



TOWN OF EXETER – 2003 PUBLIC WATER SYSTEM

EMERGENCY INTERCONNECTION GRANT

REPORT ON THE TOWN OF EXETER'S PUBLIC WATER RIGHTS

June 3, 2004

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A. STATEMENT OF PURPOSE AND SUMMARY OF FINDINGS

The Town of Exeter requested a legal opinion on its rights to withdraw water from the Exeter River for public water supply purposes in general, and, in particular, for the purpose of considering interconnections of the Exeter Water System with neighboring communities for emergency response purposes and also to consider participating in a regional water system. The law firm of Pierce Atwood was asked to conduct this review, and we have done so under the auspices of a grant to the Town of Exeter from the Department of Environmental Services authorized by the Public Health Security and Bioterrorism and Preparedness and Response Act of 2002 (the "Bioterrorism Act of 2002").

This report addresses the specific question of the extent of any limitations on the Town of Exeter's use of water from the Exeter River for the purpose of interconnecting its water system with other neighboring municipalities or participating in a regionalized water system. The report addresses the State of New Hampshire's efforts to promote regionalization of water systems to enhance the State's ability to respond to terrorist acts (and for other reasons), and then explores in depth the common law and statutory rights and limitations on water use by the New Hampshire municipalities. This requires a careful analysis of riparian water rights and the public trust doctrine under common law, as well as reference to a variety of regulatory programs enacted by the State of New Hampshire and the federal government under the police powers of both the state and federal constitutions.

As fully explained below, we conclude that the Town of Exeter has substantial ability to withdraw water for its municipal use, to interconnect with other municipal water systems, and, potentially, to supply water from the Exeter River for a regional water system. This right is limited by the common law principle of reasonable use (vis-a-vis other water users and the

general public), and is subject to various regulatory constraints. Competing users of water from the Exeter River are subject to the same regulatory and common law limitations.

Looking ahead, the Town will want to monitor proposed changes to existing regulatory requirements with great care. It will be important to participate in the policy debates on water use – and these debates will only intensify in the future – to protect the Town's interests in light of regulatory intrusions, and also in consideration of the potential impact of other current and future water withdrawals in the Exeter River Watershed.

B. BACKGROUND

This report is written at a time in the state's and nation's history when concerns about terrorist threats to our public drinking water supplies converge with a growing sense within New Hampshire that regionalization of water systems is a promising alternative to the existing and growing array of public and private water systems serving small localized areas in this state. The issue of regionalizing water systems has been at the forefront of legislative debate in New Hampshire in recent years; the impetus for regionalized water systems dates back to 1990 with the release of the report on the *Water Supply Study for Southern New Hampshire*, prepared by the New Hampshire Water Supply Task Force. That report highlighted the anticipated deficit in providing for the growth of water demand in the southern tier of the state, including the Town of Exeter. The Task Force addressed this anticipated demand with a variety of recommendations, including interconnecting public water systems and developing regionalized water systems.¹

Since the year 2000, the New Hampshire Legislature has addressed the issue of regionalization of water systems in at least five separate bills. In Chapter 64 of the Laws of 2000, the Legislature required the New Hampshire Department of Environmental Services (DES) and the Public Utilities Commission (PUC) to prepare a report on regional cooperation for water resources, management and water conservation. That report, entitled *Regulatory Barriers to Water Supply Regional Cooperation and Conservation in New Hampshire*, was issued on August 14, 2001. As with the 1990 Southern New Hampshire study, this report also made a variety of recommendations to promote regionalization of municipal water systems.

¹ The concept of physical interconnections of water systems considers primarily the most rudimentary form of regionalizing water systems, by allowing a physical pipe connecting separate water systems for purposes of providing water in emergency situations, such as natural disasters, mechanical failures, and bioterrorist acts. Regionalization of water systems connotes a broader concept, including the establishment of multi-municipal agreements to form water districts to provide public water supplies for all the member communities for all purposes, not just for emergency purposes.

The first legislation stemming from the DES and PUC study on regionalization was Chapter 141 of the Laws of 2002. This act, among other things, allows a municipal water system to charge rate premiums for customers outside of its municipal boundaries and allows public water utilities to include costs relating to developing regional water supplies in the rate base. By this law the New Hampshire Legislature also created a new committee to study the formation of regional water systems and making such systems eligible for certain state aid grants. The study committee formed by Chapter 141:7 of the Laws of 2002 issued its report on November 1, 2002. It recommended that encouraging regional cooperation among water systems should be a high priority for the state both for times of emergency and on a routine basis.

Two laws were enacted in the 2003 legislative session following up on this study committee's recommendations. First, Chapter 281 of the Laws of 2003 permits municipalities to form regional water districts and obtain municipal bonding, and subjects any such district to regulation by the Public Utilities Commission. Second, in Chapter 178 of the Laws of 2003, the legislature provided financial incentives to municipalities to form regional water systems by making certain costs associated with new or expanded regional water systems eligible for the state aid grant program initially established for surface water filtration treatment systems. In 2003, the legislature also enacted two laws establishing an ongoing study commission and a study committee to review water resources issues, including future municipal water needs in this state, and looking at potential regional impacts of increased water use across the state. (Chapters 305 and 217 of the Laws of 2003). Through these actions, the New Hampshire Legislature has evidenced its great concern for maintaining sufficient, viable water supplies into the future, and enacted specific measures to promote and provide incentives for regionalizing water systems.

