

# Forging Connecticut's Water Policy Future: Registered Diversions, Riparian Rights and the Courts after *Waterbury v. Washington*

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## I. INTRODUCTION

Leonardo da Vinci observed that "[i]n rivers the water you touch is the last of what has passed and the first of that which comes. . . ."<sup>1</sup> The riparian system of water rights found in the eastern United States – a geography traditionally blessed with plentiful rain and flowing rivers – may well have been formulated with da Vinci's ideas of inexhaustible supplies of water in mind. Today, however, drought conditions have intensified throughout the eastern U.S., water is recognized as a finite resource, and struggles over its control are increasingly common.<sup>2</sup> Connecticut has not been exempt from this trend.<sup>3</sup> Although home to over 5,800 miles of rivers and streams and a relative abundance of water,<sup>4</sup> demand has outstripped supply in many parts of the state, particularly in the summer months.<sup>5</sup> These shortfalls have become even more dramatic as sprawl and its associated development have increased water consumption

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<sup>1</sup> EUGENE C. GERHART, QUOTE IT COMPLETELY! WORLD REFERENCE GUIDE TO MORE THAN 5,500 MEMORABLE QUOTATIONS FROM LAW AND LITERATURE 938 (1998).

<sup>2</sup> See Olivia S. Choe, *Appurtenancy Reconceptualized: Managing Water in an Era of Scarcity*, 113 YALE L.J. 1909, 1909–11 (2004) (discussing water shortages in the eastern U.S.); Brenda Goodman, *Drought-Stricken South Facing Tough Choices*, N.Y. TIMES, Oct. 16, 2007, at A14.

<sup>3</sup> See Buck Rinker, *Drought Advisory: The Evidence; Trout, Reservoirs, Dairy Farms Stressed by Lack of Rain*, HARTFORD COURANT, Oct. 6, 2007, at A1; Hoa Nguyen, *Drought Comes to Unofficial End*, GREENWICH TIME, Dec. 28, 2007, at A1; Deborah Straszheim, *Water Shortage Continues*, NORWICH BULLETIN, Dec. 27, 2007, at B1.

<sup>4</sup> CONN. DEP'T OF ENV'T'L PROT., REPORT TO THE GENERAL ASSEMBLY ON STATE WATER ALLOCATION POLICIES 6 (2000) [hereinafter DEP 2000 REPORT], [http://www.ct.gov/dep/lib/dep/water\\_inland/diversions/water\\_alloc\\_rpt/wtrallc.pdf](http://www.ct.gov/dep/lib/dep/water_inland/diversions/water_alloc_rpt/wtrallc.pdf). The report notes that although the state has sufficient water resources to satisfy drinking water and environmental requirements along with the demands of other users, water is not always available when or where it is needed. *Id.* at 5.

<sup>5</sup> DEP 2000 REPORT, *supra* note 4, at 10.

patterns in previously unpopulated portions of the state.<sup>6</sup> One prominent example occurred in September 2005, when drought conditions gripped the Fenton River in the state's northeastern corner.<sup>7</sup> Besides providing a habitat to recreationally important trout species,<sup>8</sup> the Fenton River supplies water to the University of Connecticut campus.<sup>9</sup> As students returned to classes in the Fall of 2005 and water demand soared, the river was pumped dry, causing one of the state's largest recorded fish kills.<sup>10</sup> Recent concern about the adequacy of Connecticut's water allocation scheme is a product of this inherent tension between a human population competing for the same limited water resources that constitute a critical component of the state's natural environment.

The need for a statewide water allocation policy was recognized as early as 1930, when the State Water Commission aimed to have the General Assembly pass a bill providing for the planning, management and allocation of water resources.<sup>11</sup> It was not until 1982, however, that state legislators finally took action.<sup>12</sup> The precipitating event occurred the year before, when the Metropolitan District Commission ("MDC"), the utility supplying water to about 600,000 people of the greater Hartford area, proposed an annual diversion of nineteen billion gallons of water from the West Branch of the Farmington River.<sup>13</sup> The MDC's proposed withdrawal was rejected in a referendum of MDC member towns, who were concerned that a diversion of that size would impair the river's recreational and scenic

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<sup>6</sup> Kirt Mayland, *Navigating the Murky Waters of Connecticut's Water Allocation Scheme*, 24 QUINNIPIAC L. REV. 685, 686 (2006).

<sup>7</sup> Karen A. Grava, *University Responds to Drought*, U. OF CONN. ADVANCE, Sept. 26, 2005, available at <http://advance.uconn.edu/2005/050926/05092603.htm> ("[C]onservation measures were implemented two weeks ago after an estimated quarter mile of the Fenton River, one of the University's sources for water, was dry.").

<sup>8</sup> TROUT UNLIMITED, A GLASS HALF FULL: THE FUTURE OF WATER IN NEW ENGLAND 12 (2006), <http://www.tu.org/atf/cf/{0D18ECB7-7347-445B-A38E-65B282BBBD8A}/A%20GLASS%20HALF%20FULL.PDF> [hereinafter A GLASS HALF FULL].

<sup>9</sup> The Fenton River provides water to the University of Connecticut at Storrs campus. Grava, *supra* note 7.

<sup>10</sup> Grace E. Merritt, *Drought, UCONN Leave Stretch of River Dry*, HARTFORD COURANT, Sept. 16, 2005, at B1; see generally GLENN S. WARNER ET AL., LONG-TERM IMPACT ANALYSIS OF THE UNIVERSITY OF CONNECTICUT'S FENTON RIVER WATER SUPPLY WELLS ON THE HABITAT OF THE FENTON RIVER (2006), <http://www.ctiwr.uconn.edu/ProjFenton/FENTON%20RIVER%20Final%20Report.pdf>.

<sup>11</sup> See CONN. JOINT STANDING COMM. HEARINGS, ENVIRONMENT COMM., Pt. 4, 1982 Sess., at 780-82 (remarks of John Anderson, Deputy Commissioner of the Department of Environmental Protection).

<sup>12</sup> CONN. GEN. STAT. §§ 22a-365 to 22a-378 (2009) (known as the "Connecticut Water Diversion Policy Act").

<sup>13</sup> See FARMINGTON RIVER WATERSHED ASS'N, STATE OF THE FARMINGTON RIVER WATERSHED 7 (2003), [http://www.frwa.org/publications/farmington\\_sow\\_report.pdf](http://www.frwa.org/publications/farmington_sow_report.pdf); but see 25 CONN. H.R. PROC., Pt. 19, 1982 Sess., at 6239 (remarks of Representative Bertinuso, "This is not a Farmington River bill, it's not an MDC bill despite what you may have heard. This is major legislation that fills a serious gap in our water statutes as they presently exist.").

value.<sup>14</sup> In the General Assembly's 1982 session, state legislators responded to the anxiety triggered by the MDC's diversion plan<sup>15</sup> and passed significant new water legislation designed to bring Connecticut's water resources under the regulatory authority of the Department of Environmental Protection (DEP).<sup>16</sup> Although hailed as "watershed" legislation, the *Water Diversion Policy Act* ("Diversion Act") was a fatally flawed comprehensive water allocation charter. In order to win over existing water suppliers skeptical of the permitting system established by the bill,<sup>17</sup> an amendment had been added that exempted all existing diversions from the permitting process.<sup>18</sup> Unbeknownst to legislators at the time, these "registered diversions," as they came to be called, represented a

<sup>14</sup> See FARMINGTON RIVER WATERSHED ASS'N, STATE OF THE FARMINGTON RIVER WATERSHED 7 (2003), [http://www.frwa.org/publications/farmington\\_sow\\_report.pdf](http://www.frwa.org/publications/farmington_sow_report.pdf); see also CONN. JOINT STANDING COMM. HEARINGS, ENVIRONMENT COMM., Pt. 4, 1982 Sess., at 783-84 (remarks of Senator Clifton Leonhardt).

<sup>15</sup> See CONN. JOINT STANDING COMM. HEARINGS, ENVIRONMENT COMM., Pt. 4, 1982 Sess., at 800-74 (remarks of Astrid Hanzalek, "[T]he [MDC] need is real. We ought to recognize that. But we also ought to protect our future.") (remarks of Robert Crook, Director of Legislative Affairs for the Connecticut Sportsmen's Alliance, "We have heard the voice of the people on this issue and their concern about water diversion without adequate study through last Fall's referendum on the Farmington River, which was soundly defeated by a 2 to 1 margin.") (remarks of Margaret Quigley, League of Women Voters of Windsor, "Since the November 1981 MDC referendum . . . the League has become acutely aware of the need for such legislation.") (remarks of William F. Gulliam, "The major impetus for this bill presumably comes from the . . . efforts of the MDC to divert water from the Farmington River.") (remarks of Ken O'Donnell, President of the Connecticut Bass Federation, "I think the referendum that took place last Fall concerning the Farmington River diversion plans was a blessing in disguise. Because it showed the need for a bill, this bill or a bill similar to it, with some regulatory powers, watchdog powers, if you will.") (remarks of Culver Modesette, President, Farmington River Watershed Association, "[L]ast Summer and Fall found the MDC pitted against us . . . in a fight over MDC's claimed rights to divert the river . . .").

<sup>16</sup> See CONN. GEN. STAT. § 22a-366 (2009) ("[I]t is found and declared that diversion of the waters of the state shall be permitted [by DEP] only when such diversion is found to be necessary [by DEP]. . .").

<sup>17</sup> See CONN. JOINT STANDING COMM. HEARINGS, ENVIRONMENT COMM., Pt. 4, 1982 Sess., at 825-70 (remarks of Gordon Beckwith, New London Water Superintendent, "The City of New London since 1872 has had a water supply system and we've always provided our consumers with an adequate supply of water. . . [W]e have a track record of 110 years of proven service, without the so-called benefits of House Bill 5883, which we oppose.") (remarks of Charles Mokriski, Connecticut Water Works Association, "We have a number of utility professionals that have prepared to testify today . . . on the inadvisability of the water diversion bill, 5883.") (remarks of Marshall Chasluc, Vice President, Connecticut Water Works Association, "We are concerned that the proposed Act is a classic, but unfortunate example of over reaction to one or two specific problems in isolated areas of the state.") (remarks of Richard McHugh, Executive Director and CEO of the South Central Connecticut Regional Water Authority, "We estimate that the proposed permit requirements for our existing water supplies would cost . . . approximately \$2 million and this would necessitate an increase in water rates.") (remarks of Benedict Ebner, Superintendent of the City of Waterbury Bureau of Water, "In summary, we feel this bill is premature, imprudently brought, and ambitious, especially as a response to only a small number of site specific problems in the state.") (remarks of Andrew Sims, Director of Public Works for the City of New London, "The act as written and distributed . . . presents serious problems to most communities in Connecticut.")

<sup>18</sup> See 25 CONN. H.R. PROC., Pt. 19, 1982 Sess., at 6236 (remarks of Representative Casey, "This [amendment] has eliminated some of the problems that the industries and some of our colleagues had trouble with.")

substantial share of the state's available water resources.<sup>19</sup> By exempting them from state regulation, the Diversion Act assured that the allocation issues it was passed to address would frustrate policy planners into the twenty-first century.<sup>20</sup>

Prior to passage of the Diversion Act in 1982, Connecticut relied upon a common-law system of riparian rights to allocate water among competing users.<sup>21</sup> Under this common-law regime, landowners adjacent to water courses possess a right to use the water ("usufructory right"),<sup>22</sup> subject to the rights of upper and lower riparians in their use of the water.<sup>23</sup> However, as competing demands for different uses intensified, the absence of a regulatory scheme made it increasingly difficult to accommodate new water demands and adjust to shortages. The MDC's proposed diversion from the Farmington River was perhaps the most prominent example of

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<sup>19</sup> See CONN. JOINT STANDING COMM. HEARINGS, ENVIRONMENT COMM., Pt. 1, 2006 Sess., at 218-19. Representative Mushinsky remarked that:

[T]he science is saying the numbers that the Legislature thought were accurate in 1982 and '83 are not accurate. The time the diversion law was passed, and it came out of this Environment Committee, it appeared that the diversion permits were giving away just a small percentage of the water. It now appears, based on current science, that more than 80%, maybe 85% of the water was given away in the grandfathered system. And obviously the Legislature did not know it back then.

*Id.*

<sup>20</sup> See CONN. WATER PLANNING COUNCIL, WATER RESOURCES MGMT. COMMITTEE, REPORT OF SUBCOMMITTEE A (WATER ALLOCATION): ISSUES 3, 4, AND 6, at II (2002), available at <http://www.dpuc.state.ct.us/DPUCINFO.nsf/4d7534dff7a2413c85256b7500697b32/9ebe3c383688adb885256c3300478062?OpenDocument>.

The primary concern raised over Registrations is the lack of environmental review, associated alternatives analysis, and requirements for mitigation conducted under the permitting process. In addition, the registration process registered diversions at their maximum instantaneous capacity. This instantaneous capacity can be unrelated to actual usage and, when compared to permitted diversions (which generally allocate maximum daily usage) and daily or weekly river flows can lead to artificially "over allocated" watersheds. Conversely, registrants have made long term investment and planning decisions based upon the availability of registered withdrawals which they are unwilling to place at risk, particularly given the unreliability and perceived lack of consideration for public water supply needs in the existing permitting process.

*Id.*

<sup>21</sup> *City of Waterbury v. Town of Washington*, 260 Conn. 506, 579-80, 800 A.2d 1102, 1149 (2002).

<sup>22</sup> A usufruct is "the right of using and enjoying." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2524 (Philip Babcock Gove ed., 1981).

<sup>23</sup> ROBERT I. REIS, CONNECTICUT WATER LAW: JUDICIAL ALLOCATION OF WATER RESOURCES 21 (1967) (a usufructory right is considered in most states a right to make reasonable use of the water subject to the reasonable uses of upper and lower riparians). However, as will be discussed later in this Note, the Connecticut Supreme Court declared in its *Waterbury* decision that the state followed a natural flow theory until 1982. *Waterbury*, 800 A.2d at 1149. Although that declaration by the Court has been a source of critical commentary, it nonetheless establishes a common law reality quite distinct from traditional notions of reasonableness.

this dilemma. In response to these pressures the Connecticut General Assembly passed the Diversion Act, which established a permitting system for water diversions in Connecticut.<sup>24</sup>

The Diversion Act requires a permit for any activity that results in the withdrawal of water.<sup>25</sup> This permitting program provided a powerful mechanism for the DEP to regulate new water use within the state.<sup>26</sup> It established specific conditions to which the permitted uses would be required to adhere.<sup>27</sup> But while subjecting new water uses to regulatory

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<sup>24</sup> CONN. GEN. STAT. §§ 22a-365 to 22a-78 (2009). Section 22a-366 states:

In recognition that the waters of Connecticut are a precious, finite and invaluable resource upon which there is an ever increasing demand for present, new and competing uses; and in further recognition that an adequate supply of water for domestic, agricultural, industrial and recreational use and for fish and wildlife is essential to the health, safety and welfare of the people of Connecticut, it is found and declared that diversion of the waters of the state shall be permitted only when such diversion is found to be necessary, is compatible with long-range water resource planning, proper management and use of the water resources of Connecticut and is consistent with Connecticut's policy of protecting its citizens against harmful interstate diversions and that therefore the necessity and public interest for sections 22a-365 to 22a-378, inclusive, and the protection of the water resources of the state is declared a matter of legislative determination.

*Id.*

<sup>25</sup> CONN. GEN. STAT. § 22a-368(b) (2009). The statute states that “[n]otwithstanding any other provision of the general statutes or any special act to the contrary, no person or municipality shall, after July 1, 1982, commence to divert water from the waters of the state without first obtaining a permit for such diversion from the commissioner.” *Id.* The statute defines “waters” to include both surface water (rivers, streams and lakes) and ground water. CONN. GEN. STAT. § 22a-367(9) (2009). The statute exempts from the permit process withdrawals of less than 50,000 gallons in any one 24-hour period and certain other categories of diversions. CONN. GEN. STAT. § 22a-377(a) (2009).

