

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 SOUTHWEST REGION PLANNING COMMISSION

MEETING MINUTES

Meeting Date: June 4, 2009

Meeting Location: Keene Public Library in Keene, NH

Meeting Advertisement: The Southwest Regional Planning Commission 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 Strafford Regional Planning Commission. Towns represented by the Strafford Regional Planning Commission include: Barrington, Brookfield, Dover, Durham, Farmington, Lee, Madbury, Middleton, Milton, New Durham, New Market, Northwood, Nottingham, Rochester, Rollinsford, Somersworth, Strafford, Strafford County, and Wakefield. The Department of Environmental Services (DES) 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 7:00 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
Susan Roman	HB1353 Subcommittee Member
David Maclean	NH Business and Industry Association
Other Attendees	
Tim Allen	Keene State College
Bob Switzer	Town of Sullivan – Planning Board
Dick Freeman	Town of Peterborough Water Resources Commission
John Mann	Town of Alstead – Conservation Commission
Winston Sims	Town of Harrisville – Conservation Commission
Noel Greiner	Town of Harrisville – Planning Board
Christine Destremes	Town of Harrisville – Conservation Commission
Francie VonMertens	Town of Peterborough – Conservation Commission
Lisa Murphy	Southwest RPC
Neel Patel	Southwest RPC
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.

An attendee asked whether agricultural users have priority over other commercial users. Bill McCann commented on the work of the hierarchy of use subcommittee in looking at issues related to priority of use by different water users. Brandon Kernen stated that the subcommittee has a draft report and that agricultural use is identified higher up in the hierarchy. He explained that one problem with establishing a hierarchy is that the state lacks the data to implement it; while the state has developed categories of water users, it doesn't have information on the users themselves or the environment. The attendee then asked whether it is clear to a permit holder that their permit is provisional and may be subject to diminishment. Bill McCann responded that it is explained in the permit when it is issued and also discussed during the public hearing.

In reference to Brandon Kernen's statement during the presentation that almost all commercial large groundwater withdrawals required variances, Francie VonMertens asked why an applicant would be required to go through the variance process if towns don't have jurisdiction over the withdrawal. Bill McCann explained that under local land use regulations, entities such as golf courses or bottling plants would likely need a variance for the land use.

Bob Switzer asked what size operation would trigger a variance. Bill McCann explained that the land use itself would trigger the variance, regardless of how much water a facility uses. Bob Switzer then asked about who determines how much water is being withdrawn and whether someone monitors the pumping or if it is just based on the honor system. Dave Maclean responded that the amount of water that could be withdrawn will be largely controlled by the geology. He also explained that permits contain conditions requiring monitoring and reporting of information to DES and that usage of the withdrawals is monitored at the wellhead using a meter. He stated that monitoring of water use is typically performed by the permit holder. Brandon Kernen commented that DES has the authority to go to a site and inspect and read meters. He also explained that licensed geologists and engineers perform much of the monitoring and their license is at risk if they falsify data. He said DES does perform inspections when there

are concerns or the numbers don't look right. He also stated that the statute specifies that towns can enforce the provisions of the Groundwater Protection Act and enter a property and read meters to ensure compliance with a permit. Lisa Murphy commented that an important thing to note is that in most cases monitoring is done by a licensed third party not by the permit holder.

Francie VonMertens stated that the variance process has five criteria and that it would seem that an applicant could get hung up at the town level with the zoning board ruling on a variance and finding that a project (for example, a bottling facility) would not benefit the public. She stated that this would give the town a voice in the process and asked whether there have been cases like this. Susan Roman cited a case in Peterborough that had to do with trucking. She then explained that towns are preempted by RSA 485-C from regulating large groundwater withdrawals and that with all zoning, towns have to be aware of constitutional issues of equal protection and discriminatory treatment. She explained that certain land uses can't just be zoned out of town. She explained that standards for special exceptions also have to be applied fairly but regardless, towns have a lot of say about site development and incidental land use. Bill McCann stated that in the case of USA Springs, a local variance was granted prior to USA Springs submitting an application to DES. Francie VonMertens asked for clarification on whether a project could be denied solely on the basis that it would use too much water. Susan Roman responded that no, a project could not be denied on that basis.