During most of the debate over promoting regional water systems since 1990, the main issue of concern was periodic water shortages in the state, especially in the southern and seacoast regions. The serious and prolonged drought of 1999 – 2000 in the southern half of the state served as a strong reminder of what was already recognized as a serious potential for water demand to outstrip the supply.

The terrorist attack on this country of September 11, 2001 added a new and powerful element to the debate. DES has identified the bioterrorist threat as a reason for promoting regionalization. Also, the Congress already recognizes the threat to our nation's public water supplies in passing the Bioterrorism Act of 2002; Title IV of the Act concerns exclusively public drinking water supplies, vulnerability assessments and emergency response plans. This latter requirement mandates that public water systems must identify how the systems can significantly lessen the impact of an intentional attack on the water system. Protecting water supplies from terrorism and responding to any bioterrorist activity that may affect New Hampshire's public water supplies are now key considerations for New Hampshire's continuing look at regionalization.

C. **THE TOWN OF EXETER HAS SUBSTANTIAL, BUT LIMITED RIGHTS TO WITHDRAW WATER FROM THE EXETER RIVER FOR REGIONAL USE**

1. **Overview Of Legal Authorities**

The issues raised in this report bring into play the full panoply of legal authorities in the area of public water rights. The analysis begins with a focus on the Town's statutory authority to withdraw, use and convey water, and the common law rights of riparian landowners. The discussion then focuses on the limits of the Town's authority – looking at the “reasonable use” doctrine under both riparian law and the public trust doctrine, and the pervasive overlay of governmental regulation under the police power authority granted by the state and federal constitutions. Thus, we need to look at the three major sources of water law: the state and federal constitutions, the common law, and statutory law. As will be seen, the broad contours of the legal principles governing the use of public waters are well-established, but how they apply in the specific setting of the Town's withdrawal of water from the Exeter River requires a focused factual inquiry.

2. **The Town Has Substantial Rights To Use Water From The Exeter River – For Its Own Use And For Regional Use**

a. **The New Hampshire Legislature Has Authorized The Town To Operate A Public Water Distribution System**

It is well-settled in New Hampshire that “towns are merely subdivisions of the state and have only such powers as are expressly or impliedly granted to them by the legislature.” Public Service Company v. Town of Hampton, 120 N.H. 68, 71 (1980). Thus, municipalities must be authorized by the state legislature to engage in any specific activity. In the case of providing for a municipal water supply, the Legislature has done just that. RSA Ch. 38 provides authority for New Hampshire municipalities to engage in certain activities relating to municipal electric, gas

and water systems. RSA 38:2 specifically grants municipalities authority to establish or otherwise operate facilities for the distribution of water for municipal use. See also Board of Water Commissioners, Laconia Water Works v. Mooney, 139 N.H. 621, 624 (1995). Under this statute and its predecessors, the Town of Exeter has long operated a municipal water system.

b. The Legislature Has Granted Specific Water Withdrawal Rights For The Exeter Municipal Water System

In addition to the broad statutory authority granted to New Hampshire municipalities in RSA Ch. 38 and other enabling laws, the New Hampshire Legislature has granted specific rights to the Town of Exeter to withdraw and use water from the Exeter River. In Ch. 179 of the Laws of 1885, the Exeter Water Works was chartered to bring water into the Village of Exeter. The corporation thus created was given expansive authority to “appropriate” any “streams” for the purpose of obtaining and providing water for the Exeter Water Works. This law imposes no geographic limitation on which streams may be used for providing water for the Exeter Water Works, but the purpose of this authority is solely to bring water into the [then] Village of Exeter. Under this legislative grant, the water could be used for domestic uses, fire protection, and “other purposes as may be deemed necessary”.

Eight years later, in Chapter 220 of the Laws of 1893, the Legislature authorized the Town of Exeter to own and operate a water system, assuming the franchise and property of the former Exeter Water Works Corporation. The purpose of this grant of authority was to provide “through the Village of Exeter an adequate supply of pure water ... for extinguishing fires and for the use of its citizens, and for such other purposes as water may be required in said town”.

The Town² was also authorized to appropriate any streams in the Towns of Exeter and Stratham to carry out the purpose of the law.

Taken together, these two legislative grants empower the Town of Exeter to withdraw water from "streams" to provide municipal water for Exeter. Though the law did not use the term "river", it is reasonable to assume that the reference to streams includes the Exeter River. These two special laws conferring particular authority for a municipal water system in the Town of Exeter do not offer any specific underlying authority for the Town to take water for regional use. That said, the grant of authority in Ch. 220 of the Laws of 1893 is broad, including the power of the Town to use water "for such other purposes as water may be required in said town". This provision in the 1893 law offers some support for the Town of Exeter to use water it withdraws for regional purposes, to the extent that the Town of Exeter and its citizens benefit from that use.

c. The Town Of Exeter May Also Possess Water Withdrawal Rights As A Riparian Landowner

Owners of land adjoining the State's rivers and streams possess a reasonable private right of use in these waters, which is separate and distinct from the rights of the general public. These rights are known as riparian rights, applying to those landowners owning land adjacent to rivers and streams.³ Seacoast Water Commission v. Portsmouth, 106 N.H. 15, 25 (1964); Concord Co.

