

GROUNDWATER DAMAGES IN NEW JERSEY

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The state of New Jersey has embarked upon an ambitious effort, fueled by the resources of private plaintiffs' contingency fee lawyers, to collect damages for injury to groundwater resources of the state caused by historic environmental releases and discharges. In the state's view, any groundwater in any water bearing strata, without regard to its actual use or utility, has been "injured" if it is contaminated in excess of applicable groundwater quality criteria. As a consequence of such injury, the state claims it is entitled to compensation from those "in any way responsible" for the contamination. In its efforts to settle such claims without the necessity of litigation, the state has sought to short-cut the damage determination through a "surrogate" damage formula. The formula quantifies the damages in dollar terms by applying the retail price of water as charged by public utilities to the amount in gallons of annual precipitation that can be expected to infiltrate a groundwater contaminated area during the time-frame that contamination will exceed standards (or 30 years). (As this is written, a new "more robust" formula is due to be unveiled in January 2004.)

A claim by the state for natural resource damages because of contaminated groundwater necessarily invites a search for precedent to guide compensation issues. This article is a portion of a much larger analysis of these issues by the author.

The common law of groundwater did not develop in parallel with that for tidally flowed lands because the science of groundwater movement, the mechanisms of recharge and discharge, and the principles of contaminant impact and migration, until relatively recently, were very poorly understood. Indeed, in 1850, the Connecticut Supreme Court remarked:

"Water, whether moving or motionless in the earth, is not, in the eye of the law, distinct from the earth. The laws of its existence and progress, while there, are not uniform, and cannot be known or regulated. . . . These influences [over the movement of groundwater] are so secret, changeable and uncontrollable, we cannot subject them to the regulations of law, nor build upon them a system of rules, as has been done with streams upon the surface." *Roath v. Discoll*, 20 Conn. 532 (1850), cited in *Woodsum v. Pemberton Township*, 172 N.J. Super. 489, 496, 412 A.2d 1064, 1067 (L. Div. 1980), *aff'd* 177 N.J. Super. 639, 427 A.2d 615 (App. Div. 1981).

The American rule for groundwater is attributed to the New York Court of Appeals decision in *Forbell v. City of New York*, 164 N.Y. 522, 58 N.E. 644 (1900), where the court held that it was an unreasonable use to transport groundwater off the overlying land if the extraction of the groundwater caused injury to other overlying landowners. Eva H. Hanks & John L. Hanks, *Law of Water in New Jersey: Groundwater*, 24 Rutgers L. Rev. 621, 636 (1970).

In the Court of Errors and Appeals decision in *Meeker v. City of East Orange*, 77 N.J.L. 623, 74 A. 379 (E. & A. 1909), New Jersey adopted a rule similar to the correlative rights doctrine under which there is no propriety interest in groundwater *per se*, but the uses and rights of all landowners must be accommodated. See *Woodsum*, 172 N.J. Super. at 502, 412 A.2d at 1071. The *Meeker* Court held the law

recognized all reasonable uses of groundwater for the benefit of one's property, limited, however, by consideration of the reasonable use by others of their property:

[The law] does prevent the withdrawal of underground waters for distribution or sale for uses not connected with any beneficial ownership or enjoyment of the land whence they are taken, if it results therefrom that the owner of adjacent or neighboring land is interfered with in his right to the reasonable user of subsurface water upon his land, or if his wells, springs, or streams are thereby materially diminished in flow, or his land is rendered so arid as to be less valuable for agriculture, pasturage or other legitimate uses.

Id. at 638-39, 74 A. at 384-85.

Five years later, in a case that factually resonates with the issues of today, the Court of Errors and Appeals applied the *Meeker* principles to a classic groundwater contamination case. In *P. Ballantine & Sons v. Public Service Corp.*, 86 N.J.L. 331, 91 A. 95 (1914), the famous brewery lost use of the wells it relied upon to brew beer as a result of tar contamination of the groundwater emanating from the adjacent Public Service coal gas plant adjoining the Passaic River. The court applied *Meeker*, focusing on rights of use, not ownership, and held that a landowner has the right to use groundwater "in a reasonable manner and to a reasonable extent, for his own benefit . . . without undue interference with the rights of other landowners to the like use and enjoyment of such water." *Id.* at 333-34, 74 A. at 96 (emphasis added).

