

# ASCE STANDARD

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American Society of Civil Engineers

## Regulated Riparian Model Water Code

American Society of Civil Engineers

# Regulated Riparian Model Water Code

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# STANDARDS

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The following Standards have been issued:

- ANSI/ASCE 1-82 N-725 Guideline for Design and Analysis of Nuclear Safety Related Earth Structures
- ANSI/ASCE 2-91 Measurement of Oxygen Transfer in Clean Water
- ANSI/ASCE 3-91 Standard for the Structural Design of Composite Slabs and ANSI/ASCE 9-91 Standard Practice for the Construction and Inspection of Composite Slabs
- ASCE 4-98 Seismic Analysis of Safety-Related Nuclear Structures
- Building Code Requirements for Masonry Structures (ACI 530-02/ASCE 5-02/TMS 402-02) and Specifications for Masonry Structures (ACI 530.1-02/ASCE 6-02/TMS 602-02)
- SEI/ASCE 7-02 Minimum Design Loads for Buildings and Other Structures
- ANSI/ASCE 8-90 Standard Specification for the Design of Cold-Formed Stainless Steel Structural Members
- ANSI/ASCE 9-91 listed with ASCE 3-91
- ASCE 10-97 Design of Latticed Steel Transmission Structures
- SEI/ASCE 11-99 Guideline for Structural Condition Assessment of Existing Buildings
- ANSI/ASCE 12-91 Guideline for the Design of Urban Subsurface Drainage
- ASCE 13-93 Standard Guidelines for Installation of Urban Subsurface Drainage
- ASCE 14-93 Standard Guidelines for Operation and Maintenance of Urban Subsurface Drainage
- ASCE 15-98 Standard Practice for Direct Design of Buried Precast Concrete Pipe Using Standard Installations (SIDD)
- ASCE 16-95 Standard for Load and Resistance Factor Design (LRFD) of Engineered Wood Construction
- ASCE 17-96 Air-Supported Structures
- ASCE 18-96 Standard Guidelines for In-Process Oxygen Transfer Testing
- ASCE 19-96 Structural Applications of Steel Cables for Buildings
- ASCE 20-96 Standard Guidelines for the Design and Installation of Pile Foundations
- ASCE 21-96 Automated People Mover Standards—Part 1
- ASCE 21-98 Automated People Mover Standards—Part 2
- ASCE 21-00 Automated People Mover Standards—Part 3
- SEI/ASCE 23-97 Specification for Structural Steel Beams with Web Openings
- SEI/ASCE 24-98 Flood Resistant Design and Construction
- ASCE 25-97 Earthquake-Actuated Automatic Gas Shut-Off Devices
- ASCE 26-97 Standard Practice for Design of Buried Precast Concrete Box Sections
- ASCE 27-00 Standard Practice for Direct Design of Precast Concrete Pipe for Jacking in Trenchless Construction
- ASCE 28-00 Standard Practice for Direct Design of Precast Concrete Box Sections for Jacking in Trenchless Construction
- SEI/ASCE/SFPE 29-99 Standard Calculation Methods for Structural Fire Protection
- SEI/ASCE 30-00 Guideline for Condition Assessment of the Building Envelope
- SEI/ASCE 31-03 Seismic Evaluation of Existing Buildings
- SEI/ASCE 32-01 Design and Construction of Frost-Protected Shallow Foundations
- EWRI/ASCE 33-01 Comprehensive Transboundary International Water Quality Management Agreement
- EWRI/ASCE 34-01 Standard Guidelines for Artificial Recharge of Ground Water
- EWRI/ASCE 35-01 Guidelines for Quality Assurance of Installed Fine-Pore Aeration Equipment
- CI/ASCE 36-01 Standard Construction Guidelines for Microtunneling
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- CI/ASCE 38-02 Standard Guideline for the Collection and Depiction of Existing Subsurface Utility Data
- EWRI/ASCE 39-03 Standard Practice for the Design and Operation of Hail Suppression Projects
- ASCE/EWRI 40-03 Regulated Riparian Model Water Code

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# FOREWORD

The material presented in this Standard has been prepared in accordance with recognized legal and engineering principles. This Standard should not be used without first securing competent advice with respect to its suitability for any given application. The publication of the material contained herein is not intended as a

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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 allocating water rights among competing interests and for resolving 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, from government administrators working with water from a variety of perspectives, from lawyers representing development interests and from lawyers representing environmental interests, from business people representing a wide spectrum of industries, from academics from disciplines including civil engineering, economics, hydrology, law, and political science, from environmental activists, and from just plain folks. Several dozen people from such varied backgrounds gave detailed critiques of the several drafts of the project; many of these people also attended two or more meetings per year where the drafts were discussed in detail. Each person who contributed to this project probably could pick at least a few points where 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 states in the international sense might also find much of use in this project.)

