

**2006 INTERIM REPORT**  
**Commission to Study Issues Relative to**  
**Groundwater Withdrawals**  
**SB 155, chapter 0305, laws of 2003;**  
**Extended by SB 142 of 2005, chapter 278:1, laws of 2005**

**TO: Governor Lynch, Speaker Scamman, and Senate President Gatsas**

**FROM: Senator Carl Johnson, Chairman**

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**Commission Members:**

Senator Sylvia Larsen  
Representative Dave Babson  
Representative Judith Spang  
Representative Richard Cooney  
Thomas Fargo, Society for the Protection of New Hampshire Forests  
Jack Donohue, International Bottled Water Association  
Chris Mulleavey, Public Representative  
Brian Goetz, New Hampshire Water Works Association  
David Bissonnette, Associated General Contractors  
Michelle Hamm, Business and Industry Association  
Mason Westfall, New Hampshire Association of Conservation Commissions  
Elizabeth Thomas, New Hampshire Municipal Association  
Brandon Kernen, New Hampshire Department of Environmental Services  
Sarah Pillsbury, New Hampshire Department of Environmental Services  
Dave Allen, Public Representative  
Timothy Allen, Joint Board of Licensure - Professional Geologists  
Dennis Nesbitt, Business and Industry Association  
Tom Chase, Recreational Interests  
James Griswold, New Hampshire Farm Bureau  
Glenn Greenwood, New Hampshire Association of Regional Planning Commissions

The Groundwater Commission (commission) was created in 2003 pursuant to Senate Bill 155, in response to concerns regarding the laws and regulations in New Hampshire pertaining to groundwater withdrawals. The commission was originally charged with assessing: 1) Ways to clarify the hierarchy of water uses while considering existing private property rights; 2) How to bring a balanced approach to water use among residential, public water supply, industrial, commercial, agricultural, energy, recreational, and other water users; and 3) How to improve the current process by which new water

users may reasonably and efficiently use state water resources, including consideration of potential regional impacts and local water management issues, in order to best protect and preserve an adequate supply of water for the state with particular attention to groundwater.

In November 2004, the commission issued a final report on its work. The findings contained in the report can be summarized as follows:

- 1) New Hampshire should establish a clear legal standards and criteria requiring the registration and reporting of water use for entities that use more than 20,000 gallons a day. At the time, state regulations requiring water use registration and reporting were not fully supported by law. Therefore, Department of Environmental Services (DES) had limited authority to enforce the regulation requiring accurate water use measurement and reporting. The commission determined that obtaining an accurate understanding of water use in New Hampshire was critical its efforts to improve groundwater regulation in the state. This is because water use directly affects water availability, and accurate water use information is required to determine what permits are required in the state.
- 2) New Hampshire should increase is groundwater monitoring network. It was noted by the commission that water levels in only 24 wells are currently evaluated in New Hampshire. Of the 24 wells, only one well is monitoring the water level in the bedrock. It was recommended that bedrock wells be installed next existing overburden well monitoring sites through out the state. The commission supported the DES' 05-06 capital budget requests to install the additional wells. The commission also recommended that New Hampshire continue to fund and increase stream gaging in New Hampshire.
- 3) The commission recommended that the expiration date of the commission's work be extended beyond November 2004. The commission felt that it had completed a lot of work, but that many difficult issues still had to be addressed.

In 2005, all of the recommendations of the commission were acted upon. The legislature partially funded the expansion of the monitoring well network. The legislature also adopted House Bill 215, which established RSA 488 - Water Management. This law establishes a clear legal requirement for entities that withdraw, transfer, or discharge more than 20,000 gallons a day to register with and report water use to DES. The law also established standards for enforcement, including inspections by DES, and fines for violations that are not corrected after being provided a written warning. Lastly, the legislature passed Senate Bill 142 in 2005. This law extends the life of the commission established by Senate Bill 155 from November 30, 2004 to November 30, 2008. Senate Bill 142 requires that the commission issue interim reports by November 30th of each year, and that a final report be submitted by November 30, 2008.

Since the effective date of Senate Bill 142 in July 2005, the commission has conducted eight meetings with the full commission. An Annual Report was submitted in November 2005 to summarize the work of the Commission at three meetings that year. The commission has conducted five full commission meetings in 2006 (see Attachment 1 for minutes of meetings). Additionally, as described below, subcommittees of the commission have conducted approximately 10 additional meetings.

The commission developed an outline of a workplan during its meetings in September, October and November 2005. A subcommittee of the commission conducted a meeting between September and November to develop the details of the workplan. At the November 30, 2005 meeting, the commission approved a work plan (see Attachment 2) that identified the following six key issues for the commission to focus on:

- Issue 1. Groundwater Withdrawal Permitting
- Issue 2. Clarification of Groundwater Quantity Law and Legislative Authorities
- Issue 3. Hierarchy of Groundwater Users
- Issue 4. Fee on the Commercial Consumptive Use of Groundwater
- Issue 5. Protecting Groundwater Quality to Ensure Availability
- Issue 6. Groundwater Management Data Needs

The work plan identified all of the specific aspects of each issue that should be considered (see Attachment 2). The work plan also proposed that each issue be initially introduced and discussed by the full commission, and that after this, a subcommittee would complete a detailed analysis and make findings to the full commission. A summary of the membership of each subcommittee is summarized in Attachment 3. As of November 30, 2006, the subcommittee has initiated work on Issues 1-3.

Issue 1- Groundwater Withdrawal Permitting, was introduced to the commission at a meeting on January 30, 2006. A subcommittee has conducted routine meetings since that time and is nearing completion of its work on studying Issue 1. As of November 2006, it appears the subcommittee focusing on Issue 1 - Groundwater Withdrawal Permitting, will make the following three major recommendations for legislative action:

- 1) Municipal Authority to Restrict Residential Lawn Watering in Drought Conditions - A law be enacted that provides municipalities with authority to adopt bylaws or ordinances to restrict residential lawn watering during times of drought as declared by the state or federal government. Currently, only customers of community water system can be subject to water use restrictions during times of low water availability, and neither the state nor towns can require residential outdoor watering be restricted during times of drought.
- 2) Replacement Well Exemption - A law be enacted that clarifies that the installation of replacement wells and the subsequent withdraw of groundwater from these wells are exempt from large groundwater withdrawal permitting requirements.

Currently, state law is silent on the issue of replacing a well that has physically deteriorated due to structural or geochemical problems.

- 3) Well Tagging - A law be enacted to require that a tag be placed on all water wells and monitoring wells in the state upon being installed by a well driller. Well tagging is required to maintain better records of wells that are installed, cross-reference databases, make use of the data for regional water resource and water quality studies, and to maintain or abandon water wells and monitoring wells.

The full findings of the Issue 1 - Groundwater Withdrawal Permitting Subcommittee are summarized in Attachment 4. Draft legislation prepared by the subcommittee is included as Attachment 5. A list of all information and documents prepared by the subcommittee is included as Attachment 6.

Another subcommittee focused on Issue 2 - Clarification of Groundwater Quantity Law and Legislative Authorities. At the full commission meeting on June 13, 2006, attorneys representing the NH Department of Justice, business and industry, and municipalities provided the commission with approximately two hours of testimony pertaining to groundwater law and regulation in New Hampshire. A detailed summary of the testimony of the attorneys is included within the meeting minutes (Attachment 1).

The subcommittee has conducted two meetings and has not completely decided on its approach to work and the actual scope of work. At this time, the subcommittee is further evaluating the following issues:

- 1) Assessing the need and merits of requesting an advisory opinion from the New Hampshire Supreme Court to answer the following questions: 1) Is groundwater considered to be directly to be held in the public trust; and 2) What would the ramifications be relative to private property rights and environmental protection if the a law was enacted stating that groundwater is in the public trust?
- 2) Investigating issues pertaining to the international sale of groundwater extracted in New Hampshire and to what extent trade agreements with other countries may limit New Hampshire's ability to execute and enforce state laws and regulations without being subject to fines and litigation.
- 3) Evaluating the organization and clarity of existing large groundwater withdrawal laws. Existing laws, stipulating specific permitting requirements and DES' rulemaking authority are distributed in several different chapters of law (RSA 481, 485, and 485-C). Within specific chapters of laws, requirements for large groundwater withdrawal permitting are not continuous, and intermixed with groundwater quality protection statutes. In some instances, laws grant DES rulemaking authority for issues pertaining to large groundwater withdrawal permitting that other laws stipulate specific criteria for.

The last issue discussed by the full commission was Issue 3 - Hierarchy of Water Users. This issue was discussed by the full commission on May 22, 2006. At the May 22nd meeting, the commission assessed if other eastern water law states had a hierarchy of water users. The actual water laws for other eastern water law states with priority systems was reviewed and summarized by the commission. This information is available upon request from DES. At this time, the commission has delegated further consideration of a hierarchy of water users to a subcommittee, which will report back to the full commission when it completes its work. The subcommittee is anticipated to begin its work on this issue by January 2007, once many members of the subcommittee complete their work on the Issue 1 - Groundwater Withdrawal Permitting subcommittee.

In conclusion, the Groundwater Commission is continuing to methodically assess issues pertaining to the management of groundwater in New Hampshire, and its work in 2007 will continue to follow the workplan (attachment 2) it developed this year to assess ways in which New Hampshire can improve its management of water resources.

Respectively Submitted,

Senator Carl Johnson, Chairman

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## **Attachment 1 - Summaries and Minutes of Groundwater Commission Meetings**

Minutes for the commission meeting dated January 30, 2005 were not prepared. The meeting consisted of a review of Issue 1 of the commission's work plan. The entire meeting consisted on a presentation provided by DES. Copies of the materials provided to the commission are available upon request.

### Summary of SB155 Ground Water Commission Meetings

Meeting Date	Meeting Description	Meeting Materials/ Handouts
August 27, 2003	Organizational meeting. Senator Johnson elected chairman. New Hampshire Department of Environmental services (DES) asked to provide background information at the next meeting.	-Agenda -Copy of SB155
September 17, 2003	Meeting focused on groundwater occurrence and quantity regulation. The following presentations were made by NHDES staff: <ul style="list-style-type: none"> <li>- R Chormann – Ground water use and occurrence and the role of the New Hampshire Geological Survey</li> <li>- P. Currier – Status of In-stream Flow Rule</li> <li>- B. Kernan – Large Ground Water Withdrawal Permitting. (LGWWP)</li> </ul>	-Agenda -DES Information Packet: -Groundwater in NH Fact Sheet -Drinking Water Source Protection Fact Sheet -LGWWP Fact Sheet -Ground Water & Drinking Water Strategy Update -Eastern Water Law Survey
October 22, 2003	Meeting focused on ground water quality protection. A presentation was made by Sarah Pillsbury and Paul Susca of DES	-Agenda -Presentation -DES List of prohibitions in wellhead protection areas -Drinking Water Municipal Resource Map - DES newsletter “The Source”
February 13, 2004	Meeting focused on 2 presentations. These included a Water Use Law presentation by Jennifer Patterson from the AG’s Office and a presentation by Prof. Tom Ballestero from UNH on water occurrence in New Hampshire and issues concerning the current LGWWP law.	-Agenda -Professor Ballestero’s presentation - List of issues concerning existing LGWWP law from Prof. Ballestero

Meeting Date	Meeting Description	Meeting Materials/ Handouts
March 12, 2004	Meeting focused on LGWWP Case Studies. Brandon Kernen made the first presentation involving two case studies followed by Brian Goetz of Aquarion Water Company who relayed their experience in obtaining a LGWWP. Sen. Johnson asked for volunteers for a subcommittee to make recommendations by the 11/30 deadline.	<ul style="list-style-type: none"> <li>-Agenda</li> <li>-Binder on the LGWWP process and case studies prepared by DES</li> </ul>
June 2, 2004 July 29, 2004 August 30, 2004	Three Sub-committee meetings were held. The meeting focused on discussion of the interim report suggestions and what the committee should focus on. Discussion on the current LGWWP law, data needs, and the hierarchy of water users occurred. NHDES was requested to provide sub-committee members with information concerning grandfathered wells and how new withdrawals would be accommodated in an area of an existing permitted groundwater withdrawal. NHDES was also asked for specific recommendations concerning improvement to the water use reporting program. These meetings resulted in the establishment of a legislation drafting committee to address water use reporting. Subcommittee also provide with information on the capital budget request to increase the current ambient water level well network to include bedrock wells	<ul style="list-style-type: none"> <li>-Agenda</li> <li>-Subcommittee member list</li> <li>-Copy of SB155 Interim Report</li> <li>-DES prepared chart of interim report issues</li> <li>-Current news articles</li> </ul> <p>Forwarded after the first meeting:</p> <ul style="list-style-type: none"> <li>- NH Water Data Summary</li> <li>-Summary of SB162 meetings</li> <li>-Link to USGS Aquifer Study</li> <li>-Information on capital budget request for monitoring well network improvements</li> <li>- Explanation of how a new large withdrawal is accommodated in an area with an existing permitted large withdrawal.</li> </ul>
September 16, 2004 October 6, 2004 October 19, 2004	Legislative drafting committee led by James Griswold meets to draft legislation for consideration by the full committee which ultimately results in passage of SB215	Numerous drafts were circulated
November 18, 2004	Full committee meets and decides to endorse legislation to create authority for the water use reporting (i.e. draft legislation developed by sub-committee) and to extend the Groundwater Commission. Committee also decides to support the DES capital budget request to improve the existing ambient water level well network by expansion to include bedrock wells.	Final draft of proposed water use reporting legislation.

