Groundwater in Maine: A Time for Action

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GROUNDWATER IN MAINE: A Time for Action

Summary

From 1987 to 1991 the Maine Legislature, in response to an identified need for groundwater protection and water resources management, created sequential water study panels charged with analyzing Maine's water law and the state's administrative structure for handling matters related to water resources. The panels were then to make recommendations for improvement.

Each panel submitted a comprehensive report to the Governor and the Legislature. After the filing of each report, the Legislature would assemble another water study panel. Very little substantive legislative action was taken.

After February 1991, when the Water Resources Management Board had filed its report and was then abruptly disbanded by the Legislature, there was a fourteen-year lull. In 2005, the Legislature put together another panel, the Land and Water Resources Council. The Council's report is due November 1, 2006.

The various water studies provide analyses and recommendations that are as timely now as when they were written. They continue to provide a valuable tool for drafting water-related legislation and for establishing a comprehensive water resources structure within state government.

Surface water and groundwater are, for most purposes, treated differently under Maine law. As will be discussed further in this report, disputes regarding surface water are resolved using the reasonable use doctrine while groundwater disputes are decided using the absolute dominion rule. However, legislation protecting or regulating the waters of the state does not always differentiate surface water from groundwater.

The focus of this report is on groundwater. Emphasis is placed on those issues of agreement among the legislatively created water study panels.

The report is organized around five topics:

- Groundwater Law: Absolute Dominion – the English Rule
- Legislative Erosion of Absolute Dominion
- The Maine Water Transport Law
- Coordinated Water Resources Management
- The Statutory Playing Field – New Hampshire and Vermont

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INTRODUCTION

There comes a time when studying and restudying a pressing issue is just not enough. At some point studying becomes an excuse for inaction. State officials and legislators have been known to shield themselves from acting to resolve complex, controversial issues by hiding behind the oft-used, "We need time to review carefully the findings of the study commission currently looking into the problem." Relegation to the purgatory of perpetual study is precisely what has happened with groundwater protection and comprehensive water resources management in the State of Maine.

The alarm was sounded long ago. As a result of the growing concern over the supply, allocation, uses and transport of Maine water, in 1987 the Maine Legislature decided to authorize the first in a long list of water studies. This study, "Report to the Governor and the 113th Maine Legislature -- Water Supply and Allocation Study," became know as the "PUC Study," since the Public Utilities Commission was the lead agency among other state agencies and interested individuals contributing to the report. The PUC Study evaluated water resource management issues, reviewed Maine water law, and attempted to delineate a role for the state in protecting the state's waters.

Following the PUC Study, the Legislature created the Maine Water Supply Study Commission in 1988. The Commission's study recommended the creation of yet another study panel, the Water Resources Management Board. The Legislature promptly set up that Board.

The Water Resources Management Board, a broad based panel with private and public sector representation, addressed issues very similar to those addressed in the PUC Study. The Board submitted a comprehensive report, with accompanying subcommittee reports, to the Maine Legislature in February 1991. The Board's report provides a revealing history of the various water study commissions including in particular the 1988 PUC Study. The Board stated:

> In response to emerging concerns, particularly over the use and transport of water in Maine, the Maine Legislature in 1987 called for a study of water supply and allocation by the Maine Public Utilities Commission (PUC). The PUC Study, completed in February 1988, made a number of important findings and recommendations relating to the legal and organizational setting of water resources management in Maine. The most sweeping recommendation of the

> PUC Study -- a resolve to establish a Water Resources Commission -- was tabled by the Legislature at that time in favor of creating a legislative Maine Water Supply Study Commission in 1988. This Study Commission's Report, published in February 1989 and followed by companion legislation, called for creation of this temporary Water Resources Management Board (WRMB) to study a variety of issues over the coming year relating to physical, economic and institutional factors of water resources management and make recommendations for a permanent structure to carry out the State's role in water resources management.[1]

To alleviate the administrative morass of state water management, the Water Resources Management Board also recommended the creation of a permanent water resources management board to provide triage for water-related matters.[2] The Legislative response was not to address the problem but to shoot the messenger. It disbanded the Water Resources Management Board[3] and effectively buried the Board's proposals.

