

## A Compensation Fund Proposal

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The concept of creating a fund to compensate the Commonwealth of Pennsylvania for damages caused by the permitting of various activities that either consume or degrade water resources has been discussed for decades. However, little proactive effort has been made on the statutory, regulatory or policy fronts to construct a mechanism to estimate these damages and require those that exploit these resources to make the Commonwealth whole. In other words, the environmental and economic harm that is caused by the withdrawal of water resources for various consumptive uses or the degradation of water as part of the permitting of municipal and industrial discharges is endured by all of the citizens of Pennsylvania and our natural resources without just compensation. There are examples where the exploitation of other Commonwealth-owned resources are considered in either Pennsylvania law or regulation (Act No. 225, P.L. 177 as amended July 1970 (Attachment A) and 25 PA Code Chapter 105) which require just compensation. This includes the royalties paid to the PA Department of Environmental Protection (DEP) and the PA Fish & Boat Commission (PFBC) for the dredging of Commonwealth-owned sand and gravel in the riverbed of the Allegheny and Ohio Rivers in southwestern PA and the timber, coal, limestone, and oil and gas revenues received by the Commonwealth agencies that manage the lands that contain these valuable commodities. The purpose of this review is to examine the problem and propose a strategy for establishing a compensation fund which would provide a revenue source to be used by the agencies responsible for managing water resources (DEP) and aquatic natural resources (PFBC) so that these resources can be better protected and damages caused by these activities can be mitigated.

### **1) The Pennsylvania Constitution**

Article 1. Declaration of Rights of the Pennsylvania Constitution states “That the general, great and essential principles of liberty and free government may be recognized and unalterably established, WE DECLARE THAT – “.....

Natural Resources and the Public Estate  
Section 27

“The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all of the people.” (Attachment 1)

Article 1. Section 27 of our Constitution charges us, as trustees of the water and natural resources it supports, with the duty to conserve and maintain them for the benefit of all of the people. Therefore, permitting the consumptive use and degradation of these resources without just compensation or mitigation is not consistent with the explicit intent of the Pennsylvania Constitution.

Additionally Article III. Legislation discusses Compensation Laws Allowed to the General Assembly in Section 18. and although the intent appears to be for workers compensation, there may be some relevance for injuries to person or property. Although the legislature has the ability to pass laws independent of specific constitutional guidance, it would be interesting if we could also make a case under this provision. This would require some legal review and opinion.

## 2) **The Pennsylvania Statutes**

### *The Clean Streams Law* (Attachment 2)

The Clean Streams Law (CSL) is an act designed “To preserve and improve the purity of the waters of the Commonwealth for the protection of public health, animal and aquatic life, and for industrial consumption, and recreation; empowering and directing the creation of indebtedness or the issuing of non-debt revenue bonds by political subdivisions to provide works to abate pollution; providing protection of water supply and water quality; providing for the jurisdiction of courts in the enforcement thereof; providing additional remedies for abating pollution of waters; imposing certain penalties; repealing certain acts; regulating discharges of sewage and industrial wastes; regulating the operation of mines and regulating the impact of mining upon water quality, supply and quantity; placing responsibilities upon landowners and land occupiers and to maintain primary jurisdiction over surface coal mining in Pennsylvania.” (Tit. amended Oct. 10, 1980, P.L.894, No.157)

Although the CSL provides for the protection of public health, animal and aquatic life in addition to water supply and water quality, contains provisions for enforcement and imposing penalties for polluting and remedies for abating pollution, it does not contain specific language for compensating for the damages that are incurred as the result of the degradation of water resources. Controlling and regulating pollution is different than providing compensation for degradation. DEP’s permitting procedures are based upon the premise that waters may be degraded below their existing water quality but may be polluted which is commonly defined as exceeding established thresholds for protecting sensitive uses such as aquatic life and water supply. The various DEP regulatory programs are designed accordingly and actually permit various levels of degradation through water withdrawals or industrial and municipal discharges of treated wastewater.

