

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 NORTH COUNTRY COUNCIL

MEETING MINUTES

Meeting Date: June 9, 2009

Meeting Location: Granite State College (Technology Village) in Conway, NH

Meeting Advertisement: The North Country Council e-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 North Country Council. Towns represented by the North Country Council include: Albany, Bartlett, Bath, Benton, Berlin, Bethlehem, Campton, Carroll, Chatham, Clarksville, Colebrook, Columbia, Conway, Dalton, Dummer, Easton, Ellsworth, Errol, Franconia, Gorham, Groton, Harts Location, Haverhill, Jackson, Jefferson, Lancaster, Landaff, Lincoln, Lisbon, Littleton, Lyman, Madison, Milan, Monroe, Northumberland, Pittsburg, Plymouth, Randolph, Rumney, Shelburne, Stark, Stewartstown, Strafford, Sugar Hill, Thornton, Warren, Waterville Valley, Wentworth, Whitefield and Woodstock. The North Country Council also issued a press release that was carried by regional newspapers. The Department of Environmental Services e-mailed notices to all community water systems in the region. 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 Kernan	NH Department of Environmental Services
Bill McCann	Public Member
David Maclean	NH Business and Industry Association
Susan Roman	HB1353 Subcommittee Member
Other Attendees	
Rep. Thomas Buco	Carroll County – District 1
Rep. Karen Umberger	Carroll County – District 1
Jim Umberger	North Conway Water Precinct - Commissioner
Howard “Crow” Dickinson	Town of Conway - Board of Selectmen
David Sordi	Town of Conway - Planning Board
Francis Lyons	Lower Bartlett Water Precinct; FX Lyons. Inc.
Bill Hounsell	North Conway and Lower Bartlett Water Precincts
Michael DiGregorio	Town of Conway – Board of Selectmen
Kathy Sherman	Citizen; Farm Owner
David Bernier	North Conway Water Precinct - Superintendent
John Boisvert	Pennichuck Water Works
Beth Gray	Lower Bartlett Water Precinct; FX Lyons, Inc.
Andrea Osmun	Conway Daily Sun
Mark Hounsell	Citizen
Maureen Westrick	Fertile Valley Initiative
Sally Davis	Town of Thornton – Conservation Commission
Laura Slitt	Citizens for Food that Makes a Difference (CFMD)
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, also referring attendees to the handout containing lead-off questions. Bill McCann also recognized Representative Buco as one of the sponsors of HB1353.

Representative Buco commented that in the Saco River valley, there is a tremendous aquifer and the citizens want to be proactive in protecting it. He stated that he believes that a lot of concern of the residents in the valley is arising because of the situation in Fryeburg, Maine where Poland Springs is extracting groundwater for bottling. He then asked Brandon Kernen for clarification on whether groundwater is in the public trust or whether it will require a judicial ruling to make that determination. Brandon Kernen responded that the legislature can make recommendations on what they want common law to be but that it is the courts that actually affect what common law is by making decisions. He stated that the legislature can't amend common law. In response, Bill McCann stated that the language in RSA 485-C is referred to as legislative notation meaning that the legislature believes the statement to be true; however, just because the language is in statute, doesn't necessarily mean the court agrees with it. He explained that in a court case on a withdrawal, the NH Supreme Court did not respond to the argument that groundwater is in the public trust because it wasn't required to settle the case. He stated that the case was settled based on DES's regulatory power and the administrative rules. He commented that the law itself is only 10 years old and that there has only been one court case strictly dealing with RSA 485-C.

Crow Dickinson stated that he believes the state should differentiate between the ultimate use of the water, specifically in regard to public use versus commercial use, and that there should be different criteria for permitting. He also commented that the 57,600 gallon per day threshold for requiring a permit is too large and raised the issue of people withdrawing in excess of the threshold illegally. Bill McCann responded that a different subcommittee of the Groundwater Commission is looking at the hierarchy of use. With reference to the 57,600 gallon per day threshold, Bill McCann stated that this issue had been brought up at other meetings which also raises the issue as to who regulates withdrawals that are less than the 57,600 gallon per day threshold. He stated that the law is currently ambiguous and needs to be clarified. Crow

