

## Legislative Duties, Authority, and Administration of Environmental Law

### A. Duties; Public Trust Doctrine

#### 1. Surface Water

- Under the common law public trust doctrine, the State, as trustee, holds navigable waters and submerged land beneath navigable waters in trust for the benefit of the people.<sup>1</sup>
- The purpose of the public trust doctrine is to preserve for the public access to navigable waters for navigation, commerce, and fishing free from obstruction by private parties.<sup>2</sup>
- The Vermont Supreme Court has recognized the public trust doctrine and the authority of the State to supervise and control navigable waters and the lands lying under the waters.<sup>3</sup>
- The core of the public trust doctrine is the State's authority as sovereign to exercise supervision and control over the navigable waters of the State and the underlying lands.
- Generally, lands held subject to the public trust may only be used for purposes approved by the General Assembly as public uses. E.g., Burlington harbor lands.
- The General Assembly may delegate its public trust authority to another body, such as a State agency or city, but the General Assembly always retains the right to revoke the delegated powers and exercise them in a more direct manner.
- When the General Assembly delegates the legislative approval process under the public trust doctrine, the delegation must be clear and express.
- See 29 V.S.A. Ch. 11, the General Assembly expressly delegated the public trust legislative approval process for encroachments to the Agency of Natural Resources.

#### § 401. Policy

Lakes and ponds which are public waters of Vermont and the lands lying thereunder are a public trust, and it is the policy of the State that these waters and lands shall be managed to serve the public good, as defined by section 405 of this title, to the extent authorized by statute. For the purposes of this chapter, the exercise of this management shall be limited to encroachments subject to section 403 of this title. The management of these waters and lands shall be exercised by the Department of Environmental Conservation in accordance with this chapter and the rules of the Department. For the purposes of this chapter, jurisdiction of the Department shall be construed as extending to all lakes and ponds which are public waters and the lands lying thereunder, which lie beyond the shoreline or shorelines delineated by the mean water level of any lake or pond which is a public water of the State, as such mean water level is determined by the Department.

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<sup>1</sup> State v. Central Vermont Railway, Inc., 153 Vt. 337, 342 (Vt. 1989). See also Zachary C. Kleinsasser, 32 B.C. Envtl. Aff. L. Rev. 421 (2005).

<sup>2</sup> Id. Title to the land under navigable waters allows the public to freely enjoy navigation of the waters, to carry on commerce, and to have the liberty to fish and take wildlife on navigable waters.

<sup>3</sup> Central Vt. Railway, Inc., 153 at 344-346 (citing In re Lake Seymour, 117 Vt. 367 (1952); State v. Malmquist, 114 Vt. 96 (1944); and State v. Ouattropani, 99 Vt. 360 (1926). The Vermont Supreme Court also has invoked the public trust doctrine in several cases to reject claims of private rights with respect to public waters. Id at 344.

## 2. Wildlife; Ferae Naturae

- The Vermont Constitution provides that the citizens of the State shall have “liberty in seasonable times to hunt and fowl on lands they hold, and on other lands not enclosed, and in like manner to fish in all boatable and other waters (not private property) under proper regulation, to be made and provided by the General Assembly.”
- The Vermont Supreme Court has interpreted this language and common law to mean that the wild animals of the State--the ferae naturae--belong to the people of the State in their collective and sovereign capacity, and not in their individual and private capacity.
- These holdings have led to the commonly held and voiced belief that the citizens of the state “own” the wild animals of the State.
- The U.S. Supreme Court, however, has stated that the “ownership language” in the context of the public trust in wild animals is a legal fiction, and that what the public trust provides is authority to regulate the resource—the wild animals—in a manner that is consistent with the Constitution.

### **§ 4081. Policy**

(a)(1) As provided by Chapter II, § 67 of the Constitution of the State of Vermont, the fish and wildlife of Vermont are held in trust by the State for the benefit of the citizens of Vermont and shall not be reduced to private ownership. The State of Vermont, in its sovereign capacity as a trustee for the citizens of the State, shall have ownership, jurisdiction, and control of all of the fish and wildlife of Vermont.

