

January 1967

## Water Management Legislation in the Eastern States

Milton S. Heath, Jr.

Follow this and additional works at: [https://scholarship.law.uwyo.edu/land\\_water](https://scholarship.law.uwyo.edu/land_water)

---

### Recommended Citation

Heath, Jr., Milton S. (1967) "Water Management Legislation in the Eastern States," *Land & Water Law Review*. Vol. 2 : Iss. 1 , pp. 99 - 116.

Available at: [https://scholarship.law.uwyo.edu/land\\_water/vol2/iss1/4](https://scholarship.law.uwyo.edu/land_water/vol2/iss1/4)

This Article is brought to you for free and open access by Law Archive of Wyoming Scholarship. It has been accepted for inclusion in Land & Water Law Review by an authorized editor of Law Archive of Wyoming Scholarship.

# LAND AND WATER LAW REVIEW

---

VOLUME II

1967

NUMBER 1

---

As the Western states have attained a sophisticated management of water sources, their history of legislative control over water use lends a wealth of experience from which other sections of the country can learn. Today, the Eastern states are accepting the challenge of water management legislation both of a developmental and regulatory nature. Mr. Heath discusses Eastern legislative action in the water quantity area by analyzing and categorizing the types of Eastern legislation and by reviewing selected laws.

## WATER MANAGEMENT LEGISLATION IN THE EASTERN STATES

*Milton S. Heath, Jr.\**

PRIOR to the early 1950's the Eastern States had taken little action in the water management field, either of a developmental or a regulatory nature. A long-term pattern of adherence to riparian doctrines with mineral state direction or guidance remained largely unbroken. Today, a dozen years later, the picture has changed markedly. Several Eastern states have made substantial inroads on traditional surface and ground water doctrines. A number of states have enacted less extensive legislation or are now considering major new action. A few states are beginning to go into the business of developing sources of water supply for the benefit of agricultural, industrial and public uses.

Geographically the pattern of change has involved a clustering of state activity around several growth or resource centers: the Middle Atlantic region, radiating out from New Jersey; the Gulf States, with Florida and Mississippi in the

---

\* Professor of Public Law & Government, and Assistant Director of Institute of Government, University of North Carolina at Chapel Hill; B.A., 1949, Harvard University; L.L.B., 1952, Columbia University; Member of the District of Columbia Bar. Mr. Heath was former confidential law assistant to the Governor of New York, a member of the Legal Division of the Tennessee Valley Authority, and Technical Assistant to the Chairman of the Federal Power Commission. He is a member of the Board of Directors of Water Resources Institute of the University of North Carolina and is consultant to the North Carolina Department of the Water Resources on pending study of water use law.

lead; and the Lake States, reaching down into Iowa, where a tradition of public interest in natural resources is strong.

Two factors have largely stimulated Eastern water law innovation: cyclical drought conditions and developmental pressures associated with population growth and industrialization. In the East periodic droughts alone would not ordinarily suffice as a reason for revolutionizing water laws and institutions. However, at some point along the rising curves of population and economic growth, problems of local scarcity or overdevelopment of water resources become sufficiently chronic and widespread to demand new water laws and institutions.

This article summarizes recent legislative developments in the East concerning water quantity management. Water quality management is largely excluded from the discussion.

#### TYPES OF EASTERN LEGISLATION

Figure 1 indicates the types of regulatory measures currently on the statute books in the Eastern states. The labels used in this chart—"limited," "moderate," and "strong" regulation—are intended to convey an over-all impression of the status of regulation in the East today. While some of the designations are undoubtedly debatable, it is believed that at least at the extremes of "limited" and "strong" regulation there should be little disagreement with these choices.

As this chart shows there are between five and ten Eastern states with vigorous regulations affecting both ground and surface waters or surface waters only. Some of these "strong" laws are concerned with legalizing the diversion of waters beyond normal boundaries of riparian or overlying land. Others are concerned with controlling or restraining the use of water within certain areas or on a state-wide basis. Their common denominator is some kind of permit system which in most cases is or potentially can be applied state-wide.

To place the matter in its historical context: 15 to 20 years ago there was probably no Eastern state which would have qualified as having "strong regulations."

