

PRELIMINARY FINDINGS OF THE SUBCOMMITTEE ON WATER RIGHTS AND REGULATORY AUTHORITIES

Regulatory Authority: Analysis and Recommendations

- Regulatory Authority Diagram
- Matrix of Deficiencies and Possible Solutions

- Charge a central authority with the burden of proof regarding water availability with respect to the safe yield of the resource.
- Require DEM to integrate new standards for existing permit programs with water allocation program objectives.
- Identify self-supply users and educate them; clarify/quantify water rights
- More coordination of water restrictions within drought regions;
- Firm up sales agreements between water suppliers; identify where agreements do not exist or are dated and prepare new ones;
- Expand RI membership in NEIWPC and investigate whether the interstate compact addresses water quantity.
- Quantify tribal water rights
- Acknowledge conjunctive use of the resource (see Code)
- Assess potential consolidation of water planning documents
- Revise SGP #723 Water Emergency Response Plan and advise RIEMA regarding state Emergency Operations Plan conflict
- Record CRMC's Special Area Management Plans and State Guide Plan elements in the Sec. Of State's rules database

Water Rights: Existing Doctrine

- Surface Water: Reasonable Use Riparian Doctrine¹
[*Tyler v. Wilkinson*, 24 F. Cas. 472 (D.R.I. 1827)]²
- Ground Water: American Rule of Reasonable Use³
[Similar to Absolute Ownership, except that water uses that are wasteful & harmful to neighbors, are considered unreasonable, and hence unlawful]
[*Rose v. Socony-Vacuum Corporation*, 54 R.I. 411; 173 A. 627 (R.I. 1934); overruled for other reasons *Splendorio v. Bilray Demolition Co.*, 682 A.2d 461 (R.I. 1996)]⁴

¹ The reasonable use riparian doctrine says that riparian landowners have a usufructuary right (a right-to-use) to a reasonable use of the water bodies that touch their land. Whether a use is a reasonable use depends upon a comparison of a number of factors, vis-à-vis other users of the water body. Domestic uses by a riparian landowner are reasonable per se.

² The significant text from this case is as follows: “**Error! Main Document Only.**When I speak of this common right [to use water as a riparian landowner], I do not mean to be understood, as holding the doctrine, that there can be no diminution whatsoever, and no obstruction or impediment whatsoever, by a riparian proprietor, in the use of the water as it flows; for that would be to deny any valuable use of it. There may be, and there must be allowed of that, which is common to all, a reasonable use. The true test of the principle and extent of the use is, whether it is to the injury of the other proprietors or not. There may be a diminution in quantity, or a retardation or acceleration of the natural current indispensable for the general and valuable use of the water, perfectly consistent with the existence of the common right. The diminution, retardation, or acceleration, not positively and sensibly injurious by diminishing the value of the common right, is an implied element in the right of using the stream at all.” **Error! Main Document Only.**24 F. Cas. 472, 474.

³ There is very little common law on groundwater law in Rhode Island. Most cases arise from contamination of groundwater sources, rather than a conflict over pumping.

⁴ The significant text from this case is as follows: “In England this right to underground waters has been held to be absolute and the motive of the owner in appropriating or diverting the same is immaterial. *Mayor of Bradford v. Pickles*, (1895) App.

Background to Water Allocation

- Water rights under existing doctrines are limited to reasonable uses. Previously, reasonable uses have been ascertained on a case-by-case basis by courts. The following alternate structures continue these right structures, except the initial locus of determining whether uses are reasonable will shift to the administrative agency responsible for water allocation, the Water Resources Board. Unlike a case-by-case system, each of these regulatory systems allows users to predict the results of their actions before acting, and to avoid rather than repair any violations. This approach has clear savings in time, money, and resources.

General Recommendations

- [From Regulated Riparian Model Water Code, § 1R-1-01] The waters of the State of Rhode Island are a natural resource owned by the State in trust for the public and subject to the State's sovereign power to plan, regulate, and control the withdrawal and use of those waters, under law, in order to protect the public health, safety, and welfare.⁵
- An accurate inventory of surface and groundwater withdrawals and water supplies is necessary to properly manage the water resources of the State.⁶
- Water withdrawals should continue to be subject to the "reasonable use" standard.⁷
- Water allocation decisions should recognize the interdependencies of water quality and water quantity, and between groundwater and surface waters.⁸
- Water allocation should play an important role in land use and development decisions, both in ensuring sufficient supply of water, and also in assessing the impact of development on water resources.⁹
- The Water Resources Board should further develop the drought management plan, including clarifying the opportunities for farms to acquire credits through the adoption of water plans, and specifying a system of priorities for water allocation.

