Actions of the Citizen Trade Policy Commission of the Maine Legislature

2004:

- Commission established by the Jobs, Trade and Democracy Act (LD 1815)
- Commission first meets, October 2004

2005:

- Issued a statement urging Maine's Congressional Delegation to work against the passage of DR-CAFTA

- Recommended in writing that United States Trade Representative carve out government actions at the state and local level from the new GATS offer until the Commission had an opportunity to adequately review and analyze the language of the proposed commitment.

- Issued a number of press releases regarding its activities and held press conferences regarding its position on CAFTA.

2006:

- Met with and worked directly with the Office of the United States Trade Representative's (USTR) to establish a direct and open dialogue to maximize the ability of the Commission to convey the concerns of Maine's citizens to USTR in a timely and effective manner.

- In conjunction with the Forum on Democracy and Trade developed and conducted the Commission's 2006 assessment.

- Provided USTR with policy recommendations during the most recent round of the World Trade Organization's (WTO) Working Party on Domestic Regulation (WPDR) negotiations on rules implementing a provision of the General Agreement on Trade and Services (GATS) dealing with the domestic regulation of services.

- Established a legislative outreach subcommittee to better inform Maine's Legislature about trade related issues.

- Opposed the adoption of the proposed rules by the Department of Homeland Security pursuant to the Intelligence Reform and Terrorism Prevention Act that would require U.S. citizens and nonimmigrant aliens to present a passport or alternative form of documentation approved by the department in order to enter the United States from Canada.

• Supported the National Legislative Association on Prescription Drugs Prices' nomination of Sharon Treat to two USTR advisory committees.

• Began exploring possible funding sources to support an executive director position within the Commission.

2007:

• Developed a resolution that passed unanimously in both chambers of the State Legislature to request the U.S. Congress to replace the existing Trade Promotion Authority (Fast-Track) with a more inclusive and democratic system for negotiating trade agreements. Fast-Track expired without renewal on June 30, 2007, and has not yet been replaced.

2008:

• Notified Maine's Congressional Delegation and Governor Baldacci that it opposed the proposed U.S. –Colombian Free Trade Agreement based on public testimony received at the commission's February 21, 2008 public hearing and after determining that the agreement would be unfavorable to the people of Maine, the United States and Colombia.

•As a result of the People's Republic of China's challenge to Maryland's proposed legislation to regulate lead in consumer products, the commission posed the following questions USTR: 1) what agency/entity within the U.S. federal government is responsible for notifying WTO member nations of state legislation; 2) how often such notification occurs and 3) what mechanism or process is used to monitor state legislation. USTR responded that state legislatures remain fully empowered to take action to protect the public and that the WTO notification system normally requires USTR to provide notification on federal agency regulations but not federal or state legislative proposals.

• Advised USTR of its concerns about recent GATS negotiations and in particular, the draft language proposed by the chair of the WTO's Working Party on Domestic Regulations that appeared to shift the constitutionally-protected "rational basis test" for state regulation to a much more restrictive standard of "not more burdensome than necessary to ensure the quality of the service." The commission also expressed concerned about draft language that could restrict a state's ability to adopt standards that may be different from those advanced at the federal level.

AN ACT TO REQUIRE LEGISLATIVE CONSULTATION AND APPROVAL PRIOR TO ENTERING INTO BINDING AGREEMENTS TO CONFORM STATE LAWS TO THE TERMS OF INTERNATIONAL COMMERCIAL TRADE AGREEMENTS

It is the policy of the State of Maine that the State may not be bound by any trade agreement without the consent of the Legislature. Consent to a trade policy subject to this Act must be expressed in an affirmative vote of the Legislature pursuant to a resolution or resolve. The following actions are required before the State of Maine may consent to the terms of a trade agreement:

(1) When a request for binding agreement by the State of Maine is received from the United States Trade Representative (USTR) regarding procurement, services, investment or any other trade agreement rules that impact state laws or authority, the Governor shall submit to the Legislature a copy of the final legal text of the agreement for review and consideration before committing the State to adhere to its provisions.

(2) The proposed trade agreement must be referred by the Legislature to the Citizen Trade Policy Commission for review. The Commission is authorized to hold public hearings on the matter, and must review the agreement and make a recommendation to the Legislature and the Governor as to whether entering into the proposed binding trade agreement furthers the public interest of the State and its citizens.

(3) The proposed trade agreement may in addition be referred to one or more Joint Standing Committees of the Legislature having jurisdiction over the subject matter of the proposed agreement, and any findings and recommendations of the joint committees must be forwarded to the Commission for review and inclusion in its report to the Legislature and Governor.

(4) The Commission's report must include the following information and findings:

A. An analysis of how specific provisions of the agreement will change or affect existing state law;

B. A statement of any administrative action proposed to implement these trade agreement provisions in the State; and

C. A finding whether the trade agreement will benefit the public interest and why.

(5) If the Commission finds that the trade agreement will benefit the public interest, it is authorized to report out a bill authorizing the state to sign on to the specific listed provisions of the agreement in question.

(6) The bill authorizing the State to sign on to specific listed provisions of a trade agreement must be referred to committee and considered by the legislature pursuant to the rules of the Legislature applicable to any bill, and must enacted into law in order for the State to be bound by the provisions of the trade agreement in question.

Summary: This Act requires the consent of the Legislature prior to the Governor entering into a binding agreement to conform state laws to the terms of international commercial agreements.

ATTACHMENT #3

GROUND WATER BILL REQUESTS

R	LD	Sponsor1	BroadSubj	MajorSubject	MinorSubject	Title
	189	645 SARTY	NAT	GROUND WATER	EXPORTATION	An Act To Provide for Municipal Oversight and Authority over Groundwater Extraction
	237	663 SCHATZ	NAT	GROUND WATER	CONSERVATION	An Act To Clarify A Municipality's Authority To Pass Ordinances That Govern the Extraction of Groundwater
	1247	0 ADAMS	NAT	GROUND WATER	CONSERVATION	An Act To Protect Maine's Groundwater
	1285	0 HILL	NAT	GROUND WATER	WELLS	An Act To Clarify the Laws Regarding Significant Groundwater Wells
	729	0 CASAVANT	NAT	GROUND WATER	EXPORTATION	An Act To Exclude Water from Absolute Dominion Laws
	1028	0 CAMPBELL	NAT	GROUND WATER	EXPORTATION	An Act To Protect Groundwater
	1395	0 SCHATZ	NAT	GROUND WATER	EXPORTATION	An Act To Limit the Transport of Water for Export
	1455	0 BOWMAN	NAT	GROUND WATER	CONSERVATION	An Act To Secure and Protect Maine's Groundwater
	1819	0 WEBSTER	NAT	GROUND WATER	CONSERVATION	Resolve, To Establish the Blue Ribbon Commission To Examine the Legal and Policy Implications of Groundwater Extraction

Forum
on democracy & trade

Statement to Presidential Transition Team on Trade Policy
January 15, 2009

Balancing the values of free trade and federalism: First, deal with immediate problems; next, provide the analytic capacity and a process for state-federal consultation.

In the first days of the Obama Administration, several trade and federalism issues will require immediate attention, including an official reinterpretation of NAFTA chapter 11 and holding firm in opposition to proposals arising from the WTO Working Party on Domestic Regulation that would further impinge on state government authority to regulate service industries.

In the longer term, however, the goal of expanding free and fair trade depends on consultation and cooperation between the federal government and the states on export promotion initiatives and economic development programs. Intergovernmental cooperation is critical for building a positive net balance in exports. Regarding trade policy, the consultation agenda should also include attention to the full range of investment agreements, commitments in service sectors, and reform of rules on procurement, subsidies and international standards for goods.

Consultation: First, collect the data and develop analytic capacity to make state-federal consultation meaningful; next, enact a totally new model of trade promotion authority legislation that brings states to the table; and then, redesign trade development assistance strategies through innovative partnerships with states in order to advance the global competitiveness of firms, workers, and communities.

The first step in improving intergovernmental initiatives on trade and jobs will require analytic capacity building and improved formal mechanisms for state/federal consultation on trade policy. Neither the states nor the federal government currently have sufficient analytic resources to conduct in-depth consultations related to trade negotiations.

Neither federal nor state government has the legal capacity to produce a complete inventory of state laws, regulations, or policies that may be in violation of proposed or negotiated agreements. As an example, in 2005, state trade directors were given less than two weeks to respond to the impact of numerous offers under the General Agreement on Trade in Services. The task was impossible. Several governors responded simply asking that their states be carved out of any new GATS commitments – which was not helpful to U.S. negotiators and U.S. exporters of services.

Likewise, no government has the economic capacity to project the economic and employment effects of proposed and negotiated agreements, particularly at the state and community level. Both the states and the federal government lack adequate state and community level data on exports *and* imports of goods *and* services, as well as data on inbound investment. Such data are needed to better target export promotion opportunities, to identify job loss risks that may arise from international trade and investment agreements, and to evaluate the effectiveness of various investment attraction and guest skilled-worker programs.

Developing this analytic capacity will require appropriation of funds for researchers at universities, at national associations of state officials, or at NGOs so as to produce unbiased legal and economic analysis on trade and federalism issues. It also will require improvements in collection and dissemination of trade and investment data collection and dissemination. Congress should mandate the U.S. Department of Commerce to collect export and import data for both goods and services at the community level.

The second step will require consultation with states about how to strengthen their role in a totally new model of federal trade promotion authority legislation.

The third step would involve federal-state collaboration on innovative trade development design and program implementation. By building on global and grassroots best practices, such collaboration would position small and mid-sized firms to succeed in global markets, thereby creating export value, employment opportunity, and globally engaged communities.

Investment: First, reinterpret NAFTA's investment chapter; later, enact more comprehensive reforms.

During the campaign, President Obama stated, "I will ensure that foreign investor rights are strictly limited and will fully exempt any law or regulation written to protect public safety or promote the public interest. And I will never agree to granting foreign investors any rights in the U.S. greater than those of Americans. Our judicial system is strong and gives everyone conducting business in the United States recourse in our courts."[1]

The President was responding to the fact that NAFTA, other FTAs, and bilateral investment treaties (BITs) all create open-ended property rights that investors could use to challenge a wide range of regulations such as gambling limits, environmental regulations or climate policy.[2] Canada and Mexico have already lost investment disputes involving three important rules. Even if they cannot agree to renegotiate the whole agreement, the NAFTA nations could use interpretive notes, as specifically provided in chapter 11 of the existing agreement, to clarify problematic investment provisions. Specifically:

1. ***Investor rights to compensation for "expropriation."*** An interpretive note could codify a decision that the United States won, *Methanex v USA*, in which the panel interpreted investor rights narrowly so that expropriation rules do not allow "regulatory taking" claims to exceed the rights of U.S. investors.

2. ***Investor rights to a "minimum standard of treatment" (MST).*** An interpretive note could codify the interpretation by State Department lawyers in a pending dispute, *Glamis Gold v. USA*. The U.S. position taken in that case is that MST should be limited to "full protection and security" and denial of justice where domestic courts (not legislatures) treat foreign investors in a way that is "notoriously unjust."

3. ***Investor rights that supersede multilateral environmental agreements (MEAs).*** Canada lost a dispute involving its authority to limit cross-border transfer of hazardous waste under the Basel Convention. An interpretive note could codify the position argued by Canada, that investor rights do not trump MEAs.

Services: First, stop WTO efforts to expand GATS coverage of state measures; later, develop a new model for services agreement.

The General Agreement on Trade in Services (GATS) is the most complicated and far-reaching of all WTO agreements in terms of its impact on state regulatory authority – *e.g.*, utilities, telecommunications, coastal and commercial development, professions, financial services, distribution services, health facilities, storage and transportation of fuels, and higher education, among others. The GATS is also a model for the most far-reaching provisions in the FTA chapters on services. These are among the most troubling trade rules on services:

1. ***WTO negotiations on 'domestic regulation."*** In January of 2008, the chairman of the WTO's Working Party on Domestic Regulation (WPDR) released a fourth draft of 48 proposed "disciplines." A Services Working Group convened by the InterGovernmental Policy Advisory Committee (IGPAC) has highlighted several of these disciplines as posing a significant risk of conflict with state regulations that neither discriminate nor limit market access.[3] For example, the IGPAC group expressed ...
    a. "Serious concern [about disciplines that require domestic regulations to be] 'pre-established, based on objective criteria and relevant...' given the potential for unacceptable constraints on the scope and exercise of state/local regulatory authority, particularly related to complex and emerging industries." IGPAC is referring to the fact that a term like "objective" has been interpreted by the WTO in ways that are inconsistent with regulatory practice in the United States.
    b. "Active opposition to the extremely objectionable omission of any mention of sub-federal policy objectives from [the section that states a principle of deference to legitimate national policy objectives]." The services working group recommends instead the following clarifying language: *"National policy objectives include objectives identified at national or sub-national levels."*

2. ***Proposed new sector commitments.*** In the 2005 round of GATS negotiations, U.S. negotiators proposed a number of "commitments" in sectors that are likely to create conflicts between GATS rules and state-level regulation or delivery of services. Some of these commitments are part of the proposed settlement of the WTO-GATS dispute with Antigua and Barbuda over internet gambling. When USTR sought comments from state governments back in 2005, several of these sectors were not even mentioned in its communications to states. For those sectors that were mentioned, the comments submitted from important networks such as the American Council on Education were ignored. Among the sectors of concern to states (and why):
    a. *Higher education* – a GATS commitment could provide competitive advantages to service suppliers that do not have to meet stringent accreditation standards.
    b. *Research and development* – states have created substantial tax preferences to promote in-state investments in areas like stem-cell research and advanced biofuels.
    c. *Bulk storage of fuels* – state and federal regulation of coastal facilities like refineries and LNG terminals could be challenged under proposed GATS disciplines.
    d. *Electricity brokering* – state and federal regulators are still coping with the effects of market manipulation by Enron and other energy traders.

Procurement and subsidies: First, recognize a national economic emergency defense; then, develop new models for international procurement and subsidies agreements.

The first step in reforming procurement and subsidies agreements will be to recognize that a national economic emergency is a defense against claims of violations resulting from state and federal programs to create jobs and businesses, ensure energy independence, establish an effective climate policy, and recapitalize financial institutions and manufacturing firms.

OR:

The first step in reforming procurement and subsidies agreements will be to secure recognition under the WTO and in other trade agreements that in times of national economic emergency, countries can take appropriate steps to create jobs and businesses, ensure energy independence, establish an effective climate policy, and recapitalize financial institutions and manufacturing firms, with the expectation that legitimate emergency measures will not be challenged by trading partners.

Further, in the past few years, the United States has advanced proposed subsidy rules that conflict with state economic development practices. If they had been adopted, the U.S. proposals would have compromised much of the federal rescue package being developed for banks, the auto industry and other sectors of the economy.

The second step will be to initiate consultations on new models for procurement, subsidies, and similar international trade agreements that would encourage, not discourage, effective state and federal economic development and job creation strategies. As reflected in the Bipartisan Trade Deal of 2007, these strategies should include deference to core labor standards of the International Labor Organization and the objectives and procedures of multilateral environment agreements.

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[1] Pennsylvania Fair Trade Coalition, 2008 Presidential Candidate Questionnaire, answer of Sen. Barak Obama, questions 10, available at http://www.citizenstrade.org/pdf/QuestionnairePennsylvaniaFairTradeCoalition040108FINAL_SenatorObamaResponse.pdf (viewed August 24, 2008); *see also* Barak Obama for President, *A Blueprint for Change*, Strengthening the economy: Trade, 13, available at http://www.barackobama.com/issues/ (viewed August 24, 2008).

[2] Kate Miles, an Australian scholar, warns that as currently interpreted, the minimum standard of treatment "will almost certainly prove an impediment to the immediate implementation of domestic climate change mitigation measures and regulations to give effect to the CDM and emissions trading mechanisms of the Kyoto Protocol."

[3] Memo from Kay Wilkie, chair of the Intergovernmental Policy Advisory Committee, Services Working Group, to Daniel Watson, Office of the U.S. Trade Representative (February 12, 2008).

ATTACHMENT #5

Congress of the United States
House of Representatives
Washington, DC 20515

February 26, 2009

The Honorable Barack Obama
The White House
1600 Pennsylvania Avenue
Washington, D.C. 20500

Re: Working Together to Deliver Your Trade Reform Agenda to the American People

Dear President Obama:

Your election and inauguration has inspired Americans of every region, race, and creed to hope for a better future for their families and our nation. We look forward to working with you to deliver on the promise of change realized in the recent election.

Among the great challenges our nation faces is creating new trade and globalization policies that serve America's workers, consumers, farmers, and firms. We believe that a unique opportunity exists for the legislative and executive branches to work in partnership to reform U.S. trade policies; to ensure that Americans enjoy the benefits of expanded trade; and to remedy the negative consequences on the American economy, environment, and public health and safety that have resulted from aspects of the current trade and globalization model.

We heartily agree with your conclusion that trade policies "are not sustainable if they favor the few rather than the many." Rebalancing our trade and globalization policies so that they create and retain good jobs in the United States, foster sustainable and equitable development worldwide, and provide government with the policy space necessary to solve pressing economic, climate, and other challenges is critical to prosperity and security at home and around the world.

The dramatic economic downturn – caused in part by the lack of prudent global regulation of commerce and massive trade and financial imbalances – has fueled the relentless demand from the American public for trade reform. Across the country, successful candidates in 2008 ran against the failed trade policy status quo and pledged a new approach. In the 2006 and 2008 elections, Americans elected a total of 72 new fair-trade reformers to the House and Senate to replace supporters of the North American Free Trade Agreement (NAFTA), the Central America Free Trade Agreement (CAFTA), the

World Trade Organization (WTO), and our current China trade policies. The unprecedented U.S. election focus on trade and globalization reform reflects the public opinion that America's trade and globalization model needs a major overhaul.

It will be challenging to remedy the considerable damage that our past trade and globalization policies have wrought. However, we are confident that, working together, we can replace the failed policies of the past with those that deliver broadly shared benefits. We look forward to working with you to seize this exciting opportunity to create a more just American trade policy, in the areas outlined below and beyond.

Remedying the Failed U.S. - China Trade Relationship: We are eager to work with you to resolve the pervasive China currency manipulation problem. Our immense trade imbalance with China is gutting the U.S. manufacturing base and has serious economic and security implications. We urge you to remedy a broken U.S.-China trade relationship by engaging the Chinese government at the highest level, utilizing firm targets and deadlines. Further, we urge you to halt negotiations recently launched by former President Bush to establish a new U.S-China Bilateral Investment Treaty (BIT). While many in Congress have echoed your call for an end to existing loopholes that promote offshoring, BITs provide new protections to assist U.S. firms' relocation of investment and jobs offshore. A China BIT would also empower Chinese firms, including state-owned firms, to purchase even more U.S. assets under preferential terms. Moreover, a BIT based on the existing U.S. model would allow these Chinese firms to skirt U.S. courts and use foreign tribunals to challenge U.S. regulation of Chinese firms operating here, extending the investor-state system you so rightly criticized during the campaign, and which we address in more detail below.

Improving Import Safety: We are also eager to work with you to deliver on your campaign pledge to create new import-safety policies to ensure that food and goods coming from China and all countries meet U.S. safety and inspection requirements as a condition of entering our market and homes. Ensuring that Americans are not exposed to serious and unnecessary risks from imported goods will require improvements to our existing trade agreements, which limit the safety standards and inspection rates applied to imports, and to our domestic imported product and food safety regimes and their funding.

Renegotiating NAFTA and CAFTA: During the campaign, you described needed changes to NAFTA and the NAFTA-model FTAs, such as CAFTA. We pledge our support for an inclusive process to review and renegotiate these pacts. The issues that you raised regarding the NAFTA model are those that have been the basis of congressional opposition to NAFTA-style pacts: excessive foreign-investor privileges and private enforcement systems; limits on domestic procurement policy and food-safety protections; and more. Your call to renegotiate NAFTA, CAFTA, and other pacts, combined with the longstanding interest by many in Congress to improve the U.S. trade-agreement model, provide a long-overdue opportunity for a much-needed debate about U.S. trade pacts, and what policies they must and must not include. We are eager to work with you to build consensus around a new model before considering future agreements. To this end, we ask you to reverse the Bush administration's unilateral September 2008 declaration that the

United States will join in negotiations for a Trans-Pacific Strategic Economic Partnership (with Australia, Brunei, Chile, New Zealand, Singapore and Vietnam.)

The Bush Administration Free Trade Agreements (FTAs): We oppose the FTAs with Colombia, Panama, and Korea, which represent the "more-of-the-same" trade-agreement model promoted by the previous administration.

Colombia FTA. We would oppose any trade agreement with Colombia until we have witnessed a sustained period during which the current extreme human-rights violations against unionists, Afro-Colombians, and indigenous people have ceased. More than 460 unionists have been murdered in Colombia since President Álvaro Uribe took office in August 2002, including 49 in 2008 alone. This is a twenty-five percent increase from 2007, even as Colombia faced high levels of scrutiny related to the FTA. Additionally, there are growing revelations about the Uribe Administration's links to rightwing paramilitaries responsible for assassinations of unionists and other civilians. It is critical to send a signal to the world that the United States will not tolerate the assassination of people seeking to exercise their basic human rights.

Panama FTA. We also believe that Panama is not an appropriate U.S. FTA partner. A Government Accountability Office study identified Panama as one of only eight countries – and the only current or prospective FTA partner – that was listed on all of the major tax-haven watchdog lists. Panama has long been a key target of both the Organisation for Economic Co-operation and Development and other tax transparency entities for its resistance to international norms in combating tax evasion and money laundering. Indeed, Panama is one of few countries that has refused to sign any tax information exchange treaties. We applaud your cosponsorship last year of S. 681 (The Stop Tax Haven Abuse Act), which designates Panama as an "Offshore Secrecy Jurisdiction" targeted for that legislation's restrictions on the use of offshore tax havens and abusive tax shelters to avoid U.S. federal taxation. Panama is one of the top locations for multinational firms' subsidiaries – many created for the sole purpose of avoiding taxes

Korea FTA: In addition to its lopsided auto provisions, the Korea FTA includes major financial service-sector deregulation and liberalization provisions that contradict global and domestic congressional efforts to re-regulate this volatile sector.

We are eager to work with you to build support for the new trade agreement model we create together and for pacts with countries that respect the rule of law and human rights and that provide economic opportunities for American workers, farmers, and firms. While the Bush FTAs with Colombia, Panama, and Korea contain some improvements regarding labor and environmental standards relative to NAFTA, more work is needed on these and other provisions. Many of the most serious problems with the previous trade-agreement model are replicated in these FTAs. They must be renegotiated to ensure that these pacts at a minimum pass the most conservative "do no further harm" test.

This includes the FTAs' investment chapters, which afford foreign investors with greater rights than those enjoyed by U.S. investors. These three pacts' foreign-investor chapters

contain the same provisions in CAFTA that led many Democrats to oppose that pact, and that you cited as problematic during your campaign. Such provisions promote offshoring and subject our domestic environmental, zoning, health, and other public-interest policies to challenge by foreign investors in foreign tribunals.

The Bush FTAs also still contain language that limits import inspection and requires the United States to accept imported food that does not meet our domestic safety standards. Further, the Bush FTAs contain procurement rules which forbid anti-off-shoring and many Buy America policies and subject to challenge many common federal and state procurement policies regarding renewable-energy, recycled-content, and other important standards. These terms must be changed to provide the policy space for many of your exciting "Green Economy" proposals, which we also support.

The Bush FTAs also contain the NAFTA-style agriculture trade rules which have simultaneously undermined U.S. producers' ability to earn a fair price for their crops at home and in the global marketplace. Multinational grain-trading and food-processing companies have made enormous profits, while farmers on both ends have been hurt. As you noted in the campaign, one result of NAFTA-style agricultural rules has been the displacement of millions of farmers in developing-country FTA partners, with corresponding increases in illegal immigration to the United States.

Finally, while the most egregious CAFTA-based terms limiting access to affordable medicines have been removed from the Bush FTAs, the texts still include NAFTA-style terms that undermine the right to affordable medicines that were contained in the WTO's 2001 Doha Declaration on Access to Medicines.

Transforming the WTO Doha Round Agenda: We are excited to work with you to create a new agenda for future global trade talks that address the existing problems in current WTO rules. Replacing the now-outdated and long-beleaguered "Doha Round" agenda provides a unique opportunity to reestablish the United States as a global advocate for economic fairness. In contrast, the Doha Round, if concluded, would expand the damage the WTO has already wrought both here and abroad. Since establishment of the WTO and NAFTA, the U.S. trade deficit jumped exponentially from under $100 billion to over $700 billion – over 5 percent of national income. At the same time, U.S. real median wage growth has flattened, despite impressive productivity gains. Meanwhile, the developing countries that have most faithfully adopted WTO rules have seen significant declines in their growth rates, and a global food crisis has caused growing hunger in many poor nations.

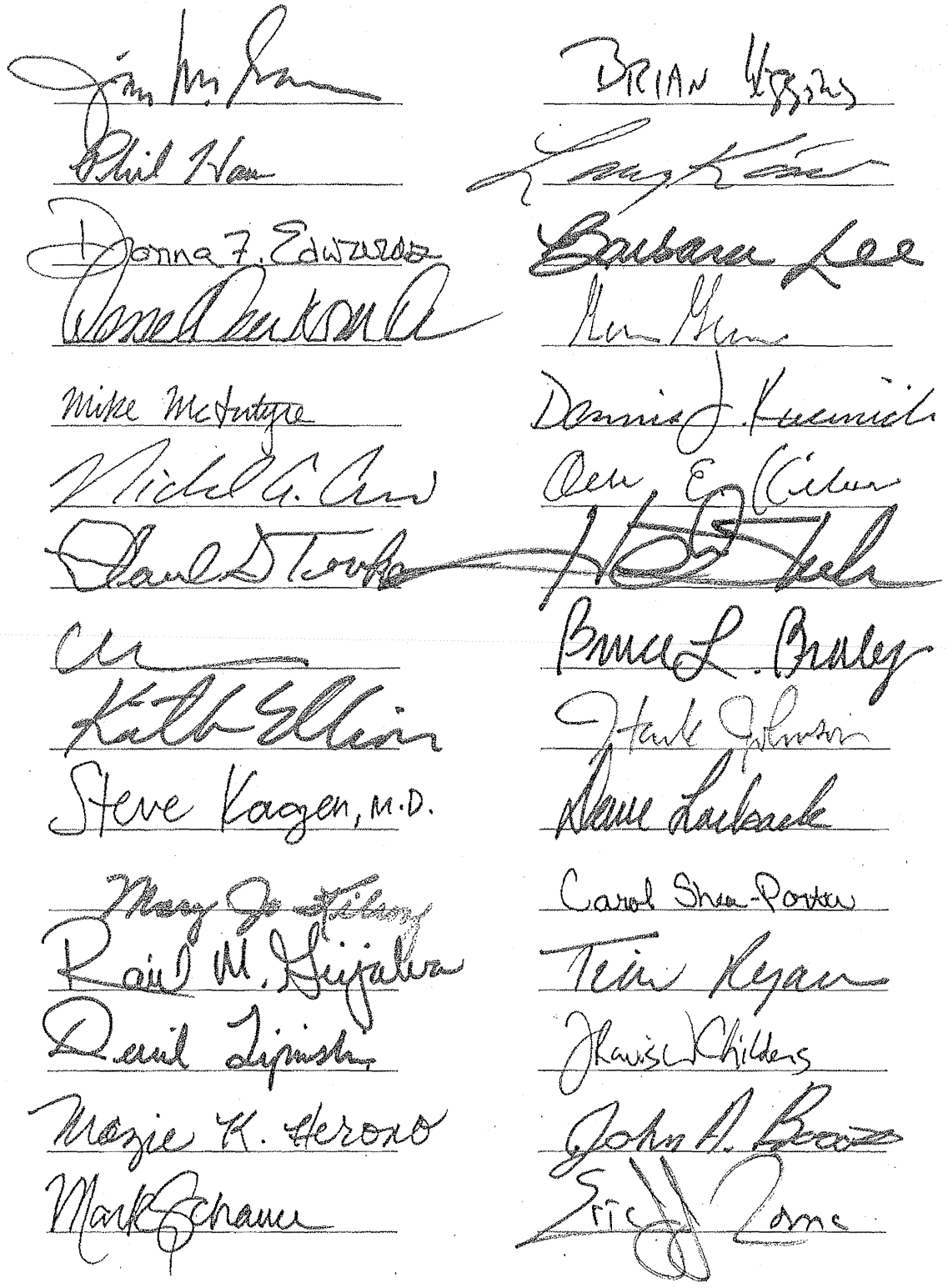
While your goal of adding labor rights to the WTO is not even on the Doha Round agenda, many troubling proposals are. Among the concessions demanded of the United States under the current talks are the unacceptable weakening of existing U.S. domestic trade laws, and the WTO-binding of increased numbers of guaranteed U.S. visas for foreign workers seeking employment here. Moreover, a key element of the Doha Round agenda is further service-sector deregulation and liberalization – including financial services and energy. Congress and the world at large are struggling to re-regulate

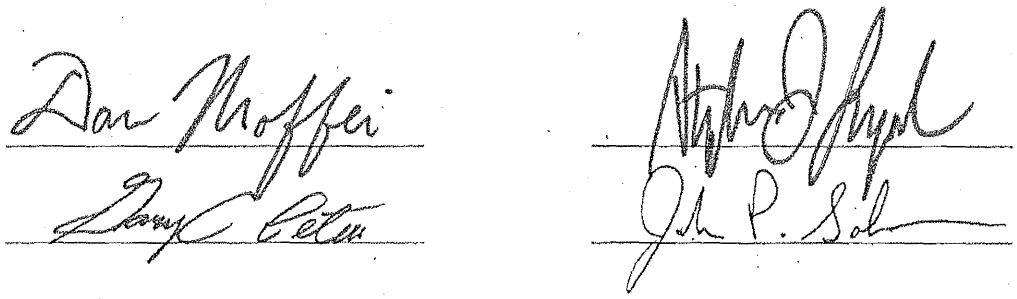
financial services and create new energy policies to ensure our shared future; it is extremely counterproductive to permit imposition of new WTO limits on the domestic policy space needed in these critical areas. Indeed, a new WTO negotiating agenda must focus on creating the flexibilities needed to address the critical issues of our time, including policies to counter global climate change.

We are all eager to work with you to create American trade and globalization policies that promote our shared goals of economic justice, poverty alleviation, healthy communities, human rights, and a sound environment. Correcting our past trade and globalization policy mistakes and moving forward on a new path can help our nation face our considerable economic challenges. We look forward to working with you to create new American trade policies that enjoy broad support.

Sincerely,

Michael H. Michaud
Rosa L. DeLauro
Louise M. Slaughter
Jan Schakowsky
Jim Oberstar
Donald Payne
Walter B. Jones
Peter J. Visclosky
Nancy Kaptur
John F. Tierney
Linda T. Sánchez
Betty Sutton
Bart Stupak





Representative Michael H. Michaud
Representative Rosa L. DeLauro
Representative Bob Filner
Representative Nick J. Rahall III
Representative Walter B. Jones
Representative Janice D. Schakowsky
Representative Marcy Kaptur
Representative Peter A. DeFazio
Representative Linda Sánchez
Representative Collin C. Peterson
Representative James P. McGovern
Representative Phil Hare
Representative Donna F. Edwards
Representative Jesse Jackson Jr.
Representative Mike McIntyre
Representative Michael A. Arcuri
Representative Paul Tonko
Representative Chellie Pingree
Representative Keith Ellison
Representative Steve Kagen, M.D.
Representative Mary Jo Kilroy
Representative Raúl Grijalva
Representative Daniel Lipinski
Representative Mazie K. Hirono
Representative Mark H. Schauer
Representative Daniel B. Maffei
Representative Gary C. Peters

Representative Louise M. Slaughter
Representative Maurice D. Hinchey
Representative John Conyers Jr.
Representative Jerrold Nadler
Representative James L. Oberstar
Representative Peter J. Visclosky
Representative John F. Tierney
Representative Frank Pallone Jr.
Representative Betty Sutton
Representative Bart Stupak
Representative Brian Higgins
Representative Larry Kissell
Representative Barbara Lee
Representative Gene Green
Representative Dennis J. Kucinich
Representative Dale E. Kildee
Representative Heath Shuler
Representative Bruce L. Braley
Representative Henry C. Johnson Jr.
Representative David Loebsack
Representative Carol Shea-Porter
Representative Tim Ryan
Representative Travis W. Childers
Representative John A. Boccieri
Representative Eric J. J. Massa
Representative Stephen F. Lynch
Representative John P. Sarbanes

Ron Kirk
c/o Office of the U.S. Trade Representative
600 17th Street, N.W.
Washington, DC 20508

Dear Mr. Kirk:

Congratulations on your appointment as the new United States Trade Representative. As chairs of the Maine Citizen Trade Policy Commission, we look forward to working with you. We believe in the power of trade as a tool for promoting economic growth and enhancing relationships between the United States and its trading partners.