FIGURE 1  
Eastern Water Use Regulations

GROUND WATER ONLY	SURFACE WATER ONLY	GROUND AND SURFACE WATER
S R T E R G O U N L G A T I O N	Mississippi Wisconsin	New Jersey Iowa Florida Indiana Minnesota
M O D E R N E U R O P E A N T E R R I T O R I A N R E G U L A T I O N	<ol style="list-style-type: none"> <li>1. Localized regulation:               <ol style="list-style-type: none"> <li>a. Regulation of large wells on Long Island (N.Y.)</li> <li>b. Certification of wells in a limited area (S.C.)</li> </ol> </li> </ol>	<ol style="list-style-type: none"> <li>1. Emergency allocation powers for public supplies (N.C.) or broader purposes (Ark.)</li> <li>2. Permits for public water supply acquisition (Pa.)</li> <li>3. Permits for water use and diversions for taconite processing (Mich., Minn., Wis.)</li> <li>4. Local acts authorizing particular diversions (S.C.)</li> <li>5. Impoundment permits conditioned on maintaining normal flows (Ark., Ky., Va.)</li> <li>6. Lake level protections (Mich., Wis.) and reservoir drawdown controls (Ill., Ind., Mass., Mich., N.H., Pa.)</li> <li>7. Permits for dredging or filling (N.H., N.Y., Conn.)</li> <li>8. Permits to change course of certain high quality streams (N.Y.)</li> <li>9. Surplus water planning (Mich.)</li> </ol>
L I M I T E D R E G U L A T I O N	<ol style="list-style-type: none"> <li>1. Partial codification of riparian (Ga., La.)</li> <li>2. Declaration of state policy plus partial codification or study commission (Ill., Mo., Ohio, R.I., Tenn., Vt., Va., W.Va.)</li> </ol>	Registration of large water users (Tenn.)

The "strong regulation" group is balanced by a comparable number of states with water codes that depart only slightly, if at all, from traditional surface and ground water doctrines. (One could add to this group several states that have essentially no water use legislation.) These laws, which we have labelled as "limited regulation," include statutes which merely codify parts of the riparian doctrine as well as statutes which contain a declaration of state policy on water resources, coupled with a study commission approach or with partial codification of riparian rights but no regulatory authority.

In between the extremes lies a middle group of states, larger than either of the first two groups, which has enacted a variety of water use laws—laws having some regulatory effect but falling short of comprehensive water management legislation. Some of these laws are concerned only with ground water, such as localized regulation of ground water use or abatement of artesian well waste. Others deal with surface waters, such as limited or emergency allocation laws; laws sanctioning extraordinary water usage by favored industries; protection of lake levels for the benefit of water recreation or fish life; permits for acquisition of water rights by public water supply agencies; registration of large water users; regulation of sand and gravel dredging in coastal waters; and permits for excavation and fills in navigable waters. One state, South Carolina, has followed a local bill approach authorizing diversions of waters from certain streams for designated public or industrial uses, and in one case requiring a certificate of convenience and necessity for digging wells in a defined area.<sup>1</sup> New York also has adopted localized regulation of ground water use on Long Island.<sup>2</sup>

---

1. S.C. ANN. §§ 70-381, -391 to -405, -411, -412, -417, -481 (1962).  
2. N.Y. CONSERV. LAW §§ 475-76 (Supp. 1965).

Figure 2 below summarizes related legislation involving licensing programs and similar matters—well driller licensing; requirements for logs and other reports on wells; dam safety licensing and inspection; and regulation of floodway encroachments.

FIGURE 2	
Eastern Licensing, Inspection and Related Laws <sup>3</sup>	
GROUND WATER	SURFACE WATER
<p>Well driller licensing and reporting and, in some instances, well installation and well use controls (Conn., Ill., Ind., Md., Mass., Minn., Miss., N.J., N.C. [localized], Ohio, Pa., Tenn., Vt.)</p>	<ol style="list-style-type: none"> <li>1. Dam safety licensing and inspection (Conn., Ind., Iowa, Ky., Md., Mass., Mich., Minn., N.H., N.J., N.Y., Ohio, Pa., R.I., Vt., W.Va., Wis.)</li> <li>2. Floodway encroachment regulation (Conn., Ill., Ind., Iowa, Ky., Md., Mass., N.J., Pa., W.Va.)</li> </ol>

Turning from regulation to development, several Eastern states have authorized state undertakings to develop water

