

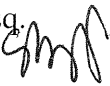


Maine State Legislature
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MEMORANDUM

TO: Representative Sean Faircloth

FROM: Susan Z. Johannesman, Esq.
Legislative Analyst 

DATE: August 7, 2008

SUBJ: **Groundwater extraction in Maine**

Per your request of August 6th, below is a brief summary of groundwater extraction law in Maine. As we discussed, given your timeframe for compiling the information, I have summarized the information and have provided citations for your use if you find you need more extensive information. I hope this is helpful.

Groundwater extraction law summary

Maine common law rule

Maine is one of the few states that follows the "absolute dominion rule". The absolute dominion rule is a common law rule that basically gives property owners broad control of the use of the groundwater below their property. A property owner may dig a well on his property and not be subject to a claim for damages even if the effect of the well may be to cut off and divert water which would otherwise find its way to the well or spring of his neighbor. Chase v. Silverstone, 62 Me. 175, 183-84 (1873). A statutory exception to the absolute dominion rule was enacted by the Maine Legislature in 1987 and creates liability when a person withdraws groundwater in excess of household purposes for a single-family home and the withdrawal interferes with a preexisting household use of groundwater (38 MRSA §404). However, this statute does not regulate commercial withdrawals of water and only protects preexisting uses of groundwater.

Other states

Most jurisdictions in the United States have adopted the reasonable use, or American, rule. The reasonable use rule prevents a landowner from wasting groundwater or from transporting it off his land for use elsewhere. See Roger A. Cunningham, et al., the Law of Property § 7.5 (1984) and Restatement (2nd) of Torts §858 (1979).

Maine Law Court challenge to common law rule

In 1999, the Maine Law Court (in Maddox v. Giles, 728 A. 2d 150, 154) was asked to abandon the absolute dominion rule in favor of the American rule. However, the Law Court rejected the

challenge noting that it was not convinced the absolute dominion rule was wrong for Maine and that landowners in Maine had relied on the absolute dominion rule for over a century. The Law Court also observed that a change in this policy is best left to the Legislature.

Police power regulation of groundwater extraction

Even though Maine follows the absolute dominion rule it does regulate groundwater extraction to some degree.

- Site Law: The Maine DEP regulates groundwater withdrawals under the Site Location of Development Law (See DEP Regulations, Chapter 375, section 8).
- Transport of Water Law: Title 22 MRSA §2660-A (as amended by 2007 PL, ch. 399) governs the transportation of water in bulk quantities away from its natural location for commercial purposes. In most instances, parties seeking to transport water in bulk must receive approval from the State (the Drinking Water Program at the DHHS) and may also have to satisfy local ordinances if any are adopted pursuant to authority provided in 22 MRSA §2642. Under 22 MRSA §2660-A, the DHHS must check to determine if the proposed transport jeopardizes public health, safety or welfare. For a source not otherwise permitted by DEP or LURC, the DHHS may authorize bulk water transports if it is satisfied that the proposed extraction will not have an adverse affect on the "waters of the State", water-related natural resources, and existing uses.
- Natural Resources Protection Act: 2007 PL, ch. 399 provides DEP with additional authority over very large groundwater extractions known as "significant groundwater wells". (The definition of "significant groundwater well", including withdrawal quantity thresholds, can be found at 38 MRSA §480-B, sub-§9-A.) Chapter 399 prohibits the establishment or operation of a significant groundwater well without first obtaining a permit from DEP. The DEP may authorize a significant groundwater well if it finds that the applicant has demonstrated that the activity will not have an undue unreasonable effect on "waters of the State", water-related natural resources and existing uses.
- Maine's Water Withdrawal Reporting Program: Maine's water withdrawal reporting program (Title 38 MRSA §§470-A to 470-H) requires water users who withdraw quantities in excess of the thresholds contained in the statute to provide information about their annual water withdrawals from water sources.

Conclusion

Groundwater in Maine is owned by the owner of the surface property overlying the groundwater. Most jurisdictions in the United States have adopted the reasonable use, or American rule, which prevents a landowner from wasting groundwater or from transporting it off his land for use elsewhere if objected to by his neighbor. Additionally, under its police power, Maine does regulate the quantity of groundwater withdrawals in certain circumstances.