The Citizen Trade Policy Commission was established by the Maine legislature in 2004 to monitor the impact of international trade policy on our state. We have members representing the House of Representatives, the State Senate, the Maine International Trade Center, various state agencies, and members affiliated with citizen constituencies including small businesses, manufacturers, labor, environmental organizations, and small farmers.

States and local governments are important partners with private business in the design and implementation of our nation's economic development strategies. States and cities have traditionally acted as the 'laboratories of democracy' where different economic policies can be pioneered. Because trade is a critical part of any successful economic development strategy, and because different states, cities and towns have needs related to trade and trade policy that are as different from one another as are the mix of products and services that we export, we seek to add our voices and expertise to this policy arena.

Since the conclusion of NAFTA and the WTO Uruguay Round, states have been allowed to play only a limited role in the policy-making process. USTR has expected our support in all matters pertaining to trade but too often has been unwilling to engage in dialogue with state actors on critical issues of trade and investment.

With your assistance, we intend to build a more collaborative relationship between the federal government and the states on trade. By working together, we can preserve our federal system and reach out for new trade relationships around the world.

In meetings convened with the support of national associations such as the National Governors Association, the National Association of Attorneys General, and the National Conference of State Legislatures, officials from the different branches of state governments have been meeting in order to articulate a set of approaches that could assist in the development of a better federal-state consultative process on trade.

To summarize our concerns:

We seek the establishment of a **Federal-State International Trade Policy Commission,** and/or the creation of a **Center on Trade & Federalism**, supported

by both the federal government and the states, with adequate personnel and resources to ensure that the major provisions of trade agreements and disputes that impact on states can be analyzed, and their findings communicated to and discussed with key state actors on trade.

We seek **changes in the structure and role of USTR trade advisory committees.** All state and local government input has been corralled into a single committee, the InterGovernmental Advisory Committee (IGPAC); the membership of that committee was determined entirely by USTR, and not by the states them-selves; no analytic resources were provided to IGPAC; turn-around times for IGPAC members to comment on the results of negotiations were extremely brief, and no consultation occurred at a stage in the process where state concerns could influence the course of negotiations. IGPAC members had to go through a lengthy process of obtaining a 'security clearance'; and while we can understand the need for discretion in the disclosure of sensitive negotiating information, it simply makes no sense to put IGPAC members through this process when the end result is that they are subsequently unable to discuss the terms of on-going disputes and negotiations with their fellow state officials. Further, more than half of all states lack any representation on IGPAC.

We look forward to discussing with you opportunities for building a collaborative approach to trade that will strengthen the system of federalism that was part of the genius of our nation's founders, and that remains a critical aspect of our national economy's competitiveness in the years to come. With congratulations and very best wishes for success in your new role.

Yours sincerely,

Statement of Maine Rep. Sharon Treat
Executive Director, National Legislative Association on Prescription Drug Prices
PIJIP Forum on Innovation and Access to Medicines
February 19, 2009

MEDICAID IS AN ESSENTIAL STATE PROGRAM – STATES ARE THE HEALTH CARE SAFETY NET IN THIS COUNTRY

- Besides education, Medicaid is the single largest state government expenditure

- Medicaid is state-federal program, jointly administered and funded by the federal government and states

- It insures nearly 60 million low income and disabled people with a total state/federal cost of more than $350 Billion in 2008

- In addition to administering Medicaid, states run a variety of other health programs with pharmaceutical components including immunizations, public health clinics for reproductive health and HIV treatment, and stand-alone prescription drug access programs for the elderly (which now wrap around Medicare Part D) and low income people who do not meet Medicaid eligibility requirements

MEDICAID IS A DRAMATICALLY MORE COST-EFFECTIVE PROGRAM THAN THE PRIVATELY ADMINISTERED MEDICARE PART D PHARMACY BENEFIT BECAUSE STATES NEGOTIATE PRICES USING A PREFERRED DRUG LIST (PDL)

- Prices paid for the drugs used by the dual eligible beneficiaries under Medicare Part D are significantly higher than the prices paid by Medicaid for the same drugs. The higher prices for the top 100 drugs produced a windfall of $1.7 billion for drug manufacturers in 2006, the first year of Medicare Part D. The higher prices produced an even larger windfall of $2 billion for the drug manufacturers in 2007 [July 2008 report by the House Committee on Oversight and Government Reform].

- The Australia and Korea FTAs, and this proposal, appear to be trying to achieve through international treaties – which states are pretty much excluded from influencing – what drug manufacturers have been unable to achieve through the courts: making sure states pay the highest possible prices for prescription drugs and slowing down the introduction of life-saving, cheaper generics

- Meanwhile state-collected data shows hundreds of millions of dollars spent even in small states on direct to consumer advertising and on marketing activities aimed at prescribers -- spending that does nothing to increase innovation and research aimed at solving the world's health crises or providing medications to the poor of the world at an affordable price.

- Quite the contrary, this money – MORE THAN WHAT IS SPENT ON R&D – is all about increasing the utilization of often non-essential drugs like Botox, Viagra, and other patent-protected drugs.

SO FROM A STATE PERSPECTIVE, IT IS HARD TO GET BEHIND A PLAN THAT APPEARS TO CRIPPLE OUR ABILITY TO PROVIDE ACCESS TO HEALTH CARE TO NEEDY PEOPLE IN RURAL MAINE, SUPPOSEDLY IN ORDER TO HELP OTHER NEEDY PEOPLE, WHILE BILLIONS ARE WASTED ON MARKETING PATENTED DRUGS.

- Its time to come up with a new model for funding innovation and R&D: we need to delink prices from R&D. We need to lower prices in the United States and other high income countries, not raise them.

- States are increasingly interested in participating in discussions about trade policy and getting engaged in international issues – witness the three state commissions on trade and sovereignty in the Northern New England states, among others.

- There are other models being proposed to spur innovation and improve access to medicines in the developing countries of the world as well as in the U.S. State legislators are willing to be part of the conversation about how to move forward with a new model that does not have the side effects of the current system.

ATTACHMENT #8

August 13, 2008

The Honorable Max Baucus
Chairman
Finance Committee
United States Senate
Washington, DC 20510

Dear Senator Baucus:

Thank you again for the opportunity to testify at the July 15 Finance Committee Hearing on "International Enforcement of Intellectual Property Rights and American Competitiveness." At the hearing, you asked us to work together to find a "middle ground" on the issue of global access to medicines. Specifically, you asked whether we could find a way "to protect our patents abroad but also demonstrate flexibility and compassion with respect to public health crises in the developing world."

We are pleased to respond that we have worked hard this past month to address your challenge, and believe that it is possible to strike such a balance. In fact, we have been able to identify a common approach that we think would do so.

The problem of health care in the developing world – especially in the poorest countries – is a complex one. People in these countries lack access to health care for a variety of reasons, including lack of financial resources, lack of health infrastructure, and political instability. Solving this problem will require the efforts of a broad range of parties, including governments, multilateral organizations, private industry, and non-governmental organizations, each with important roles to play.

We believe that these efforts are most likely to succeed if the parties involved share a common vision. An important component of health care is of course access to medicines; another important component is encouragement of research. We have agreed upon the following as a practical vision for addressing the access to medicines issue in developing countries, while preserving incentives for innovation.

(1) Developed-world nations would commit themselves to develop detailed mechanisms to ensure that their government pharmaceutical purchasing authorities pay an adequate price to encourage research and also that, as donors, they pay a price adequate to cover an appropriate share of research costs for their purchases of new products of primary value to developing nations.

(2) Under WTO rules, least developed countries (the world's poorest countries, primarily in Sub-Saharan Africa) are not obligated to provide IP protection to medicines, at least through 2016. We agree with this rule. That said, we need

to keep in mind that the goal is to promote access to medicines, and that there are a range of policies that countries need to put in place to achieve that goal effectively. We also recognize that as these countries develop and become more viable locations for investment and R&D, they should consider time-limiting such a suspension of IP. We believe it appropriate that the global and national funds purchasing for these countries pay competitive prices but also believe that these prices should cover an appropriate share of research costs for new products whose primary value is in developing nations.

(3) Middle-income nations would protect IP, but markets would be divided: the poorer sections would get the benefit of low prices, and the wealthier sectors would pay a price more aligned with the developed-world price. Some countries would need to de-regulate their pricing regimes to allow this to happen.

(4) All nations would prohibit trade in counterfeit and fake drugs, would cooperate with generic and research pharmaceutical firms to help suppress it, and would assist in preventing the reverse flow of low-income-nation generic drugs to high-income nations.

(5) All beneficiaries of the low-margin pricing would remove all legal tax, duty, and similar barriers to the import and marketing of pharmaceuticals. They would further agree to accept new drugs on the approval of those drugs by an appropriate international process.

(6) Donor nations would commit themselves to support the global funds (whether multilateral or national) at a defined level.

We identified two steps that we believe might contribute to achieving such a vision. One is to initiate a dialog among the various participants in the middle income markets to explore ways in which poorer patients in those markets might best be served. Such a discussion could include issues such as how to prevent arbitrage between market segments that would undermine access for the poorest, as well as ways to reduce counterfeits and to eliminate distortions that arise when the prescribing and dispensing functions are not separated. We are committed to beginning such a dialogue with other interested parties, and will explore the means to do so.

Second, we believe that the United States should consider as a trade goal the achievement of a sector-specific trade agreement among developed countries (e.g., under the aegis of the WTO, or perhaps the OECD) to ensure that pricing and reimbursement policies recognize and reward innovation, and to set disciplines on government practices that undermine incentives for innovation. This is necessary to ensure that short-term cost containment objectives do not overwhelm the longer term benefits from the effective promotion of R&D. We recognize that this could be a difficult and longer-term goal to achieve. It might, for example, best be achieved in the form of a global sector-specific approach that would include a number of the components of the vision outlined above.

We would be happy to attempt to propose language defining this goal for a new trade-promotion authority bill should you wish.

We are honored to have had this opportunity to explore these issues together and believe that we have started a fruitful dialogue. Thank you for the opportunity.

Sincerely,

Jeff Kindler
Chairman and CEO
Pfizer, Inc.

John Barton
George E. Osborne Professor of Law Emeritus
Stanford University

Forum on democracy & trade

Update: Prescription Drugs, Trade, and the States

Good News: Led by a National Legislative Working Group on Trade & Prescription Drugs, states won a small victory in the text of the most recent bilateral trade deal. The U.S. – Korea Free Trade Agreement chapter that deals with pharmaceuticals includes a footnote that explicitly carves out Medicaid from the disciplines of the agreement.

Advocacy Pays Off: This 'carve-out' was the result of several letters to, and face-to-face conversations with, U.S. trade negotiators. The co-chairs of the Working Group also wrote to Congress, asking members to "seek assurances....that USTR will not include limitations on cost-cutting drug formularies in any final [trade] agreement."

What's the Issue: An earlier free trade agreement—with Australia—appeared to bring state administration of Medicaid programs within the scope of the agreement. That was bad news for states, because it could complicate the ability of states to use their bulk-purchasing power to negotiate lower drug prices for Medicaid recipients.

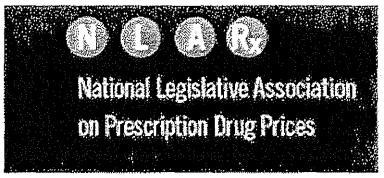
The Office of the United States Trade Representative, has attacked the use of 'reference pricing'—whereby medicines that do lead to improvements in patient health can be priced higher, but drugs that deliver no added health benefits cannot. More than 40 states use 'reference pricing' and a preferred drug list for managing the drug costs. The use of "PDLs" have been very effective in combating price hikes for prescription drugs.

What Happens Next: The US-Korea Free Trade Agreement hasn't been passed by Congress, so the provisions in that agreement are not yet 'in effect.' Nor has there been an agreement by USTR to use this 'carve-out' in all future trade negotiations. While 'access to medicines' was noted as part of the overall 'Bipartisan Trade Deal' announced this spring, that applied to developing countries, rather than to U.S. states!

Over the last year, the pharmaceutical industry has been pushing on the issue of 'reference pricing' in other countries. Many countries use the same tools as do U.S. states in managing costs. The industry continues to fight state drug pricing programs, both in domestic courts and in the text of trade agreements.

Working Group members, members of the National Legislative Association on Prescription Drug Prices (NLARx), state legislatures, state Medicaid directors and others can use their influence with Congress to ensure that this 'carve-out' of state Medicaid programs becomes part of USTR's standard negotiating model.

- Call on USTR to affirm its commitment to a 'carve-out' for Medicaid in all trade negotiations, possibly using language from the Korea agreement as precedent.
- Congress could instruct US trade negotiators *not* to interfere with the drug pricing programs used by other countries, if those programs are compatible with WTO rules. This would help ensure that other countries—*and* U.S. states—can continue to use 'reference pricing' as part of their toolkit for reducing drug prices.



Brief Overview of Industry/Government Efforts to Undermine Evidence-Based Pricing and Reimbursement Policies

National Legislative Association on Prescription Drug Prices
February 19, 2009

State governments negotiate drug prices by comparing new drugs to existing therapies

State Medicaid programs are able to provide pharmaceutical coverage for 58 million Americans because they negotiate discounted prices from drug manufacturers. At least 40 states negotiate prices based on an open formulary, or a preferred drug list (PDL). They compare evidence on the safety, efficacy, and cost-effectiveness of new drugs to existing ones in the same therapeutic class, and favor the best ones – not unlike private insurance companies or foreign governments.

The branded drug industry sued states to undermine the system of open formularies

In the early 2000s, the industry launched three separate lawsuits against state programs in Maine, Michigan and Florida, claiming federal Medicaid laws prevented their use of PDLs in their programs. However, the plaintiffs lost all three cases, with federal courts, including the US Supreme Court, upholding states' rights to negotiate prices evidence-based PDLs.

Australia-US Free Trade Agreement sets guidelines for government pricing policies

This bilateral trade agreement was the first to include a section directly addressing the pricing of pharmaceuticals. It introduced a series of rules concerning the procedures involved in administering the systems of reference pricing, including greater industry participation, an appeals process, and a commitment by both countries to observe a premium on "innovative" new products.

Korea-US Free Trade Agreement includes guidelines more favorable to branded industry

Chapter five of the Korea-US Free Trade Agreement was based on the pharmaceutical provisions in the Australia agreement, but it set pricing guidelines even more favorable to the drug industry. The agreement requires each country to "appropriately recognize the value of patented pharmaceutical products and medical devices in the amount of reimbursement it provides." State governments successfully lobbied for a provision in the agreement to exclude Medicaid, but states are concerned that future trade agreements will contain similar provisions, threatening Medicaid PDLs.

US trade officials attack evidence-based reference pricing in other fora

The U.S. Trade Representative (USTR) and the Departments of Health and Human Services, Commerce, and State are currently pressuring other developed countries, including some of our closest OECD allies, to limit programs they have in place to curb irrational pricing of medicines. USTR's National Trade Estimate Report on Foreign Trade Barriers describes their negotiating objectives in more detail, and these are similar to industry requests. These include: ending reference pricing based on comparisons of generic and patented medicines; granting pharmaceutical companies greater access to the decision makers who evaluate medicines; and creating an appeals process for decisions unfavorable to industry.

International trade agreements

Compiled by Sarah Bigney, Maine Fair Trade Campaign
Sources: WTO: www.wto.org, Forum on Democracy and Trade: www.forumdemoracy.net

NAFTA: North American Free Trade Agreement
Free trade pact between Mexico, U.S., and Canada. Went into effect in 1994. Removed tariffs and quotas and opened markets in all three countries to each other.

CAFTA: Central American Free Trade Agreement
Free trade pact between U.S., Costa Rica, Honduras, El Salvador, Nicaragua, Guatemala, and the Dominican Republic. Passed in 2005. Modeled after NAFTA.

WTO: World Trade Organization
Organization of 153 countries, designed to liberalize trade, eliminate taxes or tariffs and open borders for free flow of goods. Created in 1995 out of its predecessor the General Agreement on Taxes and Tariffs, or GATT. The WTO governs by completing "rounds" of negotiations and coming to a series of agreements that representatives of member nations agree to and each countries' parliament or Congress must ratify.

There are about 60 agreements of the WTO. A few of the most significant are:

Agreement on Agriculture (**AoA**)
The AoA has three central concepts, or "pillars": domestic support, market access and export subsidies.

General Agreement on Trade in Services (**GATS**)

The GATS was created to extend the multilateral trading system to service sector, in the same way the General Agreement on Tariffs and Trade (GATT) provides such a system for merchandise trade. This particularly effects state governments that oversee service licensing, etc.

Trade-Related Aspects of Intellectual Property Rights (**TRIPs**)

The Agreement on Trade-Related Aspects of Intellectual Property Rights sets down minimum standards for many forms of intellectual property (IP) regulation.

Technical Barriers to Trade (**TBT**)

TBT attempts to ensure that technical negotiations and standards, as well as testing and certification procedures, do not create unnecessary obstacles to trade.

Other bi-lateral free trade agreements modeled after NAFTA of which the U.S. is a party:

U.S.- Chile Free Trade Agreement (FTA)
U.S.- Peru Trade Promotion Agreement (TPA)
U.S.- Singapore FTA
U.S.- Australia FTA
U.S. - Bahrain FTA
U.S. - Oman FTA
U.S - Israel FTA
U.S. - Morocco FTA

Trade key terms

USTR: United States Trade Representative: The USTR is an ambassador level appointee of the Presidential administration designated to oversee international trade policy. The current USTR is Ron Kirk.

Doha Round: Current round of negotiations at the WTO. The round began in 2001 and has not been completed because an agreement cannot be reached. The talks collapsed in the most recent summit in 2008. Agricultural tariffs are one of the major sticking points.

Fast-Track: (Also called TPA- Trade Promotion Authority) The mechanism by which Congress gives up its constitutional right to negotiate trade policy and allows the Presidential administration to do the negotiating. After the agreements are negotiated, Congress gets an up or down vote on the agreement with no chance to amend. Once the President submits a trade agreement for ratification, Congress only has 90 days to get the bill through both chambers. There is a limit of floor debate to 20 hours in each chamber.
Fast-Track expired in 2007 and has not been renewed, so there currently is no negotiating mechanism for trade agreements.

Federal/State Consultation: Although the current model of free trade agreements directly impacts state sovereignty and federalism, the process by which they are negotiated includes no meaningful consultation with states.

IGPAC: The Intergovernmental Political Advisory Committee is one of many advisory committees to USTR. IGPAC is the only advisory committee to represent the interests of state and local governments. It has neither funding nor staff, and is often unable to access important information on negotiations. It has 30 members, so not all states are represented.

Investor-State Rights: Found in NAFTA Chapter 11 and CAFTA Chapter 10, and in subsequent trade agreements, these provisions grant the right to foreign investors the right to challenge federal, state or local laws they think limits their right to future profits. They can sue a country for damages or a reversal of the law or policy they see unfit.

Dispute Mechanism: Under the WTO, if one country feels that another has broken one of the agreements it can bring forward a challenge. This dispute settlement is similar to investor-state rights disputes, but instead of foreign investors bringing the challenge, the country itself has to bring a challenge, so they are state-state disputes. These cases are not heard in domestic courts but rather are decided by an international tribunal. There can either be a fee levied, or the offending nation can offer up other sectors to open as a settlement.

Domestic Regulation: Proposed GATS provisions that would create major restrictions on the ability of sub-federal governments (i.e. U.S. states) to license, regulate, or govern the service sector.

Cases where state sovereignty has been challenged by foreign companies or countries under international free trade agreements

Antigua v. United States: Gambling

The United States made a WTO commitment on gambling under the General Agreement on Trade in Services (GATS). The Caribbean country of Antigua, home to many Internet gambling companies, brought a WTO case against the U.S., claiming that federal and state gambling restrictions on internet casinos were unfair barriers to trade. Antigua won the case. The U.S. has since pulled its gambling commitment and is negotiating which sectors to offer in its place.

Methanex vs. United States: Water pollution

The state of California passed a law banning the gasoline additive MTBE because it was contaminating ground water. Methanex, a Canadian company that sold MTBE, sued the U.S. under NAFTA for the profits they would have made in the future if that law had not passed. Methanex eventually lost the case. However, the California Department of Justice was never reimbursed for the substantial costs they incurred defending against this NAFTA case.

Glamis Gold vs. United States: Mining

The Canadian company Glamis Gold Ltd. is challenging California's environmental and land use regulations on open pit gold mining in sensitive areas. Glamis is seeking $50 million in damages. This case is still pending in the international tribunal.

Massachusetts Burma case: Human rights

Massachusetts passed a law that state agencies could not purchase from companies doing business with Burma due to grave human rights abuses in that country. The EU and Japan took steps to bring action against the Massachusetts law under the WTO procurement provisions. The WTO case was eventually withdrawn and litigated through the U.S. courts. This is a clear example of state procurement policies being challenged.

Vermont E-Waste: Environment health

Vermont State Senator Ginny Lyons proposed legislation about the environmentally safe disposal of electronic waste in her state, and before the bill had even had a hearing she received a letter at her home address from the People's Republic of China asking her to "cancel" the bill on the grounds that it was trade illegal under the WTO Agreement on Technical Barriers to Trade.

Maryland Safe Children's Products: Product Safety

Maryland State Delegate James Hubbard sponsored a bill limiting levels of lead and toxins in children's products, and before the bill was voted on he received a notice from the People's Republic of China that they would challenge the bill under the WTO Technical Barriers to Trade if it passed. Maryland's Legislature passed the bill anyway.

Pending NAFTA cases:

- ✓ Dow Chemical is challenging the Province of Quebec's ban on four harmful pesticides.
- ✓ A Canadian cigarette company, Grand River, is challenging the terms of the 'Master Tobacco Settlement,' which has been so important for offsetting public-health costs borne by the state in fighting tobacco-based illnesses.

Maine laws potentially vulnerable to challenge under international free trade agreements

Economic development procurement policies

Preference for local business, like contracts or purchases for in-state bidders and manufacturers when price, quality, and availability are equivalent (Title 5, 1825-B)

Environmental procurement policies

Preference for products that promote high environmental standards, like products and materials with recycled content (Title 5, 1812), or cars with mileage ratings of at least 45 miles per gallon (Title 5, 1812-E)

Human rights and labor condition procurement policies

Preference for products that promote human rights, like apparel, footwear, and textiles made in non-sweatshop conditions (Title 5, 1825)

Kid's Safe Product Law

Last spring, Maine passed the "Kid's Safe Product Law", a first in the nation law that allows Maine to set up a process to quickly move towards the development and use of safe, affordable, and effective alternatives to toxic chemicals in children's products. (Title 38, 1609)

Electronic Waste

Maine requires electronic waste (e-waste) to be recycled or disposed of safety and with proper reporting. Similar to the Vermont law that was targeted by China. (Title 38, 1610)

Buy America provisions

States that signed onto procurement chapters of different trade agreements are less able to direct American Recovery and Reinvestment Act stimulus dollars to U.S. businesses..

Global warming prevention policies:

A number of global warming prevention policies could be at risk. RGGI, the Regional Greenhouse Gas Initiative that Maine participates in to lower carbon outputs (Title 38, 530-B). The state has renewable portfolio standards (Title 35A, 3210), which have been flagged also as potentially vulnerable. The federal government of Canada and the Province of Alberta have recently challenged California's adoption of a 'low carbon fuel standard.' The RGGI states are also looking to adopt a low carbon fuel standard.

This is only a short sampling of policies that could be challenged under procurement, services, and investment provisions of international trade agreements. Additionally, current negotiations continue to expand the commitments offered under the WTO. State licensing and a number of standards and policies could be subject to WTO 'disciplines' should those negotiations move forward.

Compiled by Sarah Bigney, Maine Fair Trade Campaign

Forum
on democracy & trade

First Draft

Preliminary Report on Water Policy and International Trade Law

William Waren[1]

September 11, 2009

1. **Why international trade and investment agreements may impact Maine's management of water resources?** Under U.S. domestic law, Maine has authority to adopt water policy measures in order to protect the public health and the environment and to ensure sustainable supplies of water at a fair price for individual consumption and commercial use. In pursuit of these policy goals, Maine may want to consider, for example, measures to regulate the export of water to internal and international markets. Export of water, particularly where it has been removed in large bulk quantities, can damage the ecosystem. Scientific studies could determine whether habitats on land and water might be damaged or destroyed as a result of large scale water exports from Maine. As another hypothetical example, Maine--as a state that is rich in water resources-- may want to ensure its control over those resources in the decades ahead when severe world-wide water shortages are forecast, resulting in powerful economic and political incentives for other regions and other countries to seek imports of Maine water on a truly massive scale.

   The question is whether international trade and investment law, either already adopted or likely to be considered for adoption in the future, might thwart Maine should the state adopt such aggressive water policy measures. It is a good question because the World Trade Organization, NAFTA, and similar international agreements are designed to limit the authority of state legislatures, agencies, and courts in the interest of maximizing the volume and value of international commerce.

   International tribunals created by these agreements have the power to punish the United States through retaliatory trade sanctions or in the case of investment disputes through awards of uncapped money damages for any state or local government measure,

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including any water policy measure, deemed to violate international trade and investment law.

Trade and investment cases are decided by tribunals of trade experts. Most are experienced in commercial arbitration, not constitutional law or public policy. Few of them are Americans, and few come from countries with a federal system of government and a tradition of strong local government comparable to that of the United States. In most countries sub-national units of government are mere administrative subdivisions of a centralized and unitary state.

The unitary-state model of governance is reflected in international trade law, which provides that sub-national units including American states and localities are bound by global agreements, to which they have not consented, even if the global agreement regulates core areas of state or local authority that could not otherwise be regulated by national governments.

2. **Why should the Maine Commission make the legislature and the public aware of the WTO General Agreement on Tariffs and Trade (GATT) and the limits it may impose on government restrictions on trade in water and trade in bottled water in particular?**

Bottled water: Trade in bottled water is covered by Article XI of the GATT, which bars quotas and other restrictions on exports.[2] According to Howard Mann, a leading expert on trade and the environment, "It is well understood that bottled water, for example, is covered by trade law, and that restrictions on exports of bottled water are, therefore, significantly limited."[3]

Given that bottled water is covered by the GATT and similar agreements on trade in goods (or products), the next question is what "disciplines" or limitations on government action are imposed. For example, in the case of the GATT, the "most favored nation" discipline at article I requires governments that accord "any advantage, favor, privilege or immunity" to any product destined for one country must accord that same benefit to like products destined to all countries belonging to the World Trade Organization. Similarly,

[2] Art. XI of the GATT, 1947, as renewed in 1994. See General Agreement on Tariffs and Trade, in The Results of the Uruguay Round of Multilateral Trade Negotiations, The Legal Texts, World Trade Organization, 1995.

[3] Howard Mann, "Implications of International Trade and Investment Agreements for Water and Water Services: Some Responses from Other Sources of International Law," a paper prepared for Agua Sustentable and funded by the International Development research center, Ottawa, Canada, May 2006, p. 9.

article XI of the GATT bars governmental measures, other than taxes, duties, or similar charges, on the "exportation or sale for export of any covered product, absent an exemption."

So, what exemptions in the GATT would allow application of a government measure to a covered good or product such as bottled water in spite of the disciplines imposed by article XI and/or article I? Article XX, for example, allows governments to impose measures that would otherwise be prohibited that are "necessary to protect human, animal, or plant life or health" or that relate to "the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." These two exceptions in article XX, however, are available only where governmental measures "are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." In parsing the text of article XX, it becomes clear that its exceptions are narrow and subjective in many respects. For example, a WTO tribunal will decide when a measure to protect human, animal, or plant life is "necessary." Does that mean the measure must be no more trade restrictive than necessary? Similarly, a tribunal will make the subjective judgment about when a measure is a disguised restriction on international trade. Also, governmental measures, to retain exempt status, must apply to goods consumed domestically in the same way they are applied to goods for export. And, measures must be applied to all countries in the same way.

Bulk Water: Commentators disagree about whether bulk water exports are covered by GATT and by trade in goods chapters in free trade agreements such as NAFTA. One school of thought is that bulk water is not a covered good or product. The other school of thought is that is that the language of the agreements is not clear about whether bulk water is covered.

The most common view appears to be that bulk water, in its "natural state," is not a good or product. The parties to NAFTA (Canada, Mexico, and the United States) issued a joint statement in 1993 declaring that "water in its natural state...is not a good or product, is not traded, and therefore is not and never has been subject to the terms of any trade agreement."[4] With respect to the GATT, the argument is that bulk water does not fit

[4] 1993 Statement by the Governments of Canada, Mexico, and the United States.

under that agreement's definition of a product. The GATT defines a product as a "substance produced during a natural, chemical, or manufacturing process." Water in its natural state, it is argued, is not "produced" under this definition. As one commentator noted, the GATT definition implies that "something must be done to water to make it a product, and that mere diversion, pumping, or transfer does not suffice."[5] Mere water use rights, by this view, do not confer ownership of a product. Moreover, customary international law as established by the overwhelming practice of nations operating under different legal traditions regard water as a public good which individuals may "enjoy the use of" but do not "own title to."

Dissenters ask how is it that water doesn't fit under the GATT definition of a product, when the common practice is to regard other unrefined natural resources as products and goods in international trade.[6] They also argue that as a matter of recent commercial practice water is being exported as a commodity, just like crude oil and that tribunals could find this to be a commercial reality that must be recognized.

As Howard Mann sums it up," while common sense and some history indicates trade law cannot compel the trade in freshwater resources, the matter is not without doubt, doubt created at least in part by the trade lawyers themselves. This doubt can be compounded if a first export is allowed to occur, as additional limitations or conditions on exports subsequent to a first export may become more difficult to apply due to non-discrimination requirements under trade law."[7]

3. **Why should the Maine Commission closely monitor WTO negotiations on water services?** The distribution of water is a service. The treatment of sewage is a service. The transportation of water is a service. Thus, the General Agreement on Trade in Services (GATS) comes into play.

GATS is the most complicated and far-reaching of all WTO agreements in terms of its impact on state regulatory authority – *e.g.,* utilities, telecommunications, coastal and commercial development, professions, financial services, distribution services, health facilities, storage and transportation of fuels, and higher education, among others. The GATS is also a model for the most far-reaching provisions in the FTA chapters on

[5] Weiss, note 4, at 69; Smith p.4.
[6] Smith p.4.
[7] Mann p. 10.

services.

The capacity of Maine to manage water resources in light of potential conflicts with the GATS bears watching. In particular, any resumption of GATS negotiations on domestic regulation and the future interpretations of U.S. commitments on water for sewage services and environmental services should be monitored closely.

This is despite the European Union's decision not to seek inclusion of "water for human use" as a sector of economic activity that should come under the scope of GATS regulation and despite the fact that the United States has not made a commitment to subject "drinking water services" to GATS disciplines, up to this point. The United States Trade Representative (USTR) has assured states that the United States has no current plans to make such a commitment. But, could those plans change if such a compromise could restart Doha Round negotiations in ways that would be favorable to the United States in other sectors?

Keep in mind that European water companies may see the United States as a market for expansion. Three European multinationals, Veolia (formerly Vivendi), RWE, and Suez, dominate the international market in private water services. These European companies reportedly have urged the European Community to facilitate the further opening of the U.S. water services market, even though the EU has declined for now to make such a request of the United States. Also, the U.S. sectoral commitments for "distribution services," "wastewater services," and "environmental services" might allow a challenge to the United States in the WTO based on Maine water policy. Bottled water operations in particular might be regarded as a "distribution service."

Of even greater concern to the Maine Commission should be the WTO negotiations on GATS obligations related to "domestic regulation." The potential intrusiveness of obligations covering domestic regulations will depend on the test for when they constitute a barrier to trade. It was originally proposed that these standards, requirements and procedures should be "not more burdensome than necessary." Such a necessity test could have put a range of water policy measures and a range of other regulatory measures in the State of Maine and in other jurisdictions at considerable risk of conflict with GATS

obligations.[8] Several but not all of the parties to the domestic regulation negotiations in Geneva are now looking for a compromise on some less intrusive formulation than for identifying a domestic regulation violation. The outcome of these negotiations will be vital for Maine and all other U.S. states and localities.

In January of 2008, the chairman of the WTO's Working Party on Domestic Regulation (WPDR) released a fourth draft of 48 proposed "disciplines." The IGPAC Services Working Group has highlighted several of these disciplines as posing a significant risk of conflict with state regulations that neither discriminate nor limit market access.[9] For example, the IGPAC group expressed:

- "Serious concern [about disciplines that require domestic regulations to be] 'pre-established, based on objective criteria and relevant...' given the potential for unacceptable constraints on the scope and exercise of state/local regulatory authority, particularly related to complex and emerging industries." IGPAC is referring to the fact that a term like "objective" has been interpreted by the WTO in ways that are inconsistent with regulatory practice in the United States.