With the disappearance of the Water Resources Management Board, all of the water studies began to collect dust on remote shelves in a few state libraries. Fifteen years passed.

In 2005, the Legislature established yet another water study commission, the Land and Water Resources Council (PL 2005 c. 452). Much had changed since the last study in 1991. The demand on Maine's abundant water supply had grown in ways that were unforeseen in a state not known for arid conditions. There was now regional, national and even global interest in Maine's water. The Legislature directed this committee to submit its water report in the fall of 2006.

Much valuable information has already been produced by the various water studies long since completed. Yet, as reported in the 2004 scorecard report of Robert Marvinney, State Geologist, entitled "Previous State Efforts in Water Use Policy," very little action has been taken in the past fifteen years to implement even the studies' consistent and overlapping recommendations aimed at updating Maine's water law

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1 Board Findings and Recommendations, Maine Water Resources Management Board [WRMB], 1991, p. 1

2 *Id.* at p.12

3 5 Maine Revised Statutes Annotated [M.R.S.A.] §6306

and centralizing water management responsibilities. In fact, Dr. Marvinney, in listing the specific recommendations of the various water study commissions and the status of those recommendations, was forced to designate most as simply "not adopted."

Shelving in perpetuity these various water studies would be a shocking waste of taxpayer dollars. With few exceptions the substance of the studies remains current. The studies are comprehensive in scope and address issues related to surface water as well as groundwater.

This paper is an attempt to draw from the various studies an outline sketch of Maine's groundwater -- past and present -- using excerpts from the studies themselves.

The studies highlight the need for prompt action by the legislative and executive branches of state government to protect Maine's groundwater for the future -- action based on the excellent studies that have already been presented and the findings of the the Land and Water Resources Council to be presented in the fall of 2006.

GROUNDWATER LAW: ABSOLUTE DOMINION -- THE ENGLISH RULE

Under Maine law, surface water (lakes, ponds, rivers, streams, *etc.*) and groundwater (water from underground springs or aquifers) are treated very differently. Use of surface water is governed by riparian rights which acknowledge "the qualified rights of an owner of property bordering a body of water to have access to and make reasonable [emphasis supplied] use of that water and enjoy the use and benefit of that water for all purposes to which it can be reasonably applied....The riparian does not own the water."[4]

This "reasonable use" doctrine calls for the resolution of disputes as to surface water use on a case-by-case basis. The dispute resolution standard is reasonableness. If a use is found to be unreasonable, adversely affecting other riparians' access to the same surface water, liability for the interference may be assessed.

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[4] Water Law in Maine - 1990, Report of the Legal Framework Subcommittee, Water Resource Management Board, 1990, p. 2, *citing Kennebunk, Kennebunkport, and Wells Water District v. Maine Turnpike Authority*, 145 Me. 35 (1950) and other Maine cases.

The surface water in "great ponds" (10 acres or more in a natural state) and tidal rivers is held in public trust by the state pursuant to Massachusetts Bay Colonial Ordinance 1641-47. The Law Court has found as to surface water:

> Individuals owning property on the great ponds own to the low water mark; have a right of access to the pond for bathing, boating, fishing, fowling, agriculture and domestic uses; but may not, without legislative authority, draw upon the water of the pond below its natural low water mark....In other words, they have reasonable use rights of the surface water.[5]

However, the common law of groundwater is decidedly different. Maine is one of the very few states that still adhere to the common law doctrine known variously as the "absolute dominion rule," the "English rule" or the "rule of capture." In Texas, also an absolute dominion state, the doctrine is often called "the law of the biggest pump."

Absolute dominion dates from the mid-nineteenth century when most wells were dug and groundwater was assumed to be a part of the land. The purchaser of a parcel of land acquired whatever was on the land, above it or below it. The landowner could use the water beneath the land with abandon, regardless of the impact the water withdrawal might have on groundwater beneath other properties, and could not be held liable for the interference.

Little was then known about the interrelationship between surface water and groundwater. Since the misuse of surface water was visible and could be observed, the reasonable use doctrine seemed a logical response. However, groundwater could not be seen and was thus regarded as a mystery, yet a mystery bound up in the land:

> It [groundwater] is a process of nature not apparent; and therefore such percolating water has not received the protection which water running in a natural channel on the surface has always received.[6]

> [T]he secret, changeable, and uncontrollable character of underground water in its operation is so diverse and uncertain that we cannot well subject it to the regulations of law, nor build upon it a system of rules, as is done in the case of surface streams.[7]

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5 *Id.* at p. 2, citing *In re: Opinions of the Justices*, 118 Me. 503,504 (1919).