Dickinson responded that the threshold should be cut back to 25,000 gallons per day in the statute. In follow-up, Brandon Kernen addressed Crow Dickinson stating that in regard to differentiating between water uses, his question seems to go beyond a hierarchy of use and seems to suggest two different processes. He asked Crow Dickinson what he thinks the criteria should be to differentiate between different types of water uses. He also asked what extra criteria should be looked at with a commercial withdrawal. Crow Dickinson responded that the selectmen should have final veto power, particularly on withdrawals for bottling operations because the water is being exported out of town. He also stated that towns should be able to adopt ordinances that are enforceable and that if towns were enabled to do this by the legislature, local control would be strengthened. In regard to a town having final veto power, Brandon Kernen asked Crow Dickinson for recommendations on criteria that a town would base a veto decision on. Dave Maclean commented that Crow Dickinson seemed to be primarily referring to consumptive uses of water. Crow Dickinson responded that the criteria for the permitting process should be more liberal for public use of water as opposed to commercial use of water. He also commented that water for irrigation for a golf course, for example, is not exported out of the town. Brandon Kernen asked Crow Dickinson for any suggestions regarding legally defensible criteria that a town would base a veto decision on. Dave Maclean commented that any water use for irrigation, whether it be for a golf course or agricultural use, if managed correctly, would be almost entirely consumptive, almost as consumptive as a bottling plant. Crow Dickinson stated that the legislature could attempt to give municipalities veto power, at least for the most consumptive uses of water such as bottling.

Dave Sordi asked whether in looking at the potential for a drought, are there any provisions in the regulations for seasonal testing of proposed withdrawals. He stated that the state should consider making this a requirement. He then asked whether someone who installs multiple wells on a property that are each withdrawing less than the 57,600 gallon per day threshold requires a permit. The subcommittee members responded that yes, a permit would be required. In reference to Dave Sordi's question about drought conditions, Bill McCann commented that drought conditions are covered in the conditions of a permit, specifically with regard to monitoring requirements and withdrawal thresholds. He stated that it would be site specific based on the hydrogeologic setting of the withdrawal. Brandon Kernen responded that for permits where there are concerns about impacts to other water users and water resources, there are different withdrawal thresholds or amounts based on different environmental conditions such as water levels, precipitation trends, etc. Dave Maclean commented that in some permits, it is actually spelled out that if the state declares a drought emergency, different withdrawal thresholds will be in effect. Dave Sordi asked whether there could be different withdrawal amounts or criteria that have to be met even if there was not a drought situation. The subcommittee members responded affirmatively.

Crow Dickinson addressed Dave Sordi stating that hypothetically, several individuals could get into business and subdivide a large tract of land into large enough lots and extract 57,600 gallons per day from each lot. He then asked the subcommittee if that would be a mechanism to circumvent the law. Bill McCann responded that the law takes into consideration the aggregate withdrawal.

Mark Hounsell thanked the Groundwater Commission for holding the meeting and Representative Bucu for the legislation. He directed the attendees to one of the meeting handouts which stated that water is a shared resource. He stated that he abhors the tapping of aquifers in any state by commercial entities but that as he understands it, NH has the toughest water laws in the country. He said that instead of referring to water as a shared resource, the state should reclassify it as a human right. He stated that it is imperative that we shut off commercial access to the people's right to water. He stated that he agreed with Crow Dickinson that more protection of the resource from commercial entities was necessary and that municipalities should be allowed to grow their systems and decrease their dependency on private wells and private well companies. Bill McCann responded that the concept of water as a human right is being discussed in various international venues and that advocates in some communities may pressure the legislature on this issue. He stated that Canada is in support of a worldwide declaration of water as a human right but that in recent United Nations proceedings, the United States was opposed. He then provided clarification on the history and evolution of common law and stated that only courts, through their decisions, could affect changes to common law.

Dave Bernier commented that he is in favor of the idea of hierarchy of use and that public water supply should be near the top of the list. He stated that in the permitting process, the entering into interconnection agreements by public water suppliers should be taken into consideration, as should the rate-setting practices of public water suppliers in terms of whether they promote water conservation. He stated that some relief in the permitting process should be given to public water suppliers that meet certain criteria. He also commented that DES does a good job of administering the law and rules but that the regulations are cumbersome and he thinks they are cumbersome because the same rules apply to public and commercial entities. He commented that two sets of regulations may be appropriate. Dave Maclean asked Dave Bernier what he meant by a flat rate billing structure. Dave Bernier responded that a flat rate means that a customer is charged the same rate for every unit of water they use, which doesn't encourage people to conserve water and use less. He commented that some communities have a declining block rate structure whereby the rate per unit of water decreases the more that is used, which also doesn't encourage conservation. Dave Maclean asked Dave Bernier whether he felt, from a technical standpoint, that an adverse impact to a private water supply well, whether it is caused by a withdrawal serving a paper mill or a public water system, is fundamentally different. Dave Bernier responded that he thinks industrial processes should not be reliant on groundwater sources; they should be extracting surface water and treating it. He also commented that no credit is given in the large groundwater withdrawal permitting process to water that is returned to the environment, referencing the infiltration of treated wastewater in North Conway.