- "Active opposition to the extremely objectionable omission of any mention of sub-federal policy objectives from [the section that states a principle of deference to legitimate national policy objectives]." Instead, the IGPAC services working group recommends the following language: "National policy objectives include objectives identified at national or sub-national levels."

4. **Why should the Maine Commission closely monitor international investment litigation?** A challenge under an international investment agreement or bilateral investment treaty to Maine's authority to regulate its water resources is always possible.

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[8] If something similar to the necessity test is agreed upon in Geneva, the Center for International Environmental Law identified several areas where water policy could be threatened, including among others: qualifications of water service providers; the use of licenses, permits, and technical regulations and standards related to pollution discharges, operating permits, and other water policy measures; the use of environmental criteria related to water services in awarding concession contracts or assessing licensing fees; and requirements for water sustainability impact assessments before issuing licenses. CIEL *supra* p. 2.

[9] Memo from Kay Wilkie, chair of the Intergovernmental Policy Advisory Committee, Services Working Group, to Daniel Watson, Office of the U.S. Trade Representative (February 12, 2008).

For example, in *Metalclad v. Mexico*, an international tribunal found a violation of NAFTA's chapter 11 on investment when state and local governments took regulatory action to stop operation by U.S.-based Metalclad Corporation of a hazardous waste disposal facility believed to be a threat to drinking water safety and the environment.

This suggests that the Maine Citizen's Trade Policy Commission may want to work with the U.S. Trade Representative's office and with the Maine congressional delegation to seek an official interpretation of NAFTA chapter 11 and clear language in future agreements and treaties that will codify parts of the *Methanex* and *Glamis Gold* decisions and otherwise protect bona fide government regulations, including water regulations, from any *Metalclad*-type claim that might be based on the actions of the State of Maine or one of its subdivisions.

The problem with international investment treaties and agreements is fundamentally structural. International investment treaties and agreements allow foreign investors to file claims against national governments seeking money damages in compensation for public interest regulation at the national, state, or local level. Investors no longer have to work through trade ministries to pursue a claim. As a result, the volume of cases increases. Lacking a diplomatic screen, the claims may be brought without the restraint that nation-states exercise when dealing with issues of international relations. And, international investment tribunals can effectively enforce their decisions by ordering the national government to pay money damages to the foreign investor.

By its very nature international investor-state dispute resolution grants greater procedural rights to foreign corporations and investors than those enjoyed by Americans. International investment treaties and agreements are unique in providing a private right of action for foreign corporations to initiate claims for economic damages against the national government where the investment is located. Multinational corporations and other investors are placed on an equal footing with nation-states. This by itself is a significantly greater procedural right.

Provisions for the selection of arbitrators similarly provide greater procedural rights. Arbitrators in these cases are typically international commercial lawyers who may alternately serve as arbitrators in one case and plaintiff's counsel in the next, thus raising questions of conflict of interest.

International investment agreements also grant foreign investors greater substantive rights than those accorded U.S. investors under the U.S. constitution. The definition of investment, expropriation rules, and rules on the minimum standard of treatment under international law all potentially sweep more broadly than comparable concepts in U.S. constitutional law.

The current US model for international investment treaties and agreements contains a sweeping definition of investment. For example, the definition includes the expectation of gain or profit and the assumption of risk. And, any interests resulting in the commitment of capital also might be considered an investment.[10]

In contrast to the narrow construction by U.S. courts of analogous property rights protections in the Fifth Amendment "takings" clause,[11] international arbitrators have room to read the vague expropriation language of international investment treaties and agreements broadly or narrowly. The arbitrators in *Methanex v. United States* interpreted NAFTA's expropriation rule narrowly, but the tribunal in the earlier case of *Pope & Talbott* gave the same language a broad construction.[12] Accordingly, the outcome of future cases is unpredictable, and potentially provides greater rights to foreign investors than U.S. investors.

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[10] *See, e.g.*, section C., article 10.28, U.S./Peru Free Trade Agreement.

[11] U.S. constitutional case law construes the analogous Fifth Amendment Takings Clause narrowly. U.S. courts generally find that a government regulation amounts to a compensable "taking" of property only when the regulation eliminates all or substantially all of its economic value. *See Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 at 1019 n.8, (1992) ("It is true that in at least some cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full").

[12] The NAFTA tribunal decision in *Methanex v. United States* reads the rule relatively narrowly, concluding that:"as a matter of international law, a nondiscriminatory regulation for a public purpose, which is enacted in accordance with due process and which affects...a foreign investor or investment is not deemed expropriatory or compensatory," unless specific commitments to refrain from regulation were made to the investor. *Methanex v. United States,* Final Award, part IV, chapter D, paragraph 7 (2005). In sharp contrast, the NAFTA panel in *Pope & Talbot* said economic regulation, even when it is an exercise of the state's traditional police powers, can be a prohibited indirect or "creeping" expropriation under customary international law if it is "substantial enough." *Pope & Talbot v. Canada*, Interim Award by Arbitral Tribunal, In the Matter of an Arbitration Under Chapter Eleven of The North American Free Trade Agreement Between Pope & Talbot Inc. and The Government of Canada (April 10, 2001), pp. 33-34, *available at* http://www.naftaclaims.com.

The obligation on parties to provide a minimum standard of treatment (MST) under international law is also vague and subject to being read broadly or narrowly.[13] International investment tribunals are not in agreement on the scope of MST rules. In contrast to the consistently narrow construction by modern U.S. courts of analogous "substantive due process" obligations, many international investment tribunals give a broad construction to the minimum standard of treatment obligation. On the other hand, a NAFTA tribunal in the recently decided case of *Glamis Gold v. United States* read it more narrowly.

One line of tribunal decisions, for example, has indicated that the minimum standard of treatment imposes a duty on governments not to change regulatory standards that were in effect when a foreign investment was made.[14] Under U.S. substantive due process analysis and presumably under due process principles embodied in other legal systems, governments are generally free to change regulatory standards in response to changed circumstances or priorities. Some tribunals have also noted that the minimum standard of treatment is continuing to "evolve," suggesting that the scope of protection that it provides to foreign investors will continue to expand.[15]

This expansive reading of the MST obligation, however, was rejected in large part by the tribunal in *Glamis Gold.* The tribunal ruled for the United States in this landmark case,[16] in which `Glamis, a Canadian corporation, sued under NAFTA's chapter 11, seeking $50 million in compensation for actions taken by the U.S. Department of Interior and the State of California, imposing environmental and land use regulations on Glamis's proposed open-pit gold mine in the Imperial Valley of California. The tribunal decision in *Glamis* may represent an important advance when it comes to preserving governmental regulatory authority in the face of property rights claims based on minimum standard of treatment obligations.[17]

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[13] *See generally* Matthew C. Porterfield, *An International Common Law of Investor Rights?* 27 U. Pa. J. Int'l Econ. L. 79 (2009).

[14] Award Occidental Petroleum Exploration and Production Co. v. Ecuador, para. 191 (UNCITRAL Arb.) (2004).

[15] Award Mondev Int'l Ltd. V. United States, Case No. ARB(AF)/99/2, para. 116,ICSID (W. Bank) (Oct.11, 2002).

[16]The United States is the 'defendant' in this case, even though the case concerns California state law and regulation, by virtue of the fact that the US federal government, and not California, is the signatory of the NAFTA treaty.

[17] Transcripts, submissions, and tribunal orders in Glamis Gold v. United States may be found at //www.state.g http:oc/s/1/c10986.htm (last visited July 7. 2009). The *Glamis* tribunal rejected the plaintiff's broad reading of MST,

Options Appendix I
General Water Policy Reforms for International Trade and Investment Agreements

- *All international trade and investment agreements entered into by the United States shall include the following provisions*:
    - Water, including bottled water, shall not be regarded as a good nor a product and shall be excluded from coverage in all international trade and investment agreements;
    - Any bona fide and non-discriminatory regulation adopted in the public interest related to the pumping or extraction of water or related to the distribution or transportation of water is excluded from coverage in all international trade and investment agreements;
    - No provision of any international trade or investment agreement shall be interpreted to require the privatization of drinking water or sewage services or to require the payment of damages or the authorization of retaliatory trade sanctions as a result of either the total or partial exclusion of private investors or companies from drinking water and sewerage markets.

Options Appendix II
General Federalism Reforms for International Trade and Investment Agreements

- *Protections against federal preemption and unfunded federal mandates resulting from trade and investment disputes.* Forbid U.S. federal agencies from taking any of the following actions on grounds that a state, tribal, or local government measure (or its application) is inconsistent with an international agreement or treaty:
    - initiate legal action to preempt or invalidate a sub-national law or its enforcement or application;

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finding that none of the actions of the United States or the State of California violated the obligation to provide "fair and equitable treatment," a standard that must be understood as "customary international law," under the official interpretation of MST by the NAFTA Free Trade Commission. "Custom," the tribunal concluded, is a question of fact that must be found in the "practice of states." The baseline for understanding the customary international law standard for fair and equitable treatment, the tribunal said, was established in the 1926 *Neer* arbitration. The tribunal further determined that no convincing evidence based on the practice of states had been presented by Glamis Gold to show that the *Neer* standard has evolved to encompass a right to a "stable regulatory and business climate" and similar concepts. In other words, just as in 1926 a violation of the standard of "fair and equitable treatment" requires that an act by a nation-state must be: (1) "sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons," or (2)"creation by the State of objective expectations in order to induce investments and the subsequent repudiation of those expectation." Based on its application of the *Neer standard,* the tribunal concluded that none of the acts of the United States and the State of California about which Glamis Gold complained violated the customary international law standard. This is a narrow reading of the fair and equitable treatment element of MST.

- shift costs, directly or indirectly, to a sub-national government that the United States must pay under an award for compensation to a foreign investor;
- withhold funds or impose grant conditions on funds that a sub-national government would otherwise receive;
- lobby or seek to influence a sub-national government.

Options Appendix III
Reform of International Services Agreements

- *All international services agreements entered into by the United States shall include the following provisions that*:
  - preserve the right of federal, state, and local governments to provide and regulate services in the public interest, including water and sewer services, on a non-discriminatory basis;
  - provide that nothing in the agreement shall require the privatization of public services;
  - provide that services disciplines shall be based exclusively on a positive list of commitment, each of which is defined in detail;
  - provide a general exclusion from the agreement for distribution and transportation of water and for drinking water and sewer services.
- The United States shall never accept a GATS agreement on domestic regulation that requires domestic regulations to meet a "necessity test," or to be "pre-established, based on objective criteria and relevant." Furthermore, the section in the proposed agreement on domestic regulation providing for a principle of deference to legitimate national policy objectives shall explicitly state that national policy objectives include objectives identified at both national or sub-national levels.

Options Appendix III
Reform of International Investment Agreements and Treaties

- *Minimum standard of treatment* – Narrow the minimum standard to the elements of customary international law as explained in the US brief in *Glamis*. The State Department argues that the minimum standard includes three elements: (1) compensation for expropriation, (2) "internal security," and (3) "denial of justice" where domestic courts or agencies (not legislatures) treat foreign investors in a way that is "notoriously unjust" or "egregious" such as a denial of procedural due process.[18] Further, the burden should be on

[18] Counter-Memorial of Respondent United States of America, in Glamis Gold v. USA (September 19, 2006) 221.

the investor, and the expectation of unchanging regulations is not part of customary international law.[19]

- *Indirect expropriation* – Narrow indirect expropriation so that it does not apply to nondiscriminatory regulations as explained in the *Methanex* award. In other words, establish that the adoption or application by any national or sub-national government of any bona fide and non-discriminatory measure intended to serve a public purpose shall not constitute a violation of an expropriation article of an investment agreement or treaty.
- *Protected investments* – Narrow the definition of investment to include only the kinds of property that are protected by the takings clause of the U.S. Constitution. Exclude from the definition of investment the expectation of gain or profit, the assumption of risk, and intangible property interests other than intellectual property. Acknowledge that property interests are limited by background principles of domestic property,water, and nuisance law.
- *Exhaustion of remedies* – Follow international law and require investors to exhaust domestic remedies before using investor-state arbitration. This recognizes that international investor-to-state arbitration is to be used as a last resort and should not be invoked routinely as a means of circumventing the domestic administrative and judicial processes. This also allows domestic courts and administrative bodies to resolve disputed facts and disputed points of domestic law prior to review by international arbitrators.

[19] *Id.* at 226, 232.

Summary of current State regulations governing groundwater withdrawals
Compiled by Robert G. Marvinney
Chair, Water Resources Planning Committee
Director, Maine Geological Survey
March 2009

1) The Maine Department of Environmental Protection, in coordination with other state agencies, maintains a water use-reporting program. All water users above 20,000 gallons/day are required to report their usage.
http://www.maine.gov/dep/blwq/docmonitoring/swup/index.htm

2) Site Location of Development regulations. Any major new facility that disturbs at least 3 acres of area must get a Site Location permit from the Maine DEP. If the facility involves water extraction, such as a bottling facility, geologists at the DEP require a thorough analysis of the water resources and impacts of any proposed withdrawals on other resources. Permittees are required to submit reports of water usage.
http://www.maine.gov/dep/blwq/docstand/sitelawpage.htm

3) Bottling facility license. The Maine Department of Health and Human Services licenses water bottlers in Maine. The DHHS must approve any new source for human consumption. As part of their analysis, geologists at DHHS also review the impact of withdrawals on other water uses in the area.
http://www.maine.gov/dhhs/eng/water/Templates/Rules/bottledwater.htm

4) Bulk Water Transport. If a water developer wishes to move water in bulk (containers larger than 10 gallons) across a town line, say from a wellhead to a bottling facility, they need approval from the Maine DHHS under the Bulk Water Transport law. Geologists at DHHS, the Maine Geological Survey, and the Maine DEP rigorously review applications for water transport.
http://www.maine.gov/dhhs/eng/water/Templates/Rules/BulkWaterHauling.htm

5) Wells in LURC jurisdiction. In areas of the state regulated by LURC, permits are required for any large-scale ground-water extraction. Staff from LURC and the Maine Geological Survey rigorously review these applications. Permittees are required to submit reports on water usage to LURC. Permits are conditioned and withdrawals may be limited based on resource conditions.
http://www.maine.gov/doc/lurc/reference_new1.shtml

6) Significant Well permit. Any well within 500 feet of surface water producing 50,000 gallons or more per day (144,000 gpd if more than 500 feet) must be permitted under the Natural Resources Protection Act by the Maine DEP. Exceptions for irrigation wells. This includes wells previously permitted under Bulk Water Transport. Permits require monitoring of water resource and water dependent resources. Permits are conditioned and withdrawals may be limited based on resource conditions. - agriculture uses ~~are~~ exempt
http://www.maine.gov/dep/blwq/docstand/nrpa/significant_groundwater_wells/index.htm

7) Chapter 587 In-stream flow rules. Wells may not be pumped in such volumes as to reduce flows in nearby streams below seasonally defined threshold flows.
http://www.maine.gov/dep/blwq/topic/flow/

REVIEW OF INTERNATIONAL TRADE AGREEMENTS AND THE MANAGEMENT OF GROUNDWATER RESOURCES

A REVIEW OF MAINE GROUNDWATER REGULATION

Paul Gauvreau, AAG
September 11, 2009

Introduction

- Groundwater a major source of water for domestic, municipal, commercial and agricultural uses.
- 22% of freshwater used in U.S. comes from groundwater
- In Maine sand and gravel aquifers occupy about 1,300 square miles and 40% of State's residents get their household water supply from groundwater wells.
- Another 20% of the Maine population receives its water from community water suppliers which derive their water source from groundwater.
- Maine averages 24 trillion gallons of rainwater annually.
- Water property rights vary, depending upon the particular water source.

A. Surface water law. Generally, Maine law provides that surface water (lakes, ponds, rivers, and streams) is governed by riparian rights, which recognize "the qualified rights of an owner of property bordering a body of water to have access to and make reasonable 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". *Water Law in Maine-1990, Report of Legal Framework Subcommittee, Water Resource Management Board, 1990, p.2.*

B. Great Ponds. 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 law relating back to the Massachusetts Colonial Ordinance 1641-1647. The Law Court in *Opinion of the Justices,* 118 Me. 503, 504 (1919) has stated:

> 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.

- Pursuant to the public trust doctrine, the public has a right to use the great ponds. The right is not fundamental; rather it is subject to legislative restraints. *State v. Haskell, 2008* ME 82 ¶8. The only limits on the Legislature's powers in this

regard is that they must be exercised reasonably for the benefit of the people, and not be repugnant to the provisions of the Maine Constitution. *Opinion of the Justices,* 437 A.2d 597606 (Me. 1981).

C. Groundwater It has been said that the common law of groundwater is designed "to seemingly confuse law students". (Joseph Sax, Legal Control of Groundwater Resources 395 (4th ed. 2006), note 11 at page 411).

- Groundwater law was developed on a state by state basis, separate from law relating to surface water. (Joseph Sax, Id., note 11 at 411.
- States recognize five common law groundwater doctrines. Within these doctrines, distinctions are made between "percolating" groundwater and underground streams. Modern groundwater law in most states also is subject to statutory provisions which either abrogates or significantly modifies common law groundwater principles. To further complicate matters, some states apply different rules to different geographic areas, leaving some aquifers highly regulated and others without significant regulation. (Tuhholske, Vermont Law Journal, p. 205.)

II. Common law Groundwater doctrines

A. Absolute dominion Rule. Commonly referred to as the English Rule, which is now the minority rule in the U.S. *Allows a landowner to intercept groundwater which otherwise would have been available to a neighboring water user, even if the effect of the use is to effectively control an aquifer without incurring legal liability.*

- For over 130 years absolute dominion rule has governed groundwater ownership in Maine.
- Absolute dominion rule is based upon premise that the owner of the surface land above groundwater owns the water, just as the rocks and soils constituting the overburden

- Adopted in *Chase v. Silverstone,* 62 Me. 175, (Me. 1873), absolute dominion provides:

> One may, for the convenience of himself or the improvement of his property, dig a well or make other excavations within his own bounds, and will be subject to no claim for damages, although the effect may be to cut off and divert the water which finds its way through hidden veins which feed the well of spring of his neighbor.

- Absolute dominion stemmed from perception that groundwater was a mysterious resource, whose properties and transmission were not well understood and were not susceptible of rational regulation or allocation.

- Absolute dominion doctrine gained popularity prior to the development of principles of hydrogeology, an informed appreciation of the principles of aquifer recharge, and an understanding of the interconnectivity between surface and groundwater channels of water.

- The established watercourse exception: Most underground water percolates through various substrata and does not flow in an established watercourse. This has led to a judicial presumption that underground water is percolating; the party which asserts the existence of an established watercourse bears the burden of proof on the issue.

- Absolute dominion does not allow an owner to stop or divert the flow of an established watercourse to the prejudice of an adjoining landowner. But to constitute a watercourse, the water must flow in a specific direction, by a regular channel, having a bed with banks and sides, and generally must discharge itself into another body or stream of water. Although it is not necessary for the watercourse to flow continuously, it must have a well defined and substantial existence.

- Maddocks v. Giles, 1999 ME. 63. The Law Court declined an opportunity to jettison the common law doctrine of absolute dominion in the 1999 case of Maddocks v. Giles. In *Giles,* abutting property owners brought suit against Elbridge Giles, the operation of a gravel pit located in Lincoln County. Plaintiffs contended that Giles' excavation activities compromised an underground spring, which they believed was located under their property and yielded a substantial source of groundwater. Plaintiffs claimed that Giles was accountable for damages owing from their underground spring going dry on account of his excavation activities. At trial, each party produced the testimony of hydrogeologists, who offered different opinions on the question of whether an existing watercourse ran under the Plaintiff's property and, if so, whether Giles' excavation activities caused the watercourse to run dry. The Law Court affirmed a jury verdict on behalf of Giles, finding the trial court properly instructed the jury that a property owner could use his land as he pleased, providing that he not interfere with an existing watercourse which benefited an abutter's land. The Court declined to judicially repudiate absolute dominion rule in favor of the groundwater use rules

established in the Restatement (Second) of Torts, §858(1979), (which support reasonable use rule) for three reasons:

(1) *The Court was not convinced that the absolute dominion rule was the wrong rule for Maine.* Although modern science provides enlightenment regarding the properties of groundwater, this does not mean that the common law rule has interfered with water use or caused the development of unwise water policy. There was no evidence that the absolute dominion rule has not functioned well in Maine.

(2) *For over a century, landowners in Maine have relied upon the absolute dominion rule.* See *Friendship Dev. Co., 576 S.W. 2d at 29* (citing reliance of landowners as a significant factor in upholding the common law rule). Absent reliable information that the absolute dominion rule is counterproductive and a hindrance to achieving justice, Law Court declined to depart from established common law.

(3) *The Court deferred to the Legislature regarding water law policy in this area.* The Legislature was best situated to study the ramifications of a policy change and can call upon experts to advise as to best water policy for Maine, and it can survey Maine's water needs. The Legislature had taken action in this area, creating the Water Resources Management Board to conduct 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 recommended that the Legislature adopt reasonable use principles. *See* Water Resources Management Board, Board Findings and Recommendations, #5 (Feb. 1991). The Legislature elected to leave the common law undisturbed. The Court noted that the Legislature had, in fact, modified the absolute dominion rule by creating liability when a person withdrew groundwater in excess of household use of groundwater. *38 M.R.S.A. §404 (1) & (2) (1989).*

- Absolute dominion is now the minority rule in the United States. Connecticut, Indiana, Louisiana, Massachusetts, Mississippi, Rhode Island and Texas, Vermont and Maine still recognize the rule.

B. Reasonable Use Rule

- *Limits a landowner's use of water to those uses which bear a reasonable relationship to the use of the overburden.* Commonly referred to as "the

American Rule". Rule is similar to absolute dominion, except that it prohibits waste and over site use. Similar to reasonable riparian use for surface waters, the rule requires a balancing between competing uses from the same aquifer. However, unlimited withdrawals, even to the detriment of another groundwater user, may be considered reasonable.

- Courts have authority to restrict uses which cause unreasonable harm to other users within an aquifer. Martin v. City of Linden, 667 So. 2d. 732.736 (Al. 1995). (A waste of water was unreasonable only if it caused harm and any non wasteful use of water that caused harm was nevertheless reasonable if it was made on or in connection with the use of overlying land.)

- The American Rule gained popularity with the development of the high capacity water pump, when cities bought country land or easements for use of municipal water supply, which resulted in a lowering of the water table for adjacent farms. The rule forced the cities to compensate the farmers for their damages and involved the application of tort principles, resulting in the award of damages paid by users who received the benefits of a harmful activity.

- The trend in recent years has been away from the notion that the owner's right to sub-surface waters is unqualified; rather the law has gravitated towards the premise that the use must be limited to purposes incident to the beneficial enjoyment of the land from which it is obtained, and if the diversion or sale to others away from the land impairs the supply of a spring or well on the property of another, such use is not for a 'lawful purpose' within the general rule concerning percolating waters, but constitutes an actionable wrong for which damages are recoverable. While there is some difference of opinion as to what should be regarded as reasonable use of such waters, the modern decisions generally hold that a property may not concentrate such waters and convey them off his land if the springs or wells of another are impaired." Rothrauff v Sinking Spring Water Co., 339 Pa. 129, 14 A.2d 87 (1940);

- *The reasonable use doctrine, similar to reasonable riparian use, requires balancing between competing uses from the same aquifer.* However, unlimited withdrawals, even to the detriment of another groundwater user, may be reasonable. But *courts may restrict uses for causing unreasonable harm to other uses within an aquifer, something never permitted under absolute dominion.* Martin v. City of Linden, 667 So.2d 732, 736 (Al. 1995).

- In 1842 New Hampshire became the first state to adopt the reasonable use rule. The rule requires competing uses from the same aquifer to refrain from causing unreasonable harm, with no party enjoying an absolute right to consume an aquifer.
- Reasonable use discourages wastewater water use and requires reasonable use of the groundwater resource. *However, the reasonable use doctrine is said to create a high degree of uncertainty, requiring case by case adjudication, which in turn provides little guidance even to senior users, and fails to provide guidance for new users.* Joseph Dellapenna, Quantitative Groundwater Law, 3 Waters & Water Rights §21.03.

  - Professor Dellapenna explains that abandonment of common law reasonable rights law has often led to abandonment of reasonable use in groundwater. Most riparian rights states adopted a regulated riparian rights approach in the last half of the 20th century, forming the basis for the Riparian Model Water Code.

- 21 States have adopted or indicated a preference for reasonable use rule, four of which adopted the rule in conjunction with the Prior Appropriation Rule: Alabama, Arizona, Arkansas, Delaware, Florida, Georgia, Illinois, Ky., Md., Missouri, Nebraska, New Hampshire, New York, North Carolina, Oklahoma Pa, South Carolina, Tennessee, Virginia, West Virginia and Wyoming.

C. The Correlative Use Rule

- California, followed by six other states (Hawaii, Iowa, Minnesota, New Jersey and Vermont) has adopted the correlative rights rule, which provides that *the authority to allocate water is held by the courts. The owners of overlying land and the non-owners or water transporters have correlative or co-equal rights in the reasonable, beneficial use of groundwater.* Under this doctrine, adjoining lands may be served by a single aquifer. The judicial power to allocate water rights protects the public interests and the rights of private water users.

- When an aquifer cannot accommodate all groundwater users, courts may apportion such uses in proportion to their ownership interests in the overlying surface estates. Katz v. Walkinshaw, 141 Cal. 116, 74 P. 766, 772-73 (Cal. 1903)

- *A disadvantage of the correlative rights doctrine is that litigation is necessary on a case by case basis to establish priority of use*:

  Disputes between overlying landowners, concerning water for use on the land, to which they have an equal right, in cases where the supply is insufficient for all,

are to be settled by giving to each a fair and just proportion. And here again we leave for future settlement the question as to the priority of rights between such owners who begin the use of the waters at different times. The parties interested in the question are not before us.

The objection that this rule of correlative rights will throw upon the court a duty impossible of performance, that of apportioning an insufficient supply of water among a large number of users, is largely conjectural. No doubt cases can be imagined where the task would be extremely difficult, but if the rule is the only just one, as we think has been shown, the difficulty in its application in extreme cases is not a sufficient reason for rejecting it and leaving property without any protection from the law

All users of an aquifer are entitled to groundwater use based upon their surface ownership rights regardless of priority of use, with preference given to on-tract uses. The correlative rights doctrine protects all users of an aquifer by empowering courts to prevent uses which are considered detrimental to common use of the water. Katz v. Walkinshaw, 141 Cal. 116, 74 P. 766, 772-73 (Cal. 1903)

D. Prior Appropriation Rule

- *Provides that the first landowner to beneficially use or divert water from a water source is granted priority of right. The amount of groundwater which senior appropriators may withdraw can be limited, based upon reasonableness and beneficial purposes.* Some states which adopted prior appropriation rule have migrated to a regulatory permitting system.

- Under prior appropriation, groundwater rights are obtained by putting the water to a beneficial use. New users are not allowed to interfere with existing senior rights. *But whereas Prior Appropriation is relatively easy to use with respect to surface waters (unappropriated water is visible and available for new appropriators), groundwater may not be renewable, making senior rights useless over time.* Furthermore, the interaction between surface water and groundwater uses is now better understood, and some groundwater uses may affect surface uses, creating problems for surface and groundwater appropriators.

- 12 states have adopted Prior Appropriation: Alaska, Colorado, Idaho, Utah, Kansas, Montana, Nevada, New Mexico., North Dakota., Oregon, South Dakota, and Washington.

E. Restatement of Torts Rule

§858 Liability for Use of Groundwater

(1) A proprietor of land or his grantee who withdraws groundwater from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water by another, unless:
(a) The withdrawal of ground water unreasonably causes harm to a proprietor of neighboring land through lowering the water table or reducing artesian pressure;
(b) The withdrawal of ground water exceeds the proprietor's reasonable share of the annual supply or total store of ground water; or
(c) The withdrawal of ground water has a direct and substantial effect upon a watercourse or lake and unreasonably causes harm to a person entitled to the use of its water.
(2) The determination of liability under clauses (a), (b), and (c) of Subsection (1) is governed by the principles stated in §§ 850 to 857.

- *Generally, the Restatement rule holds that a landowner who uses groundwater for a beneficial purpose is not subject to liability for interference with another's use of the resource, provided certain conditions are met. The withdrawal may not cause unreasonable harm to a neighbor by lowering the water table or reducing artesian pressure, cannot exceed a reasonable share of the total store of ground water, and cannot create a direct and substantial effect upon a watercourse or lake.*

- 3 states have adopted or indicated a preference for the Restatement of Torts doctrine: Michigan, Ohio and Wisconsin.

- In *Maddocks v. Giles*, the Law Court decided to retain absolute dominion for Maine, and rejected an invitation to adopt the groundwater use principles established in Restatement (Second) of Torts §858 (1977). The Court noted that the Restatement approach abandoned the common law distinction between underground water courses and percolating water. The Restatement position provides that a landowner who withdraws groundwater, whether from a watercourse or percolating water, and uses it for a beneficial purpose, is generally not subject to liability to another, unless the withdrawal unreasonably causes harm to a neighbor by lowering the water table or reducing artesian pressure. The Restatement Rule is derived from principles of reasonable use, but differs from its

predecessors by balancing the equities and hardships between competing users. Maddocks v. Giles, 1999 ME 63, note 5, ¶9.

III. Statutory Modification of Absolute Dominion Rule in Maine

- Site Location of Development Act, 38 M.R.S.A. §§ 481-490

  - Development projects involving 20 acres or more require DEP review to ensure no adverse effect on natural environment, including water quality. As part of review process, DEP will review a proposed structure to facilitate the withdrawal of groundwater and determine the effect of proposed withdrawal on the waters of the State, water-related natural resources, and existing uses including public or private wells within the anticipated zone of contribution to the withdrawal. 38 MRSA §484(3) (F).

- Natural Resources Protection Act, 38 M.R.S.A.§480-A

  - Section 480-A (c) (4) requires a DEP permit prior to operation of a significant groundwater well, defined as (1) withdrawals of 75,000 or more gallons per week, or 50,000 gallons per day, if located within 500 feet or less from a water body, or (2) withdrawals of 216,000 or more gallons a week (or 144,000 gallons per day) if located within 500 feet of a body of water. An applicant must demonstrate that the activity will not have an undue adverse affect upon the waters of the state, water-related natural resources, and existing uses including public or private wells within the anticipated zone of contribution to the withdrawal.

- Transport of Water Act, 22 M.R.S.A. §2660-A.

  - No person may transport 10 or more gallons of water across municipal boundaries in which water is naturally occurring without DHHS approval, subject to a wide array of exceptions for agricultural, construction, well drilling, agricultural, manufacturing, water utility and swimming pool operation.

  - The applicant must demonstrate that the transport of water (1) will not constitute a threat to public health, safety or welfare and (2) 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.

- Groundwater Reporting Program, 38 M.R.S.A. §§470 A-470-H

  Establishes groundwater extraction reporting requirements for any groundwater extraction in excess of certain statutory thresholds between 20,000 – 50,000 gallons. Reports must include gallons withdrawn, anticipated water use, water source, location of withdrawal, and volume of reasonably anticipated withdrawals under maximum high-demand conditions.

- Ground Water Protection Program, 38 M.R.S.A. §401

  Directs the study of groundwater and interagency coordination between state regulatory bodies. *Statute creates a cause of action arising from a withdrawal of groundwater which causes interference with the pre-existing beneficial domestic use of groundwater by another water user.* The statute does not restrict or pre-empt authority of a municipality pursuant to its municipal home rule authority to protect and conserve groundwater quality and quantity.

- Water for Human Consumption Act, Municipal Regulation Authorized, 22 M.R.S.A. §2642

  The municipal officers of each municipality, after notice and public hearing, may adopt regulations governing the surface uses of sources of public water supply, portions thereof or land overlying ground water aquifers and their recharge areas used as sources of public water supply that are located within that municipality in order to protect the quality of such sources of public water supply and the health, safety and welfare of persons dependent upon such supplies.

- Municipal Home Rule, 30-A M.R.S.A. §3001

  - Any municipality, by the adoption, amendment or repeal of ordinances or bylaws, may exercise any power of function which the Legislature has power to confer upon it, which is not denied, either expressly or by clear implication, and exercise any power or function granted to the municipality by the Constitution of Maine, general law or charter.

  - Municipalities have the right to exercise any power or function which is not denied them by the Legislature, either expressly or by clear implication. There is

no implicit denial of municipal police power unless the exercise of municipal ordinance would frustrate the purpose of state statute.

- *Compare* Swanda v. Bonney, 418 A. 2d 163,167 (Me. 1980) (municipal firearms ordinance more restrictive than state statutory criteria for issuance of concealed firearms permit, thus subject to state preemption) with Central Maine Power Co. v. Town of Lebanon, 571 A.2d 1171 (Me. 1990) (municipal ordinance regulating use of herbicides in power company transmission corridor not preempted by State Pesticide Board Act, holding that municipal ordinance only subject to preemption if Legislature either expressly prohibited local legislation, or where Legislature has evinced intent to occupy the field, and local ordinance would frustrate the purpose of the state law).

