

# VERMONT'S NEW GROUNDWATER LAW

## INTRODUCTION

One of the most significant accomplishments of the 1985 General Assembly was the reformation of Vermont's groundwater<sup>1</sup> law. Governed in the past by the archaic judicial doctrine of absolute ownership,<sup>2</sup> the state's underground water resources are now subject to the more modern correlative rights<sup>3</sup> doctrine. In an effort to affirmatively protect those resources, the legislature also enacted a sophisticated program of state regulation. Following a summary of the discarded absolute ownership rule, this note will analyze the new groundwater law: House Bill 130,<sup>4</sup> which adopts a new standard of liability for private actions, and Senate Bill 11,<sup>5</sup> which mandates state protection for underground water supplies.

### I. ABSOLUTE OWNERSHIP

The doctrine of absolute ownership is a rule of judicial abstention from the adjudication of disputes over groundwater. Its common law adoption was a pragmatic response to a lack of information on the sources and movement of groundwater. Without this information, necessary to determine causation, the courts were un-

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1. Groundwater is defined in H.130 as "water below the land surface." Readers unfamiliar with the properties of groundwater or the various rules governing its use are referred to RESTATEMENT (SECOND) OF TORTS 254, Introductory Note on the Nature of Ground Water and Theories Concerning Its Use (1982).

2. The absolute ownership rule has been defined as "a rule of capture . . . based on the premise that groundwater is the absolute property of the owner of the freehold, like the rocks, soil, and minerals that compose it, so that he is free to withdraw it at will . . . regardless of the effect upon his neighbors." RESTATEMENT (SECOND) OF TORTS 254, 255, Introductory Note on the Nature of Ground Water and Theories Concerning Its Use (1982).

3. The correlative rights rule has been described as "similar to that applicable to surface streams. The rights of all owners of overlying lands [are] regarded as equal, with the result that if there [is] not enough for all the water [is] apportioned among them in a manner similar to the rationing of stream water among riparians." *Id.* For an informed discussion of the various ground water rules, see generally *State v. Michels Pipeline Constr., Inc.*, 63 Wis. 2d 278, 217 N.W.2d 339 (1974).

4. H.130 is entitled "An Act Relating to Adopting a Correlative Rights Standard for any Allocation of Liability for Uses of Groundwater in the State," and is codified as VT. STAT. ANN. tit. 10, § 1410 (Supp. 1985).

5. S.11 is entitled "An Act Relating to Water Resources Board Jurisdiction Over Groundwater and to its Ability to Reclassify Streams Subject to Conditions," and is codified as VT. STAT. ANN. tit. 10, §§ 1390-94 (Supp. 1985). S.11 adds Chapter 48 to Title 10; this new chapter encompasses S.11, H.130, and VT. STAT. ANN. tit. 10, chapter 151 (licensing of water well drillers).

able to impose sanctions on those whose diversions of water appeared to result in the drying up of nearby wells and springs. Judges, therefore, utilized the concept that a landowner's title extended from heaven to hell and recognized ownership of as much groundwater as one could capture.

The Vermont Supreme Court adopted the absolute ownership rule in 1855, in *Chatfield v. Wilson*.<sup>6</sup> The defendant in that case had dug a ditch on his land to prevent the seepage of water to the plaintiff's land, for the sole purpose of depriving the plaintiff of water for his farm and household.<sup>7</sup> The court held that water in the earth was not legally distinct from the earth itself, and was thus subject to the absolute dominion of the landowner;<sup>8</sup> the defendant's motive was deemed irrelevant, since the diversion of water was itself lawful.<sup>9</sup>

The holding of *Chatfield* was reaffirmed in the 1973 case of *Drinkwine v. State*.<sup>10</sup> The Drinkwines' spring had supplied the family farm with water for over fifty years, but dried up after the state began using new wells at the nearby Salisbury Fish Hatchery.<sup>11</sup> Petitions to enjoin the heavy pumping at the hatchery were twice dismissed for failure to state a cause of action, and both dismissals were affirmed on the authority of *Chatfield*.<sup>12</sup> Although scientific knowledge about the dynamics of groundwater had advanced tremendously in the 118 years between *Chatfield* and *Drinkwine*, the court may have believed that legislative action in this area was preferable to judicial fiat.

## II. HOUSE BILL 130: CORRELATIVE RIGHTS

The General Assembly's somewhat belated response to *Drinkwine*, House Bill 130, begins by formally recognizing the scientific advances in groundwater hydrology.<sup>13</sup> The mobility of groundwater

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6. 28 Vt. 49 (1855).

7. *Id.* at 50-51.

8. *Id.* at 55.

9. *Id.* at 58.

10. 131 Vt. 127, 300 A.2d 616 (1973). The Drinkwines' first suit was also rejected by the Vermont Supreme Court in 1970. 129 Vt. 152, 274 A.2d 484 (1970). See Comment, *Groundwater Rights in Vermont: Drinkwine v. State*, 4 VT. L. REV. 189 (1979).

11. 131 Vt. 127, 129, 300 A.2d 616, 617 (1973).