6 *Chase v. Silverstone*, 62 Me. 175, 179 (1873), citing *Broadbent v. Ramsbotham*, 11 Exch. 602 (1856).

7 *Western Maryland R. Co. v. Martin*, 73 A. 267 (Md. 1909).

Nevertheless, as the science of hydrology advanced, so too did the law's treatment of groundwater. Most states east of the Mississippi have substituted the "reasonable use rule" as is applied to surface water. The New Hampshire Supreme Court pioneered reasonable use, also known as the "American Rule," in 1862.[8] Vermont abandoned absolute dominion in 1985 when its legislature enacted what is now

10 V. S. A. §1410.

As discussed below, the Maine Legislature has enacted some groundwater protection. However, Maine has retained the essence of the absolute dominion rule. In fact, in the 1999 case of *Maddocks v. Giles*, 728 A.2d 150 (1999), the Law Court specifically refused to deviate from absolute dominion basing its ruling, in large part, on the refusal of the Maine Legislature to change the state's groundwater policy:

> Finally, we are further constrained in making the requested change because the Legislature has taken action in this area by creating the Water Resources Management Board to do a comprehensive study of water law in Maine. *See* 5 M.R.S.A. §6301 (Supp. 1989), repealed by 5 M.R.S.A §6306 (Supp. 1989). The Board reported to the Legislature and suggested that it adopt reasonable use principles. See Maine Water Resources Management Board, Board Findings and Recommendations 5 (Feb. 1991). The Legislature chose to leave the common law as it currently stands.

The Maine Water Resources Management Board findings referred to in *Maddocks v. Giles* had concluded that:

> Unlike surface water users, under the current common law, groundwater users are not subject to a 'test of reasonableness' that considers the impacts on other surface or groundwater uses. In order to effectively manage these interconnected resources, the rules governing the rights should be similar. Surface water resources and groundwater resources are interrelated as components of the hydrologic cycle and, therefore, should be managed under a comprehensive, conjunctive and integrated system of water use rights.
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> The Board recommends that the Legislature adopt a general definition of reasonable use that clarifies application of the reasonable use rule to groundwater uses, as well as surface water uses. Providing this definition will offer guidance to the courts and

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[8] *Bassett v. Salisbury Mfg. Co.*, 43 N.H. 569 (1862).

> others in administering the reasonable use rule and will allow conjunctive treatment of surface and groundwater resources.[9]

This very issue had been addressed in the 1988 Report to the Governor and the 113th Maine Legislature -- Water Supply and Allocation Study [the PUC Study]:

> The existence of these problems and conflicts is due in large measure to inadequacies inherent in Maine's essentially common law framework for dealing with water supply and allocation problems. The State's water supply is a valuable resource and, if managed properly, will benefit the people of Maine for many years. Such management must be coordinated and consistent. A body of water law based on 17th century English common law, however, is incompatible with existing [1988] circumstances in Maine and incapable of reasonably resolving the increasingly complex conflicts which Maine's economic growth will inevitably produce.[10]

The legacy of *Maddocks v. Giles* and the Legislature's refusal to act on the recommendations of the Water Resources Management Board is that, at this late date, Maine is left with an antiquated groundwater law, which does not reflect modern hydrologic knowledge.

LEGISLATIVE EROSION OF ABSOLUTE DOMINION

Although the absolute dominion rule is alive and well in Maine, the Legislature has over the past few decades recognized the important role the state plays in protecting groundwater.

The PUC Study's discussion of the most significant legislative findings and statutory provisions applicable to groundwater is of great assistance in any consideration of further changes to the law.

