

GROUNDWATER COMMISSION HB1353 SUBCOMMITTEE MEETING

**A PUBLIC DISCUSSION WITH THE NH LEGISLATURE'S GROUNDWATER
COMMISSION TO DISCUSS THE ROLE OF MUNICIPALITIES IN THE
REGULATION OF GROUNDWATER WITHDRAWALS**

Sponsored by

THE CENTRAL NEW HAMPSHIRE REGIONAL PLANNING COMMISSION

MEETING MINUTES

Meeting Date: June 22, 2009

Meeting Location: Town Hall, Webster, NH

Meeting Advertisement: The New Hampshire Department of Environmental Services mailed a meeting notice prepared by the Groundwater Commission to Town Managers/Administrators, Town Planners, Planning Boards, Conservation Commissions and Selectmen for the towns represented by the Central Regional Planning Commission. Towns represented by the Strafford Regional Planning Commission include: Allenstown, Boscawen, Bow, Bradford, Canterbury, Chichester, Concord, Deering, Dunbarton, Epsom, Henniker, Hillsborough, Hopkinton, Loudon, Pembroke, Pittsfield, Salisbury, Sutton, Warner, and Webster. DES also e-mailed notices to all State Senators, Representatives and Executive Councilors that represent the region. DES also provided notice to various river and watershed organizations via e-mail. The meeting was also advertised on NHgroundwater.com, which was promoted in April in a press release issued by Senator Cilley's office.

Minutes Prepared By: Christine Bowman, NH Department of Environmental Services

These minutes provide a summary of the meeting. All meetings were video taped. Copies of these tapes can be provided upon request.

The meeting began at approximately 6:30 PM. Below is a list of participants:

Attendance:

Name	Association
Groundwater Commission Members / HB1353 Subcommittee Members	
Brandon Kernen	NH Department of Environmental Services
Bill McCann	Public Member
David Maclean	NH Business and Industry Association
Susan Roman	HB1353 Subcommittee Member
Other Attendees	
Heather Fairchild	Citizen
Peg Foss	Citizen
Bob Drown	Town of Webster – Zoning Board; Merrimack County Farm Bureau
Robert Johnson	NH Farm Bureau
Bruce Crawford	Penacook-Boscawen Water Precinct
Elaine Clow	Citizen
George Embley	Citizen
Sally Embley	Town of Webster – Conservation Commission
Nancy Clark	Town of Webster – Conservation Commission
Betsy Janeway	Town of Webster – Conservation Commission
Senator Harold Janeway	District 7
MaryJo MacGowan	Town of Webster – Conservation Commission
Bob MacGowan	Citizen
Chris Connors	Citizen
Nancy Van Loan	Town of Webster – Conservation Commission
Susan Rauth	Town of Webster – Planning Board
Martin Bender	Town of Webster – Zoning Board of Adjustment
Dot Proulx	Citizen
Martin Bourgue	Citizen
Jere Buckley	Town of Webster – Planning Board
Alan Hofman	Town of Webster – Planning Board
Richard Doucette	Town of Webster – Planning Board
Joan Doucette	Citizen
Tom Mullins	Town of Webster – Board of Selectmen
Christine Bowman	NH Department of Environmental Services
Stephen Roy	NH Department of Environmental Services

The meeting was opened with introductions. Bill McCann then gave a general overview and history of the Groundwater Commission and HB1353 and his involvement with the subcommittee. He explained that the purpose of the meeting is to get input from members of the public and local governments on the issue of local participation and/or control in the large groundwater withdrawal permitting process so that the Groundwater Commission can make recommendations to the legislature. He stated that the Groundwater Commission wants to hear what people think is right and wrong with the current process and most importantly, the basis for their opinion. Bill McCann stated that the Groundwater Commission is tasked with using the information gathered to formulate legislation if there is a need or a desire to change the process. He then introduced Brandon Kernen.

Brandon Kernen then delivered a PowerPoint presentation on laws related to groundwater withdrawals in NH and the current regulatory process. He directed the attendees to NHgroundwater.com for more detailed information. Brandon Kernen concluded the presentation by stating that written comments could also be submitted after the meeting through the website. He also directed the attendees to the list of lead-off questions on the meeting flyer. Following the presentation, Bill McCann opened the public discussion portion of meeting.