3. Statutes in Eastern States concerning the regulation, registration, or licensing of well drilling: CONN. GEN. STAT. REV. §§ 25-9 (1958); ILL. ANN. STAT. ch. 104, §§ 34-37, 63.1 (Smith-Hurd Supp. 1965), ch. 111½, §§ 116.76-158 (Smith-Hurd 1963); IND. ANN. STAT. §§ 42-2001 to -2005 (1965); MD. ANN. CODE art. 96A, §§ 30-49 (1957); MASS. ANN. LAWS ch. 21, § 17 (1966); MINN. STAT. § 105.51 (1961); MISS. CODE ANN. §§ 5956-31 to -34 (Supp. 1964); N.C. GEN. STAT. §§ 87-65 to -82 (1965); OHIO REV. CODE ANN. §§ 1521.04, 1521.05 (Baldwin 1964); PA. STAT. ANN. tit. 32, §§ 645.1-13 (Supp. 1965); TENN. CODE ANN. §§ 70-2301 to -2310 (Supp. 1966); VT. STAT. ANN. tit. 10, § 1151-57 (Supp. 1965); N.J. REV. STAT. §§ 58:4A-4 to -4.3, -14, -20, -23 (1951-1952).  
 Statutes in Eastern States regulating safety of dams through licensing and inspection: CONN. GEN. STAT. REV. §§ 25-110 to -119 (1958); IND. ANN. STAT. §§ 27-1801 to -1808 (Supp. 1966); IOWA CODE §§ 469.1-31 (1962). KY. REV. STAT. § 104.400 (1962); MD. ANN. CODE art. 96A, §§ 12-22 (1957); MASS. ANN. LAWS ch. 91, §§ 12, 12A (1954); MICH. STAT. ANN. §§ 11.421-425 (Supp. 1965); MINN. STAT. § 105.42 (1961); N.H. REV. STAT. ANN. §§ 482:3-15 (1955); N.J. REV. STAT. §§ 58.4-1 to -10 (1937); OHIO REV. CODE § 1521.06 (Baldwin 1964); PA. STAT. ANN. tit. 32, §§ 681-91 (1954); R.I. GEN. LAWS ANN. §§ 46-19-1 to -8 (1956); VT. STAT. ANN. tit. 10, §§ 701-18 (1959); W.VA. CODE ANN. § 5988 (1961); WIS. STAT. §§ 31.01-38 (1965).  
 Statutes in Eastern States regulating encroachments and obstructions of stream channels and floodways: CONN. GEN. STAT. REV. §§ 25-4a to -4g (Supp. 1966); ILL. ANN. STAT. ch. 19, §§ 70-78 (Smith-Hurd 1965); IND. ANN. STAT. §§ 27-1115 to -1123 (1960); IOWA CODE §§ 455A.33-39 (1962); KY. REV. STAT. § 104.400 (1963); MD. ANN. CODE art. 96A, §§ 12-22 (1957); MASS. ANN. LAWS ch. 91, §§ 12, 12A, (1954); N.J. REV. STAT. §§ 58:1-26, -27 (1937); PA. STAT. ANN. tit. 32, §§ 681-91 (1954); W.VA. CODE ANN. § 5988 (1961).  
 In addition to the Eastern legislation on the subjects covered by this chart, there are similar laws on all of these subjects in a number of Western states. As to surface water legislation, see HEATH, *Flood Damage Prevention in North Carolina*, N.C. DEP'T. OF WATER RESOURCES 68 (1963). As to ground water legislation, see Clark, *Ground Water Legislation in the Light of the Experience in the Western States*, 22 MONT. L. REV. 42 (1960).

supply sources by constructing reservoirs, managing ground water areas, and the like. New Jersey, matching its regulatory leadership, is perhaps the strongest example with two major reservoirs in North Jersey.<sup>4</sup> Other states with laws providing for similar programs include Illinois, New Hampshire, Ohio, Rhode Island, and most recently Kentucky.<sup>5</sup> West Virginia and Ohio have within the past five years authorized highway agencies to build slack water dams in connection with road fills.<sup>6</sup> In a different vein, Massachusetts and Rhode Island have recently created new agencies to search out and protect public access to water recreation areas.<sup>7</sup> Also, Wisconsin has designated two streams as "wild rivers" and Maine has very recently enacted legislation creating the Allagash Wilderness Waterway.<sup>8</sup>

#### DETAILED REVIEW OF SELECTED LAWS

##### Ground Water and Surface Streams: Strong Regulation

The strong water allocation laws are notable for their variety of emphasis and content. Notwithstanding some significant efforts to bring about a model or uniform approach in this area, the experience thus far is that local traditions, conditions and needs have been highly influential in shaping the response to pressures for water use regulation in the East.

Some patterns can be found in the new laws, however. Three principal types of allocation laws can be distinguished: a general compulsory permit system; compulsory permits for special problem areas; and machinery to authorize diversion in excess of established minimum flows or water levels. These alternatives can best be illustrated in terms of the laws of Iowa, New Jersey and Florida.