> Statutory Basis for Implementing a Sound Management Approach to Water Supply and Allocation Problems.
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> While much of Maine's water law consists of applying traditional common law concepts, the Legislature has acted with increased frequency to supplement and, in some cases, supplant those concepts. The Legislature has been particularly active in the area of environmental protection. As a result, current Maine

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[9] Board Findings and Recommendations, Maine Water Resources Management Board, 1991, p. 5

[10] Water Supply and Allocation Study, [PUC Study], p. 22

> statutory law recognizes both the public nature of water resources and the need for public protection.[11]

In comments aimed at establishing a statutory basis for sound management of water supply and allocation problems, the PUC Study reviewed the provisions related specifically to groundwater, beginning with 38 M.R.S.A. §361-A, which included groundwater within the definition of "waters of the State" for purposes of statutes administered by the Department of Environmental Protection. "This definition recognizes the essentially public nature of water and provides a basis for much of Maine's current, albeit fragmented, statutory water law."[12]

The PUC Study discussed the significance of the prohibition against the discharge of oil into groundwater:

> Title 38 M.R.S.A. § 543 explicitly recognizes the public nature and hence public interest in the preservation of quality groundwater by rendering illegal the discharge of oil 'into or upon any groundwater ... of the State.' This prohibition applies not only to 'waters of the State,' but also to private water supplies. An occupier of land no longer has the right to pollute his 'own' water. Section 543 simply recognizes the hydrologic facts: groundwater is a fragile resource that is not easily compartmentalized, and it is the rare case that a 'private' well is not somehow interconnected with the groundwater of other users.[13]

Next the PUC Study turned to the legislative findings of the Ground Water Protection Program, linking the State's police power to groundwater protection:

> The so-called 'English Rule' [absolute dominion] was further modified by the Legislature in 1979 by enactment of Maine's Ground Water Protection Program, 38 M.R.S.A. §401-404. Section 401 explicitly recognizes the public nature of rights in groundwater :
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> > The Legislature finds and declares that the protection of ground water resources is critical to promote the health, safety and general welfare of the people of the State.
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> * * * *

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11 *Id.* at p. 22

12 *Id.* at p. 23

13 *Id.* at p. 23

> The Legislature further finds and declares that an adequate supply of safe drinking water is a matter of the highest priority and that it is the policy of the State to protect, conserve and maintain ground water supplies in the State.
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> * * * *
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> Because of the importance of ground water to the safety and well-being of the State, there is an urgent need for the coordination and development of the programs to assess the quality and quantity of and to protect groundwater.

> The Act goes on to provide for the study of groundwater and groundwater quality in the State of Maine. The Bureau of Geology, the Department of Conservation and the Department of Environmental Protection are required to research and study recharge and cleansing rates of groundwater in various types of aquifers, map some of those aquifers, and assess the impact of agricultural practices and chemicals on groundwater quality. This research is now [in 1988] in progress.[14]

The PUC Study described the protection of groundwater in Maine's Site Location of Development Act as follows:

> Title 38 M.R.S.A. §481-490, Maine's Site Location of Development Act, requires developers of large construction projects to take into account the effect on groundwater such projects are likely to produce. If projects pose an unreasonable risk to groundwater, the Board of Environmental Protection may refuse to approve a development proposal.[15]

And again, with regard to classification of groundwater:

> Title 38 M.R.S.A. §§465-C, 470, Classification of Groundwater. These statutes classify groundwater with respect to quality. Section 465-C sets up two possible classifications: Class GW-A, the highest classification suitable for public water supplies, and GW-B, suitable for all usages other than public water supplies. Section 470 sets up, in effect, a presumption that groundwater shall be classified as Class GW-A. This classification scheme illustrates a legislative preference for maintaining the highest quality standards for groundwater.[16]

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[14] *Id.* at pp. 22, 23

[15] *Id.* at pp. 24,25

[16] *Id.* at pp. 25

The PUC Study went on to cite the Water Wells Act which requires the collection of groundwater data:

> Title 12 M.R.S.A. §550-B, Water Wells Act, requires well contractors to report to the Maine Geological Survey within 180 days of drilling a well information relating to location, construction, and well yield. Information supplied by well contractors is then used by the Maine Geological Survey as an additional tool in the ongoing process of aquifer mapping.[17]

A rare, albeit very specific, statutory alteration to absolute dominion is provided by 38 M.R.S.A. §404, and placed in context by the PUC Study:

> The common law of groundwater is not only ill-suited as a means of protecting a vital public resource. The Legislature has also recognized that the common law is a sometimes inefficient and not always equitable arbiter of private rights. For example, Title 38 M.R.S.A. § 404 provides for a statutory private right of action when a landowner's or occupier's domestic groundwater use is damaged by another. The statute creates, in effect, a priority for domestic groundwater use and recognizes the hydrologic interconnectedness of groundwater.[18]

The Underground Oil Storage Facilities and Ground Water Protection Act includes groundwater within the umbrella of "waters of the State" and provides a remedy for interference with a water source caused by discharge of oil from an underground tank:

> Groundwater users are given further protection by Maine's Underground Oil Storage Facilities and Ground Water Protection Act, 38 M.R.S.A. §§561-570-G. Section 561 recognizes that the protection of the waters of the State, including groundwater, 'is of the highest importance' and that the State's waters are threatened by the existence of leaking underground oil storage tanks.[19]

In summary, these piecemeal legislative forays into groundwater protection, while mostly reactive, do evidence the Legislature's acknowledgment of the state's authority in protecting groundwater as an essential natural resource. This could

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[17] *Id.* at p. 25

[18] *Id.* at pp. 25, 26

[19] *Id.* at p. 26

provide a statutory foundation on which to build meaningful water resource protection and management.

The PUC Study's examination of statutes relating to groundwater ended with a discussion of 22 M.R.S.A. §2660-A, the Water Transport Law, then recently enacted (1987). The enactment and implementation and the subsequent amendment and interpretation of the Water Transport Law embody some of the confusion in Maine's groundwater law and therefore merit a closer look.

THE MAINE WATER TRANSPORT LAW

As early as 1975, the State Planning Office was concerned about the future exportation of Maine's water:

> Being situated on the edge of the Boston-Washington megalopolis, Maine might find itself in the position to develop a policy toward exportation of its water to Boston for domestic supplies. It would be unwise to believe 'it couldn't happen here' because, despite a large legal backdrop against inter-basin transfer of water, such transfers can and do occur simply because large cities must have more water. California was able to secure water from the Colorado River, New York City from Delaware and Boston from the Connecticut through litigation that was handled directly by the U. S. Supreme Court.
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> * * * *
>
> The State has no policy regarding export of water and should develop one in advance of overtures from Boston that water is needed there....The matter should be given study and information developed about the nature of possible projects, their environmental impact and their economic impact. The last mentioned is exceedingly important because Maine, as a State with deep traditions of riparian doctrine, has established that water has no intrinsic price, and consequently, there is no yardstick to measure the impacts of export.[20]

Clearly, the concern over exportation of water from its source both to other states and to other locations within Maine grew during the next decade. The bottled water industry was growing exponentially. Poland Spring Water was purchased by Perrier, a French company, in 1980. Nestlé, a Swiss company, acquired Perrier in 1992, and the

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[20] Management of Water and Related Land Resources in the State of Maine/Prepared by the Maine State Planning Office and the New England River Basins Commission, 1975

acquisition included Poland Spring Water, which by 2004 had achieved annual sales of $628,000,000.

This meant that, even in 1987, a very significant amount of Maine groundwater was being extracted and exported off-site. The Legislature responded to the water exportation concern by enacting the Water Transport Law, 22 M.R.S.A. §2660. The extent of the concern was expressed in the legislative findings, in which the state's police powers were invoked to respond to the "substantial threat to the health, safety and welfare of persons who live in the vicinity of the water and rely on it for daily needs":

> "§2660. Legislative findings
>
> > The Legislature finds that the transport of water for commercial purposes in large quantities away from its natural location constitutes a substantial threat to the health, safety and welfare of persons who live in the vicinity of the water and rely on it for daily needs. If the transportation occurs, persons who relied on the presence of water when establishing residences or commercial establishments may find themselves with inadequate water supplies. In addition, the Legislature finds that the only practicable way in which to prevent the depletion of the water resources is to prohibit the transport of water in large quantities away from the vicinity of its natural location. The purpose of this prohibition is, however, not to prevent the use of such supplies for drinking and other public purposes in the vicinity of the natural location of the water.