Originally, the hope was to prepare a single Model Water Code that would be appropriate for any or every State. While 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 almost certainly will continue for many years. It proved impossible to craft a single code appropriate for all the States. In the end, two different Model Water Codes were prepared, reflecting the different needs and legal traditions of eastern States and western States—the Regulated Riparian Model Water Code and the Approp-

riative Rights Model Water Code. 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.

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 other members of the working group were Robert Abrams, Jean Bowman, Gary Clark, William Cox, Stephen Draper, and Wayland Eheart. This document is the final report of the Regulated Riparian Model Water Code. The final draft of this report was subject to independent review by three prominent experts in eastern water law who had not been actively involved in the drafting of the Model Codes. They were Marshall Golding, a professional engineer from Pennsylvania, and two law professors, Robert Beck of Southern Illinois University and Earl Finbar Murphy of Ohio State University.

Thereafter, the report was adopted by the Water Regulatory Standards Committee as a pre-standards document and submitted to a written ballot by the entire Committee. Although each section of the proposed standard (the Regulated Riparian Model Water Code) was approved overwhelmingly on the first written ballot, it required two further ballots to resolve the negatives that were cast against certain sections. That process was completed by the report distributed on August 21, 2001. Thereafter the code was approved by public ballot. The remainder of this Preface will explore in more detail why the Water Laws Committee of the ASCE decided that two versions were necessary.

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. While 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 1 & 2 WATERS AND WATER RIGHTS chs. 6–10 (7 vols., Robert E. Beck ed., 1991) (“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; Joseph Dellapenna, *Eastern Water Law: Regulated Riparianism Replaces Riparian Rights*, in THE NATURAL RESOURCES LAW MANUAL 317 (Richard Fink ed. 1995). 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 must 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 upon 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 leaves one more open to the charge that the

new system has taken rather than regulated pre-existing property rights. “Nontemporal 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. See *id.* § 9.01.

The transition to the true regulated riparian system occurred by 1957 when Iowa adopted a fully regulated system, although the realization that something truly new in water law had emerged did not occur for another several decades. Little has been written about the new system, and most of what has been written has been reportorial rather than analytic. See, e.g., Richard Ausness, *Water Rights Legislation in the East: A Program for Reform*, 24 WM. & MARY L. REV. 547 (1983); Peter Davis, *Eastern Water Diversion Permit Statutes: Precedents for Missouri*, 47 MO. L. REV. 429, 436–37 (1982). Such writers have tended to see the statutes as a mere modification superimposed on the riparian rights that they see still as the core of the law in these States. Others have construed regulated riparian statutes as inartfully drafted appropriative rights statutes. See, e.g., Frank Trelease, *A Water Management Law for Arkansas*, 6 U. ARK.-L.R. L.J. 369 (1983). Neither set of commentators realized that regulated riparian statutes represent a truly different model of water law. See Dellapenna, ch. 9.

The emergence of a new form of water law was missed because the regulatory system was not introduced as a radical revision of the water law of a particular state. In most States, it emerged gradually through a process of small legislative interventions that eventually cumulatively did fundamentally change the water law of the state. As a result, it is sometimes difficult to determine precisely when, in a particular state, the transition from riparian rights to regulated riparianism occurred. In several States it is still unclear whether the law would better be described as still basically riparian rights with limited legislative alterations or as regulated riparianism. As of 2002, approximately 17 states have enacted a regulated riparian system for surface waters, generally including underground water sources as well. Two other States apply a regulated riparian system only to underground water sources. Several States have not actually implemented the regulated riparian statutes on the books, and in several other states, the limitations on the reach of regulatory author-

ity allow serious question as to whether the State truly has enacted a regulated riparian statute.

