WEST VIRGINIA

WATER LAWS

WATER REGULATIONS

AND WATER RIGHTS

WV department of environmental protection – Promoting a healthy environment

By:

West Virginia Department of Environmental Protection

Office of Legal Services

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A

West Virginia Ownership Relative to its Border Waters

The waters that border the State of West Virginia vary in terms of which state has "ownership" over them. Pursuant to statutory authority, the term "ownership" in this context means that the State holds the watercourses in public trust for the use and enjoyment of the citizens of the State. West Virginia Code § 22 -11-2 holds that "[i]t is the public policy of the State of West Virginia that the water resources of this State with respect to the quantity thereof be available for reasonable use by all of the citizens of this State."

Generally speaking, if there is no authority to the contrary, the State of West Virginia has jurisdiction over watercourses which constitute t he boundary of the state. West Virginia Code § 1-1-2 states that "the jurisdiction of [West Virginia] also extends over all the rivers which are boundary lines between this and any other state, to the opposite shore, where there is no statute or compact t o the contrary." There does exist, however, various authority that addresses the jurisdiction of the border waters of the State:

North Branch Potomac River/Potomac River – The North Branch Potomac River and the Potomac River form the border between West V irginia and Maryland. In *Maryland v. West Virginia*, 217 U.S. 1 (1910), the State of Maryland filed an action against the State of West Virginia to determine the precise boundary line between the two states. By decree issued on May 31, 1910 (217 U.S. 577) the United States Supreme Court determined that the boundary line between West Virginia and Maryland is the low water mark on the south side of the Potomac River.

Summary: West Virginia's boundary line extends to the low water mark on the south side of the Potomac River. See *Maryland v. West Virginia*, 217 U.S. 1 (1910).

Ohio River – The Ohio River forms the border between West Virginia and Ohio. Prior to West Virginia's formation of a state in 1863, Virginia was the original proprietor of the Ohio River. Section I of Article II of the West Virginia Constitution holds that the Sta te of West Virginia includes "the bed, bank and shores of the Ohio River," and that "all territorial rights and property in, and jurisdiction over, the same, heretofore reserved by, and vested in, the commonwealth of Virginia, are vested in and shall herea fter be exercised by, the State of West Virginia." W.Va. Const. Art. II, § I. Case law has held that the true boundary line between the states is the low water mark on the northwest or Ohio side of the river. See *Ward v. Island Creek Fuel & Transp. Co.*, 261 F. Supp. 810 (1966), *State v. Faudre* , 54 W.Va. 122 (1903), *Handly's Lessee v. Anthony*, 18 U.S. 374 (1820).

Summary: West Virginia's jurisdiction of the Ohio River extends to the low water mark of the opposite (western) shore of the Ohio River.

Big San dy River – The Big Sandy River lies between the border of West Virginia and Kentucky. Prior to West Virginia's formation of a state in 1863, the Big Sandy was recognized as the boundary between Virginia (what is now West Virginia) and Kentucky in an Act o f the General Assembly of Virginia in 1842. Section I of Article II of the West Virginia Constitution holds that the State of West Virginia "includes...so much of the Big Sandy river as was formerly included in the commonwealth of Virginia." W.Va. Const. Art. II, §I.

Summary: No authority has determined precisely where the boundary line between West Virginia and Kentucky lies and it is assumed that both West Virginia and Kentucky share riparian rights with respect to the Big Sandy River.

Tug Fork River – The Tug Fork River lies between the border of West Virginia and Kentucky. In 1895, an Act of the West Virginia Legislature defined that the Tug Fork River is the State line and the southwestern boundary of Mingo County. The West Virginia Supreme Court of Appeals has determined that the boundary line "in that locality between the States of West Virginia and Kentucky is as it was between Virginia and Kentucky at the date of the formation of West Virginia…The stream called 'Tug Fork' is here the boundary, and the line between the States is its middle." *Ex parte McNeeley*, 36 W. Va. 84 (1892).

Summary: No authority has deviated from the determination by the West Virginia Supreme Court of Appeals that the boundary between West Virginia and Kentucky is the mi ddle of the Tug Fork River and it is assumed that both West Virginia and Kentucky share riparian rights with respect to the Tug Fork River.

B

Public Rights in West Virginia Watercourses: A Unique Legacy of Virginia Common Lands and the Jus Publicum of th e English Crown

By: Larry W. George

Principal factors determining public and private rights in watercourses:

- Physical Characteristics – Whether the watercourse is navigable -in-fact (non -tidal), floatable, or non-floatable at common law.
- Origin of Title to Riparian Lands – Whether the title to the riparian lands originates from a Colonial patent or a Northern Neck Proprietary grant during the colonial period, a Virginia Land Office patent (1780-1863), a West Virginia land grant (1863 to 18 64), or a deed from a West Virginia school land commissioner (1865 to 1912).
- Eastern or Western Waters – Whether riparian lands lie upon the "eastern waters" which drain to the Chesapeake Bay or the "western waters" which drain to the Ohio River.
- 1780 and 1802 Common Lands Acts - Whether a watercourse comprises common lands by reason that it is a "river or creek" excepted by statue from Virginia patents and West Virginia land grants of riparian lands and reserved in public ownership.

