

**Pennsylvania House of Representatives
State Government Committee
Briefing on Riparian Rights**

**Testimony of Cathleen Curran Myers, Deputy Secretary for Water
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Environmental Protection
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Chairman Josephs, Chairman Baker and members of the Committee, thank you for giving me the opportunity to appear before you today with Department of General Services Secretary James Creedon, to discuss the Commonwealth agencies' use of the bulkhead line as it relates to the Delaware River in Philadelphia in administering our duties related to submerged lands.

At the hearing on September 11, 2007, Secretary James Creedon testified that historically the Commonwealth agencies have utilized the federal bulkhead line for purposes of determining the extent of Commonwealth submerged lands, but that where there is open water behind the bulkhead line, the Commonwealth will consider whether that boundary is appropriate on a case by case basis.

Submerged lands beneath the ordinary low water mark on navigable rivers within Pennsylvania are owned by the Commonwealth. The state may authorize the private use of submerged lands and even give riparian landowners significant indicia of ownership in structures placed on submerged lands.

Pennsylvania law allows riparian landowners along navigable rivers to have ownership of the river bottom only as far as the ordinary low water line. The case law has long been clear on this point. See *Carson v. Blazer*, 2 Binn. 47 (1810), *Philadelphia v. Scott*, 81 Pa. 80 (Pa. 1876); *Pursell v. Stover*, 110 Pa. 43, 20 A. 403 (Pa. 1885); *Philadelphia v. Commonwealth*, 284 Pa. 225, 130 A. 491 (1925);

and *United States v. Pennsylvania Salt Manufacturing Co.*, 16 F.2d 476 (E.D.Pa., 1926).

Changes in the low water line resulting from natural accretion or erosion can add or diminish riparian landowner's and the Commonwealth's title. However, changes in the low water line associated with artificial filling do not modify the boundary unless legislative enactment provides otherwise. Where there is artificial fill on Commonwealth submerged lands, the Commonwealth retains ownership of the submerged lands, while the riparian owner may own the structures located thereon. Where there has been extensive development of a waterfront, the natural low water line is significantly altered. In such circumstances, Pennsylvania Courts have supported use of an artificial low water line for purposes of title boundary determinations.

The Delaware River was specifically declared to be a navigable river by the Pennsylvania assembly by the Act of March 9, 1771, 1 Sm. Laws 322 and the Act of September 20, 1783, 2 Sm. Laws 77, 71 P.S. §§ 1801-1808.

The Philadelphia waterfront of the Delaware River has been subject to a somewhat different legal regime than the rest of the Commonwealth. The General Assembly has adopted various legislative enactments affecting the low water line on the Philadelphia waterfront of the Delaware River since at least 1803. During the development of its port, the shape of the Philadelphia waterfront has been extensively modified by both filling along the shoreline and removal of land from what is now the river. In 1864, the General Assembly responded to these modifications by authorizing Philadelphia to survey and establish the low water line. Act of May 20, 1864, P.L. 906, 53 P.S. § 16854.

The interplay between the federal bulkhead line and the submerged lands boundary began after Congress empowered the Army to create harbor lines. After that federal legislation was passed, the Pennsylvania General Assembly gave a general grant to cities of the first class (Philadelphia) to revise and establish the “arbitrary low-water line or bulkhead line, on the Delaware river...in conformity with those now established by the secretary of war, or as they may from time to time be established by him...” *Act of June 8, 1891, P.L. 209, 53 P.S. §§ 14216-14217.*

The use of the bulkhead line as the boundary for purposes of title was specifically upheld in *United States v. Pennsylvania Salt Manufacturing Co., 16 F.2d 476 (E.D.Pa., 1926).*

Since that time, the General Assembly, DGS and DEP have all generally utilized the bulkhead line as the boundary of Commonwealth submerged lands in legislative transfers, leases and submerged lands licenses related to the Delaware River in Philadelphia where submerged lands of the Commonwealth have been filled and the federal bulkhead line traverses filled lands.

The question has been presented as to the application of the bulkhead line as the boundary of Commonwealth submerged lands where the bulkhead line traverses open water. Where the bulkhead line crosses over a portion of the river and the location of the riverbank itself and the actual ordinary low water mark can be readily ascertained, resort to use of the bulkhead line as the artificial low water line is not necessary or appropriate - and the Commonwealth agencies will use the ordinary low water mark as the boundary for determining the extent of Commonwealth submerged lands. Consistent with the principles of Pennsylvania surveying and property law, the ordinary low water mark is defined in the regulations adopted under the Dam Safety and Encroachments Act as: “The water

surface elevation at ordinary stages of low water, unaffected by drought and unchanged by artificial means.” 25 Pa. Code Section 105.1. *See City of Philadelphia v. Pennsylvania Sugar Co.*, 348 Pa. 599, 36 A.2d 653 (1944). It is important to understand that this is not the lowest historical line of the water body, but rather the line of ordinary low water. (Knud Everett Hermansen, “*Boundary Retracement Principles and Procedures for Pennsylvania*,” 4th Ed., Pennsylvania Society of Land Surveyors, publisher; p. 7-24 (1998).

To summarize, DEP and DGS utilize the bulkhead line in administering our constitutional, statutory and administrative obligations for the majority of submerged lands transfers on the Delaware River waterfront in Philadelphia. However, in those circumstances where the bulkhead line traverses open water, the ordinary low water mark is utilized as the appropriate boundary.