12. 131 Vt. 127, 130, 300 A.2d 616, 618 (1973); 129 Vt. 152, 153, 274 A.2d 484, (1970).

13. VT. STAT. ANN. tit. 10, § 1410(a)(1)-(3) (Supp. 1985).

and its interrelationship with surface water are noted,<sup>14</sup> and the right of all persons to the beneficial use of groundwater is explicitly recognized.<sup>15</sup> The absolute ownership rule is abolished.<sup>16</sup>

The statute creates a private cause of action, in tort or equity or both, for "unreasonable harm caused by . . . withdrawing, diverting or altering the character or quality of groundwater."<sup>17</sup> The key determination in suits under this law is that of "unreasonableness" of the harm; once unreasonable harm is found, liability follows. A list of nine factors is provided to aid this determination.<sup>18</sup> This list generally reflects the factors enumerated in the Restatement (Second) of Torts.<sup>19</sup> Taken together, these factors require a balancing of the values of each use and consideration of possible adjustments that would allow the conflicting uses to coexist.<sup>20</sup> Courts are also directed to consider impacts on water quality,<sup>21</sup> and the protection of existing investments.<sup>22</sup>

While not prioritizing various uses of underground water, House Bill 130 does confer a special status on agriculture. The general standard of liability is strict: liability depends solely on the reasonableness of the harm complained of.<sup>23</sup> In the case of pollution by agricultural activities,<sup>24</sup> however, a court must also consider the reasonableness of the defendant's conduct. Persons altering the "quality or character" of groundwater incident to agricultural pursuits are held liable only if "that alteration was either negligent, reckless or intentional."<sup>25</sup> This reasonable care standard for farmers applies only to pollution-related harms; however, it is also apparent in the list of factors used to determine the reasonableness of any harm, including withdrawal or diversion. A comparison of the last two listed factors illustrates the legislature's solicitude for agriculture.

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14. *Id.*

15. VT. STAT. ANN. tit. 10, § 1410(a)(4).

16. *Id.* at § 1410(a)(5).

17. *Id.* at § 1410(c).

18. *Id.* at § 1410(e)(1)-(9).

19. RESTATEMENT (SECOND) OF TORTS § 850A (1982).

20. VT. STAT. ANN. tit. 10, § 1410(e)(1)-(9).

21. *Id.* at § 1410(e)(6).

22. *Id.* at § 1410(e)(7).

23. *Id.* at § 1410(a)(4),(c); compare § 1410(d).

24. "Agricultural activities," as used in this note, should be read broadly to include "agricultural or silvicultural activities, or other activities regulated by the commissioner of the department of agriculture . . ." *Id.* at § 1410(d).

25. *Id.* at § 1410(d).

(e) Factors to be considered in determining the unreasonableness of any harm . . . shall include . . . :

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(8) the burden and fairness of requiring a person who causes harm to bear the loss; and

(9) the burden and fairness of requiring a person to bear the loss, who causes harm in the conduct of reasonable agricultural activities, utilizing good agricultural practices conducted in conformity with federal, state and local laws and regulations.<sup>26</sup>

Providing a judicial remedy for the loss of usable groundwater is clearly an important step in protecting individuals. Protection of the resource as a whole requires more affirmative state action, particularly for the prevention of harm, since polluted groundwater may be impossible to purify.<sup>27</sup> The General Assembly has addressed this need by mandating a regulatory effort.

### III. SENATE BILL 11: GROUNDWATER PROTECTION

Vermont's declared policy of maintaining high-quality groundwater is to be realized by "limiting human activities that present unreasonable risks"; this is balanced, however, with "the need to maintain and promote a healthy and prosperous agricultural community."<sup>28</sup> The secretary of the Agency of Environmental Conservation is directed to develop a comprehensive groundwater management program, based on continuing studies and the mapping and classification of aquifers.<sup>29</sup> He or she is also directed to cooperate with other government agencies in the compilation of data and development of programs,<sup>30</sup> and to assist municipal and regional efforts directed at the protection of groundwater.<sup>31</sup> Advice on programs and implementation is to come from a coordinating committee composed of representatives from the departments of agriculture, forests, parks and recreation, health, and other agencies and the private sector, as the secretary sees fit.<sup>32</sup>

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26. *Id.* at § 1410(e)(8)-(9).

27. *See, e.g.*, VERMONT AGENCY OF ENVIRONMENTAL CONSERVATION, AIR & LAND, Summer 1984, at 7.

28. VT. STAT. ANN. tit. 10, § 1390 (Supp. 1985).

29. *Id.* at § 1392(a)(1)-(9).

30. *Id.* at § 1392(a)(3).

31. *Id.* at § 1392(a)(5).

32. *Id.* at § 1392(c).

