

**“WHISKEY IS FOR DRINKING;  
WATER IS FOR FIGHTING OVER.”**

**Mark Twain**

Brian P. Barger, Esq.  
Brady, Coyle & Schmidt, Ltd.  
bpbarger@bcslawyers.com  
419-885-3000

# PRESENTATION OVERVIEW

- ▶ Ohio's Historical "Riparian" System
  - The Right to a Reasonable Use of Water
- ▶ Trend Toward Regulated Riparianism
  - Permits for Withdrawals and Consumptive Use
    - The Great Lakes Compact and Ohio's Implementing Legislation (HB 473)
    - Permits for Diversions and Consumptive Uses under R.C. 1501.30 et seq.
    - Registration of facilities capable of withdrawing more than 100,000 gallons per day under R.C. 1521.16
  - Surface Mining Dewatering under R.C. 1514.13

# THE REASONABLE USE DOCTRINE

- ▶ Right to the reasonable use of water associated with the ownership of the land within which the water flows.
  - Ohio has applied the reasonable use doctrine to stream withdrawals for many decades; the reasonable use doctrine was only recently applied to ground water withdrawals.
  - Landowners have a property interest in groundwater, a right that has been affirmed in the Ohio Constitution.

# THE REASONABLE USE DOCTRINE (Continued)

## ▶ Surface Water

- Historically, Ohio has employed the reasonable use doctrine with regard to surface water for many decades (*see, e.g., Tootle v Clifton*, 22 Ohio St. 247 (Dec. Term 1871); *Chudzinski v. City of Sylvania*, 53 Ohio App.2d 151 (1976)).

## THE REASONABLE USE DOCTRINE (Continued)

- ▶ The Reasonable Use Doctrine– Restatement Torts Second– was established as Ohio’s common law for ground water in *Cline v. American Aggregates Corp.*, 15 Ohio St. 3d 384 (1984).
- ▶ The Court held that a landowner may withdraw ground water without liability so long as the withdrawal did not unreasonably harm a neighboring landowner, did not exceed his or her own reasonable share of the annual supply of ground water, or have a direct and substantial effect on a watercourse or its users of water. However, it is important to note that the *Cline* standard assumes non-liability–a landowner is allowed to withdraw as much groundwater as he can put to beneficial use. *McNamara v. City of Rittman*, 107 Ohio St.3d 243, 246 (2005).

# THE REASONABLE USE DOCTRINE (Continued)

## ▶ Codification of the Common Law

- The Reasonable Use Doctrine was codified in 1988 in Ohio Revised Code 1521.17. It states, “The general assembly hereby finds and declares that the determination of the reasonableness of a use of water depends on a consideration of the interests of the person making the use, of any person harmed by the use, and of society as a whole.”

# THE REASONABLE USE DOCTRINE (Continued)

- ▶ R.C. 1521.17 goes on to state:
  - In accordance with section 858 of the Restatement (Second) of Torts of the American law institute, all of the following factors shall be considered, without limitation, in determining whether a particular use of water is reasonable:
    - (1) The purpose of the use;
    - (2) The suitability of the use to the watercourse, lake or aquifer;
    - (3) The economic value of the use;
    - (4) The social value of the use;
    - (5) The extent and amount of harm it causes;

## THE REASONABLE USE DOCTRINE (Continued)

- (6) The practicality of avoiding the harm by adjusting the use or method of use by one person or the other;
- (7) The practicality of adjusting the quantity of water used by each person;
- (8) The protection of existing values of water uses, land, investments, and enterprises, and;
- (9) The justice of requiring the user causing the harm to bear the loss.



## THE REASONABLE USE DOCTRINE (Continued)

### ▶ Right to a Jury Trial

- The question of reasonable use and apportionment of loss is to be left to the judgment of a jury. *Shock v. City of Canton*, (1906) 66 Ohio St. 19 at 30–31.