Francis Lyons, a private operator of community water systems, stated that he agrees with Dave Bernier in regard to systems with interconnection agreements. He stated that the Conway area is unique in that the towns do not own or regulate the water systems; the water systems are owned and managed by water precincts, water districts, homeowner associations, and commercial suppliers such as Pennichuck. He stated that this needs to be taken into consideration when looking at the regulations. He then commented that based on his research, the Saco River valley is one of the best aquifers in the country and that his biggest concern is that there will be a contamination event in the northern reaches of the valley that will affect the entire region.

Bill McCann asked how water precincts are designated or established.

Bill Hounsell responded that village districts are created through an act of the legislature that allows the selectmen to lay out the boundaries of the district. He stated that once a village district has a hearing before the selectmen, if the district is not contested, most likely the selectmen would authorize the formation of the village district. He then explained that the North Conway Water Precinct is a charter district established by an act of the legislature in the early 1900s. He explained that the North Conway Water Precinct can't expand without going back to the legislature but can pass bonds by a simple majority vote as opposed to a 2/3 majority vote. He stated that generally speaking, most water systems in the valley area are village districts in which voters can approve franchise areas which allow an expansion of the distribution system beyond the boundaries of the district through franchise agreements. He explained that the boundaries and voters are still within the original district. He then explained that a charter district, like North Conway Water Precinct, is established through a direct legislative mandate, and that village districts are established through enabling legislation.

Maureen Westrick commented that the North Conway Water Precinct is unique is that it serves portions of two different towns. She then suggested that in talking about water as a human right and how that might tie in with common law and groundwater being in the public trust and protecting groundwater from corporations, the state of NH should revoke personhood from corporations. She stated that the profit motive needs to be taken out of water. She stated that she agrees with Dave Bernier in that consideration should be granted for systems that return water to the ground in a pristine condition.

Mike DiGregorio stated that he agreed with Dave Bernier's comments on a reduced permitting process for public water systems. In reference to Dave Maclean's comment regarding an adverse impact caused by a private or public entity, he stated that this is not something he had considered but that if a withdrawal has a negative impact, it has a negative impact regardless of who the user is. He said however that it should be considered that corporations have more financial resources than public water systems. He then asked if public water systems and commercial users are treated the same way under the current law, what is preventing the legislature from giving towns the authority to tax or place fees on water that is being withdrawn from the ground by a commercial user. He commented that if a withdrawal is allowed by a community, there should be a benefit for it. Bill McCann responded that the conversation about taxes or fees on water withdrawals has taken place over the years and that it would take the legislature to pass enabling legislation to allow communities to move forward. He commented that the debate is likely to continue unless there is a fair system in place in terms of the hierarchy of use. He stated that if people think the system is unfair and entities are making a profit, there will be more of a push to tax the water. Brandon Kernen responded that the Groundwater Commission has been charged with looking at fees for consumptive uses of water and that this is being explored by another subcommittee and the research has to be finished. Dave Maclean stated that hypothetically, if there is a municipal water system and a commercial user, neither of which are causing an adverse impact, is it fair for the business to be taxed for using the water that is underneath their land. Mike DiGregorio responded that he hadn't given much thought to other scenarios but that he

could clearly say that water used for bottling should be taxed. He also commented that he would want the local communities to get the revenue, not the state.

Dave Maclean stated that the state needs to be careful when looking at consumptive uses because there is a wide variety of ways that water is used by commercial and industrial entities. Crow Dickinson responded that if the use of the water just results in routing it a different way through the same system (for example, in the case of a surface water withdrawal and subsequent discharge), he doesn't see a problem with that.

Sally Davis commented that the citizens of Thornton are concerned about wells in the stratified drift aquifer. She stated that Thornton doesn't have a municipal system and that everyone is served by private wells. She commented that when new subdivisions are proposed, the residents in the area wonder what will happen to their wells. She stated that dug wells and shallow drilled wells in town are no longer providing water. She then asked how information that is reported to the state by water well drillers is acquired. Brandon Kernen responded that since 1984, state law requires well drillers to be licensed and requires that they submit information to the state about every well they install, including information about the water level in the well, the yield of the well, and why the well was installed. He stated that the state maintains a database of this information. Sally Davis asked whether the Thornton planning board could acquire this information for the entire town so they could use it for making decisions. She then asked if estimates of well yield are based on the driller's best judgment. Brandon Kernen explained that there are criteria for how a driller is supposed to estimate well yield but the figures are questionable and don't indicate the reliable long term yield of the well. He then stated that this is a requirement for every well not just large groundwater withdrawals.

