

# MAINE STATE LEGISLATURE

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# 123rd MAINE LEGISLATURE

## FIRST REGULAR SESSION-2007

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Legislative Document

No. 1743

S.P. 610

March 27, 2007

### An Act To Create the Freshwater Resource Board

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Reference to the Committee on Natural Resources suggested and ordered printed.

A handwritten signature in cursive script that reads "Joy J. O'Brien".

JOY J. O'BRIEN  
Secretary of the Senate

Presented by Senator BARTLETT of Cumberland.  
Cosponsored by Representative KOFFMAN of Bar Harbor and Senator: STRIMLING of  
Cumberland, Representatives: BABBIDGE of Kennebunk, EBERLE of South Portland,  
WAGNER of Lewiston.

1 **Be it enacted by the People of the State of Maine as follows:**

2 **Sec. 1. 22 MRSA c. 601, sub-c. 6**, as amended, is repealed.

3 **Sec. 2. 38 MRSA c. 3, sub-c. 1, art. 1-H** is enacted to read:

4 **ARTICLE 1-H**

5 **RIGHTS TO AND PERMISSIBLE USES OF GROUNDWATER**

6 **§410-Q. Definitions**

7 As used in this article, unless the context otherwise indicates, the following terms  
8 have the following meanings.

9 **1. Nontraditional use.** "Nontraditional use" means any use of groundwater that is  
10 not a traditional use.

11 **2. Person.** "Person" means any individual, partnership, company, corporation,  
12 association, unincorporated association, joint venture, trust or municipality, the State or  
13 any agency, department or subdivision of the State, a federal agency or any other legal or  
14 commercial entity.

15 **3. Traditional use.** "Traditional use" means:

16 A. The extraction of groundwater from under a person's property for final  
17 consumption on that property, including human, agricultural and industrial  
18 consumption; and

19 B. The extraction of groundwater by any water district exclusively for the purpose of  
20 supplying the water to customers who will consume that water on the customers' own  
21 property.

22 **§410-R. Freshwater Resource Board**

23 **1. Creation of board.** The Governor shall establish the Freshwater Resource Board,  
24 referred to in this article as "the board," which must consist of seven members. The  
25 Governor shall appoint:

26 A. One representative from among nominees submitted by any statewide agricultural  
27 organization;

28 B. One representative from among nominees submitted by any statewide  
29 organization of water districts;

30 C. One representative from among nominees submitted by any statewide hunting or  
31 fishing organization;

32 D. One representative from among nominees submitted by any statewide  
33 environmental protection advocacy organization;

34 E. One representative who is a private well owner;

1        F. One representative who is a nontraditional user; and

2        G. The Attorney General.

3        The board shall appoint its own chair.

4        **2. Protection of groundwater supply and quality.** The board shall take all  
5 reasonable measures to ensure an adequate supply of usable groundwater for the people  
6 of the State and to ensure that the quality of the water is protected.

7        **3. Monitoring levels of sustainability.** The board shall monitor the levels of  
8 sustainability of groundwater and protect against uses of groundwater that are detrimental  
9 to aquifers, bodies of surface water or wetlands or to the public health, safety and general  
10 welfare and to issue bulk water transport permits as provided in this chapter.

11        **4. Powers.** The board is authorized to hire staff, establish offices and take all other  
12 reasonable administrative steps to carry out its duties under this article.

13        **5. Rulemaking.** The department may adopt rules necessary for the implementation  
14 of this article. The rules may include imposition of a fee to cover the costs of providing  
15 permits, including any impact studies required by the department. Rules adopted pursuant  
16 to this subsection are major substantive rules as defined in Title 5, chapter 375,  
17 subchapter 2-A.

18        **§410-S. Priority of traditional use**

19        A person who uses groundwater for a traditional use holds the first right to use that  
20 groundwater.

21        **§410-T. Bulk water transport**

22        **1. Prohibition.** Except as otherwise provided in this section, a person may not  
23 transport water for commercial purposes by pipeline or other conduit, by tank truck or in  
24 a container greater in size than 10 gallons beyond the boundaries of the municipality or  
25 township in which the water is naturally located or any bordering municipality or  
26 township.

27        **2. Exceptions.** The prohibition in this section does not apply to:

28        A. Any water utility as defined in Title 35-A;

29        B. Water transported for use in well drilling, construction activities, concrete mixing,  
30 filling swimming pools, servicing portable toilets, firefighting, hospital operations,  
31 aquaculture, agricultural applications or civil emergencies;

32        C. Water distilled as a by-product of a manufacturing process; and

33        D. Water transported by authority of a bulk water transport permit issued under  
34 subsection 3.

35        **3. Permitted transportation.** The board, after consultation with the department, the  
36 Public Utilities Commission, and the State Geologist, may authorize transport of water

1 for commercial purposes if the board finds as a result of independent assessment and  
2 investigation that:

3 A. Transport of the water will not constitute a threat to public health, safety or  
4 welfare;

5 B. Transport of the water will not interfere with traditional uses;

6 C. The amount of water transported from any aquifer is in sustainable amounts and  
7 will not affect the affected aquifer in a manner that will affect the groundwater's  
8 contribution to surface water and the plant and animal life dependent on these water  
9 sources;