# THE REASONABLE USE DOCTRINE (Continued)

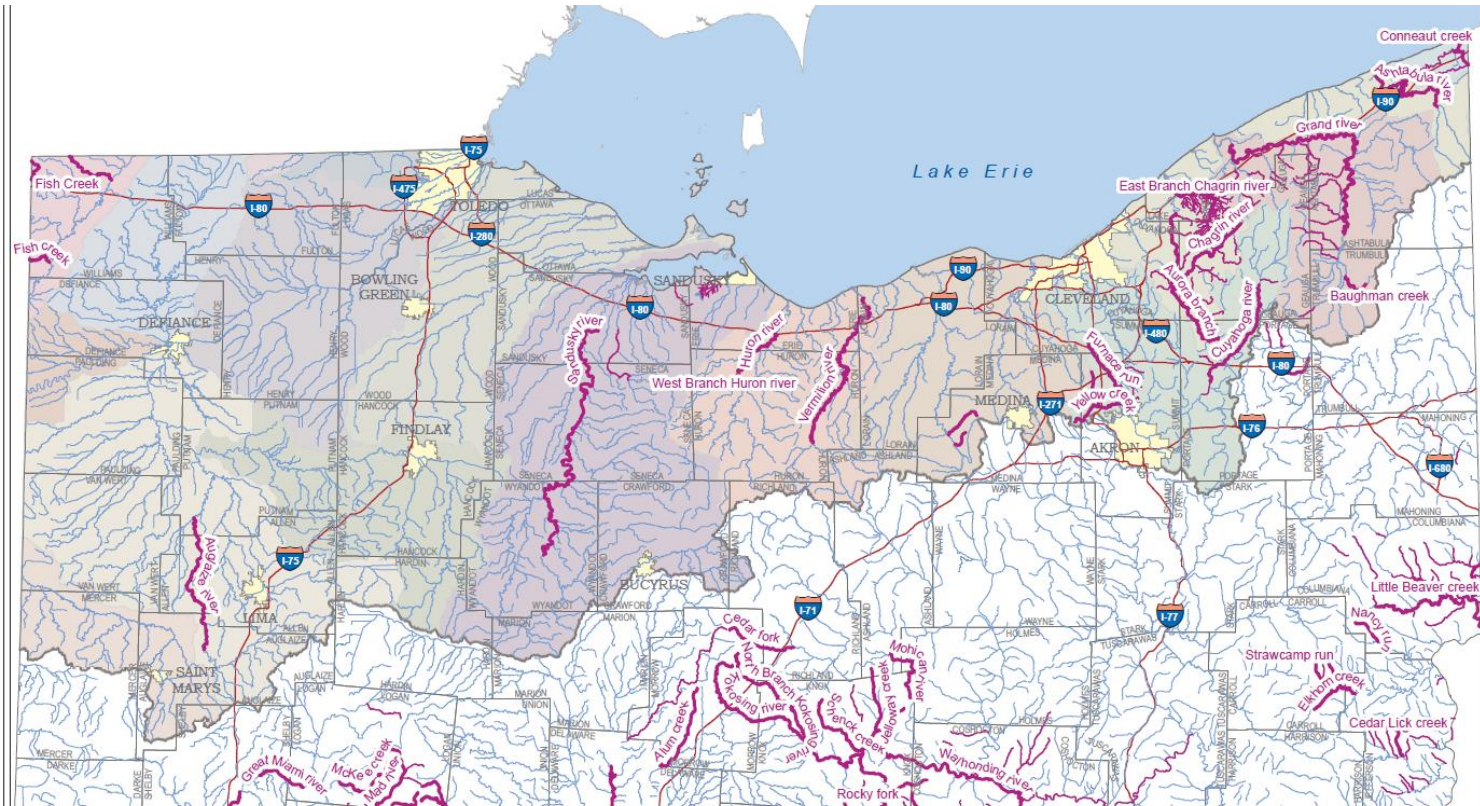
## ▶ Constitutionally Protected Property Interest