Navigable and Floatable Waters:

- Navigable Watercourse – One capable of valuable use by the public on at least a seasonal basis by watercraft historically or customarily used in commercial trade and transport. See *Campbell, Brown & Co. v. Elkins*, 141 W.Va. 801 (1956).
- Floatable Watercourse – One that is passable by "floating logs, rafts, timber, boats,…canoes, push boats, and like craft…" See *State v. Elk Island Boom Co.* , 41 W.Va.796 (1896). Unlike navigable waters, which also encompass those which have been or may be made na vigable by reasonable improvement, floatable waters encompass only those subject to such use in their natural condition. See *Gaston v. Mace*, 10 S.E. at 63 (1889).

Benchmarks to Identify Navigable and Floatable Watercourses

- Navigable Watercourses: Any wat ercourse with an upstream drainage area in excess of one hundred and twenty -five square miles (125 sq. mi.) and an average gradient of less than fifteen feet per mile (15 f.p.m.) may be considered a navigable watercourse. Such a watercourse would be consi dered navigable even if intermittent segments have a

significantly higher gradient or are rendered non -navigable by obstructions. In exceptional circumstances, Corps of Engineers' surveys have found smaller streams and modestly greater gradients to be navigable.

- Floatable Watercourses: Any watercourse with an upstream drainage area in excess of seven square miles (7.0 sq. mi.) and an average gradient of less than thirty -five feet per mile (35 f.p.m.) may be considered a floatable watercourse.

1802 Commons Land Act

- In 1802, the Virginia General Assembly enacted a statute to reserve the "banks, shores and beds of the rivers and creeks in the western parts of the Commonwealth (now West Virginia), which were intended and ought to remain as a common to all the good people thereof." After West Virginia was formed in 1863, the 1868 WV Code did not include the common lands act. However, both the 1863 and 1872 Constitutions of West Virginia provided that all private rights and interests in lands derived under the laws of Virginia were to be determined by such laws. Thus, there is Legislative intent to preserve the common lands and maintain the public uses authorized by the 1802 Commons Land Act.

Jus Publicum – Protected Public Uses

- Certain public rights and interests in watercourses are vested as a public trust in the State of West Virginia. In West Virginia, public trust interests in watercourses arise from the *jus publicum*. The sovereign powers of *jus publicum* are vested in the West Virginia Legislature as successor to the English Crown (see *Commonwealth v. City of Newport News*, 164 S.E. 689 (Va. 1932), as West Virginia (nor Virginia) has not adopted the public trust doctrine.
- The concept of *Jus publicum* appeared in the 1671 treatise of English Lord Chief Justice Matthew Hale, *De Juris Maris et Brachiorum Ejusdem* (Concerning the Law of the Sea and its Arms), which has been cited by the West Virginia Supreme Court of Appeals (in *Gaston v. Mace*, 33 W.Va. 14 (1889)) as the most authoritative source of the English common law concerning watercourses and navigation.
- In *Gaston v. Mace*, 33. W.Va. 14 (1889), the West Virginia Supreme Court of Appeals observed that the "rule of the common -law, that riparian proprietors own to the thread of fresh water rivers, has been adopted in this and many other states of the Union.
- West Virginia state law governs public and private rights subject to two doctrines of federal constitutional law:
  (1) The federal navigational servitude imposed by the Commerce Clause – protects navigation on navigable watercourses and regulation of commerce thereon by Congress
  (2) The state sovereign lands doctrine – provides that at independence, as an incident of state sovereignty, the original thirteen states acquired title to non -tidal watercourses and other public rights therein as a public trust

Public Fishing Rights

- Pursuant to West Virginia Code § 20 -2-3, the ownership of fish and aquatic life is vested in the State of West Virginia as a public trust for the use, benefit and enjoyment of its citizens. See also *Shobe v. Latimer*, 253 S.E.2d 54 (1979).

C

West Virginia Riparian Water Rights

Riparian Rights

Riparian rights refer to the rights of a landowner whose land abuts a natural watercourse. This is a very complex subject and can be treated only in a general way in this publication. The general principle of law is that all landowners along a watercourse have the same right to the use and enjoyment of its water, provided no one owner substantially climinishes or pollutes the stream, thereby causing hardship to downstream users. A landowner does not own the water in a stream. Instead, he owns the right to use it, subject to the equal rights of other owners along the watercourse.

Ownership of the stream bed depends upon the stream's classification. If the stream is classified as non-navigable, the landowner's property extends to the middle of the streambed, provided the stream is designated as a boundary line in the deed. On a navigable stream, the landowner holds title only to the low water mark, and the rest of the streambed is owned by the West Virginia Public Land Corporation. A navigable stream is defined for ownership purposes as one that may be used by the public for transportation and commerce in its natural condition.

West Virginia has long adhered to the doctrine of riparian rights for the allocation of water to particular uses. This doctrine has been recognized in a number of West Virginia statutes. (W.Va. Code § § 5D-1-5, 8-12-5(33), 17-2A-17, 17-17-17, 20-2-48, 22-ll-24(d), 22-11-27, 22-12-B(b), 31-3-9, 31-156(w), 54-1-10, 54-2-3, 61-3-47 (2003). And West Virginia courts, like courts in nearly all states still adhering to traditional riparian rights, have long applied the reasonable use version of riparian rights. West Virginia, like all states applying traditional riparian rights, does not rely solely on "pure" riparian rights. It has in place any number of regulations directed at particular uses of the waters of the state or of lands the use of which will affect the waters of the state. Still, it remains true that in West Virginia disputes limited to the allocation of water among users is determined by the reasonable use rule and not any other body of law within the state. West Virginia courts have applied the more restrictive natural flow rule only in cases involving flooding or pollution. Given the changing patterns of demand for water in the state -- including the possibility of demands for water by persons located in neighboring states, this body of law cannot stand for long.