*First.* The most far-reaching scheme of regulation in the East has been adopted by the State of Iowa.<sup>9</sup> The Iowa

4. N.J. REV. STAT. §§ 58:20-1 to -8, 21-1 to -9 (Supp. 1955-1958).

5. ILL. ANN. STAT. ch. 19, §§ 126a-h (Smith-Hurd 1963); R.I. GEN. LAWS ANN. § 46-15-4 (1956); OHIO REV. CODE ANN. § 1523.01 (1964); N.H. REV. STAT. ANN. §§ 481:1-:24 (1955); N.H. REV. STAT. ANN. §§ 482A:1-3, 482B:1-:3 (Supp. 1965); Ky. Acts 1966, ch. 23, §§ 1-15.

6. OHIO REV. CODE ANN. §§ 1523.14-20 (Baldwin 1964); W.VA. CODE ANN. §§ 2312(25)-(32) (1961).

7. MASS. ANN. LAWS ch. 21, § 17 (1966); R.I. GEN. LAWS ANN. § 42-33-1 (Supp. 1965).

8. WIS. STAT. § 30.25 (1965); Maine Laws Spec. Sess. 1966, ch. 496.

9. IOWA CODE §§ 455A.1-39 (1962).

law establishes a *general permit system*. Subject to certain exemptions, it requires that all substantial diversions, storage or withdrawals of water from streams or ground water basins be covered by permits from the state's Natural Resources Council. (Exempt categories include household uses, stock watering, very small withdrawals, existing uses within municipalities, and certain uses from boundary rivers. Some protection, the effect of which cannot be simply stated, is also provided for vested rights. Most areas served by municipal systems, and industrial self-suppliers within city limits, were initially exempted but made subject to future coverage under a provision requiring permits when the usage is increased by more than three per cent.) The principal standards for testing permit applications are beneficial use and compatibility with a comprehensive state water plan. Permits may be denied also if the proposed use would affect the "protected flow" (the established average minimum flow of a watercourse). Savings clauses were provided for navigability and pollution control laws. Permits under the Iowa law may be granted for renewable terms of no longer than ten years.

General permit systems of the Iowa-type are in force also in Minnesota, for both ground water and surface streams, and in Mississippi for surface streams only.<sup>10</sup> The Mississippi and Minnesota laws, while similar to the Iowa legislation, are by no means identical to it. The Mississippi statute permits appropriations to be made only in excess of computed minimum average stream flows. The Minnesota law exempts, among other things, all uses outside of municipalities prior to 1937 and all uses within municipalities prior to 1959. A number of the detailed provisions of the Iowa law are not paralleled in either the Mississippi or Minnesota laws—by way of illustration, the Iowa provisions restricting permits to a term of years and requiring permits to be compatible with a state water plan.

Maryland and quite recently Kentucky have also enacted general permit legislation of the Iowa-type.<sup>11</sup> Both of these laws, though, are considerably diluted by exemptions. (Despite

10. MINN. STAT. §§ 105.41, 105.44-47 (1961); MISS. CODE ANN. §§ 5956-01 to -34 (Supp. 1964).

11. MD. ANN. CODE art. 96A, § 10, 11 (1957); Ky. Acts 1966, ch. 23, §§ 16-25.



its broad exemptions, the Kentucky statute in particular appears to be one of the more carefully drafted and well-considered general permit laws that have been enacted.) The Maryland act exempts domestic, farming, municipal and pre-existing uses; while the Kentucky act exempts agricultural, domestic and industrial uses.

*Second.* A different sort of compulsory *permit system geared to the needs of problem areas* has been adopted by New Jersey.<sup>12</sup> Applicable both to surface streams and underground waters, New Jersey's law requires permits for those who divert or obtain substantial amounts of water in areas delineated by the Water Policy and Supply Council—areas where consumptive surface water diversions require regulation in the interest of residents of the watershed, or where ground water diversions exceed or threaten to exceed natural replenishment. The minimum diversion subject to regulation is 100,000 gpd of ground water or 70 gpm (approximately 100,000 gpd) of surface water. The ground water law exempts pre-existing diversions, while the surface water law exempts public water supplies and gives priority to pre-existing diversions. A 25-year maximum term is prescribed for surface water permits, which may be issued only for diversions in excess of low flows (average minimum daily flows).