- In *McNamara*, 107 Ohio St.3d at 249, the Ohio Supreme Court clarified that landowners have a property interest in ground water and that governmental interference with that right can constitute an unconstitutional taking.
- In 2008, the Ohio constitution was amended to affirm the constitutional right to a reasonable amount of ground or surface water. In *McNamara v. city of Rittman* (2005), 107 Ohio St.3d 243, 249, the Ohio Supreme Court noted that R.C. 1521.17 defines what constitutes reasonable use.

# Article 1 Section 19b of the Ohio Constitution: Property rights in ground water, lakes, and other watercourses

- ▶ (A) The protection of the rights of Ohio's property owners, the protection of Ohio's natural resources, and the maintenance of the stability of Ohio's economy require the recognition and protection of property interests in ground water, lakes, and watercourses.
- ▶ (B) The preservation of private property interests recognized under divisions (C) and (D) of this section shall be held inviolate, but subservient to the public welfare as provided in Section 19 of Article I of the Constitution.
- ▶ (C) A property owner has a property interest in the reasonable use of the ground water underlying the property owner's land.
- ▶ (D) An owner of riparian land has a property interest in the reasonable use of the water in a lake or watercourse located on or flowing through the owner's riparian land.
- ▶ (E) Ground water underlying privately owned land and nonnavigable waters located on or flowing through privately owned land shall not be held in trust by any governmental body. The state, and a political subdivision to the extent authorized by state law, may provide for the regulation of such waters. An owner of land voluntarily may convey to a governmental body the owner's property interest held in the ground water underlying the land or nonnavigable waters located on or flowing through the land.
- ▶ (F) Nothing in this section affects the application of the public trust doctrine as it applies to Lake Erie or the navigable waters of the state.
- ▶ (G) Nothing in Section 1e of Article II, Section 36 of Article II, Article VIII, Section 1 of Article X, Section 3 of Article XVIII, or Section 7 of Article XVIII of the Constitution shall impair or limit the rights established in this section.
- ▶ (SJR 8; Adopted 11-4-08, effective 12-1-08)

# Compact Defined HQ Waters



**Compact Defined High-Quality Waters**



Ohio Department of Natural Resources, Division of Soil and Water Resources  
March 2012



## VERY BRIEF BACKGROUND OF THE COMPACT

- ▶ Impetus for coordinated regulation of the Great Lakes was the 1998 approval by the Canadian government for a ship to withdraw about 160 million gallons of Lake Superior water per year for export to Asia. Public outcry resulted in the revocation of that approval. Incidentally, Lake Superior contains 3,000,000,000,000,000 – or 3 quadrillion gallons of water. Enough water to flood all of North and South America to a depth of 1 foot.

## VERY BRIEF OVERVIEW OF THE COMPACT (Continued)

- ▶ In 2008, all eight Great Lakes states and two provinces of Canada enacted legislation adopting the Compact. Congress approved and the Compact became effective on December 8, 2008.
- ▶ Compact prohibits all diversions of water outside of the Great Lakes Basin or from the watershed of one Great Lake to the watershed of another Great Lake with very limited exceptions relating to public water supplies for straddling communities.
  - One wonders what would happen if Alaska, Texas, and Louisiana formed a Compact to prohibit all diversions of oil and gas from those states.

## VERY BRIEF OVERVIEW OF THE COMPACT (Continued)

- ▶ Requires each state to implement an in-state regulatory program for new and increased withdrawals and consumptive uses.
- ▶ All existing withdrawals and consumptive uses are “grandfathered.”