With those caveats in mind, the States are:<sup>1</sup>

Iowa (1957)  
 Maryland (1957)  
 Wisconsin (1959)  
 Delaware (1959)  
 New Jersey (1963)  
 Kentucky (1966)  
 South Carolina (1969)\*\*  
 Florida (1972)  
 Minnesota (1973)  
 North Carolina (1973)\*\*\*  
 Georgia (1977)\*\*\*\*  
 New York (1979)\*  
 Connecticut (1982)  
 Illinois (1983)\*\*  
 Arkansas (1985)\*  
 Massachusetts (1985)\*\*\*  
 Mississippi (1985)  
 Hawaii (1987)  
 Virginia (1989)\*\*\*\*  
 Alabama (1993)\*

In addition, the unusual arrangements of the Delaware River Basin Compact and the Susquehanna River Basin Compact create a regulated riparian system in those basins (stretching across four and three States, respectively) under interstate supervision or management. *See id.* § 9.06(c)(2); Joseph Dellapenna, *The Delaware and Susquehanna River Basins*, in 6 WATERS AND WATER RIGHTS 137–47 (1994 replacement vol.). One might add a few examples of regulated riparian systems in western States. As indicated in the preceding list, Hawaii has enacted such a statute for water in that state, although Hawaii does not really share the western legal tradition generally or particularly regarding water. *See* Joseph Dellapenna, *Related Systems of Water Law*, in 2 WATERS AND WATER RIGHTS § 10.1(c). The Arizona Groundwater Management Act of 1980, as well, perhaps, as some other western statutes relating to groundwater, also seem

more in the regulated riparian mode than in the appropriative rights mode used for surface sources in the same state. *See* ARIZ. REV. STAT. ANN. §§ 45–401 to 45–655. These statutes, while adopting the sort of public management approach that is characteristic of regulated riparian statutes, operate against a background of appropriative rights and have some notably different features from otherwise similar statutes found in eastern States or Hawaii. Therefore, the western statutes are seldom referred to in the Regulated Riparian Model Water Code.

The most fundamental departure from common law riparian rights found in regulated riparian statutes is the requirement that, with few exceptions, no water is to be withdrawn from a water source without a permit issued by the State within which the withdrawal occurs. Such a requirement is based on a State’s police power to regulate water withdrawal and use in order to protect the public health, safety, and welfare. Regulated riparian statutes allocate the right to use water not on the basis of temporal priority but on the basis of whether the use is “reasonable” (or substitute terms such as “beneficial,” “reasonable-beneficial,” or “equitable”). The statutes also usually abolish common law restrictions based on the location of the use and require periodic review of the continuing social utility of the permits. Finally, the statutes create mechanisms for long-term planning and for otherwise providing for the public interest in the waters of the State. *See* Dellapenna, §§ 9.03 to 9.05. This Regulated Riparian Model Water Code follows this pattern for the allocation of the waters of a State. While recognizing the necessity of integrating water allocation with regulations designed to protect water quality, it does not attempt to exhaust the latter field. The Code does address the difficult question of multijurisdictional transfers of water, whether across a water basin boundary or across a state line. *See* Dellapenna, § 9.06.

Today, the main threats to the availability of water in eastern States, both as to quantity and as to quality, are not pollution or withdrawal, but the physical and ecological transformation by human intervention of water sources and the lands on or in which the sources are found. Dams not only “withdraw” water, but also disrupt temperature and nutrient patterns on which rivers depend for their ecological diversity—as does the “straightening” of a river. Repeated withdrawals of water from water sources both deplete the quantity of water remaining and alter the waste assimilative and other natural aspects of the water source, often to the detriment of potential users—human and non-human. Sediments from farms suffocate many small forms of

<sup>1</sup> The asterisks indicate:

\* Less completely developed or implemented than for other regulated riparian States.

\*\* Applicable to underground water only and requiring permits in capacity use areas only.

\*\*\* Applicable to critical management areas only.

\*\*\*\* This date refers to the adoption of a regulated riparian statute that applies to surface water sources. These states had adopted similar statutes for groundwater earlier (Georgia, 1972; Virginia, 1973).