Martin Bourgue asked how much 57,600 gallons per day of water is and how much water an average household uses per person. Bill McCann responded that 57,600 gallons per day equates to 40 gallons per minute if you pumped for a 24-hour period. Brandon Kernen responded that the average person uses 60 to 100 gallons of water per day, but that per capita usage could be greater if there is excessive lawn watering.

Elaine Clow asked what the actual definition of groundwater is. Bill McCann responded that groundwater is water below the ground that can be extracted, usually through pumping. He stated that there is a question on whether groundwater is in the public trust like certain surface waters.

An attendee asked whether there are similar regulations relating to the amount of surface water that can be withdrawn. Brandon Kernen responded that if a surface water withdrawal requires a wetlands permit (for a disturbance to the bed or banks of a surface water body), the effects of the withdrawal on that surface water body would be looked at through the wetlands permitting process. He also explained that if a withdrawal is greater than 20,000 gallons per day, the state would regulate it through a water quality certificate. Peg Foss asked for clarification on whether someone withdrawing less than 20,000 gallons per day would require a permit. Brandon Kernen responded that any new surface water withdrawal over 20,000 gallons per day needs a permit and that water level or flow impacts would be assessed through the wetlands permitting process for any new surface water withdrawal that requires a wetlands permit.

Senator Janeway thanked the Groundwater Commission for holding regional meetings and then asked for clarification on whether municipalities have any standing in the current process. Bill McCann responded that since the law was passed in 1998, the participatory role or standing of municipalities has evolved. He stated that the subcommittee is interested in hearing ideas on how communities could participate in the process over and above what the current process allows. He commented that communities have proposed changes to the existing statute that would give more

power to the municipalities and that the subcommittee is tasked with exploring this issue. Susan Roman commented that there are two issues to focus on: the permitting process and a community's participatory role in it and whether towns should have their own regulatory power, which is currently preempted for large groundwater withdrawals and possibly preempted for groundwater withdrawals less than 57,600 gallons per day.

Sally Embley asked, with reference to the USA Springs case, whether there were any improvements that could be made to the permitting process to offer more protection to municipalities. Bill McCann stated that he was one of the people who argued against the USA Springs project. He commented that the law has evolved, probably in part from the USA Springs case, and cited the NH Supreme Court's decision which stated that in the USA Springs case, the applicant demonstrated that there were no unmitigated adverse impacts and that DES's decision was based on the laws that were in effect at the time of that decision. He stated that since 2006, the legislature has made some modifications to the process. Dave Maclean asked Sally Embley whether she understood the role towns could play in the current process. Sally Embley responded that it seems that the implementation of the process may not have been effective in the USA Springs case. Bill McCann responded that USA Springs provided DES with sufficient documentation to show that there were no adverse impacts that could not be mitigated and while some people may not agree with that, the burden was on DES to respond to the critics and when the state was taken to court, DES was able to provide the necessary documentation. He stated that DES carried out their responsibility under the large groundwater withdrawal permitting process and that the NH Supreme Court did not find that DES made an error of law. He commented that the question that is being posed now is whether any of the affected communities could have had a more significant role in the permitting process.

In regard to mitigation, Heather Fairchild asked whose responsibility it is to ensure that a company is financially viable (through bonding or insurance) to correct problems they create. Bill McCann responded that there are gaps in the current process and provided an update on SB56 related to bonding and insurance requirements. He stated that since the bankruptcy of USA Springs, the commission has looked at the current law and regulations and will likely make recommendations on this issue. He stated that the bankruptcy also raises another question as to whether municipalities or DES have any say in the transfer of a permit and whether there are any requirements for the new permit holder to show that they can comply with the conditions of the permit. He commented that legislation or rule making may be required to address this issue. Heather Fairchild asked for clarification on whether the state or municipalities can currently require the permit holder to be bonded or insured. Bill McCann responded that there is no provision in the law for DES to require a bond and that the issue needs to be addressed. Dave Maclean commented that if a permit holder goes bankrupt and the permit is not transferred, the withdrawal stops. Bill McCann commented that USA Springs has not withdrawn any water to date and that consultation with the NH Department of Justice on how to deal with cases such as these may be required.