The Water Transport Law prohibits transport of water for commercial purposes "by pipeline or other conduit or by tank truck or in a container, greater in size than 10 gallons, beyond the boundaries of the municipality or township in which water is naturally located or any bordering municipality or township."[21]

There are some exceptions to the scope of the Law: water utilities and water transported in connection with services or businesses listed in §2660-A(2)(B)and (C). Also exempted, under §2660-A(2)(D), is

> Water transported from a water source that, before July 1, 1987, was used to supply water for bottling and sale, and which is used exclusively for bottling and is sold in its pure form or as a carbonated or flavored beverage product.

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[21] 22 M.R.S.A. §2660-A(1)

The bottled water and beverage product exemption was a 1989 amendment to the Water Transport Law, mysteriously included in the "Errors and Omissions Act," which act is intended to cure technical defects in laws passed by that Legislature. The exemption has no prospective application to water sources used for the first time after July 1, 1987.

Thus, the Legislature went in two opposite and contradictory directions at the same time. On the one hand, the Legislature recognized the need for groundwater protection through restrictions on bulk water transport. On the other hand, the Legislature grandfathered and exempted pre-July 1, 1987 uses and, thus, exempted Perrier's (now Nestlé's) Poland Spring Water and other bottled water brands from the very restrictions on bulk water transport that the Legislature had decided were essential for protection of the public interest.

The Water Transport Law also provides an appeal by which otherwise prohibited bulk commercial transport of water would be authorized:

> 3. Appeal. The commissioner [of Health and Human Services], after consultation with the Public Utilities Commission, the Department of Environmental Protection and the State Geologist, may authorize transport of water for commercial purposes if the commissioner finds that:
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> A. Transport of the water will not constitute a threat to public health, safety or welfare;
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> B. Water is not available naturally in the location to which it will be transported;
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> C. Failure to authorize transport of the water would create a substantial hardship to the potential recipient of the water; and
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> D. For a source not otherwise permitted by the Department of Environmental Protection or the Maine Land Use Regulation Commission, the water withdrawal will not have an undue adverse effect on waters of the State, as defined by Title 38, section 361-A, subsection 7; water-related natural resources; and existing uses, including, but not limited to, public or private wells, within the anticipated zone of contribution to the withdrawal. In making findings under this paragraph, the commissioner shall consider both the direct effects of the proposed water withdrawal and its effects in combination with existing water withdrawals.

> Any authorization under this subsection is for a period not to exceed 3 years but may be renewed subject to the same criteria. The department may adopt rules necessary for the implementation of this subsection. The rules may include imposition of a fee to cover the costs of providing permits, including any impact studies required by the department...."[22]

The Law provides a criminal penalty:

> Any person who transports water in violation of this section is guilty of illegal transport of water. Illegal transport of water is a Class D crime. Each shipment or day of transport, if by pipeline, is a separate offense.[23]

The legislative intent to limit commercial bulk transport of groundwater is clearly expressed in the legislative findings. Yet there has arisen a dichotomy between reasonable construction of the provisions of the law and its interpretation and implementation, which have whittled away the protections the statute was designed to create.

The Water Transport Act provided that all four appeal criteria must be satisfied before the Commissioner of Health and Human Services may authorize bulk water transport. However, as the review process has evolved, authorizations for transport and renewals of the authorizations seem almost automatic.

Little attention seems to be paid to whether "[w]ater is not available naturally in the location to which it will be transported." When water is extracted from a water source and taken to a bottling plant either within or outside of Maine, is a valid finding actually made that water is not available naturally in the bottling plant or in the town in which the bottling plant is located?

Further, a disproportionate weight is given to whether "[f]ailure to authorize transport of the water would create a substantial hardship to the potential recipient [emphasis supplied] of the water." In defining "substantial hardship," the Department of Health and Human Services has assumed that the potential recipient of the water is the commercial water bottler and that "hardship" refers only to the negative economic

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[22] 22 M.R.S.A. §2660-A(3)

[23] 22 M.R.S.A. §2660-A(5)

impact on the bottler if authorization to transport were not given. The Department then becomes complicit in helping the water bottler retain or increase its "market share," without giving equal weight to appeal criteria A and B that address protection of the source.

