Act. The Act requires that any person who uses a dam or alters a stream or other body of water in order to develop hydroelectric power, or who diverts water for thermal-electric plant steam generation or cooling, must obtain a limited power permit from DEP. This statute is limited in its application to those facilities on non-navigable waters which do not affect interstate or foreign commerce.

The *Water Well Drillers License Act of 1956* requires an annual license for all drillers and drilling rigs and the submission of groundwater information to the Department of Conservation and Natural Resources' Bureau of Topographic and Geologic Survey.

The Commonwealth uses the general disaster and emergency management authority in the *Pennsylvania Emergency Management Services Code of 1978* to respond to water resource shortages. Once the Governor declares a drought or water shortage emergency, the drought regulations govern the management of water uses and water supplies, including the authority to curtail uses and ration water.

A 1996 decision by the Environmental Hearing Board (EHB) indicates that DEP is vested with indirect authority under the *Pennsylvania Safe Drinking Water Act* to regulate groundwater withdrawals by public water systems to avoid violation of other state environmental laws, including the *Clean Streams Law*. The EHB held that it was DEP's duty to protect waters of the Commonwealth, such as wetlands, from pollution and degradation, and that diminishment of water quantity can constitute water pollution.

The Pennsylvania Commonwealth Court, in 1994, held that the *Municipalities Planning Code* (MPC) gave municipalities authority akin to a court of equity to approve, in the context of a zoning decision, the use of groundwater off the land of

withdrawal by a public water supply agency. A 1995 decision by the same court in the same matter, later affirmed by the Pennsylvania Supreme Court, held that local governments were preempted from imposing conflicting conditions on groundwater withdrawals approved by a river basin commission. Act 68 of 2000 added language to the MPC that recognized the preemptive effect of state or federal laws on zoning ordinances that regulate uses of land, watercourses and other bodies of water.

The *Water Resources Planning Act* (Act 220 of 2002) authorizes the preparation of a new State Water Plan, requires the registration with DEP of all withdrawals exceeding 10,000 gpd, and prohibits political subdivisions from allocating water resources.

### Federal Compacts and Law

Pennsylvania is a member of two interstate compact commissions with regulatory authority over water withdrawals, the Delaware River Basin Commission (DRBC) (1961) and the Susquehanna River Basin Commission (SRBC) (1971). The effect of the compacts, consented to by Congress and each with full participation of the federal government, is that the member states and the federal government jointly exercise sovereignty over the water resources of the respective basin. Both commissions, by regulation, require prior approval of groundwater or surface water withdrawals exceeding 100,000 gallons per day. The SRBC also regulates consumptive withdrawals that exceed 20,000 gallons per day. In 1981, because of threatened overuse of the resource, the DRBC established the Southeastern Pennsylvania Groundwater Protected Area where a permit is required for all withdrawals of groundwater in excess of 10,000 gallons per day. Both compacts explicitly reserve to the states their traditional powers to manage waters within their boundaries and tend to defer to the state agency's permitting decision.

The International Joint Commission (IJC), a six-member board created by the United States and Canada under the Boundary Waters Treaty of 1909, governs the use, obstruction or diversion of boundary waters of the Great Lakes, including Lake Erie. Under the Great Lakes Charter, a good faith agreement entered into in 1985, diversions and consumptive uses of the waters of the Great Lakes basin in excess of 5 million gallons a day require prior notice and consultation among the Great Lakes Governors and Premiers of Ontario and Quebec. Annex 2001 to the Charter calls for a new conservation-based standard and new agreements among the 8 Governors and 2 Premiers in 3 years to manage the Great Lakes. In the Water Resources Development Act of 1986, as amended in 2000, the U.S. Congress enacted a federal law that prohibits the diversion or export of water from the Great Lakes for use outside the basin without the approval of the Governors of all eight Great Lakes states. The *Great Lakes Basin Compact* created the Great Lakes Commission, limited by Congress to be a consultative agency.