Noel Greiner commented that the discussions seemed to be focusing on the current law and that he thought the purpose of the meeting was to discuss potential changes to the law. He commented that people should not be allowed to extract water for their own profit because the water belongs to the public. Bill McCann responded that the scenario posed by Noel Greiner assumes that a monitoring plan is in place that demonstrates that water is being taken from other users and an adverse impact is occurring. He stated if that was the case, DES would require actions to be taken to mitigate the adverse impact which could include reducing or terminating the withdrawal. He then explained that DES puts a lot of conditions in a permit that require monitoring for adverse impacts and that if an adverse impact occurs or there is the potential for an adverse impact to occur, the permit holder may have to cut back on how much water they are withdrawing. Dave Maclean commented that the permitting process takes a minimum of 18 months to go through and that the public is involved from the beginning so that concerns can be addressed and necessary monitoring can be incorporated into the withdrawal testing program. He explained that there is a second opportunity for public input after the withdrawal testing program where additional concerns can be raised. Lisa Murphy asked how quickly action would be taken by DES if there is a complaint that an adverse impact is occurring. Brandon Kernen responded that action occurs immediately; DES would order the permit holder to start collecting data to confirm whether an adverse impact was occurring and that both the rules and permits have timetables for investigating claims and providing mitigation. He stated that in the worst case scenario in which a permit holder wasn't being cooperative and following the order, DES would have to go to the Attorney General and enforce through the state police. He said that is where the process gets into a weeks time frame but at that point, the permit holder is putting their permit at risk by being uncooperative. He stated that that was unlikely to occur and would have severe consequences. Brandon Kernen commented that in the drought of 2001/2003, DES ordered the Golf Club of New England to investigate claims of adverse impacts to private wells in the

established zone of influence of the withdrawals. He explained that in the case of verified adverse impacts, replacement wells were provided to the affected parties at no initial capital cost. Lisa Murphy asked whether DES was proactive or reactive during drought periods. Brandon Kernen explained that in certain permits, allowable withdrawal amounts are based on water level thresholds. He explained that drought conditions could essentially shut a withdrawal down as thresholds are met.

Winston Sims commented that it seemed DES has a fair amount of discretion and tends to be quite responsive, but that DES's ability to respond is framed by the law, and that to the extent the law could be strengthened, it would serve to strengthen the hand of municipalities, citizens, and DES. In reference to water level thresholds, he asked whether the current standards speak to the water table being drawn down by a certain amount, for example 1 foot versus 10 feet. Brandon Kernen responded that thresholds are established on a site-specific basis based on the types of nearby wells and their construction, and wetlands and surface water resources. He explained that some permits contain water table elevations and/or surface water flows that have to be maintained. He commented that it varies from site to site based on what is necessary to protect water users and resources. Winston Sims asked whether water table levels are determined empirically. Brandon Kernen explained that they are measured during the pumping test program and that the data is extrapolated in time. Winston Sims asked whether a withdrawal would have to shut down if only one private well went dry as a result of the withdrawal. Brandon Kernen explained that the law requires that the impact be mitigated stating, for example, that in the case of a shallow dug well, the applicant (or permit holder) could provide the affected individual a deeper well or they could reduce their withdrawal amount so that they no longer affect the private well. Winston Sims asked whether mitigation was the same as eliminating the problem. Dave Maclean explained that where there are concerns about impacts to private wells, the applicant or permit holder is required to monitor water levels in those private wells. Winston Sims asked who has to pay for a new well for an affected user. Dave Maclean responded that the applicant (or permit holder) would bear the initial capital cost. He also explained that a source replacement plan would be in place prior to a permit being issued.

Francie VonMertens stated that she would like DES to talk about what they think is not working in the current system. Brandon Kernen responded that he wouldn't want to bias any discussion and that the purpose of the meeting is to hear what people would want the process to be like and not to try to defend the process. Bill McCann explained that it didn't matter what people's level of expertise was and that the subcommittee was interested in hearing what people would like the process to be.