² The two session laws refer at various times to the Town of Exeter and the Village of Exeter. No distinction is drawn between the two and we are aware of no legal significance to the different terms for purposes of this report, so it is reasonable to assume here that the authority in these two session laws extends to the geographic limits of the Town of Exeter.

³ The correlative rights for those landowners adjoining tidal waters and great ponds are called littoral rights. See Black's Law Dictionary, p. 934 (6th Ed. 1990). Some authorities suggest that land bordering all non-tidal water courses is riparian land. See Restatement 2d. of Torts, § 843 (1977). Riparian and littoral rights are, in any event, comparable. Compare Seacoast Water Commission v. Portsmouth, 106 N.H. 15 (1964) (riparian rights associated with the Bellamy River) with Sundell v. Town of New London, 119 N.H. 839 (1979) (littoral rights associated with Kezar Lake).

v. Robertson, 66 N.H. 1, 18 (1889); Swett v. Cutts, 50 N.H. 439, 443 (1870); Bassett v. Salisbury Manufacturing, 43 N.H. 569, (1862); See Black's Law Dictionary, p.1327 (6th Ed, 1990); Restatement 2nd of Torts, § 850A (1977); see also Virginia v. Maryland, _____ U.S. _____ (Dec. 9, 2003). The private rights of riparian owners include the right to use and occupy waters adjacent to their shore for a variety of recreational purposes, the right to erect boathouses and to "wharf out". Sundell v. Town of New London, 119 N.H. 839, 844 (1979). Riparian ownership also includes the right to domestic, agricultural and mechanical uses of the river. See Dolbeer v. Company, 72 N.H. 562, 565 (1904).

There is some doubt in this state as to the extent of riparian rights enjoyed by municipalities. The prevailing view in most jurisdictions is that withdrawal of water for public distribution is not a recognized riparian use. Kennebunk, Kennebunkport and Wells Waters District v. Maine Turnpike Authority, 84 A.2d 433, 436 (Me. 1951); Purcellville v. Potts, 19 S.E.2d 700, 703 (Va. 1942); see Virginia v. Maryland, _____ U.S. at _____ (Justice Stevens, dissenting.). This question has not been directly answered by the New Hampshire Supreme Court, but in Seacoast Water Commission, 106 N.H. at 25, the Court implied that riparian ownership includes the right of providing water for municipal purposes. In that case, the City of Portsmouth's use of the Bellamy River in Dover as its water supply was challenged by Dover and other communities on the Seacoast. The Court found that Portsmouth was legally entitled to use the Bellamy River as its water supply, citing certain specific legislative acts and RSA 38:12. The Court also stated, however, the riparian rights of Dover and neighboring communities were not impaired by Portsmouth's use of the Bellamy River. Id. at 25.

For its water use planning efforts, the Town of Exeter should not rely solely upon assertion of its riparian rights to withdraw water from the Exeter River for municipal use, both

within the Town of Exeter proper and to interconnect with neighboring water systems. The inference in the Seacoast Water Commission case is not a holding of the Court, and the more prevalent view nationally is that riparian ownership does not include the right to withdraw water to provide for a municipal water system's needs. This emphasizes the importance of the legislative authority granted to municipalities in New Hampshire, beginning with RSA Ch. 38 and the establishment of public water systems, and including the specific grants given to various municipal water works across the state by the Legislature for the provision of public water to its citizens.

d. The Town Is Authorized To Participate in Regional Water Systems And to Interconnect With Adjoining Water Systems

As discussed above at pages 3-5, the New Hampshire Legislature, the Department of Environmental Services and the Public Utilities Commission, as well as the Southern New Hampshire Water Supply Task Force, have devoted a great deal of time and attention in recent years to promoting the regionalization of water supplies. In the various studies and reports that have been done in recent years on this issue, a series of recommendations have been made to strengthen the ability of municipalities to regionalize, to some extent, the state's public water systems. As the Department of Environmental Services' then Acting Commissioner Robert Monaco stated in his February 18, 2003 letter to Rep. Charles Royce, Chairman of the House Resources, Recreation and Development Committee on then pending House Bill 738, DES supported the bill, in part, as a measure to improve "regional water supply interconnections that fortify New Hampshire's infrastructure against natural and man-made emergencies".

The underlying statutory authority for regional interconnections is two-fold. First, RSA Chapter 53-A authorizes municipalities to cooperate and enter into inter-municipal agreements to provide a number of municipal services, including water supply. RSA 53-A:3 specifically provides that “[any] power or powers, privileges or authority, exercised or capable of exercise by a public agency of the state [municipality] may be exercised jointly with any other public agency of this state.” There has been no reported case in the New Hampshire Supreme Court in which this question has been raised, leaving little doubt as to the ability of communities to enter into regional water agreements.

Second, the Town has broad authority under RSA 31:3 to sell and convey its real and personal property, and to enter into contracts that are “necessary and convenient” to conduct the Town’s business. Hampton v. Hampton Beach Improvement Company, Inc., 107 N.H. 89, 99 (1966). Such contracts must be authorized by law, meeting all legal procedural requirements, with the appropriate action of the Town’s governing body. See DeRochemont v. Holden, 99 N.H. 80, 83 (1954).

