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8th July, 2003

Deputy G. Baudains,
Clen-Moor,
Le Bourg,
St. Clement,
Jersey,
JE2 6SP.

Dear Deputy Baudains,

Water Resources (Jersey) Law 200- ("the Draft Law")

I write further to your letter of 1st June, 2003 to the Attorney General. He has asked me to respond to the second paragraph of your letter which concerns the Draft Law.

The Draft Law runs to 53 Articles and 4 Schedules but for our purposes the key points are as follows:

The Explanatory notes to the Draft Law explain that its purpose is to control the 'abstraction' and 'impounding' of inland waters[1] and ground water[2] in Jersey. Abstraction means removing water from inland waters and ground water. Impounding broadly means building or using a dam or weir, within inland waters or ground water which could have a significant effect on the flow of water or the character of the inland waters or ground water.

Once the Draft Law is in force the abstracting or impounding of water is prohibited unless it is done under a water resources licence issued by the Environment and Public Services Committee (Article 10). There will be certain exceptions. A person may abstract small quantities of water and the Draft Law will effectively not apply to dams etc. that are already in existence (before the Draft Law is registered).

But apart from the exceptions, if anyone abstracts or impounds water without a licence then, subject to the exceptions, they commit an offence (Article 12).

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[1] i.e. waters of lakes, marshlands, ponds, reservoirs, streams, surface water sewers and wetlands (whether in any such case they are natural or artificial, or above or below the ground).
[2] i.e. waters that are below the surface of the land and are not inland waters.

You are concerned that the Draft Law would conflict with a landowner's rights concerning ownership of water, minerals etc. below his land. I will need to explain in some detail the present customary[3] law governing water.

At Jersey customary law, there are three 'types' of water: *eau pluviale* (rainwater), *eau de source* (spring water) and *eau courante* (running water).

eau pluviale (rainwater)

The owner of land on to which the rain falls has the right to appropriate it. In Gibaut v Le Rossignol (1900) 11 CR 188 the 'proprietaire du fonds inférieur' (i.e. owner of the lower ground) was bound to receive the water which comes from the higher land (when there is a slope) and there is no possibility to force the owner of a dominant tenement[4] to divert or retain it as long as it runs in its accustomed channels (i.e. he cannot artificially cause the water to be discharged on to his neighbour's land, whether by gutter or water pipe or in any way whatsoever). The owner of the dominant tenement can carry out work, provided he does not artificially aggravate the natural servitude[5] or cause inconvenience to his neighbour.

eau de source (spring water)

Where water rises on land, the landowner has the first right to make use of it, and his right is quite unfettered. No-one, whether adjacent landowners, or those upon whose land the water would run were it not completely exhausted, or indeed the general public, has any right to complain if it is completely used up (see Vatcher v Allez 1855 10 CR 195, and Le Gros : Droit Coûtumier at 196). However, if the owner of the land on which the water rises does not exhaust it, he must let it leave the land by its natural course, and cannot alter the route by which it flows on to the fonds inférieur. He may do what he likes to drain the land or to preserve the water in a reservoir, on condition that he does not injure the owner of neighbouring inférieur land by altering the course of the flow in any way which would artificially increase the natural burden resulting from the state of the land see Gibaut v Le Rossignol. So far as the adjacent land owner is concerned, he is bound to receive the water which flows from the fonds supérieur when this is the natural result of the relative position of the two properties. Thus, for example, the owner of the fonds inférieur cannot require the neighbour from whose land the water comes to retain it or alter its course or prevent it from doing what it would otherwise have done : see Gibaut v Le Rossignol, above and also Le Cornu v Hubert (1880) 9 CR 472.

eau courante (running water)

The servient owner is bound to keep the channels clear so that the water does not run back into the dominant tenement : Le Gros. The dominant owner must not aggravate this servitude or pollute the water, but he may make use of any water which runs over his property, returning it to the accustomed channel Vibert v Vibert (1704). The right to use the water is common to all owners over whose property it runs. Each may use it but may not stop or divert it to the prejudice of properties lower down the stream.

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[3] The statute law (e.g. the Water Pollution (Jersey) Law 2000 and the Water (Jersey) Law 1972) is not relevant to this response.

[4] For a definition of this term see footnote below

[5] Broadly speaking a servitude is a right (i) to make use of the property of another, or (ii) to prevent the owner of the property from making certain use of it. It is akin to (but wider than) the concept of an easement at English law. A servitude is either (a) personal i.e. a person can exercise the right independent of the property or (b) real i.e. when the servitude is one to which a property ("the servient tenement") is subjected to the benefit of the adjoining tenement ("the dominant tenement").

However, the customary law is not comprehensive on the subject of water. One area it does not deal with is subterranean water. At present, the Jersey Court would look at the law in France and then, if need be, the common law of England to resolve the law on subterranean water.

According to French[6] and English Law[7], underground water which is flowing through a defined channel becomes incorporated into surface water which is flowing through a defined channel. The effect of this is that it would be an interference with the rights of downstream proprietors to abstract water from an underground stream in such a way as to exhaust the flow, just as it is an interference with the right of a well owner to abstract water directly from his well.

The position is, however, otherwise if the abstraction is of water which is below the surface of the ground but not flowing in a defined channel or contained in a well, cistern or other underground receptacle (percolating water). In the case of percolating water, a property owner has a right to abstract percolating water below the land and which he owns regardless of the effect that it has on water supply to adjoining lands.

Returning to *eau de source* and *eau courante* they could, in my view, fit the definitions of inland waters that are above ground. Otherwise inland water that is below ground and all ground waters would at present be subterranean waters and subject to the rights as set out above.

If the water is *eau de source*, it is clear that the landowner can abstract and impound the water on his land and according to Le Gros, that right is unfettered. For *eau courante*, the landowner can abstract the water and he may also impound it if it does not prejudice properties down stream.

It is clear that the Draft Law contains certain provisions which are inconsistent with the landowner's customary rights concerning ownership of water (as detailed above) and because there is such a clear inconsistency, the statute will abrogate any customary law to the extent of that inconsistency. It seems to me that that is the intention of the Draft Law.

As far as the law on subterranean waters is concerned, there is no Jersey law on the subject. Hence there is no Jersey law (customary or otherwise) that would be in conflict with the Draft Law. The Draft Law will set out, to a large extent, the position regarding subterranean waters. However, if there is a matter that the Draft Law does not address on underground waters then recourse would be had to French law and, if necessary, English common law, to resolve the issue.

As to your concern about whether the Draft Law would affect a landowner's right concerning minerals etc. below his land, I do not believe it will have any effect on mineral rights. The customary law maxim is that *"qui a le sol a le dessus et le dessous"* [Who owns the ground is also owner of all that which is below and above it.] However, as Her Majesty's Solicitor General and Paul Matthews point out[8]: *"it may be doubted just how far this ancient principle, formed in the days when air travel and undersea oil exploration were unknown, remains true today*[9]*"*.

Yours sincerely,

Richard Whitehead
Principal Legal Adviser

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[6] Dalloz, Nouveau Répertoire de Droit
[7] Bates, Water and Drainage Law
[8] The Jersey Law of Property by Paul Matthews and Stéphanie Nicolle
[9] Note also the possibility of buying flats under the Loi (1991) sur la copropriété des immeubles bâtis. The flat may be above or below another flat belonging to someone else.