

PENNSYLVANIA'S STATE WATER PLAN: WHAT NOW?

An Environmental Law Institute Issue Paper

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On March 26, 2009, the Pennsylvania Department of Environmental Protection and Statewide Water Resources Committee unveiled the Commonwealth's State Water Plan.²

The Plan, resulting from the Water Resources Planning Act (Act 220 of 2002),³ sets a new course for Pennsylvania's management of its water resources. It replaces an earlier, and long-neglected, plan prepared in 1975 and last updated in 1983.

According to Act 220, the State Water Plan will be used to:

- identify and prioritize water resource and water supply development projects,
- guide efficient investment and economic development,
- improve operation of existing water resources infrastructure,
- guide the development and implementation of policies and programs to reduce flood risk, water shortages, and conflicts between water uses,
- guide policies on activities that directly and significantly affect the quantity and quality of water available, and
- educate government officials and the public.⁴

The State Water Plan is intended to “serve as a policy and guidance document, providing information, objectives, priorities and recommendation to be considered and weighed in a broad range of state, local and private decisions.”⁵

What is in the Plan?

The Plan sets three statewide priorities:

- (1) to continue to collect, interpret, and disseminate **water resources information** in the future;
- (2) to encourage and sustain an “**integrated approach**” to managing **water resources**; and
- (3) to adopt policies that encourage **technological advances to conserve and enhance water resources**.

The Plan also includes regional basin priorities for different parts of Pennsylvania, developed by multi-stakeholder committees who worked for years to develop priorities and action plans.

The Plan makes recommendations for actions in nine areas:⁶

- (1) Implement “integrated water resources management” through an improved policy framework and incentives;
- (2) improve water conservation and efficiency through technological improvements and information;
- (3) develop a legal framework for water withdrawal and use management;⁷
- (4) reduce water pollution and improve water quality;
- (5) assess navigation needs and restore, develop, and improve transportation by water;
- (6) improve floodplain and stormwater management;
- (7) support water supply assessments and identification of alternatives to satisfy existing and future reasonable and beneficial uses of water, emphasizing “water resource protection” and “options having a reduced potential for altering the environment;”
- (8) designate critical water planning areas within Pennsylvania where existing or future demands exceed or threaten to exceed the safe yield of available water resources, and develop critical area resource plans for those planning areas.
- (9) consider the recommendations of Pennsylvania’s Sustainable Water Infrastructure Task Force for drinking water and sewage infrastructure management, facilities, and operations.

Many of the recommendations contemplate gradual implementation, some looking toward the 2013 update of the Plan. Some recommendations anticipate possible future legislative changes to Pennsylvania’s laws and policies.

What now for the Department of Environmental Protection?

The Plan says that the “DEP, with assistance from other state agencies, [interstate] compact basin commission representatives and local government representatives, should develop a **framework that links water resources planning elements** from the State Water Plan, and programs such as Sewage Facilities Planning, Stormwater Management Planning, Source Water Protection Planning, Water Supply and Wastewater Planning, Flood Control Planning, and the Watershed Restoration and Protection Program.”⁸ This framework needs to be developed if the Plan is to have serious influence on all of these water-related programs. This linkage is also essential to support the development of cost-effective incentives for efficient water management, including funding from DCNR, DCED, PENNVEST, and other portions of state government.

The Plan also directs DEP to “implement trial **integrated water resources plans using the Stormwater Management Planning program** in cooperation with willing counties/multi-county areas.”⁹ DEP has undertaken some cooperative integrated water resources efforts, building on modest efforts in Erie County,¹⁰ planning work in Chester, Montgomery and Bucks Counties dealing with watershed improvements,¹¹ and York County’s effort to link integrated water resources efforts to existing plans.¹² Most of this work has been supported by federal or local dollars.

DEP is also responsible for coordinating the **designation of the critical water planning areas** following recommendations of the Statewide Act 200 Committee. On November 18, 2010, the Statewide Committee voted to recommend that DEP designate three watersheds as “Critical Water Planning Areas”¹³ for the subsequent development and implementation of a critical area resource plan. These watersheds were given this designation by DEP on January 7, 2011.¹⁴

Laurel Hill Creek (Ohio River Basin)
Back Creek (Ohio River Basin)
Marsh Creek and Rock Creek (Potomac River Basin)

The Statewide Committee also determined that several watersheds deserve continuing review and should be placed on a “watch list” for potential future designation. Further consultation will occur with the respective regional committees and the Department will report back to the Statewide Committee concerning conditions and activities in those watersheds during 2011:

Little Lehigh Ck (Delaware)
Brodhead Creek (Delaware)
Sugar Creek (Upper/Middle Susquehanna)
Spring Creek (Upper/Middle Susquehanna)¹⁵

DEP is also charged with implementing a Water Resources Technical Assistance Center to promote **water conservation and efficiency**.¹⁶ This effort will need continuing support if it is to affect the ways in which water resources are managed throughout Pennsylvania.