Meeting Date	Meeting Description	Meeting Materials/ Handouts
September 15, 2004 Note: Commission extended per passage of SB142	Senator Johnson re-elected chair. Review of activities of Commission. Update on recent developments: Water Use Registration rule development, changes to large groundwater permitting, perchlorate, and upcoming meetings. Subgroup formed to define issues that need to be addressed by the commission. Next meeting scheduled for 10/19/05.	Legislation extending commission. Water Use Reporting Legislation Most recent Meeting Summary Chart
October 19, 2005	The subcommittee formed at the last meeting presented a “Report on Issues for Consideration and Proposed Schedule”. This report, which presents 6 groundwater related issues and associated key questions for consideration by the Commission, was reviewed by the group. Members were asked for written comments and to identify which issues they would be most interested in working on. Representative Spang provided an overview of current legislative service requests. The group agreed to finalize the approach to issues and begin discussion of the groundwater fee issue at the next meeting. Brandon Kernen gave an update on DES perchlorate public health goal work group.	Subcommittee Report on Groundwater Issues Power Point Presentation on Perchlorate
November 30, 2005	The Commission further discussed the “Report on Issues for Consideration and Proposed Schedule” and reordered the issues in consideration of what the majority felt should be discussed first. It was agreed upon that the Large Groundwater Withdrawal Permitting process should be discussed first. Senator Green reviewed legislation he was aware of and it was decided that the language of all groundwater related LSRs should be brought to and explained at the next meeting. Next Meeting scheduled for 1/23.	
January 30, 2006 (rescheduled from January 23, 2006)	The Commission initiated its discussion on Issue 1 of its work plan - Groundwater Withdrawal Permitting. A binder of informational resources summarizes the information covered at this meeting.	Binder with numerous information resources to provide background on the topic

Meeting Date	Meeting Description	Meeting Materials/ Handouts
March 13, 2006	The Commission received an update on the Seacoast Water Availability project	Agenda Handout of PowerPoint Presentations
May 22, 2006	The Commission completed its discussion initiated on at its January 30, 2006 meeting on Issue 1 - Groundwater Withdrawal Permitting. The Commission then initiated a discussion on Issue 3 - Hierarchy of Groundwater Users	Agenda PowerPoint Presentation Summary of water use priorities in other eastern water law states. Drought Management Plan
June 13, 2006	The Commission initiated its discussion on Issue 2 - Clarification of Groundwater Quantity Law and Legislative Authorities. Three attorneys provided overviews of the topic from the standpoint of municipalities, business and industry, and the state.	Agenda A handout summarizing prior NH water law studies and copies of the studies were provided.
September 25, 2006	The Commission received an update on the status of subcommittee 1 - Groundwater Withdrawal Permitting. A presentation by the subcommittee was provided to explain proposed legislative initiatives	Agenda PowerPoint presentation Proposed legislation

Minutes for meetings through November 2004 prepared by legislative staff.

**THE COMMISSION TO STUDY ISSUES RELATIVE TO GROUNDWATER WITHDRAWAL, SB 155, CHAPTER 305:1 2003**

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**Meeting Date:** March 13, 2006

**Prepared By:** Brandon Kernen, NHDES

The meeting began at 10:00 AM in Room 100 in the State House. Below is a list of participants:

**Attendance:**

<b>Name</b>	<b>Association</b>
Representative Cooney	
Representative Babson	
Representative Spang	
Michelle Hamm	Business and Industry Association
Brian Goetz	New Hampshire Water Works Association
Brandon Kernen	New Hampshire Department of Environmental Services
Sarah Pillsbury	New Hampshire Department of Environmental Services
Tom Fargo	Society for the Protection of New Hampshire Forests

**I GENERAL BUSINESS**

The meeting began with a discussion summarizing the commission's work plan dated 11/30/05. A handout was provided that listed the commission members that have volunteered to work on each of the six subcommittees that were formed to work on the six issues identified in the workplan. Michelle Hamm distributed a letter dated February 8, 2006 from the Business and Industry Association that requested its representatives on the commission participate in subcommittee issues #1-Groundwater Withdrawal Permitting, #2-Clarification of Groundwater Quality Law and Authority, #3-Hierarchy of Groundwater Users, and #4-Fee on Commercial Consumptive Use of Groundwater.

Sarah Pillsbury explained that Senator Johnson had noted to her that some commission members have not signed onto subcommittees, and that the opportunity to participate in the subcommittees is still open. She also noted that all commission members would be notified of all subcommittee meetings and that participation would be open to any commission members, even if they did not initially volunteer to be on a subcommittee.

**II SEACOAST GROUNDWATER AVAILABILITY ASSESSMENT PROJECT**

This portion of the commission meeting began with Representative Cooney and Ms. Pillsbury explaining that representatives of the United States Geological Survey, New Hampshire Geological Survey, and the Coastal Program of the Department of Environmental Services would be updating the commission on their work on the Seacoast Groundwater Availability Assessment Project. Questions about, and references to this project have been frequently made at legislative hearings and prior commission meetings, and Ms. Pillsbury explained that Senator Johnson felt it would be timely for the commission to hear an update on the progress of the project.

Ted Diers of the New Hampshire Department of Environmental Services' (DES) Coastal Program introduced the objectives for the project and explained its funding sources. He explained that the goal of the project is to put more sophisticated tools to plan for and manage water resources in the hands of the town. Mr. Diers explained that the study would not remove the need to conduct site-specific studies. He also explained that the project is 2.75 years into a 3.5 year project. He explained that the budget for the project is approximately \$1.5 million dollars and that funding came from federal grants, in-kind match from USGS and NHGS, and donations from the watershed communities (approximately 21 out of 42 towns in the project study area paid \$5000).

After Mr. Diers' introduction, David Wunsch of the New Hampshire Geological Survey (NHGS), Marilee Horn of the United States Geological Survey (USGS), and Tom Mack of the USGS all made presentations of their work on the Seacoast Project. The attached copies of their presentations provide a detailed summary of the work being completed under the project. In summary, it was explained that project would complete the following work:

- Compilation of existing data on wells, surficial deposits, and aquifer systems that have been generated by various federal, state, and local agencies and the private sector through site investigations associated with waste sites or water supply development. This data will be geo-referenced and incorporated into Geographic Information System (GIS) databases suitable for computer-based analyses.
- Development of a regional, long-term water-resources monitoring program by activating a comprehensive network of groundwater observation wells and stream gages.
- Collection of detailed water-use data, including information on withdrawals, returns, transfers and uses by different types of users in each community so that accurate water budgets and trends can be calculated.
- Development of estimates of groundwater availability within each community.
- A groundwater flow simulation model in a portion of the study area.
- Development of surficial geology maps and data for the study area.

There were a number of questions asked related to determining water usage and the preliminary findings and completion schedule for the study.

### **III    ADJORNMENT**

The meeting was adjourned at 12:00. It was agreed that the next commission meeting would be scheduled after consulting with Senator Johnson and that a notice would be sent to commission members.

**THE COMMISSION TO STUDY ISSUES RELATIVE TO GROUNDWATER  
WITHDRAWAL, SB 155, CHAPTER 305:1 2003**

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**Meeting Date:** May 22, 2006

**Prepared By:** Brandon Kernen

The meeting began at 10:00 AM in Room 103 at the State House Building. Below is a list of participants:

**Attendance:**

<b>Name</b>	<b>Association</b>
Senator Johnson	
Representative Cooney	
Representative Spang	
Tom Fargo	Society for the Protection of New Hampshire Forests
Brian Goetz	New Hampshire Water Works Association
Glenn Greenwood	Rockingham Regional Planning Commission
James Griswold	New Hampshire Farm Bureau
Michelle Hamm	Business and Industry Association
Brandon Kernen	New Hampshire Department of Environmental Services
Dennis Nesbit	Business and Industry Association
Sarah Pillsbury	New Hampshire Department of Environmental Services
Elizabeth Thomas	NH Municipal Association
Mason Westfall	New Hampshire Association of Conservation Commissions

The meeting began with commission members reviewing and approving meeting minutes from the March 13, 2006 meeting. Also, copies of the PowerPoint presentations from the March 13, 2006 meeting were distributed to commission members.

Sarah Pillsbury and Brandon Kernen then provided the commission members with an update on the status of legislative bills pertaining to groundwater in the 2006 legislative session. It was explained that two bills, SB 386 and HB 1609, had passed both houses of the legislature. SB 386 amends RSA 485-C to define the area in which impacts associated with a new large groundwater withdrawal must be assessed, defines "adverse impacts" in state law, clarifies the role of municipalities in the permitting process, and amends the appeal process for decisions DES makes on large groundwater withdrawal permits. Prior to the passage of SB 386, rules developed by DES defined adverse impacts and determined the area that must be studied when new large groundwater withdrawal applications were being reviewed. SB 386 also modifies RSA 485-C to establish that municipalities have official standing in the permitting process, as well as to require that appeals of decisions made by DES on large groundwater permits now be

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considered by Superior Court, after being considered by Water Council, but before being considered by Supreme Court.

It was explained that HB 1609 directs DES to conduct a pilot study with stakeholders that develops a groundwater management plan for a geopolitical area of the Seacoast region. The study requires DES to work with stakeholders to establish methods to estimate future water needs and develop methods municipalities can utilize to develop water management plans that can be used by DES to assist it with making decisions on large groundwater withdrawal permit applications. It was explained that HB 1609 requires DES to report to the commission on the progress of the pilot program on an annual basis.

Handouts of HB 1609 and SB 386 were provided to the commission. Also, a copy of RSA 485-C with the amendments made by SB 386 were provided to the commission.

After completing the legislative update, the commission reviewed the list of "Issues to Study" dated November 30, 2005, and reviewed the list of commission members who volunteered to serve on subcommittees that will study each issue. It was announced that that a subcommittee on Issue 1 - Groundwater Withdrawal Permitting, planned to meet on June 6, 2006 at DES' offices.

Brandon Kernen then completed the background presentation on Issue 1 - Groundwater Withdrawal Permitting that was started at the January 30, 2006 commission meeting, and summarized in binders distributed at that meeting. He then provided a background presentation on Issue 3 - Hierarchy of Water Users, and provided handouts that summarized the status of priorities for other eastern water law states. A handout with the specific statutory language for water use priorities in other eastern water law states was also provided to commission members. Copies of a PowerPoint presentation summarizing how other states prioritize water use and New Hampshire's Drought Management Plan were also handed out at the meeting. A full copy of New Hampshire's Drought Management Plan was also distributed to the commission.

At the end of the meeting, copies of the recent New Hampshire Supreme Court decision regarding the USA Springs case, along with the brief the Attorney General's office filed for the case, were distributed to the commission.

### **III ADJOURNMENT**

The meeting was adjourned at 12:00. It was agreed that the next commission meeting would be scheduled on Tuesday, June 13th, if attorneys representing the New Hampshire's Attorney General's Office, municipalities and business and industry were available to discuss Issue 2 - Clarification of Groundwater Quantity Law and Legislative Authorities.

**THE COMMISSION TO STUDY ISSUES RELATIVE TO GROUNDWATER  
WITHDRAWAL, SB 155, CHAPTER 305:1 2003**

**DRAFT MEETING MINUTES - REV 2**

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**Meeting Date:** June 13, 2006

**Prepared By:** Brandon Kernen

The meeting began at 10:00 AM in Room 103 at the State House Building. Below is a list of participants:

**Attendance:**

<b>Name</b>	<b>Association</b>
Senator Johnson	
Representative Cooney	
Representative Spang	
Representative Babson	
Senator Green	
Senator Larson	
Tom Fargo	Society for the Protection of NH Forests
Brian Goetz	New Hampshire Water Works Association
Glenn Greenwood	Rockingham Regional Planning Commission
James Griswold	New Hampshire Farm Bureau
Michelle Hamm	Business and Industry Association
Brandon Kernen	New Hampshire Department of Environmental Services
Dennis Nesbitt	Business and Industry Association
Sarah Pillsbury	New Hampshire Department of Environmental Services
Elizabeth Thomas	New Hampshire Municipal Association
Mason Westfall	New Hampshire Association of Conservation Commissions

The meeting began with Commission members reviewing and approving meeting minutes from the May 22, 2006 meeting.

The subcommittees provided updates on their work to date. Michelle Hamm, the chairman of the Issue 1 subcommittee on groundwater permitting explained that the committee was investigating the issue of grandfathered large groundwater withdrawals. She also explained that the subcommittee was reviewing the history of groundwater withdrawal permitting in New Hampshire, as well as how New Hampshire's regulations compare to other states. She also explained that the subcommittee was interested in reviewing and making improvements to educational and outreach efforts DES has in place relative to the large groundwater withdrawal program and how the program has been changed by recent laws.

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Brandon Kernen explained that he was holding off convening the first meeting on the Issue 3 Subcommittee - Hierarchy of Water Users. He explained that the membership of this committee was nearly identical to the Issue 1 Subcommittee which was meeting every two weeks and undertaking a lot of initiatives. He explained that he planned to wait for the Issue 1 Subcommittee to complete most of its work before initiating the first meeting for the Issue 3 Subcommittee.