## VERY BRIEF OVERVIEW OF THE COMPACT (Continued)

- ▶ A state may approve an application for a new or increased withdrawal or consumptive use only if the applicant meets all of the criteria in the Compact's decision-making standard.
- ▶ The standard requires ODNR to make sure that no individual or cumulative withdrawal causes a significant adverse impact to the Water and Water Dependant Natural Resources of the Basin. Basically, Water Dependent Natural Resources means anything with a cell structure. A discussion of the decision-making standard follows later in the presentation.



## VERY BRIEF OVERVIEW OF THE COMPACT (Continued)

- ▶ The Compact defines certain terms:
  - Water means “ground or surface water contained within the Basin.”
  - Basin means “the watershed of the Great Lakes and the St. Lawrence River upstream from the Trois–Riveriers, Quebec within the jurisdiction of the Parties.”
  - Withdrawal means “the taking of water from surface water or groundwater.”
  - The definition of Source Watershed has proven to be controversial.

## VERY BRIEF OVERVIEW OF THE COMPACT (Continued)

- ▶ Pursuant to the Congressional Record, dated August 1, 2008, Source Watershed means: the watershed of a Great Lake or the St. Lawrence River. “Therefore, requiring that there be no significant adverse impacts to a Source Watershed means that, for example, there be no significant adverse impacts to the Lake Michigan Watershed.”

## VERY BRIEF OVERVIEW OF THE COMPACT (Continued)

- ▶ Importantly, the term “significant adverse impact” is not defined by the Compact and, along with other non-defined terms, it is up to each state how to define it.
- ▶ Significant adverse impact has proven to be difficult to define, in large part because of how that term interacts with the Source Watershed.

## VERY BRIEF OVERVIEW OF THE COMPACT (Continued)

- ▶ In the September 22, 2008 Congressional Record, Governor Doyle, Chairman of the Great Lakes Governors, clarified that significant adverse impacts were to be judged based on impacts to the Great Lakes–St. Lawrence River Basin as a whole as well as no significant adverse impacts to the source watershed as a whole.

## VERY BRIEF OVERVIEW OF THE COMPACT (Continued)

- ▶ Scientific tools exist to assess impacts to a specific stream segment and groundwater impacts relative to a specific stream segment.
- ▶ To date no scientific tools exist to measure impacts to the source watershed.

## VERY BRIEF OVERVIEW OF THE COMPACT (Continued)

- ▶ **Section 4.10 of the Compact**
- ▶ Within five years of the effective date of this Compact, each party shall create a program for the management and regulation of new or increased withdrawals and consumptive uses by adopting and implementing measures consistent with the decision-making standard.

## VERY BRIEF OVERVIEW OF THE COMPACT (Continued)

- ▶ **“Each party may determine the scope and thresholds of its program, including which new or increased withdrawals and consumptive uses will be subject to the program.”**
  - HB 473, which was passed by the House on April 25, 2012, and is now up for vote in the Senate, is Ohio’s implementing legislation.

## VERY BRIEF OVERVIEW OF THE COMPACT (Continued)

- ▶ The business/regulated community's overarching objective is to make sure that the Lake Erie Watershed is sustainable on a long-term basis.



## GENERAL CONSUMPTIVE USE FACTS

- ▶ 39,000 gallons to build 1 automobile
- ▶ 1,000 gallons to make 1 gallon of milk
- ▶ 634 gallons to make 1 hamburger
- ▶ 10 gallons to make 1 slice of bread
- ▶ 7-1/2 years for average American residence to use the same amount of water that flows over Niagara Falls in 1 second (750,000)

# COMPACT REQUIREMENTS

- ▶ Under section 4.11 of the Compact, before an Ohioan in the Lake Erie Watershed may withdraw water above the threshold limit, ODNR must determine that it meets the Compact's decision making standard:
  - All Water Withdrawn shall be returned, either naturally or after use, to the Source Watershed less an allowance for Consumptive Use.
  - The Withdrawal or Consumptive Use will be implemented so as to ensure that the Proposal will result in no significant individual or cumulative adverse impacts to the quantity or quality of the Waters and Water Dependent Natural Resources and the applicable Source Watershed.

