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## Water Law Amendments for Virginia?

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## WATER LAW AMENDMENTS FOR VIRGINIA?

The State Water Control Board is currently engaged in a general review of Virginia's water law. Over the past two months it has been holding public meetings across the Commonwealth in order to inform the public of its intentions and to get some feedback from the people who might be affected by any revisions in present water law. The meat of the proposed changes centers around a study of Virginia's water law conducted by Professor Bergin of the University of Virginia School of Law, and around a draft mandatory statute prepared by Professor Brion of the Marshall-Wythe School of Law and Mr. Jensen of the Water Control Board.

The Bergin study, entitled Virginia Water Law: An Economic Appraisal, presents the economic considerations which need to be addressed in any amendments of the present water laws. Central to his theme is the idea that the use of water ought to be as efficient as possible in order to insure that the costs of water use are borne by the persons or organizations actually using this limited resource. It is his view that present riparian rights water law inhibits the free transferability of water and water rights, to the overall detriment of water consumers. In addition, those who have riparian rights under the present system have no way of insuring the present or future extent of those rights against any but the most obvious adverse users.

In order to remedy these drawbacks, Professor Bergin suggests that the feasibility of an alternative water-rights system be investigated by the Legislature. He observes that a water-use permit system might increase water use efficiency if the permits were to be made freely transferable. Free transferability would permit a "market" for water to develop, which would in turn allow the price/demand levels to determine the degree of efficiency water use would attain. In addition, the drawbacks of the riparian system would be remedied because each owner of water use rights would know the exact extent of his or her rights, and the actual user of the water would presumably bear the costs of its use. If each user were to bear the costs of its use the incentives for water conservation would become much greater. Before any action would be taken, however, to implement these proposals Bergin recommends that full data be gathered concerning the actual extent of current problems.

The Brion-Jensen draft statute takes a more limited approach to alteration of Virginia's water law. Upon the occurrence of one of five possible contingencies the State Water Control Board is given the power to

declare the area affected a "critical surface water area": (1) the quantities of surface water are inadequate to meet needs for beneficial uses; (2) the withdrawals would reduce stream flows or reservoir levels so as to affect valuable aquatic life; (3) surface water supplies are needed in other surface water areas; (4) the use of surface waters will interfere with recharge of groundwater aquifers; and (5) the surface water may become polluted. Once an area has been declared a critical surface water area no person is permitted to withdraw water without a permit issued by the Board (except for limited users exempted from coverage by the Act) for that particular use. Any person is permitted to challenge any application for a permit. Similar to the permit procedure suggested in the Bergin study, the free transferability of the permits is assured, subject to the rules and regulations adopted by the Board and subject to any specific conditions on the permit.

The Bergin study and the Brion-Jensen Water Conservation Act represent fairly major proposed changes to Virginia's water law. Perhaps the unifying theme in both proposals is the desire to render water rights certain through the issuance of transferable permits. Whether or not these changes are adopted by the General Assembly the practitioner should be aware that these alterations are being considered by the State Water Control Board.