Sarah Pillsbury announced that she would be scheduling the first Issue-2 (Clarification of Groundwater Quantity Law and Legislative Authorities) Subcommittee meeting after today's presentations by attorneys on the topic.

Senator Johnson and Sarah Pillsbury explained that at the meeting today, that Issue 2- Clarification of Groundwater Quantity Law and Legislative Authorities would begin to be considered by the Commission. They introduced three attorneys (Greg Smith, Jennifer Patterson, and Mark Beliveau) that would provide presentations on Groundwater Law. It was explained that Attorney Smith had represented business clients on water rights issues, Attorney Beliveau represented municipal clients on water rights issues, and that Attorney Patterson represented the state through the Attorney General's office on water rights issues.

Below, is a summary of their presentations.

**Jennifer Patterson - Chief  
Environmental Protection Bureau - New Hampshire Department of Justice**

Attorney Patterson first explained the role of the Attorney General's (AG's) office with respect to the legislature. She described that the AG's office defends the constitutionality of laws that are passed and litigate cases that arise. She explained that the AG's office does not have a policy role and does not make presentations or recommendations advocating policy.

Attorney Patterson also explained that Environmental Protection Bureau of AG's office does have statutory role with respect to common law. By statute, one of the roles of the Environmental Bureau is to exercise the common law authority of the AG's office through litigation. This includes bringing public nuisance actions, or actions that relate to the Public Trust Doctrine. She explained that common law is a system of law derived from rulings on particular cases by judges. She explained that when you think of law, you may think of the written and compiled RSAs and that these certainly exist, but there is also a common law background that consist of decisions made by judges on particular cases. There are also doctrines developed over time, many of them developed in England prior to the creation of this country that have been passed onto the legal systems of the states. The common law and doctrines exist side by side with the written RSAs. The common law is not an overall regulatory scheme. Whereas a regulatory system often has

an overall goal such as protecting water resources, the goal of common law is to ensure justice occurs in any particular case. Justices make written decisions based on facts presented in each particular case. Lawyers then extrapolate principles from the decisions which they will then use to argue other cases. Therefore, common law is very different from statutory law where the requirements of law are written.

Attorney Patterson explained that there are a couple of basic common law concepts that are relevant to water regulation. The first one is the Public Trust Doctrine. "Public Trust Doctrine" is really a term of art. The Public Trust Doctrine states that "certain waters are held in trust by the state for the benefit of the public." The public is literally acting as a trustee, and the state owns the water. The underlying rationale is that certain things including public waters cannot be privately owned. The doctrine originated back to Roman times and then to England, originally focused on navigation. In England, the Public Trust Doctrine only applied to waters that were tidal or navigable waters connected to tidal waters. Currently, the Public Trust Doctrine in New Hampshire is much broader. There has been a whole series of New Hampshire Supreme Court decisions in the 19th and 20th centuries. It is real clear now that rivers that are navigable or with other useful purposes are part of the public trust waters. The nature of what is protected under the Public Trust Doctrine has become broader over time. Originally, the Public Trust Doctrine only applied to navigation, but now fishing, swimming and other types of recreation are considered public trust uses.

Attorney Patterson also explained that another common law concept which clearly exists in New Hampshire is the "reasonable use" standard. The reasonable use standard governs rights between private owners. It applies to riparian rights (the right of property owners to use the shoreline property on their land) and groundwater use. Some of the basic principles include, "leaving some for your neighbor" and "don't unreasonably affect your neighbor or the public". The underlying assumption of the water system in New Hampshire (and most other eastern states) is that there is excess water. In the western states, water resources are considered to be scarcer, and a person that first gets to a water source may have a right to claim that water source as theirs just because he got there first.

Attorney Patterson explained that in a common law system, people enforce their water right by taking a court action against another party. One approach in court to take is to file a nuisance action. There are two types of nuisances, a public and a private nuisance. A public nuisance is a substantial or unreasonable interference with the rights of the general public. The AG's office could take court action utilizing the Public Trust Doctrine if a public nuisance is occurring. A private nuisance is a substantial or unreasonable interference with a person's use or enjoyment of their own property. When a private nuisance occurs, the person affected can cite common law to take action against the party causing the nuisance.

Attorney Patterson stated that common law principles continue to be alive and well in New Hampshire, despite the fact New Hampshire now has an extensive statutory system. She stated that in fact, three years ago, the New Hampshire Supreme Court confirmed that common law still in exists in New Hampshire in a wetland court case (Cook v.

Sullivan, 2003). This means the common law system and statutory system exist side-by-side.

She described that one of the advantages of the common-law system and "reasonable use" standard is the flexibility of the standard. What is "reasonable" can change over time, meaning something that was once reasonable overtime may no longer be considered reasonable. She stated that the legislature has clear legal authority to make laws. She described how the legislature specifically has police power authorities to regulate in the common good. She described how New Hampshire has stated a strong public interest in protecting the groundwater through several statutes relating to the quality and quantity of groundwater.

Attorney Patterson described that another issue that comes into play when considering legislation pertaining to water is the issue of takings. She described that this comes into play because the right to the reasonable use of water is a property right. She explained that the government cannot take private property without just compensation. The concept of taking gets very complicated when you have issues that include both public and private rights. For example, if there is a property that abuts the lake, and the property owner wants to install the dock, the takings analysis would include weighing the riparian rights to use the shoreline and abutting water against the fact the public owns the water under the Public Trust Doctrine. Generally, the riparian rights of a land owner are considered to be more extensive than the rights of any individual member of the public; however the rights of the public as a whole are the most extensive of all.

Attorney Patterson described how case studies of interaction between case law (common law) and statutory law system exist in New Hampshire. A Supreme Court decision in 1999 (Purdie v. Attorney General) specifically states that the determination of common law questions is a judicial and not a legislative function. In 1994, the Supreme Court made a decision that confirmed the limits of public waters on oceanfront property as the high water mark (rather than the low water mark as in some other states). However, the term "high water mark" had never been defined. After the 1994 Supreme Court case, the legislature passed a law that defined the term "high water mark", but the Supreme Court struck this law down because it stated that only the courts had authority to make rulings under the common law and that any law that takes someone's property without compensation is an unconstitutional taking. Therefore, any legislation considered relative to water law needs to be considered with great caution. The legislature does have authority to abrogate(i.e. decree that this shall no longer be the rule) the common law. However, the consequences of doing this are highly uncertain, so it makes sense to exercise great caution.

Attorney Patterson then addressed the question of "who owns the groundwater"? She described that this is a very contentious topic, and that it is important to be aware of the opinions of a number of attorneys on the topic. She stated that groundwater is not part of the traditional public trust waters. Nevertheless, there are compelling arguments that can be made as to why groundwater should be considered as part of the public trust. The AG's office has taken the position in its lawsuit regarding MTBE that groundwater is part of the public trust doctrine, however she noted that it is not a settled question of law. A

lot of people, including the AG's office had hoped that the Supreme Court would address this issue in its decision on USA Springs. However the court did not, and the reasons they did not now seem to make sense. The USA Springs case was an appeal of a permit issued by DES. Attorney Paterson stated that because the state was not a party to the appeal, that she will not speak to the specific details of the case. Mark Beliveau is scheduled to speak later, and he will speak on this topic she indicated. Attorney Patterson explained that the issue the AG's office was interested in and weighed in on in an amicus brief filed for the USA Springs case, was whether or not DES was obligated to do some analysis under the Public Trust Doctrine as part of its issuance of the large groundwater withdrawal permit under RSA 485-C. In the amicus brief, the AG took the same position that it earlier explained to the Groundwater Commission, that the statutory system and common law system are two important systems that exist, but do not interact with one another. The Supreme Court agreed with this position. The Supreme Court limited its ruling to the interpretation of RSA 485-C and whether or not DES complied with its obligations under that statute. Specifically, the Supreme Court said "we agree with USA Springs and the State that RSA 485-C provides the criteria DES must follow in issuing groundwater withdrawal permits and that RSA 481.1 (*which makes general statements about the goal of protecting public waters and groundwater*) imposes no specific additional test that DES must apply (see page 5 of the USA Springs Decision). Basically the decision does not address the issue of whether the groundwater is part of the public trust as a matter of common law, and the Supreme Court went on to decline SaveOurGroundwater's claim that statutory law required DES analyze public trust issues as part of the groundwater withdrawal permitting process required by statutes.

In the USA Springs decision, the Supreme Court verified that common law and statutory laws are separate and should continue to be kept separate. The Supreme Court did not say that groundwater is not part of the Public Trust. Attorney Patterson explained that it was her opinion that the subject of groundwater being part of the Public Trust is still left open to litigation in a court case that is focused on issues of common law and where the question of groundwater/public trust is clearly raised. She stated that the ongoing MTBE lawsuit filed by the AG's office may end up being that case. She also stated that the court also did not say that the legislature cannot regulate groundwater withdrawals. She noted that on the very last page of the court's decision, they specifically said "we note that our decision is based upon statutory language in force at the time of DES's decision; to the extent that the statutory language upon which we rely remains in force, the legislature is free to amend if it disagrees with our construction". Therefore the court recognizes the legislature's right to make laws pertaining to groundwater withdrawals.

The last thing to mention is that the MTBE lawsuit, which was initially filed in Merrimack County Superior Court, but then consolidated with other litigation in Federal Court in New York (the decision to consolidate it with other court cases is being appealed and the case could be remanded back to New Hampshire). Another decision made by the New Hampshire Supreme Court in January was on the question of whether the Cities of Dover and Portsmouth could maintain their own separate MTBE lawsuits. The court ruled that the cities' case must yield to the state's court case. The court decision mentioned Public Trust, but not in the context of groundwater. The case was basically

decided on a concept of "parens patriae". Basically this concept states that the state has an interest and a right to protect the health and well being of all of its citizens. While this is not a ruling under the Public Trust Doctrine, it certainly states the strong interest the state has in protecting through statutes and through other actions taken by the AG's office, groundwater and water resources.

Attorney Patterson completed her opening remarks and took questions from Commission members.

Rep Cooney explained that common law and written statutes sit side-by-side. When people want to understand what a statute says, they can pick up a book and can read it in black and white. However, for common law, you would have to read court cases or hire a lawyer and spend thousands of dollars to figure out what it is. Representative Cooney asked how can a regular person figure out what the common law is? Attorney Patterson responded that when it comes to water law, the standard is pretty straightforward and it is the reasonable use standard that is considered. Common law issues are very case specific - decisions on common law depend on what you are doing, what your neighbors are doing, and the general setting of the area in which everyone is using water.

Sarah Pillsbury asked if the MTBE court case in federal court is not moved back to New Hampshire Courts, how would common law in New Hampshire be considered or possibly affected by decisions of the Federal Court? Attorney Patterson responded that the Federal Court, in making any findings on common law relative to the lawsuit brought forth by New Hampshire, would have to rely on New Hampshire common law.

Senator Larson asked what would be the effect if the legislature defined groundwater as part of the Public Trust. Attorney Patterson answered that it is hard to know what the effect of that would be. In the Purdie case the legislature was attempting to address something that really is in the common law and it was struck down by the New Hampshire Supreme Court. The legislature could say it is very important to protect the groundwater and Attorney Patterson thinks they already say this in RSA 481.1. The legislature can state that DES should regulate certain impacts with large groundwater withdrawals. However, it would not be able to state that common law should be regulated by DES.

Rep. Babson asked if because a lot of groundwater already ends up in ponds and other water bodies, if we define groundwater in the public trust, aren't we saying that all water is held in the public trust? Attorney Patterson answered that to the extent groundwater is connected to or feeding other water bodies that are covered by the public trust doctrine - that there is strong public interest irregardless if the rest of the groundwater is part of the public trust.

Rep. Babson asked if it would be reasonable to pass a law that states groundwater is part of the Public Trust? Attorney Patterson responded that the concern she has is that legislation that proposes putting decisions involving the determination of property rights

in hands of DES. DES is better suited to make technical determinations, not legal determinations.

Michelle Hamm asked if all groundwater withdrawals, including grandfathered withdrawals, are subject to common law? Attorney Patterson responded that the right to withdraw groundwater is a property right under common law and that no water withdrawal is grandfathered from the common law reasonable use standard.

Representatives Cooney and Spang asked if a retroactive law could be enacted. Attorney Patterson stated that she did not think that would be a good idea because retroactive laws do not do very well (i.e., they are likely to be found unconstitutional). However, if there was a scarcity problem and a law was passed requiring existing withdrawals to obtain a permit, she would not see a problem with that because it is not really retroactive – it governs an ongoing activity.

Brian Goetz asked about the state's ability to develop through law a hierarchy of water users? Attorney Patterson answered that if a hierarchy interfered with someone's ability to reasonably use water, that then there could be problems and a takings claim could arise.

Mason Westfall asked if a law tying population growth to a hierarchy of water users would be allowable? Attorney Patterson stated that population and water availability certainly could be part of a reasonableness analysis that would be completed by a court.

