

**Legislative Study Committee of
Groundwater Regulation and Funding
Preliminary Report**

Pursuant to Sec. 3 of No. 144 of the Acts of the 2005 Adj. Sess. (2006)

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Legislative Council
State House
115 State Street—Drawer 33
Montpelier, VT 05633-5301
(802) 828-2231
www.leg.state.vt.us

Principal author:
Michael J. O'Grady, Legislative Council

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**Legislative Study Committee of Groundwater Regulation and Funding
Committee Members**

The secretary of natural resources or designeeScot Kline, General Counsel ANR

The state geologist or designee.....Larry Becker, State Geologist

The secretary of agriculture, food and markets or designee.....Jeff Comstock, Agency of Agriculture

One member each from the:

House committees on agriculture.....Rep. Bill Johnson

House committee on fish, wildlife and water resources.....Rep. David Deen

Senate committee on agriculture.....Sen. Sara Kittell

Senate committee on natural resources and energy.....Sen. Diane Snelling

A representative appointed by the governor from:

The business community.....William Driscoll, Associated Industries of Vermont

Municipalities.....Keith Arlund, Brandon Town Manager

A local environmental organization.....Thomas Sweet, Waterbury Conservation Commission

A regional or statewide environmental organization.....Jon Groveman, Vermont Natural
Resources Council

The general public.....Frank Heald, Ludlow Town Manager

Two representatives of the agricultural community:

Paul Saenger,.....Green Hill Farm

Mitch Montagne.....St. Albans

**Legislative Study Committee of Groundwater Regulation and Funding
Committee Charge**

Sec. 3 of No. 144 of the Acts of the 2005 Adj. Sess. (2006)

(a) A committee is established to examine potential regulatory programs to protect the groundwater resources of the state. The committee shall issue a preliminary report of its findings to the house committee on fish, wildlife and water resources, the senate committee on natural resources and energy, and the house and senate committees on agriculture by January 15, 2007. The committee shall issue a final report of its findings to the house committee on fish, wildlife and water resources, the senate committee on natural resources and energy, and the house and senate committees on agriculture by January 15, 2008. The final report shall include:

(1) A recommendation from the committee as to whether the groundwater resources of the state of Vermont should be declared a public trust resource.

(2) An analysis of the regulatory implications of declaring the groundwater of the state to be a public trust resource if the committee so recommends under subdivision (1) of this subsection.

(3) A proposed schedule for the groundwater mapping of the state by the agency of natural resources.

(4) A proposed appropriation to the agency of natural resources for the groundwater mapping of the state, including any proposed new or existing revenue sources that may be used by the agency to aid in funding the groundwater mapping.

(5) Proposed legislation for the regulation of groundwater withdrawal in the state, addressing:

(A) The type of groundwater withdrawals subject to regulation;

(B) A threshold amount or amounts of groundwater withdrawal subject to regulation;

(C) Groundwater users exempt from regulation;

(D) The regulation of interbasin groundwater transfers;

(E) The fee to be charged for regulated groundwater withdrawal;

(F) Monitoring, reporting, or recordkeeping requirements for regulated groundwater withdrawal; and

(G) Any other issues deemed relevant by the committee.

I. Overview

No. 144 of the Acts of the 2005 Adjourned Session (2006) of the Vermont General Assembly established an interim groundwater withdrawal permit program for new commercial or industrial groundwater withdrawals that exceed 50,000 gallons of groundwater a day. In addition to creating the interim permit program, Act 144 established a Legislative Study Committee of Groundwater Regulation and Funding to examine potential regulatory programs to protect the groundwater resources of Vermont. Act 144 provides the Groundwater Study Committee two years in which to meet its statutory charge. Prior to the Committee's final report in 2008, Act 144 requires the Groundwater Study Committee to issue this preliminary report regarding the establishment, actions, and findings of the Committee to date.

II. Committee Action

A. September Hearing

The Committee convened on September 18. At that meeting, Senator Diane Snelling and Representative David Deen were elected Co-Chairs. The witnesses at the September meeting focused on providing the committee members with an overview of Act 144, the state's current groundwater law and regulations, and the science of groundwater and groundwater withdrawal.

Michael O'Grady of Legislative Council provided the Committee with an overview of Act 144 and other statutory requirements addressing groundwater withdrawal. Jay Rutherford, the Director of the Water Supply Division at the Department of Environmental Conservation, testified regarding the statutory and regulatory requirements for groundwater withdrawal and the department's execution of those requirements through a regulatory program. In addition, Laurence Becker, the State Geologist and a member of the Groundwater Study Committee, testified regarding the groundwater resources and geology of Vermont and the science of groundwater and groundwater withdrawal. He summarized groundwater mapping activities in surrounding states and presented examples from a pilot mapping program in Vermont.