<sup>26</sup> DEP 2000 REPORT, *supra* note 4, at 17.

<sup>27</sup> CONN. GEN. STAT. § 22a-373(b) (2009):

- (b) In making his decision, the commissioner shall consider all relevant facts and circumstances including but not limited to:
  - (1) The effect of the proposed diversion on related needs for public water supply including existing and projected uses, safe yield of reservoir systems and reservoir and groundwater development;
  - (2) The effect of the proposed diversion on existing and planned water uses in the area affected such as public water supplies, relative density of private wells, hydropower, flood management, water-based recreation, wetland habitats, waste assimilation and agriculture;
  - (3) Compatibility of the proposed diversion with the policies and programs of the state of Connecticut, as adopted or amended, dealing with long-range planning, management, allocation and use of the water resources of the state;
  - (4) The relationship of the proposed diversion to economic development and the creation of jobs;
  - (5) The effect of the proposed diversion on the existing water conditions, with due regard to watershed characterization, groundwater availability potential, evapotranspiration conditions and water quality;

oversight, the Diversion Act contained a “grandfather” provision exempting uses existing at the time of the Act’s passage in 1982 from scrutiny by the state regulator.<sup>28</sup> In order to receive this “grandfathered” status, existing water diversions merely had to be registered with the DEP by a prescribed date.<sup>29</sup> Diversion registration involved the submission of specific information about the withdrawal to the DEP so as to define the uses existing prior to the adoption of the Diversion Act.<sup>30</sup> Once completed, this action effectively “grandfathered” those diversions, insulating them from the DEP’s regulatory review and permitting requirements.

Four different types of water rights holders materialized from the system of regulated riparianism established by the Diversion Act: permitted diverters, registered diverters, limited diverters, and in-stream users. Permitted and registered diverters are creatures of the Diversion Act. They hold either permits or registrations entitling their diversions, depending only on whether their withdrawal began on or before July 1, 1982. The limited diverter’s withdrawals are small and are exempted by the Diversion Act.<sup>31</sup> Limited diverters may be homeowners or small businesses with modest water needs. In-stream users do not withdraw or impound water but rely on the resource in its natural state for some activity, whether to power a small mill, or to provide habitat for fish. By virtue of their ownership of land adjacent to water, all four groups also

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- (6) The effect, including thermal effect, on fish and wildlife as a result of flow reduction, alteration or augmentation caused by the proposed diversion;
  - (7) The effect of the proposed diversion on navigation;
  - (8) Whether the water to be diverted is necessary and to the extent that it is, whether such water can be derived from other alternatives including but not limited to conservation;
  - (9) Consistency of the proposed diversion with action taken by the Attorney General, pursuant to sections 3-126 and 3-127; and
  - (10) The interests of all municipalities which would be affected by the proposed diversion.

<sup>28</sup> CONN. GEN. STAT. § 22a-368(a) (2009). The provision states:

Any person or municipality maintaining a diversion prior to or on July 1, 1982, shall register on or before July 1, 1983, with the commissioner on a form prescribed by him the location, capacity, frequency and rate of withdrawals or discharges of said diversion and a description of the water use and water system. Any such diversion which is not so registered may be subject to the permit requirements of sections 22a-365 to 22a-378, inclusive.

*Id.*

<sup>29</sup> CONN. GEN. STAT. § 22a-368 (2009).

<sup>30</sup> CONN. GEN. STAT. § 22a-368(a) (2009). This section states that information required to register includes the “location, capacity, frequency and rate of withdrawals or discharges of said diversion and a description of the water use and water system.” *Id.*

<sup>31</sup> CONN. GEN. STAT. § 22a-377(a) (2009) (exempting diversions of surface water and from wells provided that the diversions do not exceed fifty thousand gallons in any twenty-four hour period).

hold riparian rights, or common law rights that were unmentioned in the Diversion Act, but have existed in Connecticut since the late 1700s.<sup>32</sup>

There are four possible types of disputes between these holders of water rights. The first type of potential dispute is between permitted diversions and registered diversions. Disputes of this type often result when these diverters simultaneously exercise their state-endowed water withdrawal rights. For example, several of the Quinnipiac River tributaries have run dry during arid summer months as the amount of water that may be lawfully withdrawn by permitted and registered diverters exceeds the stream's flow.<sup>33</sup> A second potential conflict exists between permitted users and limited diverters or in-stream users. In this situation, a diversion authorized by the state regulator conflicts with a limited diversion or in-stream use which is either small enough to be exempted from the Diversion Act or does not withdraw any water, but is still protected under the common law riparian doctrine. Conflicts of the first and second type should theoretically be resolved during the permitting process itself, as the DEP regulations have specific provisions which limit permitted diversions to prevent their interference with existing rights.<sup>34</sup> The third type of potential dispute is between a registered diversion and a limited diversion being exercised as a riparian right. However, because limited diversions withdraw such small quantities of water, conflicts of this type are infrequent and do not threaten to upend the state's water allocation policy, as does the final type of dispute. The last type of potential dispute may arise between registered diverters and in-stream users. In these disputes the registered diversion and the in-stream use are usually mutually exclusive, and a confrontation is presented between the registered diversion, which is a statutory creation, and the in-stream use, which is a right derived from the common law riparian tradition. This type of conflict

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<sup>32</sup> See *Perkins v. Dow*, 1 Root 535 (Conn. 1793). Virtually all permitted and registered diverters are also riparians because they have a common law usufructory right emanating from ownership of land abutting a water body in addition to the statutory right claimed under the 1982 Act. Many riparians, however, are neither permitted nor registered diverters because their use falls outside the ambit of the permitting scheme and does not meet the criteria for registration. See *infra* Part II.

<sup>33</sup> See A GLASS HALF FULL, *supra* note 8, at 4. While the tributaries are running dry, the lower main stem of the river continues to experience relatively abundant flow, mostly due to industrial and municipal wastewater discharges. *Id.* at 5.

<sup>34</sup> See CONN. AGENCIES REGS. § 22a-377 (c)-2(2)(d)(5) (2009). The regulation states that:

An environmental impact report shall not be deemed to satisfy section 22a-369 (10) of the General Statutes unless it . . . identifies any water resource conflicts that will or are reasonably likely to result from the proposed diversion for at least 25 years, and evaluates means for resolving such conflicts and the financial costs and environmental impacts of each such means.

*Id.* In addition, riparians may submit comments to DEP on the merits of the permit application. CONN. AGENCIES REGS. § 22a-372-1 (2009) ("Public hearings on applications for permits under sections 22a-365 to 22a-378, inclusive, of the General Statutes shall be conducted. . . .").

appeared in *Waterbury v. Washington*,<sup>35</sup> a landmark case in Connecticut's water rights jurisprudence decided in 2002. Unfortunately, it is also likely to persist as the state faces deepening competition between in-stream, or "green" uses, and development and drinking-water diversions, which are often registered.

If completely beyond the reach of state regulators, registered diversions present a total impediment to the formation of a comprehensive state water allocation policy.<sup>36</sup> Under the Act, 1,878 diversions are registered – a number that sizably outpaces the state's 483 permitted diversions.<sup>37</sup> A system where eighty percent of the state's water users are exempt from the environmental review associated with the permitting process presents distinct complications as the state struggles to craft a long-term, comprehensive water management plan.<sup>38</sup> Without legislative action to address the issue, the health of Connecticut's rivers and streams will depend greatly on the fate of these registered diversions vis-à-vis the state's riparian common law tradition.<sup>39</sup> As discussed in a recent work devoted to Connecticut's water law, the legal status of these registered diversions under the common law could therefore be the basis for the next major water resources adjudication in Connecticut.<sup>40</sup>

This Note proposes state courts as actors capable of forging a practical, effective solution to Connecticut's water policy impasse. The Note's central assertion is that judicial recognition of riparian rights as a limit to the scope of registered diversions could strike the balance necessary for an effective statewide water allocation scheme by appropriately protecting the interests of all legitimate uses, including those of registered diverters. The

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<sup>35</sup> See *City of Waterbury v. Town of Washington*, 260 Conn. 506, 800 A.2d 1102 (2002).

<sup>36</sup> See CONN. GEN. ASSEMB. LEGIS. PROGRAM REVIEW AND INVESTIGATIONS COMM., STREAM FLOW 58 (2003) [hereinafter STREAM FLOW] ("Eliminating diversion registrations would certainly be advantageous for developing a truly comprehensive water allocation planning process."). The U.S. Supreme Court has also recognized the importance of maintaining adequate water resources at the state level. The Court, in *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, evaluated a state's ability to incorporate minimum stream flow standards into Clean Water Act permitting decisions. *Jefferson County*, 511 U.S. 700 (1994). The Court stated that:

In many cases, water quantity is closely related to water quality; a sufficient lowering of the water quantity in a body of water could destroy all of its designated uses, be it for drinking water, recreation, navigation or, as here, as a fishery. In any event, there is recognition in the Clean Water Act itself that reduced stream flow, *i.e.*, diminishment of water quantity, can constitute water pollution.

*Id.* at 719.

<sup>37</sup> CONN. GEN. ASSEMB. LEGIS. PROGRAM REVIEW AND INVESTIGATIONS COMM., *supra* note 36, at 35.

<sup>38</sup> See DEP 2000 REPORT, *supra* note 4, at 19.

<sup>39</sup> Connecticut streamflow standards are available at CONN. AGENCIES REGS. §§ 26-141a-1 to 26-141a-8 (2009).

<sup>40</sup> Mayland, *supra* note 6, at 718.



Note explores the topic in several parts. Part II explores the historical arc of the common law riparian right in Connecticut, its governing theories of reasonable use and natural flow, and its treatment by state courts. Part III examines the Connecticut Supreme Court's decision in *Waterbury v. Washington*, with special emphasis on the questions posed by the court for determination on remand. Part IV offers answers to each of the *Waterbury* court's questions as a means of establishing a rubric under which registered diversions could be evaluated in the future. Part IV also considers the approach of another state in order to ascertain existing models of judicial involvement in this legal realm. Lastly, Part V suggests a solution that could adapt Connecticut's water law to reflect twenty-first century scientific realities of increasing water scarcity while leaving permitted and registered diversions largely intact.

## II. RIPARIAN RIGHTS

Connecticut adhered to the doctrine of riparian rights prior to passage of the Diversion Act in 1982.<sup>41</sup> A riparian right is a usufructory right arising from ownership of land adjoining a watercourse.<sup>42</sup> Several integral elements compose the traditional riparian right: (1) a property right which is annexed to ownership of land adjoining a body of water;<sup>43</sup> (2) a usufructory right in the water;<sup>44</sup> and (3) a right to use water on riparian lands circumscribed by rights of upper and lower riparians.<sup>45</sup>

The 1834 Connecticut case *Buddington v. Bradley* identified riparian rights as annexed to land.<sup>46</sup> In *Buddington*, the court held that the "riparian proprietor has annexed to his lands the general flow of the stream, so far as it has not been actually required, by some prior and legally operative appropriation."<sup>47</sup> The court underscored the idea that riparian rights are predicated upon ownership of land, and not use of the water resource by concluding that the plaintiffs' "right to the water does not depend upon their use of it."<sup>48</sup>

Riparian rights were clearly articulated as usufructory in *Parker v. Griswold*, decided by the Supreme Court of Errors of Connecticut in 1845.<sup>49</sup> The court held that a riparian proprietor "has no property in the

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<sup>41</sup> *Waterbury v. Washington*, 260 Conn. 506, 580 n.44, 800 A.2d 1102, 1149 n.44 (2002).

<sup>42</sup> REIS, *supra* note 23, at 21. Reiss' work is an authoritative analysis of Connecticut's riparian rights case law, from which this Note's discussion of riparian rights, reasonable use and natural flow has drawn heavily.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Buddington v. Bradley*, 10 Conn. 212, 212 (1834).

<sup>47</sup> *Id.* at 218.

<sup>48</sup> *Id.* at 219.

<sup>49</sup> *Parker v. Griswold*, 17 Conn. 288 (1845).

water itself, but a simple usufruct as it passes along.”<sup>50</sup> Over one hundred years later, the court in *Gager v. Carlson* further delineated this distinction, stating that “[e]ven as to the water flowing over any land which the defendant owns outright, his rights are riparian and usufructory in nature. They are protected against injury. But they do not constitute ‘ownership’ of the water in the accepted sense of the word.”<sup>51</sup>

#### A. *Governing Theories: Reasonable Use and Natural Flow*

In an early riparian rights case decided in Rhode Island, Justice Story, sitting on circuit, articulated the reasonable use theory.<sup>52</sup> In the 1827 case of *Tyler v. Wilkinson*, Story concluded that, “[i]n virtue of this ownership [of land adjacent to a watercourse] he has a right to the use of the water flowing over it in its natural current, without diminution or obstruction,”<sup>53</sup> but that, “[t]here may be, and there must be allowed of that, which is common to all, a reasonable use.”<sup>54</sup> Story then expressed a simple method for assessing a reasonable use: “whether it is to the injury of the other proprietors or not.”<sup>55</sup> Although many Connecticut cases follow the reasonable use limitation on riparian rights, others quite clearly are premised on the natural flow theory, which dictates that riparian owners may rightfully expect water to flow by their land in its natural condition, without any alteration or reduction of flow by other users.<sup>56</sup> These case lines exist independently of one another, never referencing the existence of each other.<sup>57</sup> Because the distinction between reasonable use and natural flow was critically important to the outcome in *Waterbury v. Washington*, a discussion of these theories and case histories is warranted.

##### 1. *Reasonable Use Theory*

The reasonable use theory imbues each riparian owner with an equal right to the beneficial use of an adjacent watercourse.<sup>58</sup> Under the reasonable use theory, each riparian owner is entitled to use water from an

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<sup>50</sup> *Id.* at 300.

<sup>51</sup> *Gager v. Carlson*, 146 Conn. 288, 295, 150 A.2d 302, 307 (1959) (internal citations omitted). As a practical matter, the riparian right of a person who owns land such that a lake, pond or stream sits entirely within its boundaries may effectively “own” that water, if he can enforce trespass laws against any other potential users. See REIS, *supra* note 23, at 24.

<sup>52</sup> *Tyler v. Wilkinson*, 24 F. Cas. 472, 474 (C.C.R.I. 1827) (No. 14,312).

<sup>53</sup> *Id.* Story also noted that while entitled to the natural flow of water, the riparian “has no property in the water itself; but a simple use of it, while it passes along.” *Id.* This expression of the usufructory nature of the riparian right was cited by the Connecticut courts in *Parker*, 17 Conn. 288 (1845).

<sup>54</sup> *Wilkinson*, 24 F. Cas. at 474.

<sup>55</sup> *Id.*

<sup>56</sup> See *infra* Parts II.a.i and II.a.ii.

<sup>57</sup> See discussion *infra* Part III.c.ii.

<sup>58</sup> REIS, *supra* note 23, at 30.

adjacent watercourse, regardless of the effect on the natural flow of the watercourse, provided that each user exercises care not to abrogate the right of upper and lower riparians to use the water.<sup>59</sup> A Connecticut court articulated the reasonable use theory as early as 1793 in *Perkins v. Dow*.<sup>60</sup> In *Perkins*, the court was confronted with a dispute over the defendant's diversion of water from a stream for use on his meadow.<sup>61</sup> Deeming the diversion unreasonable, the court concluded that:

The defendant had right to use so much of said water, passing through his land, as to answer all necessary purposes, to supply his kitchen, and for watering his cattle, etc. also he had right to use it for beneficial purposes, such as watering and enriching his land; but this right hath restrictions, and must be so exercised as not to injure the plaintiff, who lies next below, and who hath right to have the surplus flow into his land in the natural channel; and which appeared might easily have been done in this case; the defendant, therefore in diverting the surplus of the water, not used by him, out of its natural course and away from the plaintiff's land was an injury and a nuisance.<sup>62</sup>

The next expression of the reasonable use theory appeared in 1843, in *Wadsworth v. Tillotson*, where the court considered the lawfulness of the diversion of water from a spring.<sup>63</sup> Concluding that the defendant required an opportunity in a new trial to prove reasonable use of the water and plaintiff's unreasonable use, the court pronounced that the "law requires . . . the party, by or over whose land a stream passes, [to] use the water in a reasonable manner, and so as not to destroy or render useless, or materially diminish or affect, the application of the water, by the proprietors below on the stream."<sup>64</sup>

In *Agawam Canal Co. v. Edwards*, the court was faced with a dispute over Strap Brook.<sup>65</sup> In 1826, the brook was moved by the Farmington Canal Company from its old bed, where it was a tributary of the Westfield River and diverted such that the brook became a tributary of

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<sup>59</sup> Joseph W. Dellapenna, *Adapting Riparian Rights to the Twenty-First Century*, 106 W. VA. L. REV. 539, 555–56 (2004).