Jere Buckley asked whether there is, in effect, a usurpation of areas previously covered by common law if the legislature creates a new law on this or any other subject. Bill McCann explained that another term people might hear to describe common law is case law and that in

NH, and other states, the state cannot reduce the impact of common law rulings. He explained that in NH, the legislature passed a law stating that public trust applies to groundwater; however, the court hasn't recognized it yet. Brandon Kernen commented that the legislature could pass a law stating that no one may extract more than 5,000 gallons per day for their property and DES would regulate under that law but a property owner could take the state to court citing reasonable use common law. He commented that the legislature can make laws that are not consistent with common law but they probably wouldn't hold up if appealed.

Chris Connors stated that she works in the field of landscape architecture and is familiar with issues related to groundwater. She commented that she is aware that as a state, there is a limited understanding of what our groundwater resource is and how much development our land can sustain in certain areas, referencing the USGS Seacoast study and deficiencies in the current groundwater monitoring well network. She commented that the idea of the state regulating groundwater withdrawals without community input raises concern and that even though there is a permitting process that is very site-specific, there is a lack of understanding of the impact of a withdrawal over time on a watershed basis as development occurs. She stated that there should be a movement toward watershed studies and then asked why an arbitrary number (57,600 gallons per day) was chosen as the permitting threshold. Bill McCann responded that when the law was originally passed, 57,600 gallons per day seemed like a reasonable standard. He commented that more data is required to make a valid conclusion on what is reasonable and that although the legislature has pushed for more studies to understand the resource, they haven't put a lot of financial resources toward those efforts. He commented that the state needs to know what the existing inventory is and how proposals for new withdrawals may impact the resource in the future. Chris Connors commented that communities, in some respects, know their land better than the state and that a lot of issues are very site-specific. Chris Connors reiterated that she feels the 57,600 gallon per day threshold is arbitrary and that as land is developed that is not as developable, it is important to look at where the withdrawal is occurring and what the science is and not to rely on arbitrary numbers. Brandon Kernen responded that he agrees, more data is necessary. He commented that the commission is looking at data needs for a bedrock monitoring well network. He stated that people have the idea that the state is running out of water, but the data does not exist to support or refute this, except near permitted large groundwater withdrawals where a lot of data is available. He said another subcommittee is putting together recommendations for what a monitoring network should look like and how much it would cost to maintain, and that recommendations will be made to the legislature. He referenced a bill sponsored by Senator Cilley which requires DES to perform an evaluation using existing data for an example reference watershed to project future water needs. He commented that the purpose is to see if available water supply could be estimated based on existing data and used to develop a groundwater management plan that could be taken into consideration in the large groundwater withdrawal permitting process for new withdrawals.

Tom Mullins asked how many applications received since 1998 have been denied. Brandon Kernen responded that the USA Springs application was originally denied and stated that probably over half of all applications received were significantly modified to meet the no unmitigated adverse impact standard. He commented that in essence, those applications were denied what they originally asked for.

Alan Hofman asked whether the town of Webster has a desirable aquifer that would targeted for large groundwater withdrawals. Several attendees responded yes and that it could be easily accessed.

Peg Foss stated that she agreed that the 57,600 gallon per day threshold is arbitrary in that it is not based on any sort of scientific study or knowledge. She then commented that the USGS Seacoast study is an excellent example of a detailed holistic watershed view of a region's existing groundwater resources and projected needs. She stated that because the current permitting process only requires looking at a potential impact area, and not an entire watershed, she feels that decisions may be being based on bad data. She commented that it is evident that this issue is important to a lot of people and it is well established that there isn't enough data. She asked whether there should be a moratorium on permitting until the state can catch up on collecting data to make better informed decisions. Bill McCann responded that the moratorium issue had been raised previously. He asked whether the need to gather additional data is enough to implement a moratorium. He restated the scope of the HB1353 subcommittee but commented that the subcommittee will also be reviewing other comments received. Dave Maclean asked Peg Foss why she thought there wasn't enough data, stating that large amounts of data are typically collected over a relative long period of time as part of the application process for a permit. Peg Foss stated that she doesn't think the data is collected in a holistic manner; that the assessment is based on a potential impact area and not the watershed. She also commented that she has heard from various state officials that there isn't enough data. She then stated that the issue needs to be looked at on a watershed basis.