THE TAKINGS CLAUSE OF THE U.S. AND MAINE CONSTITUTIONS; HOW THEY MIGHT IMPACT LEGISLATION MODIFYING GROUNDWATER OWNERSHIP

Prepared for the Review of International Trade Agreements and the Management of Groundwater Resources

by Assistant Attorney General Peggy Bensinger
Office of the Attorney General
September 11, 2009

SUMMARY

The Takings Clause of the Fifth Amendment of the United States Constitution and Article I, § 21 of the Maine Constitution prohibit the taking of private property for public use without just compensation.[1] While the physical occupation of a person's property is the classic taking, the U.S. and the State Constitutions also guard against certain uncompensated regulatory interferences with a property owner's interests in his or her property.

The first question we address is whether Maine's regulation of the quantity of groundwater a property owner may withdraw and use from the property might constitute an unconstitutional taking of property under the Maine or U.S. Constitution. In their consideration of takings claims, the courts have utilized two types of analyses: first, the courts look at whether the governmental action caused a *per se* taking on its face; second, if not, the courts examine, on a case-by-case basis, the facts of a particular case to determine whether a taking has occurred. The short answer here is that such groundwater regulation would not constitute a *per se* taking, and under a fact-based *ad hoc* analysis, while it would depend on the nature of the regulation, the economic impact of the regulation, and the extent to which the regulation interfered with the property owner's investment-backed expectations, it is unlikely that a reasonable regulation of the withdrawal of groundwater would amount to an unconstitutional taking of property.

The second question under discussion by the committee is whether a taking claim could be successfully made if Maine changes from being an "absolute dominion" state to a state in which the "reasonable use" doctrine applies, or some other theory governing ownership and use of groundwater. I believe that the courts would apply the *ad hoc*, fact-based analysis and such an analysis could only be done with the context of the particular law and the particular facts in hand.

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[1] "... [N]or shall private property be taken for public use, without just compensation." U.S. Const., amend. V. "Private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it." Me. Const. art. I, § 21.

OVERVIEW OF TAKINGS LAW

A. *Per Se ("In Itself")* Takings.

The Supreme Court has identified two categories of governmental regulatory action that generally are considered *per se* takings. *Langle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 536 (2005). Where the governmental regulation requires a property owner to "suffer a permanent physical invasion of her property" it must provide compensation or the requirement will be deemed to result in an unconstitutional taking of property. *Id.* A *per se* regulatory taking also will be deemed to have occurred where the government's regulation would completely deprive a property owner of all economically beneficial use of the property. *Id.* (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992)). Presumably, any regulation of a withdrawal of groundwater being contemplated by the State of Maine would not completely deprive any property owner of all economically beneficial use of the property; nor would the adoption of a "reasonable use" doctrine be likely to do so.

B. *Ad Hoc* (or Fact Specific) Takings.

A more relevant analysis of the constitutionality of the State's regulation of the quantities of groundwater which may be withdrawn by a property owner or of legislation proposing a shift in the ownership or use doctrine would be under what has been characterized by the U.S. Supreme Court as essentially an *ad hoc*, factual inquiry. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002). The courts have not adopted any bright line which would guide a determination of whether regulations enacted by governments at any level would cause an unconstitutional taking of private property. When there is no physical occupation of the land, no denial of all economically beneficial use of the land, and the government has merely regulated the use of property, determining whether the regulation rises to the level of a taking requires "complex factual assessments of the purposes and economic effects of government actions." *Yee v. City of Escondido*, 503 U.S. 519, 522-23 (1992) (citing *Penn Central Transportation Company v. New York City*, 438 U.S. 104, 123-125 (1978)). The three factors analyzed by the Courts in the *ad hoc* fact-based analysis are: 1) the economic impact of the action; 2) the extent to which the action interferes with distinct investment-backed expectations; and 3) the character of the governmental action. *Penn Central*, 438 U.S. at 124.

It is not possible to analyze whether a regulatory taking would occur without the context of the actual language of the regulation or legislation at issue, and the facts regarding their impact on a particular landowner, which would allow the necessary "careful examination and weighing of all of the relevant circumstances" (*Franklin Memorial Hospital v. Brenda Harvey*, 2009 U.S. App. LEXIS 17435 (1st Cir. August 5, 2009) (citations omitted)). However, under the three part test set forth in *Penn Central* and its interpretation by means courts, the following considerations are instructive.

1. <u>The economic impact on the property owner</u>. The mere diminution in the value of a parcel of property, even a significant diminution, has been found insufficient to demonstrate a taking. *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 645 (1993). In *Concrete Pipe*, the U.S.

Supreme Court found that the 46 percent diminution of value of a shareholder equity pension plan was not a taking. *Id.* In *Wyer v. Board of Environmental Protection and State of Maine*, the Law Court found that no taking occurred as the result of denial of a permit to build a house even though the property without the permit was worth approximately $50,000 and with a permit it would be worth $100,000. Under *Hall v. Board of Environmental Protection*, 528 A.2d 453, 455 (Me. 1987), a property owner must prove that the application of the regulations to his or her property renders the property substantially valueless.

The fact that a property owner might not make as much profit on his investment as he would have hoped is not a basis for a taking. *See*, *Curtis v. Main*, 482 A.2d 1253, 1258 (Me. 1984); *Seven Islands v. Maine Land Use Regulation Commission*, 450 A.2d 475, 483 (Me. 1982). In *Seven Islands*, the landowner claimed that because the value of the land as timberland had been destroyed, the value of the land was zero. The court found that the land retained some value and that the landowner could not claim a taking of its property simply because it could not use it in the most profitable manner. *Id.* at 482-83. In the *Wyer* case, Mr. Wyer presented evidence that he paid $10,000 for his small beach front lot in 1977 and that it would increase in value to at least $100,000 if a permit could be obtained. With the regulatory denial of his application the property could be sold for $50,000, and the Court found that such a reduction did not require a finding of a taking. As the Law Court pointed out in *Seven Islands*, that "the loss of future profit . . . provides a slender reed upon which to rest a taking claim." *Seven Islands Land Company v. Maine Land Use Regulation commission*, 450 A.2d at 482, n.10.

In a challenge to a new regulatory scheme or a new groundwater ownership/use legal framework, a court would examine the value of a landowner claimant's property in light of the law and compare it to the value of the property without the new restrictions or legal framework and make a determination whether value of the property has been so severely diminished that it has been rendered substantially valueless.

2. <u>Legitimate investment-backed expectations</u>. The U.S. Supreme Court has stated that a landowner does not have a constitutional right to a frozen set of laws and regulations governing his or her property. "It seems to us that the property owner necessarily expects the use of his property to be restricted, from time to time, by various measures newly enacted by the state in a legitimate exercise of its police power." *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1027. Those who do business in an already regulated field, the Court has found, "cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Concrete Pipe*, 508 U.S. at 645, quoting *Connolly v. Pension Benefit Guarantee Corporation*, 475 U.S. 211, 227 (1968). Likewise, a landowner is not entitled to rely on the maintenance of the same zoning of its property or regulatory status quo. *Board of Supervisors v. Omni Homes*, 481 S.E.2d 460, 465, n.3 (Va. 1997), (*cert. denied*, 522 U.S. 813 (1997)).

With regard to this prong of the three part takings test, the factors which would be considered would include whether the property owner knew of actual or potential regulations which might affect the investment potential when it purchased the property or developed it. One property owner's claim of the legitimate expectation for his development was rejected by the Rhode Island Supreme Court in *Alegria v. Kenney*, 687 A.2d 1249, 1261 (R.I. 1997), with the

Court's determination that the landowner's expectations were not reasonable "[i]n view of the regulatory climate that existed when [the property owner] acquired the subject property."

For this part of the analysis, again the language of the law or regulation and the facts regarding an individual property owner's time of acquisition and investment in the property would be necessary.

3. **The character of the governmental action.** In the analysis of a regulatory restriction on use of property, the courts also examine the legitimacy of the exercise of the government's power. *Penn Central v. New York*, 438 U.S. at 2659-60. The Law Court has repeatedly found that the protection of the environment is a legitimate exercise of the State's police power:

> We consider it indisputable that the limitation of property for the purpose of preserving from the unreasonable destruction the quality of air, soil and water for the protection of the public health is within the police power.

In re Spring Valley Development, 300 A.2d 736, 748 (Me. 1973).

With regard to this last part of the analysis, if the purpose of a legal or regulatory scheme adopted is to protect the environment, the courts are likely to find it is a legitimate exercise of the State's police power.

APPENDIX

CITIZEN TRADE POLICY COMMISSION

Paul Gauvreau, AAG
September 11, 2009

SELECTED STATE GROUNDWATER REGULATION STATUTES & REGULATIONS

1. Jurisdiction of Existing Programs Related to Impacts of Groundwater Withdrawal, Maine Geological Survey, January, 2006

2. Water Use Policy Background, Previous State Efforts in Water Use Policy, Robert G. Marvinney, State Geologist, September, 2004

3. Site Location of Development Act, 38 M.R.S.A. §§481-490

4. Significant Groundwater Withdrawals, Natural Resource Protection Act, 38 M.R.S.A. §§480-B(9-A), 480-C(4) &, 480-D(10)

5. Water for Human Consumption Act, Transport of Water Act, 22 M.R.S.A. §2660-A

6. Classification of Ground Water, 38-A M.R.S.A. §470

7. Groundwater Reporting Program, 38 M.R.S.A. §§470A-470H

8. Groundwater Protection Program, statutory cause of action for interference with pre-existing beneficial domestic use of groundwater by a property owner, 38 M.R.S.A. §404(2)

9. Water for Human Consumption Act, Municipal Regulation Authorized, 22 M.R.S.A. §2642

10. Municipal Home Rule, 30-A M.R.S.A §3001

Jurisdiction of Existing Programs Related to Impacts of Groundwater Withdrawal

Regulation	Activities addressed by regulation	Fees
Site Location of Development Act	• Commercial subdivisions of five or more lots on twenty or more acres • Residential subdivisions of fifteen or more lots on thirty or more acres • Developments of greater than twenty acres of affected area (golf courses, pipelines, powerlines, etc.) • Developments of three or more acres of impervious (or other stripped) area • Metallic mineral mining and advanced exploration • Underwater oil or gas exploration or production • Oil terminal facilities	Fee schedule established by legislature, dependent on type of development. Fees for may also be charged based on staff time, up to a maximum set by legislature
Natural Resources Protection Act	Regulates activities within seventy-five feet of "protected natural resources" as defined at 38 MRSA §480-B(8). Requires permits and establishes conditions for dewatering or other impacts on these resources but **does not** regulate groundwater quantity.	Minor, with fee established by legislature
Gravel Pit and Quarry Programs	• Gravel pits that have expanded by five or more acres since 1970 • Quarries that have expanded by one or more acres since 1970.	Minor annual fee set by legislature for support ongoing inspection and monitoring program.
LURC statutory Criteria for Approval and regulations in Chapter 10	• Statutory criteria for approval pertinent to hydrologic review – "no undue adverse effect" and "harmonious fit". • LURC rules and statute apply to all permit review, not specific to water use. • Also assessed during water use permit review - environmental impacts, including wetlands and water bodies; impacts to other users. • Require submittal of results of aquifer testing, environmental assessment, monitoring plan, and mitigation if	Minor – LURC's rules provide for higher fees if the permit review will require more staff time than normal.

	warranted. • Hydrologic report is the same as submitted to DWP, MDEP, and MGS. • LURC review and decision includes review comments from MGS, DWP, and MDEP.	
Bulk Water Transport Law	Transport of water for commercial purposes in containers >10 gallons. Review includes public health and safety, water not naturally available at the destination, failure to authorize would result in substantial hardship, and the withdrawal will not adversely affect existing uses of groundwater or surface water resources, including private wells. Three year renewal cycle, subject to continuing to meet the conditions above.	None
Water Use Reporting Law	1) All ground water withdrawals ≥50,000 gallons per day must be reported. 2) The threshold for reporting withdrawals within 500 feet of a surface water body is the same as required for that surface water body (and may be as low as 20,000 gallons per day).	None

Compiled January, 2006

Water Use Policy Background
Previous State Efforts in Water Use Policy
Compiled by
Robert G. Marvinney, State Geologist
Maine Geological Survey
Department of Conservation
September 2004

This compilation provides an outline of water policy efforts carried out during the past several decades. While this summary addresses highlights in water policy with some detail, it is not comprehensive, and makes no attempt to address efforts before the 1980s. Several agencies contributed to this summary including the Departments of Environmental Protection, Human Services, and Agriculture.

Groundwater Protection Commission, 197x-1980. Broad review of groundwater quality and quantity issues. Groundwater Quantity Subcommittee report recommendations:

1) Maine Geological Survey (MGS) and U.S. Geological Survey (USGS) continue to map gravel and bedrock aquifers. *Status*: gravel aquifer mapping nearing completion, bedrock information collected but no direct mapping.
2) Continue observation well network with USGS. *Status*: currently 23 groundwater observation wells in Maine maintained through the cooperative stream gaging program.
3) MGS and USGS prioritize future aquifer studies. *Status*: while there has been no prioritization per se, aquifer characteristics are reported as part of MGS's aquifer mapping, and ad hoc studies have been conducted.
4) Aggressive steps be taken to protect groundwater quality. *Status*: substantial rules regarding water quality protection administered by MDEP.
5) Maine agencies participate in USGS water use data program. *Status*: serious effort to collect better water use information for Maine was begun in 2003 at the direction of the Legislature.

Water Transport Law, 1987

This law and the commission described below were initiated by the Legislature in response to concerns about wholesale export of water from "water-rich" Maine.

Legislative Finding: 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.

Provisions: Restricted transport across municipal borders of water in containers greater than 10 gallons for commercial purposes. Water utilities (and some other uses) are specifically exempted and other water transporters can appeal for a three-year exemption.

Water Supply Study Commission, 1987-89

This Commission included membership from the Legislature, State Planning Office, Departments of Conservation and Human Services, the PUC, two major water districts, and a water engineering consultant.

The commission was charged with studying:

1) the adequacy of water supply for both commercial and noncommercial use;
2) impacts on the state from exportation of water;
3) adequacy of current regulation of the state's water supply;
4) a review of the appeals process regarding restrictions on water transport.

Recommendations:

1) State government should begin the process of developing a water resource management strategy in order to ensure adequate future supplies of water for domestic, commercial and industrial needs of the citizens of the state. *Status*: We've been discussing this ever since.
2) The Legislature should establish a multi-interest board to recommend the structure for Maine's future water management activities. *Status*: temporary Water Resource Management Board established to make recommendations. (see next section)
3) The Water Resource Management Board should analyze current state water management activities and issues of concern and make recommendations to the Legislature by January 1, 1991 regarding the appropriate State role in managing water supplies and the institutional structure necessary for efficient and effective State involvement. *Status*: Recommendations made in January 1991.
4) In order to begin identifying the role of state agencies in water resource issues, the Water Resource Management Board should request that copies of all applications for licenses or permits having an impact on water resources filed with other agencies of State government be sent to the Board. *Status*: Since the Board was not reauthorized, no action taken.

Water Resource Management Board, 1989-90

This temporary board was created in 1989 through legislation recommended by the Water Supply Study Commission. This Board had representation from state agencies involved in water issues (State Planning, PUC, Agriculture, Conservation, Fisheries, Economic and Community Development, Environmental Protection, Human Services) as well as water utilities, municipal governments, commercial users, hydropower producers, federal natural resources agencies, and the general public. The following summary of recommendations of this Board is organized according to the mandates in the Board's enabling legislation.

Water Use Rights: Review methods by which water rights are obtained under the existing law and recommend appropriate changes.

1) The Legislature should adopt a general definition of "reasonable use" that includes all socially and economically beneficial uses of water. *Status:* not adopted.
2) The Legislature should extend the reasonable use rule to groundwater resources. *Status*: not adopted.
3) The Legislature should provide additional guidance to be used in resolving conflicts among competing users. Beneficial uses of both surface and groundwater should be judged reasonable based on their impacts on the sustainability of the water source, impacts on other legitimate uses, as well as other factors. *Status*: not adopted.

Water Use Priorities: Recommend priority uses for preferential access to water supplies when supplies are inadequate to meet all demands.

Same recommendations as above.

Water Diversions: Recommend a policy regarding water diversion which addresses the implications of diversion from the State and the regions and sub-basins within the State.

4) Replace the Water Transport law with a permitting process for all inter-basin diversions in excess of 500,000 gallons per day. Status: not adopted.
5) An applicant for transport of water between 500,000 and 1,000,000 gallons per day should be entitled to the permit as long as it:
    a. Furnished public notice of the diversion;
    b. No evidence is produced to show that this diversion, in addition to current uses, could potentially exceed safe yield or otherwise be unreasonable.

    Status: not adopted.

Water Conservation: Recommend ways to improve and encourage conservation of water resources.

6) State agencies continue to encourage cost effective conservation measures by individuals, commercial and industrial interests. *Status*: state regulatory agencies routinely review conservation options with commercial and industrial water users. Some information on conservation practices available from some agencies.

New Permanent Structure: Recommend a permanent structure for centralized and coordinated conduct of the role of the State in water supply management.

7) Create a new water resources management board comprised of a citizen's board and supporting staff. Responsibilities:
    a. Assist in the development of water management policies;
    b. Map water basin divisions to be used in planning;
    c. Determine and designate areas of limited local water supplies and establish priorities for undertaking water resource planning;
    d. Develop, review, adopt and amend as necessary local water basin management plans;
    e. Approve or deny water withdrawal permits for large diversions or any water withdrawal permits required as part of management plans;
    f. Provide a forum for the resolution of water-related disputes;
    g. Foster cooperation among federal, state, regional and local agencies;
    h. Collect, develop, evaluate, manage and disseminate water resource data;
    i. Provide assistance to other entities preparing study and action plans related to water resources.

    Status: Board not created. Some responsibilities proposed for this Board are carried out by state agencies.

Collection of Data: Implement a strategy for coordinated collection of water supply and use data and compile that data in a readily accessible form.

8) Designate hydrologic management units within the state. *Status*: partially completed. MGS and USGS developed detailed digital drainage divide maps that have been used and enhanced by other agencies.
9) Standardize data collection among state agencies for collection and storage of water data. *Status:* partially completed. GIS serves as a common platform for collection and sharing of water data among state agencies, but there has been little effort in standardizing formats.
10) Water users of over 50,000 gallons per day should be required to report withdrawals. *Status:* Not adopted. (see Water Use Reporting law below)
11) Support the MGS/USGS water data collection project. *Status:* Water Use position at MGS cut in 1991, USGS/state water cooperative budget reduced. (see Water Use Reporting law below)
12) Develop a list of priority research needs and produce an annual report on water-related studies. *Status:* state agencies have considered priority research needs and report on water-related studies although not in the annual report format envisioned here and not in a coordinated fashion.

Technical Assistance: Develop technical assistance programs for municipalities, communities, or individuals adversely affected by water use decisions.

13) Board should coordinate water management activities among state agencies, provide technical support. *Status:* Not adopted in this form. State agencies provide considerable technical assistance to communities and individuals with regard to water problems.

Agency Coordination: Develop a strategy for coordination of all state and local agencies involved in water supply management.

14) Board should provide a single point of contact for water resource issues. *Status*: Not adopted.
15) Board should sponsor biennial exchange conference. *Status:* Not adopted in this format, but the annual Maine Water Conference accomplishes much of this recommendation.

Dispute Resolution: Recommend a process for adjudication of disputes over the right to use water and over the establishment of water levels for water supply ponds.

16) The state should modify responsibilities as necessary to achieve a complete and coordinated state agency approach to water-related dispute resolution. *Status:* not adopted.

Aroostook Water Use Policy, 1996

The Aroostook Soil & Water Management Board was established by the Legislature in 1987 to coordinate an Army Corps of Engineers irrigation and conservation research demonstration project in the St. John River basin. This project studied the impacts of irrigation and conservation practices. Although the Legislature did not pass the water policy reforms recommended by the Water Resource Management Board, the Legislature did recognize the Aroostook Soil & Water Management Board as a legitimate organization to serve as a conflict-resolution agency for northern Aroostook County. Through a series of meetings, the Board made a number of recommendations:

1) Inventory Aroostook County irrigators. *Status:* Completed.
2) Institute a process to address water withdrawal complaints. *Status*: largely implemented.
3) Work with farmers to assess irrigation needs. *Status:* in place.
4) Establish a direct withdrawal limit of 7Q10 and develop long-term Aquatic Base Flow (ABF) limits for withdrawals on streams where aquatic habitat is threatened. *Status:* in place for Aroostook County.
5) Encourage wetland use and impoundments on streams as alternatives to water withdrawal from streams. *Status:* Agricultural irrigation pond exemption and general permit process for dammed streams in place.
6) Financing for reservoir development. *Status:* Some funds available through Legislative bonds.
7) Educational program to encourage adoption of whole farm plans and to clarify the low flow plan to farmers. *Status:* in place but limited funding.

Downeast Rivers Water Use Management Plan, 2000

This effort was initiated as part of the Maine's Atlantic Salmon Conservation Plan and focuses on the important salmon rivers of eastern Maine. The plan has many elements and recommendations that are being pursued as resources permit. Those recommendations include:

1) Maintain USGS Gages on the Downeast Rivers, low-flow studies, monitoring strategies. *Status:* mostly in place.
2) Integrate Water Withdrawal Source Selection Hierarchy into State Policies. *Status:* done on an ad hoc basis.
3) Technical Assistance to Farmers -To ensure water resources are used as efficiently as possible, growers need technical assistance in implementing "best practices" for water management. *Status:* Guidance document to be completed by September 2004.
4) Cost Share Assistance- Cost share programs should be created to assist growers develop water sources that reduce current withdrawal impacts on Atlantic Salmon Habitat *Status:* New bonds

passed for agricultural source development – See Agricultural Water Management Program below.

Agricultural Water Management Program

The Department of Agriculture established a new Agricultural Water Management Program in 1999 in response to the Governor's request to solve drought related losses by farmers in 1999. The Department convened a committee to develop a plan of action, the "Blueprint", which was completed in 2000. The Blueprint was updated in March 2003 as the Sustainable Water Source and Use Policy and Action Plan. The plan has a number of recommendations and actions to reduce drought related losses:

1) Continued funding of the successful State cost share program for sustainable water source development including engineering design and offset of permitting costs. *Status:* New Bonds passed in 2001.
2) Change LURC regulations for water source development to mirror DEP regulations regarding well and pond development and seasonal agricultural use. *Status:* Considerable debate during Sustainable Water Use Policy Process (see below), but without consensus.
3) Study ways to reduce or eliminate the requirement for federal and state (LURC) mitigation of wetland impacts for agricultural pond development. *Status:* draft recommendations developed.
4) Add seasonal water use for agriculture as a high priority use in Maine law. *Status:* Law passed establishing Agricultural as a priority water user in DEP water quality regulations.
5) Support non-regulatory solutions to water withdrawal complaints during low flow periods while maintaining traditional, longstanding riparian rights of users. Utilize the successful Aroostook Water and Soil Management Board low flow policy as a model. *Status:* No action to date.
6) Fund more research studies on economics of supplemental irrigation and alternative methods to increase soil water holding capacity and create water use conservation and efficiency. *Status:* Potato and Blueberry research accomplished.
7) Fund low flow studies to establish realistic limits on withdrawal to water bodies in regions where irrigation is likely to continue with direct withdrawals. *Status:* Low-flow study completed Downeast.
8) Fund increased technical assistance from the Department, Cooperative Extension, Soil and Water Conservation Districts, and USDA-Natural Resources. *Status:* Extra funding made available through NRCS in 2003 and 2004.

Sustainable Water Use Policy Process, 2000-2002

This process was initiated by several state agencies following a DEP draft proposal in 1999 for rules governing in-stream flows and water withdrawals. This effort was organized under the SPO's Land & Water Resources Council and involved state and federal agencies, water suppliers, irrigators, industrial water users, ski resorts, commercial bottlers, environmental organizations, and other interested parties. Considerable impetus for this process came from the perceived or potential conflict between Atlantic salmon habitat and water withdrawals in eastern Maine rivers. However, the process was established to consider water use policy statewide. The goal of the process was to develop a prioritized set of recommendations to establish sustainable water withdrawal policies for Maine's public water resources. The process involved several roundtable meetings with numerous participants, regular working group meetings, and subcommittee meetings.

Participants in the process agreed that solutions to water use challenges would contain many components:

- Improved storage options.
- Flow standards.
- Water conservation and efficiency of use.
- Eliminating regulatory discrepancies.

- Monitoring and research.
- Public education.
- Capacity to implement the strategy.
- Periodic assessment of effectiveness of strategies.

Subcommittees addressed storage needs, aquatic ecosystem requirements, water conservation, consumptive use, and research and monitoring. Though in the end final consensus was not reached on the recommendations, the water use reporting law which was subsequently adopted by the legislature was based largely on the work of the Sustainable Water Use Policy Process. That new law, which is further described below, also directs the DEP to undertake rulemaking to adopt water use standards.

Water Use Reporting Law 2002

Title 38, Article 4-B was adopted by the Maine Legislature in 2002. An outcome of the Sustainable Water Use Policy process, the new law established the Water Use Reporting Program. The DEP submitted the first report of the Water Use Reporting Program to the legislature in January, 2004. The major provisions of the law are:

1) Non-consumptive use of water defined.
2) Reporting thresholds defined (paraphrased here). Users of 20,000 gallons or more per day on small streams need to report annually. This threshold increases on larger flowing water bodies based on the flow. Users that withdraw from lakes must report based on a sliding scale of weekly withdrawal vs. lake size. Groundwater users with 500 feet of a surface water body must report according to the same requirements for that surface water body.
3) Individual water reports are confidential.
4) Reports go to various state agencies that aggregate them by watershed for inclusion in a master database.
5) Non-consumptive and many other uses are exempt from reporting.
6) Requires DEP to develop rules for "maintaining in-stream flows and GPA water levels that are protective of aquatic life and other uses and that establish criteria for designating watersheds most at risk from cumulative water use." These will be major substantive rules, submitted to the legislature for consideration in 2005.
7) Requires the DEP to "encourage and cooperate with state, regional or municipal agencies, boards or organizations in the development and adoption of regional or local water use policies that protect the environment from excessive drawdown of water sources during low flow periods," as done in the Aroostook Low Flow Policy.

38 §481. FINDINGS AND PURPOSE

The Legislature finds that the economic and social well-being of the citizens of the State of Maine depends upon the location of state, municipal, quasi-municipal, educational, charitable, commercial and industrial developments with respect to the natural environment of the State; that many developments because of their size and nature are capable of causing irreparable damage to the people and the environment on the development sites and in their surroundings; that the location of such developments is too important to be left only to the determination of the owners of such developments; and that discretion must be vested in state authority to regulate the location of developments which may substantially affect the environment and quality of life in Maine. [1987, c. 812, §§1, 18 (AMD).]

The Legislature further finds that certain geological formations particularly sand and gravel deposits, contain large amounts of high quality ground water. The ground water in these formations is an important public and private resource, for drinking water supplies and other industrial, commercial and agricultural uses. The ground water in these formations is particularly susceptible to injury from pollutants, and once polluted, may not recover for hundreds of years. It is the intent of the Legislature, that activities that discharge or may discharge pollutants to ground water may not be located on these formations. [1981, c. 449, §3 (NEW).]

The purpose of this subchapter is to provide a flexible and practical means by which the State, acting through the department, in consultation with appropriate state agencies, may exercise the police power of the State to control the location of those developments substantially affecting local environment in order to insure that such developments will be located in a manner which will have a minimal adverse impact on the natural environment within the development sites and of their surroundings and protect the health, safety and general welfare of the people. [1989, c. 890, Pt. B, §84 (AMD); 1989, c. 890, Pt. A, §40 (AFF).]

The Legislature further finds that noise generated at development sites has primarily a geographically restricted and frequently transient impact that is best regulated at the municipal level pursuant to a municipality's economic development and land use plans. It is the intent of the Legislature that regulation of noise from developments be primarily the responsibility of local municipal governments. [1993, c. 383, §2 (AMD); 1993, c. 383, §42 (AFF).]

SECTION HISTORY
1969, c. 571, §2 (NEW). 1971, c. 613, §1 (AMD). 1971, c. 618, §12 (AMD). 1979, c. 466, §11 (AMD). 1981, c. 449, §3 (AMD). 1983, c. 513, §1 (AMD). 1987, c. 346, §1 (AMD). 1987, c. 812, §§1,18 (AMD). 1989, c. 890, §§A40,B84 (AMD). 1993, c. 383, §2 (AMD). 1993, c. 383, §42 (AFF). 1995, c. 704, §A2 (AMD). 1995, c. 704, §C2 (AFF). 1999, c. 468, §5 (AMD).

38 §482. DEFINITIONS

As used in this article, unless the context otherwise indicates, the following terms have the following meanings. [1995, c. 700, §2 (AMD).]

1. Board.

[1989, c. 890, Pt. A, §40 (AFF); 1989, c. 890, Pt. B, §85 (RP) .]

1-A. Borrow pit. "Borrow pit" means a mining operation undertaken primarily to extract and remove sand, fill or gravel. "Borrow pit" does not include any mining operation undertaken primarily to extract or remove rock or clay.

[1993, c. 350, §2 (NEW) .]

2. Development of state or regional significance that may substantially affect the environment. "Development of state or regional significance that may substantially affect the environment," in this article also called "development," means any federal, state, municipal, quasi-municipal, educational, charitable, residential, commercial or industrial development that:

A. Occupies a land or water area in excess of 20 acres; [1997, c. 502, §5 (RPR).]

B. Is a metallic mineral mining or advanced exploration activity as defined in this section or an oil or gas exploration or production activity that includes drilling or excavation under water; [2005, c. 330, §18 (AMD).]

C. Is a structure as defined in this section; [1997, c. 502, §5 (RPR).]

D. Is a subdivision as defined in this section; or [1999, c. 468, §6 (AMD).]

E. [1999, c. 468, §7 (RP).]

F. Is an oil terminal facility as defined in this section. [1997, c. 502, §5 (NEW).]

F. [1993, c. 680, Pt. C, §7 (RP).]

G. [1993, c. 680, Pt. C, §7 (RP).]

H. [1993, c. 680, Pt. C, §7 (RP).]

I. [1997, c. 502, §5 (RP).]

[2005, c. 330, §18 (AMD) .]

2-A. Exploration.

[1993, c. 383, §42 (AFF); 1993, c. 383, §4 (RP) .]

2-B. Metallic mineral mining or advanced exploration activity. "Metallic mineral mining or advanced exploration activity," in this article also called "mining," means an activity or process necessary for the extraction or removal of metallic minerals or overburden or for the preparation, washing, cleaning or other treatment of metallic minerals and includes the bulk sampling, extraction or beneficiation of metallic minerals, not including test sampling methods conducted in accordance with rules adopted by the department such as test boring, test drilling, hand sampling and digging of test pits with a limited maximum surface opening or methods determined by the department to cause minimal disturbance of soil or vegetative cover.

A. [1995, c. 700, §4 (RP).]

B. [1995, c. 700, §4 (RP).]

C. [1995, c. 700, §4 (RP).]

[1995, c. 700, §4 (AMD) .]

2-C. Hazardous activity.

[1993, c. 383, §42 (AFF); 1993, c. 383, §6 (RP) .]

2-D. Multi-unit housing.

[1993, c. 383, §42 (AFF); 1993, c. 383, §7 (RP) .]

2-E. Coastal wetlands. "Coastal wetlands" has the same meaning as in section 480-B, subsection 2.

[1993, c. 383, §8 (AMD); 1993, c. 383, §42 (AFF) .]

2-F. Freshwater wetlands. "Freshwater wetlands" has the same meaning as in section 480-B, subsection 4.

A. [1993, c. 383, §42 (AFF); 1993, c. 383, §9 (RP).]

B. [1993, c. 383, §42 (AFF); 1993, c. 383, §9 (RP).]

C. [1993, c. 383, §42 (AFF); 1993, c. 383, §9 (RP).]

[1993, c. 383, §9 (AMD); 1993, c. 383, §42 (AFF) .]

3. Natural environment of a locality.

[1993, c. 383, §42 (AFF); 1993, c. 383, §10 (RP) .]

3-A. Overburden. "Overburden" means earth and other materials naturally lying over the product to be mined.

[1979, c. 466, §13 (NEW) .]

3-B. Normal high-water line. "Normal high-water line" has the same meaning as in section 480-B, subsection 6.

[1993, c. 383, §11 (AMD); 1993, c. 383, §42 (AFF) .]

3-C. Passenger car equivalents at peak hour.

[1999, c. 468, §8 (RP) .]