Might there not be other ways of interpreting the appeal provisions that would be more consistent with the legislative findings? For example, "potential recipient" might mean the ultimate consumer of the water in a locale in which "[w]ater is not available naturally." If so interpreted, the "hardship" would then be the adverse consequence of failure to receive the needed water.

Under *Centamore v. Dep't of Human Services*, 664 A.2d 369 (Me. 1995), the Law Court found that great weight should be given to an administrative agency's interpretation of a statute administered by it. However, such deference is not warranted when circumstances change and the administrative agency fails to consider the new circumstances in its decision-making. The ever increasing demand for Maine groundwater and the state's duty to protect that groundwater may militate in favor of a prudent review by the Department of Human Services of its interpretation of the appeal provisions of Water Transport Law.

COORDINATED WATER MANAGEMENT

Each of the legislatively mandated water studies concluded that Maine needs a coordinated water management structure that provides centralized data collection and retrieval, adequate monitoring, a mechanism for dispute resolution, and a system of water allocation in the event of supply shortages. This would apply to all waters of the state, surface and subsurface.

The 1988 PUC Study, after surveying Maine's water-related legislation, concluded:

> These statutes, taken together, indicate that the Legislature has already modified in part the common law of groundwater and surface water in areas where regulation in the public interest has been considered necessary. A legislative decision to comprehensively regulate water withdrawals when such regulation will promote the public's general health and welfare would therefore be neither extraordinary nor unprecedented. Comprehensive water legislation in many other states that has had the effect of modifying

landowners interests in water under or abutting their land has been upheld in the courts where a reasonable relationship exists between the end sought by regulation and the means by which that end is sought. The United States Supreme Court has held that a state has a paramount interest in protecting its water resources. Thus, to adopt a comprehensive water management plan in Maine would be a logical next step in the State's continuing effort to preserve for future generations one of its most valuable resources. [Emphasis supplied.][24]

The Water Resources Management Board's Operational Framework Subcommittee Report (1991) found that:

"There are twenty-two state agencies (including departmental bureaus) with some level of responsibility for water resources. These agencies are categorized as follows:

1) Agencies which undertake or influence activities that directly affect water quantity and quality. These agency activities include:

- Interagency coordination of water resources management policies;
- Interagency assistance in developing water resources management policies;
- Enforcement of water quality laws;
- Management of water data; and
- Emergency water pollution response/clean up.

2) Agencies which indirectly affect water quantity or quality. Some of such agency activities are:

- Interagency coordination of policies regarding activities which affect water resources (ie. Land use regulation);
- Regulation/Permitting of activities which may affect water quantity or quality (ie. Shoreland zoning);
- Consultation to agencies in permitting/licensing activities which affect water quality/quantity;
- Acquisition of property associated with water resources;

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[24] *Id.* At p. 31

- Land Use Planing.

3) Agencies which may directly or indirectly affect water resources in limited geographic jurisdictions within the State.

- For example, the Land Use Regulation Commission has extensive authority over water-related activities in the unorganized territories of the state but has no such authority in the organized towns."[25]

Although the Operations Framework Subcommittee's report was submitted fifteen years ago, its analysis of the state's operational framework for water management remains useful:

> Water resource planning and management is policy making where agencies, laws and political interests converge. The physical attributes of water create substantial uncertainties for agencies which attempt to balance the disparate and sometimes conflicting public and private demands for water use. The highly diverse institutional structure for managing water resources frequently inhibits comprehensive management.
>
> A number of problems are associated with fragmentation of institutional responsibility. They include overlaps and gaps in authority, poor coordination and communication; reactive rather than proactive public policy; and unresolved conflict.
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> In effect, there is no centralized and coordinated approach to water resources management in Maine State government. Given the specific mandates, perspectives and disciplines of the multiple agencies involved, it is difficult to foster ongoing policy coordination, problem solving and general interaction among all agencies involved in water resources. While there is a lengthy list of agency responsibilities and activities that might on the whole cover the major water management issues, this collection does not of itself comprise an aggregated, comprehensive or coordinated approach.[26]

A centralized water resources management construct could become the "brain and/or central nervous system" that the Operational Framework Subcommittee of the

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[25] The Operational Framework in Maine State Government, Report of the Operational Framework Subcommittee, Water Resources Management Board, 1991, pp. 1, 2

[26] *Id.* at p. 7

Water Resources Management Board found lacking in the current, fragmented state government "web."