## PREFACE

aquatic life. Vacationers who cut down trees to improve the view from summer homes may erode stream banks or lakeshores. As a result, the stream then carries more sediment and becomes wider, shallower, and warmer, making the water unfit for many important organisms and for many significant uses. The Regulated

Riparian Model Water Code addresses only direct use of the water. It does provide some provisions for the coordination of the regulation of all human activity relevant to the waters of the State, but it does not address directly human activities other than direct uses that, often unintentionally, despoil the waters of the State.

# ACKNOWLEDGMENTS

The American Society of Civil Engineers acknowledges the work of the Water Regulatory Standards Committee of the Codes and Standards Activities Division of the Environmental and Water Resources Institute. The group consists of individuals from many backgrounds, including consulting engineering, law, research, construction industry, education, government, design, and private practice. Work on this Standard began in 1995 and incorporates information developed by the former

Water Laws Committee of the American Society of Civil Engineers as described in the Preface.

This Standard was prepared through the consensus standards process by balloting in compliance with procedures of the Codes and Standards Activities Committee of the American Society of Civil Engineers. Those individuals who served on the Water Regulatory Standards Committee are:

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## NOTE: FORM AND SOURCES

Finally, a word about the form of this Code and how that form reflects the goals of the drafters. The Code follows the form commonly used today in the drafting of proposed uniform state laws under the auspices of the National Conference of Commissioners of Uniform Laws. That form consists of a statutory language in bold face that a legislature could enact with or without change. This language is arranged in sections, generally consisting of a single sentence, for ease of citation. The numbering of the sections consists of three parts, indicating the chapter of the Code, the part of the chapter, and the sequential numbering of each section within that part. Each section in this Code also contains an “R” to distinguish it from sections in the Appropriative Rights Model Water Code (denominated “A”). For example, § 1R-2-03 means section 3 of part 2 of chapter 1 of the Regulated Riparian Model Water Code. Each section necessarily is optional in that a state legislature, even were it to decide to enact the bulk of this Code, could delete or change any particular section. Nonetheless, the drafters of this Code strove to create a complete, comprehensive, and well-integrated statutory scheme for creating or refining a regulated riparian system of water law capable of dealing with the water management problems of the twenty-first century. The drafters have concluded that nearly every section of this Code is necessary to achieve that goal. Several sections (§§ 2R-2-21, 3R-1-03, 4R-4-01 to 4R-4-08, 5R-4-09, and 5R-5-03), however, are specifically denominated “optional.” This indicates that the drafters consider that these sections might not be nec-

essary or appropriate to the needs of a particular state. These sections, therefore, merit special consideration should any legislature consider enacting this Regulated Riparian Model Water Code. A coherent and workable Code would still result were all of the “optional” sections to be omitted.

This Code refers to current *ASCE Policy Statements* and to certain common references. *ASCE Policy Statements* normally are updated every three years and should be consulted for changes occurring after this document is completed. For the eastern tradition of water law, the central source is Joseph Dellapenna, *Riparianism* [“Dellapenna”], in 1 & 2 *WATERS AND WATER RIGHTS* chs. 6–10 (7 vols., Robert E. Beck ed. 1991) [“*WATERS AND WATER RIGHTS*”]. Other standard sources are FRANK MALONEY, RICHARD AUSNESS, & J. SCOTT MORRIS, *A MODEL WATER CODE* (1972) [“MALONEY, AUSNESS, & MORRIS”]; LEONARD RICE & MICHAEL WHITE, *ENGINEERING ASPECTS OF WATER LAW* (1987) [“RICE & WHITE”]; JOSEPH SAX, ROBERT ABRAMS, & BARTON THOMPSON, JR., *LEGAL CONTROL OF WATER RESOURCES* (2<sup>nd</sup> ed. 1991) [“SAX, ABRAMS, & THOMPSON”]; A. DAN TARLOCK, *LAW OF WATER RIGHTS AND RESOURCES* (1988) [“TARLOCK”]; A. DAN TARLOCK, JAMES CORBRIDGE, JR., & DAVID GETCHES, *WATER RESOURCE MANAGEMENT* (4<sup>th</sup> ed. 1993) [“TARLOCK, CORBRIDGE, & GETCHES”]; FRANK TRELEASE & GEORGE GOULD, *WATER LAW—CASES AND MATERIALS* (4<sup>th</sup> ed. 1986) [“TRELEASE & GOULD”]. To simplify citation throughout, these standard references are cited only in the form indicated in brackets after the reference.

