

## **ORGANIZATION OF HEATH WATER LAW STUDY - 6/29/07**

(√ - A check means: bullet completed)

### **I. INTRODUCTION - BACKGROUND**

- √ 1. Primer on Water Law
- √ 2. Model Riparian Code & NC Law
- 3. Introduction to NC Law
- 4. Geography, etc.: How does NC Law Vary Place to Place
- 7. Interstate/National Issues

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## **II. STAKEHOLDERS**

- √ 5. Water Use Law/Local Water Supply
- √ 6. Impact of Drinking Water Law on Water Supply Reservoirs
  - [X Not listed: Agricultural Use
  - Y Not listed: Industrial Use]
- 8. Relicensing of FERC-licensed Dams

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### **III. USES OF SURFACE, SHORELINES, SUBMERGED LANDS**

- 10. Rights to Use Surface of Rivers, Lakes, etc.
- 11. Uses of Shorelines, Submerged Lands, etc.
- 12. Rights to Use Artificial Watercourses
- 13. Navigable Waters, Public Trust, etc.

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## **IV. MISCELLANEOUS**

- 14. Current Issues
- 15. Issues of Water Law Without Regard to Use: Quiet Enjoyment, Conservation, "Rights of Water"
- [9. Water Quality Law: Richard Whisnant]

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**TEN POINTS OF NC WATER LAW REFORM**

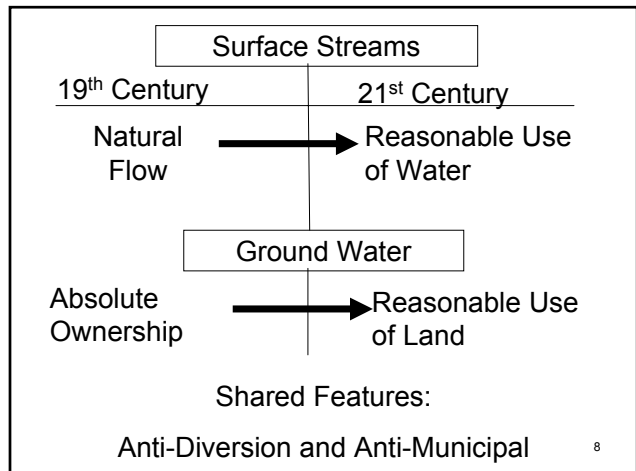
1. "It's the Law": mandated recommendations for allocation and management by 2009.
2. If you do statewide regulation, do it right: follow The Model Code.
3. We have "stopped the bleeding" (IBT's, etc.), and started the emergency, conservation and short-term processes (Governor Easley's proposals, etc.).
4. "If it ain't broke, don't fix it"; we have a lot of functioning water management laws and programs.
5. "Don't strand your allies: take care of existing local governments and state agencies.
6. Don't forget "the stakeholders"; they won't forget you (farmers, power companies, locals, and "the wildlife").
7. "In the long run", what really matters? (It starts with a "G".)
8. Is it really climate change, or just another drought?
9. Is there a hurry on basic reform? (Water law reform took a dozen years after the mid-50's drought.)
10. Sometimes "it takes an expert" (try ground water geology for local well ordinances).

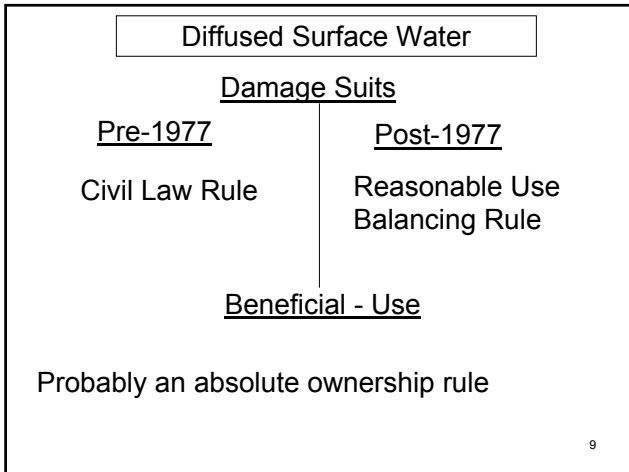
**TEN POINTS OF NC WATER LAW REFORM**

1. "IT'S THE LAW": MANDATED ERC RECOMMENDATIONS FOR ALLOCATION AND MANAGEMENT BY 2009.