Indiana has enacted legislation quite similar to New Jersey's, providing for regulation of large ground water diversions in problem areas.<sup>13</sup>

*Third.* Still another emphasis is reflected by Florida's water management laws.<sup>14</sup> Rather than providing for compulsory permits as a tool of state control of water resources, Florida provides *machinery to authorize diversions of water in local areas*. The Florida law empowers the State Board of Conservation to authorize diversion of surface waters from riparian lands and of ground waters from overlying land. Diversions are permissible only in excess of average minimum stream flows, lake levels, or ground water elevations; and

12. N.J. REV. STAT. §§ 58:1-35 to -50 (Supp. 1962-1964); N.J. REV. STAT. §§ 58:4A-1 to -4 (Supp. 1947).

13. IND. ANN. STAT. §§ 27-1301 to -1316 (1960).

14. FLA. STAT. §§ 373.072-.182 (1963).

they may not interfere with reasonable existing uses. The Board may delegate its authority to local water management districts.

The same underlying philosophy is applied in Wisconsin to surface water only.<sup>15</sup> Temporary diversions of "surplus waters" from lakes or streams are authorized, with Public Service Commission approval, for the purpose of restoring a lake level or maintaining stream flow. Non-surplus diversions for agricultural uses (including irrigation) may also be made with Public Service Commission approval.

A narrower version of this approach is reflected in an Indiana statute authorizing the diversion of flood waters of any watercourse with administrative approval.<sup>16</sup> Somewhat akin to this are laws adopted in several states which authorize landowners to impound streams or floodwaters of streams for various uses, so long as they maintain normal stream flows downstream. (Arkansas, Indiana, Kentucky, Virginia.)<sup>17</sup> A law encouraging development of "surplus waters" for riparian use has recently been adopted in Michigan (see *infra* p. 114).<sup>18</sup>

*Model Water Use Act.* No review of this subject would be complete without mention of the Model Water Use Act.<sup>19</sup> This model was drafted after extensive studies by the Legislative Research Center at the University of Michigan Law School. In 1958 it was approved as a model act by the National Conference of Commissioners on Uniform State Laws. It has been enacted by one state, Hawaii, in modified form affecting only ground water. An early draft of the Model is paralleled substantially by the Iowa legislation reviewed above.

The Model Act provides for a general compulsory permit system slightly more comprehensive in scope than the Iowa

---

15. WIS. STAT. § 30.18 (1965).

16. IND. ANN. STAT. § 27-1406 (1960).

17. ARK. STAT. ANN. §§ 21-1306, -1307 (Supp. 1965); IND. ANN. STAT. § 27-1403 (1960); Ky. Acts 1966, ch. 23, § 25; VA. CODE ANN. §§ 62-94.1-12 (Supp. 1966).

18. MICH. STAT. ANN. §§ 3.533(21)-(35) (Supp. 1965).

19. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 174-218 (1958).

legislation, and to be administered by a State Water Resource Commission. In brief, its principal provisions are as follows:

- (1) It provides for regulation under a permit system of all waters of the state subject to (a) exemptions only for domestic uses; and (b) preservation of the right to continue existing beneficial uses, uses in conjunction with pending construction, and uses made within three years prior to enactment—but preserved uses become subject to Commission determination unless declared within three years after enactment. Also, it provides that preserved uses may be extinguished because of non-use for a specified period of years.
- (2) It vests special allocation powers in the Commission to deal with water-short problem areas (comparable to the New Jersey law) and emergency situations.
- (3) It allows the Commission to establish classes of permits and to exempt small uses.
- (4) It limits the maximum permit term to 50 years.
- (5) It specifies as standards for evaluating permit applications: beneficial use; availability of water; no impairment of the most beneficial use of waters in question by the permit; and no substantial interference with preserved or domestic uses.
- (6) It allows permits to be issued without regard to any common law limitations on use within natural watersheds, use upon riparian land, etc.
- (7) It contains a series of policy declarations concerning beneficial use, conservation, pollution, etc.
- (8) It contains optional provisions: (a) giving water pollution control powers to the Commission; (b) providing for development of a comprehensive plan for most beneficial use of waters; (c) allowing pre-emption of low preference uses by more beneficial uses, on payment of compensation; and (d) empowering the Commission to protect stream flows and lake levels.

The Model Act is a carefully drafted distillation of the water allocation legislation of many states, both Eastern and Western, and should be a helpful drafting aid for any new legislation that may be enacted on the subjects within its scope.

*Salt water intrusion.* One other statute should be mentioned under the heading of strong regulation: Florida's salt water intrusion law.<sup>20</sup> This law authorizes the State Board of Water Resources to establish salt water barrier lines in areas where intrusion has reached emergency proportions. Inland of this line no canal may be built or enlarged and no stream may be deepened or enlarged which discharges to tidal waters, without a dam or other control structure seaward of the barrier line.

#### Ground Water and Surface Streams: Other Legislation

Supplementing the examples of "strong regulation" noted in the preceding section, a review of several other recent laws, programs and proposals will fill out the picture of legislation concerning ground water and surface streams. Some of the instances covered here involve laws or programs common to several states, while others portray a cross section of an individual state's program.