The impetus for regionalized water systems has been increased recently by the various enactments of the New Hampshire Legislature. The Legislature specifically authorized the creation of regional water districts in Chapter 281 of the Laws of 2003, with a primary focus of authorizing such districts to bond for the necessary infrastructure for such systems. Additionally, Chapter 141 of the Laws of 2002 specifically authorizes municipal water systems to charge a premium of up to 15% for providing water to users outside of the municipal boundary. Lastly,

the Legislature extended water supply grant eligibility to promote interconnections between public water systems.⁴

In sum, the Town of Exeter has the legal authority to provide water for regional water systems and to interconnect with adjoining public water systems, and this authority is bolstered by recent legislative initiatives that provide incentives for even greater regionalization of public water systems in New Hampshire.

3. **The Town's Right To Withdraw Water Is Not Unlimited**

Having concluded that the Town of Exeter has ample authority to undertake regional interconnections, it remains to be analyzed what limits apply to the Town's ability to withdraw water for this purpose. As fully explained below, the Town's right to withdraw water from the Exeter River is not unlimited. Under both New Hampshire riparian rights law and the State's Public Trust Doctrine, a riparian landowner is allowed "reasonable use" of the water, which requires that there not be an unreasonable impact on other water users or the public. Moreover, there is a plethora of federal, state and local regulatory controls over the withdrawal and use of water⁵. Finally, certain rights have been reserved by the present owner of the Exeter Mill Apartments to use water, and that may affect the Town's ability to withdraw water from the

⁴ Also, RSA 4-C:23 authorizes municipalities "to enter into agreements with other municipalities for the purpose of developing and implementing regional water plans and ordinances to enhance the effectiveness of their local water plans where water protection needs to extend beyond municipal boundaries."

⁵ In addition to New Hampshire common law and regulatory constraints on water use, a federal navigational servitude supercedes all other water rights. This federal constitutional principle recognizes the federal government "supremacy" in exercising its authority to control navigation in the nation's waterways. F.P.C. v. Niagara Mohawk Power Corp., 347 U.S. 239 (1954).

Exeter River. Each of these potential constraints on the Town's authority to withdraw water from the Exeter River is examined below.

a. **Under Riparian Law And The Public Trust Doctrine, The Town Is Limited To "Reasonable Use" Of Water Taken From The Exeter River**

Whether the Town's authority to withdraw water from the Exeter River derives from the riparian rights doctrine under common law or specific legislative grants, the Town's right to withdraw water is limited to "reasonable use". This is a well-established principle in common law, under which a riparian owner's rights are "governed by the rule of reasonableness applied to the facts of his case." Concord Lumber Co. v. Robertson, 66 N.H. 1, 18 (1889); see Dolbeer v. Company, 72 N.H. 562, 565 (1904); State v. Sunapee Dam Co., 70 N.H. 458, 461 (1900); Restatement 2d. of Torts, § 850A (1977). The reasonable use principle prohibits undue interference with the relative rights of other riparian owners.⁶

Each riparian owner has a right of reasonable use to the adjacent public water - to "wharf out", to recreate, to fish, etc. But, such use cannot unreasonably interfere with the rights of other riparian owners. Of the numerous cases decided by the New Hampshire Supreme Court in which the Court has applied the riparian rights concept of reasonable use, the most succinct explanation is found in Poire v. Serra, 99 N.H. 154, 156-7 (1954):

What is reasonable use . . . must depend upon a variety of conditions, such as the size and character of the stream, and the uses to which it can be or is applied; and, from the nature of the case, it is incapable of being defined to suit the vast variety of circumstances that exist; but the rule is flexible, and suited to the growing and changing wants of communities.

Whether the diversion or interference with the stream is rightful in a particular case must depend upon the question whether, under all the circumstances of the case, it is

⁶The State of New Hampshire rejected early on rejected the so-called "prior appropriation" doctrine, which is the law in the western states. In Bassett v. Salisbury Manufacturing Company, 43 N.H. 569 (1862), the Court applied "the rule of reasonableness" and did not accept what was then the common law "English Rule" of absolute and unqualified right of water use.

or is not a reasonable use of the stream; and, in determining that question, the extent of the benefit to [one] . . . and of inconvenience or injury to others, may, very properly, be considered." (citations omitted)

In that case, the Court found that the placement of fill in the Winnepesaukee River by an upstream riparian owner did not cause material or appreciable sedimentation downstream, so it did not harm the plaintiffs' boat and bait business.

A more recent example of the New Hampshire Supreme Court's view of "reasonable use" is Sundell v. Town of New London, 119 N.H. 839 (1979). In that case, in which the Court construed littoral (lake front) rights, the Town's wastewater discharge into Kezar Lake was found to have infringed on the littoral owners' rights of reasonable enjoyment of their lakefront property and the adjoining water. The more common application of riparian law arises when a riparian user claims that another's use of the river or stream substantially diminishes or diverts available water. Eg., Seacoast Water Commission, 106 N.H. at 25 (Upstream towns made no allegation that Portsmouth's use of the Bellamy River "unreasonably interfered" with their use of the water); Wisniewski v. Gemmill, 123 N.H. 701, 705 (1983) (Plaintiffs may bring an action for damages or injunctive relief in a claim that the diversion of the Cockermouth River in Hebron interfered with their riparian rights.); Gillis v. Chase, 67 N.H. 161, 162 (1891) (Plaintiff failed to show that the Defendants' diversion of water was unreasonable or there was no actual damage).