Bruce Crawford commented that the problem with a moratorium is that if you don't have a permitting process, nothing is going to get done and you won't have any information. He commented that he would rather have the state regulating groundwater withdrawals. He also commented that every time an additional regulation is adopted, the cost is passed on to the regulated community and its customers. He stated that public water systems could do with fewer regulations and more user-friendly regulations. He also commented that small water systems may not be in the same financial situation as large municipal systems. Susan Roman stated that concerns had been raised at other meetings in regard to how the regulations "fit" different entities. She commented that the hierarchy of use subcommittee examined the issue of water use by different water users during a drought situation. She stated that public water suppliers would like to have less regulation but that towns want certain entities (for example, bottling plants) to have more regulation. Bill McCann commented that perhaps the process is not "one size fits all" and that issue has to be examined further. He stated that it is a complicated issue because there are so many different uses of water. He commented that perhaps municipalities should have less regulation because they are supplying water to the public, but how would it be addressed if they sell water to commercial users.

Tom Mullins commented that the state should pay for their regulatory schemes. Bill McCann responded that who should regulate the water is one question, asking who should pay for regulating it makes it a more comprehensive question. He stated that the subcommittee has heard the regulations are onerous. Tom Mullins responded that small towns simply don't have the

people on staff to implement the regulations, and that additional regulations can be burdensome on a small towns, particularly financially. Susan Roman provided an update on HB314 –L, relating to a town being able to hire a private consultant at the applicant's expense. Bill McCann commented that Tom Mullins' concern is valid but that if towns want to be more involved in the process, they will need technical resources.

Senator Janeway asked whether the subcommittee had looked at what other states are doing in terms of striking a balance between state control and local control. Bill McCann responded commenting on other state's permitting thresholds and processes.

Bob MacGowan asked why the state wants the communities involved at all. He asked how the state is going to get communities that all have an interest in a large aquifer on the same page. As an example, he asked how the town of Webster's interest in a large aquifer is the same as the city of Concord's. Bill McCann responded that the subcommittee is tasked with looking at what people feel they want their community to be able to do or not to do, which could result in an amendment to RSA 485-C.

Heather Fairchild asked whether the state takes into account a town's master plan during the permitting process. As an example, she asked if a town had future development plans, for residential or commercial use, whether the permitting process would take into account that water had already been reserved for future use. Brandon Kernen responded that in the USA Springs case, the town showed that they had residential development planned, which contributed to DES issuing a floating permit where the amount of water that could be withdrawn would be based on groundwater levels and precipitation trends. In regard to setting aside groundwater for future development, he responded that the law says that a permit would have to be amended to protect public water supply, but not commercial or industrial supply. In effect, the law wouldn't allow for that part of a master plan to be implemented.

Martin Bourgue asked if there is any significant data to estimate the "carrying capacity" of watersheds in the state Brandon Kernen commented that the USGS Seacoast study concluded that groundwater could be withdrawn from the bedrock aquifer at significantly greater rates and groundwater levels would likely not diminish. He stated that surface water flow, however, would likely be adversely affected. Martin Bourgue asked if that would hold true for the remainder of the state. Dave Maclean responded that it is region-specific. Brandon Kernen commented that the state doesn't have an adequate bedrock monitoring well network but that the state does have a high quantity of low quality data consisting of over 100,000 water levels from well completion reports. He stated that the USGS is assessing the data to determine if water levels are changing as new wells are put in and that their report should be completed within a matter of months.