(2) The Commissioner of Fish and Wildlife shall manage and regulate the fish and wildlife of Vermont in accordance with the requirements of this part and the rules of the Fish and Wildlife Board. The protection, propagation control, management, and conservation of fish, wildlife, and fur-bearing animals in this State are in the interest of the public welfare. The State, through the Commissioner of Fish and Wildlife, shall safeguard the fish, wildlife, and fur-bearing animals of the State for the people of the State, and the State shall fulfill this duty with a constant and continual vigilance.

(b) Notwithstanding the provisions of 3 V.S.A. § 2803, the Fish and Wildlife Board shall be the State agency charged with carrying out the purposes of this subchapter.

## 3. Groundwater; Public Trust Designation by Statute

- 10 V.S.A. § 1390(5)

(5) it is the policy of the State that the groundwater resources of the State are held in trust for the public. The State shall manage its groundwater resources in accordance with the policy of this section, the requirements of subchapter 6 of this chapter, and section 1392 of this title for the benefit of citizens who hold and share rights in such waters. The designation of the groundwater resources of the State as a public trust resource shall not be construed to allow a new right of legal action by an individual other than the State of Vermont, except to remedy injury to a particularized interest related to water quantity protected under this subchapter.

- Groundwater Protection Rule and Strategy. § 12-102. PURPOSE

It is the purpose of this Rule to establish the following:

- (1) a system of management for the different classes of groundwater ;
- (2) a process for the reclassification of groundwater;
- (3) standards for the protection of groundwater quality;
- (4) processes that must be incorporated into regulatory programs to ensure that activities that present a potential threat to groundwater are designed, managed, and permitted to protect groundwater resources; and
- (5) a system to protect the groundwater resources that are held in trust for the public.

## **B. Authority; Tenth Amendment**

- Under the Tenth Amendment to the U.S. Constitution, “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>4</sup> The powers retained by the several states extend “to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people and the internal order, improvement, and prosperity of the state.”<sup>5</sup>
- In general, states may regulate intrastate and interstate commerce to protect the health and safety of their citizens.<sup>6</sup>
- In regulating interstate commerce, States must not discriminate against interstate commerce on face, in effect, or extraterritorially.

## **C. Federal Commerce Clause; Cooperative Federalism**

### 1. Commerce Clause

- U.S. Congress also regulates the environment, health and safety under the Commerce Clause to the U.S. Constitution.
- The Commerce Clause empowers Congress to regulate particular "activities causing air or water pollution, or other environmental hazards that may have effects in more than one State,” *Hodel v. Virginia Surface Mining*, 452 U.S. 264, 282 (1981), it also empowers Congress to control individual actions that, in the aggregate, would have the same effect. Congress' power to regulate intrastate activities that "substantially affect" interstate commerce.
- The grant of authority to Congress under the Commerce Clause, though broad, is not unlimited. See *SWANCC v U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *United States v. Morrison*, 529 U.S. 598 (2000).

<sup>4</sup> U.S. Const., amend 10.

<sup>5</sup> Madison, James, *The Federalist No. 45*, pp. 292-293 (C. Rossiter ed. 1961), as quoted in *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

<sup>6</sup> *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 251-52 (1829) (concluding state authorization of the dam of a navigable creek was justified as an exercise of police power and not as an exercise of the power to regulate interstate commerce).

## 2. Cooperative Federalism

- Cooperative federalism refers to a concept in which the state governments, local governments, and the federal government share responsibility in the governance of law.
- EPA embraces cooperative federalism and works with states, local government, and tribes to implement laws that protect human health and the environment.
- Federal government sets national environmental standards while states implement those standards within their borders.
- Enhance shared accountability between EPA and state, tribal and federal partners through joint governance and compliance assistance.