The Reasonable Use Rule

Riparian rights are based on the premise that the right to use water is a natural attribute of land, dependent on the natural availability of water to the land. Indeed, the very word "riparian" derives from the Latin word "ripa" meaning a riverbank. Land abutting or underlying a watercourse is termed "riparian land." Under the reasonable use version of

riparian rights, each owner of riparian land is entitled to use water from a contiguous watercourse regardless of the effect on the natural flow of the watercourse so long as each user does not transgress the equal right of other riparians to use the water. While domestic uses are preferred over other uses, the only real restriction is that no use is legal if it "unreasonably harms" another riparian use.

The reasonable use rule thus is a common property system, under which all who own land contiguous to a surface water body are co-owners of the right to use the water. As co-owners, they are left pretty much to their own individual judgment to decide whether, when, and how to use the resource. A court will intervene in these decisions only when a use by one co-owner interferes directly with a use by another co-owner. 106 W.Va. L. Rev. 539 (Spring, 2004).

West Virginia is a common law riparian state which has adopted the "reasonable use" doctrine granting each riparian landowner on a given watercourse an equal and correlative right to a reasonable consumptive use of the natural flow. A riparian may make such consumptive use as does not materially diminish the same rights of the downstream riparian's to a reasonable consumptive use or impair certain public rights. *Supra* note 3. Morris v. Priddy, 383 S.E.2d 770 (W.Va. 1989); Roberts v. Martin, 77 S.E. 535 (W. Va.1913); *Gaston,* 10 S.E. at 22-23; Coalter v. Hunter, 25 Va. 58 (1826); Marlyn E. Lugar, *Water Law in West Virginia,* 66 W.VA. L. REV.
191 (1964).

D

WEST VIRGINIA CODE – STATUES

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§ 22-26-3	Waters claimed by the state
§ 22-4-16	Water rights and replacement
§ 22-3-24	Water rights and replacement
§ 22-6A-18	Civil Action for contamination or deprivation of fresh water

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PUBLIC SERVICE COMMISSION

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§ 16-1-4

GROUND WATER PROTECTON ACT

§ 22-12-1

DAMS

§61-3-47. Dams or obstructions in watercourses; penalty.

NATURAL RESOURCES

§20-13-1. Short title. "West Virginia Stream Partners Program Act."

§20-13-2. The purpose of this act is to encourage citizens to work with appropriate state agencies to protect and utilize West Virginia's rivers and streams for public health, recreation, commercial and habitat uses to insure our rivers and streams: (a) Are safe fo r swimming, fishing and other forms of recreation; (b) can support appropriate public and commercial purposes; and (c) can provide habitat for plant and animal life.

§20-13-3. The executive committee will be: The Division of Natural Resources, Department o f Environmental Protection, Division of Forestry and the West Virginia State Soil Conservation Agency, they shall jointly administer the program.

§20-13-4. Grants are awarded by consensus of the committee, promulgated by the Department of Environmental Protection. Each grant to be matched by the group representatives with cash or in-kind services in at least an amount equal to 20% of the grant. No grant shall exceed the amount of five thousand dollars. See rule for further requirements.

PUBLIC LAND CORPORATION

§5A-11-1. This rule does not apply to the State of West Virginia's interest in the rivers, streams, creeks or beds thereof and all other public lands managed or acquired by the Division of Natural Resources or the Division of Forestry.

§5A-11-2. The Public Land Corporation ("corporation") ex officio members of the board are Executive Director of the Real Estate Division, or designee, chair, Director of Division of Natural Resources or designee, Commissioner of Department of Culture and History or designee and the Secretary of the Department of Administration, or designee.

§5A-11-3. This rule give the corporation authority to acquire from any persons or the State Auditor or any local, state or federal agency, by purchase, lease or other agreeme nt, any lands necessary and required for public use by purchase, condemnation, lease or agreement, receive by gifts and devises or exchange, rights -of-way, easements, waters and minerals suitable for public use, and consolidating lands under state or federal government administration.

Disposal Criteria: Authority to sell or exchange public lands if determined the sale or exchange meets certain criteria such as the tract is no longer required for any state purpose.

Authority to purchase, develop, restore and preserve for public use, sites, structures, objects and documents of prehistoric, historical, archaeological, recreational, architectural and cultural significance to the State of West Virginia.

Authority to enter into leases as a lessor for the devel opment and extraction of minerals, including coal, oil, gas, sand or gravel. Reserve title and ownership to the mineral rights in all

cases. Convey, assign or allot lands to the title or custody of proper departments or other agencies of state government f or administration and control within the functions of departments or other agencies as provided by law.

State Treasury has a special *Public Land Corporation Fund* which shall be paid all proceeds from public land sales and exchanges and rents, royalties and other payments from mineral leases, as long as all royalties and payments derived from rivers, streams or public lands acquired or managed by the Division of Natural Resources.

All proceeds, rents, royalties and other payments from land sales, exchanges and mineral rights leasing for public lands owned, managed or controlled by the Adjutant General's Department will be retained in a fund managed by the Adjutant General.