## COMPACT REQUIREMENTS (Continued)

- ▶ The Withdrawal or Consumptive Use will be implemented so as to incorporate Environmentally Sound and Economically Feasible Water Conservation Measures.
- ▶ The Withdrawal or Consumptive Use will be implemented so as to ensure that it is in compliance with all applicable municipal, State and federal laws as well as regional interstate and international agreements, including the Boundary Waters Treaty of 1909.

# COMPACT REASONABLENESS FACTORS

- ▶ The proposed use is reasonable, based upon a consideration of the following factors:
  - 1. Whether the proposed Withdrawal or Consumptive Use is planned in a fashion that provides for efficient use of the Water, and will avoid or minimize the waste of Water.
  - 2. If the Proposal is for an increased Withdrawal or Consumptive Use, whether efficient use is made of existing *water* supplies.

## COMPACT REASONABLENESS FACTORS (Continued)

- 3. The balance between economic development, social development and environmental protection of the proposed Withdrawal and use and other existing or planned *withdrawals* and *water* uses sharing the Water source.
- 4. The supply potential of the Water source, considering quantity, quality and reliability and safe yield of hydrologically interconnected *water* sources.

## COMPACT REASONABLENESS FACTORS (Continued)

- 5. The probable degree and duration of any adverse impacts caused or expected to be caused by the proposed Withdrawal and use under foreseeable conditions, to other lawful *consumptive* or non-consumptive uses of *water* or to the quantity or quality of the Waters and Water Dependent Natural Resources of the Basin, and the proposed plans and arrangements for avoidance or mitigation of such impacts.
- If a proposal includes restoration of hydrologic conditions and functions of the Source Watershed, the Party may consider that.

# IMPACT ON EXISTING RIGHTS

- ▶ Article 8 states that the Compact should not impair existing rights but:
  - Does the section 4.11 decision-making standard affect, limit, diminish or impair any rights validly established and existing as of the effective date of this Compact under State, or federal law governing the Withdrawal of Waters of the Basin?
  - Does section 4.11 affect or in any way interfere with the law of the respective Parties relating to common law Water rights?

# WATER RIGHTS IN OHIO AS OF THE DATE OF THE COMPACT

- ▶ As of at least December 2008, Ohioans had the right:
  - To an unlimited amount of water so long as it is not unreasonable.
  - To a jury trial on the issue of reasonableness.
  - To use the factors in R.C. 1521.17 to determine reasonableness.
  - To not need governmental approval before withdrawing water.
    - But see R.C. 1501.33 et seq., which applies to consumptive uses of over 2 MGD. This program has never been used since introduced in 1988.



# HB 473 WITHDRAWAL AND CONSUMPTIVE USE PERMIT PROGRAM

- ▶ A non-exempt owner or operator of a facility in the Lake Erie watershed must obtain a permit for new withdrawals or consumptive uses that meet certain thresholds:
  - 2.5 million gallons per day from a recognized navigation channel averaged over a 90-day period.
  - 1 million gallons per day from any river or stream or from groundwater except high quality (“HQ”) streams averaged over a 90-day period.
  - 100,000 gallons per day from a HQ stream averaged over a 45-day period or with no averaging period, depending on the drainage area.

A weir that represents a surface flow of approximately 100,000 gallons per day



# HB 473 WITHDRAWAL AND CONSUMPTIVE USE PERMIT PROGRAM (CONTINUED)

- ▶ Withdrawals and consumptive uses that do not require a permit include:
  - Those regulated under the Industrial Minerals Mining Law.
  - Public water supplies.
  - Electric generating utilities regulated under state and federal law.
  - Non-industrial impoundments such as farm ponds, golf course ponds, nursery ponds, stormwater retention ponds, or other private ponds, or if used for firefighting purposes.
  - Emergency use.
- ▶ The exemption for oil and gas was removed in this bill.