<sup>60</sup> *Perkins v. Dow*, 1 Root 535 (Conn. 1793).

<sup>61</sup> *Id.* at 535.

<sup>62</sup> *Id.* at 536–37.

<sup>63</sup> *Wadsworth v. Tillotson*, 15 Conn. 366 (1843).

<sup>64</sup> *Id.* at 375.

<sup>65</sup> *Agawam Canal Co. v. Edwards*, 36 Conn. 476 (1870).

the Farmington River.<sup>66</sup> Riparian mill owners along the Westfield River, who became riparians only after the brook had been diverted, later restored the flow and flooded the land of Edwards.<sup>67</sup> Although the case was decided upon other grounds, the court established that among riparians “each has a similar and equal usufruct[o]ry right,”<sup>68</sup> and that the “common interest requires that the right should be exercised and enjoyed by each in such a reasonable manner as not to injure unnecessarily the right of any other owner, above or below.”<sup>69</sup>

The court decided another “mill” case in 1888.<sup>70</sup> In *Mason v. Hoyle*, an upper riparian on the Fenton River operated a large mill such that several mills located lower on the river were deprived of the water necessary to operate for several months of the year.<sup>71</sup> The court applied the rule that the “use made by mill-owners of a stream must, in its relation to other mill-owners on the same stream, be a reasonable use.”<sup>72</sup> Under this rule, the court held the defendant’s use unreasonable<sup>73</sup> because during the period of greatest water diversion by the defendant, the three mills belonging severally to the three plaintiffs were required to be idle for five days to enable the defendant to enjoy the benefit of only five hours use.<sup>74</sup>

In 1930, the court decided a case in which a real estate development company sought to permit non-riparian owners bathing access in a stream used by a municipality as a water supply.<sup>75</sup> In *Harvey Realty Co. v. Borough of Wallingford*, the court recognized the right of a riparian to reasonable use of an appurtenant watercourse,<sup>76</sup> tempered by a requirement that the water be used “in a reasonable manner and so as not to destroy, or render useless, or materially diminish or affect, the legitimate application or use thereof by other riparian proprietors.”<sup>77</sup> Applying this reasonable use theory, the court held that the riparian owners would have a right to bathe in the stream, but that allowing nonriparians similar privileges would be “extraordinary and unreasonable.”<sup>78</sup>

*Lake Williams Beach Association v. Gilman Brothers* was a 1985 case in which lakefront property owners sued owners of a dam following a

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<sup>66</sup> *Id.* at 476. The stream was lawfully taken by the Farmington Canal Company pursuant to authority conferred upon it by the Connecticut legislature in the exercise of its right of eminent domain. *Id.*

<sup>67</sup> *Id.* at 494.

<sup>68</sup> *Id.* at 497–98.

<sup>69</sup> *Id.* at 498.

<sup>70</sup> *Mason v. Hoyle*, 56 Conn. 255, 14 A. 786 (1888).

<sup>71</sup> *Id.* at 786–87.

<sup>72</sup> *Id.* at 788.

<sup>73</sup> *Id.* at 794.

<sup>74</sup> *Id.*

<sup>75</sup> *Harvey Realty Co. v. Borough of Wallingford*, 111 Conn. 352, 150 A. 60 (1930).

<sup>76</sup> *Id.* at 63.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

reduction in the lake's water level in accordance with engineering recommendations concerning the dam's safety.<sup>79</sup> In *Lake Williams Beach Association*, the court held that the defendants' reduction of the lake level was a reasonable exercise of their riparian interests.<sup>80</sup> In reaching its conclusion, the court stated that, "It is settled law that each riparian owner is limited to a reasonable use of the waters, with due regard to the rights and necessities of other such owners."<sup>81</sup>

The reasonable use rule in Connecticut is therefore a common rights system under which all riparian owners whose land is adjacent to a watercourse share as co-owners the right to use the water. As riparian co-owners each may make his own reasonable use of the water resource, and courts adjudicate instances when a use by one riparian owner conflicts with a use by another riparian owner. Judgments of reasonableness of competing uses are questions of fact that depend on the circumstances of a particular case.<sup>82</sup>

## 2. Natural Flow Theory

In contrast to the reasonable use theory, the natural flow theory maintains that each riparian owner is entitled to have the water of a river or stream flow by his land in its natural condition, without alteration by others of the rate of flow or the quantity of the water.<sup>83</sup> Under the natural flow theory, no use may be made by an upper riparian that will diminish the flow or quality of the water flowing by a lower riparian.<sup>84</sup> Early Connecticut cases identified and supported the categorical right of a lower riparian owner to the natural flow of an adjacent watercourse. As early as 1818, in *Ingraham v. Hutchinson*, the court stated that,

By the common law, every person owning lands on the banks of rivers, has a right to the use of the water in its natural stream, without diminution or alteration; that is, he has a right that it should flow, *ubi currere solebat*; and if any person on the river above him, interrupts or diverts the course of the water, to his prejudice, action will lie.<sup>85</sup>

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<sup>79</sup> *Lake Williams Beach Ass'n v. Gilman Bros.*, 197 Conn. 134, 496 A.2d 182 (1985).

<sup>80</sup> *Id.* at 185.

<sup>81</sup> *Id.* (internal quotation marks omitted).

<sup>82</sup> *Id.* See also *Hazard Powder Co. v. Somersville Mfg. Co.*, 78 Conn. 171, 177, 61 A. 519, 521 (1905); *Mason v. Hoyle*, 56 Conn. 255, 262, 14 A. 786, 788 (1888).

<sup>83</sup> *City of Waterbury v. Town of Washington*, 260 Conn. 506, 580, 800 A.2d 1102, 1149–50 (2002). See also Joseph W. Dellapenna, *The Right to Consume Water Under "Pure" Riparian Rights*, in 1 WATERS AND WATER RIGHTS § 7.02(c) (Robert E. Beck ed., 1991).

<sup>84</sup> See REIS, *supra* note 23, at 29.

<sup>85</sup> *Ingraham v. Hutchinson*, 2 Conn. 584, 590 (1818).

Other cases reiterated the theory's soundness. In 1924, in *Stamford Extract Manufacturing Company v. Stamford Rolling Mills Company*, the court recognized the governing natural flow theory: "Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run, [ . . . ] without diminution or alteration."<sup>86</sup> A few years later, in *Donnelly Brick Co. v. City of New Britain*, the court concluded that, "The plaintiff was entitled as a riparian owner to have this brook flow through its land as it had been accustomed to flow as a right inseparately annexed to its soil."<sup>87</sup> In 1951, in an appeal from a suit instituted by a riparian owner along the Mianus River in southwestern Connecticut, the court held that: "It is well established that a riparian owner is entitled to have the water of the stream upon which he borders continue to flow in its wonted manner."<sup>88</sup> In 1967, the court found a violation of the natural flow riparian rights when the interference with the flow occurred beneath the ground.<sup>89</sup> In *Collens v. New Canaan Water Company*, the court held that the plaintiffs, riparian owners along the Noroton River, were "entitled to the natural flow of the water of the running stream through or along their land, in its accustomed channel, undiminished in quantity or unimpaired in quality."<sup>90</sup> A year later in 1968, the court held that defendant city's diversion of water from a pond constituted a wrongful infringement of the plaintiffs' riparian rights.<sup>91</sup> In *Dimmock v. City of New London*, the court concluded that by diverting and appropriating to its own use a portion of the natural flow of a branch of Fraser Brook, the defendant city abrogated the riparian rights of the plaintiffs.<sup>92</sup> "A riparian owner is entitled to the natural flow of the water of the running stream through or along his land," said the court, "in its accustomed channel, undiminished in quantity and unimpaired in quality."<sup>93</sup>

### III. WATERBURY V. WASHINGTON

The Connecticut Supreme Court confronted the issue of water allocation again in July 2002. In *Waterbury v. Washington*,<sup>94</sup> the city of

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<sup>86</sup> *Stamford Extract Mfg. Co. v. Stamford Rolling Mills Co.*, 101 Conn. 310, 320, 125 A. 623, 627 (1924) (internal quotation marks omitted).

<sup>87</sup> *Donnelly Brick Co. v. City of New Britain*, 106 Conn. 167, 173, 137 A. 745, 747 (1927).

<sup>88</sup> *Adams v. Greenwich Water Co.*, 138 Conn. 205, 217, 83 A.2d 177, 183 (1951). The court noted that "any infringement of that right entitles him to relief, at least by way of damages, even though the actual, provable damage is small." *Id.*

<sup>89</sup> *Collens v. New Canaan Water Co.*, 155 Conn. 477, 487, 234 A.2d 825, 831 (1967).

<sup>90</sup> *Id.* at 831.

<sup>91</sup> *Dimmock v. City of New London*, 157 Conn. 9, 18, 245 A.2d 569, 573 (1968).

<sup>92</sup> *Id.* at 572.

<sup>93</sup> *Id.*

<sup>94</sup> *City of Waterbury v. Town of Washington*, 260 Conn. 506, 800 A.2d 1102 (2002).

Waterbury, joined by the towns of Middlebury, Watertown and Wolcott, sought to continue withdrawing water from the Shepaug River for use in its public water distribution system.<sup>95</sup> Waterbury had been diverting water from the Shepaug since 1917, sending up to sixteen million gallons per day to its reservoir system.<sup>96</sup> When residents and members of conservation groups downstream from Waterbury's diversions suspected that Waterbury's withdrawals were causing the Shepaug's natural summer flow through their communities to slow to a trickle, they brought their concerns to the attention of the Connecticut Department of Environmental Protection ("DEP") and Department of Public Health ("DPH").<sup>97</sup> Anticipating a threat to its water supply, Waterbury sought a declaratory judgment that, among other things, its operation of the Shepaug dam did not violate the rights of the downstream users.<sup>98</sup> Although the case eventually settled after the Connecticut Supreme Court's decision, it highlights key historical aspects of Connecticut's riparian water law while revealing a potentially fatal flaw in the legislature's attempt at regulation of water withdrawals in the state – registered diversions.

In concluding that Connecticut followed the natural flow theory of riparian rights until 1982, the *Waterbury* court expressly referred to the 1968 *Dimmock* decision as the last time that the theory was reaffirmed.<sup>99</sup> The *Waterbury* court's conclusion that the natural flow theory applied to riparian rights in Connecticut until the passage of the Diversion Act in 1982 was critically important because it allowed for the satisfaction of the "open and visible" requirement of a prescriptive easement.<sup>100</sup> Since the provision of water to a city entirely outside the watershed from which the water is taken is not considered a riparian use in Connecticut,<sup>101</sup> as soon as the withdrawals began they were adverse to the rights of other riparians on the Shepaug, and the very existence of the Shepaug dam was sufficiently open and visible to give notice of such adverse use to every riparian on the Shepaug, including the residents of Washington.<sup>102</sup>

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<sup>95</sup> *Id.* at 1109–10.

<sup>96</sup> *See id.* at 1112, 1114.

<sup>97</sup> *Id.* at 1114–15.

<sup>98</sup> *Id.* at 1115.

<sup>99</sup> *Id.* at 1150.

<sup>100</sup> *Id.* at 1151. The court stated that, "The trial court found that [t]he presence of the Shepaug dam has certainly been an *open and visible barrier on the river since 1933*. This finding is sufficient for us to conclude, as a matter of law, that Waterbury has satisfied the open and visible requirement since 1933." *Id.* (internal quotation marks omitted) (emphasis in the original).

<sup>101</sup> *See REIS, supra* note 23, at 54.

<sup>102</sup> *Waterbury*, 800 A.2d at 1150–52. The court noted that because Waterbury had consent from the Town of Washington (in the form of a 1921 contract between the municipalities) to divert water from the Shepaug River, its use was not "adverse" to Washington, and, as a result, "Waterbury did not gain any prescriptive rights as against Washington." *Id.* at 1152. However, with respect to the other defendants that joined Washington in the suit (Roxbury, Roxbury Land Trust, Inc., Shepaug River Association, Inc., and Steep Rock Association, Inc.), the court concluded that "there is no evidence, nor

After resolving the prescriptive easement question,<sup>103</sup> the court acknowledged the state's move from a common law riparian rights regime to a system of regulated riparianism through passage of the Diversion Act.<sup>104</sup> Under such a regulated riparianism model, a state agency governs water diversion decisionmaking, determining in advance whether specific withdrawals are to be allowed, and in what quantities,<sup>105</sup> as opposed to the traditional riparian system whereby courts adjudicate disputes applying purely common law riparian rights principles.<sup>106</sup> The *Waterbury* court identified several issues tied to the shift to regulated riparianism for the trial court to decide on remand. The issues were (1) whether the Washington parties possessed any riparian rights with respect to the flow down the Shepaug River, or if this common-law right had been superseded by legislative enactment;<sup>107</sup> (2) whether the legislature intended to allow riparians to retain common law remedies against registered diversions;<sup>108</sup> and (3) if the Washington defendants retained riparian rights with respect to the registered diversion, what standard ought to govern an examination of whether Waterbury violated these rights.<sup>109</sup> The court suggested two options for a governing standard: first, some type of reasonableness inquiry, as indicated in the Regulated Riparian Model Water Code and provided for in General Statutes section 22a-373 of the Diversion Act;<sup>110</sup>

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do they claim, that there was any such permitted use." *Id.* Since the other defendants did not permit Waterbury's use, Waterbury's use was therefore "adverse" to them, fulfilling that portion of the requirement for a prescriptive easement. The court held that "[g]iven these facts, we conclude, as a matter of law, that Waterbury established a prescriptive easement against the riparian rights of the other defendants." *Id.*

<sup>103</sup> In addition to the requirement that Waterbury's diversion have been "open and visible," the other requirements necessary for Waterbury to perfect a prescriptive easement were that the Shepaug dam operated adversely to the defendants' riparian rights continuously for at least fifteen years and under a claim of right. *Id.* at 1151. After reviewing the record, the court concluded, "as a matter of law, that Waterbury established all of the elements of a prescriptive easement as early as 1948." *Id.*

<sup>104</sup> *Id.* at 1155. The term "regulated riparianism" was coined by Joseph Dellapenna. Joseph W. Dellapenna, *Owning Surface Water in the Eastern United States*, 6 PROC. E. MINERAL L. FOUND § 1.03[3] at 1-34 (1985). At least one scholar has called the scheme a "temporal nonpriority permit system." Peter N. Davis, *Australian and American Water Allocation Systems Compared*, 9 B.C. INDUS. & COM. L. REV. 647, 697-700 (1968).

<sup>105</sup> See James N. Christman, WATER RIGHTS OF THE EASTERN UNITED STATES 29-30 (Kenneth R. Wright ed., 1998); Joseph W. Dellapenna, *Regulated Riparianism*, in WATERS AND WATER RIGHTS, *supra* note 83, at § 9.03(b) ("[r]egulated riparian statutes delegate to an administering agency the right to decide who, among competing applicants, will receive the right to use water, terms and conditions under which they will hold that right, and when, where, and how that right will end.").

<sup>106</sup> See Dellapenna, *supra* note 59, at 586.

<sup>107</sup> *Waterbury*, 800 A.2d at 1155.

<sup>108</sup> *Id.* at 1156.

