**Water Resources Planning Committee**
**May 1, 2020**
**9:00 AM – 12:00 PM**
**Via Microsoft Teams**

## Meeting notes

Attending: Andrew Beahm, David Braley, David Bell, Kaitlyn Bernard, Susan Breau, Tom Brennan, Ryan Gordon, Dirk Gouwens, Bertrand Kendall, Naomi Kirk-Lawlor, Dan Kusnierz, Dan Locke, Mark Margerum, Bob Marvinney, Nancy McBrady, Stephani Morancie, Mike Plaziak, Julie Ann Smith, Greg Sweetser, Stacie Thompson, Eric Venturini. Peggy Bensinger (Attorney General's Office)

1. We briefly introduced participants on the Teams meeting.

2. Review of Maine groundwater laws and regulations.

**Maine's groundwater doctrine** – Peggy Bensinger, Attorney General's Office. (See Bensinger-Groundwater law notes file for complete details).

Topics covered:

Absolute Dominion Rule - Under the Absolute Dominion Rule, landowners are not liable for dewatering neighbors' wells or taking water from under their land, unless they are guilty of "intentional malice" or "wanton waste," both of which are very hard to prove. One exception to this rule is that a landowner may not unreasonably divert an underground "watercourse" to the detriment of his or her neighbor.

Other doctrines briefly discussed: Reasonable Use, Correlative Rights, Riparian Rights, Prior Appropriation, and the Restatement Approach.

In Maine, the Absolute Dominion Rule has been eroded by certain laws enacted by the Legislature, perhaps most notably the 1987 Ground Water Rights Law, 38 M.R.S. § 404, and other laws enacted by the Legislature.

Case Law – Peggy summarized some of the case law relative to groundwater rights, notably *Maddocks v. Giles*. The facts of that case were that the Giles' were dewatering their gravel pit for an increasingly deeper excavation and this process dewatered the Maddocks' spring. The Maddocks' didn't have a house on their land but had a desire to sell water from their spring. So, they had no existing use of the groundwater, but had a planned, commercial use. Therefore, they were not protected by 38 M.R.S. § 404.

The Maddocks' asked the Court to abandon the Absolute Dominion Doctrine, but the Court declined to do so, giving two reasons for this decision:

1) Not convinced it is the wrong rule for Maine. The Maddocks case did not present any evidence or studies showing that the old rule has caused problems, and landowners have relied on this rule for over a century.

2) Not persuaded that the Court, as opposed to the Legislature, should be weighing the policy considerations involved in this issue and effecting such a change. The Legislature can hear testimony from experts and survey Maine's water needs. This decision is best left to the Legislature.

Conclusions: None of the various common law doctrines of groundwater law provide much protection for the resource. They accommodate as much use as the supply of water allows. They provide a framework for resolving disputes and promoting orderly economic growth, but they do not look to conserve or protect the resource. In order to protect the resource, states have enacted overlays of laws applicable to groundwater.

Questions:

There has been considerable discussion in the Legislature of moving groundwater resources to a Public Trust resource. What would the benefits be of this change? In most states, Public Trust is only applied to navigable waters. This change would be a large step for Maine. Ownership is currently subject to the police powers of the State as approved by the Legislature. The change to Public Trust might be more in line with the intent of some legislative policies.

How have other states addressed the Takings implications of moving groundwater to the Public Trust? Other states have made this transition without successful lawsuits. In a Takings case, the courts will look at reasonable expectations of use. Given the body of laws now, there is no expectation of unfettered use, so the policy could move away from Absolute Dominion without successful Takings claims.

**DEP regulations**. Mark Margerum (see Water_Withdrawal_Regs_at_DEP.pptx)

38 M.R.S. § 404 Ground Water Rights – Creates a cause of action for homeowners whose domestic wells are impacted by other, non-domestic groundwater withdrawals, giving them a statutory right to sue for damages including the cost of restoring water to their property.

Significant Groundwater Well Permit – defines significant groundwater withdrawals in two categories, based on volume and proximity to water resources. Establishes the standard that the activity will not have an undue unreasonable effect on waters of the State, 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.