# HB 473 WITHDRAWAL AND CONSUMPTIVE USE PERMIT PROGRAM (CONTINUED)

- ▶ Applicant must adopt best management practices that are economically feasible for that facility.
- ▶ Permit is valid until the facility is abandoned, but must submit a certification of compliance every five years.
- ▶ The Chief must apply the Compact's decision-making standard and ensure that the withdrawal or consumptive use will result in no "significant individual or cumulative adverse impacts" on the quantity or quality of the waters and water dependent natural resources of the Great Lakes basin considered as a whole or the Lake Erie watershed considered as a whole."

# Diversion and Consumptive Use Permits under R.C. 1501.30 et seq.

- ▶ Does not apply if the activity is regulated under the Compact; e.g., if you are in the Lake Erie watershed.
- ▶ Since its enactment in 1988, ODNR has never processed an application under this statute.

# Consumptive Use Permits under R.C. 1501.30 et seq.

## – Definitions

- ▶ “Consumptive use” means a use of water resources, other than a diversion, that results in a loss of that water to the basin from which it is withdrawn and includes, but is not limited to, evaporation, evapotranspiration, and incorporation of water into a product or agricultural crop.
- ▶ “Diversion” means a withdrawal of water resources from either the Lake Erie or Ohio river drainage basin and transfer to another basin without return. “Diversion” does not include evaporative loss within the basin of withdrawal.
- ▶ “Waters of the state” includes all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and other bodies or accumulations of water, surface and underground, natural or artificial, regardless of the depth of the strata in which underground water is located, that are situated wholly or partly within or border upon this state or are within its jurisdiction.

## Diversions under R.C. 1501.30 et seq.

- ▶ No person shall divert more than 100,000 gallons per day of any waters of the state out of the Lake Erie or Ohio river drainage basins to another basin without having a permit to do so issued by the director of natural resources.
  - The application shall state the quantity of water to be diverted, the purpose of the diversion, the life of the project for which the water is to be diverted, and such other information as the director may require by rule.
  - Each application shall be accompanied by a nonrefundable fee of one thousand dollars, which shall be credited to the water management fund, which is hereby created.

# Diversions under R.C. 1501.30 et seq. – Decision-Making Standard

- ▶ ODNR shall not approve permit if any of the following apply :
  - (1) During the life of the project for which the water is to be diverted, some or all of the water to be diverted will be needed for use within the basin.
  - (2) The proposed diversion would endanger the public health, safety, or welfare.
  - (3) The applicant has not demonstrated that the proposed diversion is a reasonable and beneficial use and is necessary to serve the applicant's present and future needs.
  - (4) The applicant has not demonstrated that reasonable efforts have been made to develop and conserve water resources in the importing basin and that further development of those resources would engender overriding, adverse economic, social, or environmental impacts.
  - (5) The proposed diversion is inconsistent with regional or state water resources plans.
  - (6) The proposed diversion, alone or in combination with other diversions and water losses, will have a significant adverse impact on in-stream uses or on economic or ecological aspects of water levels.



# Consumptive Use Permits Under 1501.30 et seq.

- ▶ No person shall allow a facility that the person owns to withdraw waters of the state in an amount that would result in a new or increased consumptive use of more than an average 2,000,000 gallons of water per day in any 30-day period without first obtaining a permit from the director of natural resources under section 1501.34 of the Revised Code.

# Consumptive Use Permits under R.C. 1501.30 et seq. – Decision-Making Standard

- ▶ ODNR shall not approve permit if any of the following apply:
  - (1) Public water rights in navigable waters will be adversely affected;
  - (2) The facility's current consumptive use, if any, does not incorporate maximum feasible conservation practices as determined by the director, considering available technology and the nature and economics of the various alternatives;
  - (3) The proposed plans for the withdrawal, transportation, development, and consumptive use of water resources do not incorporate maximum feasible conservation practices as determined by the director, considering available technology and the nature and economics of the various alternatives;
  - (4) The proposed withdrawal and consumptive uses do not reasonably promote the protection of the public health, safety, and welfare;
  - (5) The proposed withdrawal will have a significant detrimental effect on the quantity or quality of water resources and related land resources in this state;
  - (6) The proposed withdrawal is inconsistent with regional or state water resources plans;
  - (7) Insufficient water is available for the withdrawal and other existing legal uses of water resources are not adequately protected.