<sup>109</sup> *Id.*

<sup>110</sup> See AM. SOC'Y OF CIVIL ENG'RS, THE REGULATED RIPARIAN MODEL WATER CODE: FINAL REPORT OF THE WATER LAWS COMM. OF THE WATER RES PLANNING AND MGMT. DIV. OF THE AM. SOC'Y OF CIVIL ENG'RS 31 (Joseph W. Dellapenna ed., 1997) [hereinafter RRMWC]; CONN. GEN. STAT. § 22a-373 (2009). Section 22a-373(b) of the statute provides that:



second, the prior law that already applied as the common law of riparian rights in Connecticut prior to 1982, which, according to the court, was the natural flow theory.<sup>111</sup>

Since the litigants in *Waterbury* settled after the Connecticut Supreme Court's decision,<sup>112</sup> no trial court has been afforded the opportunity to decide the questions directed by the *Waterbury* court for remand. This means that the status of registered diversions, and consequently the entire statewide water allocation planning process, remains in limbo.<sup>113</sup> However, it is important that the *Waterbury* court, rather than simply

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- (b) In making his decision, the commissioner shall consider all relevant facts and circumstances including but not limited to:
- (1) The effect of the proposed diversion on related needs for public water supply including existing and projected uses, safe yield of reservoir systems and reservoir and groundwater development;
  - (2) The effect of the proposed diversion on existing and planned water uses in the area affected such as public water supplies, relative density of private wells, hydropower, flood management, water-based recreation, wetland habitats, waste assimilation and agriculture;
  - (3) Compatibility of the proposed diversion with the policies and programs of the state of Connecticut, as adopted or amended, dealing with long-range planning, management, allocation and use of the water resources of the state;
  - (4) The relationship of the proposed diversion to economic development and the creation of jobs;
  - (5) The effect of the proposed diversion on the existing water conditions, with due regard to watershed characterization, groundwater availability potential, evapotranspiration conditions and water quality;
  - (6) The effect, including thermal effect, on fish and wildlife as a result of flow reduction, alteration or augmentation caused by the proposed diversion;
  - (7) The effect of the proposed diversion on navigation;
  - (8) Whether the water to be diverted is necessary and to the extent that it is, whether such water can be derived from other alternatives including but not limited to conservation;
  - (9) Consistency of the proposed diversion with action taken by the Attorney General, pursuant to sections 3-126 and 3-127; and
  - (10) The interests of all municipalities which would be affected by the proposed diversion.

*Id.*

<sup>111</sup> *Waterbury*, 800 A.2d at 1156-57.

<sup>112</sup> Press Release, Conn. Attorney Gen. Office, Attorney Gen., DEP Announce Tentative Settlement in Longstanding Shepaug River Dispute (Mar. 8, 2005), available at <http://www.ct.gov/ag/cwp/view.asp?A=1949&Q=290734>.

Under the tentative agreement, *Waterbury* will release 12 million gallons of water a day ("MGD") into the river from June 1 until September 30, a figure that drops to 6 MGD if reservoir levels drop below a specified level. From November to April, 1.5 MGD would be released and, in October and May, 6 MGD. Releases would cease during water emergencies.

*Id.*

<sup>113</sup> See Mayland, *supra* note 6, at 719.

holding that the registered diversions were beyond the scope of any regulatory or riparian review by nature of their “grandfathered” status, chose instead to have a lower court examine the issue in detail.<sup>114</sup> The remand of these questions to the trial court signals that the *Waterbury* court believed it was at least possible that these registered diversions may be subject to regulation or to common law claims, or both.

#### IV. ANSWERS AND ANALYSIS OF *WATERBURY*'S OPEN QUESTIONS

##### A. *The Waterbury court's first question: Did the Diversion Act Displace Riparian Rights?*

The first question presented for the trial court's consideration was whether the Washington parties' riparian rights with respect to the Shepaug River had been superseded by the Diversion Act in 1982. As has been discussed, Connecticut's shift to a regulated riparian system was at least partly driven by pressures of development and water scarcity that challenged the reasonable use and natural flow theories for a solution. A statewide ability to assess, forecast, and permit was required. Connecticut's answer was the Diversion Act. Therefore, the *Waterbury* court's first question gets at whether, in establishing this regulatory system, Connecticut abolished the rights of riparian owners across the state.

According to Section 1-2z of the Connecticut General Statutes,<sup>115</sup> courts seeking to determine the meaning of a statute must first consider the text of the statute itself and may only consult extratextual evidence of the statute's meaning when the statute is not plain and unambiguous.<sup>116</sup> Pursuant to this statute, an analysis begins with a close look at the plain

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<sup>114</sup> *Id.*

<sup>115</sup> CONN. GEN. STAT. § 1-2z (2009). The statute states:

The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.

*Id.* Section 1-2z was enacted by the legislature to overrule part of the Connecticut Supreme Court's decision in *State v. Courchesne*, 262 Conn. 537, 816 A.2d 562 (2003), in which Justice Borden, writing for a 5-2 majority, stated over a vigorous dissent by Justice Zarella that as “part of the judicial task of statutory interpretation,” the court would “no longer follow the so-called plain meaning rule,” which required a “threshold showing of linguistic ambiguity as a precondition to consideration of extratextual sources of the meaning of legislative language.” *Hummel v. Marten Transport, Ltd.*, 282 Conn. 477, 496-97, 923 A.2d 657, 668-69 (2007) (internal citation and quotation marks omitted). In enacting § 1-2z just three months after *Courchesne*, the legislature effectively nullified the court's decision to abandon the plain meaning rule. Section 1-2z prohibited the court from consulting extratextual sources, such as legislative history, when interpreting a statute, unless and until the court determined that the statute was ambiguous based on its language and any related statutory language. CONN. GEN. STAT. § 1-2z (2009).

<sup>116</sup> See *Kinsey v. Pacific Employers Ins. Co.*, 277 Conn. 398, 405, 891 A.2d 959, 963 (2006).

language of the Diversion Act. Section 22a-368(b) of the Connecticut General Statutes specifies that “no person or municipality shall, after July 1, 1982, commence to divert water from the waters of the state without first obtaining a permit for such diversion from the commissioner.”<sup>117</sup> Under section 22a-368(a), the statute clearly establishes that diversions maintained prior to July 1, 1982 shall be registered on or before July 1, 1983.<sup>118</sup> The statute prescribes that registrations contain a host of details such as the location, capacity, frequency and rate of withdrawals, and a description of the water use and water system.<sup>119</sup> The Act specifically exempts many withdrawals from the sweep of its regulatory scheme,<sup>120</sup>

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<sup>117</sup> CONN. GEN. STAT. § 22a-368(b) (2009).

<sup>118</sup> CONN. GEN. STAT. § 22a-368(a) (2009).

<sup>119</sup> CONN. GEN. STAT. § 22a-368(a) (2009).

<sup>120</sup> CONN. GEN. STAT. § 22a-377 (2009). Subsections (a) and (b) of the statute state that:

(a) The following diversions are exempt from the provisions of sections 22a-365 to 22a-378a, inclusive: (1) One or more wells joined in one system whose combined maximum withdrawal will not exceed fifty thousand gallons of water during any twenty-four-hour period; (2) the maximum withdrawal of fifty thousand gallons of surface water during any twenty-four-hour period; (3) discharges permitted under the provisions of section 22a-430; (4) a storm drainage system which collects the surface water runoff of an area of less than one hundred acres; (5) water for fire emergency purposes; (6) diversions within, extensions and relocation of water supply system distribution mains; (7) roadway crossings or culverts which allow for continuous flow or passage of an existing watercourse; (8) diversions directly related to routine maintenance and emergency repairs of dams; and (9) diversions by a water company, as defined in section 25-32a, that are necessary to protect the security of public water supplies, including: (A) A diversion from a back-up well where a primary well is out of service, provided (i) the back-up well is located within two hundred fifty feet of such primary well, (ii) the total quantity of water withdrawn does not result in an increase in the rate or quantity of a diversion registered or permitted by the commissioner pursuant to section 22a-368 or 22a-378a, and (iii) not later than January thirtieth of each year, the commissioner is supplied a written annual report, for the prior year, that identifies the location of each back-up well, the construction type of each back-up well, the date of installation and the daily water use from each primary well and each back-up well for those days on which the back-up well operated; or (B) a transfer of water from one distribution system to another during a water supply emergency declared pursuant to section 22a-378 or 25-32b or otherwise declared according to law, provided the transfer (i) is limited to the period during which the emergency exists, (ii) does not result in an increase in the rate or quantity of a diversion registered or permitted by the commissioner pursuant to section 22a-368 or 22a-378a, (iii) is accomplished through existing, authorized, installed capacity to transfer or through temporary equipment that is removed within thirty days after the last day of the water supply emergency, and (iv) the commissioner is notified, in writing, of any such transfer and its location within three days of the transfer and the commissioner is provided a written report of the daily transfer of water that occurred during the emergency and any other related information the commissioner may request.

(b) The commissioner may, by regulations adopted in accordance with the provisions of chapter 54, define and establish additional exempt categories or classes of diversions which would not by themselves or in combination with

including wells and surface water withdrawals of less than 50,000 gallons per day,<sup>121</sup> a threshold which makes most residential usage “exempt.”

The Act makes no mention of elimination of common law riparian rights and does not proclaim the permitting system it establishes as the exclusive means of conferring water rights.<sup>122</sup> Moreover, the Act purports only to create a permitting system for withdrawals initiated after July 1, 1982. Therefore, in its plain language, the Diversion Act does not destroy preexisting riparian rights. Rather, the Act provides a crucial regulatory overlay for the state’s overburdened riparian system in order to meet intensifying demand in an era of increasing resource scarcity.<sup>123</sup>

An analysis of the Act’s legislative history confirms the conclusions drawn from the statute’s plain language. Given that there is only one reference to riparian claims in the legislative history of the Act,<sup>124</sup> it is likely that some – perhaps most – legislators did not consider the Act’s impact on common law riparian rights. In the absence of affirmative statutory language stripping riparians of their ability to assert claims, however, courts should be reluctant to construe a largely silent legislative history as a termination of common law riparian rights. Riparian rights were unmentioned in the draft of the Act submitted to the General Assembly’s Environment Committee by the DEP.<sup>125</sup> Similarly, the raised bill and subsequent versions contained no mention of riparian rights. In contrast, the concept of registered diversions appears extensively in public hearings on the Act,<sup>126</sup> the floor debate on the Act,<sup>127</sup> and various newspaper editorials discussing the need to accommodate water companies and their existing withdrawals.<sup>128</sup> It seems inconceivable that if the Act

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each other have a substantial effect on the long-range planning for and allocation of the water resources of the state.

*Id.*

<sup>121</sup> CONN. GEN. STAT. §§ 22a-377(a)(1) to 22a-377(a)(2) (2009).

<sup>122</sup> CONN. GEN. STAT. §§ 22a-365 to 22a-378 (2009).

<sup>123</sup> CONN. GEN. STAT. § 22a-366 (2009).

<sup>124</sup> CONN. JOINT STANDING COMM. HEARINGS, ENVIRONMENT COMM., Pt. 4, 1982 Sess., at 911-13 (statement of the Second Taxing District Water Department, “This bill does not eliminate or alter in any way riparian rights. If this bill is passed our industry will be saddled with both a State wide allocation and the need to settle riparian issues.”).

<sup>125</sup> CONN. DEP’T OF ENVTL. PROT., THE CONNECTICUT WATER DIVERSION POLICY ACT OF 1982 (Feb. 1, 1982) (on file at Conn. State Library with legislative history of An Act Concerning Water Diversion, Pub. Act 82-402, 1982 House Bill No. 5883).

<sup>126</sup> CONN. JOINT STANDING COMM. HEARINGS, ENVIRONMENT COMM., Pt. 4, 1982 Sess., at 780-982.

<sup>127</sup> 25 CONN. H.R. PROC., Pt. 19, 1982 Sess., at 6233-81; 25 CONN. S. PROC., Pt. 13, 1982 Sess., at 4277-4351.

<sup>128</sup> See Editorial, *Keep Rivers Bill on Course*, HARTFORD COURANT, Apr. 5, 1982, at A10 (“The General Assembly’s Environment Committee bent over backwards to meet objections of water companies to a bill designed to protect waterways in the state.”); Editorial, *State Rivers Protected*, BRISTOL/VALLEY PRESS, Mar. 29, 1982, at 10. (“The bill which emerged from the Environment Committee is not quite the same one which went in.”).

were intended to extinguish riparian claims, there would be no statutory language or legislative history indicating this point. There is simply no plausible argument that the Act, without mentioning riparian claims *at all*, exempted existing withdrawals *and* shielded them from riparian claims. Rather, it is likely that the legislature either (1) did not consider riparian claims, or (2) intended for riparian claims to survive as a remedy against excessive withdrawals by registered diversions.<sup>129</sup> Under neither circumstance could one assume a legislative objective for the Diversion Act to displace riparian rights.

*B. The Waterbury court's second question: Did the Legislature Mean for Common Law Riparian Remedies Against Registered Diversions to be Preserved?*

Registered users generally believe they have a perpetual, state-conferred right to divert water regardless of the environmental consequences caused by their use and despite the impossibilities these registered diversions represent to the formulation of a statewide water allocation scheme. However, if the DEP is unable to regulate such a large percentage of the state's water use and no riparian claims can be enforced against registered diversions, Connecticut will face a water use impasse with very troubling potential consequences. Many of the state's surface waters are already overallocated, especially in the summer months, when the sum of the withdrawals made by registered diversions and permitted diversions exceeds the average flow.<sup>130</sup> It is important to ask, as did the *Waterbury* court, whether riparian owners are powerless to assert their rights as more and more water courses run dry for longer and longer periods? A look at the language of the Diversion Act suggests that while registered diversions enjoy explicit immunity from regulatory oversight, their invulnerability against riparian claims is highly uncertain.

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<sup>129</sup> As the *Waterbury* court noted, the Regulated Riparian Model Water Code provides, with respect to the effects of grandfathering diversions in a permit system, that riparian claims may still be brought in cases of conflict. *City of Waterbury v. Town of Washington*, 260 Conn. 506, 592-93, 800 A.2d 1102, 1156 (2002). The Code states that "most states will choose to exempt some water uses from the permit system. In that case, the Code provides that disputes involving such exempted water uses will be governed by the principle of reasonable use. In most cases, that rule is simply the prior law that already applied to them as the common law of riparian rights or the common law of underground water." RRMWC, *supra* note 110, at § 2R-1-04 cmt. background.

<sup>130</sup> TROUT UNLIMITED, A GLASS HALF FULL, *supra* note 8, at 4; FARMINGTON RIVER WATERSHED ASSOC., SUBMITTED TESTIMONY ON RAISED BILL 1319: *AN ACT ESTABLISHING A WATER PLANNING COUNCIL* (Mar. 6, 2001) (on file at Conn. State Library with legislative history of An Act Establishing a Water Planning Council, Pub. Act 01-177, 2001 Senate Bill No. 1319) ("Approximately half of our watershed [is] overallocated, that is, the existing claims on the water evidently exceed the water available, sometimes by a large margin.").

### 1. *The Plain Language of the Diversion Act*

As discussed above, the plain language of the Diversion Act granted a specific right to withdrawals existing on July 1, 1982 – the ability to register the withdrawal and avoid the permitting process that the Act established.<sup>131</sup> According to the Act, “[a]ny such diversion which is not so registered may be subject to the permit requirements of sections 22a-365 to 22a-378, inclusive.”<sup>132</sup> There is no language in section 22a-368 or anywhere else in the Diversion Act that confers immunity from common law riparian claims upon registered diversions. These registered diversions are surely exempt from the permitting process, provided that they were registered in a timely manner and according to the statute. But, according to the Act itself, a registered diversion is “only” exempt from the permitting scheme. No special privileges are conferred upon them by the Act. No vacation from riparian claims was pronounced. Instead, the plain language of the statute states only that registered withdrawals are exempt from the permitting process. To reinforce its meaning, the statute also states the inverse: unregistered diversions are subject to the permitting process. Therefore, by the very words of the Diversion Act itself, registered diversions have the special right of exemption from the permitting process. They are not uniquely excluded from common law review.