Jim Griswold recalled that Attorney Patterson stated that the reasonable use standard has been traditionally developed and applied in areas of water excess. If it is the case that areas of New Hampshire do not have enough water, then aren't we using the wrong system? Attorney Patterson stated that this is a political question that is very much up for debate. She feels that the reasonable use standard is flexible and adaptable, and has and will serve New Hampshire well. Attorney Patterson pointed out that the Prior Appropriation Doctrine sometimes results in water waste out west because a certain person owns the water no matter how much they really need at a particular point in time.

Rep. Spang asked Attorney Patterson about the situation where an existing private (commercial/industrial) water withdrawal is occurring, a municipality needs to develop a new groundwater withdrawal in the same aquifer which will diminish the supply of the private water withdrawal. Rep. Spang asked how public interests will be protected? Attorney Patterson responded that this is a difficult question to answer but that such a problem may be resolved through common law or statutory law mechanisms. Attorney Patterson stated that the existing large groundwater withdrawal permitting process allows for modification of the groundwater withdrawal permit.

Sarah Pillsbury asked Attorney Patterson about the instances where the legislature has historically deeded water rights to specific water users. Attorney Patterson explained that it is a very difficult question because the legislature has authority to sever public trust interests and at the same time, has prohibitions against severing the public trust interest.

Attorney Patterson explained it would likely depend upon the factors of each case and to what extent the public trust was being impacted.

Michelle Hamm asked if the court determines, as part of the MTBE lawsuit, that groundwater is in the public trust, would that mean the state is responsible for remediating all contaminated groundwater. Attorney Patterson stated no, that statutory law states that responsible parties are responsible for costs associated with remediating their releases.

Jim Griswold asked that if the court as part of the MTBE case determines that groundwater is in the Public Trust, what difference does it make to groundwater withdrawals? Attorney Patterson stated that she did not know, and that is a really good issue to consider.

### **Greg Smith, McLane Law Firm**

Attorney Smith introduced himself and explained his experience as the New Hampshire Attorney General, and as an attorney that has represented municipalities and businesses on water related issues.

Attorney Smith opened by stating that Attorney Patterson provided a very good overview of water law and that he agreed essentially with all of her opening remarks but had a somewhat different view of some of the parts in her response to questions.

Attorney Smith stated that there are two main sets of principles people lose site of. One is the importance of separation of powers. The legislature gives certain agencies within State government and municipalities certain powers. State agencies and municipalities have no inherent powers. Attorney Smith described that as far as it is relevant here, these powers generally are associated with providing public services or planning. These powers do not include managing the movement of water on a State-wide basis.

Attorney Smith explained that when trying to change the law as it is, that there may be unintended consequences all along the way. If the State seeks to establish a water use hierarchy, or direct water going to its growing populations, the end of that path is not going to have the legislature in charge of the water, the end of that path is going to be an act of Congress directing water to large urban centers. If the government is going to step in and direct where water will go, it will end up just like out west (Los Angeles), and water will go to the large centers of population. While this may be something we do not need to be too concerned with at the moment, this has already happened out west.

Attorney Smith described that the common law notion of reasonable use as not mysterious or remote from the public interest. He explained that common law/reasonable use has served the public interest extraordinarily well for several centuries. Attorney Smith urged the Commission not to change "fine shaker furniture" (something that works very well) until you are quite sure what the consequences are going to be.

Attorney Smith explained that the legislation that established the Commission states that one of the Commission's charges is to search for the proper balance in the interest in water rights. Attorney Smith explained that he was struck by the irony of that phrase because the common law doctrine of reasonable use has at its heart a flexible, practical, workable way to balance all of the rights of users of water, and the Commission is thinking about substantially altering or diminishing it. Attorney Smith explained that if he leaves any lasting effect with the Commission, he wants the Commission to have recognition that common law and reasonable use are very important legal principles and have served society very well.

Attorney Smith's stated that his second point to the Commission was to not be overly attracted to the "fool's gold" of trying to layout one comprehensive scheme to resolve all water problems through State statute. Attorney Smith explained that he does not believe that this is either achievable or desirable. Attorney Smith explained that a role for judicial allocation of various responsibilities will best serve society.

Attorney Smith explained that Attorney Patterson did a very good job explaining statutory/regulatory law and the legislature's ability to set policy in statutes. He explained that the courts have a role in protecting rights and adjudicating responsibilities in our three branches of government. He explained that the three branches of government are very important to remember. He explained that it would be a bad thing for society, in his view, to lose sight of the importance of what the judicial system does for us. The judicial system adjudicates rights. Attorney Smith explained that people do not have rights if they do not have remedies. He explained that in other parts of the world, courts like ours do not exist. Attorney Smith explained that it is not a sound principle of government to move extensively the adjudication of private rights or the rights of private interests versus the public authority to the executive branch of the government. He explained that the role of the executive branch of government is to execute laws that have been made.

Attorney Smith explained that we should look at what has been done relative to water law to date. Attorney Smith explained that he did not want to be seen as overly critical, and that he was aware that many people in the room have been working very hard implementing the current groundwater regulatory system. He explained that if New Hampshire is not careful, that it will make issues pertaining to groundwater worse. Attorney Smith re-iterated that New Hampshire has a system of reasonable use. He explained that a number of Commission members asked what would happen if someone is currently withdrawing a large amount of water from the aquifer for a certain use, and then at a later date, a municipality or another user also wants to withdraw large amounts of water nearby. Attorney Smith explained that the initial user, under common law, would have to adjust their activities to allow the other water users to reasonably use the groundwater. Attorney Smith explained that some may feel common law is too difficult to figure out. He explained that there is great benefit to the common law if New Hampshire continues to apply it in a manner that is similar to other American states. He explained that following this approach would allow New Hampshire to draw upon court

cases involving water resources in other American states. In explaining that common law is not obscure, Attorney Smith pointed out the hypothetical circumstance of a proposed municipal water supply being impacted by an existing private water use has probably occurred in other states with a similar common law regarding groundwater, and that cases from these states could be drawn upon by courts in New Hampshire to determine reasonable use. Attorney Smith provided another example demonstrating that common law is not obscure or remote. He told the Commission to pretend that they are in a car accident when they leave today's meeting. He explained that our right to get compensated and be made whole as much as possible by the people that caused that accident is based on the common law. He provided another example. He explained that when you enter a contract to buy a house or a business, your rights to make sure that you enjoy the benefits of that agreement come from the common law. Attorney Smith explained that some people state that in the absence of our state groundwater regulations, there would be no regulation of water. He explained that this is not true, and that common law provides for significant regulation of water. Attorney Smith explained that some say there is no value placed on the groundwater resource. Attorney Smith explained that the value of the resource is part of the purchase of the land. Attorney Smith explained that forward thinking municipalities such as Nashua and Manchester purchased watersheds a hundred years ago. He explained that they now own that water and are making a reasonable use of it by selling it to the public. He explained that if someone (including a municipality) wants water rights (similar to oil or mining rights), they must purchase the land. He explained that as we enter this era where people are viewing water differently, the value of land with water resources will change.

Attorney Smith then stated that he wanted to move on to another important issue. He described how the Commission asked several times about the idea of eliminating grandfathering or to reduce the threshold for requiring a large groundwater withdrawal permit. He explained that our State Constitution prohibits retrospective laws because they are unfair. They change the rules on people after they started an activity. The takings clause in the state and federal constitution does not prevent a municipality from acquiring the water they need. The real issue before you is are you trying to provide reasonable regulation in a capitalistic society, a society that guarantees rights to own land and enjoy property, or are you fundamentally affecting the investment back expectations of the people that bought that property - that is the question before you and that is why timing matters. Attorney Smith offered an example of a person purchasing land and a building so that they could sell water or build for example, a Budweiser plant. Attorney Smith explained that the person paid for what they believed was a right to use water. Attorney Smith explained that if the State takes away (retroactively) the person's right to use the water in our society, which is an investment society, something the person expected to have, the State would have to provide compensation for the land or a restriction on the owner's right to use the land. Attorney Smith explained that the government cannot just take the rights to use the land away from land owners under our system of government. Attorney Smith explained that this is why we have a takings clause, that people must be compensated for the property rights that are taken from them. Attorney Smith explained that another approach to address future water needs that is often not considered in debate, is that if a municipality needs water 10, 20, or 30 years

from now, and did not have the foresight of purchasing land proactively for future water supply, a municipality may purchase water rights from property owners by providing fair compensation for the property including water resources, by agreement or reluctantly by a takings proceeding. Attorney Smith explained that this approach would allow a private land owner to receive fair compensation for their property and its water resources, ensures the existing land owner stops using the water, and ensures municipal water needs are met.

Attorney Smith explained that New Hampshire water law and experiences are similar to some other states. He explained that New Hampshire, like other states, is drafting new regulations complement our underlying property rights law. He stated that he believes that since July 1998, we are creating, one permittee at a time, a prior appropriation system, grafted onto a reasonable use standard. Attorney Smith referenced Attorney Patterson's description of the Prior Appropriation Doctrine, that is the first person that uses the water first has a right to continue to do so - they do not have to reduce water usage to accommodate new water uses. Attorney Smith explained that if we look at existing large groundwater withdrawal regulations, the regulations do not allow new water users to adversely impact existing water users or water resources. He stated that this provision gives existing water users superior rights to new water users. Attorney Smith explained that this may have sounded like a good idea at the time, but he is not sure if the consequences of this approach were understood by the people developing the law.

Attorney Smith then commented on Senate Bill 386 of 2006. He referenced the provisions regarding intervenor status. Attorney Smith explained that we have an expanded regulatory system today. He explained that we have two pertinent legal criteria that judges will make decisions on. One is the statutes/RSAs that have established permit or approval processes. Attorney Smith explained that the permitting process permits for full public comment and participation, where the public can ask questions at pre-established times in the permitting process - but that it is not an adjudicative, trial setting. Attorney Smith explained that by establishing municipalities as a party to the permitting process, we are creating a process where formal public participation could continuously occur throughout the permitting process, and that adjudicative hearings (requiring evidence and so on) may arise during the permitting process. He explained that this process could be very difficult for all parties involved to follow. He explained that the permitting process, the way it was before SB 386, worked very well. He explained that under the previous requirements of law, that the permitting process with public participation would be completed, and then formal adjudicative proceedings could occur if permit decisions were appealed to the Water Council, Superior Court, and then Supreme Court. Attorney Smith explained that he does not believe it is a good idea for the executive branch of government to adjudicate a decision it has made on a permit application.

Attorney Smith changed topics and explained that he does not think it is a good idea for the legislature to declare that groundwater is in the public trust because: 1) the benefits he previously described regarding common law as it currently is; and 2) it could trigger a

significant takings claim. Attorney Smith explained that the issue of a takings claim was the problem in the Purdie case. In this case, Attorney Smith explained, the legislature was not allowed to redefine what common law has historically been. Attorney Smith explained that it is not the role of the legislature to alter the common law although it can change it. Attorney Smith explained that when common law is changed by the legislature, that it must be realized that private property rights of many people statewide may be affected and that takings claims could be filed. Attorney Smith explained that only courts can declare what historically has been protected by the common law of public trust (e.g., the legislature cannot make a law that states groundwater has always been part of the public trust, but they could make a law that changes the definition of public trust to include groundwater looking forward). Attorney Smith explained that it is because of the issues he summarized above, that he and many other attorneys have cautioned against any legislative attempt at modifying common law or the applicability of public trust. Attorney Smith explained that although almost everyone would like to have a clear and comprehensive written plan that addresses all aspects of water management, that he believes trying to create such a regulatory program is equivalent to fool's gold.

Attorney Smith then addressed the topic of the effect of RSA 481:1, which had been discussed earlier. He explained that the statement of policy in RSA 481:1 is a reflection of what the legislature feels is broadly desirable. He explained that statements of policy or purpose do not amount to specific permit requirements as the body or greater parts of the statutes do, and therefore do not dictate standards for review when considering a specific project. Attorney Smith explained that in order for the law to be just and fair, it has to be clear. He explained that broad and sweeping provisions about public benefit would add uncertainty and confusion to the very clear permitting requirements contained in law and regulation relative to groundwater withdrawals. He explained that attempting to apply broad open ended statements of policy for each case would likely lead to different, unequal treatment of projects and that this would be unconstitutional.

Representative Cooney asked Attorney Smith if there was a way to make it easier to understand what common law is in the statutes. Attorney Smith explained that he understands that it seems like a good idea to write paragraphs of law to stipulate what is or is not permissible opposed to researching court cases to interpret common law, but it is not that straight forward. He explained that even where written laws specify requirements, that any given law has to be considered in the context of all other laws, and that attorneys often need to research court cases to ensure the statutes are being interpreted appropriately. Attorney Smith explained that in the last twenty years, attorneys are publishing extensively on what the law is, and therefore professional interpretations of the law are now more readily available to the public.

Senator Green explained that he understands the issue of separation of powers and does not have issues with that. He said he has an issue when separation of powers gets in the way of two entities from doing its job. Senator Green explained that the legislature reacts to what it feels is a misinterpretation of existing laws by the courts or others. Senator Green used Kelo as an example regarding the issue of eminent domain. Senator Green explained that the Supreme Court's decision in this case is causing almost every state to

scramble to develop new laws or constitutional amendments that specify when eminent domain takings may occur.