Although, as discussed above at pages 8-10, there is some doubt whether a municipality possesses the right under riparian law to use water for a municipal water system, the "reasonable use" limitation will apply even where a municipal water system is operating under statutory authority. In State v. Sunapee Dam Co., the Court held that "... the defendants, notwithstanding their charter, were bound to exercise the right so obtained in a reasonable manner." 70 N.H. 458, 469 (1900); see also Seacoast Water Commission, 106 N.H. 15 (1964).

Thus, the Town is and will remain limited to "reasonable use" of the Exeter River. This is not a precise term, and there is no simple formula to determine what constitutes reasonable use. As with its historic and current water use, the Town is subject to constraints on water withdrawal rights due to competing water users on the Exeter River and Exeter River Watershed. This is true with respect to others who currently use water from the Exeter River. And, because New Hampshire does not follow the common law doctrine of "prior appropriation" (see footnote 6 at page 13), this is also true for competing users of the Exeter River that seek to withdraw water in the future. The "reasonable use" doctrine requires a case by case analysis of whether one user's water use interferes unreasonably with another's. While it may raise a degree of uncertainty about the Town's ultimate ability to withdraw water, the reasonable use doctrine also protects the Town's exercise of its own relative rights to use the river.

In addition to the "limits of reasonable use" imposed under riparian law, a riparian owner is also subject to the additional constraint of the Public Trust Doctrine. This is another well-established common law principle under which the State holds for the public's benefit the public trust rights to great ponds, tidal waters and navigable waters⁷ of the state.

The common law offers expansive protection of public waters under the Public Trust Doctrine. While its historical roots relate to the protection of navigation and fishing rights in public waters, the interests protected under the Public Trust Doctrine are broad, governing all public purposes, including swimming and other recreational activity, water storage, protecting water quality, and public health. Hartford v. Gilmanton, 101 N.H. 424, 426 (1958); State v. Stafford Co., 99 N.H. 92, 97 (1954); Witcher v. State, 87 N.H. 405, 409 (1935). Concord Mfg.

⁷ "Navigability" is not the sole criterion for determining whether a particular stream falls under the Public Trust Doctrine, as that analysis focuses on whether a stream is "capable in its natural state of some useful service to the public." St. Regis Paper Co. v. New Hampshire Water Resources Board, 92 N.H. 164 (1942). In either event, there is no doubt that the Exeter River is a public water, and within the ambit of the Public Trust Doctrine.

Co. v. Robertson, 66 N.H. at 5-8. The New Hampshire Supreme Court has applied the Public Trust Doctrine to navigable rivers, though the State does not own their bed. Thus, a riparian owner's right is to "use the river and its bed without an invasion of the public easement". Water Resources Board v. Lebanon Sand & Gravel, Inc., 108 N.H. 254, 259 (1967). The Court most recently analyzed the Public Trust Doctrine in the context of a request for an Opinion of the Justices relative to the public use of coastal beaches. Opinion of the Justices, 139 N.H. 82 (1994). In that Opinion, the Court restated and reaffirmed the general principles of the Public Trust Doctrine in New Hampshire. Although that Opinion addresses tidal waters, the Court's discussion of the Public Trust is equally applicable to navigable streams and rivers.

The New Hampshire Legislature has also affirmed the validity and applicability of the Public Trust Doctrine to the State's public waters. As recently as 1985, the Legislature amended RSA 481:1 to provide specifically that the State is the trustee of its public waters.

Similar to riparian law, the Public Trust Doctrine imposes a limitation of reasonableness on the use of the State's waters. The rights or privileges enjoyed by the public at large under the Public Trust Doctrine are distinguished from riparian rights, with only the latter constituting enforceable property rights. That distinguishing feature notwithstanding, however, the public and each member of the public enjoys the privilege of using the State's waters for the purposes protected under the Public Trust Doctrine, and any one person's use of the State's waters must be reasonable in view of the interests that are enjoyed by all members of the public. St. Regis Co. v. Board, 92 N.H. 164 (1942); State v. Sunapee Dam Co., 70 N.H. 458, 461 (1900); see also Concord Co. v. Robertson, 66 N.H. at 18.

The reasonableness of the use of public waters was tested recently in the case arising in 1989 of the proposed expansion of the Loon Mountain Ski Area in Lincoln, New Hampshire. In

that case, the Attorney General's Office concluded that the proposed use of public waters from the Pemigewasset River and Loon Pond was sufficient to bring the proposed withdrawal and attendant impacts under the Public Trust Doctrine. In that case the Attorney General concluded that the proposed water withdrawals would exceed the private rights of the ski area, and interfere with New Hampshire's Public Trust rights. The withdrawals, therefore, would be permissible only if authorized by the New Hampshire Legislature. (Legislative approval was granted to both Loon Mountain Development Corporation and the Town of Lincoln in the year following this examination by the Attorney General's Office.) In the case of the Public Trust Doctrine, unlike under riparian law, the Legislature is authorized to approve water use that would otherwise unreasonably interfere with the public's rights to use the public water. In no event, however, can an authorized use of public water unreasonably interfere with the private rights of a riparian owner, without causing a "taking" of private property interests requiring the payment of compensation.