Meeker was revisited in 1980 in *Woodsum*, 172 N.J. Super. at 500, 412 A.2d at 1070. In *Woodsum*, the township developed its property as a water source for public

consumption, thereby lowering the water table and rendering the plaintiffs' private well unusable. The plaintiffs could have deepened their well for a modest cost. Instead, they abandoned their home (which vandals then looted) and brought suit against the municipality, alleging among other things, a "taking" without just compensation. On appeal, the Appellate Division held, assuming without deciding there was a taking, that "plaintiffs would be limited to the traditional measure of damages," *i.e.* the difference in the value of the property with and without the well. Moreover, the court adopted the view that "[t]he measure of damages does not include any special damages suffered through frustration of the owner's plans." The court held that the home owners could have and should have simply deepened their own well and were not entitled to damages beyond that modest cost.

The trial court decision examined *Meeker* in light of 70 years of "[s]ignificant changes in scientific knowledge, demand for water and legislation." *Woodsum*, 172 N.J. Super. at 494-95, 412 A. 2d at 1068. The court concluded:

Today New Jersey is a populous urban state with water needs which are much different than they were in 1909. It is now ever more necessary that private users of subterranean water acknowledge the public interest in that water source, an interest to which the Legislature has given increasing recognition. A reasonable use of such water is one which accommodates that public need.

As to damages, however, the court re-asserted the *Meeker* principle:

In addition to the rule of reasonable use by the complaining owner (as well as his competing user), *Meeker* denies recovery unless there is a material diminution in his

flow of underground water. That diminution is not material unless it is so significant that it interferes with the reasonable use of the overlying owner.

Id. at 512, 412 A. 2d at 1076.

Significant by its omission is the fact that *no New Jersey case at common law has ever applied the public trust doctrine to groundwater*. Nor is that surprising. The public trust doctrine has traditionally dealt with the ownership, dominion, control and/or sovereignty over *lands flowed by tidal waters*, held in trust for the public for purposes of navigation, commerce, fishing and recreational values.

New Jersey has codified these common law principles. Under the Spill Act, N.J.S.A. 58:10-23.11a et. seq., the Spill Fund (Fund) is liable to pay for all cleanup and removal costs and all damages caused by a hazardous substance discharge. N.J.S.A. 58:10-23.11g(a). The liability of the Fund is as broad as the liability of dischargers or those in any way responsible for a discharge under the Spill Act. *Compare* N.J.S.A. 58:10-23.11(g) *with* -23.11g(c). The regulations implementing the Fund payment procedures make clear that only damages actually incurred are entitled to compensation:

A claim shall not be eligible for compensation from the Fund unless the claimant has actually suffered the damages which are the subject of the claim. A claim shall be ineligible for compensation from the Fund to the extent that the damages which are the subject of the claim are contingent or speculative. N.J.A.C. 7:1J-2.4(a).

Unless there is interference with actual use of the groundwater, the claimant has suffered no actual damage and the claim is contingent and speculative. It is ironic at least for the State to

argue that the Fund will only compensate claimants for damages to actual use of the groundwater, but the state can recover damages when groundwater has never been used or considered for use. See *Puerto Rico v. SS Zoe Colocotroni*, 628 F.2d 652 (1st Cir.) *cert. den.*, 450 U.S. 912 (1981) (holding that damages of restoration costs “should be awarded only to make the trust whole, not to provide a windfall to the public treasury”).

In sum, in New Jersey, groundwater was never a resource embraced by the “public trust” doctrine. Therefore, any extension of the public trust doctrine to groundwater is only by reason of legislative fiat, a topic beyond the scope of this article. The *Woodsum* decision affirms that even in our modern world, the measure of damages is to be based on principles of use-based losses or diminution in property value damages. In other words, in New Jersey the law of groundwater accommodates competing actual users and uses of the resource, and compensates only for actual lost uses, not for “ownership” *per se* or, most pertinently, for non-use “values.” In a proper case, undoubtedly, the state may document and prove compensable damage, but it should be based on actual lost uses and impairment of the functions and services of the groundwater as managed by the state for the benefit of the public in a specific factual setting. Short-cut formulae that ignore these fundamentals do nothing to achieve justice or promote fairness.