THE 2007 GENERAL ASSEMBLY DIRECTED THE ENVIRONMENTAL REVIEW COMMISSION TO STUDY NEW LEGISLATION AND TO MAKE RECOMMENDATIONS TO THE 2008 OR 2009 GENERAL ASSEMBLY CONCERNING A COMPREHENSIVE SYSTEM FOR THE ALLOCATION AND MANAGEMENT OF WATER RESOURCES, INCLUDING THE REGULATION OF SURFACE WATER WITHDRAWALS. (NC SESS. 2, 2007-518.)

2. IF YOU DO STATEWIDE REGULATION, DO IT RIGHT: FOLLOW THE REGULATED RIPARIAN MODEL WATER CODE (ASCE 1997). SOME MODIFICATIONS IN THE MODEL CODE'S STATEWIDE REGULATIONS MAY NEED TO BE CONSIDERED. FOR EXAMPLE, THE MODEL CODE RECOMMENDS A "REASONABLE USE" STANDARD FOR ALL THREE BASIC WATER CATEGORIES (WATERCOURSES, GROUND WATER AND DIFFUSED SURFACE WATER). IN NC THIS WOULD CHANGE THE LAW CONCERNING BOTH DIFFUSED SURFACE WATER AND GROUND WATER. ITS IMPACT, PARTICULARLY ON FARM PONDS USED BY FARMERS, MIGHT BE A VERY HARD SELL, POLITICALLY. (NORTH CAROLINA'S EXISTING COMMON LAW STANDARDS ARE REFLECTED IN THE TWO FOLLOWING CHARTS.)





3. WE HAVE (a) "STOPPED THE BLEEDING" (TIGHTENED OUR INTERBASIN TRANSFER LAW AND APPLIED SIMILAR COMMON LAW CONCEPTS TO GROUND WATER UNDER ROUSE v. KINSTON). (b) STARTED THE EMERGENCY, CONSERVATION AND SHORT-TERM PROCESSES (GOVERNOR EASLEY'S PROPOSALS, ETC.)

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4. "IF IT AIN'T BROKE, DON'T FIX IT"; WE HAVE A LOT OF FUNCTIONING WATER MANAGEMENT LAWS AND PROGRAMS.

a. A STABLE SET OF COMMON LAW CONCEPTS TO GUIDE WATER USERS.

b. AN ESTABLISHED REGULATORY FOUNDATION, STRENGTHENED SINCE 2005:

- THE CAPACITY USE AREAS LAW (1967).
- THE WELL CONSTRUCTION LAW (1967).
- THE INTERBASIN TRANSFER LAW (STABILIZED IN 1993) AND COMPANION GROUND WATER LAW CONCEPTS.
- GOVERNED AND STAFFED BY LONG-TERM ORGANIZATIONS (EMC AND DIVISION OF WATER RESOURCES).

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- A STRONG WATER RESOURCES PLANNING FUNCTION UNDER THE DIVISION WHICH HAS ALSO RESPONDED EFFECTIVELY TO OTHER DEMANDS, SUCH AS THE FERC HYDRO RE-LICENSING PROGRAM AND CORPS OF ENGINEERS RESERVOIR ALLOCATION.
- ALL OF THESE PROGRAMS ARE SUPPLEMENTED BY THE DRINKING WATER ACT, THE STORED WATER ACT AND THE CLEAN WATER MANAGEMENT TRUST FUND.

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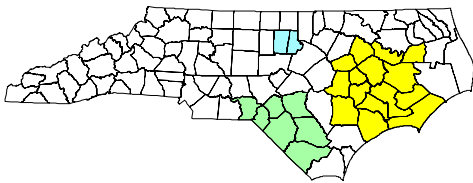
- c. A STRONG SET OF "LAW OF PLACE" ARRANGEMENTS THAT INVOLVE WATER ALLOCATION AND MANAGEMENT FOR MUCH OF THE STATE:
- FIFTEEN EASTERN NC CAPACITY USE AREA COUNTIES, NOW UNDER ANTI-DEPLETION GROUND WATER RULES AS WELL AS CONTAMINATION RULES.
  - TWELVE WESTERN NC COUNTIES CONTAINING TENNESSEE RIVER TRIBUTARIES REQUIRED TO GET TVA ACT §26a PERMITS FOR WATER SUPPLY INTAKE AND WASTEWATER DISCHARGE PIPES.

