

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES

SHALE GAS DEVELOPMENT BENEATH PUBLICLY-OWNED STREAMBEDS

Authority

Section 302(a)(13) of the Conservation and Natural Resources Act, 71 P.S. § 1340.302(a)(13), grants the Department of Conservation and Natural Resources (DCNR) the authority to enter into agreements with owners or lessees of property or property rights located in the same area as lands owned or leased by the Commonwealth of Pennsylvania (Commonwealth) for the recovery of fuel, oil, natural gas, or any other mineral deposits owned by the Commonwealth underlying those lands. The Department of Environmental Protection (DEP) is the agency that administers and enforces the Dam Safety and Encroachments Act. (32 P.S. § 693.1 *et seq.*) DEP issues permits for the construction, operation and maintenance of all dams, water obstructions and encroachments located in, along, across or projecting into any water of the Commonwealth. However, DEP's submerged lands program does not involve the leasing of oil, natural gas, and any other mineral deposits owned by the Commonwealth.

Presumption of Commonwealth Ownership

There is a presumption that the Commonwealth owns the beds and the underlying subsurface of all navigable waters between the ordinary low water marks. Owners of land along the banks of navigable waters do not have exclusive rights in those waters; that right is vested in the Commonwealth for the benefit of the public. The lands that are owned by the Commonwealth must be conserved and maintained for the benefit of all of the citizens of Pennsylvania.

Navigability

Commonwealth ownership of submerged lands is based upon navigability. The Commonwealth recognizes three categories of navigable waters: 1) the Great Rivers; 2) navigability at law; and 3) navigability in fact.

Great Rivers

The Great Rivers include the following: Ohio, Monongahela, Youghiogheny, Allegheny, Susquehanna and its North and West Branches, Juniata, Schuylkill, Lehigh, and Delaware. Each Great River is considered navigable throughout the River's entire length, from the headwaters to the mouth.

Navigability at Law

Legislative public highway declarations establish segments of waterways as navigable at law. In response to, among other things, citizens' requests to move their goods downstream unimpeded by obstructions, the Pennsylvania General Assembly passed many public highway declarations. Legislative public highway declarations are proof that the Commonwealth retains ownership of the streambed between the ordinary low water marks of the segment of waterway that is designated in the declaration.

Navigability in Fact

If a river is used, or is susceptible of being used, in its ordinary condition, as a highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water, it is navigable in fact. A public highway declaration, often passed to promote commerce and the unobstructed movement of goods on waterways, is compelling evidence of navigability in fact. In addition, historical information from 18th and 19th century America that shows there was commerce on any segment of a particular waterway is substantial evidence of navigability in fact. Furthermore, proof that the waterway is susceptible of being used as a highway for commerce in its present-day condition may be evidence of navigability in fact.

Once a stream is determined to be navigable in fact, it is considered navigable throughout its entire length, from the headwaters to the mouth. Once a river or stream meets the navigability in fact test at any point in history, it remains navigable as a matter of law up to the present time regardless of its continued use for commerce; the Commonwealth is not divested of title by disuse of a waterway for commerce.