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40-18

Regulated Riparian Model Water Code

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AMERICAN SOCIETY OF CIVIL ENGINEERS

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PUBLISHED BY THE AMERICAN SOCIETY OF CIVIL ENGINEERS

Library of Congress Control Number: 2018910771

Published by American Society of Civil Engineers
1801 Alexander Bell Drive
Reston, Virginia, 20191-4382
www.asce.org/bookstore | ascelibrary.org

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Errata: **Errata, if any, can be found at https://doi.org/10.1061/9780784414682.**

ISBN 978-0-7844-1468-2 (soft cover)
ISBN 978-0-7844-8036-6 (PDF)
Manufactured in the United States of America.

24 23 22 21 20 19 18 1 2 3 4 5

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PREFACE

The Model Water Code Project of the American Society of Civil Engineers (ASCE) was begun in 1990 under the direction of Professor Ray Jay Davis of the Brigham Young University School of Law. Its purpose was to develop proposed legislation for adoption by state governments for the allocation of water rights among competing interests and the resolution of other quantitative conflicts over water. Professor Davis enlisted the active aid of a large number of engineers, lawyers, and others interested in improving the administration of water allocation laws in the states of the United States. Input was procured from engineers engaged in working with water in many different ways: government administrators working with water from a variety of perspectives; lawyers representing development interests or environmental interests; business people representing a wide spectrum of industries; academics from disciplines including civil engineering, economics, hydrology, law, and political science; environmental activists; and just plain folks. Several dozen people from such varied backgrounds gave detailed critiques of the drafts of the project. Many of these people also attended two or more meetings per year, during which the drafts were discussed in detail. Probably each person who contributed to this project could pick at least a few points as to which he or she thinks the end products could be improved—the end products are not any single person's efforts, interests, or conclusions. Those involved in the project agree that, overall, the end products are carefully balanced to represent a coherent body of law that would markedly improve the law of water allocation as presently found in many States. (The term "State" is used throughout this Code to refer to a state of the United States, and not to states in the international sense, although such states might also find much of use in this project.)

Originally, the hope was to prepare a single Model Water Code appropriate for any or every State. Although there has been notable convergence among the water laws of eastern and western States over recent decades, there continues to be more divergence than convergence, a divergence that will almost certainly continue for many years. It proved impossible to craft a single Code appropriate for all the States. In the end, two Model Water Codes were prepared—the Regulated Riparian Model Water Code and the Appropriative Rights Model Water Code—reflecting the different needs and legal traditions of eastern and western States. In part because of the decision, made fairly late in the drafting process, to prepare two Model Water Codes, the project remained unfinished when Professor Davis retired from Brigham Young University. In August 1995, Professor Joseph W. Dellapenna of the Villanova University School of Law succeeded Professor Davis as director of the project. Professor Dellapenna had chaired the working group that drafted the regulated riparian version of the Model Water Code. The Regulated Riparian Model Water Code was approved as ASCE Standard 40-03 in 2003. The Appropriative Rights Model Water Code is still being developed into a standard. The original goal is reflected in that each Code contains as much language identical to that in the other Code as possible. A legislature considering revising its water laws should examine both Model Codes.

To understand why two complete, separate Model Water Codes proved necessary requires some understanding of the path by which States east of Kansas City created a highly administered regulatory approach to water allocation within the State, a path quite different from the path followed in the States west of Kansas City. States to the west of Kansas City experimented with private property systems that coalesced into the doctrine of appropriative rights,. States to the east of Kansas City continued to adhere to the common property model of common law riparian rights. *See* Joseph Dellapenna, *Riparianism,* in WATERS AND WATER RIGHTS chs. 6-10 (5 vols., Amy Kelley ed., 2015) ("Dellapenna"), § 6.01(b). Although based on the ideal of sharing, riparian rights proved less than helpful whenever demand for water began to outstrip supplies. The Pacific Coast States and the High Plains States (from North Dakota to Texas) eventually abandoned riparian rights in favor of appropriative rights, although these States were unable to abolish riparian rights completely through inability or unwillingness to compensate the owners. *See id.* §§ 8.01, 8.02. As a result, the States with a dual system combine the worst features of both bodies of law, unsuitable to the more hydrologically developed eastern States. Even Mississippi, the only eastern State to adopt a dual system (in 1955), abandoned it in 1985 in favor of what in this Code is called "regulated riparianism." *See id.* § 8.05 to 8.05(b). Alaska was the latest western State to switch from riparian rights to appropriative rights. Alaska's legislature purported to abolish riparian rights, although no court has yet considered whether this succeeded. At this time, therefore, one must conclude that the question of whether Alaska is a "pure" appropriative rights State or is, in fact, a dual system State has to be regarded as unresolved. *See California-Oregon Power Co. v. Beaver Portland Cement Co.,* 295 U.S. 142 (1935); Dellapenna, § 8.02.

As eastern States have become disenchanted with common-law riparian rights, they have not embraced appropriative rights. Instead, eastern States developed a highly regulated system of water administration based on riparian principles that could best be described as a system of public property. Regulatory antecedents to regulated riparianism go back to colonial times in several States. *See* Dellapenna, §§ 9.01, 9.02. Initially, the transition from extremely limited regulatory intervention to more or less comprehensive regulation resulted from incremental changes in earlier systems rather than a conscious design to revolutionize the system of water rights. As a result, there is disagreement over when to date the emergence of the first true regulated riparian system. Nor is there a fully agreed name for the new system, although regulated riparianism appears to be about as succinctly descriptive as one can hope. Suggested alternative names have serious defects. "Eastern permit systems" or the like tells us nothing about the nature of the legal regime, and leave one more open to the charge that the new system has taken rather than regulated pre-existing property rights. "Non-temporal priority permit systems" is more immediately descriptive than "regulated riparianism" but it is rather too much to expect people to say frequently and also leaves more room for the allegation that property was taken by the legislation. The name "regulated riparianism" emphasizes both that the administrative permit process proceeds on essentially riparian principles and that the new system is a regulation of rather than a taking of the older riparian rights. *Id.* § 9.01. As a result, the name "regulated riparianism" has gained a general acceptance. *See, e.g., City of Waterbury v. Town of Washington,* 802 A.2d 1102 (Conn. 2002) (holding that Connecticut has enacted a regulated riparian system).

The transition to the true regulated riparian system first occurred by 1933 when Maryland enacted a fully regulated system,