## Consumptive Use Permits under R.C. 1501.30 et seq. (Continued)

- ▶ R.C. 1501.31(B) states “Sections 1501.30 to 1501.35 of the Revised Code do not affect common law riparian rights.”

## R.C. 1521.16 – Registering facilities capable of withdrawing more than 100,000 gallons a day

- ▶ Any person who owns a facility that has the capacity to withdraw waters of the state in an amount greater than 100,000 gallons per day from all sources shall register the facility with the chief within 3 months after the facility is completed.
  
- ▶ The person shall register the facility using a form prescribed by the chief that shall include:
  - The name and address of the registrant and date of registration;
  - The locations and sources of the facility's water supply;
  - The facility's withdrawal capacity per day and the amount withdrawn from each source;
  - The uses made of the water, places of use, and places of discharge; and
  - Such other information as the chief may require by rule.

# SURFACE MINING DEWATERING

- ▶ R.C. 1514.01(I) – “Dewatering” means the withdrawal of ground water from an aquifer or saturated zone that may result in the lowering of the water level within the aquifer or saturated zone or a decline of the potentiometric surface within that aquifer or saturated zone.
- ▶ R.C. 1514.13(A) – The chief must establish a projected cone of depression for any surface mining operation that may result in dewatering.

# SURFACE MINING DEWATERING (Continued)

- ▶ R.C. 1514.02(A)(16) – For any applicant whose operation may result in dewatering, [a mining permit application must include] a compilation of data in a form that is prescribed by the chief and that is suitable to conduct ground water modeling in order to establish a projected cone of depression for purposes of section 1514.13 of the Revised Code. The chief shall adopt rules as provided in section 1514.08 of the Revised Code establishing the minimum requirements and standards governing the data required under this division.
- ▶ Ohio Administrative Code 1501:14–5 provides the detailed requirements for the hydrology study.

# SURFACE MINING DEWATERING (Continued)

- ▶ If an owner has a diminution, contamination, or interruption of its ground water supply and the owner's property is located within the projected cone of depression of a surface mining operation, the owner may submit a written complaint to the operator or to the chief.
- ▶ Not later than 72 hours after receipt of the complaint, the operator shall provide the owner a supply of water that is comparable, in quantity and quality, to the owner's water supply prior to the diminution, contamination, or interruption of the owner's water supply. The operator shall maintain that water supply until the operator provides a permanent replacement water supply to the owner.

# SURFACE MINING DEWATERING (Continued)

- ▶ Strict liability – If the owner is in the cone of depression, the operator must resolve the situation.
- ▶ However, the operator does have 14 days to rebut the presumption that surface mining caused the diminution, contamination, or interruption; e.g., that the cause was a poor constructed well. If the chief decides that surface mining was not the cause, then the operator does not need to provide water or replace the well.



## CONCLUSION

- ▶ The Compact's approach to water regulation is a significant departure from that which presently exists.
- ▶ Pursuant to Article 1, Section 19b of the Ohio Constitution, Article 8 of the Compact, and R.C. 1501.30, existing property rights are to be protected.
- ▶ Science does not presently exist to assess impacts on a source watershed basis.

# Thank You

- ▶ Brian P. Barger, Esq.
- ▶ Brady, Coyle & Schmidt, Ltd.
- ▶ [bpbarger@bcslawyers.com](mailto:bpbarger@bcslawyers.com)
- ▶ 419-885-3000