***The Hazardous Sites Cleanup Act*** (Attachment 3)

The Hazardous Sites Cleanup Act (HSCA) passed by the PA General Assembly in 1988 finds and declares that “the citizens of this Commonwealth have a right to clean water and a healthy environment, and the General Assembly has a responsibility to ensure the protection of that right.” The statute contains various provisions related to the release, cleanup and restoration of sites contaminated by hazardous substances that “pose a real and substantial threat to the public health and welfare of the residents of this Commonwealth and to the natural resources upon which they rely.” Most relevant to this discussion are the provisions in Section 507 (a) which assign liability to the person responsible for the release of the hazardous substance “for response costs and for damages to natural resources. The department (DEP), a Commonwealth agency, or a municipality which undertakes to abate a public nuisance under this act or take a response action may recover those response costs and natural resource damages in an action in equity brought before a court of competent jurisdiction.” This provision is one of the only provisions in Pennsylvania environmental law that provides for the recovery of actual damages to natural resources. It is modeled after the federal Superfund law (CERCLA) and is one of the more recent state laws that recognizes the need for equitable compensation for losses to natural resources.

***The Fish and Boat Code*** (Title 30- 1980)

The Fish and Boat Code (FBC) contains a provision in Section 2506 that provides for the recovery in civil suit of damages to fish as they are broadly defined in the Code.

**§ 2506. Commonwealth actions for damage to fish.**

**(a) Declaration of policy.**--The Commonwealth has sufficient interest in fish living in a free state to give it standing, through its authorized agencies, to recover damages in a civil action against any person who kills any fish or who injures any streams or streambeds by pollution or littering. The proprietary ownership, jurisdiction and control of fish, living free in nature, are vested in this Commonwealth by virtue of the continued expenditure of its funds and its efforts to protect, perpetuate, propagate and maintain the fish population as a renewable natural resource of this Commonwealth.

**(b) General rule.**--The commission, as an agency of the Commonwealth authorized to regulate, control, manage and perpetuate fish may, in addition to criminal penalties provided in this title, bring civil suits in trespass on behalf of the Commonwealth for the value of any fish killed or any stream or streambed destroyed or injured in violation of this chapter. In

determining the value of fish killed, the commission may consider all factors that give value to such fish. These factors may include, but need not be limited to, the commercial resale value, the replacement costs or the recreational value of angling for the fish killed. In addition, the commission is entitled to recover the costs of gathering the evidence, including expert testimony, in any civil suit brought under this section where the defendant is found otherwise liable for damages.

However, Section 2506 is dependent upon a violation of other provisions in Chapter 25. Specifically, Section 2502. Disturbance of Waterways and Watersheds, Section 2503. Littering or Section 2504. Pollution of Waters.

**§ 2502. Disturbance of waterways and watersheds.**

(a) **General rule.**--No person shall alter or disturb any stream, stream bed, fish habitat, water or watershed in any manner that might cause damage to, or loss of, fish without the necessary permits.

(b) **Penalty.**--Any person violating the provisions of this section commits a misdemeanor of the third degree.

**§ 2503. Littering.**

(a) **General rule.**--It is unlawful for any person to throw, discard, leave, emit, deposit or allow the depositing of any garbage, bottles, cans, rubbish, wire, glass, paper, cardboard or wooden boxes or cartons or any other type of debris, trash or other thing or substance in or along any waters or on any lands adjacent or contiguous to waters or in such manner that the thing or substance deposited flows into or is carried by wind into such waters or lands.

(b) **Evidence.**--In prosecutions for violations of this section the operator of a motor vehicle or watercraft shall be deemed to have allowed the depositing of any thing or substance thrown, discarded, emitted or deposited from such motor vehicle or watercraft.