All state agencies, institutions, divisions and departments shall make an inventory of the public lands of the state. This list of public lands and minerals, including their current use, intended use or best use to which lands and minerals may be put.

The Division of Highways need not provide the inventory of public lands allocated to and used by it. The Division of Natural Resources need not provide the inventory of rivers, streams and public lands acquired or managed by it.

AGRICULTURE

§19-16A-1. "West Virginia Pesticide Control Act of 1990"

§19-16A-3. Definitions. "Environment" includes water, air, land and all plants and man and other animals living therein, and the interrelationships, which exist among these.

Individuals who sell, store, dispose or apply pesticides need to be adequately trained and observe appropriate safety practices.

The commissioner may refuse or cancel the registration of a pesticide if found use of the pesticide demonstrates unreasonable adverse effects on the environment.

DEPARTMENT OF AGRICULTURE

§ 22-12-5(b). This rule gives Department of Agriculture authority to regulate facilities or activities, with the division of environmental protection, the bureau of public health, and such agencies of the state or any political subdivision as may be designated by the di rector, as appropriate. Authority to regulate the use or application of pesticides and fertilizers and regulate facilities or activities which may adversely impact groundwater that is not otherwise assigned to the division of environmental protection, the bureau of public health or such other specifically designated agency pursuant to any other provision of this code, the division of environmental protection is hereby authorized to be the groundwater regulatory agency with respect to such unassigned facilities or activities.

§ 22-12-5(d). These agencies develop groundwater protection practices to prevent groundwater contamination from facilities and activities within their respective jurisdictions consistent with this article. Such practices shall include, but not be limited to, criteria re lated to facility design, operational management, closure, remediation and monitoring. Such agencies shall issue such rules, permits, policies, directives or any other appropriate regulatory devices, as necessary.

§ 22-12-5(e). These agencies take such act ion as may be necessary to assure that facilities or activities within their respective jurisdictions maintain and protect groundwater at existing quality, where the existing quality is better than that required to maintain and protect the standards of pur ity and quality promulgated by the board to support the present and future beneficial uses of the state's groundwater.

§ 22-12-5(h). Subsections (e) of this section does not apply to coal extraction and earth disturbing activities directly involved in coal extraction that are subject to either or both article three or eleven of this chapter. Such activities are subject to all other provisions of this article.

SURFACE COAL MINING AND RECLAMATION ACT

Definitions: §22-3-10. "Replacement of water supply" mean s, with respect to water supplies, contaminated, diminished or interrupted provision of water supply on both a temporary and permanent basis of equivalent quality and quantity. Replacement includes provision of an equivalent water delivery system and payme nt of operation and maintenance cost in excess of customary and reasonable delivery cost for the replaced water supplies.

§22-3-10. Each reclamation plan submitted as part of a surface mining permit application shall include detailed description of the me asures to be taken to assure the protection of the quality of surface and groundwater systems, both on and off site, from adverse effects of the surface mining operation. The rights of present users to the water, the quantity of surface and groundwater systems, both on and off site, from adverse effects of the surface mining operation or to provide alternative sources of water where the protection of quantity cannot be assured.

§22-3-13. Any permit issued by department of environmental protection, requires the surface mining operations meet all performance standards and other requirements set forth in legislative rules proposed by the director, including the standard to restore the land affected to a condition supporting the uses which it was capable of sup porting prior to any mining, higher or better, as long as it does not pose any hazard to public health or safety or pose any threat of water diminution or pollution.

§22-3-13a. At least thirty days prior to commencing blasting, as defined in section twent y-two-a of this article, notifications in writing to all owners and occupants of man -made dwellings or structures that the operator or operator's designee will perform pre-blast surveys.

The Preblast survey includes written documentation relating to the ty pe of water supply, including a description of the type of system and treatment being used, an analysis of untreated water supplies, a water analysis of water supplies other than public utilities and information

relating to the quantity and quality of water.

OIL AND GAS

§22-6-1. Definitions. "Waters of this state" has the same meaning as the term "waters" as provided in section three, article eleven of this chapter.

§22-6-3. If an inspector finds that an imminent danger to persons exists, or whether an imminent danger that a fresh water source or supply will be contaminated or lost. This is a violation and an order requiring the operator of such well or well site or other oil or gas facility to cease further operations until such imminent danger has been abated.

§22-6-7. The director may issue a permit for well work, issue a separate permit, general permit or a permit consolidated with the well work permit for the discharge o r disposition of any pollutant or combination of pollutants into waters of this state upon condition that such discharge or disposition meets or will meet all applicable state and federal water quality standards and effluent limitations and all other requirements of the director.

It is unlawful for any person conducting these activities unless that person holds an active water pollution control permit from the director, to allow pollutants produced by or emanating from any point source to discharge of pollu tants or the effluent therefrom into the waters or operate any disposal well for the injection or reinjection underground of any pollutant, including, but not limited to, liquids or gasses, or convert any well into such a disposal well or plug or abandon a ny such disposal well.

§22-6-21. No oil or gas well shall be drilled nearer than two hundred feet from an existing water well or dwelling without first obtaining the written consent of the owner of such water well or dwelling.

§22-6-30. Within six months after the completion of the drilling process, the operator shall fill all the pits and remove all concrete bases, drilling supplies and drilling equipment. The operator shall grade or terrace and plant, seed or sod the area disturbed. No pit may be used f or the ultimate disposal of salt water. Salt water and oil shall be periodically drained or removed, and properly disposed of, from any pit that is retained so the pit is kept reasonably free of salt water and oil.