*New York legislation and proposals.* The development of New York's still evolving water resource management laws presents an interesting and instructive story.<sup>21</sup> New York has been chipping away at the task of devising a viable set of water legislation since 1959. In that year it created a (still existing) Temporary Study Commission on Water Resource Planning, consolidated water management functions in a single Water Resources Commission, and established the framework for a regional water management planning program.

In the intervening years additional legislation has been enacted which, together with laws previously on the books, includes: regulation of large wells on Long Island; dam

20. FLA. STAT. § 373.194 (1963).

21. Temporary State Comm'n on Water Resources Planning, *Water Resources Management—a 6-Year Review of Progress and Proposals* (N.Y. LEG. DOC. No. 27, 1965).

safety regulation; permits for stream dredging and filling, and for rechanneling some streams; centralized control over planning of municipal and irrigation water supply projects to ensure safe construction, protection against contamination, and fairness to other affected municipalities; enabling legislation for river regulating and improvement districts, as well as for small watershed programs; and a major upgrading of the State's water pollution control program that will ultimately cost billions of dollars.

While these intermediate steps were being taken toward assembling a complete water management program, the Study Commission was considering further possibilities. Among these was a "surplus water" concept advocated by the State Soil Conservation Committee — a proposal to define stream flows in excess of average daily flows as belonging to the State, to be captured and developed for public rather than riparian needs. The Study Commission has flirted with this notion and may yet recommend its adoption. However, the Commission opened up a new avenue of approach in 1963 and 1964 by undertaking a re-evaluation of the issues in light of a particular watershed development proposal (Flint Creek), and by contracting with the Cornell Water Resources Center for consultant studies on legal, economic and technical aspects.

Under the supervision of Professor William Farnham, retired Cornell law teacher, a careful study of water rights law and administration is now under way. One product of this research has already been enacted, a provision that harmless interference with the natural condition of a natural watercourse or lake may not be enjoined.<sup>22</sup> (This legislation is designed to overcome a line of old cases holding to the contrary, and to bring New York law fully into conformity with the reasonable use version of the riparian doctrine.)

Proceeding methodically to deal with other technical deficiencies of New York riparian doctrines, the Cornell Center is also recommending new legislation along the following lines: (a) that only unreasonable harm caused to a

---

22. N.Y. CONSER. LAW § 429-j (Supp. 1966), as amended, N.Y. Sess. Laws 1966, ch. 598, § 1.

riparian owner by the addition of foreign water to a natural stream (for transportation in the stream channel) shall be considered actionable; (b) that the person for whom lawfully added foreign water is intended may withdraw it at any point of lawful access; and (c) that no riparian owner downstream from an impoundment may take more water from the stream than would naturally be available to him unless he contributes equitably to its construction and maintenance.

Another group of recommendations by the Center is designed to facilitate the financing of small watershed projects by sale of water shares in the project, entitling the shareholders to withdraw specified amounts of water annually. This arrangement was devised in response to the expressions of landowners along the Flint Creek project.

The Center is continuing its legal-economic-technical studies and has mapped out an ambitious plan for further analysis of the structure of existing law and of possible improvements.

*Arkansas legislation.* Arkansas is a good example of a state which has enacted legislation falling just short of the category of "strong regulation."

Under a 1957 law the Arkansas State Soil and Water Conservation Commission is empowered (a) to issue permits (maximum 50-year term) for construction of dams to store water for human consumption, domestic use, industrial use, and irrigation, conditioned upon continuous discharge of normal streamflow downstream; and (b) to ratably allocate available water during shortages among those affected, on its own motion or on petition, with preference to sustaining life, maintaining health and increasing wealth, in that order.<sup>23</sup> The former statute bears some resemblance to North Carolina's approach toward small watershed project supervision, while the latter resembles North Carolina's emergency allocation law.

Arkansas has also enacted controls over flowing artesian wells.

---

23. ARK. STAT. ANN. §§ 21-1301 to -1315 (Supp. 1965).

*Special treatment for a favored industry.* At least three states, Michigan, Minnesota and Wisconsin, have enacted laws singling out particular industries for special treatment.<sup>24</sup> Michigan authorizes its Water Resource Commission to grant permits for drainage, diversion, control and use of water in connection with low-grade ore mining installations, if the permits would not unreasonably impair the interest of the public or of riparian owners. The Minnesota statute, framed in similar terms, refers to iron ore mining or taconite (as does the Wisconsin statute). It also expressly grants eminent domain powers to taconite mining companies for land, easements and water rights.