3-D. Oil terminal facility. "Oil terminal facility" means a facility and related appurtenances located in, on, over or under the surface of any land or water that is used or capable of being used to transfer, process, refine or store oil as defined in section 542, subsection 6. "Oil terminal facility" does not include:

A. A facility used or capable of being used to store less than 1,500 barrels or 63,000 gallons of oil; [1997, c. 502, §6 (NEW).]

B. A facility not engaged in the transfer of oil to or from the waters of the State; or [1997, c. 502, §6 (NEW).]

C. A facility consisting only of a vessel or vessels as defined in section 542, subsection 11. [1997, c. 502, §6 (NEW).]

[1997, c. 502, §6 (NEW) .]

4. Person. "Person" means any person, firm, association, partnership, corporation, municipal or other local governmental entity, quasi-municipal entity, state agency, federal agency, educational or charitable organization or institution or other legal entity.

[1993, c. 383, §12 (AMD); 1993, c. 383, §42 (AFF) .]

4-A. Product.

[1995, c. 700, §5 (RP) .]

4-B. Reclamation. "Reclamation" means the rehabilitation of the area of land affected by mining under a plan approved by the department, including, but not limited to, the stabilization of slopes and creation of safety benches, the planting of forests, the seeding of grasses and legumes for grazing purposes, the planting of crops for harvest and the enhancement of wildlife and aquatic resources, but not including the filling in of pits and the filling or sealing of shafts and underground workings with solid materials unless necessary for protection of ground water or safety.

[1993, c. 383, §13 (AMD); 1993, c. 383, §42 (AFF) .]

4-C. Primary sand and gravel recharge areas.

[1993, c. 383, §42 (AFF); 1993, c. 383, §14 (RP) .]

4-D. Significant ground water aquifer. "Significant ground water aquifer" means a porous formation of ice-contact and glacial outwash sand and gravel or fractured bedrock that contains significant recoverable quantities of water which is likely to provide drinking water supplies.

[1987, c. 812, §§5, 18 (AMD) .]

4-E. River, stream or brook. "River, stream or brook" has the same meaning as in section 480-B, subsection 9.

[1993, c. 383, §15 (AMD); 1993, c. 383, §42 (AFF) .]

4-F. Shoreland zone. "Shoreland zone" has the same meaning as "shoreland areas" in section 435. Terms used within this definition have the same meanings as in section 436-A.

[1993, c. 383, §16 (AMD); 1993, c. 383, §42 (AFF) .]

5. Subdivision. A "subdivision" is the division of a parcel of land into 5 or more lots to be offered for sale or lease to the general public during any 5-year period, if the aggregate land area includes more than 20 acres; except that when all lots are for single-family, detached, residential housing, common areas or open space a "subdivision" is the division of a parcel of land into 15 or more lots to be offered for sale or lease to the general public within any 5-year period, if the aggregate land area includes more than 30 acres. The aggregate land area includes lots to be offered together with the roads, common areas, easement areas and all portions of the parcel of land in which rights or interests, whether express or implied, are to be offered. This definition of "subdivision" is subject to the following exceptions:

A. [1989, c. 769, §2 (RP).]

B. [1989, c. 769, §3 (RP).]

C. Lots of 40 or more acres but not more than 500 acres may not be counted as lots except where:

(1) The proposed subdivision is located wholly or partly within the shoreland zone; [1993, c. 680, Pt. A, §35 (RPR).]

C-1. Lots of more than 500 acres in size may not be counted as lots; [1993, c. 680, Pt. A, §35 (RPR).]

D. Five years after a subdivider establishes a single-family residence for that subdivider's own use on a parcel and actually uses all or part of the parcel for that purpose during that period, a lot containing that residence may not be counted as a lot; [1993, c. 680, Pt. A, §35 (RPR).]

E. Unless intended to circumvent this article, the following transactions may not be considered lots offered for sale or lease to the general public:

(1) Sale or lease of lots to an abutting owner or to a spouse, child, parent, grandparent or sibling of the developer if those lots are not further divided or transferred to a person not so related to the developer within a 5-year period, except as provided in this subsection;

(2) Personal, nonprofit transactions, such as the transfer of lots by gift, if those lots are not further divided or transferred within a 5-year period or the transfer of lots by devise or inheritance; or

(3) Grant of a bona fide security interest in the whole lot or subsequent transfer of the whole lot by the original holder of the bona fide security interest or that person's successor in interest; [1995, c. 493, §5 (AMD).]

F. In those subdivisions that would otherwise not require site location approval, unless intended to circumvent this article, the following transactions may not, except as provided, be considered lots offered for sale or lease to the general public:

(1) Sale or lease of common lots created with a conservation easement as defined in Title 33, section 476, provided that the department is made a party; and [1993, c. 680, Pt. A, §35 (RPR).]

G. [1987, c. 864, §1 (RP).]

G-1. [1987, c. 864, §2 (RP).]

H. The transfer of contiguous land by a permit holder to the owner of a lot within a permitted subdivision is exempt from review under this article, provided that the land was not owned by the permit holder at the time the department approved the subdivision. Further division of the transferred land must be reviewed under this article. [1993, c. 680, Pt. A, §35 (RPR).]

The exception described in paragraph F does not apply, and the subdivision requires site location approval, whenever the use of a lot described in paragraph F changes or the lot is offered for sale or lease to the general public without the limitations set forth in paragraph F. For the purposes of this subsection only, a parcel of land is defined as all contiguous land in the same ownership provided that lands located on opposite sides of a public or private road are considered each a separate parcel of land unless that road was established by the owner of land on both sides of the road subsequent to January 1, 1970. A lot to be offered for sale or lease to the general public is counted, for purposes of determining jurisdiction, from the time a municipal subdivision plan showing that lot is recorded or the lot is sold or leased, whichever occurs first, until 5 years after that recording, sale or lease.

[1997, c. 603, §2 (AMD) .]

6. Structure. A "structure" means:

A. [1993, c. 383, §42 (AFF); 1993, c. 383, §18 (RP).]

B. Buildings, parking lots, roads, paved areas, wharves or areas to be stripped or graded and not to be revegetated that cause a total project to occupy a ground area in excess of 3 acres. Stripped or graded areas that are not revegetated within a calendar year are included in calculating the 3-acre threshold. [1993, c. 383, §18 (AMD); 1993, c. 383, §42 (AFF).]

[1993, c. 383, §18 (AMD); 1993, c. 383, §42 (AFF) .]

7. Storage facility.

[1995, c. 704, Pt. C, §2 (AFF); 1995, c. 704, Pt. A, §6 (RP) .]

SECTION HISTORY

1969, c. 571, §2 (NEW). 1971, c. 593, §22 (AMD). 1971, c. 613, §§2,3 (AMD). 1971, c. 618, §12 (AMD). 1973, c. 625, §276 (AMD). 1975, c. 214, (AMD). 1975, c. 297, (AMD). 1975, c. 712, (AMD). 1979, c. 466, §§12,13 (AMD). 1979, c. 541, §A263 (AMD). 1981, c. 227, §§1,2 (AMD). 1981, c. 449, §§4-6,9 (AMD). 1981, c. 698, §190 (AMD). 1983, c. 500, §2 (AMD). 1983, c. 513, §2 (AMD). 1983, c. 743, §13 (AMD). 1983, c. 788, §§1-3 (AMD). 1983, c. 819, §A63 (AMD). 1985, c. 162, §7 (AMD). 1985, c. 479, §5 (AMD). 1985, c. 654, (AMD). 1987, c. 130, (AMD). 1987, c. 737, §§C90,C106 (AMD). 1987, c. 810, §§9-11 (AMD). 1987, c. 812, §§2-8,18 (AMD). 1987, c. 864, §§1,2 (AMD). 1989, c. 6, (AMD). 1989, c. 9, §2 (AMD). 1989, c. 104, §§C8,C10 (AMD). 1989, c. 497, §12 (AMD). 1989, c. 600, §A19 (AMD). 1989, c. 769, §§2-4 (AMD). 1989, c. 890, §§A40,B85,86 (AMD). 1991, c. 160, §1 (AMD). 1991, c. 500, §3 (AMD). RR 1991, c. 2, §146 (COR). 1993, c. 350, §§1-3 (AMD). 1993, c. 366, §§1-3 (AMD). 1993, c. 383, §§3-18 (AMD). 1993, c. 680, §§A35,C7 (AMD). 1993, c. 366, §4 (AFF). 1993, c. 383, §42 (AFF). 1995, c. 493, §5 (AMD). 1995, c. 700, §§2-5 (AMD). 1995, c. 704, §§A3-6 (AMD). 1995, c. 704, §C2 (AFF). 1997, c. 502, §§5,6 (AMD). 1997, c. 603, §2 (AMD). 1999, c. 468, §§6-8 (AMD). 2005, c. 330, §18 (AMD).

38 §483-A. PROHIBITION

1. Approval required. A person may not construct or cause to be constructed or operate or cause to be operated or, in the case of a subdivision, sell or lease, offer for sale or lease or cause to be sold or leased any development of state or regional significance that may substantially affect the environment without first having obtained approval for this construction, operation, lease or sale from the department.

[2003, c. 452, Pt. W, §7 (NEW); 2003, c. 452, Pt. X, §2 (AFF) .]

2. Compliance with order or permit required. A person having an interest in, or undertaking an activity on, a parcel of land affected by an order or permit issued by the department may not act contrary to that order or permit.

[2003, c. 452, Pt. W, §7 (NEW); 2003, c. 452, Pt. X, §2 (AFF) .]

SECTION HISTORY
1987, c. 812, §§9,18 (NEW). 1991, c. 499, §19 (AMD). 1993, c. 383, §20 (AMD). 1993, c. 383, §42 (AFF). 1995, c. 704, §A7 (AMD). 1995, c. 704, §C2 (AFF). 2003, c. 452, §X2 (AFF). 2003, c. 452, §W7 (RPR).

38 §484. STANDARDS FOR DEVELOPMENT

38 §484. STANDARDS FOR DEVELOPMENT

The department shall approve a development proposal whenever it finds the following. [1995, c. 704, Pt. A, §8 (AMD); 1995, c. 704, Pt. C, §2 (AFF).]

1. **Financial capacity.** The developer has the financial capacity and technical ability to develop the project in a manner consistent with state environmental standards and with the provisions of this article. The commissioner may issue a permit under this article that conditions any site alterations upon a developer providing the commissioner with evidence that the developer has been granted a line of credit or a loan by a financial institution authorized to do business in this State as defined in Title 9-B, section 131, subsection 17-A or with evidence of any other form of financial assurance the board determines by rule to be adequate.

[1995, c. 287, §1 (AMD) .]

2. **Traffic movement.**

[1999, c. 468, §9 (RP) .]

3. **No adverse effect on the natural environment.** The developer has made adequate provision for fitting the development harmoniously into the existing natural environment and that the development will not adversely affect existing uses, scenic character, air quality, water quality or other natural resources in the municipality or in neighboring municipalities.

A. In making a determination under this subsection, the department may consider the effect of noise from a commercial or industrial development. Noise from a residential development approved under this article may not be regulated under this subsection, and noise generated between the hours of 7 a.m. and 7 p.m. or during daylight hours, whichever is longer, by construction of a development approved under this article may not be regulated under this subsection. [1993, c. 383, §21 (NEW); 1993, c. 383, §42 (AFF).]

B. In determining whether a developer has made adequate provision for the control of noise generated by a commercial or industrial development, the department shall consider board rules relating to noise and the quantifiable noise standards of the municipality in which the development is located and of any municipality that may be affected by the noise. [1993, c. 383, §21 (NEW); 1993, c. 383, §42 (AFF).]

C. Nothing in this subsection may be construed to prohibit a municipality from adopting noise regulations stricter than those adopted by the board. [1993, c. 383, §21 (NEW); 1993, c. 383, §42 (AFF).]

D. [1995, c. 700, §6 (RP).]

E. [1995, c. 700, §6 (RP).]

F. In making a determination under this subsection regarding a structure to facilitate withdrawal of groundwater, the department shall consider the effects of the proposed withdrawal on waters of the State, as defined by 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 department shall consider both the direct effects of the proposed water withdrawal and its effects in combination with existing water withdrawals. [2005, c. 452, Pt. A, §3 (NEW).]

G. In making a determination under this subsection regarding an expedited wind energy development, as defined in Title 35-A, section 3451, subsection 4, the department shall consider the development's effects on scenic character and existing uses related to scenic character in accordance with Title 35-A, section 3452. [2007, c. 661, Pt. B, §11 (NEW).]

[2005, c. 452, Pt. A, §3 (AMD); 2007, c. 661, Pt. B, §11 (AMD) .]

4. Soil types. The proposed development will be built on soil types that are suitable to the nature of the undertaking.

[1995, c. 704, Pt. A, §10 (AMD); 1997, c. 603, §§8, 9 (AFF) .]

4-A. Storm water management and erosion and sedimentation control. The proposed development, other than a metallic mineral or advanced exploration activity, meets the standards for storm water management in section 420-D and the standard for erosion and sedimentation control in section 420-C. A proposed metallic mineral mining or advanced exploration activity must meet storm water standards in department rules adopted to implement subsections 3 and 7. If exempt under section 420-D, subsection 7, a proposed development must satisfy the applicable storm water quantity standard and, if the development is located in the direct watershed of a lake included in the list adopted pursuant to section 420-D, subsection 3, any applicable storm water quality standards adopted pursuant to section 420-D.

[1997, c. 502, §8 (AMD); 1997, c. 603, §§8, 9 (AFF) .]

5. Ground water. The proposed development will not pose an unreasonable risk that a discharge to a significant ground water aquifer will occur.

[1987, c. 812, §§10, 18 (RPR) .]

6. Infrastructure. The developer has made adequate provision of utilities, including water supplies, sewerage facilities and solid waste disposal, required for the development, and the development will not have an unreasonable adverse effect on the existing or proposed utilities in the municipality or area served by those services.

[1999, c. 468, §10 (AMD) .]

7. Flooding. The activity will not unreasonably cause or increase the flooding of the alteration area or adjacent properties nor create an unreasonable flood hazard to any structure.

[1987, c. 812, §§10, 18 (NEW) .]

8. Sand supply.

[1993, c. 383, §42 (AFF); 1993, c. 383, §23 (RP) .]

9. Blasting. Blasting will be conducted in accordance with the standards in section 490-Z, subsection 14 unless otherwise approved by the department.

[2007, c. 297, §2 (NEW) .]

10. Special provisions; grid-scale wind energy development. In the case of a grid-scale wind energy development, the proposed generating facilities, as defined in Title 35-A, section 3451, subsection 5:

A. Will be designed and sited to avoid unreasonable adverse shadow flicker effects; [2007, c. 661, Pt. B, §12 (NEW).]

B. Will be constructed with setbacks adequate to protect public safety. In making a finding pursuant to this paragraph, the department shall consider the recommendation of a professional, licensed civil engineer as well as any applicable setback recommended by a manufacturer of the generating facilities; and [2007, c. 661, Pt. B, §12 (NEW).]

C. Will provide significant tangible benefits as determined pursuant to Title 35-A, section 3454, if the development is an expedited wind energy development. [2007, c. 661, Pt. B, §12 (NEW).]

The Department of Labor, the Executive Department, State Planning Office and the Public Utilities

Commission shall provide review comments if requested by the primary siting authority.

For purposes of this subsection, "grid-scale wind energy development," "primary siting authority," "significant tangible benefits" and "expedited wind energy development" have the same meanings as in Title 35-A, section 3451.

[2007, c. 661, Pt. B, §12 (NEW) .]

SECTION HISTORY
1969, c. 571, §2 (NEW). 1971, c. 256, §5 (AMD). 1971, c. 476, §2 (AMD). 1971, c. 613, §§5-8 (AMD). 1971, c. 618, §12 (AMD). 1975, c. 240, (AMD). 1977, c. 300, §30 (AMD). 1977, c. 374, §3 (AMD). 1977, c. 623, (AMD). 1977, c. 696, §343 (AMD). 1981, c. 194, §3 (AMD). 1981, c. 449, §§8,9 (AMD). 1983, c. 500, §3 (AMD). 1983, c. 513, §3 (AMD). 1985, c. 746, §21 (AMD). 1987, c. 141, §B36 (AMD). 1987, c. 760, §1 (AMD). 1987, c. 812, §§10,18 (RPR). 1989, c. 502, §B50 (AMD). 1989, c. 610, (AMD). 1989, c. 890, §§A40,B89-91 (AMD). 1993, c. 383, §§21-23 (AMD). 1993, c. 383, §42 (AFF). 1995, c. 287, §§1,2 (AMD). 1995, c. 700, §6 (AMD). 1995, c. 704, §§A8-11 (AMD). 1995, c. 704, §C2 (AFF). 1997, c. 502, §§7,8 (AMD). 1997, c. 603, §§8,9 (AFF). 1999, c. 468, §§9,10 (AMD). 2005, c. 452, §A3 (AMD). 2007, c. 297, §2 (AMD). 2007, c. 661, Pt. B, §§11, 12 (AMD).

38 §485-A. NOTIFICATION REQUIRED; BOARD ACTION; ADMINISTRATIVE APPEALS

38 §485-A. NOTIFICATION REQUIRED; BOARD ACTION; ADMINISTRATIVE APPEALS

1. Application. Any person intending to construct or operate a development shall, before commencing construction or operation, notify the commissioner in writing of the intent, nature and location of the development, together with such other information as the board may by rule require. The department shall approve the proposed development, setting forth such terms and conditions as are appropriate and reasonable, disapprove the proposed development, setting forth the reasons for the disapproval, or schedule a hearing in the manner described in section 486-A.

[1989, c. 890, Pt. B, §92 (AMD); 1989, c. 890, Pt. A, §40 (AFF) .]

1-A. Wood supply. For a new or expanded development requiring an annual supply of wood or wood-derived materials in excess of 150,000 tons green weight, the applicant shall submit a wood supply plan for informational purposes to the Maine Forest Service concurrent with the application required in subsection 1. The wood supply plan must include, but is not limited to, the following information:

A. The expected operational life of the development; [1989, c. 681, §2 (NEW).]

B. The projected annual wood consumption of wood mill residue, wood fiber and recycled materials from forest products during the entire operational life of the development; [1989, c. 681, §2 (NEW).]

C. The expected market area for wood supply necessary to supply the development; and [1989, c. 681, §2 (NEW).]

D. Other relevant wood supply information. [1989, c. 681, §2 (NEW).]

[1989, c. 681, §2 (NEW) .]

1-B. Advance ruling.

[1999, c. 468, §11 (RP) .]

1-C. Approval of future development sites. The department shall adopt rules allowing the option of, and identifying requirements for, a planning permit that allows approval of development within a specified area and within specified parameters such as maximum area, groundwater usage and traffic generation, although the specific nature and extent of the development or timing of construction may not be known at the time the permit is issued. The location and parameters of the development must meet the standards of this article. This alternative is not available for metallic mineral mining or advanced exploration activities. Rules adopted pursuant to this subsection are major substantive rules as defined in Title 5, chapter 375, subchapter 2-A.

If the department determines that full compliance with new or amended rules enacted after a planning permit was issued will significantly alter the plan for the development, the department may require the permittee to comply with the rules in effect at the time of issuance of the planning permit and, to the extent practicable, to comply with additional requirements or standards in the new or amended rules for any remaining portion of the development for which final submissions have not been provided. The department may not require significant alteration of constructed or permitted infrastructure authorized by the planning permit, or subsequent approvals designed to serve future development phases in existence at the time of the new or amended rules in assessing practicability.

For purposes of this subsection, "practicable" means available and feasible considering cost, existing technology and logistics based on the overall purpose of the project as authorized in the planning permit.

[2005, c. 602, §5 (AMD) .]

2. Hearing request. If the department has issued an order without a hearing regarding any person's development, that person may request, in writing, a hearing before the board within 30 days after notice of the department's decision. This request must set forth, in detail, the findings and conclusions of the department to which that person objects, the basis of the objections and the nature of the relief requested. Upon receipt of the request, the board shall schedule and hold a hearing limited to the matters set forth in the request. Hearings must be scheduled in accordance with section 486-A.

[1989, c. 890, Pt. B, §92 (AMD); 1989, c. 890, Pt. A, §40 (AFF) .]

3. Failure to notify commissioner. The commissioner may, at any time with respect to any person who has commenced construction or operation of any development without having first notified the commissioner pursuant to this section, schedule and conduct a public hearing with respect to that development.

[1989, c. 890, Pt. B, §92 (AMD); 1989, c. 890, Pt. A, §40 (AFF) .]

4. Permit display. A person issued a permit pursuant to this article for activities in a great pond watershed shall have a copy of the permit on site while work authorized by that permit is being conducted.

[1991, c. 838, §25 (NEW) .]

SECTION HISTORY
1987, c. 812, §§11,18 (NEW). 1989, c. 681, §2 (AMD). 1989, c. 890, §§A40,B92 (AMD). 1991, c. 838, §25 (AMD). 1995, c. 704, §A12 (AMD). 1995, c. 704, §C2 (AFF). 1999, c. 468, §11 (AMD). 2005, c. 602, §5 (AMD).

38 §486-A. HEARINGS; ORDERS; CONSTRUCTION SUSPENDED

38 §486-A. HEARINGS; ORDERS; CONSTRUCTION SUSPENDED

1. Hearings. If the department determines to hold a hearing on a notification submitted pursuant to section 485-A, the department shall solicit and receive testimony to determine whether that development will in fact substantially affect the environment or pose a threat to the public's health, safety or general welfare. The department shall permit the applicant to provide evidence on the economic benefits of the proposal as well as the impact of the proposal on energy resources.

[1989, c. 890, Pt. A, §40 (AFF); 1989, c. 890, Pt. B, §93 (RPR) .]

2. Developer; burden of proof. At the hearings held under this section, the burden is upon the person proposing the development to demonstrate affirmatively to the department that each of the criteria for approval listed in this article has been met, and that the public's health, safety and general welfare will be adequately protected.

[1989, c. 890, Pt. B, §94 (AMD); 1989, c. 890, Pt. A, §40 (AFF) .]

3. Findings of fact; order. After the department adjourns any hearing held under this section, the department shall make findings of fact and issue an order granting or denying permission to the person proposing the development to construct or operate the development, as proposed, or granting that permission upon such terms and conditions as the department considers advisable to protect and preserve the environment and the public's health, safety and general welfare.

[1995, c. 642, §6 (AMD) .]

4. No construction pending order. Any person who has notified the commissioner, pursuant to section 485-A, of intent to construct or operate a development shall immediately defer or suspend construction or operation of that development until the department has issued an order.

[1989, c. 890, Pt. B, §94 (AMD); 1989, c. 890, Pt. A, §40 (AFF) .]

5. Continuing compliance; air and water pollution. Any person securing approval of the department, pursuant to this article, shall maintain the financial capacity and technical ability to meet the state air and water pollution control standards until that person has complied with those standards.

[1989, c. 890, Pt. B, §94 (AMD); 1989, c. 890, Pt. A, §40 (AFF) .]

6. Transcripts. A complete verbatim transcript shall be made of all hearings held pursuant to this section.

[1987, c. 812, §§12, 18 (NEW) .]

7. Minor revisions. An application for an order addressing a minor revision must be processed within a period specified by the department if the applicant meets requirements adopted by the department.

[1993, c. 383, §24 (NEW); 1993, c. 383, §42 (AFF) .]

SECTION HISTORY
1987, c. 812, §§12,18 (NEW). 1989, c. 890, §§A40,B93,94 (AMD). 1993, c. 383, §24 (AMD). 1993, c. 383, §42 (AFF). 1995, c. 642, §6 (AMD).

38 §487-A. HAZARDOUS ACTIVITIES; TRANSMISSION LINES

38 §487-A. HAZARDOUS ACTIVITIES; TRANSMISSION LINES

1. Preliminary notice required for hazardous activities.

[1993, c. 383, §42 (AFF); 1993, c. 383, §25 (RP) .]

2. Power generating facilities. In case of a permanently installed transmission line carrying 100 kilovolts, or more, proposed to be erected within this State by a transmission and distribution utility or utilities, the proposed development, in addition to meeting the requirements of section 484, must also have been approved by the Public Utilities Commission under Title 35-A, section 3132.

In the event that a transmission and distribution utility or utilities file a notification pursuant to section 485-A before they are issued a certificate of public convenience and necessity by the Public Utilities Commission, they shall file a bond or, in lieu of that bond, satisfactory evidence of financial capacity to make that reimbursement with the department, payable to the department, in a sum satisfactory to the commissioner and in an amount not to exceed $50,000. This bond or evidence of financial capacity must be conditioned to require the applicant to reimburse the department for its cost incurred in processing any application in the event that the applicant does not receive a certificate of public convenience and necessity.

[1999, c. 657, §23 (AMD) .]

3. Easement required; transmission line or gas pipeline. In the case of a gas pipeline or a transmission line carrying 100 kilovolts or more, a permit under this chapter may be obtained prior to any acquisition of lands or easements to be acquired by purchase. The permit must be obtained prior to any acquisition of land by eminent domain.

[1997, c. 72, §2 (AMD) .]

4. Notice to landowners; transmission line or gas pipeline. Any person making application under this article, for approval for a transmission line or gas pipeline shall, prior to filing a notification pursuant to this article, provide notice to each owner of real property upon whose land the applicant proposes to locate a gas pipeline or transmission line. Notice must be sent by certified mail, postage prepaid, to the landowner's last known address contained in the applicable tax assessor's records. The applicant shall file a map with the town clerk of each municipality through which the pipeline or transmission line is proposed to be located, indicating the intended approximate location of the pipeline or transmission line within the municipality. The applicant is not required to provide notice of intent to construct a gas pipeline or transmission line other than as set forth in this subsection. The department shall receive evidence regarding the location, character and impact on the environment of the proposed transmission line or pipeline. In addition to finding that the requirements of section 484 have been met, the department, in the case of the transmission line or pipeline, shall consider whether any proposed alternatives to the proposed location and character of the transmission line or pipeline may lessen its impact on the environment or the risks it would engender to the public health or safety, without unreasonably increasing its cost. The department may approve or disapprove all or portions of the proposed transmission line or pipeline and shall make such orders regarding its location, character, width and appearance as will lessen its impact on the environment, having regard for any increased costs to the applicant.

[1989, c. 890, Pt. B, §96 (AMD); 1989, c. 890, Pt. A, §40 (AFF) .]

SECTION HISTORY
1987, c. 812, §§13,18 (NEW). 1989, c. 890, §§A40,B95,96 (AMD). 1993, c. 383, §25 (AMD). 1993, c. 383, §42 (AFF). 1995, c. 704, §§A13,14 (AMD). 1995, c. 704, §C2 (AFF). 1997, c. 72, §§1,2 (AMD). 1999, c. 657, §23 (AMD).

38 §489-D. TECHNICAL ASSISTANCE TO MUNICIPALITIES

38 §489-D. TECHNICAL ASSISTANCE TO MUNICIPALITIES

A state department or agency shall provide technical assistance to a municipality in the form of a peer review of development studies when the state capacity and resources exist. [1995, c. 704, Pt. A, §22 (NEW); 1995, c. 704, Pt. C, §2 (AFF).]

1. Costs. A state department or agency may charge a municipality for this assistance under this section. A municipality may recover these costs from the developer.

[1995, c. 704, Pt. A, §22 (NEW); 1995, c. 704, Pt. C, §2 (AFF) .]

2. Type of development. The following provisions apply to assistance under this section.

A. Assistance is available for the review of site location issues arising from a proposal for a subdivision of at least 5 lots and 20 acres and for a proposal for a development that has at least 3 acres of buildings, parking lots, roads, paved areas, wharves or areas to be stripped or graded and not revegetated and not subject to review by the department under this article. [1995, c. 704, Pt. A, §22 (NEW); 1995, c. 704, Pt. C, §2 (AFF).]

B. A municipality may also obtain technical assistance in the form of a peer review from a private consultant or regional council and may recover costs from the developer for a project of any size. The State Planning Office has the authority to establish rules as necessary for this purpose. [1995, c. 704, Pt. A, §22 (NEW); 1995, c. 704, Pt. C, §2 (AFF).]

[1995, c. 704, Pt. A, §22 (NEW); 1995, c. 704, Pt. C, §2 (AFF) .]

SECTION HISTORY
1995, c. 704, §A22 (NEW). 1995, c. 704, §C2 (AFF).

38 §480-B. DEFINITIONS

As used in this article, unless the context otherwise indicates, the following terms have the following meanings. [1987, c. 809, §2 (NEW).]

1. Coastal sand dune systems. "Coastal sand dune systems" means sand and gravel deposits within a marine beach system, including, but not limited to, beach berms, frontal dunes, dune ridges, back dunes and other sand and gravel areas deposited by wave or wind action. Coastal sand dune systems may extend into coastal wetlands.

[1997, c. 603, §1 (AMD) .]

1-A. Community public water system. "Community public water system" has the same meaning as "community water system" has in Title 22, section 2660-B, subsection 2.

[2007, c. 353, §6 (NEW) .]

1-B. Community public water system primary protection area. "Community public water system primary protection area" means:

A. The area within 250 feet, measured horizontally, of a great pond that is a source for a community public water system; [2007, c. 353, §7 (NEW).]

B. The area within 250 feet, measured horizontally, of a river, stream or brook that is a source for a community public water system for a distance of 1/2 mile upstream from the intake of the public water supply; or [2007, c. 353, §7 (NEW).]

C. A source water protection area identified and mapped by the Department of Health and Human Services as described under Title 30-A, section 2001, subsection 20-A. [2007, c. 353, §7 (NEW).]

[2007, c. 353, §7 (NEW) .]

2. Coastal wetlands. "Coastal wetlands" means all tidal and subtidal lands; all areas with vegetation present that is tolerant of salt water and occurs primarily in a salt water or estuarine habitat; and any swamp, marsh, bog, beach, flat or other contiguous lowland that is subject to tidal action during the highest tide level for the year in which an activity is proposed as identified in tide tables published by the National Ocean Service. Coastal wetlands may include portions of coastal sand dunes.

[2005, c. 330, §13 (AMD) .]

2-A. Dredge spoils. "Dredge spoils" means sand, silt, mud, gravel, rock or other sediment or material that is moved from coastal wetlands.

[1989, c. 656, §2 (NEW) .]

2-B. Forest management activities. "Forest management activities" means timber stand improvement, timber harvesting activities, forest products harvesting and regeneration of forest stands. For the purposes of this definition, "timber harvesting activities" means timber harvesting, the construction and maintenance of roads used primarily for timber harvesting and other activities conducted to facilitate timber harvesting. For the purposes of this definition, "timber harvesting" means the cutting or removal of timber for the primary purpose of selling or processing forest products.

[2005, c. 116, §1 (AMD) .]

2-C. Forested wetland. "Forested wetland" means a freshwater wetland dominated by woody

vegetation that is 6 meters tall, or taller.

[1989, c. 838, §3 (NEW) .]

2-D. Floodplain wetland. "Floodplain wetland" means lands adjacent to a river, stream or brook that are inundated with floodwater during a 100-year flood event and that under normal circumstances support a prevalence of wetland vegetation typically adapted for life in saturated soils.

[1991, c. 214, §1 (NEW) .]

3. Fragile mountain areas. "Fragile mountain areas" means areas above 2,700 feet in elevation from mean sea level.

[1987, c. 809, §2 (NEW) .]

4. Freshwater wetlands. "Freshwater wetlands" means freshwater swamps, marshes, bogs and similar areas that are:

A. [1995, c. 460, §12 (AFF); 1995, c. 460, §1 (RP).]

B. Inundated or saturated by surface or groundwater at a frequency and for a duration sufficient to support, and which under normal circumstances do support, a prevalence of wetland vegetation typically adapted for life in saturated soils; and [1995, c. 460, §1 (AMD); 1995, c. 460, §12 (AFF).]

C. Not considered part of a great pond, coastal wetland, river, stream or brook. [1987, c. 809, §2 (NEW).]

[1995, c. 460, §1 (AMD); 1995, c. 460, §12 (AFF) .]

5. Great ponds. "Great ponds" means any inland bodies of water which in a natural state have a surface area in excess of 10 acres and any inland bodies of water artificially formed or increased which have a surface area in excess of 30 acres.

[1987, c. 809, §2 (NEW) .]

5-A. Mooring. "Mooring" means equipment, such as anchors, chains and lines, for holding fast a vessel, aircraft, floating dock or buoy.

[1993, c. 187, §1 (NEW) .]

6. Normal high water line. "Normal high water line" means that line along the shore of a great pond, river, stream, brook or other nontidal body of water which is apparent from visible markings, changes in the character of soils due to prolonged action of the water or from changes in vegetation and which distinguishes between predominantly aquatic and predominantly terrestrial land. In the case of great ponds, all land below the normal high water line shall be considered the bottom of the great pond for the purposes of this article.

[1987, c. 809, §2 (NEW) .]

7. Permanent structure. "Permanent structure" means any structure that is designed to remain at or that is constructed or erected with a fixed location or that is attached to a structure with a fixed location for a period exceeding 7 months within any 12-month period, including, but not limited to, causeways, piers, docks, concrete slabs, piles, marinas, retaining walls and buildings.

