



**Testimony**  
**Elizabeth Gara, Executive Director**  
**Connecticut Water Works Association**  
**Before the**  
**Environment Committee**  
**March 14, 2018**

The Connecticut Water Works Association (CWVA), a trade association of municipal, regional and private water utilities, respectfully submits comments on **SB-427 –PUBLIC TRUST COMPONENTS OF THE STATE WATER PLAN.**

Although we do not support, SB-427, as drafted, our understanding is that the bill is intended to address concerns with the eleventh-hour insertions in the draft State Water Plan of language referencing the “public trust” and Section 22a-15, CGS, the preamble to the Connecticut Environmental Policy Act (CEPA), and how this may impact the availability of water supplies for critical public uses.

To determine whether the insertion of the public trust/CEPA reference has any implications regarding the availability of the state’s public water supplies, CWVA requested an independent legal memorandum from counsel at Day Pitney LLP. The memorandum, which is currently in draft form and will be shared with policymakers when finalized, confirms that the insertion of this reference may, intentionally or not, result in the misapplication of the public trust doctrine in Connecticut in ways that may undermine the availability of water supplies necessary to meet the public health, safety and economic development needs of the state.

This is very unfortunate. CWVA and our members actively participated in extensive meetings and discussions with the Water Planning Council (WPC) and other stakeholders over a four-year period. Throughout that process, numerous complex policies and issues were researched and debated, and documents carefully edited to achieve consensus among the stakeholders for language in the plan. However, not once during this time was the issue of public trust and the CEPA statute raised, discussed or considered. Instead, based on vague references to the phrase “public trust” in mass generated emails to the WPC, the WPC revised the Plan at the last minute to insert the reference to the public trust under the preamble to the CEPA statute in the context of the Plan’s goal of balancing water use for all needs, including the needs of public water supply, economic development, recreation and ecological health.

However, because the State Water Plan references the CEPA statute in isolation and ignores the extensive body of common law and caselaw on the public trust doctrine as well as other environmental and public health laws regulating water use, this raises significant concerns regarding how it will impact the established water rights of public water suppliers, business and industry, agriculture, municipalities, and other water users.

## **The Misapplication of the Public Trust Doctrine Jeopardizes Established Water Rights**

The Insertion of the CEPA statute in the State Water Plan may result in the misapplication of the public trust doctrine when implementing the Plan. For the WPC to effectively extend the public trust doctrine unilaterally to the management of water resources of the State or the balancing of water needs is vastly overreaching and potentially problematic, given the considerable body of common law and caselaw regarding the public trust doctrine, which dates back to ancient Roman and early English times, and, in Connecticut, to the 1800s.

The Connecticut Supreme Court in *Waterbury v. Washington* was very clear – the CEPA statute does not trump other environmental laws. However, by highlighting the CEPA statute as central to the State Water Plan’s goal of balancing water uses, the Plan appears to position the CEPA statute to, in fact, trump other laws in governing water use rights. This creates enormous uncertainty and will invite legal challenges to established water rights, such as registered diversions, diversion permits, reservoir impoundments, and other regulated water uses. This uncertainty and potential upset to the long established order is clearly not what the legislature envisioned when authorizing the Water Planning Council to undertake a State Water Plan.

The reference to the public trust doctrine in the Plan is particularly troubling given that its proponents have relied on this phrase to call for 1) the elimination of registered diversions, which public water suppliers have invested in and relied upon to meet public water supply needs; 2) the extension of stream flow regulations to groundwater supplies, which may result in water shortages and economic development moratoriums in certain municipalities; 3) the imposition of inflexible water conservation requirements that may impose unnecessary and/or unachievable burdens on public water suppliers, businesses, and residents; and 4) new permitting requirements on high volume water users that will add unnecessary costs and administrative burdens on water companies and customers.

The potential misapplication of the public trust doctrine may also raise questions regarding the continued availability of water supplies needed to support business, agriculture, hospitals, colleges and universities, and other facilities.

## **Exceeds the Scope of the Water Planning Council’s Responsibilities**

The eleventh-hour Insertions to the Plan providing for the WPC’s consideration of the public trust doctrine as part of its efforts to develop a State Water Plan are outside the scope of the WPC’s responsibilities under Public Act 14-163, which identifies 17 specific requirements that should be addressed in the State Water Plan. Nowhere in the statute or in the legislative history do the words “public trust” appear. Moreover, the public trust issue was not discussed during any of the numerous state water plan meetings held over a four-year period.

## **Undermines the State Water Plan’s Goal of Balancing Water Uses**

PA 14-163 directs the WPC to develop a State Water Plan for the management of the water resources of the State and requires any such plan to balance water use for all needs, including the needs of public water supply, economic development, recreation and ecological health. The definition of balance specified in Public Act 14-163, which was carefully and deliberately crafted by lawmakers, is not relevant to the application of the public trust doctrine in Connecticut.

## **Public Trust Insertions Conflict with other Laws**

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The Plan's reference to public trust under the CEPA statute are in direct conflict with: 1) the common law public trust doctrine; 2) the General Assembly's declaration of policy in Section 22a-15 of CEPA and related case law in Connecticut; 3) Connecticut's current water allocation system, including extensive laws and regulations; and 4) the Public Act directing the WPC to prepare a state water plan.

Clearly, the public trust doctrine and its application in Connecticut is a significant public policy issue and should not be allowed to be inserted in the State Water Plan at the eleventh hour without regard for its impact on established water rights.

Given the enormous implications associated with the application of the public trust doctrine, including the potential impact on Connecticut's business climate, CWWA urges lawmakers to delete the references to public trust and Section 22a-15, CGS from the State Water Plan.

Thank you for the opportunity to address these concerns.