

PLEASE NOTE: Legislative Information **cannot** perform research, provide legal advice, or interpret Maine law. For legal assistance, please contact a qualified attorney.

## **An Act To Create the Freshwater Resource Board**

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

**Sec. 1. 22 MRSA c. 601, sub-c. 6**, as amended, is repealed.

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

### **ARTICLE 1-H**

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

##### **§ 410-Q. Definitions**

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

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

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

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

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

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

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

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

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

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

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

- D. One representative from among nominees submitted by any statewide environmental protection advocacy organization;
- E. One representative who is a private well owner;
- F. One representative who is a nontraditional user; and
- G. The Attorney General.

The board shall appoint its own chair.

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

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

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

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

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

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

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

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

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

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

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

- C. Water distilled as a by-product of a manufacturing process; and
- D. Water transported by authority of a bulk water transport permit issued under subsection 3.

**3. Permitted transportation.** The board, after consultation with the department, the Public Utilities Commission, and the State Geologist, may authorize transport of water for commercial purposes if the board finds as a result of independent assessment and investigation that:

- A. Transport of the water will not constitute a threat to public health, safety or welfare;
- B. Transport of the water will not interfere with traditional uses;
- C. The amount of water transported from any aquifer is in sustainable amounts and will not affect the affected aquifer in a manner that will affect the groundwater's contribution to surface water and the plant and animal life dependent on these water sources;
- D. For a source not otherwise permitted by the department 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 section 361-A, subsection 7; water-related natural resources; or 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 board shall consider both the direct effects of the proposed water withdrawal and its effects in combination with existing water withdrawals; and

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

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

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

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

**6. Penalty.** A 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.

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

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

**2. Factors.** Factors to be considered in determining the unreasonableness of any harm referred to in subsection 1 include, but need not be limited to, the following:

- A. The purpose of the respective uses or activities affected;
- B. The economic, social and environmental value of the respective uses, including protection of public health;
- C. The nature and extent of the harm caused;
- D. The practicality of avoiding the harm;
- E. The practicality of adjusting the quantity or quality of water used or affected and the method of use by each party;
- F. The maintenance or improvement of groundwater and surface water quality;
- G. The protection of the existing value of land, investments, enterprises and productive uses;
- H. The burden and fairness of requiring a person who causes harm to bear the loss; and
- I. The burden and fairness of requiring a person to bear the loss who causes harm in the conduct of reasonable agricultural activities, using good agricultural practices conducted in conformity with federal, state and local laws and regulations.

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

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

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

**2. Authorized water transporter.** A person authorized to transport water under Title 22, section 2660-A410-T using water in conformance with rules adopted under that section; or

**Sec. 4. Study of the public trust doctrine and allocation as applied to groundwater.** The Freshwater Resource Board as established pursuant to the Maine Revised Statutes, Title 38, section 410-R shall study whether the interconnectivity between surface water and groundwater warrants an extension of the public trust doctrine, now applicable to surface water in the great ponds and tidal rivers, to other surface water and to groundwater. The Freshwater Resource Board shall also study

methods to allocate groundwater for nontraditional use when, to ensure sustainability of the groundwater supply, nontraditional use must be limited. The completed studies must be submitted to the Governor and the Legislature within 18 months of the effective date of this Act.

## **SUMMARY**

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