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# Chapter I Declarations of Policy

Chapter I sets forth the policies that are to inform the interpretation of the Regulated Riparian Model Water Code in both litigious and administrative settings. These policy statements describe in general terms the goals the administering State Agency and courts are to pursue in carrying the Code into effect. While the goals sometimes conflict, together they express a comprehensive vision of the waters of the State as public property to be administered by the Agency to achieve optimum social utility. The Agency is given considerable discretion to resolve policy conflicts when they appear in concrete situations.

“Discretion” as used here does not mean “arbitrary.” Rather, it refers to decision according to legal standards that are to guide the decisions by the Agency. Those standards are carefully delineated in this Code. To call a decision “discretionary,” as used in this Code, then, is to use a neutral term that describes the nature of the decision-making process; it is not in any sense pejorative.

## § 1R-1-01 PROTECTING THE PUBLIC INTEREST IN THE WATERS OF THE STATE

**The waters of the State are a natural resource owned by the State in trust for the public and subject to the State’s sovereign power to plan, regulate, and control the withdrawal and use of those waters, under law, in order to protect the public health, safety, and welfare by promoting economic growth, mitigating the harmful effects of drought, resolving conflicts among competing water users, achieving balance between consumptive and nonconsumptive uses of water, encouraging conservation, preventing excessive degradation of natural environments, and enhancing the productivity of water-related activities.**

**Commentary:** This section sets forth the basic policies of the Regulated Riparian Model Water Code, delineating the central issue to be resolved by the State Agency in managing the water of the State: the need to balance economic growth against other important values. In a general sense, this balance could be described as “the public interest,” a term defined in a more general way in section 2R-2-18. For an analysis of how States have worked out of the several policies expressed in this section, *see generally* Dellapenna, § 9.03. *See also* Linda Butler, *Defining a Water Ethic*

*Through Comprehensive Reform: A Suggested Framework for Analysis*, 1986 U. ILL. L. REV. 439. This Code defines the interest of the state in major part through the concept of “sustainable development.”

Numerous policies of the American Society of Civil Engineers support specific aspects of this section. *See ASCE Policy Statements* No. 131 on Urban Growth (2000), No. 139 on Public Involvement in the Decision Making Process (1998), No. 243 on Ground Water Management (2001), No. 275 on Atmospheric Water Management (2000), No. 337 on Water Conservation (2001), No. 408 on Planning and Management for Drought (1999), No. 418 on the Role of the Engineer in Sustainable Development (2001), No. 422 on Watershed Management (2000), and No. 437 on Risk Management (2001). Thus, while no single policy can be cited as expressing the policy of this section, collectively there can be little doubt that the policies do support it.

The reference to the ownership of the waters by the State in trust for the public echoes the idea of the public trust doctrine. *See National Audubon Soc’y v. Superior Ct.*, 658 P.2d 709 (Cal.), *cert. denied sub nom. City of Los Angeles v. National Audubon Soc’y*, 464 U.S. 977 (1983); *United Plainsmen Ass’n v. North Dakota State Water Conserv. Comm’n*, 247 N.W.2d 457 (N.D. 1976); Douglas Grant, *Western Water Rights and the Public Trust Doctrine: Some Realism About the Takings Issue*, 27 ARIZ. ST. L.J. 423 (1995); Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970). The public trust doctrine has been invoked with limited success to unsettle apparently settled property rights in several western States. *See* Joseph Sax, *Some Thoughts on the Decline of Private Property*, 58 WASH. L. REV. 481 (1983). The public trust doctrine has had a much lower profile in riparian law than it has assumed in appropriate rights, if only because property notions remain less fully developed in riparian law. *See* Dellapenna, § 7.05(b). In either event, the formulation in the Code is not a direct expression of the public trust doctrine, for this formulation is found in the law even of States that most insistently reject the applicability of the public trust doctrine to the waters of the State. *See* COLO. CONST., art. xvi, § 5. This formulation compels neither the acceptance nor the rejection of the public trust doctrine as such. It does serve to underscore the reality that water as an ambient resource cannot be fully subordinated to private rights; water is always a matter of public concern and is subject to regulation in the public interest.