### 2. *Possible Regulatory Impingements of Registered Diversions*

Subsequent legislative and regulatory developments have validated the court’s intuition.<sup>133</sup> The passage of a revised minimum stream flow statute in 2005 was perceived by some as a mechanism to bring registered diversions within the authority of the state regulator.<sup>134</sup> Yet despite relatively clear language,<sup>135</sup> the statute is not widely acknowledged as the

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<sup>131</sup> CONN. GEN. STAT. § 22a-368 (2009).

<sup>132</sup> CONN. GEN. STAT. § 22a-368(a) (2009).

<sup>133</sup> See CONN. GEN. STAT. §§ 26-141a to 26-141b (2009).

<sup>134</sup> CONN. JOINT STANDING COMM. HEARINGS, ENVIRONMENT COMM., Pt. 1, 2006 Sess., at 259-66 (remarks of Kirt Mayland, Director of the Eastern Water Project, Trout Unlimited).

<sup>135</sup> CONN. GEN. STAT. § 26-141c (2009). The statute states that:

After the adoption of regulations pursuant to section 26-141b, no person or municipality, as defined in section 22a-423, shall maintain any dam or structure impounding or diverting water within this state except in accordance with regulations as established by the Commissioner of Environmental Protection. If the commissioner finds that any person or municipality, as defined in section 22a-423, is violating such regulations, the commissioner shall issue an order to such person or municipality to comply with the regulations. The order shall include a time schedule for the accomplishment of the necessary steps leading to compliance. If such person, or municipality fails thereafter to comply with the regulations concerning flow of water, the commissioner may request the Attorney General to bring an action in the Superior Court to enjoin such person

panacea for the state's water allocation policy that some had hoped when it was contemplated in 2004.<sup>136</sup> In that year, the DEP led a stream flow legislation committee comprised of a host of constituents,<sup>137</sup> aiming to reach consensus on a legislative proposal to amend section 26-141a of the Connecticut General Statutes, which prescribed standards for the flow of water in stocked streams. The committee reached consensus on a legislative proposal near the end of 2004 and the legislation passed in 2005 as Public Act 05-142.<sup>138</sup> This new statute authorizes the DEP to revise the state's Minimum Stream Flow Regulations to apply to all Connecticut streams, not just streams stocked with fish.<sup>139</sup> In response, the DEP Commissioner appointed a Stream Flow Advisory Group in December 2005 to work with agency staff in the development of the regulation. As of March 2009, new stream flow regulations have not been published, though

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or municipality from restricting the flow of such water in accordance with such regulations.

*Id.*

<sup>136</sup> CONN. JOINT STANDING COMM. HEARINGS, ENVIRONMENT COMM., Pt. 1, 2006 Sess., at 263 (statement of Kirt Mayland, Director of the Eastern Water Project, Trout Unlimited).

SEN. FINCH: So what you are maintaining here is that without this bill, basically, no one can review most of the diversion permits ever? Is that what you are saying?

KIRT MAYLAND: I didn't think that was the case until about two weeks ago, but I thought the stream flow regulations handled that, but apparently in the view of many people they don't.

*Id.*

<sup>137</sup> The committee included representatives from the Department of Public Health ("DPH") and members of the Water Planning Council ("WPC") Advisory Group. According to the DEP website:

The Water Planning Council . . . consists of Commissioners from four state agencies: [DEP; DPH;] Department of Public Utility Control ("DPUC"); and the Office of Policy and Management ("OPM"). The Council convened its first meeting on October 22, 2001 to study eleven issues identified by the Legislature regarding water company management and natural resource management. . . . The [WPC] established an Advisory Group in 2003 comprised of a broad array of stakeholders to assist the [WPC] in accomplishing action items set out in its 2003 report. Significant action items for the WPC included a proposed revision to the Diversion Act concerning registered diversions and a revision of the Stream Flow Standards. Legislation to revise the Minimum Stream Flow regulations that set standards for stocked streams and expand authority to regulate flows of all Connecticut streams passed in 2005.

Department of Environmental Protection,  
[http://ct.gov/dep/cwp/view.asp?a=2720&q=325644&depNav\\_GID=1654](http://ct.gov/dep/cwp/view.asp?a=2720&q=325644&depNav_GID=1654) (last visited Mar. 27, 2009). HB 5277, the proposed legislation to revise the Diversion Act, failed, as is discussed *infra*, note 156.

<sup>138</sup> CONN. GEN. STAT. § 26-141a (2009).

<sup>139</sup> See CONN. GEN. ASSEM., OFFICE OF LEGIS. RESEARCH, BILL ANALYSIS FOR SB 1294, AS AMENDED BY SENATE A (2005), available at <http://www.cga.ct.gov/2005/BA/2005SB-01294-R01-BA.htm> ("The bill requires the . . . DEP . . . commissioner to revise minimum flow regulations for all rivers and streams where a dam impounds or diverts the water flow. It expands the scope of these regulations to all such rivers and streams, rather than just those that DEP has stocked with fish.")

the statutory deadline called for implementation of the new regulations by December 2006.<sup>140</sup>

Section 26-141c contains clear language that instills in the DEP Commissioner the power to apply minimum stream flow standards to all of the state's streams. The statute states that "no person or municipality . . . shall maintain any dam or structure impounding or diverting water within the state except in accordance with regulations as established" by the Commissioner of the DEP.<sup>141</sup> The statute goes on to state that "if the commissioner finds that any person or municipality . . . is violating such regulations, the commissioner shall issue an order to such person or municipality to comply with the regulations."<sup>142</sup> The statute clearly identifies that the new stream flow standards apply to all diversions within the state and that the commissioner may issue compliance orders to any person or municipality who violates them. The statute contains no exemption for registered diversions and limits its scope only in specific circumstances, such as an extreme economic hardship, an agricultural diversion, a water quality certification related to a license issued by the Federal Energy Regulatory Commission ("FERC"), or as necessary to allow a public water system to comply with its legal obligations.<sup>143</sup> Nonetheless, registered diverters generally do not believe that these minimum stream flow regulations, whenever they are eventually published, will fundamentally change the exempted status of their registered diversions.<sup>144</sup> Even advocates of regulation feel that the minimum stream

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<sup>140</sup> CONN. GEN. STAT. § 26-141b (2009). The statute states:

The Commissioner of Environmental Protection shall, on or before December 31, 2006, and after consultation and cooperation with the Department of Public Health, the Department of Public Utility Control, an advisory group convened by the Commissioner of Environmental Protection, and any other agency, board or commission of the state with which said commissioner shall deem it advisable to consult and after recognizing and providing for the needs and requirements of public health, flood control, industry, public utilities, water supply, public safety, agriculture and other lawful uses of such waters and further recognizing and providing for stream and river ecology, the requirements of natural aquatic life, natural wildlife and public recreation, and after considering the natural flow of water into an impoundment or diversion, and being reasonably consistent therewith, shall adopt regulations, in accordance with the provisions of chapter 54, establishing flow regulations for all river and stream systems.

*Id.*

<sup>141</sup> CONN. GEN. STAT. § 26-141c (2009).

<sup>142</sup> *Id.*

<sup>143</sup> CONN. GEN. STAT. § 26-141b (2009).

<sup>144</sup> See CONN. JOINT STANDING COMM. HEARINGS, ENVIRONMENT COMM., Pt. 1, 2006 Sess., at 220-21 (remarks of Betsy Gara, Executive Director of the Connecticut Waterworks Association, and Susan Suhanovsky, Torrington Water Company). Ms. Suhanovsky stated her anticipation that if HB 5277 were passed, "the Commissioner would most likely impose minimum stream flows [sic] requirements as a new operating condition on existing registered diversions." *Id.* at 141. Ms.



flow standards are not sufficient to address the problem of registered diversions.<sup>145</sup>

However, a credible argument can be made that the streamflow standards will impose regulatory control over registered diversions despite a relatively clear legislative intent against such an outcome.<sup>146</sup> Courts will interpret this statute by looking first to its plain meaning, as prescribed by the legislature in section 1-2z of the Connecticut General Statutes.<sup>147</sup> If that meaning is plain and unambiguous, and does not yield unworkable results, the legislative history cannot be consulted.<sup>148</sup> From its plain language, the statute conveys a specific legislative directive that all of the state's streams shall be subject to minimum streamflow regulations adopted by the DEP Commissioner.<sup>149</sup> To reinforce the idea of the streamflow regulations' universal applicability, the statute limits exemptions. Section 26-141b directs that the regulations "may" – *not* "shall" – provide exemptions,<sup>150</sup> and that flow management plans approved by the DEP Commissioner – like the one included as part of the settlement agreement between Waterbury and Washington – will be exempt.<sup>151</sup> Therefore, the minimum streamflow statute plainly exempts registered diversions incorporated into a settlement agreement endorsed by the state regulatory authority. However, registered diversions will enjoy no other mandatory exemption from the regulations.<sup>152</sup> Exemptions "may" be granted at the discretion of the DEP Commissioner, but under the

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Suhanovsky's statement implies that without passage of HB 5277, the minimum streamflow requirements would not apply to registered diversions.

<sup>145</sup> *Id.* at 45 (remarks of Doctor Vincent Ringrose, Chairman of the DEP's Fisheries Advisory Council). Doctor Ringrose stated that, "[I]ast year's stream flow legislation does not adequately cover all these situations, in the opinion of the Council. Any grandfathered diversions of over 50,000 gallons per day are essentially untouchable under the present situation." *Id.*

<sup>146</sup> 48 CONN. H.R. PROC., Pt. 21, 2005 Sess., at 6245 (remarks of Representative Mushinsky, "This bill is not revisiting existing diversions. . . . You know, that question is going to come up in the future and we will have to address it, but it doesn't come up in today's bill . . .").

<sup>147</sup> CONN. GEN. STAT. § 1-2z (2009). See also discussion *supra* Part III.a.

<sup>148</sup> CONN. GEN. STAT. § 1-2z (2009).

<sup>149</sup> CONN. GEN. STAT. § 26-141b (2009) ("The Commissioner of Environmental Protection shall . . . adopt regulations . . . establishing flow regulations for all river and stream systems.").

<sup>150</sup> *Id.* ("Such flow regulations may provide special conditions or exemptions . . ."). The statute states that exemptions may include, but are not limited to:

an extreme economic hardship or other circumstance, an agricultural diversion, a water quality certification related to a license issued by the Federal Energy Regulatory Commission or as necessary to allow a public water system, as defined in subsection (a) of section 25-33d, to comply with the obligations of such system as set forth in the regulations of Connecticut state agencies.

*Id.*

<sup>151</sup> *Id.* ("Any flow management plan contained in a resolution, agreement or stipulated judgment to which the state, acting through the Commissioner of Environmental Protection, is a party . . . is exempt from any such flow regulations.").

<sup>152</sup> An excellent discussion of takings may be found in Mayland, *supra* note 6, at Part VI.

language of the statute these exemptions can be granted on a case-by-case basis without exempting the entire class.

The plain and unambiguous nature of the statute's language in making all of the state's river and stream systems subject to minimum flow regulation stands in stark contrast to the statute's legislative history, which indicates with equal clarity a legislative intent to avoid the question of registered diversions.<sup>153</sup> While General Statutes sections 26-141a through 26-141c could be construed by courts as imbuing the DEP with regulatory authority over registered diversions in Connecticut,<sup>154</sup> very few of the parties associated with the statutes' adoption understand them to dispense that power.<sup>155</sup> It is unsurprising, then, that the legislative debate continued the following year.

As a response to the perceived inadequacy of the new streamflow statute to apply to registered diversions, the Environment Committee of the Connecticut General Assembly favorably reported HB 5277 out of its committee on March 20, 2006.<sup>156</sup> The bill represented an explicit attempt to bring registered diversions within the control of the state regulator.<sup>157</sup>

<sup>153</sup> 48 CONN. H.R. PROC., Pt. 21, 2005 Sess., at 6245 (remarks of Representative Mushinsky).

<sup>154</sup> See CONN. JOINT STANDING COMM. HEARINGS, ENVIRONMENT COMM., Pt. 1, 2006 Sess., at 261 (remarks of Kirt Mayland, Director of the Eastern Water Project, Trout Unlimited, "For all intents and practical purposes that the D[E]P now had a right [after Public Act 05-142], and it says it right here, to review registered diversions.").

<sup>155</sup> See *id.* at 263 (remarks of Kirt Mayland, Director of the Eastern Water Project, Trout Unlimited).

SEN. FINCH: So what you are maintaining here is that without this bill, basically, no one can review most of the diversion permits ever? Is that what you are saying?

KIRT MAYLAND: I didn't think that was the case until about two weeks ago, but I thought the stream flow regulations handled that, but *apparently in the view of many people they don't*.

*Id.* (emphasis added).

<sup>156</sup> The vote total was 15-12. CONN. GEN. ASSEM., ENV'T COMM., VOTE TALLY SHEET FOR HB-5277 (2006), available at <http://www.cga.ct.gov/2006/TS/H/2006HB-05277-R00ENV-CV72-TS.htm>.

<sup>157</sup> An Act Concerning Preservation of Rivers and Streams, H.B. 5277, Feb. Sess. (2006). The bill proposed to repeal § 22a-375 of the General Statutes and substitute the following in lieu thereof:

(1) (c) The commissioner may periodically investigate and review nonagricultural diversions registered in accordance with section 22a-368. If the commissioner determines, after reviewing the applicable data, that there is probable cause that a registered diversion is having, on its own or together with other diversions, a detrimental effect on the environment and natural aquatic life in a basin, the commissioner may, after recognizing and providing for the needs and requirements of public health and safety, water supply and industry, issue an order directing the holder of any such registered diversion to apply for and obtain a permit for such diversion in accordance with sections 22a-365 to 22a-378, inclusive, and the regulations of Connecticut state agencies. A person or municipality maintaining such registered diversion may continue to withdraw water at its current quantity, frequency and rate until a decision is made by the commissioner pursuant to section 22a-373.

(d) If the holder does not apply for a permit as ordered by the commissioner, the commissioner may issue an order pursuant to this subsection

HB 5277 would have authorized the DEP Commissioner to (1) periodically investigate and review non-agricultural registered diversions and (2) order a registered diverter to apply for and obtain a permit if the registered diversion, alone or with other diversions, was having a detrimental effect on the environment and natural aquatic life.<sup>158</sup> Because the bill never received a vote from the full legislature,<sup>159</sup> the status of the state's registered diversions remains unchanged. However, efforts toward its passage reveal a legislative awareness of registered diversions as the proverbial "elephant in the room" of the state's effort to formulate a comprehensive water allocation policy.<sup>160</sup>

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and . . . the order shall specify the general location of the diversion and specify a reasonable period of time within which the holder shall make application for and obtain a permit for such diversion in accordance with sections 22a-365 to 22a-378, inclusive, and the regulations of Connecticut state agencies. Such order shall remain in effect unless the commissioner finds the holder of the diversion has surrendered such diversion or that the time frame to apply for and obtain a permit is unreasonable.

(g) If the person or persons subject to the order fails to comply with the order, the commissioner shall revoke the registration that was the subject of the order. If the commissioner issues an order pursuant to this subsection to two or more persons, each person shall be jointly and severally liable with respect to such order.

*Id.*

<sup>158</sup> *Id.* § 5277(1)(c).

<sup>159</sup> HB 5277 was referred to the Committee on Planning and Development and never reported out of this committee. See 112 CONN. H.R. J., Pt. 1, 2006 Sess., at 506.

<sup>160</sup> See CONN. JOINT STANDING COMM. HEARINGS, ENVIRONMENT COMM., Pt. 1, 2006 Sess., at 142 (remarks of Representative Urban). Representative Urban stated that:

I'm a little bit flummoxed by what the problem is, as if there was an unlimited source of water out there that does not, in fact, belong to the public and that we really don't need to get our hands around some of the issues of the streams, the rivers, the fish, and the other environmental issues that are becoming forced because of draw-downs that we can't seem to get a handle on.

*Id.* Representative Moukawsher stated that:

[S]treams have dried up, that water's been, so much water's been taken and under a claim that, well, we're grandfathered, we can take whatever we want, that there's no accountability for, you know, massive fish kills, for degradation of streams and rivers. I mean, isn't that what this bill's designed to try to combat?