The Committee concluded the September meeting with a discussion of priorities and a selection of issues on which to focus committee action and future committee hearings. Although some members of the Committee argued that the first priority should be the issue of groundwater

mapping and funding, the Committee elected to first address whether the groundwater resources of the state should be declared a public trust resource and to educate themselves on that issue..

B. October Hearing

On October 10, the Committee held a second hearing focusing on the public trust doctrine and its potential application through legislation to the groundwater resources of the state. The common law public trust doctrine is an ancient doctrine,¹ under which the state, as trustee, holds navigable waters and the land submerged beneath navigable waters in trust for the benefit of the people. The traditional purpose of the public trust doctrine is to preserve for the public access to navigable waters for navigation, commerce, and fishing free from the obstruction or interference of private parties.²

Under the common law, the public trust doctrine usually³ is not extended to groundwater resources. However, several states have declared groundwater to be a public trust resource through legislation. Act 144 requires the Groundwater Study Committee to analyze and recommend whether the groundwater resources of Vermont should be declared a public trust resource and, if the Committee makes such a recommendation, what the regulatory implication of the declaration would be. Due to the legal complexity of such an analysis and recommendation, the Committee solicited and received the legal opinion of several witnesses regarding the declaration of groundwater as a public trust resource.

After Michael O'Grady of Legislative Council provided a short overview of the public trust doctrine and the state's groundwater resources, the Committee heard from two experts in environmental law: Patrick Parenteau, a law professor at Vermont Law School, and Joseph Dellapenna, a law professor at the Villanova University School of Law. Professor Parenteau testified in support of declaring groundwater to be a public trust resource. Professor Parenteau acknowledged that the state, under its police power, has the authority to protect groundwater and to adopt a groundwater withdrawal scheme without declaring groundwater to be a public trust resource. However, he argued that such a declaration would serve as recognition of the stewardship obligation of the Vermont General Assembly and would impose an affirmative duty on the state to manage the groundwater resources in a well-informed and judicious manner.

¹ State v. Central Vermont Railway, Inc., 153 Vt. 337, 342 (Vt. 1989). See also Zachary C. Kleinsasser, 32 B.C. Env'tl. Aff. L. Rev. 421 (2005).

² Id.

³ But see, National Audubon Society v. Superior Court of Alpine County, 33 Cal. 3d 419, 658 P.2d 709 (Cal. 1983).

Professor Parenteau also testified that declaration of groundwater as a public trust resource would not, in itself, result in a taking of private property, but the law as applied could result in a taking. To avoid a takings claim, the General Assembly could enact several legislative mechanisms, such as grandfathering existing groundwater rights, in order to avoid takings claims.

Professor Dellapenna agreed with Professor Parenteau in the conclusion that under its police power, the General Assembly has the authority to regulate groundwater withdrawal. In contrast to Professor Parenteau, Professor Dellapenna argued that declaring groundwater to be a public trust resource does not significantly add to the protection of groundwater. He argued that the public trust doctrine only requires the state to comply with a regulatory regime, and that a state legislature can easily avoid the restrictions of the public trust doctrine by declaring a use of the resource as a public use.⁴ Professor Dellapenna concluded by stating that if Vermont declared groundwater to be a public trust resource, such a declaration would not result in a successful takings claim.

Matt Chapman, an attorney for the Vermont Agency of Natural Resources, testified after Professor Dellapenna. His testimony focused on existing statutory and regulatory groundwater authority that the committee had yet to discuss. Mr. Chapman also testified that declaring groundwater to be a public trust resource may limit future uses of the resource due to a need to show a public benefit of a proposed use.

Mark Sciarrotta, an assistant attorney general, testified after Matt Chapman. He testified that declaring groundwater to be a public trust resource likely would not result in a taking of property. He also testified that such a declaration would not alter existing property rights of Vermont landowners. Bill McCann, an ex-New Hampshire state legislator, testified last regarding how New Hampshire declared groundwater a public trust resource. Specifically, he discussed the process that led to the legislation and some issues that the state had in implementing the legislation due to the drafting of the legislation and conflicting interpretations of that language.

⁴ Professor Dellapenna provided the example of the New Jersey legislature authorizing the construction of a football stadium on the public trust meadowlands of northern New Jersey because the stadium provided the public use of recreation.