§22-6-35. Any contamination or depriv ation of a fresh water source or supply within one thousand feet of the site of drilling for an oil or gas well, there shall be a rebuttable presumption that such drilling, and such oil or gas well, or either, was the proximate cause of the contamination or deprivation of such fresh water source or supply.

HORIZONTAL WELL ACT

§22-6A-1. Short Title: "Horizontal Well Act"

§22-6A-2. This rule gives the secretary of department of environmental protection broad

authority to condition the issuance of well work permits relating to horizontal well drilling practices.

Horizontal drilling techniques, allow the development of multiple wells from a single surface location, and may involve fracturing processes that use and produce large amounts of water.

Some of these practices require the construction of large impoundments or pits for the storage of water or wastewater. It is necessary to protect the safety of persons, to prevent inadequate or ineffective erosion and sediment control plans, to prevent damage to publicly owned lands or resources, to protect fresh water sources or supplies or to otherwise protect the environment.

§22-6A-3. This rule applies to any natural gas well, other than a coal-bed methane well, drilled using a horizontal drilling method, which disturbs three acres or more of surface, excluding pipelines, gathering lines and roads, or utilizes more than two hundred ten thousand gallons of water in any thirty day period.

§22-6A-4. Definitions "Best management practices" means schedules of activities, prohibitions of practices, maintenance procedures and other management practices established by the department to prevent or reduce pollution of waters of this state. For purposes of this article, best management practices also includes those practices and procedures set out in the Erosion and Sediment Control Manual of the Office of Oil and Gas.

"Flowback Recycle Pit" means a pit used for the retention of flowback and freshwater and into which no other wastes of any kind are placed;

"Freshwater Impoundment" means an impoundment used for the retention of fresh water and into which no wastes of any kind are placed;

"Perennial stream" means a stream or portion of a stream that flows year-round, is considered a permanent stream and for which base flow is maintained by ground-water discharge to the streambed due to the ground-water elevation adjacent to the stream being higher than the elevation of the streambed.

§22-6A-7. It is illegal for any person to start any site preparation work without a well work permit.

The well work permit information must supply the type of water source, such as surface or groundwater, the county of each source to be used by the operation for water withdrawals, and the latitude and longitude of each anticipated withdrawal location. The anticipated volume of each water withdrawal. The anticipated months when water withdrawals will be made.

Identification of current and existing water uses, including any public water intakes within one mile downstream of the withdrawal location.

§22-6A-10. Notification is to be given to a ny surface owner or water purveyor to have a water well, spring or water supply source located within one thousand five hundred feet of the center of the well pad which is used to provide water for consumption by humans or domestic animals.

§22-6A-12. Wells may not be drilled within two hundred fifty feet measured horizontally from any existing water well or developed spring used for human or domestic animal consumption.

§22-6A-16. If well is contaminated payment of all reasonable costs incurred by the real property owner in securing a water supply.

§22-6A-20. Certification is required from the Division of Highways pertaining to the state local service roads.

§22-7-3. The oil and gas developer shall be obligated to pay the surface owner compensation for any damage to a water supply in use prior to the commencement of the permitted activity.

PUBLIC SERVICE COMMISSION

§24-2-1a. Gives the commission authorized and empowered permission to enter and inspect any property, premise or place, owned or operated by a railroad.

§24-2-1b. Give the commission authority to establish, prescribe and enforce rules providing for the safe trans portation of solid waste in the state. The commission shall establish rules for the collection of waste tires by private commercial carriers of solid waste.

§24-2-1c. A permit to construct, operate, expand or seeking a major permit modification for a commercial solid waste facility from the division of environmental protection first shall obtain a certificate of need from the public service commission.

§24-2-1i. The director of the division of environmental protection shall modify any commercial solid waste facility permit, issued under article five -f, chapter twenty of this code, to conform with the maximum monthly solid waste disposal tonnage and any other terms and conditions set forth in a temporary certificate issued under this section.

PUBLIC HEALTH.

§16-1-1. The purpose of this policy is to promote the physical and mental health of all of West Virginia Citizens, to prevent disease, injury, and disability whenever possible.

§16-1-2. Definitions. "Public water system" means any water supply o r system which regularly supplies or offers to supply water for human consumption through pipes or other constructed conveyances, if serving at least an average of twenty -five individuals per day for at least sixty days per year, or which has at least fifteen service connections."

§16-1-4. This rule gives Director of Public Health the power to regulate and promote safe drinking water, to regulate land usage endangering the public health, restrict subdivi sions or

development, to prevent contamination of wellheads and well fields used by public water supplies and to regulate requirement of distribution of bottled drinking water.

GROUND WATER PROTECTON ACT

§22-12-1. Short title. "Groundwater Protection Act."

§22-12-2. This act pertains only to the groundwater of West Virginia. Over fifty percent of West Virginia's overall population, and over ninety percent of the state's rural population, depend on groundwater for drinking water;

The Legislature establishes that it is the public policy of the state of West Virginia to maintain and protect the state's groundwater so as to support the present and future beneficial uses and further to maintain and protect groundwater at existing quality where the existing quality is better than that required to maintain and protect the present and future beneficial uses. Such existing quality shall be maintained and protected unless it is established that (1) the measures necessary to preserve existing quality are not technically feasible or economically practical and (2) a change in groundwater quality is justified based upon economic or societal objectives. Such a change shall maintain and protect groundwater quality so as to support the present and future beneficial uses of such groundwater.