(c) **Penalty.**--Any person who deposits or otherwise disposes of a thing or substance in violation of this section which causes or may cause damage to, or destruction of, fish commits a summary offense of the first degree. Any person who transports household refuse or garbage from another location and disposes of it by leaving it on lands or waters open to fishing or boating commits a summary offense of the second degree. Any person who otherwise violates this section commits a summary

offense of the third degree. In addition to the penalties set forth in section 923 (relating to classification of offenses and penalties), an additional penalty of \$10 for each item or piece of litter thrown, discarded, left, emitted or deposited in violation of this section may be imposed on any person who is convicted or acknowledges guilt of a violation of this section. (Dec. 22, 1989, P.L.735, No.102, eff. Jan. 1, 1990)

**§ 2504. Pollution of waters.**

**(a) General rule.**--No person, regardless of intent, shall:

(1) Put or place in any waters within or on the boundaries of this Commonwealth any electricity, explosives or any poisonous substances except that, for the purposes of research and fish management, agents of or persons authorized by the executive director may use any method or means to collect, eradicate or control fish.

(2) Allow any substance, deleterious, destructive or poisonous to fish, to be turned into or allowed to run, flow, wash or be emptied into any waters within or bordering on this Commonwealth.

**(b) Evidence.**--In criminal prosecutions under this section for water pollution known to be injurious to fish, it is not necessary to prove that the violation has actually caused the death of, or damage to, any particular fish.

**(c) Construction of section.**--This section does not repeal or supersede any of the provisions of the act of June 22, 1937 (P.L.1987, No.394), known as "The Clean Streams Law."

**(d) Penalty.**--Any person violating the provisions of this section commits a misdemeanor of the third degree.

The Fish and Boat Code is a criminal statute and by design is reactive to punish violators for doing something wrong. Although it contains civil damage recovery procedures, they must be triggered by a violation of a criminal provision. The pollution, littering and disturbance sections do not give the PFBC the authority to recover damages that result from water withdrawals or discharges of substances that do not cause or might cause damage to aquatic life especially when these activities are permitted by DEP.

***The Water Rights Act of 1939*** (Attachment 3a)

The Water Rights Act provides a process for the acquisition of water rights by a public water supply company through the application and subsequent permitting consistent with a public interest review. The Act originally placed the authority with the Water and Power Resources Board and it is now vested in the DEP.

***Water Resources Planning—Act 220 (27 Pa. Cons. Stat. Chapter 31)*** (Attachment 3b)

Act 220 requires that DEP to prepare and adopt a State Water Plan within 5 years (March 16, 2008) of the effective date of the Chapter. Obviously this date has passed but DEP has received an extension from the legislature and has prepared a draft plan that is expected to be finalized early in 2009. The PFBC is a member of the statewide committee and actively participates in the discussion with regard to the plan. However, Act 220 is similar to other Commonwealth environmental statutes in that it assigns certain powers and duties that involve registration, reporting, enforcement and civil remedies that allow for regulating water withdrawals within the Commonwealth and bringing suit to “restrain and abate violations”, but contains no language to address compensation for consumptive uses. Should such language exist, the Basin Commission Compacts would defer this judgment to the Commonwealth which has authority over this issue and has a constitutional duty as trustee of these resources to insure their protection. The Act does contain a provision for abatement of public nuisances (§ 3134 (a)) which provides the opportunity for “equity for abatement of public nuisances” and recovery of “reasonable expenses” from the violator. A copy of DEP permit fees is also included in Attachment 3c. Weston and Burcat (1990) provided an analysis of Pennsylvania Water Law which is summarized and updated in Attachment 3c.

Other Pennsylvania Environmental Laws such as the Surface Mining Conservation and Reclamation Act, the Oil and Gas Act, and the Dam Safety and Encroachments Act contain water quality, quantity and fish and wildlife protection provisions to various degrees but none contain the necessary language to compensate the Commonwealth for the degradation that they allow through the permitting of water withdrawals or the discharge of industrial or municipal wastewater.

**3) Pennsylvania Regulations**

I did not attempt to do an exhaustive review of Pennsylvania environmental regulations because the guiding laws do not provide for the powers and authorities to recover compensation for the types of damage that is the focus of this review.