The primary components of the comprehensive management program are: (1) classification of aquifers, based on their character and exposure to risk,<sup>33</sup> and (2) technical criteria and standards, relating to classification and to activities that pose risks to groundwater and are therefore to be regulated or precluded.<sup>34</sup> The secretary is given separate lists of considerations for classification decisions and for standard setting.<sup>35</sup>

Four classes of groundwater are set out in the statute.<sup>36</sup> Class I and II aquifers are characterized by excellent quality, suitable for public water supply. Class II is distinguished by present exposure to activities that pose a risk to its usability; class I is applicable only to groundwater that is not exposed to any risk. Class III waters are suitable for individual domestic supply, irrigation, agriculture, and general industrial and commercial use. Class IV applies to nonpotable groundwater, which may be suitable for some agricultural, industrial, or commercial uses.

The policy of the state is to permanently protect class I groundwater;<sup>37</sup> such protection requires the exclusion of risk-posing activities from the vicinity of these aquifers.<sup>38</sup> The secretary is empowered to prescribe rules for the management and exclusion of risky activities.<sup>39</sup> This power is being interpreted as overriding local zoning.<sup>40</sup> However, the secretary's exercise of this power is limited, since the legislature must approve any class I designations affecting privately owned land.<sup>41</sup> An estimated forty to fifty Vermont communities may lie over potentially class I waters.<sup>42</sup>

As in the correlative rights bill, specific provisions in Senate Bill 11 mark the legislature's concern for agriculture. The secretary must obtain the consent of the commissioner of agriculture before promulgating any standards that restrict activities in that commis-

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33. *Id.* at § 1392(a)(6); § 1394(a).

34. *Id.* at § 1392(a)(6); § 1394(h).

35. *Id.* at § 1394(e)(1)-(6), (h)(1)-(9).

36. *Id.* at § 1394(a).

37. *Id.* at § 1394(f).

38. *Id.*

39. VT. STAT. ANN. tit. 10, § 1394(f),(h).

40. Interview with David Butterfield, Chief of Groundwater Management, Agency of Environmental Conservation (Aug. 7, 1985).

41. VT. STAT. ANN. tit. 10, § 1394(f).

42. Remarks of David Butterfield, Chief of Groundwater Management, Agency of Environmental Conservation, at Vermont League of Cities and Towns Conference on New Environmental Laws (Aug. 7, 1985).

sioner's jurisdiction.<sup>43</sup> Standards restricting forestry management may be issued only after consultation with the commissioner of forests, parks, and recreation.<sup>44</sup>

Finally, Senate Bill 11 repeals sections 1278 and 1279 of title 10; these were very brief and general policy statements adopted in 1973.<sup>45</sup> These sections provided the legal authority for the new program's predecessor—the Aquifer Protection Program.<sup>46</sup> This service, offered to Vermont towns, consisted of mapping aquifer recharge areas connected to public water supplies and helping develop strategies for the protection of these areas.<sup>47</sup>

### CONCLUSION

The new laws summarized in this note provide a dose of rationality in an area that sorely needed it. Enough is known about groundwater hydrology to permit judicial redress for loss of water supplies, whether the loss is caused by pollution or excessive withdrawals. The *Chatfield* doctrine of absolute ownership was a feeble relic undeserving of the new life breathed into it by *Drinkwine*; the legislature's delay in bringing Vermont up to date in this area is justifiable only by the quality of its final product. As clean groundwater becomes increasingly scarce, and disputes over it increasingly common, the codification of explicit criteria for deciding those disputes will be increasingly appreciated.

The enactment of an affirmative regulatory scheme was also badly needed; once again the creation appears to justify its own lengthy gestation. The subterranean water resources of this and other states are threatened by a plethora of activities and practices. Industrial waste handling, hazardous material storage, municipal land filling, agricultural chemical use—the list goes on. The insidious and often irreversible nature of groundwater pollution demands state regulation of risk-bearing activities in vulnerable areas.

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43. VT. STAT. ANN. tit. 10, § 1394(i).

44. *Id.*

45. VT. STAT. ANN. tit. 10, §§ 1278-79 (repealed May 1985).

46. Butterfield, *supra* note 42.

47. VERMONT DEPARTMENTS OF WATER RESOURCES AND ENVIRONMENTAL ENGINEERING, HEALTH, AND AGRICULTURE, AN OUNCE OF PREVENTION (1984). This excellent booklet describes groundwater conditions in Vermont and ways towns can protect their water supplies, and lists sources of help for various water-related problems. It is available from the publishing agencies.

Senate Bill 11 at least provides the tools needed to begin this vital protective task. The Agency of Environmental Conservation now has the authority and the unequivocal mandate to (1) gather the necessary information and (2) act on it. The legislation is laudably complete in its enunciation of values to be weighed and goals to be served in implementing the regulatory program; only time and the appropriation process can judge the true depth of commitment to this important undertaking.

A final note about agriculture: both of the new statutes display a marked solicitude for farming. In light of the state's economic dependence on agricultural and silvicultural activities, this solicitude is justifiable as well as politically expedient. It cannot, however, be taken for granted if the purposes of these laws are to be served. The agricultural community is no less responsible for, or dependent upon, clean water supplies than any other segment of the economy. A well polluted by pesticides is as irretrievably lost as one polluted by other hazardous chemicals; affirmative action is needed to prevent either loss.

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