Site Law – For activities that occupy a land or water area in excess of 20 acres or 3 acres stripped and not revegetated. The standard is that the activity will not have an undue unreasonable effect on waters of the State, water-related natural resources and existing uses. In making the determination, the Department shall consider both the direct effects of the proposed water withdrawal and its effects in combination with existing water withdrawals.

Chapter 587 In-stream Flow Rules – Establishes minimum river and stream flows and lake and pond water levels to protect natural aquatic life and other designated uses in surface waters threatened by significant water withdrawals, either direct or indirect.

Questions:

Do Public Water Systems have to comply with the Chapter 587 rules? Yes, but if they are found to have an impact on water quality or designated uses, there is a certification process to recognize their existing uses and impacts. They would negotiate an agreement with DEP to limit those impacts as much as possible. To date, the DEP has not issued such a certificate.

One of the outcomes of Chapter 587 have been more discussions with DEP regarding potential new withdrawals for irrigation.

Comment: The Chapter 587 rules have effectively precluded agricultural withdrawals from free-flowing water, except for large main stems. The Agricultural community is working on sustainable sources and storage. Maine is not like dry-land farming in the West, where water is being mined. It's a seasonal timing issue.

**Land Use Planning Commission (LUPC) regulations**. Naomi Kirk-Lawler (see LUPC Water Use Regulation.pdf)

Naomi provided an overview of the LUPC's responsibilities, jurisdiction, and map-based regulatory structure. A major difference with the DEP is the role of zoning in the regulatory process.

Naomi outlined the water-related land uses and activities that LUPC regulates, and which activities require permits: irrigation (except for ponds < 1 acre that are not fed or drained by flowing waters); large commercial extractions (e.g. for bottling or snow-making).

Permit criteria include:

- No undue adverse effect on existing uses and natural resources.
- Must meet the requirements of DEP's Chapter 587 rules.

Naomi provided examples of the permitting process for snow making, irrigation, and bottled water.

**Maine Drinking Water Program (DWP) regulations**. Susan Breau (see DWP Functions – Water Resources Planning Committee.pptx)

The DWP implements rules relating to drinking water in order to protect public health. The DWP oversees multiple water system types with sources in both ground and surface water.

The DWP:

- Addresses imminent hazards to public health (Drinking Water Orders).
- Regulates springs and bottling plants from a public health perspective. The DWP regulates from the source through treatment, bottling is regulated by the Department of Agriculture.
- Implements aspects of the Bulk Water Transport law relative to emergency transport of potable water.

- Approves new water supply wells. Considerations include siting, setbacks, well construction standards, sampling requirements, and water treatment.
- Implements the federal Groundwater Rule, intended to reduced disease incidence associated with harmful microorganisms in drinking water.
- Implements the federal Surface Water Treatment Rule, intended to reduced illnesses caused by harmful pathogens in drinking water.
- Works with Public Water Systems to addresses emergency preparedness, response and recovery.

Comment by Tom Brennan: The state agencies with oversight on water resources have always based positions in sound science and have been very consistent in doing so.

3. Project updates from the Maine Geological Survey – Ryan Gordon, Dan Locke

    - National groundwater Monitoring Network – will add 10 additional wells.

    - Soil Water Balance Model – the final report and model have been released: https://pubs.er.usgs.gov/publication/sir20195125
    - Twelve snow surveys were conducted during the winter of 2020 to help with spring flood forecasting. Generally, below normal snow amounts across Maine in 2020, except for northern Maine. Maine Cooperative Snow Survey: https://www.maine.gov/dacf/mgs/hazards/snow_survey/

4. Terms were set for Committee members. See WRPC-membership-terms-2019.docx in the DACF Water Resources Planning Committee Teams site, under the "General" section.

5. Topics for next meeting. Potentially a discussion of the State's response to PFAS.

6. The Maine Geological Survey will compile the Annual Report to the Legislature in July-August 2020.

Meeting recording:

https://web.microsoftstream.com/video/2773a9fb-4db2-4fe4-97ea-37c8af22397e