DAMS

§61-3-47. Dams or obstructions in watercourses; penalty.

No person may fell any timber and permit the same to remain in any navigable or floatable stream of this state when to do so obstructs the passage of boats, rafts, staves, ties or timber of any kind.

Except as may be provided in chapter twenty or twenty-two of this code, no person may construct or maintain any dam or other structure in any stream or watercourse, which in any way prevents or obstructs the free and easy passage of fish up or down such stream or watercourse, without first providing as a part of such dam or other structure a suitable fish ladder, way or flume, so constructed as to allow fish easily to ascend or descend the same; which ladder, way or flume shall be constructed only upon plans, in a manner, and at a place, satisfactory to the division of natural resources: *Provided,* That if the director of the division of natural resources determines that there is no substantial fish life in such stream or watercourse, or that the installation of a fish ladder, way or flume would not facilitate the free and easy passage of fish up or down a stream or watercourse, or that an industrial development project requires the construction of such dam or other structure and the installation of an operational fish ladder, way or flume is impracticable, the director may, in writing, permit the construction or maintenance of a dam or other structure in a stream or watercourse without providing a suitable fish ladder, way or flume; and in all navigable and floatable streams provisions shall be made in such dam or structure for the passage of boats and other crafts, logs and other materials: *Provided, however,*

That this section does not relieve such person from liability for damage to any riparian owner on account of the construction or maintenance of such dam.

Any person who violates any of the provisions of this section is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not exceeding one thousand dollars, or imprisoned in the county jail not exceeding one year, or both fined and imprisoned, and, whether a conviction is had under this section or not, such violation is a nuisance, which may be abated at the suit of any citizen or taxpayer, the county commission of the county, or, as to fish ladders, at the suit of the director of the division of natural resources, and, if the same endangers county roads, the county commission may abate such nuisance peaceably without such suit.

CASE LAW

1. Ours v. Grace Property
186 W.Va. 296 (1991)

Where ownership of the land underlying a man-made lake is clear and distinct, the owner of a portion of the lake bed has the exclusive control and use of the water above the portion of the lake bed that he owns. Further, the owner has a right to exclude others, including other adjoining owners of the lake bed, by erecting a fence or other barrier to prohibit others from utilizing the water which overlies his property.

Riparian rights do not stem from the ownership of the lake-bed but from shore ownership. Thus, a riparian owner is one who bases his right to use a lake upon the fact that his land abuts upon the lake. Moreover, the general rule is that riparian rights do not ordinarily attach to artificial bodies of water which necessarily includes a man-made lake. In cases where various parts of the soil under a private lake are owned by different persons, and in which it does not appear that ownership was based on riparian rights, it has generally been held that each owner has exclusive rights to the use of the surface of the water over his land, or at least that the owner of a larger portion can exclude from it the owner of a small portion.

2. Campbell Brown & Co. v. Elkins
141 W.Va. 801 (1956)

In the United States there are three classes of navigable streams: (l) Tidal streams, that are held navigable in law, whether navigable in fact or not; (2) those that, although non-tidal, are yet navigable in fact for 'boats or lighters,' and susceptible of valuable use for commercial purposes; (3) those streams which, though not navigable for boats or lighters, are floatable, or capable of valuable use in bearing logs or the products of mines, forests and tillage of the country they traverse to mills or markets.

As to a stream, which is navigable because it is valuable to the public as a public highway, the fact that it cannot be used at certain seasons of the year will not destroy the right of navigation or make such stream non-navigable. And a stream navigable in the sense that it is or may be used by the public for transportation and commerce is not rendered non-navigable because of the difficulties attending such navigation. *Gaston v. Mace,* 33 W.Va. 14 (1889)

3. Morris Asscocs. V. Priddy
181 W.Va. 588 (1989)

Generally, under the rule of reasonable use, the landowner, in dealing with surface water, is entitled to take only such steps as are reasonable, in light of all the circumstances of relative advantage to the actor and disadvantage to the adjoining landowners, as well as social utility.

Ordinarily, the determination of such reasonableness is regarded as involving factual issues to be determined by the trier of fact To the extent that *Jordan v. City of Benwood, 42 WVa. 312, 26 S.E. 266 (1896),* differs, it is overruled.

4. Snyder v. Callaghan
168 W.Va. 265 (1981)

When the State authorizes the introduction of foreign material into the flow of a natural watercourse which passes through or past the land of a lower riparian owner, such state action directly affects the interest of the lower riparian owner in the watercourse and constitutes an infringement of a property interest for purposes of article 3, section 10 of the state constitution.

Parties -- Persons Who May Sue

An association which has suffered no injury itself, but whose members have been injured as a result of the challenged action, may have standing to sue solely as the representative of its members when: (1) its members would have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Claimed individual holders of riparian interests and organization composed of similarly situated individuals and other interested persons petitioned for writ of mandamus to compel Director of Department of Natural Resources to afford them hearing on certification of upstream construction activity which involved alteration and filling of riverbed.