A South Carolina special act mentioned earlier, authorizing a named paper company to 'divert 100 cfs of water from the Great Pee Dee River at a designated place, might be considered analogous to these Michigan, Minnesota and Wisconsin laws.<sup>25</sup>

*Lake level controls, laws favoring fisheries and recreation, etc.* Two of the Lake States, Michigan and Wisconsin, have enacted comprehensive legislation empowering administrative agencies or courts to determine normal levels of lakes and other public waters, and to regulate the fluctuation of those levels—as by fixing a level below which a lake may not be lowered.<sup>26</sup>

A related group of laws, somewhat narrower in scope, requires that water levels be maintained behind dams sufficiently high to preserve fish life, or that the permission of a fisheries agency must be obtained before draining off waters from reservoirs inhabited by fish (Illinois, Indiana, Pennsylvania).<sup>27</sup> One step removed are laws requiring that notice be given to fisheries agencies in advance of drawdowns (Massachusetts, New Hampshire).<sup>28</sup>

24. MINN. STAT. §§ 105.64, 117.471 (1961); MICH. STAT. ANN. §§ 13.145(1)-(8) (Supp. 1966); WIS. STAT. §§ 107.05(1)-(10) (1965).

25. S.C. CODE ANN. §§ 70-481, -482 (1962).

26. MICH. STAT. ANN. §§ 11.300(1)-(26) (Supp. 1965); MINN. STAT. §§ 110.31-.39, 111.65-.79 (1965).

27. ILL. ANN. STAT. ch. 19, § 70 (Smith-Hurd 1963); PA. STAT. ANN. tit. 30, § 191 (1958); IND. ANN. STAT. § 11-1101 (1956).

28. MASS. ANN. LAWS ch. 91, § 19A (Supp. 1965); MASS. ANN. LAWS ch. 131, § 117A (1965); N.H. REV. STAT. ANN. § 211.11 (1964).

Other water use legislation designed to protect fish life includes Indiana and Louisiana laws requiring screens or other devices for large pumps in order to avoid destroying fish life; and a Connecticut law authorizing its wildlife agency to regulate sand and gravel dredging in the interest of fish and game protection and recreational use.<sup>29</sup> New York has a somewhat broader law requiring that permits be obtained from its Water Resources Commission in order to remove sand and gravel from stream beds, or to change the course of a stream classified AA to C, or to make excavations or fills in navigable waters.<sup>30</sup> Standards under this New York law include protection of public health, safety or welfare, and protection against loss or destruction of natural resources.

A great deal of legislation is on the statute books which establishes anti-pollution safeguards for fish and wildlife, North Carolina's "fishkill law" being a good example.<sup>31</sup> This legislation will not be reviewed here, however, since the scope of this article excludes water *quality* management.

*Miscellaneous.* In concluding this section on ground water and surface streams, we note briefly several other recent laws which we believe merit special mention:

- (1) Florida has earmarked funds from public roads revenues and other sources for annual contributions to an *expanded topographic mapping program*.<sup>32</sup>
- (2) Indiana has empowered its water resource agency to provide *voluntary mediation services* in connection with surface water disputes.<sup>33</sup> Minnesota has related legislation providing for *referral of water policy questions* pending before state agencies and courts to its water resource agency for findings and recommendations.<sup>34</sup>
- (3) New Jersey has established a continuing interim study committee to provide *watchdog service to its legislature*, to keep the legislature informed of pending investigations and studies.<sup>35</sup>

29. LA. REV. STAT. § 56:361 (1950); CONN. GEN. STAT. § 25-10 (1958); IND. ANN. STAT. § 11-1111 (1956).

30. N.Y. CONSERV. LAW §§ 429-a to -f (Supp. 1965).

31. N.C. GEN. STAT. § 143-215.3(a) (7) (1964).

32. FLA. STAT. § 373.012 (1963).

33. IND. ANN. STAT. § 27-1406 (1960).

34. MINN. STAT. §§ 105.72-79 (1961).

35. N.J. REV. STAT. §§ 58:23-1 to -10 (Supp. 1955-1958).



- (4) Pennsylvania requires that *water rights acquisitions by local water supply agencies be approved* by its State water agency as a condition to condemnation of water rights.<sup>36</sup>
- (5) New Jersey requires that *payments be made to the State for diverted waters* to be used for public water supply, industrial uses and other uses.<sup>37</sup>
- (6) Michigan has recently empowered its Water Resources Commission upon local requests to make surveys for possible *surplus waters* available for impoundment and use. If surpluses above "optimum flows" are found to exist local entities may develop the surplus waters for nonconsumptive uses to all riparians, charging back the costs to users.<sup>38</sup>
- (7) Two proposals recommended during the mid-'50's drought for consideration by Southeastern states should be mentioned: (a) an *extension of eminent domain powers* to permit broader use of surface waters by non-riparians or greater security for riparian rights; and (b) an *extension of the reasonable use doctrine*, along lines suggested by the Restatement of Torts, to sanction any reasonable water uses for riparian or non-riparian purposes, and to make riparian rights freely transferable to non-riparian owners.<sup>39</sup>