An attendee from Peterborough stated that he would like to see more focus and resources put into understanding the relationship between groundwater and surface water.

John Mann commented that he was concerned with future considerations for water use. He asked how a town could protect a stratified drift aquifer that is not currently being used for future use. He stated that the town does not have the money to buy the land over the aquifer. He asked whether the state has the power to take away a permit and give that water withdrawal to another user that has a higher priority use (for example, for agricultural use for food production). Bill

McCann explained that a permit is only issued for ten years at which time it has to be renewed. He said DES would have to consider additional water use and new water users at the time of permit renewal but that under the current law, DES cannot just take away a permit. Brandon Kernen explained that DES cannot make a value judgment or a public benefit analysis of a water use in terms of whether one use is more beneficial than another. John Mann asked whether municipalities should have the right to preserve water resources for the future. Dave Maclean responded that to protect water resources for the future, municipalities have to look at it from a water quality and a water quantity standpoint; from a water quality perspective, there is a considerable amount of power that municipalities have, for example by implementing aquifer protection overlay districts and establishing wellhead protection areas. He stated that towns are able to regulate land uses within those designated areas to prevent land uses that could adversely affect water quality. John Mann expressed that he was concerned about quantity not quality.

Tim Allen asked whether withdrawals for which permits were granted were still protected if the withdrawals themselves were not activated. He asked if a new applicant would have to take into consideration the protection of that previously permitted amount. He stated that if that was the case, would it be possible for a town, with no intent of actually developing a well, to go through the process of permitting a withdrawal as a way to protect a future water supply. He then asked about what point in the process a well actually gets installed and how much hydrogeologic work is conducted before a well is drilled or the preliminary application is filed. Brandon Kernen responded that permits do not constitute a water right and that the process protects existing larger water users based on their monthly reported water use; there is no reservation of water. He commented, however, that the concept of a town going through the process as a way to protect the resource is a recommendation others have also made. Regarding Tim Allen's question about the timing of well installation, Dave Maclean responded that large overburden wells are typically installed after a fair amount of hydrogeological work is completed and that bedrock wells are typically installed earlier in the process.

In reference to John Mann's comments, Lisa Murphy asked whether potential future uses for undeveloped land around a proposed withdrawal would be taken into consideration in the permitting process. She also stated that she agrees that agricultural use has to take priority but also agrees that when businesses invest a lot of money is getting a permit; you can't just pull it out from under them. Bill McCann responded that the permitting process looks at the zone of influence of the withdrawal and whether there is the potential for the withdrawal to cause any adverse impacts to water resources or users in that area. Lisa Murphy commented that municipalities should perhaps set priorities for land uses that are most important to them. Dave Maclean suggested that towns start with their master plan and then ensure that land use ordinances are in line with their master plan. Francie VonMertens asked for examples on what the general wording in a master plan would be that would prioritize land uses. Dave Maclean commented that it would depend on the degree to which water resources had been inventoried in a town and cited efforts in Hollis, NH. Susan Roman commented that if an applicant satisfies the large groundwater withdrawal permitting criteria, they can withdraw the water regardless of what a town's master plan states; that is how the law works. Brandon Kernen commented that a town's master plan has played a role in other commercial projects and that if a master plan expressed a desire for a town to preserve certain areas for certain purposes and it was zoned

appropriately, the applicant would require a variance for that land use. In response to an attendee stating that their community does not have zoning, Susan Roman stated there is no regulatory enforcement under a master plan but that there is under zoning.

Winston Sims asked about the origins of the 57,600 gallon per day threshold. He stated that this may be a reasonable threshold in certain areas of the state but that it may not be appropriate in all areas of the state. Bill McCann explained that the 57,600 gallon per day threshold was taken from a differentiation between small and large community water systems. Winston Sims stated that he thinks it is inappropriate for the legislature to impose the same threshold on different geographic areas. An attendee commented that it seems that there is enough yield data from existing wells to establish geographic-specific limits on what constitutes a large groundwater withdrawal. Bill McCann stated that since it is a statewide policy, it doesn't seem that the state would establish thresholds for different regions. The attendee commented that instream flow requirements are going to be established on a geographic-specific basis, not on a statewide level. He also stated that he doesn't believe the legislature should be establishing thresholds on scientific data; the legislature should be telling DES to establish regional thresholds. Bill McCann commented that the state still needs to establish an inventory to be able to quantify region-specific thresholds and that additional funding would be required.