Cas. 587. In this country the authorities are in conflict as to the nature of the right in underground waters. Some jurisdictions follow the English rule and others modify the rule to the extent that the owner of land may not through malice or negligence deprive the adjoining owner of percolating waters. To this extent in the latter jurisdictions the right is not absolute but relative. See *Chatfield v. Wilson*, 28 Vt. 49; *Elster v. Springfield*, 30 N.E. 274; *Phelps v. Nowlen*, 72 N.Y. 39; *Chesley v. King*, 74 Me. 164; *Greenleaf v. Francis*, 35 Mass. 117, 18 Pick. 117; *Wheatley v. Baugh*, 25 Pa. 528; *Bassett v. Company*, 43. N.H. 569; *Roath v. Driscoll*, 20 Conn. 533. Angell on Watercourses, (6th ed.) 114.

In this State the right to subterranean waters appears to be relative to the extent that they may not be purposely or negligently diverted. In *Buffum v. Harris*, 5 R.I. 243, it was held on motion for a new trial, after a verdict for the defendant, that the plaintiff received the benefit of all the direction to which he was entitled when the jury were charged: "That if the defendant had purposely or negligently constructed his drains, so as thereby to drain the water off from, or to lessen the quantity of water in the plaintiff's fountain, he would be liable to the plaintiff therefor." 54 R.I. 411, 418.

⁵ This statement lays out the general idea that the waters of the state should be managed in a way that promotes the "public interest." Whether a use is in the public interest depends on a balancing of different considerations.

⁶ Proper management requires information. For water resources management, the information needed includes the quantities of available water resources, their locations, and demands on these water resources. With this information, creative solutions to water shortages may be found.

⁷ The "reasonable use" standard is the foundation of the reasonable use riparian surface water and American reasonable use groundwater doctrines. Western water rights tend to be based on the "appropriation" standard. However, the conditions in Rhode Island imply that the reasonable use standard is more appropriate.

⁸ These interconnections are very important. Poor water quality can mean that surface waters are unavailable for use, while additional water quantities for dilution can improve water quality. Meanwhile, the running of surface waters recharges underlying aquifers through seepage. In the past, water quality and water quantity, and groundwater and surface water have been treated separately. However, due to these interconnections, joint management of water quality and water quantity, and groundwater and surface water will be helpful.

⁹ Land use decisions are also interconnected with water allocation. Increased development of an area leads to reduction in the area available for aquifers to be recharged (due to roads and compactment of soil). As a result, increased development will reduce the recharge rates of aquifers. Meanwhile, new developments have specific water requirements. As a result, again, joint management of land use and water allocation will be helpful.

Priorities

- The agricultural sub-committee, consisting of Al Bettencourt, Bill Stamp, III and Ken Ayars, has concluded that agriculture “is “a” priority and usually ranked 2nd next to direct human consumption or sanitation necessary for human survival and health.” This is consistent with the treatment of the Regulated Riparian Model Water Code, § 6R-3-04:¹⁰
- “When the waters available from a particular water source are insufficient to satisfy all lawful demands upon that water source, water is to be allocated ... up to the safe yield or other applicable limit of allocation of the resource according to the following preferences:
(a) direct human consumption or sanitation ... as necessary for human survival and health;
(b) uses necessary for the survival or health of livestock and to preserve crops or physical plant and equipment from physical damage or loss in so far as it is reasonable to continue such activities in relation to particular water sources; and
(c) other uses in such a manner as to maximize employment and economic benefits within the overall goal of sustainable development as set forth in the comprehensive water plan.”
- Within classes of users, priorities may also be assigned to those users who have provided information about their prior and existing water use, have adopted water-conservation practices, or have done a combination of these two.
- Flexibility in working with priorities is valued; however, clarity and certainty in determining rights based on priorities is also important.