Senator Green explained that he believes that it is important for legislators to maintain their authority under the constitution to interpret their own laws without the court telling us what we mean. Senator Green explained that there is another side of the story to which Attorney Smith has told. Senator Green felt Attorney Smith focused on what the court's role is, and Senator Green would like to hear more presented about what the role of the legislature is. Attorney Smith explained that he does not believe the court has the ability to override the legislature, provided that the laws passed by the legislature were constitutional. He explained that if the legislature feels courts are misinterpreting laws they passed, they are free to change the laws. Attorney Smith did not believe current legal issues must result in "head butting" among the various branches of governments as Senator Green's comments seem to indicate, but rather that issues move back and forth between the branches as each play their role.

Senator Green explained that our court has never provided any insight on regarding the issue of groundwater being in the public trust. Also, the Supreme Court in the USA Springs decision, stated that the legislature is free to make new laws if people are unhappy with the current groundwater law. Attorney Smith explained that we can only interpret decisions made by the court based on what they say, not based on what they did not say. Also, Attorney Smith explained, the legislature cannot make laws that state what common law is currently or was in the past, but that they could pass laws that change common law going forward.

Jim Griswold asked Attorney Smith if an advisory opinion from the Supreme Court could be requested. Attorney Smith said that it could, but it may be easier to explore how other states with similar legal systems have considered groundwater. Attorney Smith also explained that the State's Constitution allows for the transfer of a draft bill from the House of Representatives, Senate, or Governor to the Supreme Court. He indicated that the court can be expected to respond to requests for an advisory opinion on a draft bill. He noted that these opinions are not analogous to actual court decisions that are based on extensive fact-finding and specific examples.

Brandon Kernen asked Attorney Smith if he had a sense what other eastern water law states have determined relative to the issue of groundwater and the public trust. Attorney Smith stated that he did not, but did not think it would be too hard to determine.

Sarah Pillsbury asked Attorney Smith he felt the current large groundwater withdrawal regulations and law went too far beyond the reasonable use standard? He felt the laws generally did not go too far, with the caveat that he is concerned about the "prior appropriation" effect the process creates. He explained that he would need much more time to go through each provision of the current law with the Commission, however, to answer this question thoroughly. He also explained that we have no idea what the courts will say if a case arises where someone who would be a new user asserts their reasonable use rights are adversely affected by a permitted withdrawal - which would take

precedence? Attorney Smith explained that is why he has repeatedly cautioned during his testimony today, about the alteration of groundwater regulation. He explained that the common law system currently in place has been around for 400 years and has served us well. Sarah Pillsbury noted that the amendments to the law made by SB 386, now allow DES to modify large withdrawal permits to accommodate new permit applications.

### **Mark Beliveau, Pierce Atwood**

Attorney Mark Beliveau introduced himself and noted that a lot of ground had already been covered by the other two attorneys. He noted that his views are different than the views presented earlier, but not dramatically different. He explained that he thought it would be most useful to the Commission if he quickly reviewed the USA Spring's Supreme Court decision with the remaining time for the meeting.

Attorney Beliveau explained that he broke the USA Springs decision down into six issues. He initially felt three of the six issues were interesting, and the other three issues were important. However after hearing the discussion that occurred at the Commission this morning, he is now convinced that all six issues are vitally important.

Attorney Beliveau stated that the first issue is associated with the declaration of policy. Attorney Beliveau explained that some petitioners in the USA Springs case argued that the policy in RSA 481.1 applied to the large groundwater withdrawal in the USA Spring's case. Attorney Beliveau summarized certain provisions of RSA 481.1 pertaining to water resources above and below the ground, and the need to manage water resources for the maximum public benefit. He explained that the Supreme Court determined that RSA 481.1 does not apply to large groundwater withdrawals because it is not in RSA 485-C and RSA 485-C does not cross reference RSA 481.1. Attorney Beliveau said that the question the Supreme Court decision leaves him with is what was the intent of the legislature when it enacted RSA 481.1 - did they mean for it to be applied to large groundwater withdrawals? He explained that if the legislature intended for RSA 481.1 to be applied to large groundwater withdrawals, that they would need to include these provisions in RSA 485-C.

Attorney Beliveau explained that RSA 485-C has its own statements of policy that pertain to public trust. He noted that RSA 485-C:1, II states "The state, which has general responsibility for groundwater management in the public trust and interest, should develop groundwater protection programs within the scope of this chapter when such programs are not developed by a local entity." Attorney Beliveau noted that the Supreme Court did not strike down this statement of policy and in fact the court cites RSA 485-C:1, II in its decision. Attorney Beliveau noted that the legislature developed the policy section of RSA 485-C before adding groundwater withdrawal laws to the statutes, and that the policy has never been updated when the numerous laws pertaining to large groundwater withdrawals were added to RSA 485-C.

Attorney Beliveau stated that an important issue to consider is whether it is important to have an additional statement declaring that groundwater is part of the public trust in RSA 485-C. He said that the important question to consider is what would be the effect of doing this? He explained that adding a statement of this nature to law may address some constituent concerns, but that he did not think it was essential to accomplish what the state has been trying to do to regulate groundwater. He explained that clearly the state has very strong authority under "police powers" to regulate and protect groundwater resources.

Attorney Beliveau then addressed the issue of takings/private ownership of groundwater and noted that there are different opinions regarding the issue of takings relative to groundwater laws and regulations. He noted that some believe the common law and public trust doctrine allow for the state to regulate groundwater, while others cite the constitution and property rights. He noted that on page 7 of the USA Springs decision, the Supreme Court decision sheds significant light on the issue. He explained that plaintiffs in the USA Springs case petitioned the court for a takings claim because USA Springs would lower the water level/pressure in their wells - essentially taking or damaging their property (the water beneath their land). Attorney Beliveau explained that the Supreme Court said that you do not have a property right in the water underlying your land and they cited the Bassett case in 1862 which described the regulation of groundwater as being subject to the reasonable use standard and that there is no absolute ownership of groundwater. Attorney Beliveau continued to explain that in addition to citing the Bassett case, the Supreme Court cited a 1979 Florida Supreme Court case which stated (see page 8 of the USA Springs decision):

"The right to use water does not carry with it ownership of the water lying under the land. This "right of user" may be protected by injunction, or regulated by law, but the right of user is not considered "private property" requiring condemnation proceedings unless the property has been rendered useless for certain purposes."

Attorney Beliveau explained that in the USA Springs decision, the NH Supreme Court went on to further cite additional court cases demonstrating that groundwater is not owned, and he noted that in addition to the 1862 Bassett case and 1979 Florida Supreme Court case, they cited a 1998 Ohio case which stated:

"The loss of the use of groundwater is not a loss of the use or enjoyment of the overlying land. In this case, plaintiffs' complaint, alleging only a deprivation of the flow of groundwater did not state a claim for compensation."

Attorney Beliveau explained that he thinks what the NH Supreme Court said in the USA Springs decision provides a lot of insight on the issue of private property rights and the question of if groundwater is part of the public trust/"who owns the groundwater" in New Hampshire.

Attorney Beliveau then discussed NH Supreme Court's decision relative to the "demonstration of need" that is required by RSA 485-C for large groundwater

withdrawals. He explained that DES interpreted "Demonstration of Need" as requiring an applicant for a large withdrawal to demonstrate water use efficiency. He explained that the Supreme Court used the dictionary to define need and that their decision stated that USA Springs only had to show that the withdrawal was useful or desirable. Because USA Springs demonstrated in their application that the market for bottled water was growing, they satisfied that requirement. He felt that that the findings made by the court made DES' interpretation of RSA 485-C regarding "demonstration of need" no longer applicable, and that if the legislature agreed with DES' interpretation, additional legislation would have to be passed [Note: The water conservation requirements established by SB 441 of 2002 (see RSA 485.61) exceed the water efficiency requirements required by DES's interpretation of RSA 485-C - so the decision made by the Supreme Court on this point really does not impact DES' historic interpretation/application of this law]

Attorney Beliveau explained that in the USA Springs case, many people believed that there was strong evidence that the withdrawals operated by USA Springs would lower the water level in wetlands. He explained that some of the wetlands in question for the USA Springs case were designated as prime wetlands. He explained that in NH, there is a special process for assessing impacts to prime wetlands, but that DES felt this process applied only to permit applications for dredge and fill and not large groundwater withdrawals. He explained that some stakeholders appealed to the Supreme Court because they believed that large groundwater withdrawals that may impact a prime wetland must be subject to laws and regulations associated with prime wetlands. Attorney Beliveau explained that the Supreme Court found that the large groundwater withdrawal proposed by USA Springs was not subject to RSA 482-A:3, not for the reasons DES stated, but because the statute did not contain the word "water". Attorney Beliveau explained that if the legislators want prime wetlands that may be impacted by large withdrawals to be afforded the same protection, public hearing and approval processes that a proposed dredge and fill project in a prime wetland requires, then existing law would have to be clarified as a result of the Supreme Court's decision.

Attorney then addressed another issue that was considered by the USA Springs Supreme Court case. He explained that Nottingham argued that DES should have held an adjudicative hearing pursuant to RSA 541-A:31. He explained that the Supreme Court disagreed, and held that Nottingham was not a "party". Attorney Beliveau explained that the question he believes this presents for the Commission is "does the legislature want large groundwater withdrawal permits to be deemed contested cases under RSA 541-A"? He explained that it was unclear to him how "intervener status" (set forth in amendments made to RSA 485-C pursuant to SB 386) would impact the issue of whether there should be an adjudicative hearing under RSA 541-A.

After the presentations from the attorneys were completed, Brandon Kernen provided a handout that summarized two previous water studies that investigated water rights, as well as copies of the final report from the two studies. The first study was completed in December 1992 and was titled, "Public Water Rights in New Hampshire Study

Committee". The second study was titled, "Regulatory Barriers to Water Supply Regional Cooperation and Conservation in New Hampshire".

### **III     ADJOURNMENT**

The meeting was adjourned at 12:00 and the Commission agreed to schedule a meeting for late August.

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**Attachment 2 - Groundwater Commission Work Plan**

**Groundwater Withdrawal Commission**  
**Issues for Consideration and Proposed Schedule**  
**11/30/05 Draft**

Introduction: In September of 2005, a subcommittee of the Groundwater Commission (Commission), established and then extended under SB 155, Chapter 305:1, 2003 and SB 142, Chapter 287, 2005, was formed. The purpose of this subcommittee was to develop a list of issues that should be considered by the Commission and to identify key questions and research needs related to each issue. The subcommittee report was presented to the Commission and discussed at two meetings in October and November, 2005. The following documents the subcommittee's membership and goal and provides the list of issues agree upon by the entire Commission. An action plan and schedule for addressing the issues also follows. The order of issues should not be construed as a designation of the priority of the issue, rather they are ordered by the Commission's agreed upon schedule for addressing each of these important topics.

Subcommittee Members: Representative Spang, Representative Cooney, James Griswold, Jack Donohue, Sarah Pillsbury, Brandon Kernen

Subcommittee Goal: To define discussion items for the Groundwater Commission so that future meetings are focused on key questions and specific issues mandated by the statute so that one or more of the following can occur:

- Consensus on issues
- Documentation of how each issue was addressed by the Commission for consideration by present and future legislative committees and other interested parties
- Development of action items or future study related to issues

List of Issues for Consideration by the Groundwater Commission:

The following is a list of issues in the order the commission intends to discuss them. Under each issue are key questions and research needs related to them. It should be noted that some bills proposed for the 2006 legislative session pertain to some aspects of the issues below. The following 2 key questions relate to each of the issues and should be considered and addressed by those working on each issue:

- Why is it important that the commission consider this issue (i.e. Is there enough benefit to the State for the Commission to spend time on this?)?
- What are the legal, political and technical challenges inherent to the issue, and the economic implications of any actions being considered to address the issue?

**Issue 1. Groundwater Withdrawal Permitting:**

- Identify and review how other states permit large groundwater withdrawals.
- Are any changes to the existing large groundwater withdrawal permitting program needed? Why and what should they be?

- Should there be additional requirements for commercial applicants under the large groundwater permitting program? If so, who should be subject to them and what should they be?
- Is the role of local government in the permitting process adequate? If not, why and how should it be changed?
- Should local permitting (e.g. site plan review) be obtained prior to a State large groundwater withdrawal permit application being reviewed?
- Does there need to be a requirement to project and protect future water needs and supply when permitting a new large groundwater withdrawal? If so, how should future need be determined?
- Should an applicant have to demonstrate that a proposed large withdrawal is protective of public interest?
- Should there be additional requirements when developing withdrawals that that will result in an inter-basin transfer of water? If so, what criteria should be used to determine which withdrawals should be subject to more scrutiny (e.g. basin size, withdrawal volume, etc.)
- Should “grandfathered” large groundwater withdrawals be subject to regulation or withdrawal limitations?
- What are the loopholes in the current large groundwater withdrawal permitting law and regulations?
- Should the amount of land owned by an applicant be considered as criteria when permitting new large groundwater withdrawals?
- Are the rights of future users adequately addressed in the current system? If not, how could future rights be better accommodated?
- Are surrounding wells and water resources (and the ecosystems dependent upon them) adequately protected by the existing law? If not, what impact criteria should be used instead?
- Do towns need authority to impose water use restrictions for private wells during times of drought or other water supply emergencies?