An attendee from Peterborough stated that the state needs better data on groundwater resources to make these types of decisions and that a statewide database is needed. He commented that groundwater recharge is also important, and should be taken into consideration in stormwater management. He then commented that a regional approach would be challenging because some towns are more water rich than others. He stated that there also needs to be incentives to conserve water and then expressed that he is concerned about protecting groundwater resources from pollutants.

Bob Switzer stated that a distinction should be made between consumptive and non-consumptive uses and that consumptive uses, such as bottling, should be taxed. Lisa Murphy asked whether the consumptive nature of the water use was taken into consideration in the permitting process. Brandon Kernen responded that a water budget is included in the application and that obviously bottled water would return little to no water to the hydrologic system. He then explained that irrigation uses also return very little water to the system as recharge.

Winston Sims commented that the meeting handouts didn't appear to include any analysis of the advantages or disadvantages of the current process. He commented that no case studies were provided and that one needs to assess the strengths and weaknesses of the process to provide comment on it. Bill McCann responded that there have been very few cases where a dispute has had to be adjudicated or mediated. He stated that adjudication would occur at the Water Council, Superior Court, or Supreme Court and that since the law has been in effect, only one case has had to be adjudicated in the Supreme Court. Winston Sims asked if this spoke to the adequacy or the inadequacy of the law. Brandon Kernen responded that there are four areas that DES sees room for improvements. He stated that DES supported a bill that would allow municipalities to hire a consultant at the expense of the applicant to perform a third party review of the application to be able to make recommendations to DES. He also stated that DES supported doing something

with the pre-1998 wells, commenting that the lack of their regulation is a gap in a comprehensive management system. He then stated that subdivisions that avoid putting in a large well but instead have on lot water that extract a lot of water collectively are also a gap in a comprehensive management plan. He commented that DES also believes that the statute needs to be clarified on whether withdrawals that are less than 57,600 gallons per day can or cannot be regulated and by whom. He commented that the state is currently identifying data needs and formulating recommendations for how to address them.

In reference to Winston Sims' request for case studies, Tim Allen asked if there was any information available on DES's web site. Brandon Kernen responded that he does have case studies prepared that could be emailed to interested parties. He asked attendees to submit a request through the email address at NHgroundwater.com. He also stated that the subcommittee would be soliciting comments through June and that these could be submitted through the email address on the website.

Lisa Murphy commented that there should be a bonding requirement for permit holders. Bill McCann provided an update on SB56 related to bonding and insurance requirements. Lisa Murphy then commented that when the use of a withdrawal stops, there should be some requirement to restore things back to their preexisting condition.

Francie VonMertens stated that she hopes the subcommittee is also hearing from a lot of professionals in addition to concerned citizens or local government officials.

The meeting was adjourned at approximately 8:45 PM.

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

- Should agriculture uses of water get priority over other water uses?
- How can the state provide adequate oversight of how much water a person is using?
- Why can someone use a public resource such as water for private profit?
- Does DES have adequate capacity to respond to adverse impacts associated with large groundwater withdrawals?
- Groundwater resources need to be managed and protected for future uses.
- The large groundwater withdrawal permitting process needs to needs to consider not only new but future withdrawals in the permitting process.
- Municipalities should be allowed to preserve water resources for future use.
- Master plans should dictate the priority of water uses in a municipality.
- Does it make sense to apply the same large withdrawal permitting threshold of 57,600 gallons for the entire state or should the threshold be different for different regions of the state.
- The state needs more data to direct policy and regionalization.
- The state should encourage regionalization.
- The state should develop incentives for water conservation.
- The protection of groundwater quality is just as important as protecting water quantity.
- The large groundwater withdrawal permitting process needs to differentiate between consumptive and non consumptive uses.
- The large groundwater withdrawal permitting process should require bonding and insurance.