An attendee asked whether effects on streamflow were taken into consideration in the permitting process. Brandon Kernen responded yes but that part of the problem is, there are only a handful of permitted large groundwater withdrawals that are affecting streamflow. He said the state doesn't have a handle on the pre-1998 withdrawals and how they may be affecting streamflow.

Chris Connors asked what happens to water quality if a groundwater withdrawal increases the natural rate of infiltration thereby reducing surface water flows. Brandon Kernen responded that the effects are site-specific and that there may not be a noticeable change but that in some instances, it could result in increased levels of iron and manganese in the groundwater. He commented that this would be most pronounced in close proximity to the withdrawal.

An attendee asked about the impact of international trade agreements stating that she understands that they can override states' regulations. Bill McCann responded that there have been discussions about that issue over the last 6 to 7 years and that the World Trade Organization has asserted certain rights. He stated that the NH Department of Justice gave an opinion that it wasn't an issue the state had to deal with.

Susan Rauth commented that what is unique about Webster is that it is zoned entirely residential agricultural. She asked for recommendations for local controls towns could adopt as part of their land use and subdivision regulations, particularly if they wanted to maintain the rural nature of their community. In regard to subdivisions, Bill McCann commented that an additional question that had been raised at other meetings was whether it is in the best interest of the community for a subdivision to have a community water supply well or individual water supply wells. He commented that a community would be able to keep its rural character if they didn't have to have bigger lots with individual wells versus smaller lots with a community well. He said this could be achieved through local zoning. He commented that in the more controversial large groundwater withdrawal projects proposed since 1998, the decision to build was made locally before the state process began. He stated that there is a lot of power at the local level in terms of regulating land use and referred Susan Rauth to the toolkit. Susan Roman commented that the control Bill McCann was speaking about was in regard to the land use not the water withdrawal. Brandon Kernen commented that for smaller withdrawals, the toolkit cites examples of model site plan review regulations from other states which look at the effects of multiple small wells. He then referred Susan Rauth to Nhgroundwater.com for a full copy of the toolkit.

Martin Bourgue asked if the 57,600 gallon per day threshold is per well, per individual, per property, per owner, etc. Bill McCann responded it is per piece of property. Brandon Kernen responded that the law states "single property or place of business," and that someone could try to circumvent the process by subdividing under different entity names but that the state has pursued entities in the past that have tried to circumvent the intent of regulations and has prevailed in stopping that approach. Martin Borgue then asked who measures the 57,600 gallons per day. Dave Maclean responded that the yield is measured during the pumping test. Brandon Kernen explained that the state requires that if you use more than 20,000 gallons per day, you have to register and report your water use to the state and that water use has to be measured using a calibrated meter. He stated that the state has inspection authority to ensure compliance.

Peg Foss commented that she is concerned that people have already found ways to circumvent the process. She also commented that the permitting process should take into consideration the connection between groundwater and surface water. She also stated that there should be better regulatory collaboration between DES's groundwater and surface water groups. Dave Maclean commented that there are adverse impact criteria that an applicant has to address relative to

surface water bodies and wetlands. Peg Foss stated that municipalities have joint regulatory authority with DES's Wetlands and Subsurface Systems Bureaus and that this joint jurisdiction is lacking in groundwater regulations.

Chris Connors commented that because withdrawals could impact aquifers in other towns, it is important for the state to take a watershed based approach. Bill McCann responded that similar comments had been made at other meetings and that the issue of regional impacts is something that will have to be explored further. Bill McCann explained that a planning board has the authority to declare a project a regional impact but asked how you would go about assessing the regional impact of a large groundwater withdrawal. Dave Maclean commented that under the current regulations, the assessment is based on a potential impact area, which could extend across multiple towns.

Bruce Crawford commented that it might not be prudent for towns to encourage community water systems as opposed to individual wells. He stated that the cost of operating small water systems can be high. George Embley stated that he didn't think the water quality would be better if everyone is on individual wells. Bruce Crawford stated that it wouldn't but there also wouldn't be the issue of having to maintain a water system with a licensed operator. He stated that the operation of individual wells is left up to individual homeowners. George Embley commented that at some point, if houses are close enough together, you have to have a community water system. Bruce Crawford stated that is a municipality's decision but that local regulations could force the development of smaller lots. Bill McCann stated that the subcommittee had heard arguments in favor of both options at other meetings. Bruce Crawford stated that towns should be aware of unintended consequences.