DEP’s implementation activities (including continuing updating of the state water atlas and a “water analysis screening tool” for use in planning activities) are intended to support an **update to the Plan**, which by law is to be updated every five years.¹⁷

These activities are modest, but could have significant effects if understanding water resources can be fully integrated into the numerous laws and planning programs administered by DEP and other agencies. Water has been addressed inconsistently, and sometimes in conflicting ways because of the historic approaches that separate water as stormwater, from floodwater, from drinking water, from wastewater (both industrial and domestic), from cooling water, from water used in oil and gas production.

Act 220 and the State Water Plan do not authorize the DEP to take any action to “modify or impair” any permits, approvals, or vested rights under other statutes related to water withdrawals or uses, nor to interfere with or impose additional conditions on existing reservoirs or water storage facilities, nor to regulate or impose any conditions not currently authorized on any activity or use.¹⁸ But the Plan provides a factual basis and set of goals that can serve to coordinate these separate and often conflicting programs.

What now for counties and municipalities?

The Plan lays out a set of recommendations for local governments exercising their existing land use regulatory powers under the Municipalities Planning Code and other laws:

- Land use *planning and zoning ordinances* should consider the impacts of land use, development, and redevelopment on *water quantity and quality*.
- The *protection of water resources must be considered early in the development planning process* in order to address cumulative impacts to a watershed.
- Alterations to the landscape must also consider stormwater management. *It is important that stormwater be considered as a resource* and be managed for re-use and recharge of the groundwater.
- Protect, maintain, and restore functions and values of sensitive areas during development and redevelopment. *Sensitive areas within the watershed, such as wetlands, well heads, headwaters, and riparian zones should be protected from the potential impacts of future development.*
- The last defense to protect water quality is the land immediately adjacent to rivers and streams. *To the maximum extent practicable and cost effective, vegetated buffers should be preserved and restored along all waterways.*¹⁹

Under Act 220, no local government “shall have power” to allocate water resources or regulate any water withdrawal. But municipalities retain their authority to regulate land use, to require mandatory connection to public water supplies, and to prohibit or regulate withdrawals from water that may be contaminated in order to protect public health.²⁰

More importantly, under long-standing provision of the Municipalities Planning Code, all county, municipal, or multi-municipal comprehensive plans are to include “a plan for the reliable supply of water, considering current and future water resources availability, uses and limitations, including provisions adequate to protect water supply sources” and **all comprehensive plans must be “generally consistent with the State Water Plan.”**²¹ The fact that Pennsylvania has an up-to-date State Water Plan for the first time in 25 years, and the value of the information compiled by DEP in the preparation of the plan, offer local governments a very valuable resource. Decisions to protect stream corridors, or groundwater recharge areas, or decisions about where to concentrate new development can take into account critically important data about existing water conditions, existing withdrawals, and relationships to other activities in the watershed. The Sewage Facilities Act has a similar provision requiring sewage facilities plans and plan revisions to “take into consideration any existing State Plan affecting the development, use and protection of water and other natural resources.”²² Thus, whenever comprehensive plans and sewage facilities plans are under review or being updated or coordinated, the State Water Plan sets out the need for coordination among uses of water, and the importance of current and projected data affecting Pennsylvania’s water resources.

What now for state funding?

Under Act 220, PENNVEST is directed to establish funding priorities for projects that address unaccounted for water loss or implement water conservation practices by public water supply agencies with unaccounted for loss of more than 20 percent provided that the applicant seeks to recover true costs from ratepayers and implements water system management that conforms to minimum standards set by DEP, the PUC, or a River Basin Commission. PENNVEST is also directed to give special consideration to projects that provide for interconnection between water systems to improve reliability.²³

The DEP is authorized to provide up to 75 percent of funding for voluntary water use reduction plans, and grants for technical assistance and conservation, where funding is appropriated.²⁴

What now for the General Assembly?