In our discussions with Town officials we have gained a general understanding of the Town of Exeter's long term water management plan, that calls for a gradual increase in water use needed to serve 100% of the expected Town population in the year 2020. Assuming a modest rate of growth, the Town's increasing water use from the Exeter River should not be found to interfere unreasonably with the public's rights. Any additional water use attributable to a regionalized water system would increase modestly the likelihood of an issue surfacing under the reasonable use principle. The Legislature's recent enactments in support of regionalizing water systems are a strong indicator of the public benefit that is generally associated with regional interconnections. However, the actual legislative grant of authority for the Town to take water for the municipal water system does not address directly regional water use.

b. The Town's Withdrawals From The Exeter River Are Subject To State And Federal Regulatory Programs Concerning Water Quality, Instream Flow, And Resource Protection

In addition to the paramount interests of the State under the Public Trust that limits the extent of water use by riparian owners or municipalities, state, federal and local governments impose many regulatory limitations on water use. The state regulatory limitations all emanate from laws and regulations enacted pursuant to the government's⁸ "police power", the constitutional authority to enact laws for the common good. The state's authority is set forth in Part 2, Article 5 of the New Hampshire Constitution, in which the state government is empowered to enact "all manner of wholesome and reasonable orders, laws, statutes ... for the benefit and welfare of this state." State v. Griffin, 69 N.H. 1, 23, 27 (1896) (one of the earliest N.H. cases upholding the state's police power, in the case to prohibit the dumping of sawdust in Lake Massabesic.).

The New Hampshire Legislature has exercised its police power in enacting literally hundreds of statutes designed to promote the public good and protect the public health and safety, among them the state's many environmental laws. Laws validly adopted pursuant to the state's police power are fully enforceable separate from enforceable limits imposed by the Public Trust Doctrine and under riparian law. Thus, in considering the Town's ability to withdraw water from the Exeter River, it is necessary to analyze the "reasonable use" standard, and any laws affecting water use enacted by the Legislature. Such laws also include, importantly, administrative rules adopted by the Department of Environmental Services (and other state

⁸ This report addresses state and federal regulatory considerations that may affect the Town's ability to withdraw, use and convey water from the Exeter River. In pursuing any water project, the Town should be mindful of any municipal regulations or processes that must or should be followed.

agencies) pursuant to rulemaking authority found in virtually all enabling legislation for regulatory programs and adopted in conformance with RSA Ch. 541-A, the *Administrative Procedures Act*.

The following is a list of pertinent state environmental statutes that may impose limitations on the amount and manner of withdrawal of water from the Exeter River:

- *RSA Ch. 482 – Dams, Mills and Flowage*
This chapter and rules adopted thereunder relate primarily to the operation and maintenance of dams.
- *RSA Ch. 482-A – Fill and Dredge in Wetlands*
This chapter would apply to any physical impact proposed to be undertaken in or along the banks of the Exeter River.
- *RSA Ch. 483 – N.H. Rivers Management and Protection Program*
This chapter provides for the official designation by law of certain rivers in New Hampshire as designated rivers under the Rivers Management and Protection Program. The Exeter River has been designated under this program as a rural river, from the Town of Chester to the confluence with the Great Brook. RSA 483:15, XI. This does not affect the withdrawal of water from closer to the Upper Falls Dam. However, if a withdrawal were proposed for a section of the Exeter River that has been designated as a rural river under the Rivers Management and Protection Program, no interbasin transfers of water would be allowed. RSA 483:9-a, III.
- *RSA Ch. 483-B – Comprehensive Shoreland Protection Act*
This law generally establishes minimum standards for the subdivision, use and development of the shorelands within 250 feet of public waters, including the Exeter River.
- *RSA Ch. 485-A – Water Pollution and Waste Disposal*
While not directly affecting the withdrawal of water from the Exeter River, there may be some regulatory impact from the wastewater discharge requirements in the statute and rules adopted pursuant to the statute that may affect the ability of the Town to take water from the Exeter River.

Under each of these statutory programs the Dept. of Environmental Services has also adopted administrative rules, intended in the main to “fill in the gaps” from the statute. As with all

regulated activity, it is essential to understand and comply with the requirements of both the enabling legislation – the statute – and the administrative rules. Two sets of administrative rules bear noting here. First, DES requires that all water users withdrawing over 20,000 gallons per day must report its water use to the department. Chapter Env-Wr 700, *Water Use Registration and Water Use Reporting*. Second are DES's instream flow rules. These establish a mechanism for establishing protected flows and developing a water management plan to achieve the protected flow levels. These rules currently apply only to certain reaches of the Lamprey and Souhegan Rivers.

There are federal counterparts to most of the state laws listed above, usually involving the regulatory presence of the United States Environmental Protection Agency. Most notable of applicable federal statutes are Sections 401, 402 and 404 of the federal Clean Water Act. Section 401 establishes the requirement for states to certify to EPA and for EPA to determine that major projects that may cause a discharge into navigable waters do not threaten to violate the State's water quality standards. The Town of Durham recently negotiated the 401 process with DES when it proposed to increase its withdrawal from the Lamprey River. The certification imposed certain operational limits on the Town's ability to store water in its reservoir behind the Wiswall Dam. Section 404 regulates impacts to wetlands, with the U.S. Army Corps of Engineers and the EPA jointly regulating the program. Lastly, Section 402 establishes the National Pollutant Discharge Elimination System, the federal equivalent of New Hampshire's wastewater discharge laws. These state and federal laws may, either directly or indirectly, affect the manner in which the Town withdraws water from the Exeter River. These laws must be carefully considered in any water withdrawal project.

c. **Certain Rights Reserved By The Exeter Mill Apartments Affect The Town's Ability To Withdraw Water From The Exeter River**

The Exeter Mill Apartment complex is one current competing user of the Exeter River with rights reserved and conveyed in the deed of the Dam Upper Falls Dam (or Great Dam) in downtown Exeter to the Town in 1981. The reserved water rights to Exeter Mill Apartments limit the extent of the Town's ability to participate in a regionalized water system. Therefore, determining the scope of the water rights reserved for the former Exeter Mill building is a necessary component of the analysis of the extent of the Town's ability to use water from the Exeter River for a regional interconnection. The issue warrants a recitation of background facts and an analysis of their legal implications. (We have not done an independent analysis of the chain of title and rely on various documents provided by the Town.)