*Id.* at 216. Representative Mushinsky stated that:

You know, the science is saying the numbers that the Legislature thought were accurate in 1982 and '83 are not accurate. The time the diversion law was passed, and it came out of this Environment Committee, it appeared that the diversion permits were giving away just a small percentage of the water. It now appears, based on current science, that more than 80%, maybe 85% of the water was given away in the grandfathered system. And obviously the Legislature did not know it back then. So if you insist on maintaining what you were given back in the early '80s on bad science forever, then that means you'd have to go to court for every single one of these contested diversions, even as the evidence mounts that some of these rivers are over-allocated. I hope you don't mean that you plan to go to court on all these instances. I hope you're willing to work with the other

Ultimately, legislative efforts to bring registered diversions under the state's regulatory authority have failed. Although a plain reading of the state's minimum streamflow statute could suggest otherwise, the overwhelming extratextual evidence indicates that registered diversions are still exempt from regulation.<sup>161</sup> Despite the section 1-2z plain meaning statute, courts would be unlikely to limit their construction in this instance to only the plain language. Some ambiguity could undoubtedly be located and used as a basis to consider the minimum streamflow statute's legislative history, which points to the rather clear conclusion that legislators themselves do not consider registered diversions within the scope of the state regulatory authority.

#### a. The Massachusetts Example

A slightly different case exists in Massachusetts. Under the Massachusetts Water Management Act,<sup>162</sup> in effect since March 1986, existing diverters were allowed to register their uses, subject to periodic

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parties to figure out, now that we know the science is bad and now that we know the accurate information or we're getting the accurate information. How can we then fairly allocate the water among all the stakeholders?

*Id.* at 218-19.

<sup>161</sup> *Cf. In the Matter of Metro. Dist. Comm'n and the Town of Portland: Application to Divert Water From the MDC System to Portland*, Application No. Div 96-09 (DEP 1998) (example of limited, albeit successful state regulation of a registered diversion). In this adjudication, the MDC and Portland jointly filed an application with the DEP, seeking a permit to divert a maximum of two million gallons per day of water from the MDC water distribution system to Portland's water distribution system. The DEP required that all relevant environmental regulations promulgated pursuant to the Diversion Act applied to the proposed sale, even though MDC's existing registered diversion, when added to the proposed diversion to Portland, was substantially lower in volume than its registered capacity of withdrawal. In its second conclusion of law, the DEP held that:

In part, MDC is required to apply for a water diversion permit in this matter because MDC is proposing to divert water outside of the public water supply service area, which constitutes part of the water use and water system it registered pursuant to Conn. Gen. Stat. § 22a-368, and the proposed diversion is not otherwise exempt pursuant to Conn. Gen. Stat. § 22a-377 or any promulgated regulation.

*Id.* at 17 (proposed decision). Although the decision does not suggest that registered diversions are subject to regulation in any other circumstance, it nevertheless stands as legal recognition that registered diverters are required to apply for a permit when attempting to sell water to a new service area.

<sup>162</sup> The Water Management Act ("WMA") became effective in March 1986. MASS. GEN. LAWS ch. 21g (2009). The Act authorizes the Massachusetts Department of Environmental Protection ("MassDEP") to regulate the quantity of water withdrawn from both surface and groundwater supplies. *Id.* The purpose of these regulations is to ensure adequate water supplies for current and future water needs. 310 MASS. CODE REGS. 36.00 (2009). The WMA consists of a few key components, including a registration program and a permit program. MASS. GEN. LAWS ch. 21g (2009). Large water users had the ability to register their existing water withdrawals based on their water use between 1981 and 1985. *Id.* The registration program established the renewable right of previously existing water withdrawals over 100,000 gallons per day (gpd) on average, per river basin, between 1981 and 1985. *Id.* DEP issued registration statements to document these registrations. The last day to register was January 1, 1988. *Id.*

renewal. Since the Act's inception, these registered withdrawals had always been, like in Connecticut, completely free of any regulation. However, on December 31, 2007, the state regulatory authority ("MassDEP") renewed several of the state's registered diversions subject to certain regulatory conditions.<sup>163</sup> Specifically, the registered diversions were required to comply with updated regulatory guidance governing permit applications, which mandated (1) residential water use caps; (2) a limit on unaccounted for water; and (3) a limit on summer water withdrawals.<sup>164</sup>

Thirty-seven cities and towns appealed MassDEP's decision, claiming that the agency had no authority to issue registered diversion renewals subject to regulation by the state.<sup>165</sup> The MassDEP Commissioner stayed the appeals while the agency updated its guidance documents related to these issues.<sup>166</sup> Eventually, fourteen cities and towns challenged the MassDEP conditions on the renewal of their registrations in superior court.<sup>167</sup> In *Town of Wellesley Department of Public Works v. Massachusetts Department of Environmental Protection*, the cities and towns sought a declaratory judgment that MassDEP could not condition the renewal of their registered diversions.<sup>168</sup> The court entered a declaratory judgment declaring that the WMA "does not authorize the [MassDEP] to condition a withdrawal registration renewal; and that the plaintiffs may file their registration renewals, without condition, with the [MassDEP]."<sup>169</sup>

The *Wellesley* decision examined several aspects of the WMA in concluding that registration renewals could not be conditioned by MassDEP. The court scrutinized the language and legislative history of the WMA, as well as MassDEP guidelines,<sup>170</sup> and determined that MassDEP "has no discretion to deny a complete, properly filed renewal application."<sup>171</sup> The outcome in *Wellesley* reinforces the idea that regulatory action against registered diversions in Connecticut is unlikely to succeed, and does little to incentivize Connecticut DEP to initiate regulatory action against registered diversions. Instead, the *Wellesley*

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<sup>163</sup> See Robert Knox, *Advocates Fault New Water Policy*, BOSTON GLOBE, Jan. 10, 2008, at Reg.1.

<sup>164</sup> *Town of Wellesley Dep't of Pub. Works v. Mass. Dep't of Env'tl. Prot.*, No. 08-0174, at 4 (Mass. Dec. 12, 2008) [hereinafter *Wellesley v. MassDEP*].

<sup>165</sup> Telephone Interview with Margaret VanDeusen, Gen. Counsel, Charles River Watershed Ass'n (Apr. 28, 2008).

<sup>166</sup> COMMONWEALTH OF MASS., DEP'T OF ENVTL. PROT., COMM'R DIRECTIVE: APPEALS OF WATER MGMT. ACT REGISTRATION RENEWAL STATEMENTS (2008).

<sup>167</sup> *Wellesley v. MassDEP*, at 1.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 12.

<sup>170</sup> *Id.* at 8-10.

<sup>171</sup> *Id.* at 9.

decision bolsters the arguments of registered diverters that their withdrawals are completely outside the scope of state regulation.<sup>172</sup> Assuming that DEP acted to regulate registered diversions anyway, the similarities between the WMA and the Diversion Act suggest that Connecticut courts would also invalidate any regulatory action. Based on the *Wellesley* case, a purely regulatory approach to registered diversions appears untenable. Since the General Assembly has also been unable to limit or condition registered diversions, state courts remain the only viable forum in which registered diversions may be limited.

3. *Where Common Law Riparian Claims Stand Vis-à-vis Registered Diversions*

It is unlikely that the Diversion Act immunized registered diversions against common law riparian claims, especially when no language in the statute indicates such a broad inoculation. A more likely explanation seems to be that the General Assembly assumed water use conflicts could still be decided on a case-by-case basis in state courts under the existing common law riparian framework. There is simply nothing in the language or legislative history of the Diversion Act to suggest that the legislature, while exempting all existing withdrawals from the Act's permitting system through a system of registration, was extinguishing all riparian rights against them. Without any expression of intent by the legislature to strip riparians of their common law rights against registered diversions in either the language or the history of the Act, courts would seem hard-pressed to hold that such an eradication of riparian rights had occurred. Indeed, it is unlikely that the legislature would have simultaneously conferred an enormous exemption for a class of water users while removing all traces of protection against those exemptions from another class – all without any discussion of the issue. Such a move would undoubtedly have spurred some opposition – if not enough to jeopardize the Act's passage, at least enough to inspire protest from riparians. Yet there is no evidence of opposition from riparians in the legislative record.<sup>173</sup> If the simplest explanation for an occurrence is usually the most probable, it follows that the omission of a discussion of riparian rights in the Diversion Act is an acknowledgment that they will endure. This interpretation of the legislature's intent, when coupled with the plain language of the Diversion Act and subsequent legislative efforts – namely HB 5277 – to provide a holistic *regulatory* scheme for registered diversions, suggests that the

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<sup>172</sup> The superior court's opinion in *Wellesley* is on appeal, and may be overturned or vacated. Such an outcome would of course improve the chances that similar regulatory action in Connecticut would be approved by the courts.

<sup>173</sup> See, e.g., CONN. JOINT STANDING COMM. HEARINGS, ENVIRONMENT COMM., Pt. 4, 1982 Sess., at 911 (statement of the Second Taxing District Water Department).

legislature intended to allow riparians to retain common law remedies against registered diversions.

*C. The Waterbury court's third question: Under What Theory – Reasonable Use or Natural Flow – Would Registered Diversions Be Subject to Common Law Riparian Claims?*

Even if a registered diversion is subject to common law riparian claims, the *Waterbury* court's third and final question remains unanswered – under what theory: reasonable use or natural flow? The *Waterbury* court suggested that the answer may be either theory,<sup>174</sup> and remanded the question to the trial court.<sup>175</sup> However, under Connecticut's pre-1982 law that applies to these diversions as the common law of riparian rights, the natural flow theory would govern.<sup>176</sup> Yet, a trial court confronted with this issue after *Waterbury* would best apply the reasonable use theory,<sup>177</sup> because while each theory has merits and imperfections,<sup>178</sup> use of the natural flow theory would result in, among other things, prescriptive easement claims that would threaten the state's ability to create a comprehensive water allocation policy .

*1. Weaknesses of the Reasonable Use Theory*

As a primary matter, any decision adjudicating a conflict between riparians under the reasonable use theory will necessarily rely on a relatively long list of imprecise factors.<sup>179</sup> In addition, if the nature of a use

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<sup>174</sup> *Waterbury v. Washington*, 260 Conn. 506, 592-594, 800 A.2d 1102, 1156-57 (2002).

<sup>175</sup> *Id.* at 1156-57. The court held that:

if the trial court determines that the defendants retain riparian rights with respect to the exempted diversion, it must decide what standard will govern its examination of whether *Waterbury* violated these rights: either some type of reasonableness inquiry, as indicated in the model code and provided for in General Statutes § 22a-373 of the diversion act, or the prior law that already applied to them as the common law of riparian rights; which, prior to 1982 in Connecticut, was the natural flow body of law.

*Id.* (internal citations and quotation marks omitted).

<sup>176</sup> *Id.* In *Waterbury*, the court decided that until 1982 Connecticut subscribed to the natural flow theory of riparian rights. *Id.* at 1149-50.

<sup>177</sup> See Robert E. Beck, *The Regulated Riparian Model Water Code: Blueprint for Twenty First Century Water Management*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 113, 115 (2000).

<sup>178</sup> Dellapenna, *supra* note 59, at 559.

<sup>179</sup> See RESTATEMENT (SECOND) OF TORTS, § 850A (1979). The Restatement states that:

The determination of the reasonableness of a use of water depends upon a consideration of the interests of the riparian proprietor making the use, of any riparian proprietor harmed by it and of society as a whole. Factors that affect the determination include the following:

- (a) The purpose of the use,
- (b) the suitability of the use to the water resource,
- (c) the economic value of the use,

previously deemed reasonable is altered, the calculus will change and what was thought a reasonable use may quickly become unreasonable.<sup>180</sup> From the perspective of encouraging private investment in water resources this “instability of result” presents questionable policy implications.<sup>181</sup> For example, regional water authorities may be unable to fund infrastructure modernization projects if a “right” to use the water in the future is uncertain. On the other hand, the increased risk of future water loss from common law claims could cause larger riparian owners to secure adequate supplies through private market mechanisms, perhaps by augmenting their ownership of land to which riparian rights are attached. Consolidation of riparian ownership would help to avoid overburdening the courts with excessive riparian claims. Because courts do not often decide the riparian rights of parties uninvolved in a suit,<sup>182</sup> encouraging such private market alternatives to adjudication will be an important method to avoid opening the floodgates to riparian litigation. Without privately bargained-for solutions, however, the reasonable use theory requires significant involvement by courts to balance interests and determine the rights of all riparian owners of a watercourse. Since litigation generally empowers wealthier users over those unable to afford the costs of legal action, reliance on the reasonable use theory could disadvantage those whose withdrawals are small, but whose riparian rights are no less valid. This weakness of the reasonable use theory provides at least a partial explanation of the American West’s move to an appropriative system<sup>183</sup> and the eastern states’ adoption of regulation.<sup>184</sup>

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- (d) the social value of the use,
  - (e) the extent and amount of harm the use causes,
  - (f) the practicality of avoiding the harm by adjusting the use or method of use of one proprietor or the other,
  - (g) the practicality of adjusting the quantity of water used by each proprietor,
  - (h) the protection of existing values of water uses, land, investments and enterprises,
  - (i) the justice of requiring the user causing harm to bear the loss.

*Id.*

<sup>180</sup> Dellapenna, *supra* note 59, at 559.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> See *Orr v. Arapahoe Water and Sanitation Dist.*, 753 P.2d 1217 (Colo. 1988) (explanation of appropriative rights in Colorado).

<sup>184</sup> See A. Dan Tarlock, *Water Law Reform in West Virginia: The Broader Context*, 106 W. VA. L. REV. 495, 517 (2004) (“Permits . . . transform an inchoate and completely uncertain water right into a more secure one.”). Fundamentally, riparianism is a system of co-ownership where individual riparian owners make use choices subject only to the reasonableness of that use vis-à-vis the uses of the other riparian owners. A scheme such as this has been referred to by scholar Garrett Hardin as a “tragedy of the commons.” Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244 (1968). Hardin illustrates the principle through the example of a cow pasture that is open to all. *Id.* Individuals are motivated to add to their flocks to increase personal wealth. *Id.* Yet, every animal added to the total degrades the commons. *Id.* As a rational being, each herdsman seeks to maximize his own gain. *Id.*



## 2. Weaknesses of the Natural Flow Theory

The natural flow theory has a major advantage over a reasonable use analysis because it is the declared theory governing the common law of riparian rights prior to the passage of the Diversion Act in 1982.<sup>185</sup> Use of the natural flow theory as a mechanism to adjudicate common law claims against registered diversions would therefore seem an instinctive response for the state's courts. However, upon closer inspection, the natural flow theory suffers from several infirmities that make it an inferior solution as compared to the Code's reasonable use scheme.

First, Connecticut's riparian law prior to 1982 was not as clear as the *Waterbury* court asserted.<sup>186</sup> There is a long line of reasonable use cases that the *Waterbury* court ignored.<sup>187</sup> As discussed earlier, the Connecticut Supreme Court in 1843, in *Wadsworth v. Tillotson*, articulated the reasonable use theory.<sup>188</sup> In that case, the court recognized the futility of the natural flow rule, concluding that "[a]ll that the law requires of the party . . . over whose land a stream passes, is, that he should use the water in a reasonable manner, and so as not to destroy . . . or materially diminish or affect, the application of the water, by the proprietors below on the stream."<sup>189</sup> Many other Connecticut cases follow this reasoning in upholding the reasonable use rule.<sup>190</sup>

The natural flow theory, on the other hand, was extensively cited by courts in the 1800s,<sup>191</sup> but has become less favored in the modern era, where it has been applied primarily for prescriptive rights determinations, but not for other conflicts. At least one scholar has suggested that the *Waterbury* court may have been excessively focused on satisfying the criteria necessary to trigger a prescriptive easement, and therefore eager to pronounce Connecticut a natural flow state prior to 1982.<sup>192</sup> This approach would align the *Waterbury* court with courts such as *Dimmock*,<sup>193</sup> also

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"Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit - in a world that is limited." *Id.*

<sup>185</sup> *City of Waterbury v. Town of Washington*, 260 Conn. 506, 580, 800 A.2d 1102, 1149-50 (2002).