[2007, c. 290, §2 (AMD) .]

8. Protected natural resource. "Protected natural resource" means coastal sand dune systems, coastal wetlands, significant wildlife habitat, fragile mountain areas, freshwater wetlands, community public water

system primary protection areas, great ponds or rivers, streams or brooks, as these terms are defined in this article.

[2007, c. 1, §20 (COR) .]

8-A. Transportation reconstruction or replacement project. "Transportation reconstruction or replacement project" means the improvement of an existing transportation facility to modern design standards without expanding its function or creating any additional roadways, facilities or structures. These projects are limited to:

A. Highway or bridge alignment changes not exceeding a distance of 200 feet between the old and new center lines in any protected natural resource; [1989, c. 814, §1 (NEW).]

B. Replacement or rehabilitation of the roadway base, pavement and drainage; [1989, c. 814, §1 (NEW).]

C. Replacement or rehabilitation of bridges or piers; [1989, c. 814, §1 (NEW).]

D. The addition of climbing lanes, and turning lanes of less than 1,000 feet in length in a protected natural resource; and [1989, c. 814, §1 (NEW).]

E. Rehabilitation or repair of state-owned railroads. [1989, c. 814, §1 (NEW).]

[1989, c. 814, §1 (NEW) .]

9. River, stream or brook. "River, stream or brook" means a channel between defined banks. A channel is created by the action of surface water and has 2 or more of the following characteristics.

A. It is depicted as a solid or broken blue line on the most recent edition of the U.S. Geological Survey 7.5-minute series topographic map or, if that is not available, a 15-minute series topographic map. [1995, c. 92, §2 (NEW).]

B. It contains or is known to contain flowing water continuously for a period of at least 6 months of the year in most years. [2001, c. 618, §1 (AMD).]

C. The channel bed is primarily composed of mineral material such as sand and gravel, parent material or bedrock that has been deposited or scoured by water. [1995, c. 92, §2 (NEW).]

D. The channel contains aquatic animals such as fish, aquatic insects or mollusks in the water or, if no surface water is present, within the stream bed. [1995, c. 92, §2 (NEW).]

E. The channel contains aquatic vegetation and is essentially devoid of upland vegetation. [1995, c. 92, §2 (NEW).]

"River, stream or brook" does not mean a ditch or other drainage way constructed, or constructed and maintained, solely for the purpose of draining storm water or a grassy swale.

[2001, c. 618, §1 (AMD) .]

9-A. Significant groundwater well. "Significant groundwater well" is defined as follows.

A. "Significant groundwater well" means any well, wellfield, excavation or other structure, device or method used to obtain groundwater that is:

(1) Withdrawing at least 75,000 gallons during any week or at least 50,000 gallons on any day and is located at a distance of 500 feet or less from a coastal or freshwater wetland, great pond, significant vernal pool habitat, water supply well not owned or controlled by the applicant or river, stream or brook; or

(2) Withdrawing at least 216,000 gallons during any week or at least 144,000 gallons on any day and is located at a distance of more than 500 feet from a coastal or freshwater wetland, great pond, significant vernal pool habitat, water supply well not owned or controlled by the applicant or river, stream or brook.

Withdrawals of water for firefighting are not applied toward these thresholds. [2007, c. 399, §10 (NEW).]

B. "Significant groundwater well" does not include:

(1) A public water system as defined in Title 22, section 2601, subsection 8 other than a public water system used solely to bottle water for sale;

(2) Individual home domestic supply;

(3) Agricultural use or storage;

(4) A development or part of a development requiring a permit pursuant to article 6, article 7 or article 8-A; or

(5) A structure or development requiring a permit from the Maine Land Use Regulation Commission. [2007, c. 399, §10 (NEW).]

[2007, c. 399, §10 (NEW) .]

10. Significant wildlife habitat. "Significant wildlife habitat" means:

A. The following areas to the extent that they have been mapped by the Department of Inland Fisheries and Wildlife or are within any other protected natural resource: habitat, as defined by the Department of Inland Fisheries and Wildlife, for species appearing on the official state or federal list of endangered or threatened animal species; high and moderate value deer wintering areas and travel corridors as defined by the Department of Inland Fisheries and Wildlife; seabird nesting islands as defined by the Department of Inland Fisheries and Wildlife; and critical spawning and nursery areas for Atlantic salmon as defined by the Atlantic Salmon Commission; and [2005, c. 116, §2 (NEW).]

B. Except for solely forest management activities, for which "significant wildlife habitat" is as defined and mapped in accordance with section 480-I by the Department of Inland Fisheries and Wildlife, the following areas that are defined by the Department of Inland Fisheries and Wildlife and are in conformance with criteria adopted by the Department of Environmental Protection or are within any other protected natural resource:

(1) Significant vernal pool habitat;

(2) High and moderate value waterfowl and wading bird habitat, including nesting and feeding areas; and

(3) Shorebird nesting, feeding and staging areas. [2005, c. 116, §2 (NEW).]

[2005, c. 116, §2 (RPR) .]

SECTION HISTORY
1987, c. 809, §2 (NEW). 1989, c. 430, §3 (AMD). 1989, c. 656, §2 (AMD).
1989, c. 814, §1 (AMD). 1989, c. 838, §3 (AMD). 1991, c. 214, §1 (AMD).
1991, c. 693, §1 (AMD). 1993, c. 187, §1 (AMD). 1993, c. 296, §1 (AMD).
1995, c. 92, §2 (AMD). 1995, c. 406, §13 (AMD). 1995, c. 460, §§1-3 (AMD).
1995, c. 625, §A51 (AMD). 1995, c. 460, §12 (AFF). 1997, c. 603, §1 (AMD).
1999, c. 243, §11 (AMD). 1999, c. 401, §BB17 (AMD). 2001, c. 618, §1 (AMD).
2005, c. 116, §§1,2 (AMD). 2005, c. 330, §13 (AMD). 2007, c. 290, §2 (AMD).
2007, c. 353, §§6-8 (AMD). 2007, c. 399, §10 (AMD). RR 2007, c. 1, §20 (COR).

38 §480-C. PROHIBITIONS

1. Prohibition. A person may not perform or cause to be performed any activity listed in subsection 2 without first obtaining a permit from the department if the activity is located in, on or over any protected natural resource or is located adjacent to any of the following:

A. A coastal wetland, great pond, river, stream or brook or significant wildlife habitat contained within a freshwater wetland; or [1995, c. 460, §12 (AFF); 1995, c. 460, §4 (RPR).]

B. Freshwater wetlands consisting of or containing:

(1) Under normal circumstances, at least 20,000 square feet of aquatic vegetation, emergent marsh vegetation or open water, except for artificial ponds or impoundments; or

(2) Peatlands dominated by shrubs, sedges and sphagnum moss. [1995, c. 460, §12 (AFF); 1995, c. 460, §4 (RPR).]

A person may not perform or cause to be performed any activity in violation of the terms or conditions of a permit.

[2001, c. 618, §2 (AMD) .]

2. Activities requiring a permit. The following activities require a permit:

A. Dredging, bulldozing, removing or displacing soil, sand, vegetation or other materials; [1987, c. 809, §2 (NEW).]

B. Draining or otherwise dewatering; [1987, c. 809, §2 (NEW).]

C. Filling, including adding sand or other material to a sand dune; or [1987, c. 809, §2 (NEW).]

D. Any construction, repair or alteration of any permanent structure. [1987, c. 809, §2 (NEW).]

[1987, c. 809, §2 (NEW) .]

3. Application.

[1993, c. 721, Pt. H, §1 (AFF); 1993, c. 721, Pt. F, §1 (RP) .]

4. Significant groundwater well. A person may not perform or cause to be performed the establishment or operation of a significant groundwater well without first obtaining a permit from the department.

[2007, c. 399, §11 (NEW) .]

SECTION HISTORY
1987, c. 809, §2 (NEW). 1989, c. 430, §4 (AMD). 1989, c. 838, §4 (AMD). 1989, c. 890, §§A40,B70 (AMD). 1993, c. 721, §F1 (AMD). 1993, c. 721, §H1 (AFF). 1995, c. 460, §4 (AMD). 1995, c. 460, §12 (AFF). 2001, c. 618, §2 (AMD). 2007, c. 399, §11 (AMD).

38 §480-D. STANDARDS

The department shall grant a permit upon proper application and upon such terms as it considers necessary to fulfill the purposes of this article. The department shall grant a permit when it finds that the applicant has demonstrated that the proposed activity meets the standards set forth in subsections 1 to 9, except that when an activity requires a permit only because it is located in, on or over a community public water system primary protection area the department shall issue a permit when it finds that the applicant has demonstrated that the proposed activity meets the standards set forth in subsections 2 and 5. [2007, c. 353, §9 (AMD).]

1. Existing uses. The activity will not unreasonably interfere with existing scenic, aesthetic, recreational or navigational uses.

In making a determination under this subsection regarding an expedited wind energy development, as defined in Title 35-A, section 3451, subsection 4, the department shall consider the development's effects on scenic character and existing uses related to scenic character in accordance with Title 35-A, section 3452.

[2007, c. 661, Pt. B, §10 (AMD) .]

2. Soil erosion. The activity will not cause unreasonable erosion of soil or sediment nor unreasonably inhibit the natural transfer of soil from the terrestrial to the marine or freshwater environment.

[1989, c. 430, §5 (AMD) .]

3. Harm to habitats; fisheries. The activity will not unreasonably harm any significant wildlife habitat, freshwater wetland plant habitat, threatened or endangered plant habitat, aquatic or adjacent upland habitat, travel corridor, freshwater, estuarine or marine fisheries or other aquatic life.

In determining whether there is unreasonable harm to significant wildlife habitat, the department may consider proposed mitigation if that mitigation does not diminish in the vicinity of the proposed activity the overall value of significant wildlife habitat and species utilization of the habitat and if there is no specific biological or physical feature unique to the habitat that would be adversely affected by the proposed activity. For purposes of this subsection, "mitigation" means any action taken or not taken to avoid, minimize, rectify, reduce, eliminate or compensate for any actual or potential adverse impact on the significant wildlife habitat, including the following:

A. Avoiding an impact altogether by not taking a certain action or parts of an action; [1987, c. 809, §2 (NEW).]

B. Minimizing an impact by limiting the magnitude, duration or location of an activity or by controlling the timing of an activity; [1987, c. 809, §2 (NEW).]

C. Rectifying an impact by repairing, rehabilitating or restoring the affected environment; [1987, c. 809, §2 (NEW).]

D. Reducing or eliminating an impact over time through preservation and maintenance operations during the life of the project; or [1987, c. 809, §2 (NEW).]

E. Compensating for an impact by replacing the affected significant wildlife habitat. [1987, c. 809, §2 (NEW).]

[2001, c. 618, §3 (AMD) .]

4. Interfere with natural water flow. The activity will not unreasonably interfere with the natural flow of any surface or subsurface waters.

[1987, c. 809, §2 (NEW) .]

5. Lower water quality. The activity will not violate any state water quality law, including those governing the classification of the State's waters.

[1987, c. 809, §2 (NEW) .]

6. Flooding. The activity will not unreasonably cause or increase the flooding of the alteration area or adjacent properties.

[1987, c. 809, §2 (NEW) .]

7. Sand or gravel supply. If the activity is on or adjacent to a sand dune, it will not unreasonably interfere with the natural supply or movement of sand or gravel within or to the sand dune system or unreasonably increase the erosion hazard to the sand dune system.

[2003, c. 551, §8 (AMD) .]

8. Outstanding river segments. If the proposed activity is a crossing of any outstanding river segment as identified in section 480-P, the applicant shall demonstrate that no reasonable alternative exists which would have less adverse effect upon the natural and recreational features of the river segment.

[1987, c. 809, §2 (NEW) .]

9. Dredging. If the proposed activity involves dredging, dredge spoils disposal or transporting dredge spoils by water, the applicant must demonstrate that the transportation route minimizes adverse impacts on the fishing industry and that the disposal site is geologically suitable. The Commissioner of Marine Resources shall provide the department with an assessment of the impacts on the fishing industry of a proposed dredging operation in the coastal wetlands. The assessment must consider impacts to the area to be dredged and impacts to the fishing industry of a proposed route to transport dredge spoils to an ocean disposal site. The Commissioner of Marine Resources may hold a public hearing on the proposed dredging operation. In determining if a hearing is to be held, the Commissioner of Marine Resources shall consider the potential impacts of the proposed dredging operation on fishing in the area to be dredged. If a hearing is held, it must be within at least one of the municipalities in which the dredging operation would take place. If the Commissioner of Marine Resources determines that a hearing is not to be held, the Commissioner of Marine Resources must publish a notice of that determination in a newspaper of general circulation in the area proposed for the dredging operation. The notice must state that the Commissioner of Marine Resources will accept verbal and written comments in lieu of a public hearing. The notice must also state that if 5 or more persons request a public hearing within 30 days of the notice publication, the Commissioner of Marine Resources will hold a hearing. If 5 or more persons request a public hearing within 30 days of the notice publication, the Commissioner of Marine Resources must hold a hearing. In making its determination under this subsection, the department must take into consideration the assessment provided by the Commissioner of Marine Resources. The permit must require the applicant to:

A. Clearly mark or designate the dredging area, the spoils disposal route and the transportation route; [1997, c. 164, §1 (NEW); 1997, c. 164, §2 (AFF).]

B. Publish in a newspaper of general circulation in the area adjacent to the route the approved transportation route of the dredge spoils; and [1997, c. 164, §1 (NEW); 1997, c. 164, §2 (AFF).]

C. Publish in a newspaper of general circulation in the area adjacent to the route a procedure that the applicant will use to respond to inquiries regarding the loss of fishing gear during the dredging operation. [1997, c. 164, §1 (NEW); 1997, c. 164, §2 (AFF).]

[2001, c. 248, §1 (AMD) .]

10. Significant groundwater well. If the proposed activity includes a significant groundwater well, the applicant must demonstrate that the activity will not have an undue unreasonable effect on waters of the State, as defined in 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 subsection, the department shall consider both the direct effects of the proposed withdrawal and its effects in combination with existing water withdrawals.

[2007, c. 399, §12 (NEW) .]

SECTION HISTORY
1987, c. 809, §2 (NEW). 1989, c. 430, §5 (AMD). 1989, c. 656, §3 (AMD). 1989, c. 890, §§A40,B71,72 (AMD). 1993, c. 296, §2 (AMD). 1997, c. 164, §1 (AMD). 1997, c. 164, §2 (AFF). 2001, c. 248, §1 (AMD). 2001, c. 618, §3 (AMD). 2003, c. 551, §8 (AMD). 2007, c. 353, §9 (AMD). 2007, c. 399, §12 (AMD). 2007, c. 661, Pt. B, §10 (AMD).

22 §2660-A. RESTRICTIONS ON TRANSPORT OF WATER

22 §2660-A. RESTRICTIONS ON TRANSPORT OF WATER

1. Prohibition. Except as otherwise provided in this section, no person may transport 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.

[1987, c. 531, §1 (NEW) .]

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

A. Any water utility as defined in Title 35-A; [1987, c. 745, §1 (NEW); 1987, c. 816, Pt. KK, §20 (NEW).]

B. Water transported for use in well drilling, construction activities, concrete mixing, swimming pool filling, servicing portable toilets, firefighting, hospital operations, aquaculture, agricultural applications or civil emergencies; [1987, c. 745, §1 (NEW); 1987, c. 816, Pt. KK, §20 (NEW).]

C. Water distilled as a by-product of a manufacturing process; [2007, c. 399, §4 (AMD).]

D. Water transported from a water source that, before July 1, 1987, was used to supply water for bottling and sale and that is used exclusively for bottling and is sold in its pure form or as a carbonated or flavored beverage product; and [2007, c. 399, §4 (AMD).]

E. Water withdrawn pursuant to a permit issued by the Department of Environmental Protection or the Maine Land Use Regulation Commission. [2007, c. 399, §4 (NEW).]

[2007, c. 399, §4 (AMD) .]

3. Appeal. The commissioner, 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:

A. Transport of the water will not constitute a threat to public health, safety or welfare; and [2007, c. 399, §5 (AMD).]

B. [2007, c. 399, §6 (RP).]

C. [2007, c. 399, §7 (RP).]

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. [2005, c. 452, Pt. A, §2 (AMD).]

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. Rules adopted pursuant to this subsection are major substantive rules as defined in Title 5, chapter 375, subchapter 2-A.

[2007, c. 399, §§5-7 (AMD) .]

3-A. Conditions of authorization. Notwithstanding Title 1, section 302, the exceptions authorized in subsection 2 and any authorization granted under subsection 3 shall be subject to future legislative limitations

of the right to transport water.

[1987, c. 745, §2 (NEW); 1987, c. 816, Pt. KK, §21 (NEW) .]

4. Emergencies. 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 commissioner within 3 days and the commissioner may determine when the emergency is over.

[1987, c. 531, §1 (NEW) .]

5. 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.

[1987, c. 531, §1 (NEW) .]

SECTION HISTORY
1987, c. 531, §1 (NEW). 1987, c. 745, §§1,2 (AMD). 1987, c. 816, §§KK20,KK21 (AMD). 1989, c. 502, §B22 (AMD). 1997, c. 587, §2 (AMD). 2003, c. 121, §1 (AMD). 2005, c. 452, §A2 (AMD). 2007, c. 399, §§4-7 (AMD).

38 §470. CLASSIFICATION OF GROUND WATER

38 §470. CLASSIFICATION OF GROUND WATER

All ground water shall be classified as not less than Class GW-A, except as otherwise provided in this section. The board may recommend to the Legislature the reclassification of any ground water, after careful consideration, public hearings and in consultation with other state agencies and the municipalities and industries involved, and where the board finds that it is in the best interests of the public that the waters be so classified. [1985, c. 698, §15 (NEW).]

SECTION HISTORY
1985, c. 698, §15 (NEW).

38 §404. GROUND WATER RIGHTS

38 §404. GROUND WATER RIGHTS

1. Definitions. As used in this section, unless the context indicates otherwise, the following terms have the following meanings.

A. "Beneficial domestic use" means any ground water used for household purposes essential to health and safety, whether provided by individual wells or through public supply systems. [1987, c. 491, §4 (NEW).]

B. "Ground water" means all the waters found beneath the surface of the earth. [1987, c. 491, §4 (NEW).]

C. "Preexisting use" means any use which was undertaken by a public water supplier, a landowner or lawful land occupant or a predecessor in interest of either of them, at any time during the period of 3 years prior to the commencement of the use which resulted in the interference. [1987, c. 491, §4 (NEW).]

[1987, c. 491, §4 (NEW) .]

2. Cause of action created. Subject to the limitations of subsection 3 and except as provided by Title 23, section 652, a person is liable for the withdrawal of ground water, including use of ground water in heat pump systems, when the withdrawal is in excess of beneficial domestic use for a single-family home and when the withdrawal causes interference with the preexisting beneficial domestic use of ground water by a landowner or lawful land occupant.

[1987, c. 491, §4 (NEW) .]

3. Limitations. The liability imposed under subsection 2 shall be in compensatory damages only, to be recovered in an action brought by the landowner or other lawful land occupant whose ground water use has been interfered with, against the person whose subsequent use has caused the interference.

A. The damages shall be limited to the following:

(1) All costs necessary to restore the landowner or lawful land occupant to a status which is reasonably equivalent in terms of quantity and quality of ground water, made available on a similarly accessible and economic basis;

(2) Compensatory damages for loss or damage to property, including, without limitation, the loss of habitability of residence, caused to the landowner or lawful land occupant by reason of the interference, prior to restoration of the status provided for in subparagraph (1); and

(3) Reasonable costs, including expert witness and attorney fees, incurred in initiating and prosecuting an action when necessary to secure a judgment granting the relief provided for under this chapter. [1987, c. 491, §4 (NEW).]

B. The rights afforded by this chapter shall be in addition to, and not in derogation of, any other rights, whether arising under statute or common law, which any person may have to seek redress against any other person for ground water interference or contamination. [1987, c. 491, §4 (NEW).]

[1987, c. 491, §4 (NEW) .]

SECTION HISTORY
1987, c. 491, §4 (NEW).

22 §2642. MUNICIPAL REGULATION AUTHORIZED; PENALTY

22 §2642. MUNICIPAL REGULATION AUTHORIZED; PENALTY

1. Municipal regulations authorized. The municipal officers of each municipality, after notice and public hearing, may adopt regulations governing the surface uses of sources of public water supply, portions thereof or land overlying ground water aquifers and their recharge areas used as sources of public water supply that are located within that municipality in order to protect the quality of such sources of public water supply and the health, safety and welfare of persons dependent upon such supplies.

At least 15 days prior to public hearings held under this section, notice of the hearing must be published in a newspaper of general circulation in the county in which the municipality is located and mailed by certified mail to each owner of land bordering the source of public water supply within that municipality. Regulations adopted pursuant to this section become void upon the expiration of one year from the date of the adoption unless sooner ratified by vote of the legislative body of the municipality.

[1995, c. 664, §1 (AMD) .]

2. Penalty. Whoever willfully violates any regulation established under the authority of this section must, upon conviction, be penalized in accordance with Title 30-A, section 4452.

[1991, c. 824, Pt. A, §41 (AMD) .]

SECTION HISTORY
1975, c. 751, §4 (NEW). 1979, c. 472, §5 (AMD). 1985, c. 479, §1 (AMD). 1987, c. 192, §2 (AMD). 1991, c. 824, §A41 (AMD). 1995, c. 664, §1 (AMD).

30-A §3001. ORDINANCE POWER

Any municipality, by the adoption, amendment or repeal of ordinances or bylaws, may exercise any power or function which the Legislature has power to confer upon it, which is not denied either expressly or by clear implication, and exercise any power or function granted to the municipality by the Constitution of Maine, general law or charter. [1987, c. 737, Pt. A, §2 (NEW); 1987, c. 737, Pt. C, §106 (NEW); 1989, c. 6, (AMD); 1989, c. 9, §2 (AMD); 1989, c. 104, Pt. C, §§8, 10 (AMD).]

1. Liberal construction. This section, being necessary for the welfare of the municipalities and their inhabitants, shall be liberally construed to effect its purposes.

[1987, c. 737, Pt. A, §2 (NEW); 1987, c. 737, Pt. C, §106 (NEW); 1989, c. 6, (AMD); 1989, c. 9, §2 (AMD); 1989, c. 104, Pt. C, §§8, 10 (AMD) .]

2. Presumption of authority. There is a rebuttable presumption that any ordinance enacted under this section is a valid exercise of a municipality's home rule authority.

[1987, c. 737, Pt. A, §2 (NEW); 1987, c. 737, Pt. C, §106 (NEW); 1989, c. 6, (AMD); 1989, c. 9, §2 (AMD); 1989, c. 104, Pt. C, §§8, 10 (AMD) .]

3. Standard of preemption. The Legislature shall not be held to have implicitly denied any power granted to municipalities under this section unless the municipal ordinance in question would frustrate the purpose of any state law.

[1987, c. 737, Pt. A, §2 (NEW); 1987, c. 737, Pt. C, §106 (NEW); 1989, c. 6, (AMD); 1989, c. 9, §2 (AMD); 1989, c. 104, Pt. C, §§8, 10 (AMD) .]

4. Penalties accrue to municipality. All penalties established by ordinance shall be recovered on complaint to the use of the municipality.

[1987, c. 737, Pt. A, §2 (NEW); 1987, c. 737, Pt. C, §106 (NEW); 1989, c. 6, (AMD); 1989, c. 9, §2 (AMD); 1989, c. 104, Pt. C, §§8, 10 (AMD) .]

SECTION HISTORY
1987, c. 737, §§A2,C106 (NEW). 1989, c. 6, (AMD). 1989, c. 9, §2 (AMD). 1989, c. 104, §§C8,10 (AMD).

38 §470-A. DEFINITIONS

As used in this article, unless the context otherwise indicates, the following terms have the following meanings. [2001, c. 619, §1 (NEW).]

1. Nonconsumptive use. "Nonconsumptive use" means any use of water that results in the water being discharged back into the same water source within 1/4 mile upstream or downstream from the point of withdrawal such that the difference between the volume withdrawn and the volume returned is no more than the threshold amount per day. This also includes withdrawals from groundwater that are discharged to a subsurface system or to a hydraulically connected surface water body such that no more than the threshold amount is consumed.

[2001, c. 619, §1 (NEW) .]

2. Water source. "Water source" means any river, stream or brook as defined in section 480-B, any lake or pond classified GPA pursuant to section 465-A or groundwater located anywhere in the State.

[2001, c. 619, §1 (NEW) .]

3. Water withdrawal; withdrawal of water. "Water withdrawal" or "withdrawal of water" means the removal, diversion or taking of water from a water source. All withdrawals of water from a particular water source that are made or controlled by a single person are considered to be a single withdrawal of water.

[2001, c. 619, §1 (NEW) .]

SECTION HISTORY
2001, c. 619, §1 (NEW).

38 §470-B. THRESHOLD VOLUMES FOR REPORTING

38 §470-B. THRESHOLD VOLUMES FOR REPORTING

Except as otherwise provided in this article, a person making a water withdrawal in excess of the threshold volumes established in this section shall file a water withdrawal report in accordance with section 470-D covering the 12 months ending on the previous September 30th. The threshold volumes for reporting are as follows. [2001, c. 619, §1 (NEW).]

1. Withdrawals from river, stream or brook. The threshold volume for reporting on withdrawals from a river, stream or brook or groundwater within 500 feet of a river, stream or brook is 20,000 gallons on any day or, if the watershed area at the point of withdrawal exceeds 75 square miles, a volume in gallons per day for any day that is:

A. One percent of the estimated low-flow volume of water to occur for 7 days once in 10 years based on historical flows for rivers, streams or brooks with an adequate record of gauge data; [2001, c. 619, §1 (NEW).]

B. One percent of the estimated low-flow volume of water to occur for 7 days once in 10 years based on an estimated low-flow value for a river, stream or brook below a dam where flow is limited by gate settings or leakage; or [2001, c. 619, §1 (NEW).]

C. If paragraphs A and B are not applicable, then a threshold volume calculated using the formula V=168.031 times A to 1.1 power, where V is the volume in gallons per day and A is the watershed area in square miles. [2001, c. 619, §1 (NEW).]

[2001, c. 619, §1 (NEW) .]

2. Withdrawals from GPA lake or pond or certain groundwater sources. The threshold volume for reporting on withdrawals from a Class GPA lake or pond or groundwater within 500 feet of the lake or pond is determined from the following table:

Lake area in acres	gallons/ week
< 10	30,000
10-30	100,000
31-100	300,000
101-300	1,000,000
301-1000	3,000,000
1001-3000	10,000,000
3001-10,000	30,000,000

[2001, c. 619, §1 (NEW) .]

3. Withdrawals from other groundwater sources. The threshold volume for reporting on withdrawals from groundwater greater than 500 feet from a river, stream, brook or GPA classified lake or pond is 50,000 gallons on any day, unless the person making the water withdrawal demonstrates to the department's satisfaction that the withdrawal will not impact any adjacent surface water body.

[2001, c. 619, §1 (NEW) .]

SECTION HISTORY
2001, c. 619, §1 (NEW). 2001, c. 619, §1 (NEW).

38 §470-C. EXEMPTIONS

The following are exempt from the reporting requirements of this article: [2001, c. 619, §1 (NEW).]

1. Nonconsumptive uses. Nonconsumptive uses. Dams are explicitly exempt as nonconsumptive uses, including hydropower dams licensed by the Federal Energy Regulatory Commission, storage dams and dams subject to a water level setting order pursuant to sections 840 to 843;

[2001, c. 619, §1 (NEW) .]

2. Household uses. A water withdrawal for ordinary household uses;

[2001, c. 619, §1 (NEW) .]

3. Public water systems. A public water system that is regulated by the Department of Health and Human Services pursuant to Title 22, chapter 601;

[2001, c. 619, §1 (NEW); 2003, c. 689, Pt. B, §6 (REV) .]

4. Subject to existing reporting requirements. Water withdrawals subject to water withdrawal reporting requirements established in any state permitting or licensing program prior to the effective date of this article, including, but not limited to, the site location of development laws, natural resources protection laws, Maine Land Use Regulation Commission laws and Maine waste discharge laws, provided that the water user files a notice of intent to be covered by this exemption on a form to be provided by the department;

[2001, c. 619, §1 (NEW) .]

5. Public emergencies. A water withdrawal from surface or groundwater for fire suppression or other public emergency purposes;

[2001, c. 619, §1 (NEW) .]

6. Commercial or industrial storage ponds. A water withdrawal from a storage pond or water supply system in existence prior to the effective date of this article provided that the withdrawal is for a commercial or industrial use, the water user has filed a water use plan as part of a state license application and the water user files a notice of intent to be covered by this exemption on a form to be provided by the department;

[2001, c. 619, §1 (NEW) .]

7. Off-stream storage ponds. A water withdrawal from an artificial storage pond that does not have a river, stream or brook as an inlet or outlet, constructed for the purpose of storing water for crop irrigation or other uses;

[2001, c. 619, §1 (NEW) .]

8. In-stream storage ponds. A water withdrawal from an artificial pond constructed in a stream channel provided that it is subject to a minimum-flow release requirement in an existing permit, and the water user files a notice of intent to be covered by this exemption on a form to be provided by the department; and

[2001, c. 619, §1 (NEW) .]

9. Duplication of reporting. A water withdrawal that is reported to any other state agency under any program requiring substantially similar data provided that the other agency has entered into a memorandum of

agreement with the department for the collection and sharing of that data.

[2001, c. 619, §1 (NEW) .]

SECTION HISTORY
2001, c. 619, §1 (NEW). 2003, c. 689, §B6 (REV).

38 §470-D. FILING OF REPORTS BY USERS; AGGREGATION OF DATA

38 §470-D. FILING OF REPORTS BY USERS; AGGREGATION OF DATA

Unless exempted under section 470-C, a person withdrawing more than the threshold volume of water established in this article must file an annual water withdrawal report on December 1, 2003 and on every December 1st thereafter as provided in this section. [2001, c. 619, §1 (NEW).]

Water withdrawal reports must be submitted to either the Commissioner of Environmental Protection, the Commissioner of Conservation, the Commissioner of Health and Human Services or the Commissioner of Agriculture, Food and Rural Resources in a form or manner prescribed by that commissioner. No later than January 1, 2003, those commissioners shall jointly publish a list indicating which classes of users are to report to which department. The form and manner of reporting must be determined by each commissioner, provided that the required information is collected from each user above the threshold and in a manner that allows that data to be combined with data collected by the other commissioners. The reports must include information on actual and anticipated water use, the identification of the water source, the location of the withdrawal including the distance of each groundwater withdrawal from the nearest surface water source, the volume of the withdrawals that might be reasonably anticipated under maximum high-demand conditions and the number of days those withdrawals may occur each month and the location and volume of each point of discharge. The reporting may allow volumes to be reported in ranges established by the commissioners and reported volumes may be calculated estimates of volumes. The board, the Department of Agriculture, Food and Rural Resources, the Department of Conservation and the Department of Health and Human Services may adopt routine technical rules as defined in Title 5, chapter 375, subchapter II-A as necessary to implement the reporting provisions of this article. [2001, c. 619, §1 (NEW); 2003, c. 689, Pt. B, §§6,7 (REV).]

Individual water withdrawal reports filed under this article are confidential and are not public records as defined in Title 1, section 402, subsection 3. [2001, c. 619, §1 (NEW).]

SECTION HISTORY
2001, c. 619, §1 (NEW). 2003, c. 689, §§B6,7 (REV).

38 §470-F. LOCAL WATER USE POLICIES ENCOURAGED

38 §470-F. LOCAL WATER USE POLICIES ENCOURAGED

The department shall encourage and cooperate with state, regional or municipal agencies, boards or organizations in the development and adoption of regional or local water use policies that protect the environment from excessive drawdown of water sources during low-flow periods. The department shall encourage those entities, in developing those policies, to review previously adopted low-flow policies, including any such policies adopted by the Aroostook Water and Soil Management Board established in Title 7, section 332. [2001, c. 616, §1 (NEW).]

SECTION HISTORY
2001, c. 619, §1 (NEW).

38 §470-F. LOCAL WATER USE POLICIES ENCOURAGED

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SECTION HISTORY
2001, c. 619, §1 (NEW).

38 §470-G. REPORTING AND USE OF COLLECTED DATA

38 §470-G. REPORTING AND USE OF COLLECTED DATA

The department shall report data collected pursuant to this article to the Water Resources Planning Committee established under Title 5, section 3331, subsection 8. The Water Resources Planning Committee shall use this data in the fulfillment of its duties under Title 5, section 3331, subsection 8. Reporting of the data must be summarized in a manner that does not allow for the identification of any individual user. [2007, c. 619, §6 (RPR).]

SECTION HISTORY
2001, c. 619, §1 (NEW). 2003, c. 689, §B7 (REV). 2007, c. 619, §6 (RPR).