### Diffused Surface Water

Most of the Eastern states which have actually enacted legislation concerning the use of diffused surface waters have elected to confirm the common law rule of absolute ownership. That is, they have provided by statute (with some variations) that the owner of land on which such water flows or falls has the unrestricted right to its use. (Arkansas, Indiana, Iowa, Kentucky, Virginia.<sup>40</sup>)

---

36. PA. STAT. ANN. tit. 32, §§ 631-41 (1949).

37. N.J. REV. STAT. §§ 58:2-1 to -5 (1937).

38. MICH. STAT. ANN. §§ 3.533(21)-(35) (Supp. 1965).

39. Marquis, Freeman & Heath, *The Movement for New Water Rights Laws in the Tennessee Valley States*, 23 TENN. L. REV. 797, 833 (1955).

40. ARK. STAT. ANN. § 21-1310 (Supp. 1965); IND. ANN. STAT. ch. 27, § 1402 (Smith-Hurd 1960); IOWA CODE § 455A.27 (1962); VA. CODE ANN. § 62-94.2 (Supp. 1966); Ky. Acts 1966, ch. 23, § 16, amending, KY. REV. STAT. § 262.680 (1962).

While these enactments have largely favored the absolute ownership rule, some recent proposals lean toward other solutions. The Model Water Use Act prohibits the impounding or collection of 'diffused surface waters in substantial quantities without securing a permit from the State. In explanation of this provision, the comments accompanying the Model Act state:

In order to secure intelligent management of the uses of the waters of the state and to avoid interference with these uses when made in accordance with the Act, it is necessary for the Commission to have power over all water resources which reasonably could cause interference with uses sanctioned by the Act. This section recognizes the scientifically established fact that all waters whether above, upon, or beneath the earth are part of one hydrological cycle and that an interference with one phase of the cycle affects other phases.<sup>41</sup>

(Notwithstanding the literal terms of the Model Act, its principal author has been quoted as saying that it was not intended to apply to farm ponds but only to large uses of water.)<sup>42</sup>

Other commentators have suggested that riparian rights and rights to use diffused surface waters ought to be correlated by allowing landowners to make only reasonable uses of diffused waters while on their land. Suggestions to this effect were made over 20 years ago by Hutchins and the Natural Resources Planning Board.<sup>43</sup> More recently Professor William Dolson has also advocated this point of view, at least as to large surface water users.<sup>44</sup> (Exemption of small uses from regulation is almost universally accepted by the proponents of new legislation concerning diffused surface waters.)

The Cornell University Water Resources Center, principal consultant of the Temporary State Commission on Water Resources Planning in New York, has intimated that

---

41. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 204 (1958).

42. Dolson, *Diffused Surface Water and Riparian Rights: Legal Doctrines in Conflict*, 1966 WIS. L. REV. 58, 113 n.231.

43. *Id.* at 114, 115.

44. *Id.* at 114-20.

it would probably favor prohibiting harmful and unreasonable interferences with surface waters which would normally feed a stream. However, the Center intends to study the law as to the use of surface water more extensively before making definitive recommendations in the area.<sup>45</sup>

In recapitulation, two divergent points should be re-emphasized. *First*, the existing legislation concerning use of diffused surface water almost without exception codifies the common law rule of absolute ownership. *Second*, nonetheless, most of the recent published expressions of experts and advisory groups appears to favor statutory modification of the common law doctrine—either by subjecting it to a rule of reason or by making diffused waters subject to permit-type regulation with exemption of small uses.

#### CONCLUSION

No purpose would be served by attempting to summarize here this very brief review of Eastern water legislation. The Western practitioner will have readily recognized these Eastern primitives of a far more sophisticated Western aquaculture. Hopefully the East, as it moves toward more intensive management of water sources, will profit by the wealth of Western experience with legislative control over water use.

---

45. Temporary State Comm'n on Water Resources Planning, *Water Resources Management—a 6-Year Review of Progress and Proposals* 243-49 (N.Y. LEG. Doc. No. 27, 1965).