Recommendation of Appropriate Structure

- Surface Water
 - Alternative 1: Management of Drought Situations
 - During regular years, no changes would occur, although water users would be encouraged to report information concerning their use. If drought conditions exceed set triggers, additional restrictions will be implemented. More restriction will occur in times of greater drought.
 - Particular sections of the Model Code should be considered in implementing this alternative: § 7R-3-02 Declaration of a Water Shortage; § 7R-3-03 Declaration of a Water Emergency; and § 7R-3-06 Conservation Credits. [See Alternative 2 below for more on these.]
 - Alternative 1a: Regulatory Approach
 - Initial phase would be entirely voluntary, involving education and encouragement to use water-saving practices in domestic, industry, and agriculture settings.
 - If drought conditions worsen, as evidenced by exceeding specific triggers, additional mandatory restrictions will be put into place. Priority criteria will be applied to determine these restrictions.
 - Furthermore, in order to determine priority, the WRB needs sufficient information to understand the impact of a particular user on water allocation supplies and demands. This information should be provided by the users themselves. For the users’ own benefit, this information is best provided *before* a drought
 - Alternative 1b: Market Approach
 - This approach could involve a combination of banking (intertemporal trades) and temporary transfers of water allocations. It could also involve using prices to allocate water.

¹⁰ Please note: this section of the Regulated Riparian Model Code is inserted as a reference, and not as a specific recommendation.

- Under the banking/transfer approach, credits for allocations during drought periods could be obtained by reducing allocations in other periods in exchange for allocations during drought periods, or by trading with current users who have surplus allocations they are willing to sell.
 - This approach would require sufficient information reporting by current users to enable the calculation of baselines for establishing the quantity of credits.
 - Under the pricing approach, a price for surface water would be charged. As drought conditions worsened, prices would rise. The revenues collected would then be distributed, less a charge for administration of this program, to documented rights owners.
 - Again, this approach would require sufficient information reporting by current users to enable the calculation of the portion of rebated revenues.
- Alternative 1c: Voluntary Approach
 - This approach is entirely voluntary, involving education and encouragement to use water-saving practices in domestic, industry and voluntary settings. The voluntary system would endeavor to:
 - Educate the public through workshops, newsletters, various publications, public access TV, public radio and other methods as to the potential of water shortages in the future if proper conservation methods are not used today.
 - Collect data from farmers and businesses (on a volunteer basis) and improve methods of estimating water use.
 - Establish minimum stream flows as a desired goal.
- Alternative 2: Full Permit System
 - Under this system, a permit would be required for withdrawing water from either groundwater or surface water resources. Exceptions to the permit requirement could be available for withdrawals below a specified quantity.
 - Development of this permit system might take guidance from the Regulated Riparian Model Water Code (hereinafter Model Code). The following points highlight specific sections of the Model Code that might be useful in this process.
 - § 2R-2-14 of the Model Code defines a permit: A written authorization issued by the State Agency to a person entitling that person to hold and exercise a water right involving the withdrawal of a specific quantity of water at a specific time and place for a specific reasonable use as described in the written authorization.
 - § 4R-1-08 Water Use Fees: One role of the water use fee is to introduce an incentive to reduce water use while still keeping the decision as to how much water should be used in the hands of the individual user. Questions arise as to how much this fee should be, and what should be done with the revenue raised.
 - The permitting process is described in §6R-1-01 of the Model Code: All withdrawals from the waters of the State are unlawful unless made pursuant to a permit—however, the WRB can specify exemptions to this requirement.
 - § 6R-1-02 sets the levels for exemption. Users whose withdrawals do not exceed these amounts are not required to obtain a permit.
 - § 6R-1-03 Existing Withdrawals: Current users must also obtain a permit—but will generally be assured of obtaining one initially. This gives current users preference over new users in evaluating the initial group of permits.
 - § 6R-1-05: Temporary Permits. The Code provides for the issuance of temporary permits while an application is pending, or during an emergency.