**Issue 2. Clarification of Groundwater Quantity Law and Legislative Authorities:**

- Identify and review existing evaluations of NH water law pertaining to groundwater.
- What are the current laws pertaining to groundwater use?
- What authority does the legislature have to regulate the use of the State’s groundwater? What authority do/could state agencies have?
- Is there a need to change existing law? If so, why?

**Issue 3. Hierarchy of Groundwater Users:**

- Identify and review the purpose and structure of other state’s hierarchies.
- Review the existing Drought Management Plan to determine if it establishes an appropriate hierarchy in times of temporary scarcity/ drought? If not, what should the hierarchy be?
- Does there need to be a hierarchy of groundwater users for any other purposes (e.g. reserving available water for specific uses in permitting decisions etc?) If so, what should it be and how should it be applied?

**Issue 4. Fee on the Commercial Consumptive Use of Groundwater:**

- Identify and review what other states are doing in this area.
- Should commercial users of (some threshold amount of) groundwater pay a fee?
- If so, how do you define consumptive (i.e. which users should pay?), what should the fee be, how should it be applied and collected, what should the fee be used for?

**Issue 5. Protecting Groundwater Quality to Ensure Availability**

Protection of Private Residential Wells:

- Identify and review materials describing state and local protection efforts for private wells.
- Should there be a State requirement for periodic sampling of private wells? Why and what should they be?
- Should the State be doing more to educate private well owners? If so, what?

Land Use Near Wells:

- Identify and review current land use setbacks to protect groundwater
- Are current setbacks and performance standards in regulation and RSAs for entities using large quantities of regulated substances adequate to protect public and private wells? If not, what should be changed and why?

Municipal/Local Groundwater Quality Protection Assistance

- Identify and review what NH and other states are currently doing in this area.
- Should the state be doing more to help municipalities protect ground water? If so, what should it be doing?

Aquifer Protection/ Protection of Future Well Sites

- Identify and review what NH and other states are currently doing in this area
- Should the state be doing more to identify and protect aquifers and potential future well sites? If so what?

**Issue 6. Groundwater Management Data Needs:**

- Identify and review statewide summaries of current data and data needs analysis and review the Seacoast Groundwater Availability Study.
- What data is needed to effectively manage groundwater resources? Do we have it? If not, how do we obtain it?
- Is the existing monitoring net work consisting of 26 overburden wells and 13 bedrock wells measured monthly for water level data sufficient? If not, why?
- Is there a need for ambient groundwater quality data?
- Should the current stream gage network be maintained and or expanded? How should stream gauging be funded and who should complete the work?
- Is there a need to link water quality data to location and, if so, is well tagging the way to do it?

Action Plan/ Schedule for Addressing Issues:

The Commission has been reauthorized for a three year period, with an interim report due in November, 2006. Taking our charge in one year increments, the action plan is to address each of the six issues listed above, in order, as numbered. The intention is to form six working subcommittees to delve into the issue and then report back to the full commission.

It is recognized that the listed issues vary in complexity and will require a variable level of effort and timeframe to bring the issue to closure: "closure" comprising the attainment of one or more of the items listed above, under Subcommittee Goal.

Hopefully, one or more of the issues can be brought to closure within the upcoming year. That said, it is recognized that there will be issues needing further work after the first year.

Accordingly, the general plan is as follows:

- Discuss each issue with the full commission, sequentially over the course of the next year. The objective will be to hear discussion on the issue at hand, refine the elements to be considered and select a subcommittee to work through it for the following 5-6 months. If we can properly vet each issue in less than one full Commission meeting, this portion of the schedule may be reduced.
- The subcommittee will then report back to the full committee, beginning after the last issue has been vetted.

Each year we will issue our annual report, revisit remaining issues and schedule them for action in the upcoming year.

**Attachment 3 -  
Membership of Subcommittees of the Groundwater Commission**

## **SB 155 Commission: Subcommittee Volunteers/Members**

### **1. Groundwater Withdrawal Permitting**

Jack Donahue, Tom Fargo, Glenn Greenwood, Brandon Kernen, Rep. Cooney, Rep. Spang, Dennis Nesbit, Michelle Hamm, and Elizabeth Thomas

### **2. Clarification of Groundwater Quality Law and Legislative Authorities**

Rep. Spang, Sarah Pillsbury, Tom Fargo, Glenn Greenwood, James Griswold, Sen. Johnson, Sen. Green, Brian Goetz, and Dennis Nesbit and Michelle Hamm

### **3. Hierarchy of Groundwater Users**

Jack Donahue, Glenn Greenwood, Brandon Kernen, Dennis Nesbitt, Rep. Babson, Rep. Spang, Dennis Nesbit and Michelle Hamm

### **4. Fee on the Commercial Consumptive Use of Groundwater**

Sen. Green, Rep. Cooney, Rep. Babson, Sarah Pillsbury, Dennis Nesbit and Michelle Hamm

### **5. Protecting Groundwater Quality to Ensure Availability**

Tom Fargo, Glenn Greenwood, Brandon Kernen, Sen. Johnson

### **6. Groundwater Management Data Needs**

Brian Goetz, Sarah Pillsbury, Rep. Cooney, Sen. Green

**Attachment 4 - Findings of the Issue 1 -  
Groundwater Withdrawal Permitting Subcommittee**

**November 20, 2006**

## Findings of the Issue 1 - Groundwater Withdrawal Permitting Subcommittee

1.	Identify and review how other states permit large groundwater withdrawals	<b>Completed</b> - This information has been extensively researched and summarized in tabular, narrative and graphical form by the commission. NH laws and regulation pertaining to groundwater withdrawals are among the most stringent in the among eastern water law states.
2.	Are any changes to the existing large groundwater withdrawal permitting program needed? Why and what should they be?	<b>Yes</b> - Provisions in law should be added to clarify that withdrawals from replacement wells (a new well installed to replace or back-up an existing well that operates and impacts water users and water resources in substantially the same manner as the well that is being replaced) do not require a new large groundwater withdrawal permit. Draft legislation has been prepared to address this issue.
3.	Should there be additional requirements for commercial applicants under the large groundwater permitting program? If so, who should be subject to them and what should they be?	<b>No</b> - There is no technical basis for this requirement.  Developing additional regulatory requirements for certain types of water users, such as bottled water is discriminatory in nature. SB 386 of 2006 states that NHDES can modify a large groundwater withdrawal permit if it is necessary to protect the water supply for the public. Another commission subcommittee will be studying the issue of a water user hierarchy.
4.	Is the role of local government in the permitting process adequate? If not, why and how should it be changed?	<b>Yes</b> - NH requires two public hearings, two written public comment periods, that copies of all documents be provided to municipalities, and that municipalities have intervener status during the permitting process. The role of local government in the permitting process is more extensive than other states. Many of these requirements were added to state law in 2005 and 2006. The subcommittee acknowledged that groundwater is a shared resource and needs to be managed on a watershed basis. Therefore, the subcommittee noted that it is appropriate that the state have jurisdiction to regulate groundwater. State jurisdiction to regulate groundwater is also consistent with all other states operating under an eastern water law system.
5.	Should local permitting (e.g. site plan review) be obtained prior to a State large groundwater withdrawal permit application being reviewed?	<b>No</b> - Both the subcommittee and the legislature have assessed this issue and do not think a provision of this nature is warranted. Many local governments prefer to have the state permitting process occur first or in tandem with the local permitting process. In this manner, the local planning board can integrate its findings and decisions made for a project with state findings and decisions on permit applications.

**Findings of the Issue 1 - Groundwater Withdrawal Permitting Subcommittee (continued)**

6.	Does there need to be a requirement to project and protect future water needs and supply when permitting a new large groundwater withdrawal? If so, how should future need be determined?	<b>Under Review</b> - HB 1609 requires NHDES to develop, on a pilot basis, a regional groundwater management plan that estimates available water supply and projects future needs. The results of this project will be used to assess this issue further.
7.	Should an applicant have to demonstrate that a proposed large withdrawal is protective of public interest?	<p><b>Yes</b> - NH currently ensures the public interest is protected when new large groundwater withdrawals are proposed. NH law does stipulate criteria for protecting water supplies and water resources. SB 386 of 2006 identifies quantitative and qualitative criteria for determining if ecological resources or water supplies will be adversely impacted by a proposed new large groundwater withdrawal. A general requirement of stipulating protection of "public interest" would have little meaning and be subjective without clearly defining what "public interest" means. Any definition would likely produce criteria for protecting water supply and water resources that is similar to the criteria already in law.</p> <p>In some states, where protection of "public interest" is included in law, but not defined, boards of elected or appointed officials make determinations on proposed water withdrawals. The subcommittee agreed that technical decisions on water supply projects are more appropriate for regulating water.</p>
8.	Should there be additional requirements when developing withdrawals that that will result in an inter-basin transfer of water? If so, what criteria should be used to determine which withdrawals should be subject to more scrutiny (e.g. basin size, withdrawal volume, etc.)	<b>No</b> - The subcommittee found that the existing large groundwater withdrawal permitting process factors into the permitting process the significant displacement of large volumes of water from a watershed or aquifer.

### Findings of the Issue 1 - Groundwater Withdrawal Permitting Subcommittee (continued)

9.	Should "grandfathered" large groundwater withdrawals be subject to regulation or withdrawal limitations?	<p><b>Additional regulation should not be required at this time</b> - The subcommittee defined "grandfathered" large withdrawals as a withdrawal from any well that was developed prior to August 1998 that either does or has the capacity to exceed 57,600 gallons over any 24-hour period. There is no definition for "grandfathered" large withdrawals in state law.</p> <p>The subcommittee noted that developing a permitting process for grandfathered large groundwater withdrawals has been previously voted down by the legislature. It also noted that while grandfathered large withdrawals do not have to obtain a permit, these withdrawals are subject to the State's surface water quality standard which protect the quality and quantity of all surface waters in the state. The subcommittee also noted that grandfathered large withdrawals are subject to the common law of the state, and that unreasonable impacts by a large withdrawal could be mitigated through a judicial process.</p> <p>The subcommittee researched the topic of grandfathered large groundwater withdrawals thoroughly. It found that: 1) 85% of grandfathered large withdrawals are associated with community water supplies; and 2) Only one occurrence of an unmitigated adverse impact caused by a large groundwater withdrawal has been documented.</p> <p>The subcommittee considered the range of options for managing impacts associated with grandfathered large withdrawals and determined that no changes are warranted at this time. The subcommittee prepared legislation that establishes a process for resolving conflicts if a grandfathered large withdrawal affects private water supply wells. Based on the research of the subcommittee, however, it does not support moving forward with the legislation at this time. Nevertheless, if unacceptable impacts to private water supply wells from withdrawals from grandfathered wells become an issue in the future, then the subcommittee recommends consideration of the conflict resolution legislation that is has prepared.</p>
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**Findings of the Issue 1 - Groundwater Withdrawal Permitting Subcommittee (continued)**

<p>10.</p>	<p>What are the loopholes in the current large groundwater withdrawal permitting law and regulations?</p>	<p>SB 386 of 2006 addressed the issues of groundwater withdrawals from multiple wells at the same property. Other loopholes that remain include: 1) Groundwater fed dug ponds not being subject to groundwater withdrawal permitting; 2) Unused wells developed prior to 1998 not being subject to the large withdrawal permitting process; and 3) Subdivision housing developments installing hundreds of private wells to avoid large withdrawal permitting.</p> <p>The subcommittee noted that housing developments installing hundreds of private wells for new homes at least would require a large area of land, and that often much of the water is returned on-site via individual septic systems.</p> <p>The subcommittee also noted that NHDES had developed policies to address the issue of unused wells developed prior to 1998, and that these policies have been effective to date. Lastly, the subcommittee did not believe that groundwater withdrawals from dug ponds would be common-place and warrant extensive regulation to prevent regional impacts from occurring. The subcommittee noted that often, dug ponds store stormwater run-off or surface water skimmed from a nearby river during high flows.</p>
<p>11.</p>	<p>Should the amount of land owned by an applicant be considered as criteria when permitting new large groundwater withdrawals?</p>	<p><b>No, not directly</b> - Under the current permitting process, this issue is indirectly considered. A person proposing a large withdrawal that owns a lot of land would most likely have to address a lower number of environmental impacts. This is because a large number of other water users would not likely be located nearby, and there would be a lower number of other competing water users within the watershed and aquifer.</p> <p>The concept of linking a large withdrawal to the amount of land owned has been considered by the legislature multiple times over the last few years. The legislature has not supported this concept. In general, issues with zoning/sprawl, impractical land ownership requirements and identifying the technical or scientific rationale for doing this have been reasons for legislative committees to decline supporting this concept. The subcommittee noted that directly relating state regulation of groundwater withdrawals to the amount of land owned is not consistent with historical eastern water law concepts.</p>