38 §470-H. IN-STREAM FLOW AND WATER LEVEL REQUIREMENTS; RULES

38 §470-H. IN-STREAM FLOW AND WATER LEVEL REQUIREMENTS; RULES

The board shall adopt rules that establish water use requirements for maintaining in-stream flows and lake or pond water levels that are protective of aquatic life and other uses and that establish criteria for designating watersheds most at risk from cumulative water use. Requirements adopted under this section must be based on the natural variation of flows and water levels, allowing variances if use will still be protective of water quality within that classification. The board shall incorporate into the rules a mechanism to reconcile, to the extent feasible, the objective of protecting aquatic life and other uses as provided for in this section and the objective of allowing community water systems to use their existing water supplies to provide water service. Before the department issues a community water system withdrawal certificate, the certificate must be reviewed and approved by the drinking water program of the Department of Health and Human Services, with technical assistance from the Public Advocate on economic issues, to ensure that conditions contained in the certificate are economically affordable and technically feasible and will not jeopardize the safety, dependability or financial viability of the community water system. Except as necessary to meet the requirements in this section and rules adopted pursuant to this section, a community water system does not forfeit the rights, powers or responsibilities related to water use that are contained in its legislative charter or similar authority. Rules adopted under this section are state water use rules in accordance with the authority reserved to states under the federal Clean Water Act. A water user that fails to comply with the requirements of the rules adopted under this section is subject to penalties pursuant to section 349. For purposes of this section, "community water system" has the same meaning as in Title 22, section 2660-B, subsection 2. Rules adopted under this section are major substantive rules as defined in Title 5, chapter 375, subchapter 2-A. [2007, c. 235, §1 (AMD).]

SECTION HISTORY
2005, c. 330, §12 (NEW). 2007, c. 235, §1 (AMD).

Maine's Groundwater Resources
Is There Enough ?

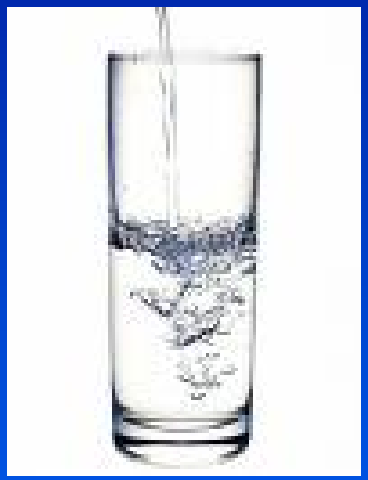
Presentation to the Citizen Trade Policy Commission

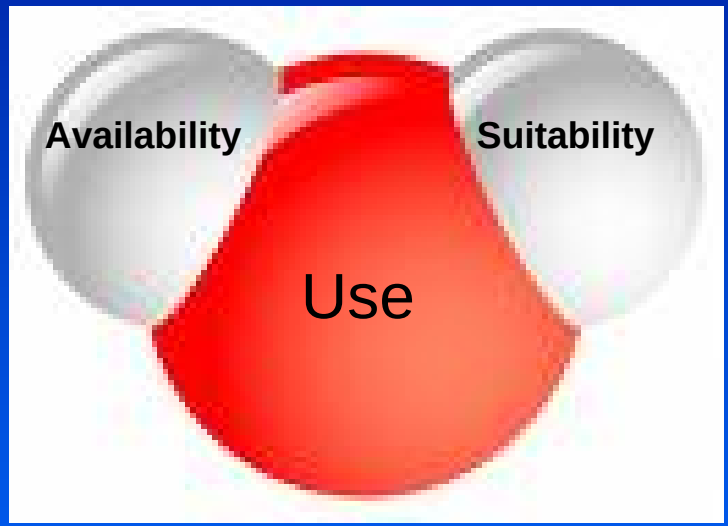
and Water Resources Planning Committee

Carol White, C. A. White & Associates, LLC

September 11, 2009

How do we know if there is enough ?



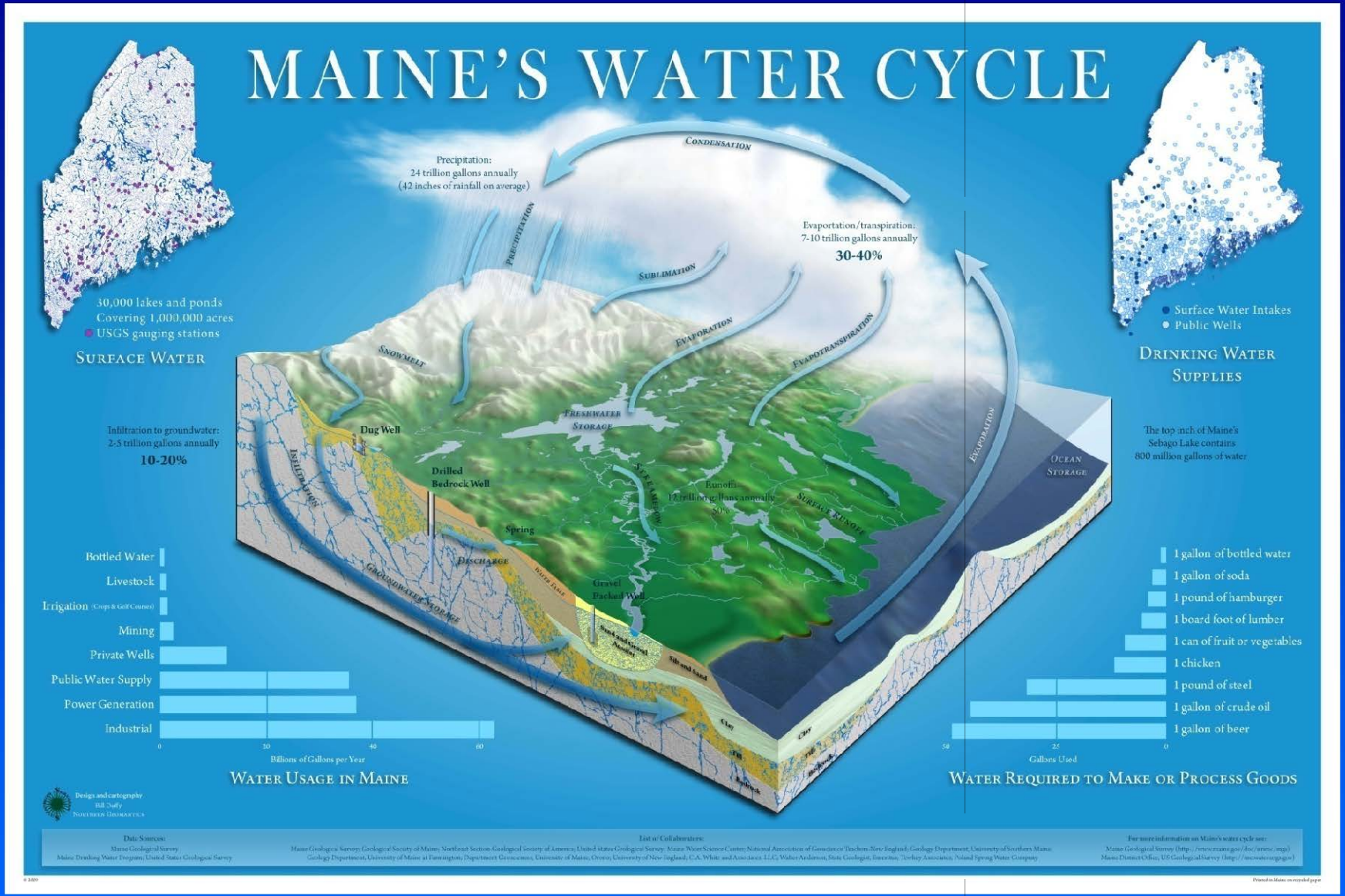


Sustainability is a balance between meeting the needs of the present without compromising the needs of the future

What do we mean by Groundwater Sustainability?

…….the development and use of groundwater in a manner that can be maintained for indefinite time without causing unacceptable environmental, economic or social consequences.

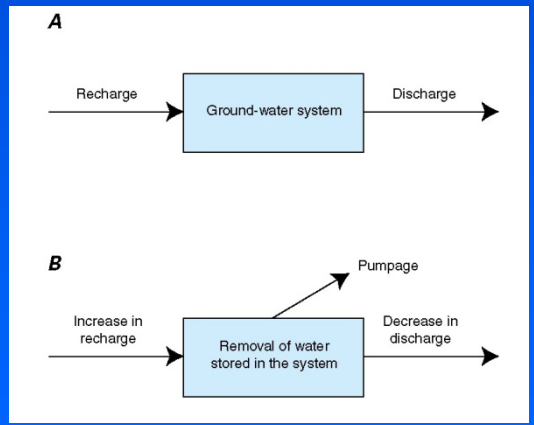
-USGS Circular 1186



Maine's groundwater is a rapidly renewable resource

solar & wind | water | trees | petroleum | minerals

There is no "extra" water in an aquifer. Water captured by pumping will result in some combination of loss of discharge to surface water, an increase in recharge from the surface, or a loss in storage.



USGS Circular 1186 graphics

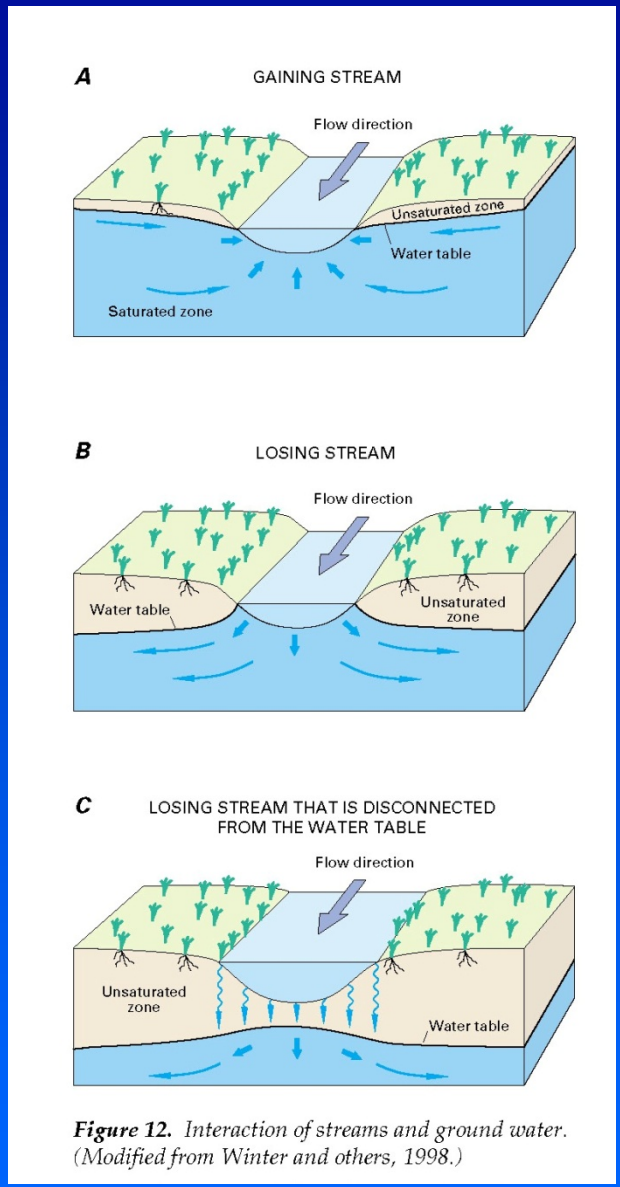
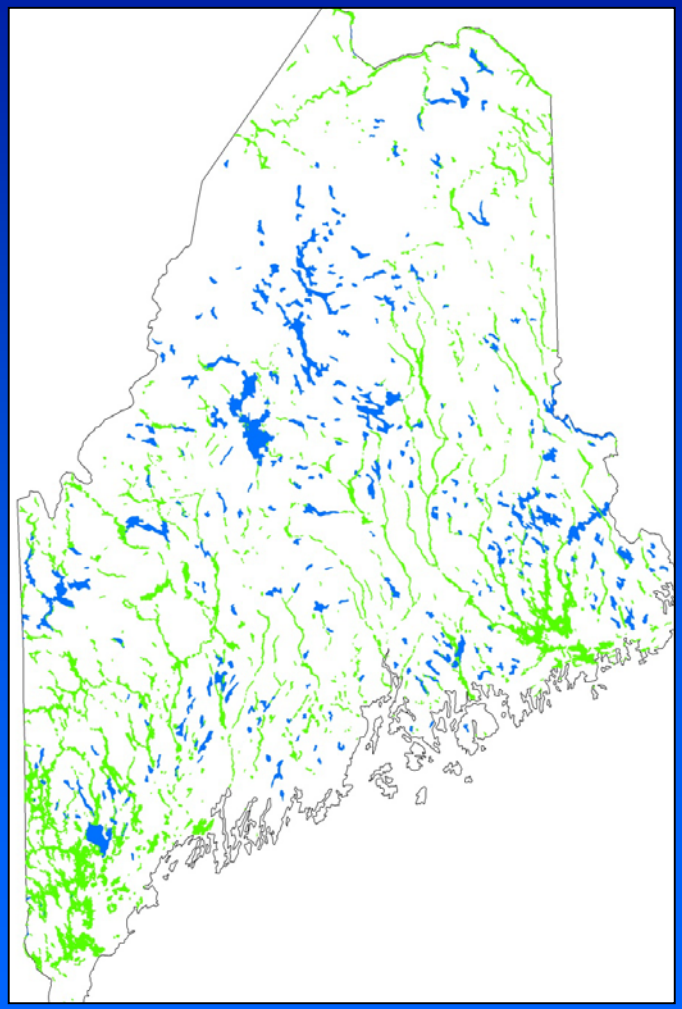


Figure 12. *Interaction of streams and ground water. (Modified from Winter and others, 1998.)*

Where do we find groundwater in Maine ?

Sand & Gravel Aquifers



Glacial deposits

Approximately 1300 square miles in Maine

Recharge 240 billion gallons of water annually

Typical yields 10-1000's gpm

Vulnerable to contamination

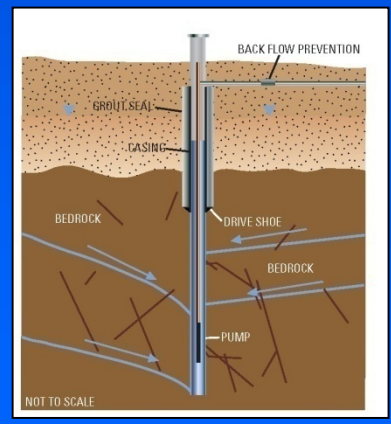
Bedrock Aquifers

Water from fractures in the rock

Typically lower yields 1-10 gpm

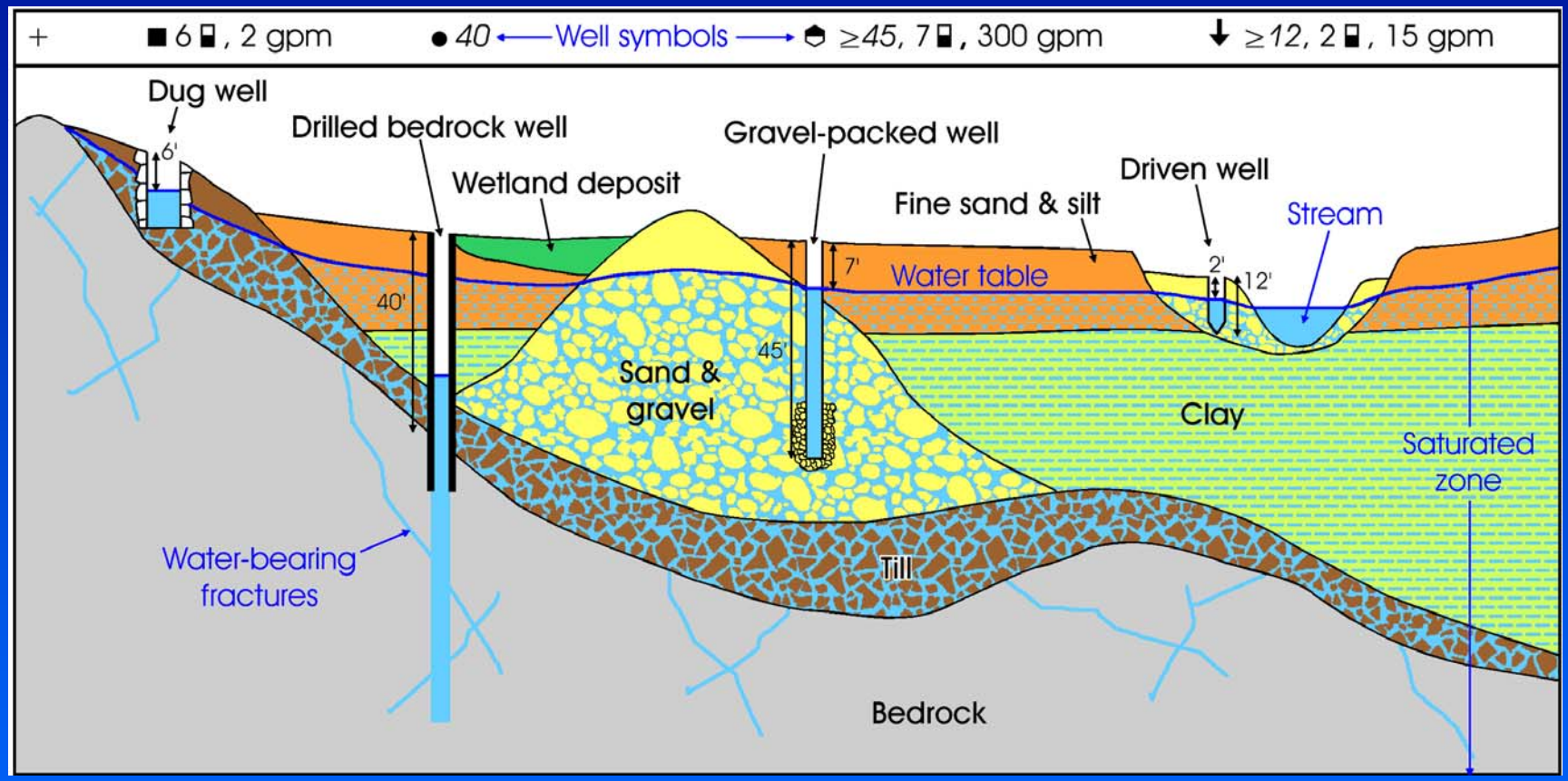
Individual private wells

More likely to have naturally-occurring water quality issues



Source: An Overview of water Resources in Maine, Maine Geological Survey,2005

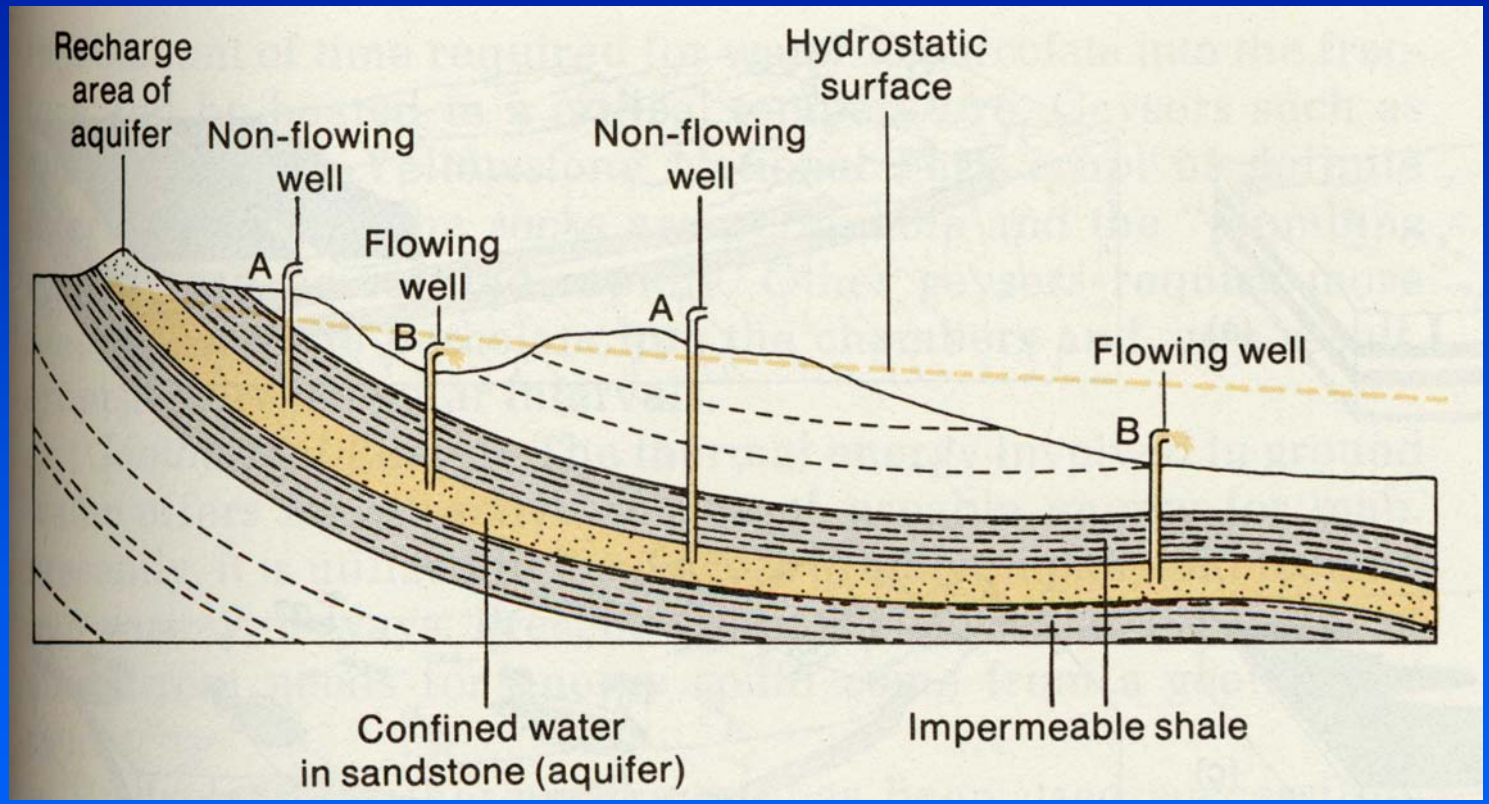
Maine Aquifers



1 – 5 miles

Maine Geological Survey graphic

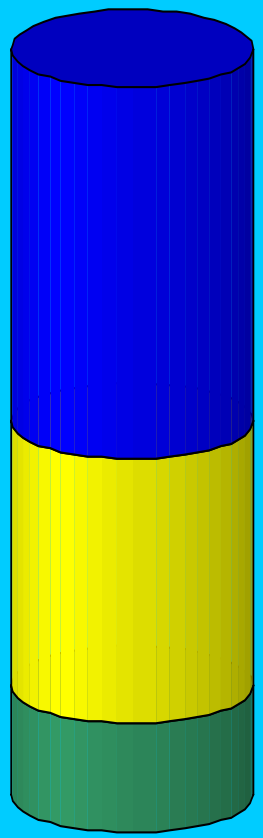
Typical Western United States aquifer



Graphic: Hamblin, 1975, Burgess Press

500 – 1,000 miles

How much groundwater do we have in Maine ?



42 Inches of precipitation annually equals 24 Trillion gallons per year

50 % Runoff
12 trillion gallons

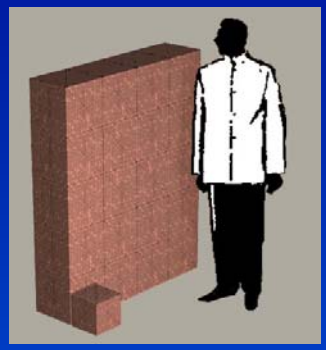
30-40% Evaporation /Transpiration
7 – 10 trillion gallons

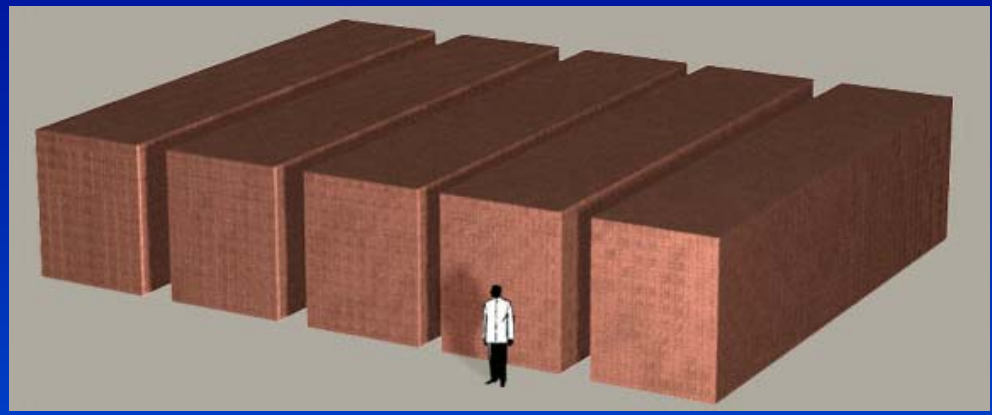
10-20% Infiltration
2-5 trillion gallons

And in storage in Maine's aquifers …….

So how much is a trillion anyway ?

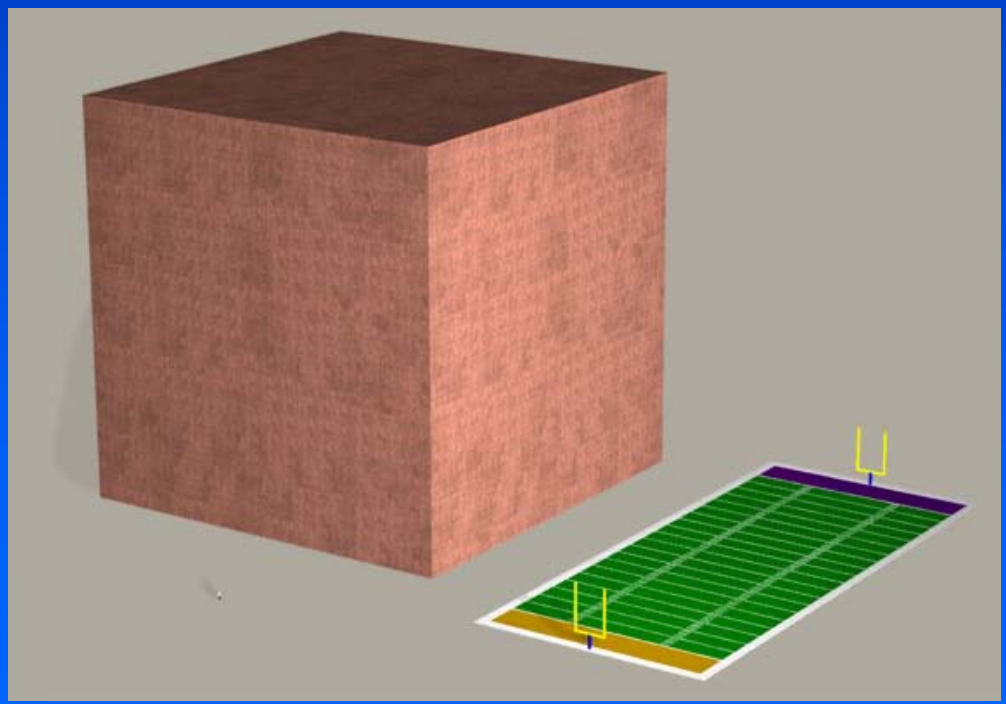
One Million





One Billion

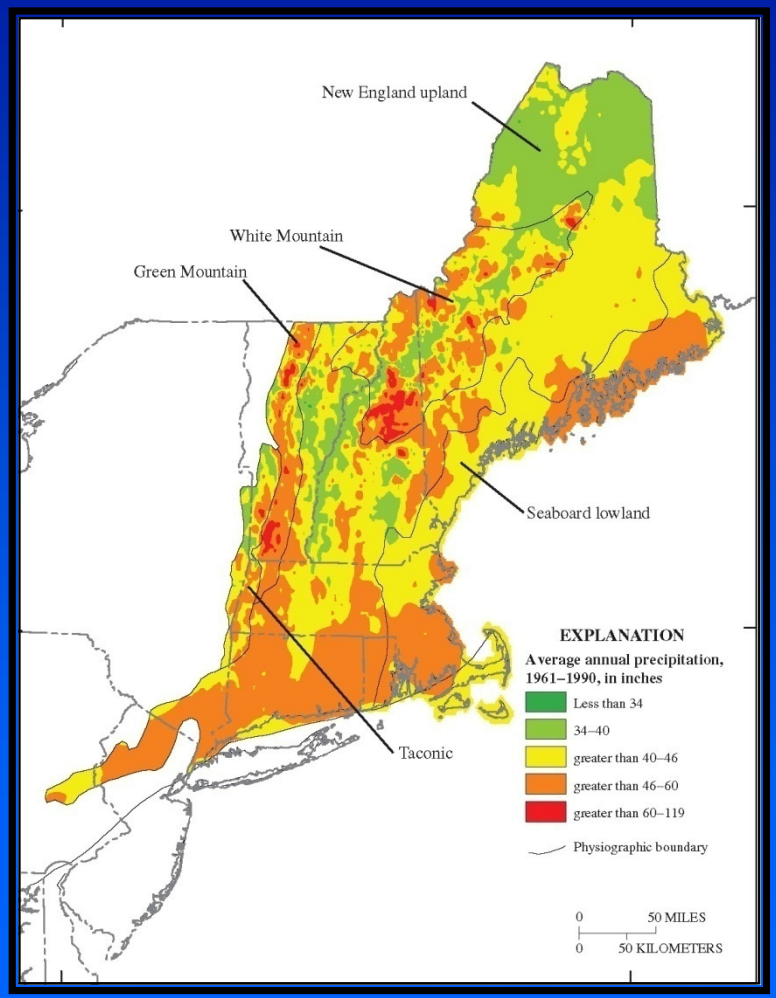
One Trillion



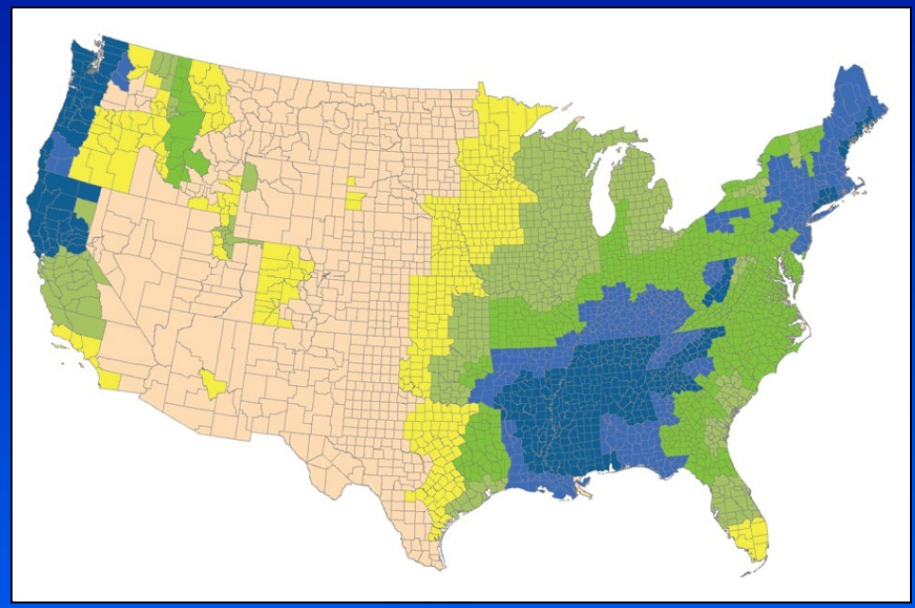
more on the numbers

- The US receives about 1 trillion gallons of recharge per day
- An estimated 200 - 400 billion stars in the Milky Way
- U.S. population is about 303 million
- Maine's population is about 1.3 million
- *What could you do with a trillion gallons of water ?*
  - shower non-stop for 300,000 years
  - supply 3,000,000 people with a lifetime of drinking water
  - produce 20,000,000,000 -- that's billions - bottles of beer

Groundwater availability



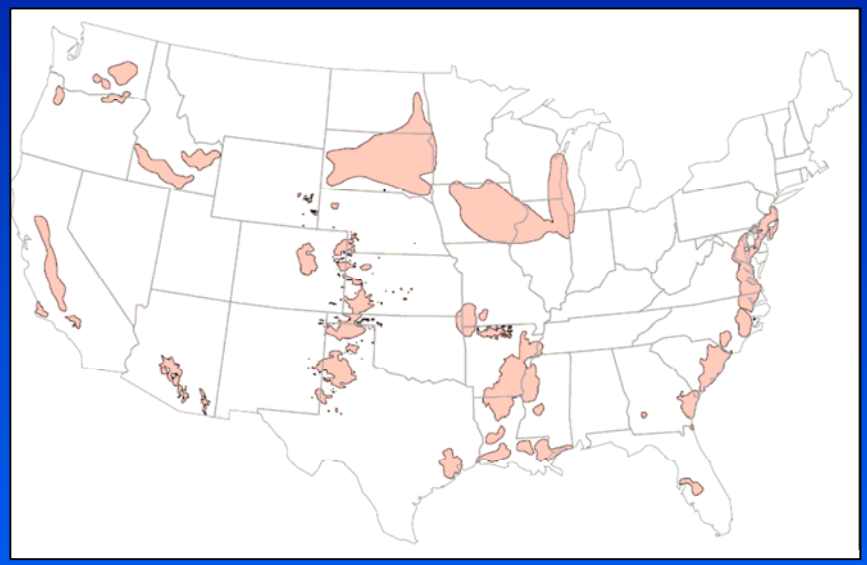
Average Annual Precipitation



Available Precipitation

Source: USGS Circular 1186

Groundwater Depletion



Areas of the US where the water table has dropped over 40 feet

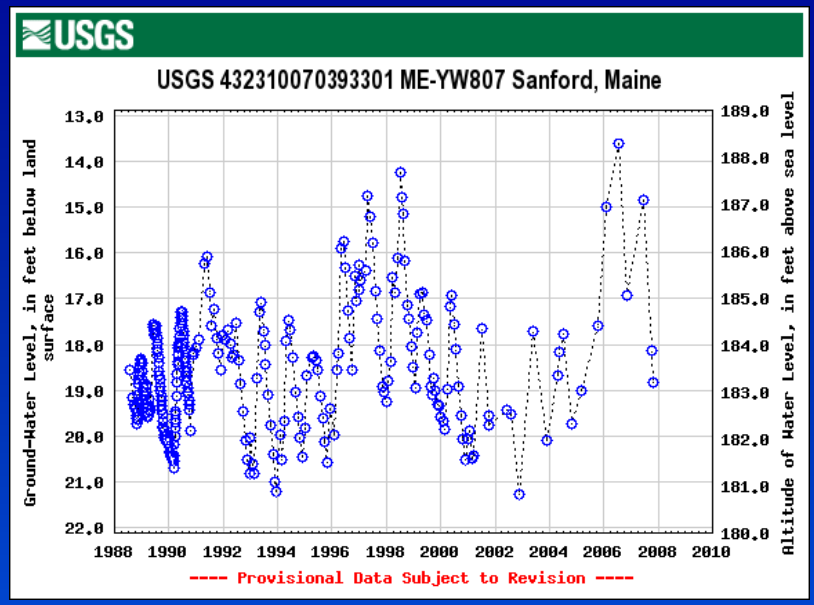
This earth fissure formed on Rogers Lake at Edwards Air Force Base, California, in January 1991, and forced the closure of one of the space shuttle's alternative runways. The fissure has been attributed to land subsidence related to ground-water pumping in the Antelope Valley area (Galloway and others, 2003).