<sup>186</sup> See discussion of the separate lines of Connecticut case law defining riparian rights, *supra* Part II.a. One line is clearly based on the reasonable use theory while the other relies on the natural flow theory. The separate lines of cases do not acknowledge the other's existence.

<sup>187</sup> See discussion of reasonable use riparian rights cases, *supra* Part II.a.i.

<sup>188</sup> *Wadsworth v. Tillotson*, 15 Conn. 366 (1843).

<sup>189</sup> *Id.* at 375.

<sup>190</sup> See discussion of reasonable use cases, *supra* Part II.a.i.

<sup>191</sup> See discussion of natural flow cases, *supra* Part II.a.ii.

<sup>192</sup> See Mayland, *supra* note 6, at 705.

<sup>193</sup> *Dimmock v. City of New London*, 157 Conn. 9, 14, 245, A.2d 569, 572 (1968).

faced with prescriptive easement claims, which have found the natural flow theory persuasive.<sup>194</sup>

While the natural flow theory benefited a consumptive user in *Waterbury*, it was used in 1967 to benefit the environment. In *Collens v. New Canaan Water Company*, riparian owners were granted an injunction against a water company whose well pumping disturbed the flow of the Noroton River.<sup>195</sup> The court invoked the classic natural flow language in holding that the riparians were “entitled to the natural flow of the water of the running stream through or along their land, in its accustomed channel, undiminished in quantity or unimpaired in quality.”<sup>196</sup> The outcome in *Collens* reminds us that strict application of the natural flow theory could produce substantial advantages for nonconsumptive, “green” water users, like *Collens* or the town of Washington, because even the smallest diversions that altered the natural flow of water could be enjoined. However, the potential benefits of the natural flow theory fade quickly when its practical effects are considered. As discussed above, the natural flow theory actually weakens riparian rights because registered diverters will be granted prescriptive easements. Registered diversions account for an overwhelming amount of the state’s water use. Since they have existed for over fifteen years,<sup>197</sup> and they are sufficiently “open and visible,” registered diverters are likely to be quite successful in securing prescriptive easements from courts if the natural flow theory controls the analysis. An outcome whereby the courts sanction registered diversions through prescriptive easements is to be avoided if the state wishes to craft a water allocation policy that addresses more than a quarter of its diversions. For this reason alone, the natural flow theory should be decisively rejected as the governing theory for disputes involving registered diversions. However, invocation of the natural flow theory possesses other subtle but unsettling potential consequences.

With its emphasis on an undiminished quantity and quality of water, the natural flow theory imposes great certainty of result, but nevertheless

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<sup>194</sup> Prescriptive easements are provided under Connecticut General Statutes § 47-37, which states that “no person may acquire a right-of-way or any other easement from, in, upon or over the land of another, by the adverse use or enjoyment thereof, unless the use has been continued uninterrupted for fifteen years.” CONN. GEN. STAT. § 47-37 (2009). Because of the natural flow theory’s ironclad insistence on an uncompromising preservation of flow, courts have treated impairments as inherent satisfaction of a prescriptive easement’s “open and visible” use requirement. *See, e.g., City of Waterbury v. Town of Washington*, 260 Conn. 506, 576-77, 800 A.2d 1102, 1148-52 (2002).

<sup>195</sup> *Collens v. New Canaan Water Co.*, 155 Conn. 477, 493-95, 234 A.2d 825, 834 (1967).

<sup>196</sup> *Id.* at 831.

<sup>197</sup> Since the Diversion Act required registration of existing diversions by 1983, all registered diversions have existed for a minimum 25 years. Many registered diversions, like *Waterbury’s*, have existed for even longer. *See* Department of Environmental Protection, [http://www.ct.gov/dep/lib/dep/water\\_inland/diversions/regdiv.pdf](http://www.ct.gov/dep/lib/dep/water_inland/diversions/regdiv.pdf) (providing a list of the state’s registered diversions).

remains a distasteful policy choice because of its potential to overburden the DEP permitting apparatus. Strict application of the natural flow theory would prohibit uses affecting the rate of flow or the quality of water, unless that diversion was permitted,<sup>198</sup> because permitted diversions would override riparian claims. For example, diversions of less than 50,000 gallons per day – currently outside the scope of the Diversion Act – would face a peculiarly unsecure future. These small diversions would likely need to come under state regulation to obtain permits because without permits these exempted diversions could be liable even for their minimal uses. Conceivably, the DEP could be required to process permit applications from all of these unregulated diversions, adding an unknown burden to its already overstretched permitting staff. The DEP will also face significant pressure to grant these permit applications because without a permit, and without a prescriptive easement,<sup>199</sup> these smaller diverters face certain liability to natural flow riparian claimants. Such a rule would seem to exact too heavy a price upon this class of diverters – and the DEP staff that might be required to regulate them – to justify imposition of the natural flow theory.

### 3. *A Reasonableness Standard Analogized From Public Trust Claims*

The *Waterbury* court held that state environmental regulations – rather than common law adjudication – are to determine reasonableness in suits brought under the Connecticut Environmental Protection Act (“CEPA”) to enforce the public trust in the state’s natural resources.<sup>200</sup> In reaching this

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<sup>198</sup> See REIS, *supra* note 23, at 29.

<sup>199</sup> It is hard to imagine many unregulated diversions that could satisfy the criteria necessary to establish a prescriptive easement. As they have been unregulated, there has been little incentive to accumulate the data necessary to sustain the prescriptive easement.

<sup>200</sup> *City of Waterbury v. Town of Washington*, 260 Conn. 506, 557, 800 A.2d 1102, 1137 (2002) (“[W]hen there is an environmental legislative and regulatory scheme in place that specifically governs the conduct that the plaintiff claims constitutes an unreasonable impairment under CEPA, whether the conduct is unreasonable under CEPA will depend on whether it complies with that scheme.”). See Environmental Protection Act of 1971, CONN. GEN. STAT. §§ 22a-14 to 22a-20 (2009). Section 22a-15 is a declaration of policy stating that:

there is a public trust in the air, water and other natural resources of the state of Connecticut and that each person is entitled to the protection, preservation and enhancement of the same. It is further found and declared that it is in the public interest to provide all persons with an adequate remedy to protect the air, water and other natural resources from unreasonable pollution, impairment or destruction.

CONN. GEN. STAT. § 22a-15 (2009). In § 22a-16, CEPA permits certain parties to bring an action against:

any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity, acting alone, or in combination with others, for the protection of the

conclusion, the court reasoned that if statutes shall be construed to create a consistent body of law, it follows that the legislature would not enact an “environmental regulatory scheme that runs on two different tracks with respect to the same conduct.”<sup>201</sup> That is to say, the *Waterbury* court rejected the notion that conduct satisfying the environmental regulatory scheme promulgated by the DEP could simultaneously be held as unreasonable by the courts, “irrespective of whether it is in compliance with those specific [regulatory] criteria.”<sup>202</sup> Applied to the CEPA claim made in *Waterbury*, this meant that the reasonableness of *Waterbury*’s impairment of the Shepaug River’s flow would be judged according to the requirements of the minimum streamflow standards adopted by the DEP.<sup>203</sup> Under the court’s holding, no other reasonableness evaluation was permissible.

It is prudent then to consider whether the *Waterbury* court’s rule – that reasonableness in public trust (“CEPA”) suits must be evaluated according to the state regulatory scheme – applies to reasonableness evaluations under common law riparian claims as well. Persuasive factors in favor of this proposition are certainty, uniformity and efficiency. A standard of reasonableness based on statutory and regulatory requirements would eliminate discretionary consideration of unenumerated reasonableness factors, leading to more consistent outcomes and more predictable results. Armed with improved up-front knowledge of their bargaining positions, litigants might be more likely to settle their disputes, sparing judicial resources. If disputes reached the courts, judges would be equipped with a fixed and stable method upon which to make determinations.

However, such an approach would be unfavorable for several reasons. First, riparian common law claims are fundamentally different than public trust suits initiated under CEPA.<sup>204</sup> CEPA claims exist solely because of the CEPA statute, while riparian claims originate from the common law. An assertion of common law riparian rights is intended to protect an

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public trust in the air, water and other natural resources of the state from unreasonable pollution, impairment or destruction.

CONN. GEN. STAT. § 22a-16 (2009).

<sup>201</sup> *Waterbury*, 800 A.2d at 1137.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> One author has eloquently contrasted common and statutory law:

[L]egislation has an inherent danger. In the common law, the general principle develops from the particular. In law enacted by the legislature, statutes state a general rule to be applied at some time in the future to particular situations. Since no legislature can conceive of all possible contingencies, the general rule is sometimes inappropriate in a particular instance. The courts are usually the place where this is revealed.

ROBERT SATTER, UNDER THE GOLD DOME: AN INSIDER’S LOOK AT THE CONNECTICUT LEGISLATURE 233 (2004).

individual right recognized by Connecticut state courts for hundreds of years. It does not rely on the legislature for its existence. The distinction between statutory and common law is an important one. Riparian claims, as derivatives of the common law, are not ideally governed by regulatory-based reasonableness standards. Instead, riparian claims should be judged upon an evaluation of each user's exercise of restraint from impairing the right of other riparians to their use of the water,<sup>205</sup> just as courts have done since deciding *Perkins v. Dow* in 1793.<sup>206</sup> While courts should maintain discretion to refer to state regulations as the basis of a reasonableness determination, they should not be required to do so, as they would be when determining reasonableness under a statutory cause of action such as CEPA.

A second challenge is presented if public trust issues and riparian claims are analogized. The Diversion Act exempts from state regulation any diversions under 50,000 gallons per day. Since these "smaller" diversions are beyond the ambit of the state's regulatory scheme, it would seem peculiar for courts to invoke a regulatory-based reasonableness test to determine whether, for example, a 25,000 gallon per day unregulated diversion violated an aggrieved plaintiff's riparian rights. To what regulations would the court refer in its analysis? Since no regulations exist, courts would be required to either (1) use the regulations governing diversions greater than 50,000 gallons per day, or (2) craft another reasonableness calculation. Problems inhere in each approach. It would seem problematic for courts to use a regulatory-based reasonableness test because the regulations were never intended to govern such withdrawals. However, if the courts used an alternative analysis, the efficiency and uniformity provided by a regulatory-based reasonableness standard would be subverted because courts would be required to craft a new approach to determine reasonableness for these smaller diversions. In other words,

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<sup>205</sup> Connecticut's common law treats groundwater withdrawals differently from surface water withdrawals. For interference with other groundwater withdrawals, the "rule of capture" applies, which means that a user may, without malice, pump his well even if it dries up a neighbor's well. *Roath v. Driscoll*, 20 Conn. 533, 537 (1850). However, surface riparian rights are an important qualification to this rule. A user cannot pump his well in a way that interferes with his neighbor's surface riparian rights. *Collens v. New Canaan Water Co.*, 155 Conn. 477, 487, 234 A.2d 825, 831 (1967). Current understandings of hydrology suggest that such differing rules make little sense, as surface water and groundwater are now known to be interconnected. Since important groundwater diversions will virtually always interfere with surface water downstream, common law groundwater diversions, which are exempt from permitting, do not represent an important qualification on the idea that riparians are to exercise their use rights so as not to impair the rights of other users. Likewise, since the differing groundwater rules make little sense in light of current hydrologic understanding, it is likely that the rule of capture from *Roath* would be changed to the rule articulated in *Collens* were the pertinent case brought before the courts today. Because the groundwater "rule of capture" would probably be changed, it therefore does not represent an appropriate method of analogizing riparian claims against registered diversions.

<sup>206</sup> *Perkins v. Dow*, 1 Root 535 (Conn. 1793).

once the courts have developed a method for determining reasonable use and applied it to one class of cases, they could apply the same or similar approach to all cases, and achieve an equivalent efficiency and uniformity. The virtues of a regulatory-based reasonableness analysis seem to fade in light of these considerations.

Lastly, as described earlier, neither the plain language nor the legislative history of the Diversion Act or the Minimum Streamflow Statute make any reference to a requirement that common law riparian claims against registered diversions – if proceeding under the reasonable use theory – must be decided by reference to state regulations.<sup>207</sup> Such a sweeping change to the state’s common law doctrine would likely have been addressed by the legislature in the Diversion Act. Absent a positive statement by the legislature, courts would be unlikely to interpret legislative silence on this issue as an affirmative step to alter the *common law* reasonable use calculus by substituting a regulatory-based approach. While the state regulatory system may present a reasonableness framework that could be used to adjudicate riparian claims against registered diversions, courts remain free to adopt different approaches when deciding common law disputes. This is not the case with public trust claims brought under CEPA, which *require*, according to the *Waterbury* court, reference to the applicable regulatory scheme for determinations of reasonableness.

Courts need not completely abstain, however, from consulting state statutes or regulations when determining a case under the reasonable use theory. Indeed, General Statutes section 22a-373 provides a sweeping list of factors that the DEP Commissioner is required to consider when deciding whether to grant a diversion permit application.<sup>208</sup> Using these factors to determine the common law reasonableness of existing uses is undoubtedly a permissible judicial approach. The competing interests described in section 22a-373 provide a rational basis upon which courts could decide disputes while trying to satisfy a broad range of stakeholders. If there was no better alternative, reliance on section 22a-373 would surely constitute the preferable reasonable use scheme under which to decide common law riparian claims.

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<sup>207</sup> See *supra* Parts IV.a, IV.b.i, and IV.b.ii.

<sup>208</sup> CONN. GEN. STAT. § 22a-373 (2009). This list of factors could provide the statutory standard for “reasonableness” if a CEPA claim was brought against a registered diversion. *Waterbury*, 800 A.2d at 1137. For example, a suit could be initiated against a registered diverter under CEPA for “unreasonable pollution, impairment or destruction” of the public trust in the state’s water resources. Under the standard articulated in *Waterbury*, if a statutory or regulatory scheme specifically governing the disputed conduct exists, then the standard of “reasonableness” must be judged according to that statutory or regulatory scheme. *Id.* In the case of a CEPA claim against a registered diversion, one could imagine the court defaulting to the factors stated in § 22a-373 as the basis of a “reasonableness” determination. However, since the § 22a-373 factors govern analysis of permitted diversions, it is not certain that they apply “specifically” as a scheme governing registered diversions as well.

#### IV. A MORE EFFECTIVE SOLUTION: REASONABLENESS AS DEFINED IN THE REGULATED RIPARIAN MODEL WATER CODE

Under the Regulated Riparian Model Water Code,<sup>209</sup> adjudications involving exempted diversions are specifically decided based on the reasonable use theory.<sup>210</sup> For the reasons set forth below, a hypothetical trial court would ideally choose the reasonable use theory promulgated by the Code. Although the Code's reasonable use evaluation – like section 22a-373 – was written primarily as a standard to assess applications for new permits,<sup>211</sup> it represents a model upon which state courts could rely in adjudicating disputes over existing uses.

Work on the Code began in 1990, in order to provide state governments with an effective method of “allocating water rights among competing interests and for resolving other quantitative conflicts over water.”<sup>212</sup> When published in 1997,<sup>213</sup> the Code was recognized as a comprehensive scheme for creating a regulated riparian system of law capable of addressing the water management problems of the twenty-first century.<sup>214</sup> It recognized that some states may choose to exempt particular water withdrawals from the permitting process.<sup>215</sup> However, the Code is explicit in its insistence that all withdrawals, whether exempted or not, are subject to a reasonableness standard.<sup>216</sup>

The Code insists on adherence to this reasonableness standard, stating that “no person shall make any use of the waters of the [s]tate except in so far as the use is reasonable as determined pursuant to this Code.”<sup>217</sup> The Code goes on to specify that “[n]o person using the waters of the [s]tate shall cause unreasonable injury to other water uses made pursuant to valid water rights, regardless of whether the injury relates to the quality or the quantity impacts of the activity causing the injury.”<sup>218</sup> Next, the Code details that “[e]very person exercising a water right pursuant to this Code is required to protect the prescribed minimum flows or levels when

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<sup>209</sup> See RRMWC (1997).