5. Gaston v. Mace
33 W.Va. 14 (1889)

The public in this State have a ***right*** to use as highways not only tidal ***rivers,*** in which the tide ebbs and flows, and fresh water ***rivers*** capable of being profitably used to carry on commerce in their natural state without artificial improvement, but also floatable streams, that is, such streams as are capable of being profitably used by the public in their natural state to float logs or timber or the products of mines or tillage to markets or ruills.

To be a floatable stream so as to entitle the public to use it as a public highway, the stream need not be at all times capable of floating logs, but it will suffice, that, when the water is high, it is thus capable for such a length of time as would make it useful and profitable for the public to so use it as a highway to float logs to mill or market

6. McCausland v. Jarrell
136 W.Va. 569 (1951)

A natural watercourse consists of bed, bank and water, and a stream in which the water usually flows in a certain direction and by a regular channel with banks or sides is a natural watercourse.

The owner of land through which a natural watercourse passes has a *right* of property in such land to have the water of the stream pass to and from his land in its natural flow.

The obstruction or the diversion of a natural watercourse which restricts the natural flow of the water of the stream and causes such water to overflow, accumulate and stand upon the land through which such watercourse passes is an infringement of a property *right* of the landowner and imports damage to such land.

Equity has jurisdiction to vindicate the *right* of a landowner to the natural flow of the water of a natural watercourse to and from his land by restraining the obstruction of the natural flow of the water or its inadequate diversion from its natural course and by requiring the removal of such obstruction or the cause of such diversion.

Though the evidence is conflicting, a finding of fact by a trial chancellor, based upon an inapplicable principle of law, is, for that reason, clearly wrong and will be set aside on appeal.

7. Union Sand & Gravel Co. v. Northcott
102 W.Va.519 (1926)

Owner of Land Bounded by Ohio River, Not Otherwise Limited by Deed, Has *Rights* and Title of *Riparian* Owner to Low Water Mark (Const. Art. 2, *§* 1). The owner of land bounded by the Ohio *River,* not otherwise limited by the terms of his deed, has all the *rights* and title of a *riparian* owner down to and including low water mark. (p. 520.)

Holder of Tax Deed to Island in Ohio River Held to Have, as Against Stranger or Trespasser, All *Rights* of *Riparian* Owner of Land on Mainland (Const. Art. 2, § *!;Acts* 1872-73, c. 134, §§ 1, 3; 2 Vt. St at Large, p. 317). One who holds a tax deed to an island in the Ohio *River* in this state, originating in a proceeding begun in 1878, has, as against a stranger or trespasser, all the *rights* of a *riparian* owner ofland on the mainland bordering on said *river.* (p. 527.)

Riparian Owner oflsland May Maintain Trespass Against Person Entering Between High and Low Water Mark and Removing Sand and Gravel. And such a *riparian* owner of an island may maintain trespass against one who without his permission enters upon such island between high and low water mark and removes sand and gravel therefrom, for the value of such material. (p. 529.)

Trespasser, Entering in Good Faith, Believing He Had ***Right*** to Take Gravel Between High and Low Water Mark, is Liable for Actual Value Thereof. But if the defendant enters with permission of the federal government, and in good faith, believing he has the ***right*** to take such material at the place or places of entry, he will be liable to the owner only for the actual value thereof at the place from which it was removed. (p. 529.)

"Low-Water Mark:' of Ohio ***River*** is Point to Which Water Recedes at Lowest Stage. Low water mark within the intendment of our law, as related to the Ohio ***River,*** is the point to which the water recedes at its lowest stage. (p. 528.)

Low Water Mark of Ohio ***River*** is Not in Legal Contemplation Changed by Locks and Darns Built to Improve Navigation. And such low water mark will not in contemplation of law be changed by locks and darns built by the state or federal government in the improvement of navigation or in aid of commerce upon said ***river.*** (p. 529.)

8. Roberts v. Martin
72 W.Va. 92 (1913)

Natural Water Course--Diversion. A diversion of a natural watercourse, though without actual damage to a lower riparian owner, is an infringement of a legal right and imports damage. (p. 94).

Riparian Rights--Nature and Extent. The right of a riparian proprietor to have the water of the stream pass his land in its natural flow is a right annexed to the soil and exists as parcel of the land. (p. 94).

The right of a riparian owner to the natural flow of the stream is not dependent upon its value to him or the use which he makes of it. (p. 95).

The right of a lower riparian owner to the natural flow of the stream is subject only to a reasonable use of the water by the upper riparian owners as it runs through their lands before reaching his. (p. 95).

No legal right exists in a riparian owner to divert water of the stream for use beyond his riparian land, and any such diversion and use is an infringement of the rights of l0wer riparian proprietors who are thereby deprived of the flow. (p. 96).

If the diversion of water from riparian land for use elsewhere is not so inconsiderable, when the amount diverted is viewed relatively with the stream at its lowest stage as to be excluded under the maxim *de minimis non curat lex,* a lower riparian owner may have redress against the diversion. (p. 98).

Natural Water Course--Diversion. A stream begins at its source, when it comes to the surface, and a diversion of it at the spring head is just as much a diversion as if the water had been taken lower dovm. (p. 99).

Equity has jurisdiction to vindicate the right of a riparian owner to the natural flow of the stream by restraining an unlawful diversion of the water from its natural course. (p. 99).

9. Taylor v. Chesapeake & O.R. Co.
84 W.Va. 442 (1919)

Defendant not Negligent not Liable for Flood Damages. In the absence of some initial or intervening act of negligence on his part contributing thereto one is not liable for damages arising from an act of God, such as an unprecedented flood of ***waters*** of great force and volume caused by a cloud burst at the head ***waters*** of a creek or river. (p. 444).