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- FORTY(+) COUNTIES CONTAINING PRIVATE POWER COMPANY HYDRO PLANTS, REQUIRING FERC RE-LICENSING IN RECENT YEARS, WITH NEW WATER MANAGEMENT FEATURES.
- NINETEEN(+) COUNTIES CONTAINING CORPS OF ENGINEERS RESERVOIRS, WITH WATER ALLOCATION FEATURES.
- COMPOSITE MAP: AT LEAST 85 COUNTIES.

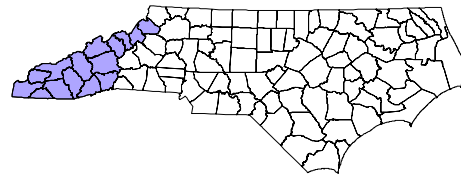
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Capacity Use Areas - Central Coastal Plain, Eno River Voluntary & Southern Coastal Plain Study Area



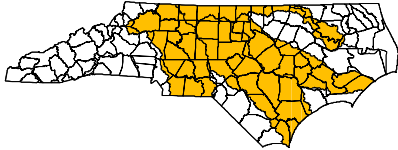
DWR  
Division of Water Resources

Tennessee Valley Authority Regulated Area

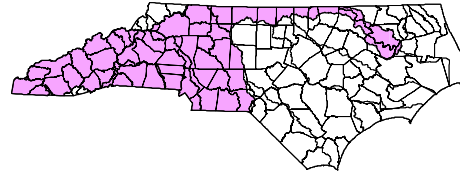


DWR  
Division of Water Resources

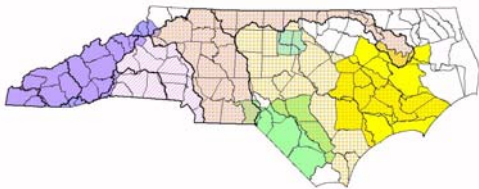
### USACE Regulated Basins



### FERC Regulated Basins



### LAW OF PLACE: Composite



- d. ALTOGETHER, NORTH CAROLINA HAS A SET OF WATER MANAGEMENT INSTITUTIONS THAT -- WITH FINE-TUNING AND GAP-FILLING CHANGES -- OFFER WATER POLICY MAKERS A VIABLE OPTION TO MAJOR WATER LAW REFORM (SUCH AS A STATEWIDE WATER WITHDRAWAL PERMIT SYSTEM).

5. "DON'T STRAND YOUR ALLIES" -- TAKE CARE OF EXISTING LOCAL GOVERNMENTS AND STATE AGENCIES (WHAT DO I MEAN? HERE ARE A FEW EXAMPLES.)

a. FUNDAMENTAL WATER LAW REFORM WOULD COME AT A HIGH COST IF IT INVOLVED (NEAR) DISMANTLING OF THE DIVISION OF WATER RESOURCES OR THE ENVIRONMENTAL MANAGEMENT COMMISSION. THERE MUST BE ANOTHER WAY.

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b. HISTORICALLY THE STATE-LOCAL RELATIONSHIP FOR WATER SUPPLY SYSTEMS HAS LEFT MOST MANAGEMENT ASPECTS TO THE LOCAL UTILITIES, WITH A FEW LIMITED EXCEPTIONS (NOTABLY INTERBASIN TRANSFER LAW, SOME MODEST PLANNING REQUIREMENTS, AND UTILITIES COMMISSION REGULATION OF PRIVATE BUT NOT GOVERNMENTAL SYSTEMS). GOVERNOR EASLEY'S RECENT LEGISLATIVE PROPOSAL FOR WATER SUPPLY SYSTEMS MAY SIGNAL A NEW DIRECTION IN STATE-LOCAL RELATIONS,

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THAT IS:

- ALL DROUGHT AND CONSERVATION ISSUES ARE UP FOR GRABS.
- THERE IS SIGNIFICANT POLITICAL DISAGREEMENT, AS REFLECTED IN THE RECENT CANDIDATES FORUM.
- A TILT TOWARDS REGIONAL SYSTEMS MAY BE ENCOURAGED, BUT WHAT DOES THAT MEAN? (HOW DOES IT SQUARE WITH INTERBASIN TRANSFER RESTRICTIONS? DOES ANYONE REMEMBER CARL STEWART?)
- AT THE VERY LEAST THERE IS A NEED FOR PROFESSIONALS TO DEVELOP SOME STANDARD DEFINITIONS OF KEY CONCEPTS, SUCH AS SAFE YIELD, REPORTING REQUIREMENTS, AND CATEGORIES OF WATER USE.