Even though the Maine water studies differ in their specific recommendations as to how the centralized water board or agency should be designed, they are unanimous in their finding that such a "brain and/or central nervous system" is an integral and essential part of prudent water resources management.

THE STATUTORY PLAYING FIELD

For close to two decades the Maine Legislature has failed, in any meaningful way, to convert into legislative action the recommendations presented to it regarding groundwater law and coordinated water resources management.

Meanwhile, Maine's northern New England sister states, New Hampshire and Vermont, have moved forward to protect their groundwater. As discussed earlier, both states had already distanced themselves from the absolute dominion rule. They have adopted the reasonable use doctrine in determining interference with groundwater and the corresponding liability for such interference.

Within the past six months both New Hampshire and Vermont have enacted important groundwater protection legislation.

Governor Lynch, in signing SB 386 on June 22, 2006, proclaimed:

> Our groundwater is a precious resource. We must protect this resource to ensure that our citizens and businesses will continue to have access to clean, safe drinking water for generations to come.
>
> This new law is an important step forward in increasing the ability of the state to protect groundwater and to provide communities with the information they need to manage and protect their groundwater resources.
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> The legislation makes it easier for cities, towns and individuals to get involved in the permitting process for large groundwater withdrawals if they could be impacted. It also expands the permit appeals process.
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> The legislation makes clear that groundwater should be considered a public trust, and that the Department of Environmental Services must consider the potential impact on water supplies for neighbors and communities before granting a large withdrawal permit.

The New Hampshire law adds a definition of "large groundwater withdrawal" (57,600 gallons per day); adds administration of the public trust interests in groundwater to the duties of the Department of Environmental Services; adds an appeal to the Superior Court to the appeal process for large groundwater withdrawal permits; enables any municipality from which groundwater will be withdrawn or diminished to request a determination from the Department that the public trust is not being violated; and creates an intervenor status for municipalities impacted by a large groundwater withdrawal.

The Vermont legislation (H.294), An Act relating to Groundwater Management, was enacted on April 28, 2006. Its enactment was due in large part to the efforts of a coalition made up of nonprofit organizations, led by the Vermont Natural Resources Council, and a bipartisan group of legislators.

The legislation sets up an interim groundwater withdrawal permitting process for groundwater withdrawals in excess of 50,000 gallons a day. This is similar to New Hampshire's permitting threshold. The interim permitting program will remain in effect until July 1, 2011, long enough it is hoped for a comprehensive groundwater protection program to be put in place.

It also creates a committee to study "potential regulatory programs to protect the groundwater of the state." The committee's report, to be submitted in one year, must include a recommendation "as to whether the groundwater resources of the state of Vermont should be declared a public trust resource" and the regulatory implications of such a recommendation.

The New Hampshire and Vermont state governments have acted in bold fashion to protect groundwater on behalf of their citizens. Maine has been considering these same issues for almost twenty years. It is now time for Maine's elected representatives to exercise their authority beyond the creation of water study panels. They should enact the much needed groundwater protection and comprehensive water resources management legislation the citizens of Maine deserve.

CONCLUSION

The record of the last twenty years shows extensive study and recognition of the need for meaningful measures to protect Maine's groundwater resources. The record also shows that the two other northern New England states, New Hampshire and Vermont, have gone from study and recognition to the adoption of stringent but reasonable remedies to protect their groundwater. Unfortunately, in Maine the leap from study and recognition to enactment of groundwater legislation has been slow in coming. It certainly appears that Maine's protracted study of water resources issues has been used as an excuse to justify administrative, legislative and judicial inaction.

Whether the Land and Water Resources Council now preparing its report is engaged in yet another exercise in futility depends on the willingness of the Legislature to address the difficult issues of 1) modification of Maine's groundwater ownership law and 2) creation of a mechanism for accommodating private use of groundwater in a manner consistent with the public interest. These two issues have been focal points of all prior water studies – studies that have included carefully crafted recommendations.

By enacting groundwater protection legislation, the Legislature will give meaning to the hard work evidenced by the series of water studies presented to it. More importantly, the Legislature will, after much delay, fulfill its own responsibility to the people of Maine.