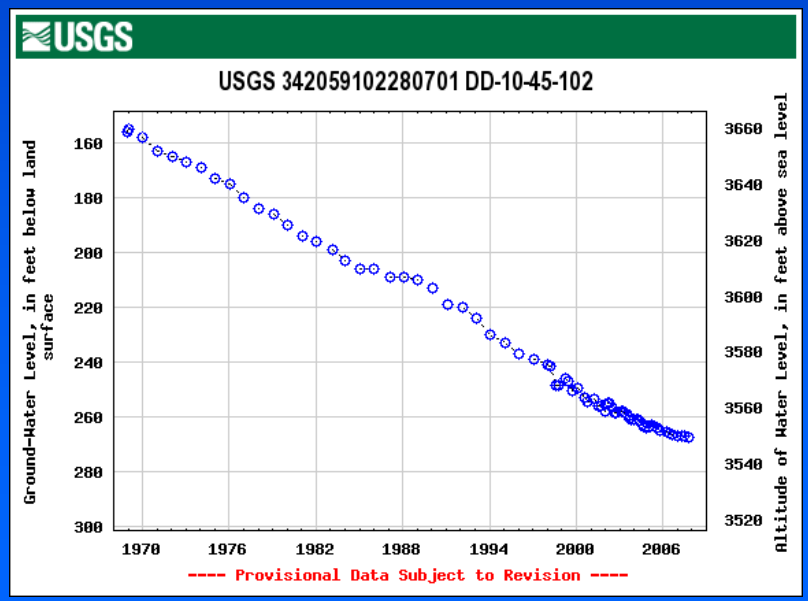
Source: USGS Circular 1186

Long-term water levels for a well in southern Maine (top) and a well in west Texas (bottom).

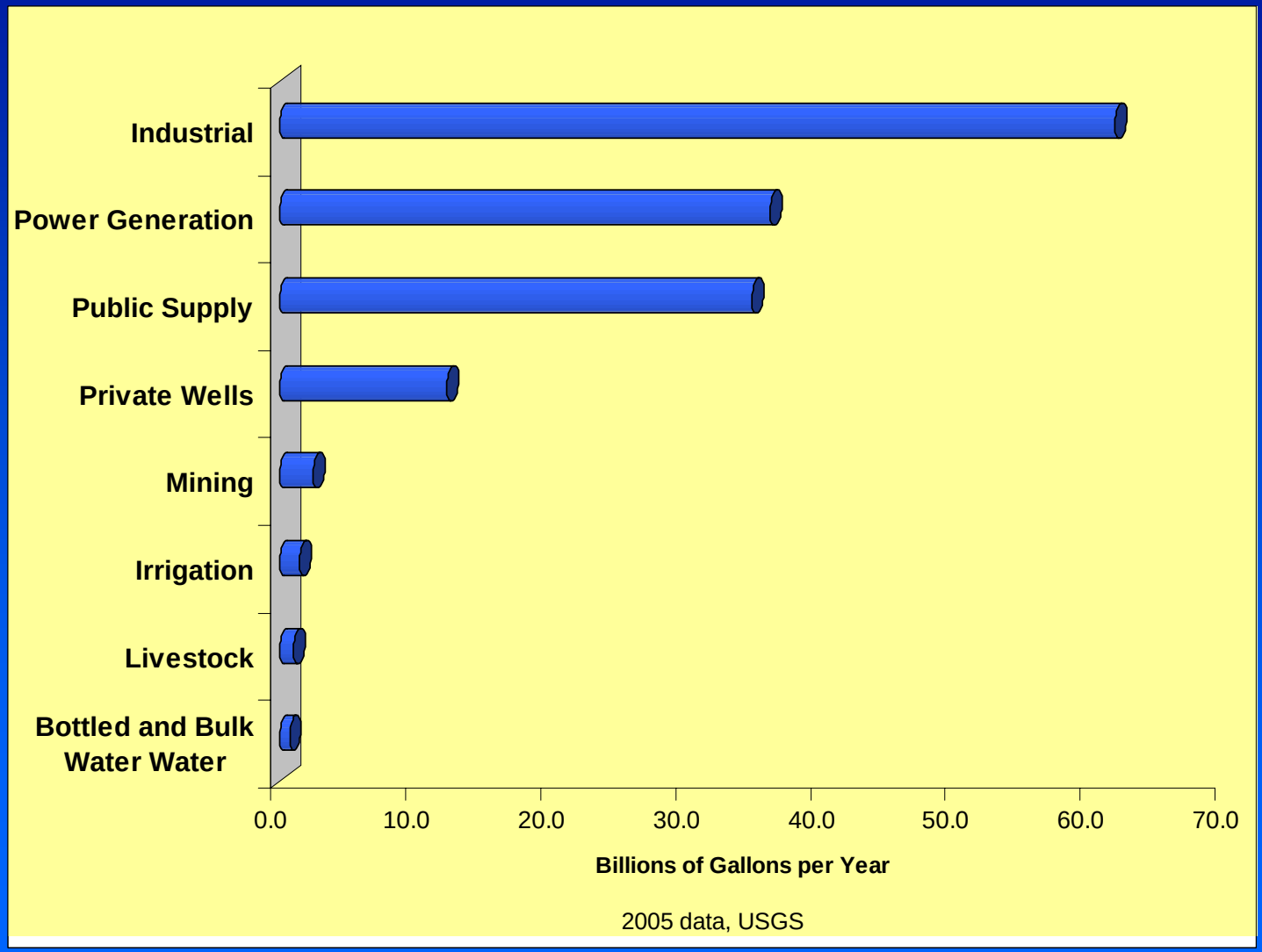
The Maine well shows a variation in water level of ~ 8 feet and the graph is an example of sustainable groundwater use.

The Texas well shows a recession of more than 100 feet and is an example of unsustainable groundwater use – "groundwater mining".

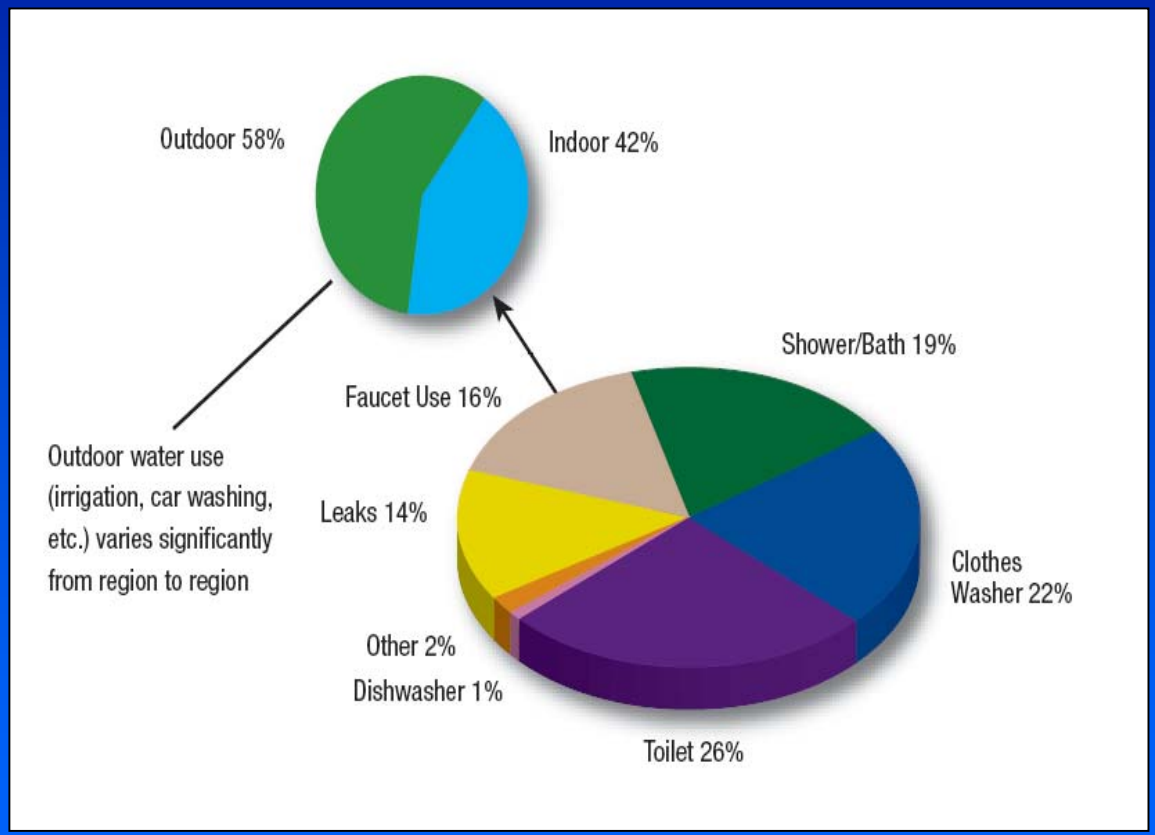




How do we use water in Maine



Household water use

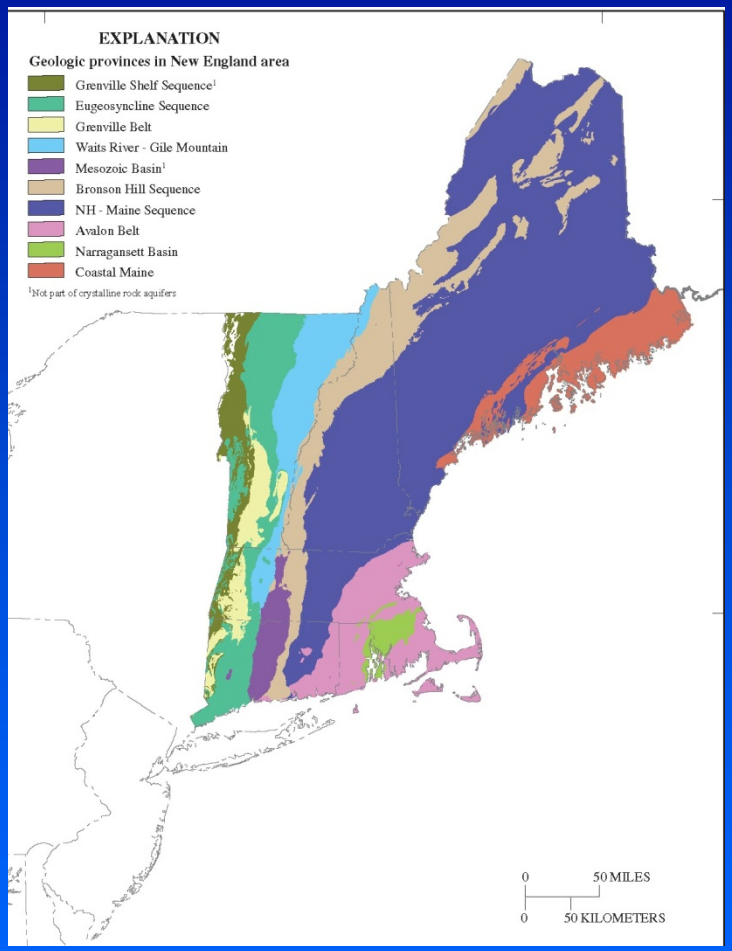


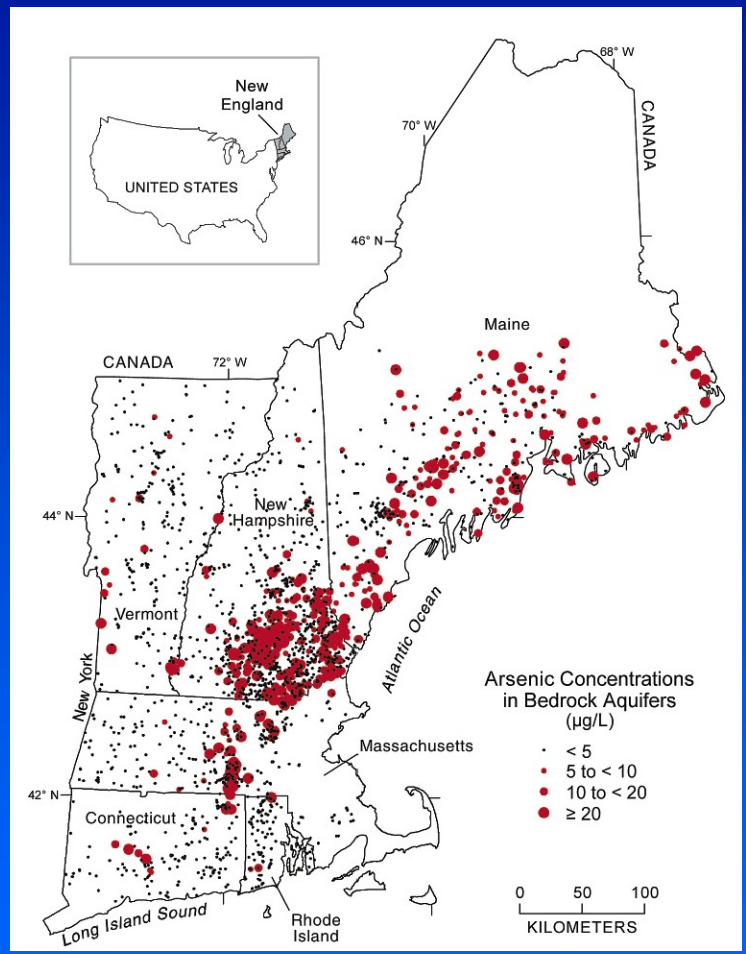
The average American uses about 100 gallons per day

Not all groundwater is the same

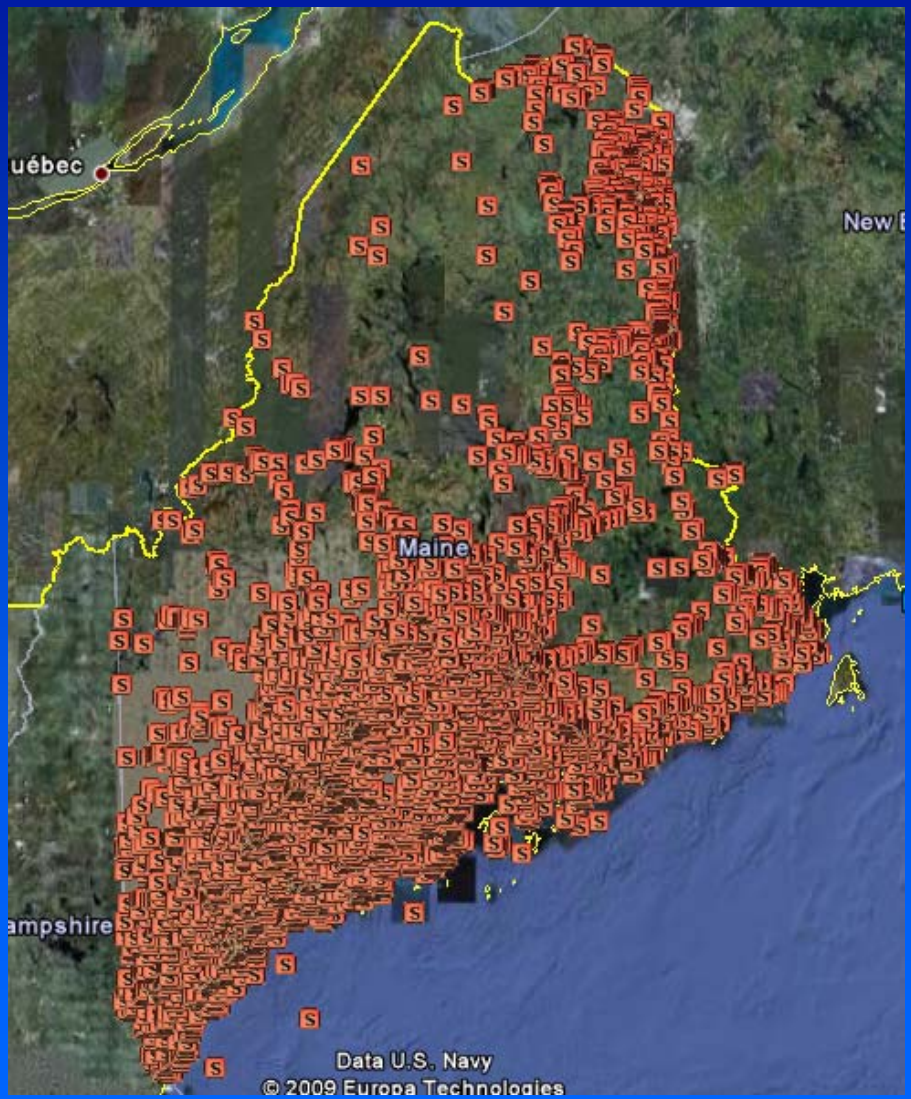
Groundwater quality affects suitability

Naturally-occurring contaminants





.....the other kind



Petroleum Spill Sites in Maine

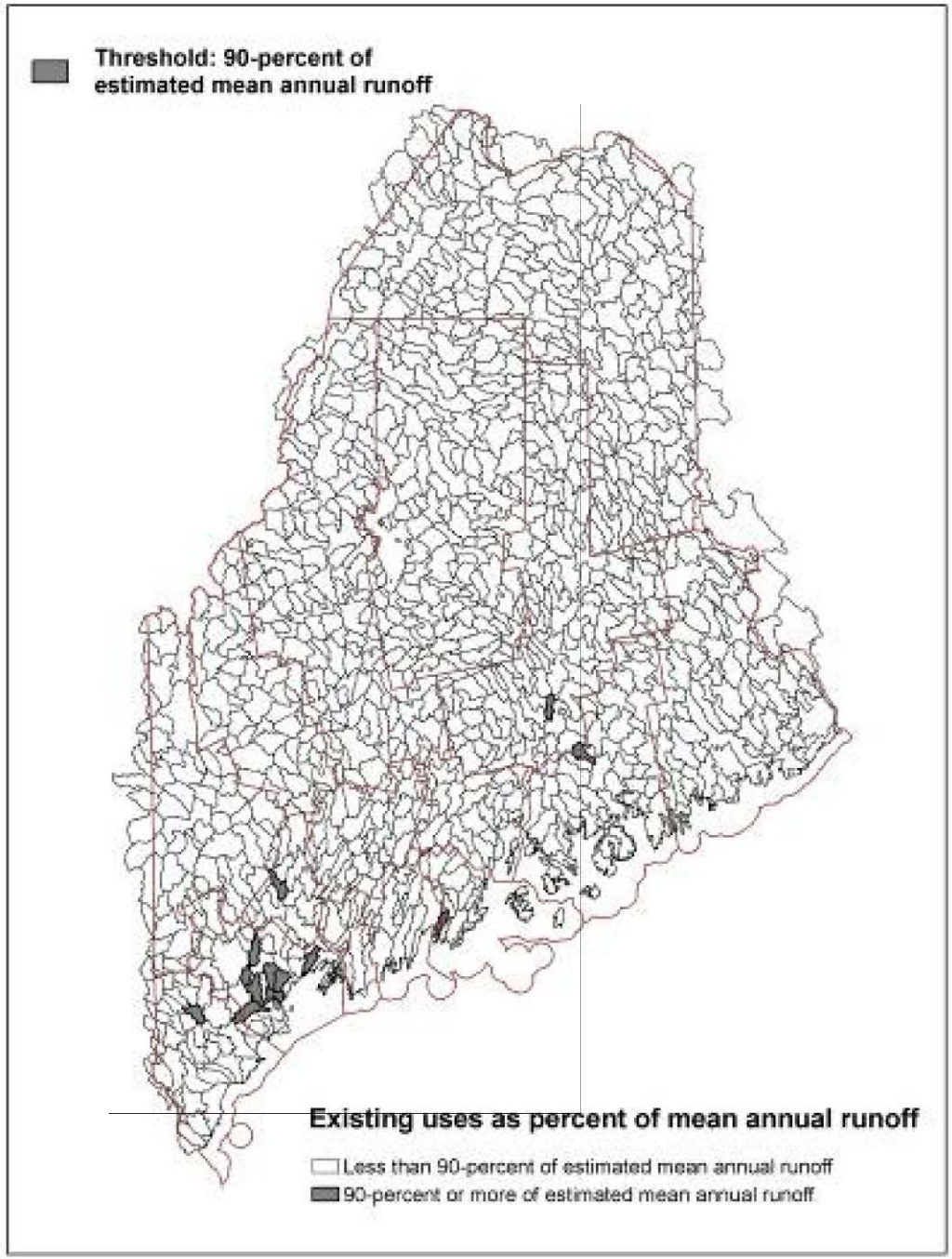
source: Maine Department of Environmental Protection
www.maine.gov/dep/gis/datamaps/

Where are we having problems now ?

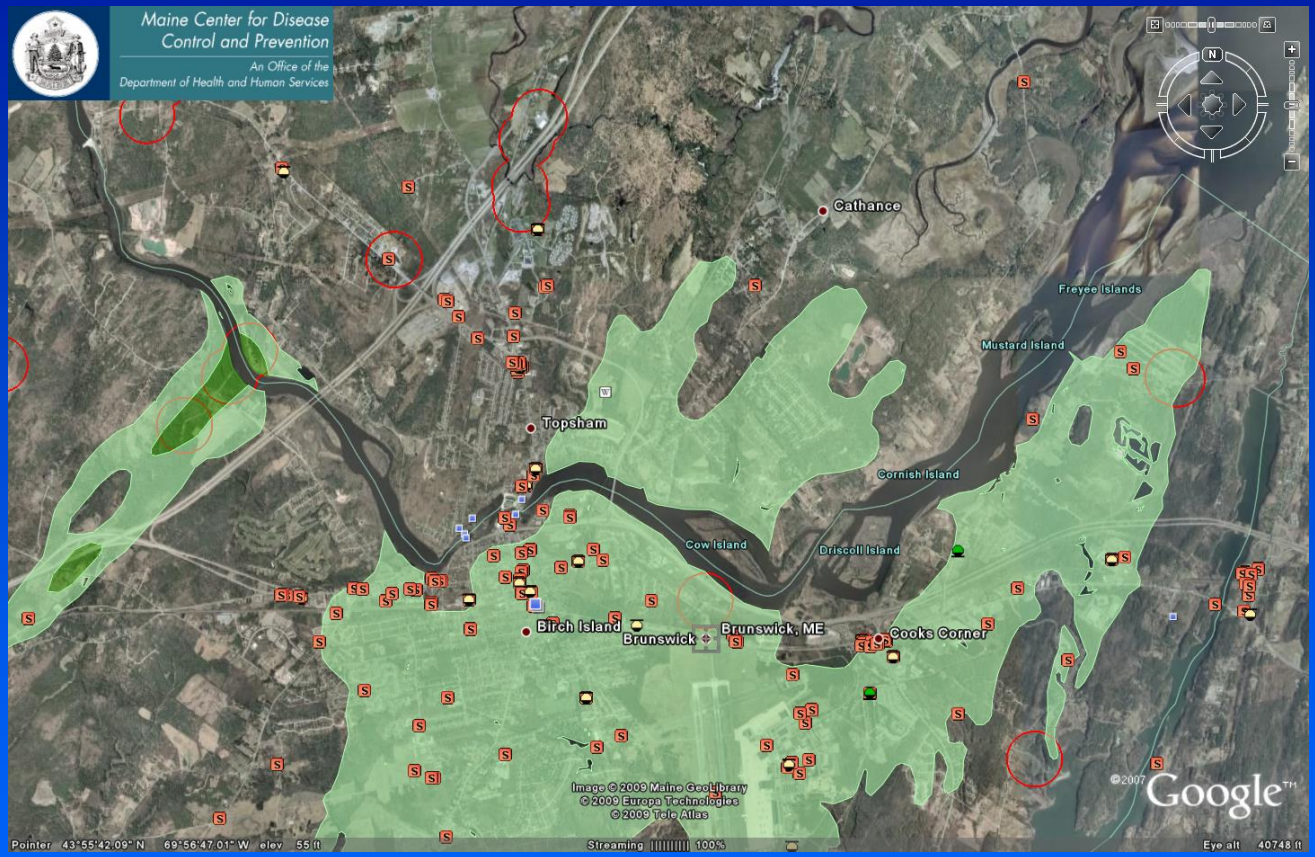
Maine Water Resources Planning Committee

Does Maine have a statewide problem with water resources, or are there select areas where we should focus additional effort?

Areas with *potential* quantity concerns

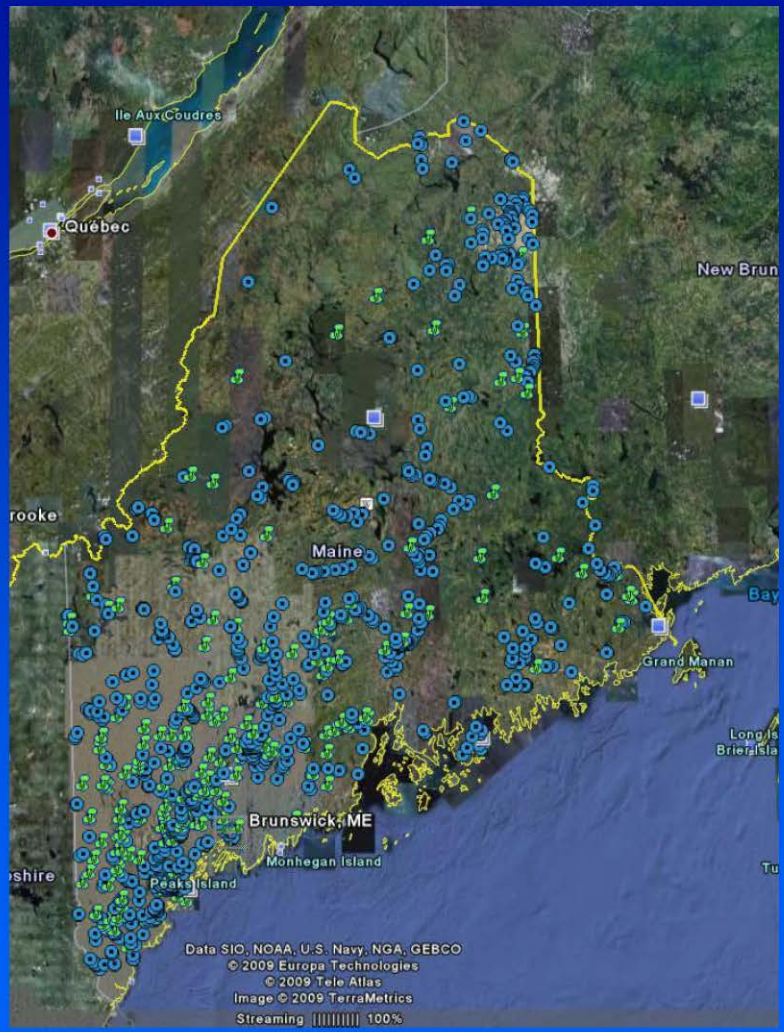


Potential and known quality concerns



source: Maine Department of Environmental Protection
www.maine.gov/dep/gis/datamaps/

Maine has abundant, good quality water.

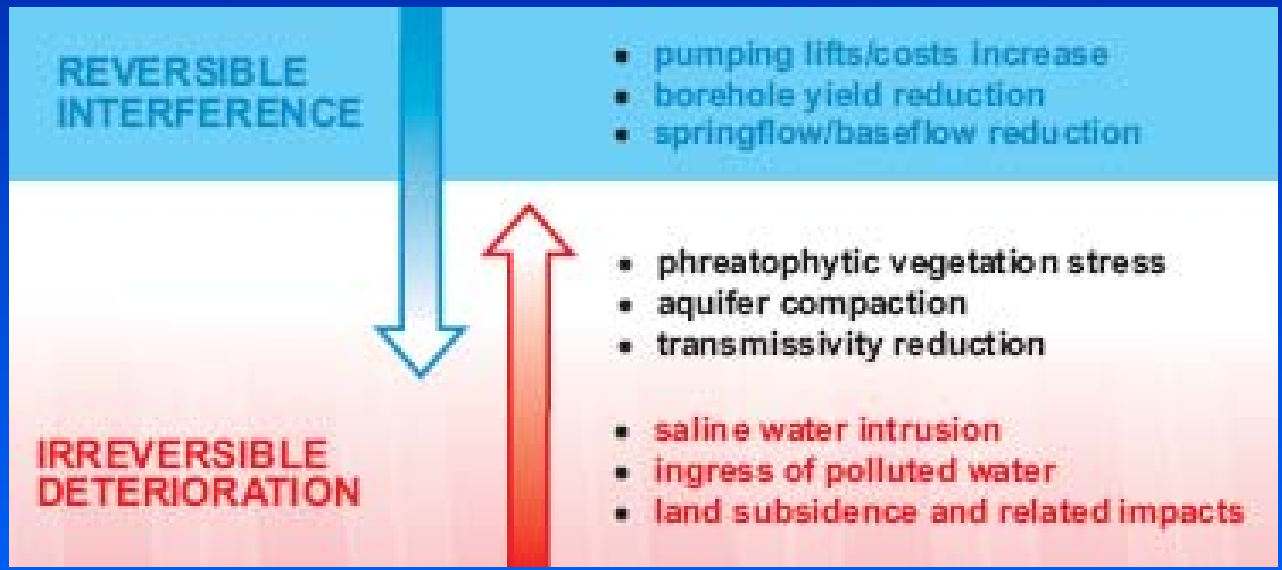


source: Maine Department of Environmental Protection
www.maine.gov/dep/gis/datamaps/

Effective groundwater management policies are based on Science which requires *accurate & adequate data.*

Stream biomonitoring and wetlands monitoring sites in Maine

…… and the system is dynamic



References

Alley, Franke, Reilly, ***Sustainability of Groundwater Resources,*** USGS Circular 1186, 1999

Marvinney, R, 2004, ***An Overview of Water Resources in Maine,*** Maine Geological Survey, Department of Conservation, Augusta, Maine

Websites

Maine Geological Survey
www.maine.gov/doc/nrimc/mgs

Maine Department of Environmental Protection
www.maine.gov/dep/gis/datamaps

USGS Groundwater information
www.water.usgs.gov.ogw