Riparian Owner Has ***Right*** to Unobstructed Flow of Stream. A ***riparian*** proprietor has as a general rule the ***right*** to have the ***waters*** of a stream or ***water*** course pass his land in its natural flow unobstructed and to render anyone violating or interfering with such ***right*** liable to him in damages sustained thereby. (p. 444).

Riparian Owner May Construct Barriers to Keep Flood ***Waters*** in Stream. The only limitation on such ***right*** of a ***riparian*** owner is that any other ***riparian*** owner may erect barriers or dykes on his own land on the banks of such ***water*** course or on the interior of his land for the purpose of confining flood ***waters*** within the natural banks of the stream although such action may result in injury to another ***riparian*** owner. (p. 444).

But such limitation upon the general rule will not justify a ***riparian*** owner or other person in erecting or placing within the channel or banks of such stream any obstruction or barrier which will interfere with the free flow of the ***waters*** therein or cause the same to be backed up and to flood the land or property of a ***riparian*** owner along such stream. (p. 444).

10. In Re Flood Litig.
216 W.Va. 534 (2004)

"Generally, under the rule of reasonable use, the landowner, in dealing with surface ***water,*** is entitled to take only such steps as are reasonable, in light of all title circumstances of relative advantage to the actor and disadvantage to the adjoining landowners, as well as social utility. Ordinarily, the determination of such reasonableness is regarded as involving factual issues to be determined by the trier of fact" Syllabus Point 2, in part, *Morris Associates, Inc. v. Priddy,* 181 W.Va. 588,383 S.E.2d 770 (1989).

In determining whether a landowner acted reasonably in dealing with surface ***water*** pursuant to the "reasonable use" rule set forth in Syllabus Point 2 of *Morris Associates, Inc. v. Priddy,* 181 W.Va. 588, 383 S.E.2d 770 (1989), a jury generally should consider all relevant circumstances, including such factors as amount of harm caused, foreseeability of

harm on the part of the landowner making alteration in the flow of surface ***waters,*** the purpose or motive with which the landowner acted, etc.

"In the matters of negligence, liability attaches to a wrongdoer ... because of a breach of duty which results in an injury to others." Syllabus Point 2, in part, *Sewell v. Gregory,* 179 W.Va. 585, 371 S.E.2d 82 (1988).

"The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised. The test is, would the ordinary man [or woman in the defendant's position, knowing what he [or she]knew or should have known, anticipate that harm of the general nature of that suffered was likely to result?" Syllabus Point 3, *Sewell v. Gregory,* 179 W.Va. 585, 371 S.E.2d 82 (1988).

"The right of a ***riparian*** proprietor to have the ***water*** of the stream pass his [or her]land in its natural flow is a right annexed to the soil and exists as parcel of the land." Syllabus Point 2, *Roberts v. Martin,* 72 W.Va. 92, 77 S.E. 535 (1913).

"A diversion of a natural ***water*** course, though without actual damage to a lower ***riparian*** owner, is an infringement of a legal right and imports damage." Syllabus Point 1, *Roberts v. Martin,* 72 W.Va. 92, 77 S.E. 535 (1913).

"The right of a ***riparian*** owner to the natural flow of the stream is not dependent upon its value to him [or her] or the use which he [or she] makes of it." Syllabus Point 3, *Roberts v. Martin,* 72 W.Va. 92, 77 S.E. 535 (1913).

"The obstruction or the diversion of a natural watercourse which restricts the natural flow of the ***water*** of the stream and causes such ***water*** to overflow, accumulate and stand upon the land through which such watercourse passes is an infringement of a property right of the landowner and imports damage to such land." Syllabus Point 3, *McCausland v. Jarrell,* 136
W.Va. 569, 68 S.E.2d 729 (1951).

Compliance of a landowner in the extraction and removal of natural resources on his or her property with the appropriate state and federal regulations may be evidence in any cause of action against the landowner for negligence or unreasonable use of the landowner's land if the injury complained of was the sort the regulations were intended to prevent. Such compliance, however, does not give rise to a presumption that the landowner acted reasonably or without negligence or liability to others in his or her extraction and removal activities.

Where a rainfall event of an unusual and unforeseeable nature combines with a defendant's actionable conduct to cause flood damage, and where it is shown that a discrete portion of the damage complained of was unforeseeable and solely the result of such event and in no

way fairly attributable to the defendant's conduct, the defendant is liable only for the damages that are fairly attributable to the defendant's conduct. However, in such a case, a defendant has the burden to show by clear and convincing evidence the character and measure of damages that are not the defendant's responsibility; and if the defendant cannot do so, then the defendant bears the entire liability. To the extent that our prior cases such as *State ex ref. Summers v. Sims,* 142 W.Va. 640, 97 S.E.2d 295 (1957); *Riddle v. Baltimore & O. R. Co.,* 137 W.Va. 733, 73 S.E.2d 793 (1952), and others similarly situated held differently, they are hereby modified.

11. International Shoe Co. v. Heatwole
126 W.Va. 888; 30 S.E.2d 537 (1944)

A private individual has no right of action for a public nuisance or wrong unless he has suffered some special and peculiar injury, differing, not simply in degree, but in character, from that affecting the general public.