**Findings of the Issue 1 - Groundwater Withdrawal Permitting Subcommittee (continued)**

12.	Are the rights of future users adequately addressed in the current system? If not, how could future rights be better accommodated?	<p><b>Yes</b> - The subcommittee found that current law requires that NHDES modify large withdrawal permits if necessary to protect public water supplies and environmental resources. Also, existing regulations require that large groundwater withdrawal permits be renewed every ten years, and that a thorough assessment of potential impacts associated with a large groundwater withdrawal occur at that time. The subcommittee also found that NHDES already builds into its existing permits, measures to protect future water needs in areas where significant development is planned.</p> <p>Additionally, HB 1609 requires NHDES to conduct a pilot study to assess approaches to quantify water availability and predict future water needs. House Bill 1609 also requires that a groundwater management plan be developed.</p>
13.	Are surrounding wells and water resources (and the ecosystems dependent upon them) adequately protected by the existing law? If not, what impact criteria should be used instead?	<p><b>Yes</b> - New Hampshire's requirements are working well and exceed that of other states. No new issues could be identified.</p>
14.	Do towns need authority to impose water use restrictions for private wells during times of drought or other water supply emergencies?	<p><b>Yes</b> - The majority of the subcommittee found that municipalities do not have adequate authority to restrict discretionary outdoor uses of groundwater during times of drought. The subcommittee has proposed legislation that would allow municipalities to adopt ordinances or bylaws to restrict residential lawn watering when the state or federal government have declared a stage of drought.</p> <p>The member of the commission representing the NH Farm Bureau has stated that this organization does not support the proposed legislation. The NH Farm Bureau believes this legislation may unfairly impact the business of sod farmers.</p>
15.	Other Issues - Well Tagging	<p>While completing its work, the subcommittee found implementing a requirement for well tagging in NH is important for: 1) Keeping records of wells installed in NH; 2) Completing water resource studies; 3) Ensuring wells are properly maintained or decommissioned; 4) Accurately geo-locating wells; and 5) Completing water quality studies and notification.</p> <p>The commission found it very difficult to cross link wells in various databases, because wells are not tagged with a common unique identification number.</p>

**Attachment 5 - Legislation Proposed by the Issue 1 -  
Groundwater Withdrawal Permitting Subcommittee**

# **Proposal 1 - Replacement Wells**

## **1.0 Background**

Water supply wells require routine operation and maintenance. It is common for well screens or the aquifer formation immediately adjacent to a well to become clogged with fine grained sediments or naturally occurring minerals that precipitate out of solution from the groundwater. Also, in some cases, well casings or seals fail, and need to be replaced.

Additionally, in order to improve the capacity of community water systems in New Hampshire, NHDES has encouraged towns to install redundant wells immediately adjacent to existing water supply wells. The redundant wells are not allowed to be used to increase the amount of water extracted from an aquifer, but ensures that a community has an adequate water supply in the event that a mechanical or structural failure occurs at one of its other water supply sources.

## **2.0 Large Groundwater Withdrawal Permitting Requirements for Replacement Wells**

Prior to the enactment of SB 386 of 2006, RSA 485-C directed NHDES to develop rules for determining how impacts from new groundwater withdrawal that exceed 57,600 gallons over any 24-hour period to water users and water resources would be assessed and mitigated (if necessary). In the rules (Env-Ws 388) adopted by NHDES, a waiver section was included that provided criteria for exempting wells from the large groundwater withdrawal regulations that were installed to replace or back-up wells installed prior to August 1998. In order to receive a waiver, a person had to demonstrate that the a new well that replaced or backed up an existing well would not impact water resources or a water user differently than the original well. NHDES developed these rules because the intention of the large groundwater withdrawal approval requirements established by the Legislature in 1998 was to ensure new groundwater withdrawal projects did not adversely impact existing water users or water resources. Also, if reasonable provisions were not in place allowing persons to expeditiously and cost effectively replace water wells, then the following would likely occur:

- 1) Community water systems may experience water supply shortages or emergencies as failing wells would not be replaced;
- 2) The use of acids and other chemicals would increasingly be used and poured into the subsurface in an attempt to unclog well screens;
- 3) Community water systems would not install redundant wells that would dramatically improve the over all source capacity of the water system in the event that other system wells experience mechanical or structural failure; and

- 4) Water users would continue to use and retrofit failing wells. Failing wells or wells that are retrofitted generally produce less water, which decreases the water level elevation in a well. This means additional money would be spent on electrical consumption to extract water. Also utilizing or retrofitting failing wells is not an optimal use of money.

Legislation passed in 2006 places the majority of the standards and criteria for approving large groundwater withdrawals into law which NHDES does not have authority to develop waiver rules for. Both RSA 485-C:14a and RSA 485-C:21 apply to large withdrawals from wells established after the date the legislation was passed. The law is silent on the issue of replacement wells or redundant wells. By policy, NHDES has exempted these wells from the large withdrawal permitting requirements. It is not clear, however, that this policy would withstand judicial scrutiny.

Below, is proposed legislation that would exempt replacement wells or redundant wells for the large withdrawal permitting process.

**485-C:2 Definitions.**

XIIIa. "Replacement well" means a new well installed to replace or back-up an existing well that operates and impacts water users and water resources in substantially the same manner as the well that is being replaced.

**485-C:22 Exemptions for Large Groundwater Withdrawals from Replacement Wells (new section)**

I. Large groundwater withdrawals from new wells that replace a well or wells installed prior to August 1, 1998 shall not be subject to the requirements of RSA 485-C:14-a and RSA 485-C:21.

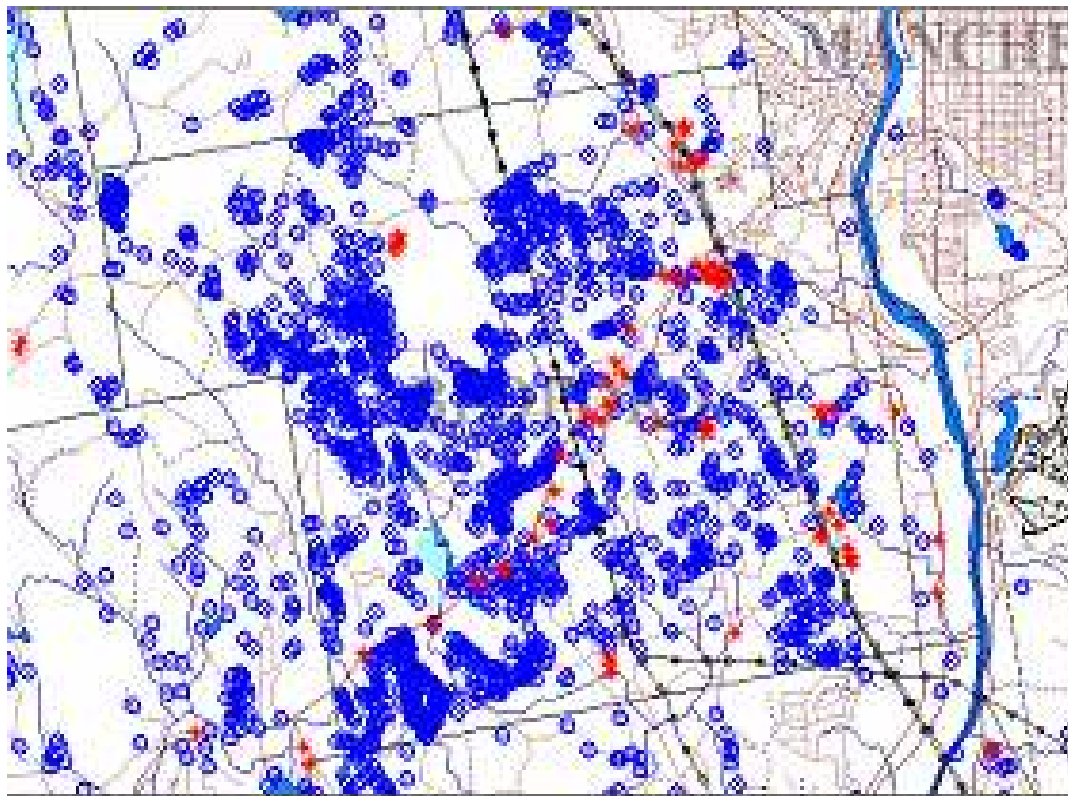
II. No person shall withdraw 57,600 gallons of groundwater from replacement well(s) over any 24-hour period without approval from the department.

III. Before the department issues an approval for a large groundwater withdrawal from replacement well(s), a person must demonstrate the withdrawal from the replacement well(s) will operate and impact water users and resources in substantially the same manner as the well(s) that are being replaced.

## **Proposal 2 - Municipal Authority to Limit Residential Outdoor Lawn Watering During a Federally or State Declared Drought**

In accordance with state law, municipalities currently only have authority to implement water use restrictions during times of drought for customers of a municipal water system that it controls. Similarly, owners of private community water systems can implement water use restrictions on its customers during times of drought or other water supply shortage. The New Hampshire Department of Environmental Services (DES) has developed guidance documents to assist both private and municipal community water systems with implementing water use restrictions (see [www.des.state.nh.us/h2o\\_conservation.htm](http://www.des.state.nh.us/h2o_conservation.htm)).

Residents in many municipalities, however, utilize private water supply wells. In more densely populated municipalities, thousands of wells are tapping the same subsurface water source. During times of droughts, such as in 2002 and 2003, people often withdraw large volumes of water from wells to maintain a green lawn. The high water use occurs at a time when a minimal amount of water is recharging the subsurface due to drought conditions existing. The combination of high water use for lawn watering along with drought conditions can lead to the temporary dewatering of private water supply wells, and create a water supply emergency for home owners. Figure 1, below, shows an example, for the Town of Bedford, of how a large number of private wells and community water supply wells can be located in close proximity to one another.



During the drought of 2002 and 2003, many municipalities contacted DES to find out how they could curtail lawn watering in order to minimize the effects that the drought had on water supply wells. Because neither the state nor municipalities have authority to implement water use restrictions for private water supply wells, municipalities could not restrict residential lawn watering in areas where they believed a water supply emergency may occur. The only measure the state and municipalities could implement to curtail the effects of excessive water use during the drought was to provide educational outreach measures to the municipalities.

Proposed legislation - **see highlighted text in paragraph (n)**

**31:39 Purpose and Penalties. –**

I. Towns may make bylaws for:

- (a) The care, protection, preservation and use of the public cemeteries, parks, commons, libraries and other public institutions of the town;
- (b) The prevention of the going at large of horses and other domestic animals in any public place in the town;
- (c) The observance of Memorial Day, whereby interference with and disturbance of the exercises for such observance, by processions, sports, games or other holiday exercises, may be prohibited;
- (d) Regulation of the use of mufflers upon boats and vessels propelled by gasoline, oil or naphtha and operating upon the waters within the town limits;
- (e) The kindling, guarding and safekeeping of fires, and for removing all combustible materials from any building or place, as the safety of property in the town may require;
- (f) The collection, removal and destruction of garbage, snow and other waste materials;
- (g) Regulating the operation of vehicles, except railroads as common carriers, upon their streets;
- (h) Regulating the conduct of public dances;
- (i) Regulating the conduct of roller skating rinks;
- (j) Regulating the sanitary conditions of restaurants within town limits in accordance with the provisions of RSA 147:1;
- (k) Issuing a license for the operation of a restaurant and other food serving establishments within the town limits and charging a reasonable fee for same;
- (l) Making and ordering their prudential affairs;
- (m) Issuing permits for tattooing facilities and charging a fee for the permit; and
- (n) Restricting the use of water from private wells or public water systems for residential outdoor lawn watering when administrative agencies of the state or federal government have designated the region as being under a declared stage or condition of drought.**
- (n) Regulating noise.

II. Towns may appoint all such officers as may be necessary to carry the bylaws into effect.

III. Towns may enforce the observance of the bylaws by suitable penalties not exceeding \$1,000 for each offense to ensure to such uses as the town may direct.

## **Proposal 3 - Well Tagging**

### **1.0 Background**

This document advocates the implementation of a state-wide well tagging program. The well tag proposed by this document would include the use of a sturdy, distinctive material with a well's alpha-numeric identifying code that is strapped or otherwise attached to each new well that is installed or re-drilled in New Hampshire. The licensed well driller installing the well would have the initial responsibility for affixing the well tag. However, the licensed well driller would not have a permanent responsibility to maintain the tag on a given well, unless they removed a tag, in which case they would have to replace it with a new tag.

New Hampshire state law stipulates that only licensed well drillers may construct, modify or abandon wells in New Hampshire. Upon installing new wells, abandoning wells, or reconstructing wells, well drillers must submit a well completion report to the Water Well Board. The form contains basic well construction information, a general description of the geology, well yield, and depth to water. The form also includes varying degrees of information regarding the location of the well. Some well drillers report street addresses, and other include tax map and lot information. A few drillers utilize GPS instruments to provide coordinates to show the location of wells they have installed. The form also includes the name of the well owner. In some instances, the owner of the well may be a particular person or place of business, while in other instances, when projects include the construction of multiple houses, a large construction company may be listed as the well owner. Each well completion report is entered into a Water Well Inventory Database. Information in the database can be obtained online, or by submission of a data request to NHDES.

The information on well completion reports submitted by the well drillers to the Water Well Board has been invaluable to well owners, researchers, engineering/environmental consultants and regulators. Because over 100,000 wells have been installed since 1984, and each well completion report contains basic well construction and geologic information, the water well inventory has useful information for all areas of the state. Information in the Water Well Inventory Database that is routinely accessed by the public has been used to:

- 1) Determine well yield, well construction details, and well contractor information.  
Often this information is needed to address a well maintenance issue.
- 2) Complete state-wide assessments pertaining to bedrock water supply (quality and quantity) issues.
- 3) Complete regional and local studies assessing water availability.