10 D. For a source not otherwise permitted by the department or the Maine Land Use  
11 Regulation Commission, the water withdrawal will not have an undue adverse effect  
12 on waters of the State, as defined by section 361-A, subsection 7; water-related  
13 natural resources; or existing uses, including, but not limited to, public or private  
14 wells, within the anticipated zone of contribution to the withdrawal. In making  
15 findings under this paragraph, the board shall consider both the direct effects of the  
16 proposed water withdrawal and its effects in combination with existing water  
17 withdrawals; and

18 Before issuing a permit the board shall require the applicant to provide any information or  
19 studies it considers necessary to ensure an independent assessment of projected  
20 sustainability. Any permit issued must include a provision for ongoing independent  
21 monitoring of water extracted during the term of the permit and the effect on traditional  
22 users, the aquifer and surface waters.

23 Any authorization under this subsection is for a period not to exceed 3 years and is  
24 subject to termination if the board finds that the conditions on which the permit was  
25 issued have changed. Authorization may be renewed subject to the same criteria.

26 **4. Conditions of authorization.** Notwithstanding Title 1, section 302, the  
27 exceptions authorized in subsection 2 and any authorization granted under subsection 3  
28 are subject to future legislative limitations of the right to transport water.

29 **5. Emergency.** In case of an emergency, any person may transport water as  
30 necessary for the duration of the emergency, but the person transporting the water must  
31 inform the board within 3 days and the board may determine when the emergency is over.

32 **6. Penalty.** A person who transports water in violation of this section is guilty of  
33 illegal transport of water. Illegal transport of water is a Class D crime. Each shipment, or  
34 day of transport if by pipeline, is a separate offense.

35 **§410-U. Reasonable use; liability for interference**

36 **1. Cause of action.** A person may maintain under this section an action for  
37 equitable relief or an action in tort to recover damages, or both, for the unreasonable harm  
38 caused by another person's withdrawing, diverting or altering the character or quality of  
39 groundwater.

- 1        **2. Factors.** Factors to be considered in determining the unreasonableness of any  
2 harm referred to in subsection 1 include, but need not be limited to, the following:
- 3        A. The purpose of the respective uses or activities affected;  
4        B. The economic, social and environmental value of the respective uses, including  
5 protection of public health;  
6        C. The nature and extent of the harm caused;  
7        D. The practicality of avoiding the harm;  
8        E. The practicality of adjusting the quantity or quality of water used or affected and  
9 the method of use by each party;  
10       F. The maintenance or improvement of groundwater and surface water quality;  
11       G. The protection of the existing value of land, investments, enterprises and  
12 productive uses;  
13       H. The burden and fairness of requiring a person who causes harm to bear the loss;  
14 and  
15       I. The burden and fairness of requiring a person to bear the loss who causes harm in  
16 the conduct of reasonable agricultural activities, using good agricultural practices  
17 conducted in conformity with federal, state and local laws and regulations.

18       **§410-V. Protection from terrorism**

19       A corporation that is owned in whole or in part by a corporation located outside the  
20 United States has the same right to groundwater for nontraditional use as a domestic  
21 corporation upon demonstration that the foreign corporation and its subsidiaries are not  
22 involved in terrorist activities anywhere in the world.

23       **Sec. 3. 38 MRSA §570-M, sub-§2,** as enacted by PL 2001, c. 626, §15, is  
24 amended to read:

25       **2. Authorized water transporter.** A person authorized to transport water under  
26 ~~Title 22,~~ section ~~2660-A~~ 410-T using water in conformance with rules adopted under that  
27 section; or

28       **Sec. 4. Study of the public trust doctrine and allocation as applied to**  
29 **groundwater.** The Freshwater Resource Board as established pursuant to the Maine  
30 Revised Statutes, Title 38, section 410-R shall study whether the interconnectivity  
31 between surface water and groundwater warrants an extension of the public trust doctrine,  
32 now applicable to surface water in the great ponds and tidal rivers, to other surface water  
33 and to groundwater. The Freshwater Resource Board shall also study methods to allocate  
34 groundwater for nontraditional use when, to ensure sustainability of the groundwater  
35 supply, nontraditional use must be limited. The completed studies must be submitted to  
36 the Governor and the Legislature within 18 months of the effective date of this Act.

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## SUMMARY

2        This bill provides for the creation of the Freshwater Resource Board to protect Maine  
3 groundwater, to protect the rights of all persons who own homes, farms and businesses  
4 over the groundwater and to protect the surface water that benefits from groundwater and  
5 the plants and wildlife that benefit. The bill provides for the continuation of water  
6 removal by water bottling interests when the removal of water does not threaten these  
7 goals. The bulk water transport permitting process is amended to make clear that  
8 transport for bottling is permitted. The bill transfers the authority to issue bulk water  
9 transport permits from the Commissioner of Health and Human Services to the  
10 Freshwater Resource Board and to also convey the power to set fees to carry out this law  
11 from the commissioner to the board.