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6. "DON'T FORGET THE STAKEHOLDERS"; THEY WON'T FORGET YOU (FARMERS, POWER COMPANIES, OTHER INDUSTRIES, LOCALS, AND "THE WILDLIFE"). LIKE IT OR NOT, THE STAKEHOLDER ORGANIZATIONS ARE OUT THERE, AND THEY WILL INFLUENCE ANY POLITICAL ACTION AFFECTING THEM, AS THEY SHOULD. (AFTER ALL, THESE ORGANIZATIONS ARE SURROGATES FOR THOUSANDS OR EVEN MILLIONS OF CITIZENS.)

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WHAT SHOULD THE POLICY MAKERS AND SHAPERS BE DOING ABOUT THE WATER MANAGEMENT STAKEHOLDERS? THEY SHOULD BE OUT THERE TALKING TO THE STAKEHOLDERS ABOUT WHAT THE STAKEHOLDERS THINK, NOT ABOUT THE POLICY SHAPERS' OWN FAVORITE IDEAS.

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7. IN THE LONG RUN, WHAT REALLY MATTERS (IT STARTS WITH A "G")?
- a. SPEAKER HACKNEY'S VIEW, AND SUPPORTING REACTIONS.
  - b. FOR STARTERS, SOME EXAMPLES:
    - SEPTIC TANK ACREAGE LIMITS, AND OTHER DENSITY CONTROLS.
    - WATER RATE INCENTIVES (e.g., INCREASING BLOCK RATES) TO DISCOURAGE EXTRA CAPACITY THAT MEETS LARGE DEMANDS.

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- RECLAIMED WATER SYSTEMS TO RECYCLE TREATED NON-POTABLE WASTEWATER.
- BROADER APPLICATION OF THE CAPACITY USE AREAS LAW OR SIMILAR TOOLS.
- CONTROL OF WELL WITHDRAWALS BY CAREFULLY PLANNED ORDINANCES.
- STRIKE WHILE THE IRON IS HOT WITH TARGETED GROWTH REDUCTION -- THE OREGON PHILOSOPHY.
- STRENGTHEN COASTAL MANAGEMENT AND RECONSIDER MOUNTAIN MANAGEMENT AND THE LAND POLICY ACT.

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- c. WHAT LESSONS ARE TO BE LEARNED FROM OUR PAST FAILURE TO SUCCESSFULLY LINK GROWTH CONTROL WITH (FOR EXAMPLE) ENERGY MANAGEMENT, AIR QUALITY CONTROL, AND INFRASTRUCTURE PLANNING?

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8. IS IT REALLY CLIMATE CHANGE, OR JUST DROUGHT? IN 2-4 YEARS WE MAY HAVE BETTER ANSWERS TO THIS QUESTION.

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9. IS THERE A HURRY ON BASIC WATER LAW REFORM?

- THE 1967 WATER LAW PACKAGE TOOK 12 YEARS TO EVOLVE AND PROBABLY WAS THE BETTER FOR IT.
- POINTS 7 AND 8 RAISE LONG-TERM ISSUES THAT ARE LIKELY TO TAKE MORE RATHER THAN LESS TIME TO ADDRESS AND PERHAPS RESOLVE.
- THE SHORT-TERM ISSUES THAT WE ARE NOW ADDRESSING PROBABLY SHOULD BE ADDRESSED PROMPTLY, BUT MAJOR WATER MANAGEMENT LAW REFORM MAY BENEFIT FROM AN ENACTMENT TARGET WELL BEYOND THE YEAR 2009.

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10. SOMETIMES "IT TAKES AN EXPERT" (TRY GROUND WATER GEOLOGY FOR LOCAL WELL ORDINANCES). SOME COUNTIES AND CITIES RECENTLY HAVE CONSIDERED OR ADOPTED LOCAL ORDINANCES REGULATING TURF IRRIGATION FROM WELLS AND OTHER LARGE GROUND WATER USERS. THIS HAS RAISED ONE LEGAL ISSUE -- THE LACK OF ANY SPECIFIC LEGAL AUTHORITY FOR ADOPTION OF SUCH ORDINANCES, WHICH MAY BE ADDRESSED BY LEGISLATION THIS YEAR.

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IN PLANNING FOR SUCH ORDINANCES THERE IS NO SUBSTITUTE FOR BASIC STUDIES OF THE GROUND WATER GEOLOGY OF THE AREA. GROUND WATER GEOLOGIST, GALE JOHNSON, OF THE NORTH CAROLINA DIVISION OF ENVIRONMENTAL HEALTH WILL SHOW US WHY.

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