The Town acquired the Great Dam and other land, appurtenances and water rights in a quitclaim deed from a predecessor owner of the Exeter Mill dated October 7, 1981. Two provisions of the deed are pertinent to the Exeter Mill Apartments' reserved water rights. First, certain aspects of the conveyance were conditioned on the Town's agreement to refrain from actions that would interfere with the flow of sufficient water in the river to provide adequate fire protection for the Exeter Mill building. Specifically, the deed provides as follows:

The conveyances of the water rights and privileges are given subject to the condition that the grantee, its successor and assigns, shall not take such action, nor cause, nor permit such action to be taken as will lower the water level on the Southerly (upstream) side of the Upper Falls dam to such extent as will prevent sufficient water from flowing through the flume or pipeline herein above described in Parcel #3 of this deed to ensure adequate fire protection to the manufacturing building of the grantor lying Westerly of Chestnut Street.

Second, the Grantor also reserved to itself and “its successors and assigns, the right to maintain, repair or replace the pipeline or flume which is located under water on the Southerly (upstream) side of the headwall of the Upper Falls dam.”

The current owner of the Exeter Mill Apartments, as successor in title, claims a right to a flow of water through the penstock that ensures the apartment complex’s fire protection needs; it currently exercises a right to water from the penstock for its fire protection system and also for cooling and irrigation purposes. The Town and the Exeter Mill Apartments agree that the Town may not affirmatively prevent water from flowing through the penstock in sufficient quantity to provide for the former manufacturing building’s fire protection needs. The reserved right, however, is to provide water for fire protection needs only for “the manufacturing building of the grantor lying westerly of Chestnut Street.” See p. 94 of the deed. Thus, the Town’s obligation is to allow sufficient water to pass for this single building’s fire protection needs. While compliance with this reserved right must be “strict,” the Town may direct water from the penstock to two nearby dry hydrants in the event of a “fire or other emergency.” Id.

The owner of the Exeter Mill Apartments asserts that it is not precluded from using the water for other purposes, and it currently does use the water flowing through the penstock for cooling and irrigation purposes also. On its face, the deed reservation considers no other use of the reserved water than fire protection, and there is no ambiguity on that. Thus, the guidance of the N.H. Supreme Court in Essex Company v. Gibson, 82 N.H. 139, 149-150 (1925), is of limited value. (There the Court held that the language in a grant of water rights was ambiguous and found that the quantity of water to be used was limited, but not the manner of its use.)

Even under the apartment complex owner’s claim that the deed does not strictly limit the purposes for which the water may be used, the extent to which the Exeter Mill Apartments may

use water through the penstock for fire protection and for any other purpose is limited. The reservation of rights to water through the penstock is limited in the following ways:

- only water for fire protection for the single former manufacturing building must be provided;
- only that amount of water needed for fire protection must be maintained;
- no other use of the water through the penstock that reduces the necessary available water for fire protection is protected by the reserved right; and
- the reserved right requires the Town to refrain from causing or permitting the water to drop below the level necessary for fire protection. Natural conditions (e.g., drought) causing low flows in the river are obviously beyond the Town's control.

Thus, the Town may limit the amount of water flowing through the penstock to the minimum amount needed for fire protection for the former manufacturing building. This exact amount can be fixed and then maintained. Further, the Town has no control over low flows caused by natural conditions. The Town cannot be expected and the deed should not be read to require it to cease all withdrawals from the river in favor of leaving water for the Exeter Mill Apartments' fire, cooling and irrigation needs. (Nor, we assume, would the owner so argue.)

D. THE TOWN SHOULD TAKE STEPS TO MAINTAIN ITS AUTHORITY AND ABILITY TO USE THE WATER FROM THE EXETER RIVER FOR REGIONAL USE

Water use, water availability, water quality and water quantity are currently the focus of careful scrutiny in New Hampshire. This focus has intensified in the aftermath of the terrorist attack of September 11, 2001, with heightened concern about the security of the State's public water supplies. As the Town of Exeter considers participation in a regionalized water system, it

is important that the Town stay current with and join the debate on water policy proposals from Concord (and from Washington), and also to continue to take advantage of funding support from DES, EPA and other governmental agencies to aid the Town's efforts to secure its future water supply and to contribute to a regional response to water security concerns. We analyze several key aspects of this debate below. We also urge the Town to resolve any unsettled questions concerning the impact on the Town's water withdrawals from the Exeter River attributable to the Exeter Mill Apartments complex.