Mark Hounsell stated, in reference to the table summarizing permitting statistics in the presentation, that it seems that corporations are more successful in getting large groundwater withdrawal permits than public water systems. Bill McCann responded that of the bottled water permits issued, only one facility is in operation, three did not get financing, and one permit holder is in bankruptcy. Brandon Kernen commented that there have been many more applications for community water systems but that they seem to take more time to go through the process. Mark Hounsell commented that the application process is expensive and that municipalities can only get revenue to fund applications through property taxes and that corporations have more financial resources.

Bill Hounsell commended the Groundwater Commission for their effort. He then made the following comments:

- 1) It seems that western water law could help develop eastern water law in prioritizing water use for the citizens of a state over other water users. He stated that the citizens of the state should have first rights to the water.
- 2) Laws should clarify that the United States constitution overrides international trade agreements.
- 3) The law for large groundwater withdrawals should be flexible for abundant overburdened aquifers versus fractured bedrock aquifers.

- 4) The legislature should seek opinions from the United States Department of Justice on bills that are filed.
- 5) Regarding a reduction of withdrawals and overall water use during a drought emergency, this could be achieved through public education of the need to conserve water for the common good. He stated that people will respond to emergency situations and conserve water.
- 6) The criteria for large groundwater withdrawals by public water systems should be based on monitoring for negative impacts. He stated that the permitting process is a large cost to municipalities and rather than the threat of a denial of a permit for a municipality, the focus should be on how much monitoring should be done and where. He commented that triggers for negative impacts could be intertwined with local land use regulations which would increase the community role.
- 7) The state needs to continue to be a partner in grant funding for regionalization of water and wastewater systems. He stated that SB60 is going to create a commission to study water infrastructure sustainability funding. He commented that there is a need to find a dedicated source of revenue to reinstate grant programs which may be the only way for communities to develop regional infrastructure projects.

Bill McCann commented that the NH Supreme Court found that DES has to issue a permit as long as it can be demonstrated that the withdrawal will result in no unmitigated adverse impacts. He stated that the burden is on the applicant and on DES to ensure that if there is an adverse impact, it can be mitigated. Bill Hounsell stated that he didn't feel the burden should be put on DES and that there needs to be a different tone in the language of the regulations and that the process is negative for municipalities.

Representative Bucu commented that several years ago, citizens were afraid that the withdrawal standards were too weak but now the state has come to a point where the process is too restrictive on municipalities. He stated that citizens can be reassured that NH does have strict groundwater withdrawal regulations.

Crow Dickinson commented that the legislature could pass a law that allows municipalities to pass ordinances to control groundwater. He referred to ordinances passed by other NH communities, acknowledging that they are tenuous, and some ME communities. He reiterated that the 57,600 gallon per day permitting threshold should be reduced to 25,000 gallons per day and commented that the state should establish a hierarchy of use. He then stated that the local governing bodies or the local legislative body should have veto power in large groundwater withdrawals and that the state and municipality together should make it clear that they have the power to restrict withdrawals and other water uses in any emergency situation. He stated that the towns can't do it all by themselves but they can back up the state. He then commented that the state can override court rulings by changing the law. In follow-up, Dave Maclean asked that if municipalities were granted more authority or veto power, or a larger role through ordinances, who would they rely on for technical assistance. Crow Dickinson responded that the towns would have to rely on DES for the technical aspects. Dave Maclean asked Crow Dickinson how different is the current process, considering that the towns can be formally involved twice. Crow Dickinson responded that he trusts the people in the towns and that there are towns struggling to

write ordinances but there is no back up for them in the law. He commented that he doesn't necessarily trust the state to do what is right for local municipalities but he trusts that local citizens will make the right decisions if they are properly advised.

Representative Umberger stated that an entity such as Pennichuck shouldn't be forgotten in the hierarchy because they provide water to the people. She stated that they should be in the same category as a municipal water supplier even though they are a commercial entity. She then commented that it is an expensive process for a community to obtain a large groundwater withdrawal permit and that communities should go into the process expecting that they will be successful. Regarding agricultural users, she commented that family farms that sell farm products commercially may also have a significant need for water and that she doesn't think it is appropriate that a family farm would have to go through the permitting process because it would bankrupt them. She stated that there should be some way to apply an exemption or an exception to the regulations for agricultural users. Bill McCann responded that there has been discussion at other meetings regarding agriculture users and that the issue has to be looked at. He thanked Representative Umberger for attending the meeting.