**4) Basin Commissions**

***Susquehanna River Basin Commission***

The Susquehanna River Basin Commission (SRBC) was created in a compact among the states of Maryland, New York, Pennsylvania and the United States government which was signed into law on December 24, 1970 (*Public Law 91-575, 84 Stat. 1509 et seq.*) The Susquehanna River Basin Compact was also adopted by the legislatures of the respective states and assigns the Commission the responsibility to coordinate the water

resources efforts of the three states and the federal government. An overview of the SRBC is included in Attachment 5 and the Compact is included in Attachment 6. The Governor's of the states are members of the Commission and Pennsylvania's delegate is the Secretary of DEP or their designee. The current administration's representative is DEP Deputy Secretary for Water, Cathy Curran Myers. The Commission meets periodically to act on applications for projects using water in the basin, adopt regulations, and direct planning and management activities affecting the basin's water resources. The Commission's Project Fee Schedule for 2009 is included in Attachment 4 and contains the various application fees required for various water use projects that the Commission regulates. The Commission's regulations are provided in Attachment 7 and explained in § 801.6 (b) for water supply that "The Commission may regulate the withdrawal of waters of the basin not regulated by the signatory parties for domestic, municipal, industrial, and agricultural uses if regulation is considered essential to further the aims set forth in the comprehensive plan." Furthermore, in § 801. 7(a) for water quality that "The signatory states have the primary responsibility in the basin for water quality management and control." The Memorandum of Understanding between PA DEP and SRBC signed in 1999 and an Information Sheet explaining the SRBC permitting process are included in Attachment 8.

The SRBC has been very active in developing regulations and policies that deal with water withdrawals in the basin consistent with their authorities vested within the Compact. However, their regulations explain that the states have the primary regulatory authority for these issues if they choose to exercise it consistent with the direction provided in law by their General Assemblies. Currently, although the Commission requires the payment of a "Consumptive Use Mitigation Fee", it is not designed to compensate for local impacts to aquatic life but is used to find replacement storage in the basin.

### ***Delaware River Basin Commission***

The Delaware River Basin Commission (DRBC) was created in 1961 by compact among the states of Delaware, New Jersey, Pennsylvania, New York and the United States of America. The Delaware River Basin Compact was also adopted by the legislatures of the respective states and assigns the Commission the responsibility "to encourage and provide for the planning, conservation, utilization, development, management and control of the water resources of the basin." It also recognizes that "the water resources of the basin are the sovereign right and responsibility of the signatory parties, and it is the purpose of this compact to provide for a joint exercise of such powers of sovereignty in the common interests of the people of the region." A copy of the original compact is included in Attachment 11. The compact gives the Commission the authority in § 3.7 to set rates and charges for "... products and services rendered thereby.." so a copy of the current allocation and project review fee is included in Attachment 9 and the regulations that apply to setting water supply charges are in Attachment 10.

Article 10 of the Compact deals with water withdrawals and provides the authority for the Commission to designate “protected areas”, issue withdrawal permits and set standards to insure receiving stream uses are protected. No mention is made of mitigating damages due to withdrawals that may injure a receiving water. The DRBC, unlike the SRBC, also takes an active regulatory role with respect to pollution control as provided for in Article 5 of the compact. It develops water quality standards for the basin which are incorporated by reference in the Commonwealth’s water Quality Standards in 25 Pa Code Chapter 93. The Delaware River Basin Water Code (18 CFR Part 410) is included in Attachment 12 and the Water Quality Regulations (18 CFR Part 410) are in Attachment 13.

#### **4) Summary**

Based upon this review of existing law, regulation and policy and the author’s general understanding of the various environmental regulatory programs that exist in Pennsylvania, there is an obvious need for the Commonwealth to seek compensation for the damages that are occurring due to the consumptive use of water being withdrawn from a variety of sources. The new demands being placed upon streams and rivers from the escalating natural gas development in the Marcellus Shale formation highlights the importance of water in today’s society. Most of our current laws were developed in times when we were most concerned about controlling water pollution to prevent fish kills and provide suitable water quality conditions to allow fish to return to our waters. These laws worked as envisioned by their creators and we now have a Delaware River where fish freely migrate upstream and downstream and do not get blocked because of a dissolved oxygen barrier caused by the discharge of raw sewage entering the river near Philadelphia. The same can be said for the Monongahela, Allegheny and Ohio Rivers which didn’t freeze in the winter due to chemical and thermal pollution. We are now at a time when the demand for water from our eastern rivers is similar to the fights that were fought on our western rivers that caused the western water law to be written to define the rights of fish and people to water (SFI Bulletin 1991) (Attachment 14). It should be obvious that Pennsylvania law either needs to be re-written to provide the necessary updates to control this increasing demand or new laws need to be created to do the same.