C. November Hearing

The Committee held its last meeting on November 16. The testimony at the November hearing focused on the use of groundwater in Vermont and specific impacts on groundwater users. The hearing began with further testimony regarding groundwater science. Jeff Nelson, the principal hydrogeologist for Pioneer Environmental, testified first regarding groundwater use and groundwater recharge in Vermont. Professor Matt Davis, a hydrogeologist from the University of New Hampshire, testified next regarding groundwater science and impacts on groundwater due to over use and environmental conditions. Similarly, Kim Greenwood, the staff scientist for the Vermont Natural Resources Council, testified regarding groundwater science and the potential impacts that over use and environmental conditions could have on the state's groundwater resources.

The Committee next heard testimony from several citizens regarding their interest in protecting groundwater or impacts on their groundwater use. The Reverend Sister Laurian Seeber of the Episcopal Church of Vermont discussed a resolution passed by the church regarding the need to protect the state's groundwater resources. Darlene Paola, a member of a citizen's group from Stratton, testified regarding concerns that development on Stratton Mountain could affect surrounding groundwater resources and use. Hugo Leipman, of the citizens group Water First, testified regarding impacts to groundwater resources in the state, with an emphasis on impacts to Blaisdell Brook in Randolph allegedly caused by withdrawal by the water bottler ClearSource. Dave Tracyzk, a representative of a citizen's group from Williamstown, testified regarding groundwater contamination in the town.

The committee also heard testimony from municipal groundwater users at the November hearing. Ray Counter of the Brandon Fire District discussed how the drinking water of the town of Brandon is provided solely through untreated groundwater from a single source aquifer. Mr. Counter explained that the fire district and the town are very diligent and careful in protecting the aquifer due to the cost and difficulty in finding an alternate drinking water source if the aquifer were to be contaminated or depleted. Consequently, the town, with the help of the Agency of Natural Resources, has begun preliminary mapping of its groundwater.

Lee Nellis, the town planner of Williston, testified regarding groundwater supply problems in portions of Williston that are remote from the municipal system and cannot be connected due to expense and geography. Mr. Nellis stated that the groundwater supply

problems in Williston were largely a product of manipulation of the nine-lot subdivision exemption to Act 250 and land use planning that failed to recognize the cumulative impact of the resulting overdevelopment. Mr. Nellis stated that the overdevelopment could also lead to on-site wastewater issues and subsequent contamination of groundwater if the multiple on-site wastewater systems in the relevant area failed. Mr. Nellis stated that groundwater maps of Williston would have helped avoid overdevelopment of the relevant parcel.

The November hearing concluded with testimony from Nick Manosh, a local well driller, and two representatives of the agricultural community. Mr. Manosh testified regarding well drilling practices and the need for groundwater maps. Vern Grubinger of the UVM Extension Service, representing the Vermont Vegetable and Berry Growers Association, testified regarding groundwater use by the association's members. Rob Achilles of the Agency of Agriculture, Food, and Markets concluded the hearing with testimony regarding use of groundwater by dairy farms in Vermont.

III. Committee Findings

Due in part to the complexity of the issues inherent in its charge and in part to its two-year duration, the Legislative Study Committee of Groundwater Regulation and Funding has yet to make any formal findings. However, the Committee heard extensive testimony regarding the need for groundwater mapping. The Committee heard that such maps could be useful to many of the interested parties, including land use planners, developers, and well drillers. In addition, groundwater maps could be an important aid to the Agency of Natural Resources in protection of the state's groundwater resources and regulation of their use.

Consequently, in order to protect the groundwater resources of the state while simultaneously providing for adequately planned development and groundwater withdrawal, the Legislative Study Committee of Groundwater Regulation and Funding has determined that it is essential that the state of Vermont conduct groundwater mapping as soon as reasonably possible. To further this goal, the Administration and the General Assembly should work together to pursue all sources of funding for groundwater mapping in Vermont. Moreover, the General Assembly should work with the Agency of Natural Resources and other interested parties in developing an acceptable process for the mapping of the groundwater of the state.

IV. Further Committee Action

In December 2006, the Committee sent a letter to Governor Douglas requesting that he appoint a representative of a local Vermont environmental organization to the Legislative Study Committee of Groundwater Regulation and Funding. Act 144 required the appointment by the Governor of a representative of a local environmental organization to the Committee. On December 22, the Governor appointed Thomas Sweet of the Waterbury Conservation commission as the representative of a local environmental organization.

The next meeting of the Legislative Study Committee of Groundwater Regulation and Funding is tentatively planned for March 2007.