- 4) Determine the occurrence of, and well construction details for, private water supply wells that may be within the zone of influence of a large groundwater withdrawal.
- 5) Determine the occurrence of entities that may be impacted by nearby groundwater contamination.
- 6) Determine and track water users that may need to either: 1) Register and report monthly water use; and/or 2) Obtain large groundwater withdrawal permits. The requirement for obtaining a large groundwater withdrawal permit is dependant upon the date wells are installed and withdrawals are initiated, so it is critical for NHDES to be able to identify wells in the field.
- 7) Determine the depth to bedrock in a given area to support land development decisions.
- 8) Complete environmental, geotechnical or engineering studies by consultants in a given region.

## **2.0 Current Shortcomings with the Water Well Inventory Database**

The Water Well Inventory Database has been extensively used since its development and is one of the most useful resources in the state for water well or hydrogeologic information. However, its utility would be significantly improved if wells in the database were linked to well identification numbers that could be found on the actual well. Currently, the database is only partially (50%-75%) usable, because in many instances, the location of wells or owner information in the database cannot be linked to wells in the field. Well location information is often vague or no longer accurate due to the renaming of tax map lots through subdivision processes, renaming of roads associated with construction projects, or only partial or inaccurate well location information being described on the well completion form. Also, referencing the original well owner's name in the database often is not usable for identifying a well at a later date, especially when a property has been involved in many transactions or the original owner listed was a land development company that may have completed many wells in the area. This challenge exists, even though the oldest wells in the database only date back to 1984. The difficulty in using information in the Water Well Inventory Database will only increase as the database increases in size (approximately 5000 water supply wells per year), and as it becomes more difficult with time to trace original well owners or well contractors responsible for installing wells.

Another major shortcoming in the existing Water Well Inventory Database is that monitoring wells are not generally recorded in the database. Technical drillers, which install monitoring wells, are not required to submit well completion reports to the Well Water Board. This means that the state generally has a very poor record of monitoring wells in the states, and often it is impossible to determine any information about a given monitoring well.

### **3.0 Benefits of Well Tagging**

- If well tagging is implemented in New Hampshire, it would ensure that there is a means for directly identifying the well construction details and basic hydrogeologic information for every well installed in the future. Also, the well identification number could then be used and cross referenced in the Water Well Inventory Database, Water Use Registration and Reporting Database, and NHDES' Water Quality Database. Recently, the a Subcommittee of the SB 155 Groundwater Commission requested records from NHDES regarding actual water use and potential well yields for existing wells in New Hampshire. NHDES generated reports from the Water Well Inventory Database, Public Water System Database, and the Water Use and Reporting Database. It was very difficult and not possible in some cases to cross reference wells that occur within all three databases. However, if wells were physically tagged with the identification number, regulators and water users could all reference this number in all three databases.
- Well tagging would provide an opportunity for NHDES to better locate wells in the field. NHDES may be able to hire intern workers once a year to utilize GPS equipment to locate tagged wells and survey their location. Currently, only approximately one-third of the wells installed in New Hampshire since 1984 are geographically located (with coordinates) in a database that can be linked to the State's GIS system.
- Well tagging would allow for the tracking of water quality in a database (when/where well owners sign-off on a consent form to share water quality data). This will be useful to existing homeowners, potential buyers of homes, regulators, researchers and municipalities who want to track and manage water quality issues to protect public health.
- Well tagging would identify entities that are owners of monitoring wells throughout the state. Often, numerous monitoring wells are installed when environmental site assessments are completed. Owners of monitoring wells have a responsibility to either properly maintain monitoring wells so they do not become a direct conduit for contamination, or to hire a licensed well driller to abandon the well properly when it is no longer needed. If wells are tagged, both the owner of a monitoring well can be identified, as well as the construction records of the well.
- Well tagging could be used to enforce well driller licensing requirements in the state. Only licensed well drillers would have access to well tags provided by NHDES, and therefore wells installed by unlicensed drillers could be more readily identified and investigated.

- Well tagging will facilitate the more accurate identification and location of wells in the field, enhancing the New Hampshire Geologic Survey's ability to utilize this data for its geological mapping program.
- Well tagging will reduce costs associated with researching and providing the homeowners, water systems, well contractors, pump installers, and consultants with well construction and geologic data.

#### 4.0 Cost of Implementing Well Tagging

The cost for each well tag developed in accordance with the proposed legislation would cost approximately \$0.17/tag. Under the proposed legislation, it is estimated that 8000 water supply wells and monitoring wells per year would be installed. This means it would cost the state \$1336.80 per year to provide well drillers with well tags.

Well drillers will be responsible for installing tags on the well casing. It is estimated that the unit cost of the stainless steel band used to attach the tag to the well casing is \$4.00. Bands are commercially available that use crimping tools that cost less than \$20. Often, drillers already have tools of this nature. Lastly, the driller is required to stamp each tag with their license number, date of installation, and a unique well identification number.

In general, a well tagging requirement would require minimal costs and level of effort from water well contractors who install water supply wells and already submit well completion reports to the state. However, technical drillers, who install monitoring wells, currently do not submit well completion reports to the state. If well tagging is implemented as proposed in the attached legislation, then technical drillers will have to begin submitting well completion reports and this will require more work.

**Proposed Language is shown in highlighted text, below**

482-B:10 (a) Record of Wells. I. Within 90 days after completion of a well, a water well contractor shall provide the board with a record of the well containing the following information:

- (1) Well owner or home owner or building contractor;
- (2) Location of well by providing 911 street address and tax map and lot number;
- (3) Date well was completed;
- (4) Proposed use of well;
- (5) Reason for constructing well;
- (6) Type of well;
- (7) Total depth of well;
- (8) Casing details;
- (9) Method of sealing casing to bedrock, if applicable;
- (10) Screen details, if applicable;
- (11) Yield test;
- (12) Static water level, if encountered;

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- (13) Description of depth to bedrock, and changes in soil type encountered during the well drilling process;
- (14) Yield test at various depths, if performed;
- (15) Hydro-fracturing or other well development details, if applicable;
- (16) Company name;
- (17) Date;
- (18) Well identification number as described by paragraph II, below; and
- (19) Any other information required by rules adopted by the Water Well Board

II. Each water well contractor and technical driller shall assign a unique well identity using alphanumeric letters or numbers or a combination thereof. Each well identity assigned, shall begin with the full license number of the licensed water well contractor that installed the well, followed by a "-", and then a unique alphanumeric identity.

#### 482-B:10(b) Well Identification Tag

Preamble (to include in the introduction of legislation - but not part of law)

This legislation is to provide for the identification of wells by owners, water well contractors, technical drillers, pump installers and state agencies. Well identification will allow for the dissemination of information to the public regarding the construction of the well, water quantity and quality test results and will enhance the ability of state agencies to manage groundwater sources.

I. Immediately upon completion of a well subject to paragraph (a), above, licensed water well contractors and technical drillers shall attach a well identification tag to the well.

II. Licensed water well contractors and technical drillers shall stamp the tag with the month and year of the well completion, the contractor's own well identification number that will be recorded on the record of the well required by paragraph (a), above, and the phone number for the water well board.

III. Tags shall be fastened to the well casing approximately 6 inches above finished grade by means of a minimum 1/2 inch wide stainless steel band or clamp or by means of a tack weld. Devices which use a screw-type tightening mechanism are not acceptable.

IV. Where a pitless adaptor is not used, the tag may be permanently attached or fastened to a concrete base or cover or other cover used to identify the well.

V. Tags shall be suitable for stamping letters and numbers using dies leaving a permanent imprint.

VI. The number and character letters on the well tag shall be at least 1/8 inch in height and leave a permanent legible imprint.

VII. If the identification tag is removed from the well by a licensed water well contractor, technical driller or pump installer during work on the well, it shall be replaced or reattached by the person so removing it in the proper position and manner.

VIII. If a well tag is defaced or otherwise unusable, the person working on the well must remove the tag and affix a replacement tag that contains the information described in paragraph II, above, unless such information cannot be obtained from the existing tag or the department of environmental services.

IX. Licensed water well contractors and technical drillers shall not be responsible for installing, inspecting, and repair of well tags on wells beyond the requirements of paragraphs I-VI, above.

X. The water well board may approve alternative methods for affixing tags to wells installed after the effective date of this section, provided that the alternative method is equivalent to or exceeds the standards required by this section.

XI. Well owners, well drillers, or pump installers may voluntarily attach identification tags to wells established prior to the effective date of this session. The water well board shall provide forms and maintain records for wells that have an identification tag voluntarily attached.

XII. Well tags meeting the minimum requirements of this section shall be made available by the department of environmental sources.

XIII. Well tags may be provided by the water well contractor or technical well driller provided the well tags: (1) Meet the minimum requirements of this section; and 2) At a minimum, contain the information required by this section.

## **Conflict Resolution**

The subcommittee developed legislation that would apply to large groundwater withdrawals that were developed prior to the development of the existing permitting program. The objective of the legislation was to establish a process where private water supply wells could petition to the DES if a "grandfathered" large groundwater withdrawal impacted a private water user. Ultimately, the subcommittee decided not to recommend that the legislation be pursued at this time, but it maybe worthy of consideration at a later date if impacts from grandfathered wells became problematic.

### **485-C:2 Definitions.**

VII-a *"Grandfathered Large Groundwater Withdrawal" means a groundwater withdrawal at a single property or place of business that exceeds 57,600 gallons over any 24-hour period that is not subject to RSA 485-C:4 or RSA 485-C:21.*

### **485-C:22 Conflict Resolution for Grandfathered Large Groundwater Withdrawals**

- I. If complaints are made to the commissioner by private domestic wells owner(s) regarding the effects of a grandfathered large groundwater withdrawal at a single property or place of business, the following procedures shall be followed:
- (a) The commissioner shall provide complaint forms to the parties making the complaint.
  - (b) The commissioner shall investigate and assess the complaint by:
    - (1) Analyzing and evaluating the submitted complaint forms, hydrologic facts and characteristics of the water users involved.
    - (2) Requesting additional facts from the parties making the complaint and the person operating the grandfathered large groundwater withdrawal. In order to assure that available data on domestic wells(s) are provided, the parties making the complaint shall cooperate with the grandfathered large groundwater withdrawal water user in providing such facts as may be available and allowing the commissioner access to obtain necessary available facts. If the parties making the complaint do not cooperate in providing available facts or allowing the commissioner access to the domestic wells, the commissioner shall dismiss the complaint.
    - (3) Conducting, if necessary, a field investigation.
    - (4) Requiring the person operating the large groundwater withdrawal conduct additional hydrologic tests and evaluation when hydrologic information is unavailable or inadequate to make a determination of necessary facts in the matter.
  - (c) In evaluating the probable influence of the grandfathered large groundwater withdrawal on domestic wells, the commissioner shall consider whether the domestic

well(s) provides a dependable water supply in accordance with RSA 485-C:21,V-c, (a) and (c).

(d) Where adverse impacts on domestic wells are substantiated in accordance with paragraph (c), above, the grandfathered large groundwater withdrawal user shall mitigate the impact in accordance with adverse impact mitigation rules developed pursuant to RSA 485-C:4, XII(c) unless the grandfathered large groundwater withdrawal water user and party making the complaint reach a mutually acceptable alternative solution.

(e) New domestic wells installed after the date grandfathered large groundwater withdrawal users initiated withdrawals must demonstrate that adverse impacts are the result of the grandfathered large groundwater withdrawal user:

- 1) Increasing water withdrawals; and/or
- 2) Causing area water resources to be inadequate to support domestic water supplies.

(f) Large groundwater withdrawals from wells developed after July 31, 1998, shall not be subject to paragraphs (a)-(e), above. These withdrawals shall comply with the requirements of RSA 485-C pertaining to new large groundwater withdrawals.

**Attachment 6 - Summary of Documents Prepared by the Issue 1 -  
Groundwater Withdrawal Permitting Subcommittee**

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**Documents Prepared by the SB 155  
Issue 1 - Groundwater Withdrawal Permitting  
(resource documents)**

- 1) List of communities planning to develop new sources of water.
- 2) Compilation of 27 bills regarding groundwater that have been proposed since 1997.
- 3) List of nondomestic water supply wells installed since 1984 with the potential capacity to exceed 57, 600 gallons/24-hour period (1130 wells).
- 4) List of existing groundwater withdrawals that exceed 57,600 gallons over any 24-hour period. (85% of withdrawals are for community water supplies).
- 5) PowerPoint presentation and binder distributed at the March 2006 Commission meeting on Issue 1. This presentation presented the background of all of the items listed under Issue 1 in the workplan for the Groundwater Commission dated November 30, 2005.
- 6) Detailed analysis of how other eastern water law states regulate groundwater withdrawals (matrix, maps, and narrative).
- 7) Subcommittee meeting minutes (four meetings)
- 8) Draft legislation for replacement wells, well tagging, conflict resolution and drought response.
- 9) Narrative explanation and flowchart explaining the history of groundwater permitting in New Hampshire.
- 10) Summary of impacts caused by grandfathered large groundwater withdrawals to other water users or the environment.

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