The same holds true for compensating for the degradation that occurs on every National Pollutant Discharge Elimination System (NPDES) permit that is issued by the DEP. Although current law allows for this degradation and permits are designed only to prevent pollution as our current laws are written, billions of gallons of treated wastewater are discharged every day from industrial and municipal sources that degrade the existing quality of receiving streams. These discharges reduce a stream’s ability to dilute and assimilate other unregulated pollutants such as non-point source pollution, acid rain and even the effects of climate change. This natural pollutant abatement capacity provided by nature’s ability to dilute and assimilate the effects of pollution should be reserved for treatment of these other environmental insults so that biological communities are not impaired. As importantly, this degradation must also be treated downstream by water



supply companies that withdraw water for public water supply use. This additional treatment of upstream-degraded water places an additional cost on the water suppliers which is then passed on to the general public.

#### **4) Recommendation**

I submit that the time is right to pursue additional legislation for these injuries. The escalating Marcellus Shale gas development and the public and legislative concerns are central to the timing of this legislative initiative. Large volumes of water are not only being withdrawn for the development and fracing of these wells but the stimulation fluids and produced waters that are returned to the surface need to be treated and discharged.

I recommend that this legislation be immediately labeled a compensation or mitigation fund so that opponents that will most likely call it a tax or fee can be advised quickly about why it isn't and how it will be assessed and spent.

Obviously, this concept requires the full support of DEP since they would be the vehicle to assess the compensation fee as part of their water withdrawal and NPDES permitting programs and then collect the funds to be allocated for various uses. The PFBC should be a major player since we have the jurisdictional responsibility for the aquatic life that are exposed to the degraded water from the treated discharges and suffer the consequences of less water when DEP permits the withdrawals. As I pointed out in my review, there should also be compensation to the water suppliers that accrue additional costs of treating water because of the additional permitted degradation. This would hopefully get their support for the legislation.

Perhaps the initial attempt should be for only industrial water users and industrial dischargers since additional costs to municipalities would most likely cause negative feedback and would not be publicly popular. That's not to say that it will be popular with industry but they will see it as a cost to pass on to the consumer. I tried to get an estimate of the volume of treated wastewater from industrial and municipal users in the Commonwealth from DEP staff but no luck so far. We are literally talking about billions of gallons of water and perhaps a one to 5 cent per gallon/gpm charge may be all we need for both withdrawals and dischargers. I also foresee that if this is based on design flows rather than actual discharge flows, we will have applicants being more conservative about what they ask DEP to permit if that is the basis for the fee.

In terms of legislative strategy, I would recommend a separate piece of legislation instead of commingling with our license bill increase. Given the complexity of the approach, a separate law would be a better idea in my opinion and then we could bring in other partners with similar interests especially if we diversify how the funding will be allocated. Alternatively, we could look at individual laws such as the Clean Streams Law for NPDES permits and for also water withdrawals. DEP legal staff have concluded that DEP can regulate withdrawals under the existing authority of the CSL on a statewide basis

for controlling impacts to receiving streams and water supplies. Amending existing law with appropriate language for just compensation may be more acceptable than creating new law. However, anytime an existing law is re-opened for change, there could be opposing interests that add language that would weaken environmental protection standards.

**5) Literature Cited**

Sport Fishing Institute Bulletin. 1991. Fisheries: The Neglected Component in Water Allocation, ISSN: 0085-6592, SFI, Washington D.C.

Weston, R.T. and J.R. Burcat. 1990. Legal Aspects of Pennsylvania Water Management , Water Resources in Pennsylvania: Availability, Quality and Management.