<sup>210</sup> *Id.* § 2R-1-04 cmt. background (“Most states will choose to exempt some water uses from the permit system. In that case, the Code provides that disputes involving such exempted water uses will be governed by the principle of reasonable use.”).

<sup>211</sup> *Id.* § 6R-3-02 cmt. background (“This section describes the factors that shall inform any decision by the State Agency regarding whether a proposed use is reasonable.”).

<sup>212</sup> *Id.* at preface.

<sup>213</sup> *Id.* See American Society of Civil Engineers, <http://www.asce.org>.

<sup>214</sup> See Beck, *supra* note 177, at 117.

<sup>215</sup> The commentary to the Code states, “All uses of water, including those not required to have a permit or an allocation, must be ‘reasonable’ as defined in this Code.” RRMWC § 2R-1-01 cmt. background.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* § 2R-1-01.

<sup>218</sup> *Id.* § 2R-1-03.

exercising such right.”<sup>219</sup> Lastly, the Code requires that all who withdraw water are subject to water shortage and emergency orders.<sup>220</sup>

The Code defines “reasonable use” as:

the use of water, whether in place or through withdrawal, in such quantity and manner as is necessary for economic and efficient utilization without waste of water, without unreasonable injury to other water right holders, and consistently with the public interest and sustainable development.<sup>221</sup>

In determining whether a use is reasonable, the Code includes a detailed set of considerations for the State Agency to weigh,<sup>222</sup> which are

<sup>219</sup> *Id.* § 3R-2-01(2).

<sup>220</sup> *Id.* § 7R-3-05(1).

<sup>221</sup> *Id.* § 2R-2-20.

<sup>222</sup> *Id.* § 6R-3-02. The Code states that:

In determining whether a use is reasonable, the State Agency shall consider:

- (a) the number of persons using a water source and the object, extent, and necessity of the proposed withdrawal and use and of other existing or planned withdrawals and uses of water;
- (b) the supply potential of the water source in question, considering quantity, quality, and reliability, including the safe yields of all hydrologically interconnected water sources;
- (c) the economic and social importance of the proposed water use and other existing or planned water uses sharing the water source;
- (d) the probable severity and duration of any injury caused or expected to be caused to other lawful consumptive and nonconsumptive uses of water by the proposed withdrawal and use under foreseeable conditions;
- (e) the probable effects of the proposed withdrawal and use on the public interest in the waters of the State, including, but not limited to:
  - (1) general environmental, ecological, and aesthetic effects;
  - (2) sustainable development;
  - (3) domestic and municipal uses;
  - (4) recharge areas for underground water;
  - (5) waste assimilation capacity;
  - (6) other aspects of water quality; and
  - (7) wetlands and flood plains;
- (f) whether the proposed use is planned in a fashion that will avoid or minimize the waste of water;
- (g) any impacts on interstate or interbasin water uses;
- (h) the scheduled date the proposed withdrawal and use of water is to begin and whether the projected time between the issuing of the permit and the expected initiation of the withdrawal will unreasonably preclude other possible uses of the water; and
- (i) any other relevant factors.

*Id.*



similar in many respects to the factors included in section 22a-373.<sup>223</sup> Both emphasize consideration of the supply potential of the water source in question and the safe yield of reservoir and interconnected water systems.<sup>224</sup> Both recognize economic interest and development as important factors.<sup>225</sup> Both identify effects on water quality as important parts of the reasonableness calculus.<sup>226</sup>

However, the Code goes further than the General Statutes in many ways. While careful to incorporate economic<sup>227</sup> and development<sup>228</sup> benefits in its definition, the Code encourages the pursuit of these profit interests without waste of water,<sup>229</sup> without injury to other water rights holders,<sup>230</sup> and with concern for the public interest.<sup>231</sup> The importance of these factors is substantial at a time when conflicts like that in *Waterbury* become increasingly more common. Unless explicitly identified, as in the Code, priorities like reductions in waste and consideration of the injury to other holders of water rights are not often accounted for in a reasonableness calculus.<sup>232</sup> Indeed, they are absent from the General Statutes section 22a-373.<sup>233</sup> The omission of these conservation-oriented factors is a conspicuous one, for they are “likely to give way before a sufficiently compelling showing that the consumptive use generates considerable employment, wealth, and public revenue while the non-consumptive use does not.”<sup>234</sup>

Besides filling this gap in the General Statutes, the Code’s reasonable use scheme fits well with the state’s reasonable use case law. Courts have generally relied on the reasonable use theory to decide disputes between riparian owners when no prescriptive easement is at stake. Whether a competing use is reasonable becomes a question of fact that depends on the circumstances in the particular case and turns on the effect of the use.<sup>235</sup> For example, bathing by a riparian proprietor in a lake used as a water

<sup>223</sup> CONN. GEN. STAT. § 22a-373 (2009).

<sup>224</sup> RRMWC § 6R-3-02(b); CONN. GEN. STAT. § 22a-373(b)(1) (2009).

<sup>225</sup> RRMWC § 6R-3-02(c) & (e)(2); CONN. GEN. STAT. § 22a-373(b)(4) (2009).

<sup>226</sup> RRMWC § 6R-3-02(e)(6); CONN. GEN. STAT. § 22a-373(b)(5) (2009).

<sup>227</sup> RRMWC § 6R-03-02(c)

<sup>228</sup> *Id.* § 6R-03-02(c)(2).

<sup>229</sup> *Id.* § 6R-03-02(f).

<sup>230</sup> *Id.* § 6R-03-02(d).

<sup>231</sup> *Id.* § 2R-2-20. The Code lists seven factors to be considered when assessing the probable effects of the proposed withdrawal and use on the public interest in the waters of the State. *Id.* § 6R-3-02(e).

<sup>232</sup> See Dellapenna, *supra* note 83, at § 7.02(d)(3). Dellapenna states that “[t]hus far, courts seem to have given the greatest attention to weighing economic costs against economic benefits, with social costs and benefits receiving only minimal, if any, express attention.” *Id.*

<sup>233</sup> See CONN. GEN. STAT. § 22a-373 (2009).

<sup>234</sup> Dellapenna, *supra* note 83, at § 7.03(a).

<sup>235</sup> Hazard Powder Co. v. Somersville Mfg. Co., 78 Conn. 171, 177, 61 A. 519, 521 (1905); Mason v. Hoyle, 56 Conn. 255, 261-62, 14 A. 786, 788 (1888).

supply may be an ordinary and reasonable use.<sup>236</sup> On the other hand, bathing by dozens of non-riparian guests at a newly established lake resort may unreasonably impact other riparians.<sup>237</sup> The diversion of water through an aqueduct for cooking and thirsty cattle may be reasonable,<sup>238</sup> but if the aqueduct carries surplus water away from a downstream riparian it becomes unreasonable.<sup>239</sup> In such cases, the Code's reasonable use calculus offers the best standard for evaluation. The Code defines reasonable use in abstract terms with regard to the manner in which water is used, but it also explicitly adopts the relational notion that a reasonable use is one that does not unreasonably impair other water right holders.<sup>240</sup> It provides definite, evenhanded criteria for determining whether a use is reasonable, specifically considering the safe yield of the water source,<sup>241</sup> the economic importance of the use,<sup>242</sup> the minimization of waste,<sup>243</sup> and numerous other factors.<sup>244</sup>

This philosophy harmonizes well with Connecticut's distributed system of water rights holders: permitted, registered, limited and in-stream. The framework of the Code's approach ought to go far in satisfying all users because the Code's reasonableness definition not only emphasizes sustainable development,<sup>245</sup> but also public interest<sup>246</sup> and "in place" uses.<sup>247</sup> These latter emphases are especially important as users with conservation and preservation interests increasingly assert their rights. The Code's reasonable use theory definitively reaches these uses, as it specifies that consideration is to be made of the probable effects of the proposed withdrawal on the public interest of the waters of the state, including "general environmental, ecological, and aesthetic effects."<sup>248</sup> So-called "green" users could therefore be fairly assured that the Code's reasonable use theory has internalized their instream concerns.<sup>249</sup> General Statutes section 22a-373 fails to consider these uses in such an explicit manner.

At the same time, the Code is focused on sustainable development and economic viability, which should satisfy out-of-stream, or "non-green"

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<sup>236</sup> *Harvey Realty Co. v. Wallingford*, 111 Conn. 352, 359, 150 A. 60, 63 (1930).

<sup>237</sup> *Id.* at 64.

<sup>238</sup> *Perkins v. Dow*, 1 Root 535, 536-37 (Conn. 1793).

<sup>239</sup> *Id.* at 537.

<sup>240</sup> RRMWC § 2R-2-20 cmt. background.

<sup>241</sup> *Id.* § 6R-3-02(b).

<sup>242</sup> *Id.* § 6R-3-02(c).

<sup>243</sup> *Id.* § 6R-3-02(f).

<sup>244</sup> *Id.* § 6R-3-02(i) (last factor among many in the Code's consideration of whether a use is reasonable is that consideration shall be made of "any other relevant factors.").

<sup>245</sup> *Id.* § 2R-2-20 cmt. background.

<sup>246</sup> *Id.* § 2R-2-20.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* § 6R-3-02(e)(1).

<sup>249</sup> For example, if riparian owners wanted to utilize small, in-stream hydroelectric devices to offset carbon emissions, the Code could accommodate this initiative.

users. It makes a significant change to traditional riparian law that often constrains out-of-stream uses under the reasonableness theory.<sup>250</sup> The Code eliminates the restriction preventing use of diverted water on land that is not contiguous to its water source.<sup>251</sup> In doing so, it removes a barrier to out-of-stream users that exists under many reasonableness schemes, including Connecticut's.<sup>252</sup> Additionally, the Code utilizes language that should assure most out-of-stream users of its satisfactory consideration of their concerns. In its plain language the Code refers to the "economic and social importance of the proposed water use,"<sup>253</sup> as well as "sustainable development" as an effect of the withdrawal on the public interest.<sup>254</sup> In this way the Code focuses on the use's economic utility as well as its preservation utility, offering a practical approach that considers not only all present uses, but also those in the future. No single factor or type of factor is made dispositive.

The Code's reasonable use analysis serves as the most effective instrument for judicial determination of common law riparian rights against registered diversions. It benefits from a collaborative approach to development.<sup>255</sup> It is both broader in scope and more specific than the General Statutes and was developed more recently.<sup>256</sup> Finally, it could be easily designated by the Connecticut courts as the governing theory of riparian rights against registered diversions. In contrast, modernizing and enhancing the General Statutes to provide an equivalent to the Code would require a process whose result would be uncertain at best, based on the legislative experiences described earlier in this Note.<sup>257</sup>

#### A. Courts Are Well-Suited to Adjudicate These Conflicts

The courts possess the necessary latitude to define the appropriate method for resolving future conflicts over water resources. Although it seems clear that the legislature intended for common law riparian rights to

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<sup>250</sup> *Id.* at ch. 2, pt. 1.

<sup>251</sup> *Id.* "The rationale for the traditional restrictions is to restrict water rights to the land that naturally benefits from the presence of water." *Id.*

<sup>252</sup> See *Dimmock v. City of New London*, 157 Conn. 9, 18, 245 A.2d 569, 573 (1968) (defendant city's diversion of water from a pond constituted a wrongful infringement of plaintiff's riparian rights, for which they were entitled to nominal damages).

<sup>253</sup> RRMWC § 6R-3-02(c).

<sup>254</sup> *Id.* § 6R-3-02(e)(2).

<sup>255</sup> See *Beck*, *supra* note 177, at 116. According to *Beck*, the Code resulted from a seven year effort by the American Society of Civil Engineers' Water Laws Committee, beginning under the chairmanship of Professor Ray Jay Davis of Brigham Young University Law School, and concluding under the chairmanship of Professor Joseph Dellapenna of Villanova University School of Law. *Id.*

<sup>256</sup> The RRMWC was published in 1997. See RRMWC (1997). Section 22a-373 of the Connecticut General Statutes was adopted fifteen years earlier, in 1982. CONN. GEN. STAT. § 22a-373 (2009).

<sup>257</sup> See *supra* Part IV.b.ii. (discussion of HB 5277's failure).

survive the Act and apply against registered diversions, an explicit reference to natural flow or reasonable use in the statute would have settled the debate.<sup>258</sup> Without such a reference in the Diversion Act, and with dim prospects for future legislation, the courts will assume an important role in settling this question.

From an institutional perspective, the courts provide the best forum for crafting answers that take all factors into account, including economics, resource scarcity, and the safety of public water supplies. While not completely free from public opinion and political pressure, courts are uniquely predisposed to weigh evidence neutrally, with an eye toward public policy repercussions. Courts are equipped to act as factfinders and balance competing interests to settle disputes, qualities that are vital to applying a reasonable use analysis.

The natural flow theory, on the other hand, would seem only to increase the number of prescriptive easement claims before the courts. Rather than allow the judicial apparatus to apply its experience to formulate water use decisions that positively affect the state's resources, the natural flow theory would likely transform the courts into a referee whose decisions, while important in individual instances, have few positive policy implications. Lastly, while it might be ideal to have the legislature consider all factors and provide a statutory solution that addresses the rights of riparians vis-à-vis registered diversions, it has failed in its efforts to date. The courts are therefore the singular option for adjudicating conflicts between riparians and registered diverters. By allowing common law riparian claims to proceed under a reasonable use analysis adopted from the Code, state courts may limit unreasonable water withdrawals that the DEP would otherwise be unable to regulate. Such an approach preserves the "grandfathered" status of registered diversions with respect to the state regulator while allowing unreasonable registered diversions to be adjusted by the court. This technique sensibly addresses the state's water use impasse because it recognizes the need to curb registered diversions but leaves them intact without subjecting them to broad new regulations. The upshot is a notion of registered diversions consistent with the Diversion Act: existing water withdrawals exempt from the permitting process but subject to common law riparian claims.

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<sup>258</sup> Georgia's surface water use statute does include a provision that explicitly recognizes that riparian rights will survive and may be exercised. GA. CODE ANN. § 12-5-46 (2003). The Georgia statute states:

Nothing in this article shall be construed to alter or abridge any right of action existing in law or equity, civil or criminal, nor shall any provision of this article be construed to prevent any person, as a riparian owner or otherwise, from exercising his rights to suppress nuisances or to abate any pollution.

*Id.*

## V. CONCLUSION

Connecticut will continue its struggles in adopting a comprehensive water policy until registered diversions, which represent at least eighty percent of the state's withdrawals, are subject to either regulatory or common law limits, or voluntarily yield part of their claims. Eliminating registered diversions altogether would be a decisive step in developing such a policy in the state.<sup>259</sup> To date, however, the Connecticut General Assembly has chosen to postpone a confrontation with registered diversions and they remain outside the scope of the permit process established by the Diversion Act in 1982. Going forward, it will be important for the legislature to figure out a way to bring these registered diversions into the permitting process. At the very least, the legislature must provide for the retirement of registered diversions which are unused.

Until the legislature acts there is an obvious role for the courts in shaping the state's water allocation policy. The *Waterbury* court contemplated that registered diversions might be subject to claims made by riparian owners asserting their common law rights. While the state's riparian case law is a study of contrast between the natural flow and reasonable use theories, there is abundant evidence that Connecticut's courts should consider riparian claims against registered diversions under a reasonable use theory. A modern, measured and comprehensive reasonableness standard is articulated in the Regulated Riparian Model Water Code, and could serve as the governing paradigm for common law riparian adjudications against registered diversions in Connecticut. The courts are well-equipped to resolve these conflicts over registered diversions using a reasonable use scheme adopted from the Code. Such a move by the courts would have sound legal and policy underpinnings, and could stimulate a negotiated solution between registered diverters and riparian owners. Judicial action therefore offers the highest promise in formulating a water allocation policy for Connecticut that would secure the resource well into the future.

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<sup>259</sup> STREAM FLOW, *supra* note 36, at 58.