The new State Water Plan makes a number of key recommendations for new legislation:

- “Enact new or amended legislation to link local land use decisions with water resources planning and management, and to provide adequate funding for developing information necessary for making sound decisions.”
- Enact new or amended legislation that would encourage the development and implementation of Integrated Water Resources Plans.”
- “Through appropriate legislation, regulation, and administrative changes, integrate and leverage existing” requirements to provide “an effective, straightforward, seamless stormwater management program that is blind to regulatory origin.” “Clearly authorize” authorities, utilities or management districts to “collect fees and generate revenues” for stormwater management infrastructure.
- “Enact legislation to require proficiency-based licensing and certification of water well drillers, and to establish statewide private water well construction standards.”²⁵
- Adopt legislation needed to remove roadblocks to integrated water resources management. The Plan says, “During and after the development of the trial integrated water resources plans for selected counties, a third party should assist DEP and the Statewide Water Resources Committee to identify roadblocks to successful integrated water resources management plan implementation, as well as legislative changes and possible amendments that would encourage more effective and efficient water resources integration....The recommendations will be reviewed and updated as part of the 2013 State Water Plan.”²⁶

And, of course funding is needed to support the implementation of the State Water Plan. The Plan was born out of the drought conditions of nearly a decade ago. Today, Pennsylvania’s water problems are just as likely to be flooding, extreme weather events, and control of storm water. New uses and stresses on water resources have emerged. Support for the critical water planning areas will be needed.

This new State Water Plan was nearly a decade in the making and involved continuous effort by regional basin committees of citizens from across the Commonwealth. If it is to succeed, implementation will need funding support. Otherwise, as in the past, the progress once made in understanding Pennsylvania's advantages, and in rationalizing Pennsylvania's water resources policies will be lost -- again.

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² State Water Plan, at <http://www.depweb.state.pa.us/watershedmgmt/cwp/view.asp?a=1426&q=486209>

³ 27 Pa. Cons. Stat. Ann. §§ 3101-3136. Act 220 also provides for registration by large water users, and for enforcement of registration requirements for persons using or withdrawing 10,000 gallons or more per day and all public water suppliers and hydropower facilities. 27 Pa. Cons. Stat. Ann. § 3118.

⁴ Id. at § 3116(B)(1)-(6). The Plan includes a statewide data system on water resources. Id. at § 3117.

⁵ Id. at § 3116(A). However, the plan "is not intended to constitute or contain legally binding regulations, prohibitions or prescriptions." *Id.* Such prescriptions and regulations must arise from other sources of authority under Pennsylvania law, implementing decisions *informed* by the State Water Plan.

⁶ State Water Plan, State Water Plan Principles, pp. 22-77.

⁷ "Focus should be placed on considering and evaluating the options and issues described on pages 48-49 [actually 37-38] of the Water Plan Principles, evaluating programs that are used in other states..." to advise the General Assembly how to make Pennsylvania's "water rights system more effective, efficient, predictable and secure." (State Water Plan, Executive Summary, p.7)

⁸ State Water Plan, Executive Summary, p. 8.

⁹ State Water Plan, Executive Summary, p. 8.

¹⁰ <http://pib.psu.edu/>

¹¹ DEP and Corps of Engineers, *Chester, Delaware, & Montgomery Counties Regional Watershed Improvement Project*

¹² http://www.ycpc.org/County_Long_Range_Pages/comp_plan_IWRP.html

¹³ <http://www.pawaterplan.dep.state.pa.us/docs/MeetingMinutes/Statewide/2010-11-18DraftmtgSum.pdf>

¹⁴ <http://www.portal.state.pa.us/portal/server.pt/community/newsroom/14287?id=15850&typeid=1>

¹⁵ <http://www.pawaterplan.dep.state.pa.us/docs/MeetingMinutes/Statewide/2010-11-18DraftmtgSum.pdf>

¹⁶ 27 Pa. Cons. Stat. Ann. § 3120; *see* 25 Pa. Admin. Code § 110.604 (2008) ("The Department will establish a Water Resources Technical Assistance Center to promote voluntary water conservation and to provide technical assistance on water resources use issues, including programs identified in section 3120(a) of the act (relating to water conservation).")

¹⁷ 27 Pa. Cons. Stat. Ann. § 3115.

¹⁸ 27 Pa. Cons. Stat. Ann. § 3136.

¹⁹ State Water Plan Principles, Executive Summary, p. 14.

²⁰ 27 Pa. Cons. Stat. Ann. § 3136.

²¹ 53 Pa. Stat. Ann. § 10301(b).

²² 35 Pa. Stat. Ann. § 750.5(d)(5). While the existing implementing regulations refer to state water plans adopted pursuant to prior federal legislation, the language of the Sewage Facilities Act ("any existing State plan") itself should require consideration of the new Act 220 Plan.

²³ 27 Pa. Cons. Stat. Ann. § 3120(b).

²⁴ 27 Pa. Cons. Stat. Ann. § 3121.

²⁵ State Water Plan, Executive Summary, p. 7.

²⁶ State Water Plan, Executive Summary, p. 9.

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