1. The Town Should Carefully Track The Governments' Efforts To Manage Instream Flows

Of particular note for purposes of looking to the future and what may impact the Town of Exeter's ability to withdraw water for any purpose are the instream flow rules that have been developed by the Department of Environmental Services. DES has engaged for over a decade in developing such rules, and only in 2002 did DES finally adopt them. These rules are designed to provide a process to develop appropriate instream flow levels for the various designated rivers, and then to have the significant water users along each designated river develop jointly a management plan to maintain the protected flows. Both of these processes are designed to involve heavy local participation, through instream flow technical review committees and water management planning area advisory committees. These rules apply at the present time only to the Lamprey and Skowhegan Rivers, consistent with Chapter 278 of the Laws of 2002. At the present time, DES has formed a technical review committee for the Skowhegan River only. Through this committee DES will establish a protected instream flow, and then the water management planning effort will be underway with the formation of a water management planning area advisory committee. These rules do not currently have any impact on the Exeter River. Nevertheless, it is important for future planning purposes to anticipate that the issue of

instream flow and how protected levels will affect the ability to withdraw water for any purpose, including public water supply within or outside of a municipality, will remain a priority for the state.

Of more immediate concern is the State's narrative water quality standard for instream flow. DES applies this standard whenever a project requires a Cleanwater Act Section 401 water quality certificate.

2. The Town Should Continue To Participate In The N.H. Rivers Management And Protection Program

The Exeter River is designated as a protected river under the Rivers Management and Protection Program, from the Town of Chester to the confluence with Great Brook, more than a mile upstream from the Upper Falls Dam in Exeter and the Town's intake for the municipal water system. Therefore, at present, there is little or no direct impact by virtue of the river's classification as a "rural river" at the point of withdrawal for the Town's water system. However, the work of the State's Rivers Management Advisory Committee (RMAC) and the DES Watershed Bureau in the area of rivers management remains important to the Town's future water supply initiatives. That the instream flow rules are a mandate of the River Management and Protection Act and very much a product of years of input from the RMAC is reason enough to stay current with the RMAC's work. Beyond that, however, the Committee and the Watershed Bureau staff at DES will continue to be important "players" on broad policy issues affecting the State's rivers. New rivers policy initiatives will certainly emanate from the RMAC, and its work bears close watching and invites close collaboration from stakeholders such as the Town of Exeter.

3. The Town Should Carefully Monitor The N.H. Legislature's Continuing Focus On Water Rights

The Legislature last year enacted a bill creating a broad-based commission, consisting of legislative, executive branch, and many affected water users, to study a variety of important water resources issues. Chapter 305, Laws of 2003. This commission, along with a companion legislative study committee consisting only of legislative members, issued an interim report in November of 2003, and faces a final report deadline of November 30, 2004. It is an important study group that has come together at an important time to look at the most significant emerging issue in the environmental arena in New Hampshire. Although the bill as passed is entitled "A Commission to Study Issues Relative to Groundwater Withdrawals" (emphasis added), the commission is, in fact and law, charged with a much broader array of water resources issues. In Chapter 305:1, the Legislature directed the commission to study "ways to clarify the hierarchy of water uses while considering existing private property rights, to bring a balanced approach to water use among residential, public water supply, industrial, commercial, agricultural, recreational and other water users, and to review the current process by which all such new water users may reasonably and efficiently use State water resources, including consideration of potential regional impacts and local water management issues". In addition, the commission is charged specifically with looking at potential regional impacts and local management issues, impacts on New Hampshire's environment, property rights with regard to groundwater, and possible fees on withdrawal of groundwater.

Among the 21 members of the study commission are one member of a regional planning commission and a representative of municipal interests nominated by the New Hampshire Municipal Association. This is an important time for municipalities to be heard, through the

work of commission members with local interests and backgrounds, but also through the participation of the public at large.

4. The Town Should Resolve The Issue Of The Reserved Rights To Water Flow From The Exeter River Held By The Owner Of The Exeter Mill Apartments

The discussion at pages 21-23 above addresses the unresolved question of the extent of the Town's obligation to avoid interfering with the ability of the Exeter Mill Apartments to use water from the Exeter River for fire protection. This issue presents an important potential constraint on the Town's ability to use withdrawals from the Exeter River to pursue regional water supply interconnections. The precise parameters of the water use limitations, if any, imposed by the Exeter Mill Apartments reserved rights should be ascertained, and the issue resolved with the apartment complex owner.

5. The Town Should Continue To Pursue State And Federal Grants And Loans To Support Its Regionalization Efforts

DES administers various funding programs through which grants and low interest loans may be available for the Town in its effort to expand the public water system and to participate in a regionalized system. The grants and loans are provided through state general fund support and with federal dollars. The Town should continue to take full advantage of the governments' financial support in the key area of public water supply, especially with the new focus regionalization efforts. Additionally, the Town should continue to explore the opportunity to obtain grant monies through the U.S. EPA, the Department of Homeland Security, and Congress to assist in its regionalization efforts.

The Town's effective engagement with the State's Congressional delegation in pursuit of appropriations assistance from Congress on expanding the Town's water system should continue.

At the state level, funding through State Aid Grants for Regional Water Systems is available. RSA 486-A:3, III was added in 2003 to the state aid grant program for public water systems to make grant eligible certain regional water systems costs. Under this program, the State reimburses 25% of the eligible costs. Eligible costs include land acquisition, easements, and related administrative expenses. To date, DES has not yet issued a grant under this program, but funding is available. The Drinking Water State Revolving Fund is also a source of low interest loans for regional interconnections and regionalized water systems.