- § 6R-1-06 Registration of Withdrawals Not Subject to Permits. The Code allows the State to require accurate information reporting on water use. This requirement may extend to exempt users (permitted users, of course, will have already reported water use in their application).
- § 6R-2-01 Contents of an Application for a Permit. The WRB may in essence demand any information it wants; the user must provide it at his own expense. The Code suggests various minimum information that will always be required.
- § 6R-2-02: Notice and Opportunity to be Heard. The Code provides for a notice process before granting a permit: 1) written notice by return-receipt mail to state agencies with regulatory authority over the withdrawal, other users who are likely to be affected, and adjacent property owners; and 2) newspaper publication as appropriate to inform the local public.
- § 6R-2-04 Contesting an Application. Users who are likely to be adversely affected may request a hearing within 30 days of receiving notice; § 6R-2-05 allows all other users to file a written statement within 45 days.
- 6R-2-06: Obligation of the WRB to Act: This important section has three main provisions: 1) the WRB must rule on all applications in 6 months or less; 2) A failure to evaluate the application is deemed as approval; and 3) any applicant whose petition has not been considered may bring an appropriate court action to declare the terms and conditions of the permit as valid.
- § 6R-3-01 Standards for a Permit: The WRB will consider, for instance, whether the proposed use is reasonable, the effect on the safe yield, general plans and strategies, and conservation plans.
- § 6R-3-02 Determining Whether a Use Is Reasonable: Considerations include the number of persons using a water source, the supply potential of the water source, the economic and social importance of the proposed water use, the probable severity and duration of any injury caused to other lawful uses of water by the proposed withdrawal, the probable effects of the proposed withdrawal and use on the public interest in the waters of the State, including, but not limited to: (1) general environmental, ecological, and aesthetic effects; (2) sustainable development; (3) domestic and municipal uses; (4) recharge areas for underground water; (5) waste assimilation capacity; (6) other aspects of water quality; and (7) wetlands and flood plains.
- § 7R-1-01 Permit Terms and Conditions: Essential terms of a new, renewed, or modified permit include: type of use; place, quantity, and time of withdrawal; duration (both of withdrawal and of the permit generally); expiration; duties of the permit holder (such as restoration of water sources, or provision of return flow); and metering, surveillance, and reporting requirements.
- § 7R-1-02 Duration of Permits: The duration of the permits may be limited to a period of time representing the economic life of any necessary investments. Right holders may apply for a renewal of the permit, however at this point, the WRB may consider changed circumstances.

Part 3: Restrictions during Water Shortages or Water Emergencies: One of the central purposes of a regulated riparian system of water law is to enable a State to cope reasonably and effectively with the recurring shortfalls in water supply that are becoming more frequent in the humid parts of the nation. The dominant mode by which water is managed during periods of water crisis under a regulated riparian system is the pairing of a comprehensive information gathering system with legal

authority in the state to restrict uses during periods of shortfalls of water supply notwithstanding the permits authorizing greater use during periods of normal supply. This Part provides authority to the State Agency to respond to such shortfalls and to compel water users to comply with the Agency's strategies and decisions.

- § 7R-3-01 Authority to Restrict Permit Exercise: During a shortage or emergency, the WRB may restrict the terms or conditions of permits. In doing so, the WRB should impose restrictions according to previously developed drought management strategies unless they are inappropriate.
 - § 7R-3-02 Declaration of a Water Shortage: The WRB shall declare a water shortage whenever it finds the preset conditions exist. Before restricting the exercise of any right conferred by a permit under this Code because of a water shortage, the State Agency shall serve notice of the proposed action on and provide an opportunity for a contested hearing to any person affected by the proposed restriction.
 - § 7R-3-03 Declaration of a Water Emergency
 - The WRB can declare a water emergency when preset conditions exist.
 - The WRB may then order a person who holds a permit under this Code immediately to cease or otherwise change the withdrawal or use of water as necessary to alleviate the emergency.
 - Any person affected by a restriction under this section may obtain a hearing to challenge the restriction.
 - § 7R-3-04 Delineation of the Area Affected: The WRB, in declaring a water shortage or a water emergency, shall determine and clearly delineate the area of the State and the water sources included within the shortage or emergency.
 - § 7R-3-06 Conservation Credits
 - (1) If practicable, the WRB, in ordering restrictions on the withdrawal or use of water during a water shortage or water emergency, shall not order a person to do more if that person has successfully implemented conservation measures pursuant to the plan of conservation made a term or condition of their permit, until other permit holders shall have achieved comparable restrictions in the exercise of their water rights.
 - (2) When a person holding a water right voluntarily undertakes conservation measures during a period of water shortage or water emergency beyond those required by this Code, including the terms or conditions of the person's permit, that result in significant quantifiable reductions, that person is entitled to a credit for such reductions.
- Alternative 3: Registration System
 - Under this system, users of both surface and groundwaters above a threshold level would be required to register their water use. The registration system would be used to collect information needed to build the inventory of water uses in Rhode Island. It might be later combined with a Drought Management System.
 - Alternative 4: Combinations of these systems
 - The ultimate allocation plan could involve combinations of these systems. For instance, very large water users could be under a permitting system, whereas users below the criteria level could be under a drought management system.

Groundwater Recommendations

- Groundwater should be managed in a manner consistent with the management of surface waters.
- Additional information about the use of groundwater and availability of groundwater for specific aquifers is necessary.
- Triggers for more close management of groundwater withdrawals could involve measurements of groundwater use to availability of groundwater in particular aquifers, or measurements of stream flow in designated streams that feed specific aquifers.