Crow Dickinson stated that he agreed with Representative Umberger in that the application process should be simplified for agricultural users. Susan Roman asked Crow Dickinson if, when he talked about veto power, he meant that a town would be able to deny an application for a large groundwater withdrawal if DES approves it. She asked if he also meant that a town could approve an application if it was originally denied by DES. Crow Dickinson responded that the town's review would be the last step in the process and that it would entail denial only. He stated that if an applicant knew there was the potential to be denied, they might be more inclined to accommodate all of a community's concerns. Bill McCann commented that it seems to be more about a balance of power by placing the municipality on equal footing with the state.

In response to Crow Dickinson's comments, Mark Hounsell stated that he does not believe it is in the best interest of the issue to give municipalities any veto authority. He said that the process will be driven by different agendas and politics and will be adversely affected. He then commented that water does not respect municipal boundaries and that the permitting process has to be easier for communities. He also commented that commercial extraction is not the same as private operators and he is concerned that commercial extraction could occur through private operators. He stated that in the past, the town was not comfortable with a well being installed for the Birch Hill water system; this resulted in an interconnection with North Conway Water Precinct wherein the infrastructure is provided by Pennichuck and the water is provided by the water precinct. He then commented that changing the current tone of the process is essential and that towns are essentially gambling when they go through the permitting process. He commented that the state should reject the concept that communities and corporate entities have to be treated equally and that the process should be made easier for communities and more difficult for commercial entities.

John Boisvert stated that this was the fourth meeting that he had attended and that discussions being held at the meetings reflect the recent water survey that was conducted, in that there are different areas of interest in different regions of the state. He commented that the Saco River

valley is experiencing growth and development much like the Seacoast and Lower Merrimack regions of NH but that entities in the valley have the opportunity to encourage regionalization. He stated that in other areas of the state, there is a lot of fragmentation. He commented that the state should make it easier to extend municipal/public water systems to smaller systems. He also commented that the cost and time to go through the permitting process drives developers to private wells which are not regulated and that typically water is overused for irrigation. He commented on other effects of subdivisions and development on water quality. He stated that the valley can lead by example and that solutions need to be regional. He encouraged the attendees to think about how local control can be redirected through a plan for growth management.

Bill McCann closed the discussion portion of the meeting, referring attendees to NHgroundwater.com for additional information. Brandon Kernen added that written comments could also be submitted through the email address at NHgroundwater.com.

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:

- How can we make sure groundwater is in the Public Trust?
- The permitting process should differentiate between public and commercial uses of water. The permitting process should be streamlined for public water systems and a higher standard of permitting should be applied to commercial uses of water.
- The threshold for requiring a large groundwater withdrawal permit should be lower than 57,600 gallons per day.
- Municipalities should have veto power for bottled water withdrawals and/or consumptive withdrawals.
- Municipalities should be enabled to adopt local groundwater withdrawal ordinances that are enforceable.
- Field testing associated with applying for a large groundwater withdrawal permit should only occur during dry periods.
- In New Hampshire, water is considered a shared resource. Water should be recognized as a human right.
- A hierarchy of water uses needs to be established. This should dictate who gets the water and the difficulty of the permitting procedures associated with withdrawing large volumes of water.
- Public water systems should be required to implement a rate structure to encourage conservation.
- The large groundwater withdrawal permitting process should be streamlined if the water user returns water to the aquifer.
- Water systems that support an interconnected regional water system should be given relief in the permitting process.
- The State should revise its Constitution to revoke person-hood from corporations.
- A tax or fee on commercial/corporate water withdrawals should be established. Revenues should go to the towns.
- The statute should be expanded to assess the impact from multiple small withdrawals that cumulatively represent a large withdrawal such as new subdivisions.
- The state should address water quality/public health issues associated with private drinking water wells.
- The Federal Government should take measures to ensure our Constitution, laws and regulations are not undermined by international trade agreements.
- The State should increase funding for the interconnection of water/wastewater systems.
- The requirements and associated costs of the large groundwater withdrawal permitting process should consider the use. For instance, the process should be relatively simple and inexpensive for agriculture use.
- Because the large groundwater withdrawal permitting process is expensive and lengthy, developers of new subdivisions are electing to install a large number of private wells instead of developing a public water system in order to avoid the large groundwater withdrawal permitting process.