Joan Doucette asked if a town's expenses will increase if they accept more regulations. Bill McCann responded that if the state mandates new regulations and the community accepts them, then the community has to provide the financial resources.

An attendee commented that while a regulatory scheme on a regional basis may look good on paper, the small towns don't have the resources to participate so in reality they have little say. Bill McCann stated that the issue has to be looked at further in terms of whether a regional approach is an equitable solution. Susan Roman commented that there is enabling legislation for zoning but a town doesn't have to adopt it. She said the if the state allows towns to regulate groundwater withdrawals, they don't have to, but under the current law, they are not allowed to.

Peg Foss asked whether the water community would benefit from a position like the consumer advocate at the Public Utilities Commission who helps in negotiations with utilities and municipalities. Bill McCann stated that the issue was raised at another meeting but hasn't been researched yet. He commented that it is clear that communities need resources. Bruce Crawford commented that perhaps the Local Government Center would take on this role. Susan Roman commented that they wouldn't take on an advocacy role.

Bob Drown commented that agricultural use is one of the biggest uses of water in the state and that it has to be taken into consideration that agricultural use returns up to 80% of water back to

the ground. Bill McCann asked Bob Drown whether he uses surface or groundwater for his irrigation supply. Bob Drown responded that he uses high-yielding wells on his property. Bill McCann commented that currently many farms use surface water but that there could be more groundwater use in the future. Bob Drown commented that farms located along large rivers have tremendous irrigation potential, and that if the state is going to continue to have agriculture, the state should be an advocate for agriculture. Bill McCann responded that this issue had been raised at other meetings and commented on work by the hierarchy of use subcommittee. Brandon Kernen commented that looking at how water is displaced or consumed is important and that the current process has a water budget consideration. He then stated that unless someone is excessively over-watering their vegetation during the growing season, only about 20% of that water could potentially make it back into the ground

The meeting was adjourned at approximately 8:30 PM.

The following is the list of discussion points noted on the flip chart during the meeting:

- The definition of groundwater should be clarified to include surface water bodies reliant on groundwater.
- Disparity between groundwater withdrawal and surface water withdrawal regulation does not make sense.
- The communities should have a strong standing in the large groundwater withdrawal permitting process.
- The large groundwater withdrawal permitting process should be strengthened to give more protection to communities.
- The large groundwater withdrawal permitting process should include bonding and insurance requirements.
- The large groundwater withdrawal permitting process needs to more carefully consider how ownership of a permit is transferred from one person to another. Additionally, the fate of a permit when a permit holder becomes bankrupt needs to be addressed in the permitting process.
- There is inadequate data to assess groundwater withdrawal impacts on a watershed basis.
- Does the threshold of 57,600 gallons a day for a large groundwater withdrawal permit make sense?
- There should be a moratorium on new large groundwater withdrawals until the state has an adequate groundwater level monitoring network.
- The permitting process is far too costly for community water system, especially given all of the other state and federal regulations that a community water system needs to comply with.
- There needs to be a process for coordinating the efforts of towns to coordinate the management and protection of shared water resources (such as an aquifer that overlies multiple political boundaries).
- The large groundwater withdrawal permitting process needs to take into account a town's master plan.
- The permitting process should consider how inducing surface water infiltration can impact groundwater quality.
- The impact of international trade agreements on our ability to manage and protect our water resources needs to be addressed.
- Other environmental regulatory processes have concurrent state/local authority and requirements an entity must comply with such as the Shoreline Protection Act. Why can't this approach be applied to large groundwater withdrawals?
- Regional impacts associated with water withdrawals need to be evaluated - especially when aquifers do not coincide with municipal boundaries.
- If towns were enabled to regulate large groundwater withdrawals, will this cause them additional expense? Who will pay for this?
- Would communities benefit from a consumer/water advocate?
- Special considerations should be provided for determining how agriculture water use is regulated.